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Revised Uniform Commercial Code Article 9: Impact in Bankruptcy

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REVISED UNIFORM COMMERCIAL CODE ARTICLE 9: IMPACT IN BANKRUPTCY

BY: C. SCOTT PRYOR*

INTRODUCTION

At its meeting from July 24-31, 1998, the National Conference of Commissioners on Uniform State Laws ("NCCUSL")¹ approved the final draft of a complete revision of Article 9 ("Revised Article 9") of the Uniform Commercial Code ("U.C.C.")² The American Law Institute ("ALI")³ previously approved this draft of Revised Article 9 on May 13, 1998.⁴ Many articles have already appeared describing the changes from the current Article 9.⁵ Most, if not all, of these changes

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¹ NCCUSL is a national organization of practicing lawyers, judges, law professors, and others appointed by the governor of each state. See Diane W. Savage, *The Impact of Proposed Article 2B of the Uniform Commercial Code on Consumer Contracts for Information and Computer Software*, 9 LOY. CONSUMER L. REP. 251, 253 (1997) (stating that U.C.C. was drafted and revised by ALI and NCCUSL, which is a national organization "composed of commissioners appointed from every state"); Thomas J. Stipanowich, *Reconstructing Construction Law: Reality and Reform in a Transactional System*, 1998 WIS. L. REV. 463, 548 (stating that NCCUSL "is a body of men and women representing each of the fifty states,...[which] exists primarily through appropriations from the states, [and which] has drafted more than 200 uniform laws on a wide variety of subjects."). NCCUSL drafts uniform laws in various fields and then proposes them to the various state legislatures for adoption. See *id.* at 549-50.

² See Uniform Commercial Code Revised Article 9 – Secured Transactions (with conforming amendments to Articles 1, 2, 2A, 4, 6, 7, and 8) (American Law Institute and National Conference of Commissioners on Uniform State Laws 1999); see also Barbara Clark and Barkley Clark, *Special Report: New Article 9*, 31 U.C.C. L.J. 243, 243 (1999) (noting that NCCUSL approved final draft at its 1998 annual meeting); Fred Miller, *Whither the States and Revised U.C.C. Article 9*, 52 CONSUMER FIN. L. Q. REP. 335, 335 (1998) (stating that revisions to Article 9 of U.C.C. were approved by ALI and NCCUSL in May and July of 1998).

³ The ALI was founded in 1923 to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work. See, e.g., Fred H. Miller, *U.C.C. Articles 3, 4 and 4A: A Study in Process and Scope*, 42 ALA. L. REV. 405, 405 (1991); Savage, *supra* note 1, at 253. Its principal products have been the various Restatements of the common law.

⁴ See Alvin C. Harrell, *UCC Article 9 Revisions Move Toward Summer 1998 Approval, Pt. II*, 52 CONSUMER FIN. L.Q. REP. 227, 227 (1998) (stating that Article 9 revisions were approved by ALI at their Spring 1998 meeting held on May 13, 1998); Miller, *supra* note 2, at 335 (explaining that revisions to Article 9 of U.C.C. were approved by NCCUSL and ALI in May and July of 1998).

⁵ See Clark and Clark, *supra* note 2, at 243 (discussing significant changes to Article 9 and how Revised Article 9 affects current laws); George A. Hisert, *Letters of Credit Under Revised UCC Article 9*, 31 U.C.C. L.J. 458 (1999) (explaining how Revised Article 9 affects "security interests in rights under a letter of credit"); George A. Nation III, *Revised Article 9 of the U.C.C.: The Proposed Revisions Most Important to Commercial Lenders*, 115 BANKING L.J. 212, 214 (1998) (discussing increased scope of Revised Article 9 and changes it would make if adopted); Peter Siviglia, *Perfection of Security Interests By Filing Under the*

will be significant to the bankruptcy bench and bar.⁶ This article will focus on the systemic impact that Revised Article 9 will have in bankruptcy.⁷

Part I of this Article will briefly describe the history and evolution of Revised Article 9. Part II will focus on the two most substantial areas of impact of Revised Article 9 in bankruptcy: reduction in the effect of the trustee's avoiding powers under Bankruptcy Code section 544 and the expansion of the secured creditor's interest in proceeds under Bankruptcy Code section 552(b). Part III will address some other areas of impact of Revised Article 9 while Part IV will conclude with some observations about the net impact of these revisions in bankruptcy.

I. THE ORIGINS OF REVISED ARTICLE 9

Three organizations control the Official Text of the Uniform Commercial Code: NCCUSL, the ALI, and the Permanent Editorial Board ("PEB").⁸ The ALI

1998 Revisions to Article 9 of the Uniform Commercial Code, 31 U.C.C. L.J. 444, 444 (1999) (explaining how Article 9 affects filing to perfect security interest); Steven O. Weise, *A Comparison of a Security Agreement Under the Current Article 9 and the Draft New Article 9*, 31 U.C.C. L.J. 131 *passim* (1998) (providing sample security agreement to explain differences between current Article 9 and revised Article 9).

⁶ See R. JORDAN AND W. WARREN, *SECURED TRANSACTIONS IN PERSONAL PROPERTY* 463 (4th ed. 1997) ("No lawyer can competently advise on the planning of secured transactions without a detailed understanding of the Bankruptcy Code's impact on Article 9 security interests."); Samuel J.M. Donnelly & Mary Ann Donnelly, *Commercial Law*, 44 SYRACUSE L. REV. 109, 154 (1993) (discussing relationship between bankruptcy and Article 9 of Uniform Commercial Code); Philip T. Billard, Note, *Bankrupting the Proceeds Section: Recent Interpretations of Section 9-306(4)(d) of the Uniform Commercial Code*, 55 TEX. L. REV. 891, 892 (1977) (noting that Article 9 of UCC impacts federal Bankruptcy Act).

⁷ See 11 U.S.C. §§ 101 – 1330 (1994). Of course, the Bankruptcy Code is a moving target. At this writing, the House of Representatives has passed H.R. 833, 106th Cong. (1999) and the Senate Judiciary Committee has approved S. 625, 106th Cong. (1999) (accepting Bankruptcy reform by amending Title XI to include such programs as "Debtor Financial Management Training Test Program"). However, none of the currently proposed changes to the Bankruptcy Code will materially impact the conclusions of this article.

⁸ The agreement between NCCUSL and the ALI creating the PEB places on the PEB the responsibility of studying the need for modernization or other improvements to the U.C.C. See Henry D. Gabriel, *The Inapplicability of the United Nations Convention on the International Sale of Goods As a Model for the Revision of Article Two of the Uniform Commercial Code*, 72 TUL. L. REV. 1995, 2014 n.4 (1998). The PEB is composed of members of both NCCUSL and the ALI, and periodically makes recommendations to NCCUSL and the ALI for revisions to the U.C.C. See *Agreement Describing the Relationship of the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and the Permanent Editorial Board with Respect to the Uniform Commercial Code*, 187-192 (July 31, 1986) (amended January 18, 1998); Frederick H. Miller & Patricia B. Fry, *Introduction to the Uniform Commercial Code Annual Survey: Good News and Bad News*, 45 BUS. LAW 2281, 2281 (1990) (noting that PEB aids sponsoring bodies of U.C.C. by monitoring U.C.C.'s operation and recommending further steps for development). The American Bar Association (A.B.A.) also provides one or more persons to act as liaison to any committee charged with revising the U.C.C. See Peter Winship, *Law Making and Article 6 of the Uniform Commercial Code*, 41 ALA. L. REV. 673, 681-83 (1990) (stating that advisor was appointed to PEB to assist in revision of UCC). In the case of Revised Article 9, the A.B.A. (or its committees) appointed five advisors. See Nation, *supra* note 5, at 212 (stating that ALI, NCCUSL and PEB established study committee to determine if Article 9 of U.C.C. should be revised).

and NCCUSL combined efforts beginning in the 1940s to create the U.C.C.⁹ The U.C.C. was (and arguably still is) the most ambitious reform of American law and is now operative in all American jurisdictions except Louisiana.¹⁰

A. *The PEB Study Report*

In 1990, the PEB created a committee to study Article 9 (the "PEB Study Group") and to recommend whether it needed revision.¹¹ Two years later, on December 1, 1992, the PEB Study Group issued its report and recommended a series of revisions to Article 9.¹² The PEB Study Report suggested three broad areas of change: scope of Article 9; enforcement and perfecting a security interest, and improving the public notice function of perfection.¹³ Revised Article 9 adopted most of the Study Committee's recommendations with a number of modifications.¹⁴ Yet focusing on these areas of concern helps to clarify the significance of the final result of the revision process.

The PEB Study Report proposed to allow a single filing with respect to a debtor regardless of the form of the collateral.¹⁵ The current 1972 version of Article 9 generally provides that a financing statement must be filed in the state where goods such as inventory and equipment are located, and in the state of the debtor's chief executive office for intangible collateral such as accounts and general

⁹ See William A. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1, 1-3 (1967) (discussing NCCUSL negotiations with ALI to create group large enough to prepare Code); Robert E. Scott, *The Truth About Secured Financing*, 82 CORNELL L. REV. 1436, 1446 (1997) (stating that ALI and NCCUSL created Uniform Commercial Code); see also Richard L. Savage, III, *Laying the Ghost of Reliance to Rest in Section 2-313 of the Uniform Commercial Code: An "Endpoints" Analysis*, 28 WAKE FOREST L. REV. 1065, 1066 (1993) (stating that although there were many compromises made between Karl Llewellyn's 1940 draft and Committee's 1952 version, Llewellyn's revolutionary ideas remained).

¹⁰ See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 83 (1977) (describing influences of various personalities on drafting of U.C.C., and history of its development). Louisiana nonetheless adopted Article 9 of the U.C.C. in 1988, which became effective January 1, 1990. See LA. REV. STAT. 10:9-101 (1993); see also *Brill v. Catfish Shaks of America*, 727 F. Supp. 1035, 1041 n. 10 (E.D. La. 1989) (stating that "[e]ffective January 1, 1975, Louisiana adopted part, but not all of the UCC.").

¹¹ The Study Committee's specific charge was to "[recomm]end whether Article 9 and related provisions of the U.C.C. [were] in need of revision." See PEB Study Group, *Uniform Commercial Code Article 9: Report*, 1 (1992) (hereinafter "PEB Study Report"). It was composed of sixteen members (including its chair) plus four advisors, assisted by two reporters. See *id.* at 2-3. The Committee met a total of seven times, each meeting usually lasting two and one-half days. See *id.* at 4. The Committee also received input from approximately twelve advisory groups on a variety of specialized topics. See *id.*

¹² See PEB Study Report, *supra* note 11, at 18-42.

¹³ See PEB Study Report, *supra* note 11, at 10; see also Nation, *supra* note 5, at 213 (describing increased scope of Article 9).

¹⁴ See Revised U.C.C. § 9 (referring to number of changes UCC has made to improve footing of secured creditors in addition to other important aspects).

¹⁵ See PEB Study Report, *supra* note 11, Recommendation B.9.A., at 22, 74-78 (recommending that Drafting Committee eliminate "location of the collateral" rule and make law of jurisdiction in which debtor is located sole rule for perfecting security interest in both tangible and intangible property).

intangibles.¹⁶ A single place of filing would have gone far toward unifying the notice system of perfection without federalizing it.

The second area where the PEB Study Group proposed a significant change increased the scope of Article 9 in connection with deposit accounts.¹⁷ The PEB Study Report recommended that the scope of Article 9 be increased to cover deposit accounts as collateral.¹⁸ At present, to the extent a deposit account contains proceeds of collateral, and to the extent those proceeds can be identified,¹⁹ a secured creditor has a security interest in that deposit account²⁰ under current U.C.C. section 9-306(1). The deposit account itself, however, may not currently serve as collateral.²¹ The recommendation of the PEB Study Report would have reversed that result simply by making deposit accounts available as original collateral.²²

¹⁶ See U.C.C. § 9-103 (1996) (stating that perfection of documents, instruments and ordinary goods is governed by law of jurisdiction where collateral is located, while perfection of accounts, general intangibles and mobile goods is governed by laws of jurisdiction in which debtor is located (including conflict of laws rules)).

¹⁷ See PEB Study Group, *supra* note 11, at 68 (understanding the need for Article 9 to encompass deposit accounts).

¹⁸ See PEB Study Report, *supra* note 11, Recommendation A.7.A., at 21, 68-71 (recommending that Article 9 be revised to include deposit accounts as original collateral).

¹⁹ See U.C.C. § 9-306(2) (1994) (suggesting that debtor's control over deposit account, coupled with deposits from sources other than collateral or its proceeds, may make it difficult for secured creditor to trace and thus identify proceeds in deposit account); *see also, e.g.*, *Harley-Davidson Motor Co. v. Bank of New England-Old Colony*, 897 F.2d 611, 620-22 (1st Cir. 1990) (reversing grant of summary judgment to junior secured creditor in conversion action by senior secured creditor for cash proceeds of joint collateral, based on policy that third parties (including junior secured creditors) who receive payments from debtor's deposit account in ordinary course takes free of any security interest (but indicating junior secured creditor would likely prevail on facts of this case)). *See generally* *Universal C.I.T. Credit Corp. v. Farmers Bank of Portageville*, 358 F. Supp. 317, 325-27 (E.D. Mo. 1973) (explaining rules of tracing).

²⁰ See U.C.C. § 9-105(1)(e) (1996) (stating that "[d]eposit account" means a demand, time, savings, passbook or like account maintained with a bank, savings and loan association, credit union, or like organization, other than an account evidenced by a certificate of deposit"); *Frank v. ITT Commercial Fin. Corp. (In re Thompson Boat Co.)*, 230 B.R. 815, 826 (Bankr. E.D. Mich. 1995) (noting that Michigan uses same definition as U.C.C. for "deposit account"); *Wolff v. FWB Bank (In re Richman)*, 181 B.R. 260, 264 (Bankr. D. Md. 1995) (noting that Maryland uses same definition of "deposit account" as U.C.C.).

²¹ See U.C.C. § 9-104(f) (1996) (stating "[t]his articles does not apply...to a transfer of an interest in any deposit account (subsection (1) of § 9-105), except as provided with respect to proceeds (§ 9-306) and priorities in proceeds (§ 9-312)."); *P.A. Bergner & Co., v. Bank One (In re P.A. Bergner & Co.)*, 140 F.3d 1111, 1122 (7th Cir. 1998) (suggesting that bank cannot enforce its security interest in collateral after honoring customer's letter of credit unless attachment and perfection take place more than 90 days before bankruptcy).

²² This change would have been consistent with California's non-uniform version of current U.C.C. § 9-104. *See* CAL. COM. CODE § 9-104 (West Supp. 1998) (stating "this division does not apply to...(L). Any security interest created by assignment of the benefit..."); *see also* *Parker v. Community First Bank (In re Bakersfield Westar Ambulance, Inc.)*, 123 F.3d 1243, 1247 (9th Cir. 1997) (noting California Legislature's failure to incorporate entire Article into California law and its rejection of U.C.C.'s deposit account exclusion, which excludes deposit accounts from scope of Article 9, except where account constitutes proceeds from other collateral); *Johanson Trans. Serv. v. Rick Pik'd Rite, Inc.*, 210 Cal. Rptr.

Next, the PEB Study Report dealt in depth with the rights of buyers in ordinary course and prepaying buyers' vis-à-vis secured creditors. Buyers in ordinary course²³ currently take goods from a seller free from a perfected security interest in those goods.²⁴ The PEB Study Report proposed to limit the current definition of "buyer in ordinary course" to those who had the right to possession of the purchased goods under U.C.C. Article 2.²⁵ U.C.C. section 9-307(1) would also have been amended to preclude the status of a favored buyer in ordinary course, with respect to goods in the possession of the secured party.²⁶ Finally, in a nod toward unsecured claimants, the PEB Study Group recommended that the U.C.C. be amended to protect prepaying buyers from a competing security interest in goods in the event of default by the seller.²⁷

433, 438 (Cal. Ct. App. 1985) (noting that California does not recognize exceptions to general deposit accounts exclusion).

²³ See U.C.C. § 1-201(9) (1996):

Buyer in ordinary course of business means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker.

Id. See, e.g., *Martin Marietta Corp. v. New Jersey Nat'l Bank*, 612 F.2d 745, 751-53 (3d Cir. 1979) (using U.C.C.'s definition of "buyer in ordinary course"); *United States v. Continental Grain Co.*, 691 F. Supp. 1193, 1194, 1198 (W.D. Wis. 1988) (relying on U.C.C.'s definition of "buyer in ordinary course").

²⁴ See U.C.C. § 9-307(1) (1998) (stating that buyer in ordinary course of business takes free of security interest created by his seller even though security interest is perfected and buyer knows of its existence); *Taft v. Jake Kaplan, Ltd. (In re Dexter Buick-GMC Truck Co.)*, 2 B.R. 253, 254 (Bankr. D.R.I. 1980) (noting that buyer in ordinary course of business takes free of third party's perfected security interest even if it knows of its existence); *Hempstead Bank v. Andy's Car Rental Systems, Inc.*, 312 N.Y.S.2d 317, 318 (N.Y. 1970) (stating that U.C.C. § 9-307 expressly provides that individual is entitled to its protection even if it has knowledge of existence of security interest in goods).

²⁵ See PEB Study Report, *supra* note 11, Recommendation C.26.A, at 36, 190-92 (clarifying anomaly between Uniform Commercial Code Article 2 (U.C.C. §§ 2-502, 2-716(1) and 2-716(3)) on one hand, and U.C.C. § 9-307(1) on other); Alvin C. Harrell, *Selected Comments on the UCC PEB Study Group Article 9 Report*, 47 CONSUMER FIN. L.Q. REP. 385, 387 (1993) (noting that PEB Report recommends revising § 1-201(9) so that buyers may not qualify as buyers in ordinary course until Article 2 rights of possession vest).

²⁶ See PEB Study Report, *supra* note 11, Recommendation C.26.A, at 36, 190-92 (reversing *Tanbro Fabrics Corp. v. Deering Milliken, Inc.*, 350 N.E.2d 590 (N.Y. 1976)). The court in *Tanbro* held that the primary vendor's security interest in goods remaining in its possession for storage was cut off by its buyer's subsequent resale to the ultimate purchaser. See *id.* at 592-93. Compare *Homer Kripke, Should Section 9-307(1) of the Uniform Commercial Code Apply Against a Secured Party in Possession?*, 33 BUS. LAW. 153 *passim* (1977) (contrasting and criticizing analysis of *Tanbro* decision) with *Harold Birnbaum, Section 9-307(1) of the Uniform Commercial Code Versus Possessory Security Interest - A Reply to Professor Homer Kripke*, 33 BUS. LAW. 2607 *passim* (1978) (supporting *Tanbro* decision).

²⁷ See PEB Study Report, *supra* note 11, Recommendation C.27.A, at 36, 194-98 (codifying *Daniel v. Bank of Haywood*, 425 N.W.2d 416 (Wis. 1988)). The Wisconsin Supreme Court concluded that a consumer's purchase of a van by execution of a motor vehicle purchase contract, together with the surrender of its current vehicle as a down payment, cut short the secured creditor's interest in the van even though the van was still in the dealer's possession. See *United States v. Handy*, 750 F.2d 777, 781 (9th Cir. 1984) (holding buyer was protected in its purchase of "inventory" from secured creditor's interest).

With the exception of formally recognizing the claims of prepaying buyers to undelivered goods in the event of a seller's insolvency, each of the recommendations in the PEB Study Report would have served the interests of secured creditors. Any expansion of the rights of secured creditors must come at the expense of an insolvent debtor's other stakeholders. The pattern of incremental enhancement of a secured creditor's rights would continue through the subsequent drafting process.

B. *The Drafting Committee*

After receiving the PEB Study Report, NCCUSL (in consultation with the ALI) appointed the Uniform Commercial Code Article 9 Drafting Committee (the "Drafting Committee") in 1993.²⁸ The Drafting Committee met 14 times over the next six years, its work culminating in submission of a final draft to the 1998 NCCUSL Annual Meeting.²⁹ NCCUSL approved the final draft subject to stylistic adjustments after which it came before the ALI Council for its final approval.³⁰

The draft has been submitted to the states for adoption starting in 1999. The proposed effective date for Revised Article 9 is July 1, 2001.³¹ In addition to reorganizing and renumbering virtually all of the provisions of the current version of Article 9, the Drafting Committee made a number of substantive changes. A summary of some of the most significant changes follows.

²⁸ See Edward J. Heiser, Jr. & Robert J. Flemma, Jr., *Consumer Issues in the Article 9 Revision Project: The Perspective of Consumer Lenders*, 48 CONSUMER FIN. L.Q. REP. 488, 488 (1994); Fred H. Miller, *The Revision of U.C.C. Article 9*, 47 CONSUMER FIN. L.Q. REP. 257, 258 (1993) (stating that "[a] drafting committee to revise Article 9 has been constituted"); James M. Swartz & Paul D. Steinkraus, *Planned Changes to UCC Article 9 Pose Significant Risks to Creditors*, METROPOLITAN CORPORATE COUNSEL, MID-ATLANTIC FIRMS, June 1997 (mentioning that current efforts to revise Article 9 were initiated based on recommendations of study group by PEB of UCC).

²⁹ See Revised U.C.C. § 9-101 Official Cmt. 2; Neil Cohen, *Commercial Law Preparing Now for Revised Article 9*, N.Y.L.J. Feb. 19, 1999, at 3 (mentioning that Revised U.C.C. § 9-701 provides that revised article is not effective until July 1, 2001).

³⁰ The history of arduous and sometimes contentious work of the Drafting Committee can be found in the articles referenced above. See Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569, 576 (1998) (discussing near collapse of Article 9 Drafting Committee over efforts to include consumer protection provisions in remedial sections of Revised Article 9); Fred H. Miller, *Realism Not Idealism in Uniform Laws – Observations From the Revision of the UCC*, 39 S. TEX. L. REV. 707, 709 (1998) (critiquing criticisms of process of revising Article 9 by those not involved in process); Steve H. Nickles, *Consider Process Before Substance*, 69 AM. BANKR. L.J. 589, 595 (1995) (urging merger of Drafting Committee and Bankruptcy Review Commission to give political legitimacy to perceived insular Article 9 revision process); Kathleen Patchel, *Interest Group Politics, Federalism and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 85-86 (1993) (questioning adequacy of uniform laws process as means of promulgating commercial law rules); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 597 (1995) (using "structure-induced equilibrium" theory to study activities of ALI and NCCUSL on theory that they act as private legislatures); *supra* note 28 (noting that PEB study group recommended revising Article 9).

³¹ See Revised U.C.C. § 9-701 (1999) (stating that effective date of Revised Article 9 is July 1, 2001); Patrick Guiday, *1999 Financing Health Care Providers*, ALI-ABA Course Study 401, 434 (1999) (stating that "[t]he proposed 'Uniform Effective Date' for the revised Article 9 is July 1, 2001.>").

1. Scope

In response to the Study Committee's recommendations,³² the Drafting Committee's final product expands the scope of Revised Article 9 in several important areas. First, Revised Article 9 significantly broadens the definition of accounts so that it now includes payment obligations arising out of the sale, lease or license of all kinds of tangible and intangible property, as well as credit card receivables.³³ These changes both increase collateral available as security (and thus reduce the residuum for unsecured creditors) and decrease the "catch-all" category of general intangibles.

Second, Revised Article 9 makes a significant change to the current law's broad exclusion of insurance claims from Article 9 coverage.³⁴ Most insurance claims will continue to be outside the scope of Revised Article 9,³⁵ however, a health-care provider will be able to use "health-care-insurance receivables"³⁶ as collateral. This change recognizes the increasing need for the health-care industry to finance receivables, and, as a result, should spark more traditional forms of lending to

³² PEB Study Report, *supra* note 11, Recommendations A.1-7, at 18-42.

³³ See Revised U.C.C. § 9-102(a)(2)(ii) and (iv) (1999); see also U.C.C. § 9-102(a)(2)(viii) (defining "account" broadly to include even such rights of payment as lottery winnings); Nation, *supra* note 5, at 217 (1998) (noting how Revised Article 9 broadens definition of account).

³⁴ See Revised U.C.C. § 9-104(g). But see U.C.C. § 9-306(1) (excepting insurance proceeds to extent payable on account of loss or damage to collateral); see also Rheade H. Ryan, Jr., *Trade Receivables Purchases*, ALI-ABA Course Study 305, 311 (1999) (noting Revised Article 9 expands scope to cover health care insurance receivables defined as interest in or claim under policy of insurance, which is right to payment of monetary obligation for health care goods or services provided in § 9-102(a)(2) and (4)).

³⁵ See Revised U.C.C. § 9-109(d)(8):

This article does not apply to...a transfer of an interest in or an assignment of a claim under a policy of insurance, other than an assignment by or to a health-care provider of a health-care-insurance receivable and any subsequent assignment of the right to payment, but Sections 9-315 and 9-319 apply with respect to proceeds and priorities in proceeds.

Id. See, e.g., Revised U.C.C. § 9-109 Official Cmt. 13 (stating that § 9-109 (d)(8) narrows broad exclusion of interests in insurance under former § 9-104(g)); Amanda K. Esquibel, *An Article 9 Primer Regarding Uninsured Collateral Destroyed by a Tortfeasor*, 46 KAN. L. REV. 211, 215 (1998) (noting that plain language of U.C.C. § 9-104(k)'s exclusion states that Article 9 security interest may not arise from transfer of any tort claim); *infra* notes 119-26 and accompanying text (discussing further use of health-care-receivables as collateral).

³⁶ See Revised U.C.C. § 9-102(a)(46) (1999) (stating "'[h]ealth-care-insurance receivable' means an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health-care goods or services provided."); see also 1999 *Financing Health Care Providers*, SD 71 ALI-ABA 401, 405 (1999) (asserting healthcare providers and their lenders must now rely on collateralizing provider's assets to get their financing approved, and explaining that collateral packages may include real estate, tangible personal property, unrestricted or otherwise eligible endowments and trust funds, certain contract rights, and general intangibles); Edwin E. Smith, *Overview of Revised Article 9*, 73 AM. BANKR. L.J. 1, 6 (1999) (explaining that insurance claims exclusion of Revised Article 9 is narrowed, and that while it has generally preserved current Article 9's exclusion for assignments of insurance claims as original collateral, it includes assignments of insurance claims as original collateral relating to provision of health-care goods and services).

health care providers, in place of the current practice of structured financing of health care receivables.³⁷

Finally, Revised Article 9 breaches the wall previously prohibiting the use of tort claims as collateral.³⁸ Similar to its insurance revisions, Revised Article 9 continues the practice that it does not apply to the creation or perfection of a security interest in most personal tort claims.³⁹ However, this long-standing exclusion no longer applies to "commercial tort claims."⁴⁰ Commercial tort claims are those where the claimant is either an organization or an individual; the claim arose in the course of the claimant's business and does not involve personal injury or death.⁴¹

2. Creation and Attachment of a Security Interest

The rules on attachment of a security interest under Revised Article 9 remain largely unchanged.⁴² The only major modification replaces the current requirement that the debtor sign the security agreement⁴³ with one that the debtor "authenticate" the document.⁴⁴ The Drafting Committee developed a new concept of

³⁷ In structured financing a health care provider typically transfers its health-care receivables to a separate Special Purpose Vehicle ("SPV"), usually an unassociated trust or corporation. The SPV then issues securities with repayment obligations that are secured by the newly acquired health-care receivables. To the extent health care receivables are not eligible as collateral under U.C.C. § 9-104(g), the lender must rely on common law principles of perfection and priority, which are often unclear and vary from state to state. See HEALTH CARE INSOLVENCY MANUAL (Gary W. Marsh et al., 1997) (examining current practice of structured financing); see also Stephen L. Schwacz, *The Alchemy of Asset Securitization*, 1 STAN J. L. BUS. & FIN. 133, *passim* (1999) (observing that greatest benefit of securitization is its potential for bringing low cost capital market financing to companies that would otherwise be unable to access capital markets, however, innovative approaches, such as recently advanced concept of "divisible interest," may permit hospitals to pool their receivables and reduce transaction costs, making securitization far more feasible and attractive).

³⁸ See Revised U.C.C. § 9-104(k); see also Harold R. Weinberg, *Tort Claims as Collateral: Impact on Consumer Finance*, 49 CONSUMER FIN. L.Q. REP. 155, 155 (1995) (observing that Article 9 of Uniform Commercial Code does not apply to transfer in whole or in part of any claim arising out of tort). But see Harold R. Weinberg, *They Came From "Beyond the Pale": Security Interests in Tort Claims*, 83 KY. L.J. 443, 450 (1995) (examining desirability of bringing tort claims within scope of Article 9).

³⁹ See Revised U.C.C. § 9-109(d)(12); Smith, *supra* note 36, at 6 (noting that tort claims exclusion of Article 9 has also been narrowed and that noncommercial personal injury claims remain excluded from Article 9); *infra* notes 120-38 and accompanying text (discussing use of commercial tort claims as collateral).

⁴⁰ See Revised U.C.C. § 9-109(d)(12) (stating "[t]his article does not apply to...(12) an assignment of a claim arising in tort, other than a commercial tort claim").

⁴¹ See *id.* § 9-102(a)(13) (defining commercial tort claims under Code).

⁴² See *id.* § 9-203(b) (1999); *id.* Official Cmt. 2 (noting Subsection (b) states three prerequisites to existence of security interest: value, rights or power to transfer rights in collateral, and agreement plus satisfaction of evidentiary requirement).

⁴³ See U.C.C. § 9-203(1)(a) (1995) (stating "a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless...(b)...the debtor has signed a security agreement which contains a description of the collateral.")

authentication in recognition of the increasing significance of electronic commerce. Authentication includes the traditional method of signing the agreement along with the use of any electronic means by which the authenticating party can be identified and the authenticity of the record can be established.⁴⁵

Revised Article 9 makes it clear that the security agreement need only describe the collateral by type (e.g., "inventory")⁴⁶ with two exceptions: certain consumer

⁴⁴ Revised U.C.C. § 9-203(b) states:

[A] security interest is enforceable against the debtor and third parties with respect to the collateral only if:

- (1) value has been given;
- (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
- (3) one of the following conditions is met:
 - (A) the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;
 - (B) the collateral is not a certificated security and is in the possession of the secured party under Section 9-313 pursuant to the debtor's security agreement;
 - (C) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under Section 8-301 pursuant to the debtor's security agreement; or
 - (D) the collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, and the secured party has control under Section 9-104, 9-105, 9-106, or 9-107 pursuant to the debtor's security agreement.

See Revised U.C.C. § 9-203(b) Official Cmt. 3 (stating that paragraph (3)(A) represents evidentiary alternatives under which debtor must authenticate security agreement that provides description of collateral).

⁴⁵ Revised U.C.C. § 9-102(a)(7) states:

"Authenticate" means:

- (A) to sign; or
- (B) 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.

See Revised Article § 9-102 Official Cmt. 9b (1999) (explaining that "authenticate" and "authenticated" generally replace "sign" and "signed" and that "authenticated" broadens definition of "signed" in § 1-201 to encompass authentication of ALI records); Harry C. Sigman, *The Filing System Under Revised Article 9*, 7 AM. BANKR. L. J. 61, 68 (1999) (explaining that Revised Article 9 deletes requirement that filings be signed).

⁴⁶ Revised U.C.C. § 9-108(b) (1999) states:

[A] description of collateral reasonably identifies the collateral [in the security agreement] if it identifies the collateral by:

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

transactions and where the collateral is a commercial tort claim.⁴⁷ "Super-generic" descriptions of collateral, although permitted in *financing statements*, are not sufficient within the security agreement.⁴⁸

The following three changes proposed in Revised Article 9 each increase the pool of assets that can be made subject to a consensual security interest under the U.C.C. First, the definition of proceeds (in which a security interest continues to attach automatically)⁴⁹ is expanded to include rights arising out of the lease or license of collateral and claims arising out of defects in or damage to collateral.⁵⁰ Second, Revised Article 9 creates a new form of collateral identified as a "supporting obligation"⁵¹ that is treated as additional collateral for a security interest in the supported obligation. Thus, if a debtor pledges a promissory note as collateral for its obligation to a secured creditor, any security or other credit enhancement for that note is automatically pledged as well.⁵² Third, Revised

See Revised U.C.C. § 9-108 Official Cmt. 2 (explaining that (1) description of collateral is required for evidentiary purposes; (2) description will be sufficient if it identifies collateral described; and (3) "serial number" test is unnecessary).

⁴⁷ See Revised U.C.C. § 9-108(e)(1) (stating that "[a] description only by type of collateral defined in the [U.C.C.] is an insufficient description of... a commercial tort claim.").

⁴⁸ See Revised U.C.C. § 9-108(c) (1999) (stating "[a] description of collateral as 'all the debtor's assets' or 'all the debtor's personal property' or using words of similar import does not reasonably identify the collateral."); see also avid L. Kuosman, *Sufficiency of The Description of Collateral in a U.C.C. Section 9-203 Security Agreement: A Critique of White & Summers' Approach*, 65 U. COLO. L. REV. 151, 162 (1993) (noting that security agreement must take possible identification of collateral described, and while it need not point to specific collateral encumbered, it must, at minimum, detail course of inquiry which will lead to determination of specific items covered); Revised U.C.C. § 9-108 Official Cmt. 5 (stating that description of collateral "only by type" is sufficient if description reasonably identifies collateral and contains descriptive component beyond simply "type").

⁴⁹ See Revised U.C.C. § 9-203(f) (stating that "[t]he attachment of a security interest in collateral gives the secured party the rights to proceeds provided by § 9-315 and is also attachment of a security interest in a supporting obligation for the collateral."); Richard L. Barnes, *Tracing Commingled Proceeds: The Metamorphosis of Equity Principles Into U.C.C. Doctrine*, 51 U. PITT. L. REV. 281, 288 (1990) (noting that U.C.C. § 9-306 provides for automatic attachment and for automatic perfection of security interest in proceeds in various subsections).

⁵⁰ See Revised U.C.C. § 9-102(a)(64)(D) (1999) (stating that "[p]roceeds means the following property: to the extent of the value of collateral claims arising out of the loss, nonconformity, or interference with the use of defects or infringements of rights on, or damage to, the collateral").

⁵¹ See *id.* § 9-102(a)(77) (stating "supporting obligations" are those sets of rights, such as guaranties and their collateral and letters of credit, that are generally understood to follow the debt the payment of which they enhance); see also *infra* note 165 and accompanying text (discussing impact of automatic perfection in supporting obligations of Bankruptcy Code § 552(b)).

⁵² See Revised U.C.C. § 9-203(f) (asserting that automatic perfection is another benefit included with automatic attachment of supporting obligations as collateral); see also *id.* § 9-308(d) (stating that perfecting security interest in supporting obligation for collateral occurs when perfection of security interest in collateral itself occurs); *id.* § 9-203(g) (stating that "[t]he attachment of a security interest in a right to payment or performance secured by security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien"). See generally Carl S. Bjerre, *Secured Transaction Inside Out: Negative Pledge Covenants, Property and Perfection*, 84 CORNELL L. REV. 305, 331 (1999) (stating that perfection reduced evidentiary burdens of establishing priority and protects third parties against debtor's fraudulent assertions that competing interests were previously conveyed to third parties); Thomas M. Mayer, *Understanding the Business, Bankruptcy and*

Article 9 nullifies any provision in an underlying account, promissory note, chattel paper or even any other law that would restrict the free assignability of such an account or instrument as collateral.⁵³

3. Perfection

The most visible change to the requirements and methods of perfection by Revised Article 9 is "medium neutrality." No longer will the debtor need to sign a financing statement,⁵⁴ nor will any written document evidencing perfection be required. Pure electronic filings will be permitted.⁵⁵ Revised Article 9 requires the debtor's consent to perfection⁵⁶ but that consent is conclusively presumed by statute from execution of the security agreement.⁵⁷

Securities Aspects of Derivatives, Derivatives in Default: Getting Collateral, 721 PLI/COMM 123, 131 (1995) (explaining that perfection is necessary to "guard against creditors who obtain later security interests because the rule is that first perfected security interest, not first granted security has priority right to collateral...[and]security party can perfect by filing financing statement with appropriate state or local official, giving notice to world of its interest in collateral [or by] taking possession of the collateral").

⁵³ See Revised U.C.C. § 9-406(d)(1) (stating that term of agreement prohibiting, restricting, or requiring consent of account debtor to assignment is ineffective); see also *Erickson v. Marshall*, 771 P.2d 68, 70 (Idaho Ct. App. 1989) (holding that security interests are assignable and guarantor who pays secured debt on behalf of principal obligor is subrogated to creditor's rights in collateral); Paul M. Shupack, *Making Revised Article 9 Safe for Securitizations: A Brief History*, 73 AM. BANKR. L.J. 167, 177 (1999) (referring to U.C.C. § 9-406(d) as "successor" to current U.C.C. § 9-318(4) and stating that it "overrides all anti-assignment clauses."); *infra* notes 122-26 and accompanying text (discussing free assignability in health care receivable context).

⁵⁴ See Revised U.C.C. § 9-502(a) (1999) (excluding signature of debtor from requirements for sufficient financing statement); *id.* § 9-502 Official Cmt. 3 (explaining that removal of former U.C.C. § 9-402(1)'s requirement that debtor's signature appear on financing statement: (1) facilitates paperless filing; and (2) makes former U.C.C. § 9-402(2)'s exceptions unnecessary); see also *In Re Numeric Corp.*, 485 F.2d 1328, 1331 (1st Cir. 1973) (stating that any writing which adequately describes collateral, carries signature of debtor, and establishes that in fact security interest was agreed upon, satisfies formal requirements of Uniform Commercial Code); *Scallop Petroleum Co. v. Banque Trad-Credit Lyonnais S.A.*, 690 F. Supp. 184, 188 (S.D.N.Y. 1988) (noting that previous financing statement alone met basic Article 9 requirements of writing, signed by debtor, describing collateral, and, thus, all that is needed in addition to financing statement to perfect security interest is another document demonstrating intent).

⁵⁵ See Revised U.C.C. § 9-102(a)(39) (defining financing statement in terms of filed "record"); see also *id.* § 9-102(a)(69) (describing "record" as information either "inscribed on a tangible medium" or contained in electronic form but "retrievable in perceivable form"); *id.* § 9-102 Official Cmt. 9(a) (observing that tangible and intangible forms of filing fall within definition of "record" under Revised Article 9); Nation, *supra* note 5, at 222 (clarifying that while Revised Article 9 does not require electronic filing, it "clearly allows filing offices to move in that direction").

⁵⁶ See Revised U.C.C. § 9-509(a)(1) (indicating that "[a] person may file an initial financing statement amendment that adds collateral covered by a financing statement, or amendment that adds a debtor to a financing statement only if...the debtor authorizes the filing in an authenticated record."); see also *id.* § 9-203(b)(3)(A) (declaring that security interest is enforceable against debtor and third parties with respect to collateral, only if certain criteria announced in § 9-203(b)(1) & (2) have been met along with authentication by debtor providing description of collateral and, if interest transfer to be cut, description of land concerned); Smith, *supra* note 36, at 13 (remarking that security agreement must be authenticated by debtor under revisions to Article 9).

⁵⁷ See Revised U.C.C. § 9-509(b) (asserting that "[b]y authenticating...a security agreement, a debtor . . . authorizes the filing of an initial financing statement covering: (1) the collateral described in the security agreement; and (2) property that becomes collateral under Section 9-315(a)(2)").

Several other changes in the perfection rules will impact bankruptcy cases more substantially than electronic filing. First, litigation concerning whether a debtor's incorrect name on the financing statement is "substantially misleading" will be virtually eliminated. The new "bright line" rule provides that a financing statement incorrectly naming the debtor is seriously misleading unless a search of the filing records office's conducted under the correct name discloses the financing statement as actually filed.⁵⁸ Second, "super-generic" descriptions such as "all assets" will sufficiently describe the collateral and be enforceable against third parties, including bankruptcy trustees.⁵⁹ Third, the place(s) where financing statements must be filed are substantially reduced and simplified.⁶⁰ With some exceptions, the place of filing is where the debtor, not the collateral, is located.⁶¹ The exceptions include the traditional fixtures and similarly locally anchored collateral⁶² and

⁵⁸ See *id.* § 9-506(c) (declaring that "if a search of the records of the filing office under the debtor's correct name, using the filing offices' standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with § 9-503(a), the name provided does not make the financing statement seriously misleading."); see also Nation, *supra* note 5, at 225-26 (analyzing Revised Article 9's rule that failure to state correct name on financing statement is seriously misleading unless filing office's standard search shows that financing statement was filed under incorrect name); Sigman, *supra* note 45, at 62 (explaining that "Revised Article 9 allows for a searcher to rely on a single search conducted under the correct name of the debtor and penalizes filers only for errors that result in nondisclosure of the financing statement in a search under the correct name.").

⁵⁹ See Revised U.C.C. § 9-504(2) (providing that "[a] financing statement sufficiently indicates the collateral that it covers only if the financing statement provides...(2) an indication that the financing statement covers all assets or all personal property"). But see *Gill v. United States (In re Boogie Enterprises, Inc.)*, 866 F.2d 1172, 1174 (9th Cir. 1989) (asserting that phrase "personal property" in financing statement is insufficient to perfect interest). See, e.g., *Durbin, Inc. v. Jefferson Nat'l Bank (In re I.A. Durbin Inc.)*, 46 B.R. 595, 598-99 (Bankr. S.D. Fla. 1985) (finding phrase "all property rights of any kind whatsoever, whether real, personal, mixed or otherwise, and whether tangible or intangible" insufficient); *Merchants Nat'l Bank of Cedar Rapids v. Halberstadt*, 425 N.W. 2d 429, 432 (Iowa Ct. App. 1988) (stating that phrase "it being the intention of the debtor to include herein all personal property now owned or hereafter acquired" insufficient for financing statement).

⁶⁰ See Revised U.C.C. § 9-301(1) (1999) (providing locations where financing statement must be filed); see also Sigman, *supra* note 45, at 62-63 (arguing that Revised U.C.C. § 9-501 makes intrastate filing simpler by utilizing one statewide office, and interstate filing under Revised Article 9 leads to fewer filings, errors, and less litigation).

⁶¹ See Revised U.C.C. § 9-301(1) (stating that "[e]xcept as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral."); see also *In re Doughty's Appliance Inc.*, 236 B.R. 407, 411 (Bankr. D. Or. 1999) (explaining "effects of perfection or non-perfection of a security interest in collateral are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected" (quoting U.C.C. § 9-103(1)(b))); *In re Gibson*, 234 B.R. 776, 780 (Bank. N.D. Ca. 1999) (proposing that "if the enforceability of the Dagnet Clause is viewed as an issue relating to perfection or the effect of perfection or non perfection, that issue will be determined under California law" because collateral has always been in California).

⁶² See Revised U.C.C. § 9-301(3)-(4) (stating that while collateral is in jurisdiction, local law of that jurisdiction applies to "perfection of a security interest in the goods by filing a fixture filing...and...the effect of perfection or nonperfection and the priority of a non-possessory security interest in the collateral."); Carle S. Bjerre, *International Project Finance Transactions: Selected Issues Under Revised Article 9*,

possessory security interests.⁶³ Revised Article 9 also makes determining the location of the debtor easier by a series of three rules.⁶⁴ The correct place of filing will be; the state of organization for an entity created by registration with a state (e.g., a corporation), the state of the entity's chief executive office for entities not created by registration with a state (e.g., most general partnerships), or the state of an individual's principal residence.⁶⁵

Finally, Revised Article 9 expands the kinds of collateral in which a security interest may be perfected by filing (rather than possession).⁶⁶ Unlike current law, which requires possession for perfection of security interests in money and instruments,⁶⁷ the new regime will permit perfection by filing in instruments and several other forms of collateral historically associated with the pledge.⁶⁸ Perfection by possession will continue to be possible for most of these items.⁶⁹

73 AM. BANKR. L.J. 119, 121 (1999) (explaining that except for fixtures, process for perfecting security interest will occur in state where debtor has its corporate charter or organization document).

⁶³ See Revised U.C.C. § 9-301(2) (granting exception to rules determining place of filing for possessory security interests). Even though perfection by filing is generally reduced to a single place under Revised Article 9, the limited issues of priority and the effect of perfection of security interests in goods, documents, instruments, money, negotiable documents, and tangible chattel paper are determined by the law of the situs of the collateral. See Patrick J. Borchers, *Choice of Law Relative to Security Interests and Other Liens in International Bankruptcies*, 46 AM. J. COMP. L. 165, 190 (1998) (taking note of exception that possessory security interests, or those where creditor has possession of collateral, are governed by law of jurisdiction of collateral's situs).

⁶⁴ See Revised U.C.C. § 9-307 (b) (listing rules to be used for determining debtor's location); see also Bjerre, *supra* note 62, at 131 (observing that there may be difficulties with "place of organization" filing requirement for registered organizations); Borchers, *supra* note 63, at 189 (noting that prior to revisions determining debtors' "location" was often difficult).

⁶⁵ See Revised U.C.C. § 9-307(b) (declaring that place of filing is determined by individual's place of residence and by chief executive for organization with more than one place of business); *id.* § 9-307(e) (asserting that place of filing for registered organization is state of organization); see also Caseel v. Kolb, 72 Cal. App. 4th 568, 575 (Ct. App. 1999) (stating notice inquiry filing of UCC-1 financing statements allow interested parties to obtain relevant information regarding security agreement from parties involved in transaction without necessity of filing entire security agreements, by placing third parties on notice that another party may have security interest in collateral and further inquiry is required).

⁶⁶ Collateral for which something more than filing is necessary for perfection includes money. See Revised U.C.C. § 9-312(b)(3) (indicating that perfection of money occurs by possession, as well as deposit account and letter of credit rights); see also *id.* § 9-312(b)(1)-(2) (establishing that it is necessary to show "later control" so as to prove perfection in deposit accounts and letter of creditor rights); John D. Muller, *Selected Documents In the Law of Cyberspace*, 54 BUS. LAW. 403, 415 (1998) (stating that security interest in electronic chattel paper may be perfected by control).

⁶⁷ See U.C.C. § 9-304(1) (1977); *In re United States Physicians Inc.*, 1999 WL 557682 (Bankr. E.D. Pa. 1999) (holding physician's shares in professional corporation were instruments, security interest which could be perfected only by possession); see also *In re Professional Ins. Management*, 130 F.3d 1122, 1130 (3d Cir. 1997) (noting that security interest in cash commissions are perfected by possession as opposed to filing).

⁶⁸ See Revised U.C.C. §§ 9-310(a), 9-312(a) ("A security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing."); see also discussion, *infra* Part II.A.5. (explaining impact of perfection by dominion on trustees' avoiding powers under Bankruptcy Code § 544(a)).

⁶⁹ See Revised U.C.C. § 9-313(a) ("[A] secured party may perfect a security interest in negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral.");

There are many further revisions, alterations or modifications of Revised Article 9, some of which will be discussed in Part II below.⁷⁰ However, even this cursory examination demonstrates the success of the Drafting Committee incorporating the Study Committee's aspiration that "insofar as the Committee's recommendations would make it easier and less costly to take and perfect security interests, they are likely to have the effect of improving the position of secured creditors relative to that of unsecured creditors."⁷¹ The net effects of the adoption of Revised Article 9 will be to reduce the reach of the trustee's avoiding powers under Bankruptcy Code section 544(a) and to increase the scope of the secured creditor's claims to proceeds under Bankruptcy Code section 552(b).⁷²

II. IMPACT ON BANKRUPTCY LAW

Under some situations, which commonly exist in the case of a firm in bankruptcy, the value realizable through a collective remedy may exceed that of the creditors' piecemeal exercise of their individual remedies.⁷³ Among the most commonly advanced justifications for the institution of bankruptcy is the need for a collective mechanism of paying multiple claims in the event of insolvency. As a

Nation, *supra* note 5, at 232 (noting that under Revised Article 9 preference is given to possessory security interests when security interests conflict); Adam B. Strauss, *Reviewing Revised Article 8 of the Uniform Commercial Code*, 44 WAYNE L. REV. 203, 214 n. 70 (1998) (stating that perfection of security interests in certified securities can still occur through possession under Article 9).

⁷⁰ See Bjerre, *supra* note 62, at 121 (explaining that Revised Article 9 is reconstructed to reflect many new issues facing our increasingly complex society); see also Borchers, *supra* note 63, at 190 (describing various impacts Revised Article 9 has on perfecting security interests); Larry T. Graven, *The Changed (And Changing?) Uniform Commercial Code*, 26 FLA. ST. U. L. REV. 285, 344 (1999) (discussing impact of Article 9 revisions on creditors).

⁷¹ PEB Study Report, *supra* note 11, at 9. See W. Rodney Clement, Jr., *Enforcing Security Interests in Personal Property in Mississippi*, 67 MISS. L.J. 43, 94-5 n. 256 (1992) (noting lien creditors continue to have priority over unperfected security interests); Graven, *supra* note 70, at 344 ("Even more important [than the costs Revised Article 9 will impose on secured creditors as they change the way they do business], though, is the tendency of revised Article 9 to favor secured lenders over trade creditors and other unsecured creditors").

⁷² See *In re Professional Ins. Management*, 130 F.3d at 1129 (asserting that in order to hold secured position over trustee one must protect its security interest in property); see also Douglas G. Baird & Thomas H. Jackson, *Possession & Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175, 196-201 (1983) [hereinafter BAIRD & JACKSON 1] (suggesting that Article 9's scope is inadequate); David A. Rice, *Digital Information As Property and Product: U.C.C. Article 2B*, 22 U. DAYTON L. REV. 621, 643 (1996) (noting that scope of Article 9 includes both tangible and intangible personal property as collateral).

⁷³ See Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 99-102 (1984) [hereinafter BAIRD & JACKSON 2] (critiquing, supporting, and expanding "creditors' bargain" model of bankruptcy). See generally Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857 (1982). But see Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 777 (1987) (indicating that there is little dissent from fundamental presupposition that collective nature of bankruptcy is its most salient feature).

unitary process of liquidation and distribution arguably produces a greater net return than otherwise.⁷⁴

From the creditors' viewpoint, a corollary to the axiom of a bigger pot through bankruptcy is the desire for equality of treatment. Exercise of state law collection remedies focuses on the relationship between the debtor and an individual creditor.⁷⁵ State law remedies are administered on a "first in time is first in right" basis,⁷⁶ therefore individual creditors have every incentive to be the first to aggressively employ legal mechanisms necessary to enforce their obligations because there may be nothing left for those who have waited.⁷⁷ The relationship among creditors is important when a debtor is insolvent as the creditors' race of diligence undermines the goal of achieving the greatest total return on the debtor's assets.⁷⁸ Bankruptcy – the creditors' collective collection remedy – therefore should treat similarly situated creditors equally or the virtue of collective action may be subverted.⁷⁹

⁷⁴ See Douglas G. Baird, *Revisiting Auctions in Chapter 11*, 36 J.L. & ECON. 633, 641-42 (1993) (questioning whether bankruptcy proceeding should focus only on resolving disputes among parties with rights to debtors assets or should also focus on running ongoing business); Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 J. LEGAL STUD. 127, 141 (1986) (discussing issue of whether corporate reorganizations should exist at all); Warren, *supra* note 73, at 781 (questioning whether corporate reorganizations are desirable process with desirable outcome).

⁷⁵ See *In re Correct Mfg. Corp.*, 167 B.R. 458, 459 (Bankr. S.D. Ohio 1994) (stating pre-petition relationship with debtor is threshold requirement for claim); *In re Piper Aircraft Corp.*, 162 B.R. 619, 626-27 (Bankr. S.D. Fla. 1994) (adopting pre-petition relationship as appropriate for claimants recovery against debtor); Lynn M. LoPucki, *Should The Secured Credit Carve Out Apply Only in Bankruptcy? A Systems/Strategic Analysis*, 82 CORNELL L. REV. 1483, 1491 (1997) ("The state remedies system has as its primary purposes the resolution of disputes regarding the existence and amounts of debts and forcible debt collection").

⁷⁶ See BAIRD & JACKSON 1, *supra* note 72, at 194-95; see also Daniel L. Keating, *Getting A Handle On Late Manifesting Claims: A Comment*, 72 WASH. U. L.Q. 1095, 1099 (1994) (noting that state law collection procedures operate on first come, first served basis); Frederick Tug, *Taking Future Claims Seriously: Future Claims and Successor Liability in Bankruptcy*, 49 CASE W. RES. L. REV. 435, 451-52 (1999) (stating that creditors suffer as whole under state law collection rules that divide debtors' assets on first come, first served basis).

⁷⁷ See C. TABB, *THE LAW OF BANKRUPTCY* 4 (1997) ("Under the race of diligence, the first creditors who grab the debtor's assets will be paid in full. Those who come later in time will get nothing."); see also J. Bradley Johnson, *The Bankruptcy Bargain*, 65 AM. BANKR. L.J. 213, 241 (1991) (asserting that under state collection law, creditors must aggressively pursue their state law remedies before debtor's assets are depleted); Ellen E. Sward, *Resolving Conflicts Between Bankruptcy Law and the State Police Power*, 1987 WIS. L. REV. 403, 412-13 (criticizing state law procedures for resulting in "plundering of the debtors assets by the more aggressive creditors").

⁷⁸ See Alan Schwartz, *A Theory of Loan Priorities*, 18 J. LEGAL STUD. 209, *passim* (1989) (advancing theme of distributive justice to support equality of creditor treatment); Warren, *supra* note 73, at 795 (stating that state procedures often lead to poor results). No resolution of the normative rationale for equality is necessary to acknowledge its significance in the scheme of current bankruptcy law. See Grant Gilmore, *The Good Faith Purchase Ideas and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15A GA. L. REV. 605, 608 (1981) (contending that good faith purchaser left holding bag).

⁷⁹ See Gilmore, *supra* note 78, at 613 (reasoning that bankruptcy leaves behind unsecured creditor without compelling arguments for defeating their property rights); LoPucki, *supra* note 75, at 1491 (recognizing that two systems – state collective system and bankruptcy – allow potential for inequitable distribution of funds to like creditors).

On the other hand, bankruptcy has never functioned in a vacuum.⁸⁰ The right to property, which cannot be taken away without just compensation is guaranteed by the Fifth Amendment to the United States Constitution.⁸¹ No scheme of bankruptcy has ever treated every creditor equally because equality of treatment of creditors without consideration of their property interests would run afoul of the right to property.⁸² The Bankruptcy Code explicitly recognizes the right to property with respect to security interests,⁸³ and the Supreme Court has acknowledged this.⁸⁴

Regardless of whether Congress has the power pursuant to the Commerce or Bankruptcy Clauses of the Constitution⁸⁵ to legislate security interests out of existence consistently with the Fifth Amendment, it has chosen not to do so.⁸⁶ The

⁸⁰ See BAIRD & JACKSON 2, *supra* note 73, at 97 ("Bankruptcy law does not exist in a vacuum"); *id.* at 100 (asserting that substantive non-bankruptcy rules "should be changed only when following bankruptcy code better sustains rights of investors on whole"); see also Lucian A. Bebchuck & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105A YALE L. J. 857, 873 (1996) (asserting problems with priority and secured interests). *But see* Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 823 (1987) (arguing that bankruptcy law should not determine who has priorities when firm fails).

⁸¹ "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Framers would probably have considered the right to property an inalienable "law of nature." See J. LOCKE, TWO TREATISES OF GOVERNMENT 754 (J.M. Dent & Sons Ltd. 1924) (1690).

⁸² The Bankruptcy Code has recognized other reasons for departing from an equality scheme, such as the nature of the debt (11 U.S.C. § 507), creditor agreement (11 U.S.C. § 510(a)) or creditor misconduct (11 U.S.C. § 510(c)).

⁸³ See, e.g., 11 U.S.C. §§ 506(a), 725 (1994) (establishing that Bankruptcy Code's recognition of security interests as protected property interests does not mean that such interests may not be affected by bankruptcy); *id.* at §§ 1129(b)(2)(A), 1225 (a)(5) and 1325 (a)(5) (describing conditions which must be met in order to have plan confirmed).

⁸⁴ See *Butner v. United States*, 440 U.S. 48, 55 (1979) (stating "[p]roperty interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."); see also *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) (observing that federal system is assumed to defer to traditions of state unless there is clear expression otherwise); *Nobleman v. Am. Sav. Bank*, 508 U.S. 324, 329 (1993) (asserting that property laws fall within purview of states unless clearly specified otherwise).

⁸⁵ "The Congress shall have the Power To . . . regulate Commerce with foreign Nations, and among the several States . . . [and] To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. 1, § 8, cl. 3-4.

⁸⁶ See *Chrysler Credit Corp. v. George Ruggiere Chrysler-Plymouth (In re George Ruggiere Chrysler-Plymouth)*, 727 F.2d 1017, 1019 (11th Cir. 1984) ("Security interests are 'property rights protected by the Fifth Amendment from public taking without just compensation...."); James Steven Rogers, *The Impairment of Secured Creditors Rights in Reorganization: A Study of the Relationship between the Fifth Amendment and the Bankruptcy Clause*, 96 HARV. L. REV. 973 *passim* (1983) (asserting that Congress does have power to eliminate security interests in bankruptcy). It should also be noted that the Rogers article was written before the resurgence of "takings" jurisprudence in the Supreme Court. See e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994) (indicating that in order for court to find uncompensated taking under Fifth Amendment, there must be review of nexus between legitimate state interest and permit conditions); *Lucas v. S.C. Coastal Comm.* 505 U.S. 1003, 1014-16 (1992) (reviewing relationship between "taking" and state legislation preventing development of coastal property); *Nollan v. Cal. Coastal Comm.*, 483 U.S. 825,

goal of absolute creditor equality by means of collective debt collection in bankruptcy, with its virtue of enhancing the collective return of all creditors, cannot be achieved under the current bankruptcy regime. Consistency with the right of property, including the right of security interests in property governed by the U.C.C., precludes this objective.⁸⁷

A. *The Avoiding Powers Under § 544(a)*

Although current bankruptcy law mandates recognition of security interests, it does not require any more for a secured creditor in a collective distribution scheme than the minimum that that creditor might have received had it exercised its individual rights outside of bankruptcy. The goal of the bigger pot through collective efforts is compatible with a rule in bankruptcy eliminating security interests in property of the estate to the greatest extent possible consistent with the right of property under state law. Whether under an instrumentalist creditor bargain model or a distributionist theory of bankruptcy, there is no reason to permit creditors who have not complied with all steps required to perfect their security interests to escape the equality of distribution envisioned in bankruptcy.⁸⁸ Secured creditors without priority over all potential competing lien claims in a state forum will not prevail in a bankruptcy proceeding.⁸⁹

Congress derived Bankruptcy Code section 544(a)⁹⁰ from section 70(c) of the Bankruptcy Act of 1898.⁹¹ The historical antecedents of section 70(c) illustrated the

831-42 (1987) (discussing generally whether city's prohibition on developing homes on beach access is "taking" under Fifth Amendment).

⁸⁷ See Steven L. Harris & Charles W. Mooney, Jr., *A Property-Based Theory of Security Interests: Taking Debtors' Choices Seriously*, 80 VA. L. REV. 2021, 2024 (1994) (validating decisions of debtors to transfer their property for collateral purposes and respecting personal autonomy and freedom of contract); see also R. Wilson Freyermuth, *Rethinking Proceeds: The History, Misinterpretation and Revision of U.C.C. Section 9-306*, 69 TUL. L. REV. 645, 696 (1995) (developing coherent model of what should constitute proceeds under U.C.C. based on property paradigm of security interests).

⁸⁸ See Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725, 735 (1984) ("In 'avoiding' the secured party's unperfected security interest, the trustee does not confer victory upon the unsecured creditor; rather he assures a tie."); Thomas H. Jackson, *Bankruptcy, NonBankruptcy Entitlements and the Creditors Bargain*, 91 YALE L.J. 857, 860 (1982) (explaining that "race" system assumes that creditors are secured but inadvertently forgot to secure their claim).

⁸⁹ See *Fidelity Fin. Serv. v. Fink*, 522 U.S. 211, 221 (1998) (holding that creditor may invoke enabling loan exception by satisfying state-law perfection requirements within period required by federal statutes); *Grasso Prod. v. BMO Fin. Inc. (In re Century Offshore Management Corp.)*, 83 F.3d 140, 143-44 (6th Cir. 1996) (holding that statutory lien pursuant to Louisiana law prevailed over consensual mortgages held by appellee bank); *Pearstein v. United States Small Bus. Admin.*, 719 F.2d 1169, 1176 (D.C. Cir. 1983) (dictum) ("[i]f the competing...lien...had been that of a state or private party, there would be no question that applicable nonbankruptcy law for determining priority between the liens would be that of the district").

⁹⁰ 11 U.S.C. § 544(a).states:

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

concerns associated with secret liens.⁹² As commercial practices developed and methods of public notice of secured transactions became commonplace, the focus of cases under section 70(c) came to bear on which creditors it protected.⁹³ Prior to the widespread adoption of the U.C.C. and the Bankruptcy Reform Act of 1978, some uncertainty had existed regarding when unsecured creditors could benefit from section 70(c).⁹⁴ For example, the Second Circuit held that the actual existence of a creditor with the power to avoid an unperfected lien under state law was not necessary to avoidance of a security interest under section 70(c).⁹⁵ But in *Pacific Finance Corp. v. Edwards*⁹⁶ the Ninth Circuit held that the nonexistence of a single actual creditor who could have avoided the security interest granted by a conditional sales contract doomed the trustee's efforts to avoid it for the benefit of all creditors.⁹⁷ Coupled with U.C.C. section 9-301(1)(b), Congress' adoption of Bankruptcy Code section 544(a) unambiguously rejected *Pacific Finance*.⁹⁸

(1) a creditor that extends credit to the debtor at the time of commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

⁹¹ 11 U.S.C. § 110(c) (1975) (describing role of trustee in various stages of bankruptcy).

⁹² See *In re Fidelity Tube Corp.*, 278 F.2d 776, 778 (3d Cir. 1960) (stating that policy of § 70 (c) is to increase size of bankrupt's estate available to unsecured creditors); *Sampsel v. Straub*, 194 F.2d 228, 231 (9th Cir. 1951) ("[S]ection 70, sub. c . . . is employed primarily to protect general creditors of the bankrupt against secret liens"); Carlos J. Cuevas, *Bankruptcy Code Section 544(a) and Constructive Trusts: The Trustee's Strong Arm Powers Should Prevail*, 21 SETON HALL L. REV. 678, 773 (1991) (discussing relationship of § 544 and constructive trusts and arguing that "express language of § 544(a) was intended to prevent the imposition of a constructive trust").

⁹³ See *United States v. Speers*, 382 U.S. 266, 275 (1965) (deciding that trustee in bankruptcy is judgment creditor for purposes of priority over unrecorded federal tax lien); *McCannon v. Marston*, 679 F.2d 13, 16-17 (3d Cir. 1982) (holding that word "knowledge" in Bankruptcy Code § 544 was not intended to include "notice" and that trustee was subject to equitable lien of partner in Drake Hotel); See generally 5 COLLIER ON BANKRUPTCY, 541LH (1999) (describing history of various bankruptcy acts).

⁹⁴ See Thomas J. Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725, 850 (discussing historical mystery surrounding strong-arm power of trustees).

⁹⁵ See *Lewis v. Mfrs. Nat'l Bank of Detroit*, 364 U.S. 603, 609 (1961) (holding that security interest was not voidable by bankruptcy trustee even though secured creditor recorded it four days after judgment creditor had executed on property because no new credit had been extended in four-day gap period); *Constance v. Harvey*, 215 F.2d 571, 574 (2d Cir. 1954) (stating that trustee could avoid mortgagee interest if trustee can show that interest was unperfected as of date of bankruptcy). *But see In re Federal's Inc.*, 553 F.2d 509, 513 (6th Cir. 1977) (criticizing *Harvey* case as mistakenly creating "hypothetical super creditor").

⁹⁶ 304 F.2d 224, 228 (9th Cir. 1962).

⁹⁷ See *id.* at 228 (holding that § 70(c) does not vest trustee with rights of creditor holding lien on property of bankrupt "in the absence of a creditor of the bankrupt who could have obtained a lien on such property");

Since 1978, Bankruptcy Code section 544(a) has empowered trustees in bankruptcy to turn secured (but unperfected) creditors into unsecured creditors.⁹⁹ With respect to consensual security interests in personal property, this power is measured by that of a hypothetical judicial lien creditor under state law.¹⁰⁰ Since 1972, the relevant state law has been the current version of U.C.C. section 9-301(1):

Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of

(b) a person who becomes a lien creditor before the security interest is perfected.¹⁰¹

The U.C.C. does not provide a collective remedy; it operates on a case-by-case basis to resolve conflicts between two creditors.¹⁰² Bankruptcy Code section 544(a)

see also United Cal. Bank v. England, 371 F.2d 669, 671 (9th Cir. 1966) (stating that trustee has all powers of creditors who actually exist and who could obtain liens against property); *In re KOMFO Prods. Corp.*, 247 F. Supp. 229, 233 (E.D. Pa. 1965) (noting that rights are determined by Bankruptcy Act but "initial relationships are created and determined by state law").

⁹⁸ See 24 CONG. REC. H11089, 11097 (daily ed. Sept. 28, 1978) (Statement of Rep. Edwards), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6456 (asserting that "in particular, § 544 overrules Pacific Finance...in so far as [it held] that the trustee did not have the status of a creditor who extended credit immediately prior to the commencement of the case"). The dispute regarding the extent of the trustee's avoiding powers has not been completely resolved by Bankruptcy Code § 544(a) insofar as such powers pertain to certain real estate transactions. *See generally* Richard L. Epling, *Treatment of Land Sales Contracts Under the New Bankruptcy Code*, 56 AM BANKR. L. J. 55, 62-63 (1982) (discussing powers of trustee related to certain real estate transaction, namely powers to avoid unrecorded contracts to purchase real estate). *Compare In re Mill Concepts Corp.*, 123 B.R. 938, 944-46 (Bankr. D. Mass. 1991) (asserting that although trustee now has power to avoid transfers of interests in personal property regardless of whether actual creditor exists, trustee still does not have power under Bankruptcy Code § 544(a)(3) to acquire or retain interest in real property against claimant under constructive trust) *with* Mullins v. Paul J. Paradise & Assocs., Inc. (*In re* Paul J. Paradise & Assocs., Inc.), 217 B.R. 452, 454 (Bankr. D. Del. 1997) (finding that Bankruptcy Code § 544(a)(3) confers status of bona fide purchaser upon trustee for all purposes). Constructive trusts in personal property have also survived attacks by bankruptcy trustee. *See, e.g.,* Kemp v. Bowen (*In re* Visiting Nurse Ass'n of Western Pa.), 143 B.R. 633, 643-44 (W.D. Pa. 1992) (positing that under Pennsylvania law, judgment and execution creditors are not protected against beneficiary of constructive trust).

⁹⁹ *See* Moore v. Bay, 200 U.S. 4, 5 (1931) (announcing that mortgage which is adverse to creditors on date of mortgage and those who thereafter became creditors between date of mortgage and date such mortgage was recorded, do not get priority over those who became creditors after recordation of mortgage). *But see* Lewis v. Manufacturers Nat'l Bank of Detroit, 364 U.S. 603, 607 (1961) (suggesting that creditors' rights accrue at petition of bankruptcy and should not be cut off earlier).

¹⁰⁰ *See* Smith v. Mark Twain Nat'l. Bank, 805 F.2d 278, 284-5 (8th Cir. 1986) (focusing on state law in discussing powers of trustee regarding priority over debtors' deposits in creditor-bank); Bryant v. Secretary, 227 B.R. 89, 92 n. 26 (W.D. Va. 1998) (reasoning that defects in lien under state law are not cured and avoidance of lien does not cure defect); Ledford v. Easy Living Furniture (*In re* Jackson), No. 3-84-00195, 1985 Bankr. Lexis 5341 at * 3 (Bankr. S.D. Ohio. Sept. 12, 1985) (noting that although federal law provides trustee with strong arm powers, exercise of such powers is determined under state law).

¹⁰¹ *See* U.C.C. § 9-301(1) (1972) (diminishing rights of lien creditor who acquires such lien without knowledge of prior security interest and before such interest perfected).

¹⁰² *See* U.C.C. § 9-301(3) (understanding that usual scenario pits secured creditor whose claim to priority is vulnerable against unsecured creditor who has become lien creditor and defining lien creditor as "a

is the means by which unsecured creditors collectively may take advantage of the priority rule of U.C.C. section 9-301(1)(b) because it incorporates the rule "whether or not such a creditor exists."¹⁰³

1. The Revised Priority Rule

Current U.C.C. section 9-301 will be replaced by Revised U.C.C. section 9-317(a):

An unperfected security interest or agricultural lien is subordinate to the rights of:

- (2) a person that becomes a lien creditor before the earlier of the time the security interest or agricultural lien is perfected or a financing statement covering the collateral is filed.

Revised U.C.C. section 9-317(a) will impact bankruptcy cases in two ways, one obvious, the other more subtle but far more significant. The straightforward effect of Revised U.C.C. section 9-317(a) is to resolve the largely theoretical problem that can arise in interpreting the interplay between current U.C.C. sections 9-301(1)(b) and 9-203. Under current law, and notwithstanding the filing of a financing statement, a security interest is not perfected until it has attached.¹⁰⁴ Attachment does not take place until three events have occurred: 1) the debtor executes a security agreement (or delivers possession), 2) the secured party gives value, and 3) the debtor has rights in the collateral.¹⁰⁵ Thus, a lender who files a financing statement describing its borrower's collateral on August 1, but who does not make an advance until September 1, is subordinate to an unsecured creditor who procures a judicial lien in the interim.¹⁰⁶ Revised Article 9 will reverse this relatively rare

creditor who has acquired a lien on the property involved by attachment, levy or the like and includes . . . a trustee in bankruptcy from the date of the filing of the petition "); *see also* Dick Warner Cargo Handling Corp. v. Aetna Bus. Credit, Inc., 700 F.2d 858, 861 (2d Cir. 1983) (balancing New York's version of U.C.C. § 9-301(4) with Connecticut garnishment law).

¹⁰³ 11 U.S.C. § 544; *see also In re Boyertown Auto Body Works*, No. 91-2075, 1991 U.S. Dist. Lexis 17372 at * 10 (E.D. Pa. Nov. 27, 1991) (stating that "[u]nder Pennsylvania's priority rules, an unperfected security interest is subordinate to the rights of a lien creditor. 13 Pa. C.S.A. § 9301(a)."); *First Nat'l Bank and Trust Co. v. Lasich (In re Three Lakes Cocktail Lounge and Restaurant, Inc.)*, 131 B.R. 70, 72 (Bankr. W.D. MI 1991) (stating that creditor's interest "is subordinate under M.S.A. 19.1301(1)(b) to the Trustee's § 544(a)(1) status as judicial lien creditor").

¹⁰⁴ *See* U.C.C. § 9-303(1) (stating that "[a] security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken"); *see also United States v. McDermott*, 507 U.S. 447, 450-53 (1993) (holding that state-law lien was not first in time since it did not attach until after federal lien was filed); *E.F. Corp. v. Smith*, 496 F.2d 826, 830 (10th Cir. 1974) (stating that attachment cannot occur until "value is given").

¹⁰⁵ *See* U.C.C. § 9-203(1) (1977) (stating that security interest is not enforceable and collateral does not attach unless all three steps enumerated in U.C.C. § 9-203(1) are taken).

¹⁰⁶ *See id.* § 9-301(1)(b) (1972) (explaining "[A]n unperfected security interest is subordinate to the rights of . . . a person who becomes a lien creditor before the security interest is perfected."). Some courts have imported equitable considerations into an otherwise straightforward exercise in statutory application to give

result by making (the earlier of either perfection *or* filing) the date on which the secured creditor gains priority over the holders of subsequent judicial liens.

This change should have little effect in bankruptcy cases.¹⁰⁷ It is rare that a lender will, absent the protection of a financing order of the Bankruptcy Court under section 364 of the Bankruptcy Code, make its first advance *after* a borrower's bankruptcy filing. The bankruptcy trustee's power to avoid the grant of the security interest only benefits unsecured creditors if the secured creditors have given value to the debtor's estate. If creditors who have perfected their loan never make an advance (due to the intervening bankruptcy), then the trustee's avoidance of the lien is largely superfluous.

Revised Article 9 really impacts the avoidance powers of Bankruptcy Code section 544(a) by enlarging the class of property subject to Article 9, and by increasing the ease in perfecting security interests. Part I.B. of this Article identified several aspects of Revised Article 9's impact. The following sections will examine those factors as well as some others in more detail.

2. Revised Definition of Account

Revised Article 9's changes to the definition of "account" should have little impact on bankruptcy cases. The primary source of the increase in the scope of account in Revised U.C.C. section 9-102(a)(2) is the current category of general intangibles.¹⁰⁸ As long as a creditor has a properly perfected security interest in all categories of assets under the current U.C.C., whether an item is properly classified as an account or general intangible makes little difference outside the agricultural context.¹⁰⁹ Both must be perfected by filing at the state level¹¹⁰ in the state of the borrower's location.¹¹¹

the unperfected secured creditor priority over the holder of a judicial lien where the debtor has somehow made it impossible for the secured creditor to perfect its interest. *See, e.g., In re Einoder*, 55 B.R. 319, 327-28 (Bankr. N.D. Ill. 1985) (finding that bank's unperfected security interest in land trust is subordinate to trustee's powers); *In re Trim-Lean Meat Products*, 10 B.R. 333, 335 (D. Del. 1981) (holding that financing company with unperfected lien is subordinate to trustee's power).

¹⁰⁷ This is unlike Professor James J. White's proposal to eliminate *any* priority for judicial lien creditors over unperfected secured creditors under current U.C.C. § 9-301(1), which would have substantially reduced litigation under Bankruptcy Code § 544(a) (emphasis added). *See* James J. White, *Revising Article 9 To Reduce Wasteful Litigation*, 26 LOY. L.A. L. REV. 823, 842 (1993).

¹⁰⁸ *See* Revised U.C.C. § 9-102 Official Cmt. 5a (1999) (noting that "[m]any categories...classified as general intangibles under former Article 9 are accounts under this Article."); *see also* Wasserman v. Alexander (*In re Drapery Design Ctr., Inc.*), 86 B.R. 120, 124 n.2 (Bankr. N.D. Ohio 1988) (recognizing that U.C.C. § 9-102 includes security interests created in general tangibles or accounts); Carl S. Bjerre, *Secured Transactions Inside Out: Negative Pledge Covenants, Property and Perfection*, 84 CORNELL L. REV. 305, 392 n.351 (1999) (noting that U.C.C. § 9-102(1) had "heretofore applied" to sales of accounts and chattel paper, but not to general intangibles).

¹⁰⁹ *See generally* Revised U.C.C. § 9-101 Cmt. 4d (1999) (stating that in most cases security interest may be perfected by control or filing whereas agricultural liens may only be perfected by filing).

¹¹⁰ *See* U.C.C. § 9-401 (1972) (stating that filing must be either with official in prescribed county or with secretary of state); *see also* J.D. Court, Inc. v. U.S., 712 F.2d 258, 259 (1983) (noting that party perfected his security interest by filing with Illinois Secretary of State pursuant to U.C.C. § 9-401); First Nat'l Bank

3. Sales of Payment Intangibles and Promissory Notes

Revised Article 9 creates a new subcategory of general intangibles, the payment intangible,¹¹² as well as a new subcategory of instruments, the promissory note.¹¹³ Payment intangibles are general intangibles where the principal obligation of the obligor is the payment of money.¹¹⁴ Payment intangibles are not instruments, which are characterized by either negotiability or assignability by indorsement.¹¹⁵ Examples of payment intangibles include loan agreements or commercial debt instruments that typically contain too many covenants to constitute an instrument¹¹⁶ and are usually sold or participated, not negotiated. Promissory notes have, of course, existed for centuries and are now separately categorized to permit their sale by a holder who retains a security interest to defeat bankruptcy trustees without

Trust v. First Nat'l Bank of Greybull, 582 F.2d 524, 526 (1978) (observing that bank initially perfected security interest by filing with Montana Secretary of State, but interest not perfect where filed improperly with county clerk's office).

¹¹¹ See U.C.C. § 9-103(3)(b) (stating that perfection is governed by law of jurisdiction where debtor is located). Revised Article 9 will virtually eliminate perfection by filing at the local level. See Revised U.C.C. § 9-501 Official Cmt. 2 (1999) (stating that local filing increases costs associated with such filing and central filing is to be done in most situations). Alternatives 2 and 3 to U.C.C. § 9-401(1) will no longer exist, thus eliminating the special subcategories of agricultural equipment as well as accounts and general intangibles arising out of the same of farm products. See *id.* (providing filing option for agricultural lien or security interest). "Farm Products" will still exist. See *id.* § 9-102(34) (listing "[g]oods, other than standing timber, with respect to which the debtor is engaged in farming."). However, perfection in "farm products" will also be at the state level. See *id.* § 9-501 Official Cmt. 2. Only as-extracted minerals, timber, and fixtures will continue to be perfected by filing at the local level. See *id.* § 9-501(a)(1)(a), (b) (stating that these interests must be filed in office where mortgage on related property would be filed).

¹¹² See Revised U.C.C. § 9-102(a)(61) (1999) (defining payment intangible as "general intangible under which the account debtor's principal obligation is monetary obligation"); see also U.C.C. § 9-106 (defining general intangible as "personal property...other than goods, accounts, chattel paper, documents, instruments, investment property, rights to proceeds of written letters of credit, and money.").

¹¹³ See Revised U.C.C. § 9-102(a)(65) (stating "'Promissory note' means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank"); *id.* § 9-102(a)(65) Official Cmt. 5c (stating that definition of promissory note is "new"); U.C.C. § 3-104(a) (stating that negotiable instrument is unconditional promise to pay money).

¹¹⁴ See Revised U.C.C. § 9-102 Official Cmt. 5d (1999) (noting that payment intangible is "subset" of general intangibles where "account debtor's principal obligation is a monetary obligation") (emphasis added in original); discussion *supra* note 113 (noting requirements for negotiable instruments under U.C.C. § 3-104(a)).

¹¹⁵ See *id.* § 9-102(a)(47) (explaining "'Instrument' means (i) a negotiable instrument or (ii) any other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment."); see also *Tompkins Printing Equip. Co. v. Almik, Inc.*, 725 F. Supp. 918, 920 (E.D. Mich. 1989) (stating that there may be assignments of portion of debt evidenced by negotiable instrument); *Manufacturers Hanover Trust Co. v. Frymire*, 1991 WL 274972, at *3 (N.D. Ill. 1991) (noting that negotiable instruments are convenient tangible alternatives to money).

¹¹⁶ See Revised U.C.C. § 9-104 (a)(1), (2), (3) (stating that negotiable instrument is conditional promise to pay fixed amount that is payable to bearer or holder, payable on demand or specified time, and does not contain any covenants beyond duty to pay); see, e.g., *Yin v. Society Nat. Bank Indiana*, 665 N.E.2d 58, 62-3 (Ind. App. 1996), *reh. denied, transfer denied* 683 N.E.2d 581 (1997) (agreeing line of credit was not "negotiable instrument" within meaning of U.C.C. where debtor could make draws of varying amounts upon line of credit).

perfection by filing *or* possession. Revised Article 9 improves the position of purchasers of interests in payment intangibles or promissory notes as well as loan participants in the event that the lead lender or seller becomes insolvent. The purchaser of a payment intangible (or loan participant) is deemed to have a security interest in the written evidence of the underlying obligation that is automatically perfected, even though the loan agreement or promissory note remains in the possession of the lead lender or seller.¹¹⁷ Automatic attachment and perfection will defeat the claim of the bankruptcy trustee under Bankruptcy Code section 544(a), even though the automatic security interest of a purchaser of a promissory note is subordinate to the security interest of another creditor who has possession of the same instrument.¹¹⁸

4. Health-Care-Insurance Receivables and Commercial Tort Claims

The addition of health-care-insurance receivables and commercial tort claims may significantly reduce the assets available for unsecured creditors in the event of bankruptcy. The use of health care receivables as primary collateral has historically faced two stumbling blocks. First, the majority of the health care account debtors are either insurance companies or government programs.¹¹⁹ Under the current version of the U.C.C., insurance proceeds are not available as primary collateral.¹²⁰ Second, Congress has enacted a series of anti-assignment provisions designed to prevent factoring of the health care payables it generates.¹²¹

¹¹⁷ See Revised U.C.C. §§ 9-109(a)(3), 9-309(3)-(4) (noting security interests in sale of payment intangibles and sale of promissory notes are perfected when they attach.); see *id.* § 9-309(3), Official Cmt. 3 (noting that filing is not necessary to perfect purchase money security interest in consumer goods); *id.* § 9-309(4), Official Cmt. 4 (providing perfection automatically, to certain assignments of payment intangibles and accounts); see generally, Reade H. Ryan, Jr., *Revised U.C.C. Article 9 – Letters of Credit and Deposit Accounts*, ALI-ABA Course Study 81, 86 (1999) (observing application of Article 9).

¹¹⁸ See Revised U.C.C. § 9-330(d) (stating that same priority rule does not apply in case of payment intangible in which case priority of purchaser/participant cannot be subordinated even by another secured creditor); see also Linda J. Rusch, *Farm Financing Under Revised Article 9*, 73 AM. BANKR. L.J. 211, 248 n.244 (1999) (observing that Revised Article 9 no longer distinguishes "claiming the instrument as mere proceeds and claiming the instrument as more than mere proceeds" when dealing with instruments); Smith, *supra* note 36, at 27 (stating that Revised § 9-330(d) places priority on secured party if possession taken with good faith, value, and without knowledge).

¹¹⁹ For example, Medicare and Medicaid payments comprise 45% of the average hospital's receivables and 80% or more of the income for nursing homes. See Patrick A. Guida, *Lessons in Fitting Your Square Collateral Into The UCC's Round Hole*, ALI-ABA Course Study 159, 206 (1998). Other programs sponsored by the government include the Civilian Health and Medical Program of the Uniformed Services ("CHAMPUS"), the Civilian Health and Medical Program of Veterans Affairs ("CHAMPVA"), and the Veterans' Administration ("VA"); see *id.* at 207; see also James T. Markus & John F. Young, *Intensive Care: Anti-discrimination Provisions - Do They Have Any Real Meaning?*, 1998 ABI JNL. LEXIS 74, at *1 (stating that health care industry has changed such that "an increasing portion of healthcare provider revenues are derived from participation in the Medicare and Medicaid programs").

¹²⁰ See *supra* Part I.B.1 (discussing broadened scope of Revised Article 9 as related to collateral).

¹²¹ See Social Security Amendments of 1972 (codified at 42 U.S.C. § 1395g(c) (1994) and 42 U.S.C. § 1396a(a)(32) (1994)) and the Medicare-Medicaid Anti-fraud and Abuse Amendments to the Social Security Act (codified at 42 U.S.C. § 1395g (c) (1994)); see also H.R. REP. NO. 92-231 (1972) *reprinted in*

The alternative of securitization of health care receivables¹²² has proven inadequate as a means of financing health care providers for another reason. In general, health care receivables are widely dispersed across a large number of hospitals, clinics, labs, and doctors' offices.

Revised U.C.C. section 9-102(a)(46) should enable traditional lenders to make advances to borrowers on account of health care receivables due from insurers like any other account.¹²³ State law, however, cannot overcome the anti-assignment provisions of federal law. Presumably in recognition of this fact, the blanket preclusion of the effect of anti-assignment language by account debtors consistently excludes health care receivables.¹²⁴ This exclusion will continue to prevent effective use of payments under Medicare, Medicaid and similar federal health insurance programs as primary collateral.

In the case of non-governmental insurers, however, an anti-assignment provision is *ineffective* to prevent attachment or perfection of a security interest in a health care receivable.¹²⁵ The very next subsection, Revised U.C.C. section 9-408(d), however, relieves the health care account debtor from virtually every obligation to the secured creditor. Thus, the net effect of a security interest in a health care receivable from a private insurer containing an anti-assignment clause is simply to eliminate the power of the bankruptcy trustee to avoid the security interest for the benefit of unsecured creditors.¹²⁶

1972 U.S.C.C.A.N. 4989, 5090; H.R. REP. NO. 95-393 (1972) *reprinted in* 1972 U.S.C.C.A.N. 3039, 3051-52 (focusing on purpose for 42 U.S.C. § 1396a(a)(32)).

¹²² See *supra* note 36 and accompanying text (discussing "health-care-insurance receivables").

¹²³ See Revised U.C.C. § 9-102(a)(46) (1999) (defining "health-care-insurance receivable" to be "an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health-care goods or services provided"); *id.* § 9-109(d)(8) (indicating that article does not apply to transfer or assignment of claim under insurance policy involving non-health care insurance receivable); Smith, *supra* note 36, at 6 (stating that Revised Article 9 coverage includes "assignments of insurance claims as original collateral").

¹²⁴ See U.C.C. §§ 9-404(e), 9-405(d), 9-406(i) (making corresponding section inapplicable to health-care-insurance receivable); Jason M. Ban, *Deposit Accounts: An Article 9 Security Interest*, 17 ANN. REV. BANKING L. 493, 526 (1998) (noting Revised Article 9 deposit accounts replaced pledge and assignment); Nation, *supra* note 5, at 214 (stating that Revised Article 9 would specifically include "security interest in non-assignable general intangibles").

¹²⁵ See U.C.C. § 9-408(c) (explaining that "[a] rule of law, statute, or regulation that prohibits, restricts, or requires the consent of...an account debtor to the assignment or transfer of, or creation of a security interest in a promissory note, health-care-insurance receivable is ineffective to the extent that the rule of law, statute or regulation would impair the creation, attachment, or perfection of a security interest.").

¹²⁶ See Revised U.C.C. § 9-408, Official Cmt. 6 (revealing intent of drafters). This comment states:

Subsections (a) and (c) affect two classes of persons. These subsections affect account debtors on . . . health-care-insurance receivables Subsection (c) also affects governmental entities that enact or determine rules of law. *However, subsection (d) ensures that these affected persons are not affected adversely.* That provision removes any burdens or adverse effects on these persons for which any rational basis could exist to restrict the effectiveness of an assignment or to exercise any remedies. For this reason, the effects of subsections (a) and (c) are immaterial insofar as those persons are concerned.

The addition of commercial tort claims to the quiver of Article 9 collateral is more straightforward. Current Article 9 excludes all tort claims from the ambit of its coverage on the ground that tort claims "do not usually serve as commercial collateral."¹²⁷ The exclusion of tort claims from Article 9 never meant that they could not serve as collateral for a loan. Rather, the creation, attachment and perfection of a lien on a tort claim were left to non-uniform state law.¹²⁸ Revised Article 9 will standardize the resolution of these matters on a national scale.¹²⁹

There are, however, three substantial restrictions on the creation of a security interest in commercial tort claims. First, the claim must fit the definition of a commercial tort claim.¹³⁰ Second, the claim must be described in the security agreement with some specificity.¹³¹ A generic reference to "all commercial tort claims" would be insufficient. The degree of specificity required, however, is rather low. "A description such as 'all tort claims arising out of the explosion of debtor's factory' would suffice."¹³² Even this limited degree of identification would

Id. (emphasis added); see also Paul M. Shupack, *Making Revised Article 9 Safe for Securitizations: A Brief History*, 73 AM. BANKR. L.J. 167, 177-78 (1999) (observing relationship between Revised U.C.C. § 9-406 and Revised § 9-408(d)). Although Revised § 9-408(d) appears to restrict Revised § 9-406(d), the resulting effect maintains the rights of the account debtor. See *id.* at 178 n.55 (asserting similarity between Revised Article 9 and Federal Communications Commission's handling of broadcast licenses); *In re Cheskey*, 9 F.C.C.R. 986, 987 (1994) (holding that FCC approval is required before transfer of license).

¹²⁷ U.C.C. § 9-104, Official Cmt. 8. See *Barclays Bus. Credit, Inc. v. Four Winds Plaza Partnership*, 938 F. Supp. 304, 308 (D.V.I. 1996) (opining § 9-104 excludes transfer of tort claims not exclusion of tort settlement proceeds); *Sicherman v. Falkenberg (In re Falkenberg)*, 136 B.R. 481, 485 (Bankr. N.D. Ohio 1992) (stating U.C.C. § 9-104 does not include insurance policy claims or tort claims). See generally Harold R. Weinberg, *They Came From "Beyond The Pale": Security Interests in Tort Claims*, 83 KY. L.J. 443, 449 (1994-1995) (discussing significance of including and excluding tort claims as collateral in Article 9 and stating that inclusion is better choice).

¹²⁸ See Janger, *supra* note 30, at 626-27 (asserting that "state[s] could adopt a priority for tort claimants through a statutory lien, akin to a mechanic's lien, that would have priority over an Article 9 lien" but concluding that such non-uniform state laws would not offer solution because collective action problems and state competition would seriously impair state law efforts to legislate in favor of tort claimant priority).

¹²⁹ See Revised U.C.C. § 9-109 (d) (12) (applying Article 9 to commercial tort claims); *supra* notes 40-41 and accompanying text (discussing treatment of commercial tort claims as collateral under Revised Article 9); see also Elizabeth Warren, *Making Policy with Imperfect Information: The Article 9 Full Priority Debates*, 82 CORNELL L. REV. 1373, 1389 (1997) (noting that Article 9 full priority disadvantages tort creditors).

¹³⁰ See Revised U.C.C. § 9-102(a)(13):

Commercial Tort claim means a claim arising in tort with respect to which:

- (A) the claimant is an organization; or
- (B) the claimant is an individual and the claim:
 - (i) arose in the course of the claimant's business or profession; and
 - (ii) does not include damages arising out of personal injury to or the death of an individual.

Id. However, if the tort claim is settled, thereby becoming a contractual settlement, a claim can no longer arise in tort. See Revised U.C.C. § 9-109 Official Cmt. 15 (indicating also that right to payment turns into payment intangible).

¹³¹ See Revised U.C.C. § 9-108 (e)(1) (1999) (stating "[a] description only by type of collateral defined in the U.C.C. is an insufficient description of a commercial tort claim").

¹³² *Id.* § 9-108 Official Cmt. 5.

be unnecessary in the financing statement in which a simple reference to all assets or all personal property would be sufficient even with respect to commercial tort claims.¹³³

Third, a security interest in commercial tort claims may not attach to newly arising claims by virtue of an after-acquired property clause in the security agreement.¹³⁴ This limitation is a corollary to the requirement that the commercial tort claim be described in the security agreement. It is not clear whether the definition of commercial tort claim in the Revised U.C.C. is as broad as the definition of "claim" in the Bankruptcy Code.¹³⁵ In other words, can a debtor grant a security interest in an unmatured, contingent commercial tort claim? While the Revised U.C.C. does not have a definition of "claim," its definition of "commercial tort claim" uses the present participle "arising," not the past participle "has arisen": "(13) 'Commercial tort claim' means a claim *arising* in tort"¹³⁶ (Emphasis added). This suggests that a security interest could attach to a sufficiently described but still unmatured and contingent claim. On the other hand, Official Comment 4 to Revised U.C.C. section 9-204 states that "[i]n order for a security interest in a tort claim to attach, the claim must be in existence when the security agreement is authenticated." Is an unmatured and contingent tort claim "in existence?" The answer may well be yes for bankruptcy purposes¹³⁷ but litigation may be necessary for a resolution of this issue under Revised Article 9.

The effect of increasing the pool of potential collateral to include commercial tort claims will certainly be to lessen their availability to unsecured creditors in bankruptcy cases. The three limits described above will reduce the collateralization of claims but the primary areas of attack on the use of commercial tort claims as collateral will involve sufficiency of description in the security agreement and avoidance under Bankruptcy Code section 547. Under Revised Article 9, commercial lenders may routinely demand representations from prospective borrowers describing all potential commercial tort claims. Similar certificates will also be required from current borrowers listing any such newly arising claims. Inclusion of commercial tort claims in the security agreement for preexisting

¹³³ See *id.* § 9-504 (2) (asserting that "[a] financing statement sufficiently indicates the collateral that it covers only if the financing statement provides . . . an indication that the financing statement covers all assets or all personal property").

¹³⁴ See *id.* § 9-204 (b) (2) (1999) (observing that "[a] security interest does not attach under a term constituting an after-acquired property clause to . . . a commercial tort claim").

¹³⁵ See Revised U.C.C. § 9-102 (a) (13) (explaining definition of commercial tort claim); 11 U.S.C. § 101 (5) (1994) (defining "claim").

¹³⁶ See Revised U.C.C. § 9-102 (a) (13) (exemplifying use of "arising" in present participle in definition of tort claim).

¹³⁷ Compare *Avellino & Bienes v. M. Frenville Co.* (*In re M. Frenville Co.*), 744 F.2d 332, 337 (3d Cir. 1984) (advocating narrowly accrued state law claim theory) with *Grady v. A.H. Robins Co.*, 839 F.2d 198, 200 (4th Cir. 1988) (articulating broad conduct test theory) and *Epstein v. Official Comm. of Unsecured Creditors of the Estate of Piper Aircraft Corp.* (*In re Piper Aircraft Corp.*), 58 F.3d 1573, 1577-78 (11th Cir. 1995) (describing "middle of the road" relationship test).

claims, and amendments of existing security agreements to include such claims as they arise, may take place regularly. Unless the perfunctory transfer of a security interest in commercial tort claims can be set aside as a preference, the trustee will have no power to avoid it.

5. Perfection by Dominion: Possession or Control

Courts historically preferred possession by the secured creditor as the method of perfection.¹³⁸ Debtors' practical need to continue to possess collateral they had financed during the later nineteenth and early twentieth centuries prompted creation of new non-possessory methods of perfection such as chattel mortgages.¹³⁹ Yet even after the enactment of the current U.C.C., a substantial place remained for perfection by pledge and delivery of possession of collateral.¹⁴⁰ Unfortunately, current Article 9 failed to define possession. Litigation has thus abounded, especially over the questions of custody, by whom, and what extent of dominion amounts to sufficient "possession" to constitute perfection.¹⁴¹

The scope of perfection by possession was expanded and modified in 1994 to make Article 9 consistent with the revisions to Article 8 of the U.C.C. Article 8 was substantially modified in that year to reflect the reality of modern indirect holdings of securities.¹⁴² The conforming amendments to Article 9 permitted perfection of a security interest in investment property by the exercise of "control."¹⁴³ The category of investment property includes securities for which physical possession is either impossible or impracticable.¹⁴⁴ A secured creditor can achieve the requisite

¹³⁸ See *In re Richman*, 181 B.R. 260, 266 (Bankr. D. Md. 1995) (stating that U.C.C. requires secured party obtain possession in order to perfect security interest); *In re Kontaratos*, 10 B.R. 956, 961 (Bankr. D. Me. 1981) (asserting that U.C.C. requires possession by secured creditor to perfect security interest); *In re Ault*, 6 B.R. 58, 64 (Bankr. C.D. Tenn. 1980) (reasoning that security interests depend on possession of goods and when possession is relinquished, security interest becomes unperfected).

¹³⁹ See DOUGLAS G. BAIRD & THOMAS H. JACKSON, *SECURITY INTERESTS IN PERSONAL PROPERTY* 35 (2d ed. 1987) (providing analysis of history of pre-U.C.C. methods of perfection).

¹⁴⁰ See *id.* (discussing non-possessing methods of perfection).

¹⁴¹ See, e.g., U.C.C. §§ 9-304 (1) & 9-305 (1995) (noting that security interest in goods, instruments, money, negotiable documents, or chattel paper may be perfected by secured party's taking possession of collateral). The secured party may perfect a security interest in the right to proceeds of a written letter of credit by the taking possession of the letter of credit. See also *Norwest Bank v. Bergquist (In re Rolain)*, 823 F. 2d 198, 199 (8th Cir. 1987) (utilizing test set forth in U.C.C. § 9-305); *In re Prescott*, 805 F. 2d 719, 730 (7th Cir. 1986) (same); *Lovett v. Schuster*, 633 F. 2d 98, 105 (8th Cir. 1980) (stating that perfection of security interest is complete upon secured party's possession of instrument).

¹⁴² See *In re Rolain*, 823 F.2d at 200 (finding debtor's attorney to be valid bailee/agent of creditor, and thus, creditor had perfected security interest in note); see also *In re Copeland*, 531 F.2d 1195, 1202 (3d Cir. 1976) (opining that lender's security interest in certain shares of stock placed in escrow are perfected upon delivery of such stock to escrow agent or debtor's attorney).

¹⁴³ See *In re Kontaratos*, 10 B.R. 956, 961 (Bankr. D. Me. 1981) (observing changes that Article 8 has made to treatment of investment securities); James Gadsden & Austin D. Keyes, *Revised Article 8 of the Uniform Commercial Code: Investment Securities*, 115 *BANKING L.J.* 346, 346 (1998) (considering major changes to treatment of investment securities made in 1994 revisions to Article 8 of Uniform Commercial Code).

¹⁴⁴ See U.C.C. § 9-115 (1994) (discussing importance of control with regard to perfecting security interest). With the increased role that control will play under Revised Article 9, I have coined the usage

control over an item of investment property within a three-party agreement among the debtor, the securities intermediary and the secured party.¹⁴⁵ The agreement would provide that the debtor and the intermediary agree that the latter will transfer the security, or any value in the securities account to the secured creditor, without further consent by the debtor.¹⁴⁶ Execution of such an agreement would constitute perfection.¹⁴⁷

Of greater significance in bankruptcy cases was another 1994 amendment, which provided that by filing, a security interest in investment property could be perfected.¹⁴⁸ Even though a security interest perfected by filing will always be subordinate to one perfected by control, it will still defeat an unperfected security interest,¹⁴⁹ for example, a judicial lien creditor (and bankruptcy trustee).

Revised Article 9 discusses a secured creditors perfection through dominion in two ways. First, it sets out in great detail how a person other than the secured party

"dominion" to describe both perfection by control and traditional possession. *See, e.g.* Charles W. Mooney, Jr., et al., *An introduction to the Revised U.C.C. Article 8 and Review of other Recent Developments with Investment Securities*, 49 BUS. LAW. 1891, 1897 (1994) (explaining two special rules that apply if party to transaction is securities intermediary); Adam B. Strauss, *Reviewing Revised Article 8 of the Uniform Commercial Code*, 44 WAYNE L. REV. 203, 214 (1998) (discussing Article 9 and "control" as being key innovation for perfecting security interest).

¹⁴⁵ *See* U.C.C. § 9-115 (1) (f) (defining "investment property" to mean: (i) security whether certificated or uncertificated; (ii) security entitlement; (iii) securities account; (iv) commodity contract; or (v) commodity account); *see also* Scott E. Nutter & Bryan T. Pratt, *A Practitioners' Guide to Revised Articles 5 and 8 of the Uniform Commercial Code*, 63 MO. L. REV. 325, 335 (1998) (defining investment property and discussing differences between its treatment under Article 8 and Article 9 of U.C.C.). *But see In re U.S. Physicians, Inc.*, 236 B.R. 593, 602 (Bankr. E.D. Pa.) (1999) (finding purpose and effect of § 9-115 to be only understood in coordination with definitions found elsewhere in U.C.C. and that it is necessary to examine other sections to understand what exactly constitutes "investment property").

¹⁴⁶ *See* Revised U.C.C. § 9-102 (a)(3) (defining "[a]ccount debtor" to be person obligated on account, chattel paper, or general intangible, and excluding persons obligated to pay negotiable instruments even if instrument constitutes part of chattel paper); *see also id.* § 9-102 (a) (72) (A) (defining "secured party" to be person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding); U.C.C. § 8-102 (14) (1994) (defining "securities intermediary" to mean: (i) clearing corporation; or (ii) person, including bank or broker, that in ordinary course of its business maintains securities accounts for others and is acting in that capacity).

¹⁴⁷ *See* U.C.C. § 9-115 (4) (a) ("A security interest in investment property may be perfected by control."); *see also In re Keene Corp.*, 188 B.R. 881, 889 (Bankr. S.D.N.Y. 1995) (discussing that Revised Article 8 of U.C.C. does not require written security agreement by debtor to secure interest).

¹⁴⁸ *See* U.C.C. § 9-115 (4) (b) (1994) (noting that except as otherwise provided in this section security interest in investment property may be perfected by filing); *see also In re U.S. Physicians, Inc.*, 236 B.R. at 602 (determining that security interest in investment property may generally be perfected either by control or by filing financial statement). *But see* *Green Tree Acceptance, Inc. v. Wyoming Nat'l Bank*, 1993 WL 300999, *2-3 (10th Cir. August 2, 1993) (detailing problems that arise when perfection of security interests in personal property occur through filing).

¹⁴⁹ *See* U.C.C. § 9-115 Official Cmt. 5 (stating "perfection by filing is intended to affect only general creditors or other secured creditors who rely on filing"). *But see* U.C.C. § 9-115 Official Cmt. 4 (stating that "although filing is a permissible method of perfection, a secured party who perfects by filing takes the risk that the debtor has granted or will grant a security interest in the same property to another party who obtains control."). *See generally* *Brown & Root, Inc. v. Hempstead County Sand & Gravel, Inc.*, 767 F.2d 464, 469 (8th Cir. 1985) (allowing bank, which failed to file financing statement, to retain priority over subsequent judgment lien based upon state law, as opposed to Uniform Commercial Code).

achieves perfection through possession.¹⁵⁰ Second, it greatly expands the collateral to include not only investment securities, but also deposit accounts, letter-of-credit rights, and electronic chattel paper.¹⁵¹

The newly created ability of a secured creditor to perfect a security interest in deposit accounts will have the greatest impact in bankruptcy cases. The PEB Study Report recommended that Article 9 be revised to allow all deposit accounts to serve as primary collateral.¹⁵² Subsequently, the Drafting Committee modified Article 9 to exclude only *consumer* deposit accounts and also required the consent of the depository institution to the pledge of a non-consumer account.¹⁵³ Still, under the current version of Article 9, deposit accounts maintained by a secured creditor bank, generally function as primary collateral by virtue of either a common law bankers' lien or pursuant to the common law right of set-off.¹⁵⁴ The ability of a non-

¹⁵⁰ Revised U.C.C. § 9-313 (c) (1999):

With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor when (1) the person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party's benefit or (2) the person takes possession of the collateral after having authenticated a record acknowledging that it will hold possession of collateral for the secured party's benefit.

See *In re Copeland*, 531 F.2d 1195, 1204 (3d Cir. 1976) (finding that in pre-amendment time, possession of collateral does not have to be by individual under sole dominion and control of secured party so long as it adequately informs potential lenders of perfected security interest); see also Strauss, *supra* note 144, at 215 (addressing importance of "super-priority" rule for debtor's own intermediary in defeating secured parties with control, but questioning limitations of rule in practice).

¹⁵¹ See Revised U.C.C. § 9-314 (a) (stating "A security interest in investment property, deposit accounts, letter-of-credit rights, or electronic chattel paper may be perfected by control of the collateral."). See generally Reade H. Ryan, Jr., *Revised U.C.C. Article 9—Letters of Credit and Deposit Accounts*, ALI-ABA Course Study 81, 83 (1999) (addressing significant changes that Article 9 has made affecting security interests in letters of credit and deposit accounts); Edwin E. Smith, *Sample Form of Revised U.C.C. Article 9 (1998) Deposit Account "Control Agreement" with Commentary*, 30 ALI-ABA 327, 329 (1998) (providing sample forms and function of attaching security interest in deposit accounts).

¹⁵² See Smith, *supra* note 151, at 329 (giving examples of sample forms); see also *Parker v. Community First Bank*, 123 F.3d 1243, 1246-47 (9th Cir. 1997) (demonstrating how California rejected U.C.C.'s deposit account exclusion in order to cover field of secured transactions and personal property). See generally *Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Van Kylene*, 98 B.R. 455, 461 (Bankr. W. D. Wis. 1989) (holding that security interest granted to bank in cash management account established by debtor and spouse with their investment broker was not excepted from article nine as security interest in "deposit account").

¹⁵³ Compare U.C.C. § 9-104 (l) (stating "[t]his Article does not apply . . . to a transfer of an interest in any deposit account") with Revised U.C.C. § 9-109 (d) (13) (stating "[t]his article does not apply to . . . an assignment of a deposit account in a consumer transaction"). See generally Jason M. Ban, *Deposit Accounts: An Article 9 Security Interest*, 17 ANN. REV. BANKING L. 493, 495-99 (1998) (comparing common law, present U.C.C. and Revised U.C.C. and offering reasons for change in present law); Ryan, *supra* note 151, at 91 (discussing differences between current Article 9 and Revised Article 9 in their treatment of deposit accounts).

¹⁵⁴ See Dwight L. Greene, *Deposit Accounts As Bank Loan Collateral Beyond Setoff To Perfection-- The Common Law Is Alive And Well*, 39 DRAKE L. REV. 259, 264 (1989/1990) (arguing that deposit account financing is just another form of private bargained for debt collateralization and should be accommodated by common law and given parity with Article 9 perfected security interests). See generally *Zions First Nat'l Bank v. Christiansen Bros. Inc.*, 66 F.3d 1560, 1564-65 (10th Cir. 1995) (finding bank's perfected security

bank lender or a bank whose debtor customer maintains a deposit account at another institution to perfect a security interest in the account is dependent upon being able to show that the traceable funds in the account were proceeds of collateral.¹⁵⁵ Lenders in such situations made use of special depository or lockbox agreements under which they fared tolerably well.¹⁵⁶ Nonetheless, the power to use commercial deposit accounts as primary collateral will certainly not make additional assets available to unsecured creditors in the event of bankruptcy. Such security interest may be perfected by "control" without the necessity of filing a financing statement.¹⁵⁷ The requisite control can be achieved automatically by the debtor's maintenance of an account with the lender bank¹⁵⁸ or through a three-party agreement comparable to those used in connection with investment securities.¹⁵⁹

The priority of the right of set off over a security interest in a deposit account is another indication that the chief target of the provisions of Revised Article 9 regarding deposit accounts are unsecured creditors and their representative, the bankruptcy trustee. Consistent with the current Article 9, rights of recoupment and

interest in subcontractor's accounts receivable to be subordinate to general contractor's right to set off funds it paid subcontractor's supplier to remove mechanics' lien against amount it owed subcontractor); Janet A. Flaccus, *Banks Against Secured Parties: To the Victor Go the Spoils*, 6 U. MIAMI BUS. L.J. 59, 59 (1997) (analyzing priority disputes between bank with secured lines of credit and creditor with security interest in proceeds that pass through bank).

¹⁵⁵ See Flaccus, *supra* note 154, at 90 (discussing creditors' ability to perfect security interest in deposit account in another institution; see also *Capital Tracing Co. v. Interstate Stores, Inc.*, 830 F.2d 16, 19 (2d Cir. 1987) (applying common law principles as opposed to U.C.C. where bank claimed security interest in operating account maintained by debtor at different bank).

¹⁵⁶ *But see General Elec. Co. v. Halmar Distribs., Inc.*, 968 F.2d 121, 128-29 (1st Cir. 1992) (discussing whether security interest in proceeds expires when it passes into lockbox controlled by bank); *Robbins, Salomon & Patt, Ltd., v. Allnet Communication Servs., Inc.*, No. 94C700, 1997 WL 106132, *1-3 (N.D. Ill. Feb. 10, 1997) (discussing problems associated with lockbox agreement and possibility that creditor may gain priority while agreement is in place); *Petron Trading Co., Inc. v. Hydrocarbon Trading & Transp. Co.*, 663 F.Supp 1153, 1159 (E.D. Pa. 1996) (discussing example of pitfalls of lockbox financing).

¹⁵⁷ See Revised U.C.C. § 9-314 (a) (explaining "[a] security interest in [a] . . . deposit account may be perfected by control."); see also *P.A. Bergner Co. v. Bank One*, 140 F.3d 1111, 1121 (7th Cir. 1998) (determining whether Wisconsin would recognize common law security interest in deposit account along with whether such security interest is perfected by bank's assumption of control over account); *Jefferson Bank & Trust v. United States*, 894 F.2d 1241, 1242-44 (10th Cir. 1990) (holding that bank had perfected security interest in its customer's accounts because bank had control and continually monitored monies in accounts and could have prevented withdrawal, rendering Government's tax lien junior and inferior to bank's security interest).

¹⁵⁸ See Revised U.C.C. § 9-104(a)(1) (1999). (stating "[a] secured party has control of a deposit account if the secured party is the bank with which the deposit account is maintained."). See generally Reade H. Ryan, Jr., *Trade Receivables Purchases* 71 A.L.I.-A.B.A. 305, 309 (1999) (citing Revised Article 9 in relation to loans secured by receivables); Steven O. Weise, *U.C.C. Article 9- Personal Property Secured Transactions*, 47 BUS. LAW. 1593, 1598 (1992) (discussing perfecting of security interests in passbook accounts maintained at bank).

¹⁵⁹ See Revised U.C.C. § 9-104(a)(2) (stating "a secured party has control of a deposit account if the debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the account without further consent of the debtor"); see also *supra* text accompanying notes 121-122.

set off are still excluded from coverage under the Revised Article.¹⁶⁰ However, Revised Article 9 specifically provides that a bank with the right of set off against a deposit account has priority over a lender with a security interest in that deposit account.¹⁶¹ The care to continue observing the commercial lending practice coupled with the ease of perfecting a security interest in a commercial deposit account make it all the less likely that there will be any unencumbered funds available in bankruptcy cases.

6. Perfection by Filing: Expansion of Scope

Perhaps the most significant reduction in the trustee's avoiding powers effected by Revised Article 9 is increasing the number of categories of collateral in which a security interest may be perfected by filing. Previously, Part I.B.3. addressed the Drafting Committee's decision to permit perfection of a security interest in instruments by filing a financing statement.¹⁶² The failure of a secured party to perfect by obtaining possession of instruments as required under current U.C.C. section 9-304(1) has certainly provided ample fodder for the trustee's avoiding powers under Bankruptcy Code section 544(a).¹⁶³ The ability to perfect by simple filing under Revised U.C.C. section 9-312(a) will thus reduce assets available to unsecured creditors.

However, the Drafting Committee did not wish to upset settled commercial practice under which possession still remains the primary means of perfection of security interests in instruments. Not only does possession without filing still remain a legitimate means of perfection,¹⁶⁴ but one who obtains possession has priority over a secured creditor who perfected its security interest in an instrument only by filing.¹⁶⁵ Therefore, the principal significance of permitting perfection by

¹⁶⁰ See Revised U.C.C. § 9-109 (d) (10) (stating "[t]his article does not apply to . . . a right of recoupment or set-off."); see also U.C.C. § 9-104 (i) (stating that article does not apply to right of set-off).

¹⁶¹ See Revised U.C.C. §9-109, -104.

¹⁶² See *supra* text accompanying notes 59-60.

¹⁶³ See *In re Sprint Mortgage Bankers Corp.*, 164 B.R. 224, 229 (Bankr. E.D.N.Y. 1994) *aff'd*, 177 B.R. 4 (Bankr. E.D.N.Y. 1995) (concluding that trustee had rights superior to those of putative secured creditors because creditors failed to obtain possession of notes); see also *In re Churchill Mortgage Inv. Corp.*, 233 B.R. 61, 70 (Bankr. S.D.N.Y. 1999) (granting trustee's motion to sell mortgaged property over objection of putative secured creditor/investor who had failed to obtain possession of mortgage and note); *Stockschlaeder & McDonald v. Kittay (In re Stockbridge Funding Corp.)*, 145 B.R. 797, 808 (Bankr. S.D.N.Y. 1992) *aff'd in part and vacated in part*, 158 B.R. 914 (S.D.N.Y. 1993) (stating that to perfect interest in mortgage assignment assignee must possess note).

¹⁶⁴ See Revised U.C.C. § 9-313 (a) (1999) ("Except as otherwise provided in subsection (b), a secured party may perfect a security interest in negotiable documents, goods, instruments, money or tangible chattel paper by taking possession of the collateral.").

¹⁶⁵ See Revised U.C.C. § 9-330 (d) (stating "Except as otherwise provided in § 9-331(a), a purchaser of an instrument has priority over a security interest in the instrument perfected by a method other than possession if the purchaser gives value and takes possession of the instrument in good faith and without knowledge that the purchase violates the rights of the secured party."). This result may not be readily apparent because the statute speaks in terms of a conflict between a party who perfected by filing and a *purchaser* of the

filing instruments is not to change the relative rights of secured creditors, but to make it uncomplicated for any secured creditor to defeat a bankruptcy trustee by simply including the category of "instruments" in its security agreement and filing an "all assets" financing statement.

B Proceeds Under Bankruptcy Code § 552(a)

Thus far we have considered the impact of the changes effected by Revised Article 9 on what is subject to a security interest at the outset of the bankruptcy case. Expansion of the scope of Article 9 and increased ease of perfection combine to reduce the ability of the bankruptcy trustee to pry assets loose from security interests. What effect will Revised Article 9 have on property that security interests would otherwise attach *after* the case is commenced?

1. Value Enhancement Under the U.C.C.

The current version of the U.C.C. made two substantial advances over previous uniform statutes and the common law in the means by which a secured creditor could reach property that did not exist when its debtor executed the security agreement. U.C.C. section 9-204 validated provisions in a security agreement that extend the reach of collateral to after-acquired property.¹⁶⁶ This represented a major victory for freedom of contract in general (and secured creditors in particular) in the face of continued judicial antipathy to the concept of the floating lien.¹⁶⁷ At the same time, current U.C.C. section 9-306(2) automatically extends a security interest to the proceeds of any described collateral.¹⁶⁸

2. Bankruptcy Code Limitations

Notwithstanding the clear victory for the proponents of secured lending in the current version of the U.C.C., Congress balked at full recognition of such claims when it enacted the Bankruptcy Code. On the one hand, Bankruptcy Code section

instrument. A party who qualifies as a secured creditor will also be deemed a "purchaser" for purposes of this section. *See id.* § 9-330, Official Cmt. 2 (noting that priority of secured creditor in possession of instrument is afforded only if possession is gained in good faith, without knowledge that it violates rights of secured party which perfected by filing).

¹⁶⁶ U.C.C. § 9-204 (1) (stating "a security agreement may provide that any or all obligations covered by the security agreement are to be secured by after-acquired collateral."). *But see id.* § 9-204 (2) (stating "[n]o security interest attaches under an after-acquired property clause to consumer goods other than accessions when given as additional security unless the debtor acquires rights in them within ten days after secured party gives value."); *id.* § 9-204 (2) Official Cmt. 2 (stating "[t]his Article validates a security interest in the debtor's existing and future assets.").

¹⁶⁷ *See* U.C.C. § 9-204, Official Cmt. 2 (noting judicial dislike for after-acquired property interests); *see also* *Benedict v. Ratner*, 268 U.S. 353, 360 (1925) (expressing judicial disfavor of floating liens)

¹⁶⁸ *See* U.C.C. § 9-306(2) (stating "a security interest continues in collateral . . . and also continues in any identifiable proceeds."); *id.* § 9-306(2) Official Cmt. 3 (observing that when debtor disposes of collateral without permission of secured party, security interest in property continues).

552(a)¹⁶⁹ establishes the general rule that property acquired after the commencement of the bankruptcy case is not subject to any lien resulting from a pre-petition security agreement. However, Bankruptcy Code section 552(b) creates an important exception: if the security interest created by a pre-petition agreement extends to property of the debtor acquired before the commencement of the case and to the five categories of proceeds, product, offspring, rents, or profits of such property, then such a security interest extends to such proceeds, product, offspring, rents, or profits acquired by the estate after the commencement of the case but only to the extent provided by the security agreement *and* by applicable non-bankruptcy law.¹⁷⁰

The rationale for limiting property rights arising under state law in the context of after-acquired property in bankruptcy flows directly from the Bankruptcy Code's policy of rehabilitation.¹⁷¹ Similar to the debate surrounding the recognition of security interests generally,¹⁷² there also has been some scholarly discussion and constitutional analysis of the congressional power and wisdom in cutting off a secured creditor's interest in after-acquired property in bankruptcy.¹⁷³ Whatever the

¹⁶⁹ 11 U.S.C. § 552 (a) (1994) (stating "[P]roperty acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.").

¹⁷⁰ See 11 U.S.C. § 552 (b) (1) (1994):

[I]f the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds . . . of such property, then such security interest extends to such proceeds . . . acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law."

See also *Fin. Sec. Assurance, Inc. v. Days Cal. Riverside Ltd. Partnership* (*In re Partnership*), 27 F.3d 374, 377 (9th Cir. 1994) (holding that room receipts from hotel business are "rents for security purposes" thereby allowing secured creditor to maintain its bargained-for interest); *Third Nat'l Bank v. Fischer* (*In re Fischer*), 184 B.R. 293, 301 (Bankr. M.D. Tenn. 1995) (protecting secured creditors interest in stock sold post-petition).

¹⁷¹ "[T]he debtor's fresh start should entitle the debtor to use after-acquired property, so long as it is not property of the estate under § 541(a)(6), free and clear of a pre-bankruptcy lien. This is what § 552(a) accomplishes with respect to security interests." 15 COLLIER ON BANKRUPTCY ¶ 552.01 (15th ed. 1999); see *Local Loan Co. v. Hunt*, 292 U.S. 234, 245 (1934) (stating that purpose of bankruptcy is to create "new opportunity in life and the clear field for future effort"); see also *In re Baker*, 217 B.R. 609, 611 (Bankr. N.D. Cal. 1998) (citing cases where courts discussed damaging effect of garnishment on debtors fresh start after bankruptcy).

¹⁷² See *supra* text accompanying notes 73-87 (discussing goals of creditors rights law).

¹⁷³ For recent analysis of this issue, see Lawrence Ponoroff & F. Stephen Knippenberg, *The Immovable Object Versus the Irresistible Force: Rethinking the Relationship Between Secured Credit and Bankruptcy Policy*, 95 MICH. L. REV. 2234, 2279 (1997) (arguing that concept of property in general and security interests as property in particular are metaphorical and should not be rectified in bankruptcy where distributional policies should be given priority); Steven L. Schwarcz & Janet Malloy Link, *Protecting Rights, Preventing Windfalls: A Model for Harmonizing State and Federal Laws on Floating Liens*, 75 N.C. L. REV. 403, 455-56 (1997) (accepting concept of security interests as property but proposing paradigm of "liquidating collateral" and "non-replacement collateral" to provide predictability to "proceeds" exception of Bankruptcy Code § 552(b)); see also Lucian Ayre Bebhuck & Jesse M. Fried, *The Uneasy*

wisdom of Bankruptcy Code section 552(a) in eliminating after-acquired property from the reach of a pre-bankruptcy security agreement, Bankruptcy Code section 552(b) goes far in ameliorating the result. The clarity of Bankruptcy Code section 552(b), however, leaves much to be desired.

Bankruptcy Code section 552(b) gives back part of what subsection (a) takes away from secured creditors.¹⁷⁴ Outside of bankruptcy, the precise limits of an automatic security interest in proceeds often is mooted because the debatable property is also quite likely to constitute after-acquired property.¹⁷⁵ While the "new entity" theory of the effect of a bankruptcy filing has come under assault,¹⁷⁶ the filing of a bankruptcy case still creates a temporal cleavage in the powers and immunities of the debtor for at least some purposes.¹⁷⁷ Bankruptcy Code section

Case for the Priority of Secured Claims in Bankruptcy, 105 YALE L.J. 857, 872-73 (1995) (suggesting that partial priority for secured claims in bankruptcy would reduce efficiency costs in bankruptcy); Ronald J. Mann, *The First Shall Be Last: A Contextual Argument for Abandoning Temporal Lien Priority*, 75 TEXAS L. REV. 11, 21-23 (1996) (asserting that abandonment of temporal lien priorities in bankruptcy would advance principle of wealth maximization in bankruptcy). One older bankruptcy court case, *First Nat'l Bank of Colorado Springs v. Hamilton (In re Hamilton)*, 18 B.R. 868, 870 (Bankr. D. Colo. 1982), squarely held that Bankruptcy Code § 552(a) is constitutional.

¹⁷⁴ See 11 U.S.C. §§ 552 (a), 552 (b) (1994) (denying liens on property acquired after commencement of case in 552(a) and allowing security interest to extend to after acquired property if security agreement entered before case extended to debtor's property); see also *Financial Assurance, Inc. v. Tollman-Hundley Dalton, L.P.*, 74 F.3d 1120, 1124 (11th Cir. 1996) (using § 552(b) to find that creditor has security interest in hotel revenues); *In re Northeastern Copy Services, Inc.*, 175 B.R. 580, 583 (Bankr. E.D. Pa. 1994) (holding that post-petition cash is not "proceeds" within § 552(b)).

¹⁷⁵ See *Paulman v. Gateway Venture Partners III (In re Filtercorp, Inc.)*, 163 F.3d 570, 578 (9th Cir. 1998) (holding that Washington Supreme Court would hold that security interests in inventory and receivables would "presumptively include" after-acquired property subject to agreement otherwise); see also *Kubota Tractor Corp. v. Citizens & S. Nat'l Bank*, 403 S.E. 2d 218, 222 (1991) (stating that security interest extends to after-acquired property only if agreement provides for it, subject to exceptions). The irrelevance of the answer to the question of "proceeds versus after-acquired property" definitely is *not* moot under the current U.C.C. where the property is cash proceeds of collateral in a commingled deposit account. See generally *In re San Juan Packers, Inc.*, 696 F.2d 707, 711 (9th Cir. 1983) (resolving dispute among bank and other secured creditors of food processor over issue of "identifiability" of security interest in commingled proceeds). The addition of deposit accounts as primary collateral by Revised Article 9 may resolve some of these issues. See *supra* text accompanying notes 150-160.

¹⁷⁶ See *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984).

[O]bviously if the [debtor-in-possession] were a wholly 'new entity,' it would be unnecessary for the Bankruptcy Code to allow it to reject executory contracts, since it would not be bound by such contracts in the first place. For our purposes, it is sensible to view the debtor-in-possession as the same 'entity' which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent the bankruptcy filing.

Id. See also *United States v. James A. Allen (In re Allen)*, 135 B.R. 856, 868 (1991) (stating "Bildisco has 'laid to rest the 'separate entity' doctrine for all time'" (quoting *In re Ontario Locomotive & Ins. Ry. Supplies*, 126 B.R. 146, 147 (1991)); Steven L. Schwarcz, *Rethinking Freedom of Contract: A Bankruptcy Paradigm*, 77 TEX. L. REV. 515, 584-85 (1999) (noting academic and judicial decline of new entity theory while acknowledging that interests of trustee or debtor-in-possession are not identical to those of pre-petition debtor).

552(a) represents one residual perspective on the "new debtor" phenomenon by cutting off the previously granted security interest in after-acquired property.¹⁷⁸ Outside of bankruptcy, the secured creditor of a debtor who transfers the collateral to a new entity outside the ordinary course of business retains a security interest in the property in the hands of the new entity under current law.¹⁷⁹ The secured creditor's interest extends to the proceeds of the transferred collateral even in the possession of the transferee.¹⁸⁰ The secured creditor would not, however, have an interest in any after-acquired property of the transferee; U.C.C. section 9-204(1) binds only the debtor who signed the security agreement.¹⁸¹ So it is in a bankruptcy case as well. The Bankruptcy Code substantially duplicates the current non-bankruptcy result based on the premise that the bankruptcy debtor should succeed to the state law status of such a transferee.¹⁸²

¹⁷⁷ See David Gray Carlson, *Voidable Preferences and Proceeds: A Reconceptualization*, 71 AM. BANKR. L.J. 517, 519-20 (1997) (suggesting that "new entity" theory explains powers and new duties of debtor-in-possession better than other theories); Brett W. King, *Assuming and Assigning Executory Contracts: A History of Indeterminate "Applicable Law"*, 70 AM. BANKR. L.J. 95, 125 (1996) (arguing that over-reliance on ability of debtor-in-possession to reject executory contracts skews analysis against otherwise useful "new entity" theory); see, e.g., *Bildisco & Bildisco*, 465 U.S. at 529 (explicating the difference in time that debtor-in-possession or trustee has to accept or reject executory contract based on whether they filed chapter 11 or 7 respectively).

¹⁷⁸ See 11 U.S.C. § 552(a) (1994); *Philip Morris Capital Corp. v. Bering Trader, Inc. (In re Bering)* 944 F.2d 500, 502 (9th Cir. 1991) (holding secured creditor's pre-petition security interest in debtor's accounts did not extend to post-petition proceeds); *First Nat. Bank of Colorado Springs v. Noble J. Hamilton (In re Hamilton)*, 18 B.R. 868, 872-73 (Bankr. D. Colo. 1982) (holding although bank had vested property interest in debtor's after-acquired property, after-acquired property was not subject to bank's liens).

¹⁷⁹ See U.C.C. § 9-306(2) (1994) (stating "Except where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor."); U.C.C. § 9-307(1) ("A buyer in ordinary course of business other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence."); see also Steven O. Weise, *Survey: Uniform Commercial Code (U.C.C. Article 9- Personal Property Secured Transaction)*, 47 BUS. LAW. 1593, 1621 (1992) (explaining that Permanent Editorial Board commentary No. 3, comments that security interest in collateral continues regardless of its sale by borrower under U.C.C. § 9-306(2)).

¹⁸⁰ See U.C.C. § 9-306(2); see also *In re Figearo*, 79 B.R. 914, 918 (Bankr. D. Nev. 1987) (holding debtor's property was subject to secured creditor's interest at time debtor transferred property); Weise, *supra* note 179, at 1601 (positing security interest continues in collateral regardless of its sale); Steven O. Weise, *Survey: Uniform Commercial Code (U.C.C. Article 9: Recent Development)*, 52 BUS. LAW. 1591, 1611 (1997) (opining unless secured party authorizes sale, its security interest continues in collateral regardless of sale of collateral by debtor).

¹⁸¹ See *Sommers v. I.B.M.*, 640 F.2d 686, 689 (5th Cir. 1981) (stating financing statement filed by creditor is not sufficient to perfect security interest as it was not signed by debtor); *Valmont Equip. Corp. v. Great Basin Transp., Inc. (In re Great Basin Transp., Inc.)*, 32 B.R. 365, 368 (Bankr. W.D. Okla. 1983) (holding debtor "signed" security agreement according to Oklahoma Law); see also Weise, *supra* note 179, at 1599 (stating under U.C.C. § 9-203(1)(a) debtor must sign security agreement in order for security interest to exist).

¹⁸² Revised U.C.C. § 9-203(d) makes it clear that (1) a transferee of collateral may be bound by the debtor's security agreement if state law otherwise so provides, or (2) if the transferee becomes generally

While the policy behind Bankruptcy Code section 552(b) may be clear, the courts have struggled to identify those items of property that fall within one of the five categorical exceptions: proceeds, product, offspring, rents or profits.¹⁸³ Secured creditors have been successful in persuading Congress to amend Bankruptcy Code section 552(b) to help clarify the protected status of hotel room rents and other charges.¹⁸⁴ But it appears unlikely that any systemic changes will be made to this provision. The Drafting Committee consequently approached the issue from the other direction; rather than waiting on amendment of Bankruptcy Code section 552(b) by Congress, it revised the definition of proceeds in the U.C.C.¹⁸⁵

3. Effects of Revised Article 9

While the current definition of proceeds in U.C.C. section 9-306(1) is characterized by its brevity,¹⁸⁶ Revised U.C.C. section 9-102(a)(64) is more specific and comprehensive:

obligated for the debtor's obligations and substantially all of the debtor's assets, regardless of other state law. Bankruptcy Code § 552(a) will, of course, prevail over any contrary result entailed by Revised U.C.C. § 9-203(d)(2). *See* *Butner v. United States*, 440 U.S. 48, 48-55 (1978) (adopting view of 2d, 4th, 6th, 8th, and 9th Circuits that property rights in assets of debtor's estate come under state law and if congress wanted uniform law it would have expressed it in federal statute).

¹⁸³ Compare *In re Delbridge*, 61 B.R. 484, 488 (Bankr. E.D. Mich. 1986), *aff'd*, 104 B.R. 824 (E.D. Mich. 1989) (holding milk was product of cow), with *In re Lawrence*, 41 B.R. 36, 37-38 (Bankr. D. Minn. 1984), *aff'd*, 56 B.R. 727, 728 (D. Minn. 1984) (holding milk was *not* product of cow). *See, e.g., In re S.F. Drake Hotel Assocs.*, 131 B.R. 156, 160 (Bankr. N.D. Cal. 1991) (holding hotel room revenues were rent); *Majestic Motel Assocs. v. Casco N. Bank, N.A. (In re Majestic Motel Assocs.)*, 131 B.R. 523, 525 (Bankr. D. Me. 1991) (finding hotel room revenues are not "rents" and "profits" within meaning of security agreements under Maine law).

¹⁸⁴ The Bankruptcy Reform Act of 1994 added subsection (b)(2) to Bankruptcy Code § 552. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 214, 108 Stat. 4106, 4126. With this amendment Congress actually improved the priority status of mortgagees with an assignment of rents. Bankruptcy Code § 552(b)(2) deems such creditors to be perfected even if they have not complied with the common state-law requirement that a receiver be appointed to make their interest in rents choate. The amended § 552 (b)(2) specifies that if the debtor and creditor entered into a security agreement before the commencement of the case, a security interest is created and this includes rents received for the use of hotel, motel or other public facilities. *See id.* *See also* *Financial Sec. Assurance, Inc. v. Tollman-Hundley Dalton, L.P.*, 74 F.3d 1120, 1124-25 (11th Cir. 1996) (declaring creditor's pre-petition security interest in revenues from chapter 11 debtor's hotel was security interest in "rents," within meaning of Bankruptcy statute providing for continued validity of such pre-petition security interests post-petition); *In re S.F. Drake Hotel Assocs.*, 131 B.R. at 160 (finding under California law, hotel room revenue was rent, not accumulation of accounts, thus remained subject to lien of pre-bankruptcy deed of trust which contained rents, issues and profits clause).

¹⁸⁵ *See* Revised U.C.C. § 9-102(a)(64) (1999) (defining term "proceeds" with more specificity).

¹⁸⁶ U.C.C. § 9-306(1) states:

"Proceeds" includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds, except to the

"Proceeds" means the following property:

- (A) whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral;
- (B) whatever is collected on, or distributed on account of, collateral;
- (C) rights arising out of collateral;
- (D) to the extent of the value of the collateral, claims arising out of the loss, nonconformity, or interference with the use of, defect or infringement of rights in, or damage to, the collateral; or
- (E) to the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity or, defects or infringement of rights in, or damage to, the collateral.¹⁸⁷

Revised U.C.C. section 9-102(a)(64) will impact bankruptcy cases in at least one area. In 1993, the Tenth Circuit had held in *In re Hastie*¹⁸⁸ that cash dividends on stock pledged as collateral in a pre-petition transaction were not proceeds of the secured creditor's collateral because a cash dividend was not a "disposition" of the collateral.¹⁸⁹ U.C.C. section 9-306(1) was amended in 1996 to overturn this result but at least one bankruptcy court had also concluded that the proceeds of a lease of underlying collateral did not constitute proceeds of collateral.¹⁹⁰ Both cases were

extent that it is payable to a person other than a party to the security agreement. Any payments or distributions made with respect to investment property collateral are proceeds. Money, checks, deposit accounts, and the like are "cash proceeds". All other proceeds are "non-cash proceeds."

U.C.C. § 9-306(1); see also *In re Reda, Inc.*, 54 B.R. 871, 876 (Bankr. N.D. Ill. 1985) (interpreting 9-306(1) to mean that right to payment of insurance proceeds on account of damage to Article 9 collateral is "proceeds" for Article 9 purposes); Freyermuth, *supra* note 88, at 652-54 (discussing judicial interpretation of § 9-306(1) proceeds).

¹⁸⁷ Revised U.C.C. § 9-102(a)(64).

¹⁸⁸ *FDIC v. Hastie (In re Hastie)*, 2 F.3d 1042 (10th Cir. 1993); see *State Street Bank & Trust Company v. Allen M. Mintz (In re Mintz)*, 192 B.R. 313, 319 (Bankr. D. Mass. 1996) (following logic of *Hastie*, bankruptcy court held distributions on limited partnership interests were not proceeds within meaning of U.C.C. § 9-306(1)). *But see Weise, supra* note 180, at 1620 (stating both *Hastie* court and *Mintz* court were in error).

¹⁸⁹ "The receipt of cash dividends by a registered owner of certificated securities bears no resemblance to the events specified in the definition of proceeds or to an act of disposition generally." *In re Hastie*, 2 F.3d at 1045; see also *In re Mintz*, 192 B.R. at 319 n.9 (defining disposition as permanent transfer of possession).

¹⁹⁰ See *General Electric Credit Corp. v. Cleary Brothers Construction Co., Inc. (In re Cleary Brothers Construction Co., Inc.)*, 9 B.R. 40, 41 (Bankr. S.D. Fla. 1980) (finding although secured party had perfected lien in equipment, it did not have perfected interest in lease of equipment, thus proceeds did not include rents from lease of equipment); see also *In re Keneco Financial Group, Inc.*, 131 B.R. 90, 96 (Bankr. N.D. Ill. 1991) (holding rent received was proceeds of lease contract); *Feldman v. Philadelphia National Bank*, 408 F.Supp. 24, 37-38 (E.D. Pa. 1976) (finding same).

arguably incorrect even under the version of the U.C.C. then in effect.¹⁹¹ Whatever the case, the inclusion of the word "lease" in Revised U.C.C. section 9-102(a)(64)(A) and the expression "whatever is . . . distributed on account of [,] collateral" in section 9-102(a)(64)(B) should now resolve both of these issues in favor of the secured creditor rather than the bankruptcy estate.¹⁹²

Bankruptcy trustees will also need to account for another effect of subsection (B) of the expanded definition of proceeds. The grant of a security interest in an account, chattel paper, document, general intangible, instrument or investment property carries with it an automatically attached security interest in any supporting obligation or other lien securing a right to payment in which the debtor has granted a security interest.¹⁹³ If the security interest in the supporting obligation or lien is perfected, its proceeds too are the secured creditor's collateral.¹⁹⁴ The ability to perfect a security interest by an "all assets" filing in collateral formerly perfectible only by possession, combined with the automatic extension of security interests to supporting obligations (and all their proceeds, broadly defined), will reduce the assets available to the bankruptcy trustee.

Finally, Revised U.C.C. section 9-102(a)(64)(C) and (D) expand the concept of proceeds into new territory. It is clear under current U.C.C. section 9-306(1) that a payment by insurer on the destruction of collateral is proceeds.¹⁹⁵ But current law is

¹⁹¹ See *Weise*, *supra* note 158, at 1613 n.125 (criticizing *Cleary Bros.*); see also *Weise*, *supra* note 180, at 1620 (remarking that *Hastie* ruling was incorrect).

¹⁹² See Revised U.C.C. § 9-312(a) (1999) (permitting perfection by filing). As a result, the secured creditor will be entitled to cash dividends even if it does not have possession of the investment security. See *supra* text accompanying notes 162-165. The secured creditor will be entitled to cash dividends even if it does not have possession of the investment security because Revised U.C.C. § 9-312(a) permits perfection by filing. See *id.*

¹⁹³ See Revised U.C.C. § 9-203(f) (stating "[t]he attachment of a security interest in collateral gives the secured party the rights to proceeds provided by § 9-315 and is also attachment of a security interest in a supporting obligation for the collateral."); *id.* § 9-203(g) (stating "[t]he attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien."); see also *supra* text accompanying notes 51-52.

¹⁹⁴ See Revised U.C.C. § 9-102 Official Cmt. 13b:

Under subparagraph (B), collections on and distributions on account of collateral consisting of various credit-support arrangements ('supporting obligations,' as defined in Section 9-102) also are proceeds. Consequently, they are afforded treatment identical to proceeds collected from or distributed by the obligor on the underlying (supported) right to payment or other collateral. Proceeds of supporting obligations also are proceeds of the underlying rights to payment or other collateral.

¹⁹⁵ See U.C.C. § 9-306, Official Cmt. 1 (1994) (stating "[t]his section. . . makes clear that insurance proceeds from casualty loss of collateral are proceeds within the meaning of this section."); see generally *Sicherman v. Falkenberg* (*In re Falkenberg*), 136 B.R. 481, 485 (Bankr. N.D. Ohio 1992) (finding insurance proceeds that debtor received following destruction of motorcycle in which creditor had security interest qualifies as "proceeds" of motorcycle); A. Eric Kauders, Jr., Note, *Substitution of Proceeds Theory for U.C.C. § 9-306(5)*, or, *the Expansive Life and Times of a Proceeds Security Interest*, 80 VA. L. REV. 787, 803 (1994) (discussing high costs of litigation in determining what qualifies as proceeds within scope of modern secured transaction).

not equally clear on the status of claims a debtor may have for breach of warranty or other non-insurance claims related to collateral.¹⁹⁶ Under revised Article 9 all such claims arising out of collateral will be deemed its proceeds. The secured creditor's interest in them will thus be automatically perfected regardless of whether they arise in tort or contract, even if the secured creditor does not have a direct interest in general intangibles.¹⁹⁷

The increased breadth of the definition of proceeds under Revised Article 9 will expand the safe-harbor of Bankruptcy Code section 552(b). The changes effected by Revised U.C.C. section 9-102(a)(64) are not nearly as far reaching as those that increase the scope of Article 9 and relax the requirements related to perfection. Nonetheless, they will reduce the number and value of assets free of secured claims in bankruptcy cases.

III. OTHER AREAS OF BANKRUPTCY IMPACTED BY REVISED ARTICLE 9

The revisions to Article 9 can be ordered according to various schemes. Most previously published articles have considered them in light of the organizational outline of Article 9 itself. This article has considered them as they impact bankruptcy through the lenses of Bankruptcy Code sections 544(a) and 552(b). This piece has not attempted to be exhaustive of the changes that Revised Article 9 will bring but has attempted to describe those that will be most significant in the bankruptcy context.

There are a number of additional changes that will affect assets in bankruptcy and the competing interests in them. While these considerations could have been categorized under Parts II.A or II.B above, their unique character and focused impact merit separate treatment.

¹⁹⁶ U.C.C. § 9-306(1) does not explicitly reach such claims, which are things in action. On the one hand, current U.C.C. § 9-106 includes things in action from the category of general intangible. On the other, the definition of account would cover things in action only to the extent they arise out of a claim for goods sold or leased or from services rendered. Furthermore, to the extent claims arising out of destruction sound in tort, they are excluded from current Article 9. U.C.C. § 9-104(k). Thus, claims for breach of warranty or injury to collateral remain almost exclusively outside the purview of current § 9-306(1). *See generally* Reymet Federal Credit Union v. Jones (*In re Jones*), 19 B.R. 293, 295-96 (Bankr. E.D. Va. 1982) (holding debt of insurance agent arising out of failure to procure insurance on collateral was dischargeable on ground that debt was not secured creditor's collateral because it was not proceeds of collateral); *In re Continental Trucking, Inc.*, 16 U.C.C. Rep. Serv. 526, 529-30 (M.D. Fla. 1974) (holding payment on account of judgment in lawsuit for negligence and breach of implied warranty was not proceeds of creditor's security interest in vehicle).

¹⁹⁷ *See* Revised U.C.C. § 9-315(c) (1999) (stating "[a] security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected."); Smith, *supra* note 36, at 14-22 (perfecting security interest could occur by filing appropriate financing statements, taking possession or controlling collateral, or by automatic perfection upon attachment).

A. *Purchase Money Security Interests*

By the end of the nineteenth century common law courts had held that those holding purchase money security interests in property other than inventory were entitled to priority even over earlier recorded secured creditors.¹⁹⁸ The fungible and ever-changing nature of inventory, however, prevented most courts still dominated by the concepts of legal formalism from extending the concept of purchase money priority to that form of property.¹⁹⁹ In more recent years economic and other policy-based theories have been advanced to justify the existence of purchase money priority.²⁰⁰

The current version of Article 9 permits sellers and lenders to obtain purchase money security interests in any form of goods.²⁰¹ Revised Article 9 slightly expands

¹⁹⁸ See *United States vs. New Orleans Railroad*, 79 U.S. (12 Wall.) 362, 365 (1870) (holding previous mortgage secured by after-acquired property attached to that property in condition mortgagor received it, including its subjection to purchase money encumbrance). The Supreme Court was also instrumental in extending the priority of purchase money security interests outside the railroad context. See *Holt v. Henley*, 232 U.S. 637, 639-40 (1914) (holding seller who retained title to automatic sprinkler system installed in factory had priority over previous mortgage notwithstanding sprinkler's status as fixture subject to mortgage). For a discussion of the history of the priority of purchase money security interests see Russell A. Hakes, *According Purchase Money Status Proper Priority*, 72 OR. L. REV. 323 *passim* (1993).

¹⁹⁹ See *Zartman v. First National Bank of Waterloo*, 82 N.E. 127, 129 (N.Y. 1907) (holding inventory vendor's purportedly retained title was inconsistent with debtor's unfettered control of inventory and that retention of interest in inventory would prejudice unsecured creditors). See also *supra* note 167; *Skilton v. Codrington*, 77 N.E. 790, 793 (N.Y. 1906) (concluding plaintiff, as trustee in bankruptcy of mortgagor, has same rights as creditor armed with attachment or execution); *New York Sec. & Trust Co. v. Saratoga Gas & Elec. Light Co.*, 53 N.E. 758, 760 (N.Y. 1899) (holding lien upon earnings attaches only upon what is earned after time when lien is perfected by entry and possession); *Stephens v. Perrine*, 39 N.E. 11, 13 (N.Y. 1894) (holding mortgagor cannot add to his title by his own act).

²⁰⁰ See Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143, 1167 (1979) (stating "[a]lthough the after-acquired property clause saves costs, it also creates what economists call a 'situational monopoly,' in that a creditor with a security interest in after-acquired property enjoys a special competitive advantage over other lenders in all his [sic] subsequent dealings with the debtor"); L. LOPUCKI, ET AL., *COMMERCIAL TRANSACTIONS* 1108 (1998) (positing "[a] secured party may be willing to tolerate the debtor's acquisition of additional collateral through purchase money financing because it increases the aggregate value of the secured party's collateral."). As with the earlier questions regarding the value of the concept of secured debt and the propriety of cutting off a secured creditor interest in after-acquired property in bankruptcy, it is not necessary to resolve this policy issue to analyze the effect of Revised Article 9 in this area. See V. BRUDNEY & M. CHIRELSTEIN, *CASES AND MATERIALS ON CORPORATE FINANCE* 984-99 (1972) (discussing expected value and variance in financial contexts).

²⁰¹ U.C.C. § 9-107 states:

A security interest is a 'purchase money security interest' to the extent that it is:

- A. taken or retained by the seller of the collateral to secure all or part of its price;
- or
- B. taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

the categories of property in which purchase money priority may be obtained to include software as well as goods.²⁰²

Three troublesome issues arose in connection with purchase money security interests in bankruptcy since the adoption of the Bankruptcy Code: the conflict between non-uniform variations on ten-day window of perfection under U.C.C. section 9-312(4),²⁰³ and Bankruptcy Code section 547(c)(3)(B),²⁰⁴ and the judicial creations of the "transformation rule" and the "dual status rule".²⁰⁵ Revised Article 9 now makes the period of perfection after possession (for goods other than inventory) a uniform 20 days.²⁰⁶ The response of the Drafting Committee to the efforts of the courts to reduce the scope of purchase money security interests is also clear.

Some courts in applying the so-called transformation rule concluded that an otherwise properly perfected purchase money security interest would lose its purchase money priority in certain circumstances, generally where the purchase money security interest secured an obligation in addition to the purchase price of the collateral.²⁰⁷ While the great bulk of decisions applying the transformation rule have been in the consumer context, in 1985 the Eleventh Circuit extended it to the

²⁰² The Revised U.C.C. § 9-103 states:

(a) In this section:

(1). 'purchase-money collateral' means goods or software that secures a purchase-money obligation incurred with respect to that collateral.

²⁰³ The current uniform version of U.C.C. § 9-312(4) provides: "A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral or its proceeds if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within ten days thereafter." Due to backlogs in filing financing statements at the offices of various Secretaries of State, the time within which to perfect to gain the purchase money priority in collateral other than inventory has been increased to 20 or more days in many states except the District of Columbia and South Carolina, which have retained the ten-day period, and Georgia and Florida which have increased the perfection period to 15 days. See 9 RONALD A. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 9-312:4 (3d ed. rev. 1994).

²⁰⁴ In 1994, Congress amended the Bankruptcy Code to increase the time from 10 to 20 days for perfection of purchase money security interests as an exception to the preference rule of Bankruptcy Code § 547(b). See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 203, 108 stat 4106, 4121-22.

²⁰⁵ See *Billings v. AVCO Colorado Indus. Bank* (*In re Billings*), 838 F.2d 405, 409 (10th Cir. 1988) (noting basic problem with automatic transformation rule is that it discourages creditor who has purchase money security interest from helping their debtors work out financial problems without surrendering collateral security of debt).

²⁰⁶ "[A] perfected purchase-money security interest in goods other than inventory or livestock has priority over a conflicting security interest in the same goods, and ... a perfected security interest in its identifiable proceeds also has priority, if the purchase-money security interest is perfected when the debtor receives possession of the collateral or within 20 days thereafter." Revised U.C.C. § 9-324(a).

²⁰⁷ See *Roberts Furniture Co. v. Pierce* (*In re Manuel*), 507 F.2d 990, 993 (5th Cir. 1975) (holding combination of add-on clause with failure to release any collateral until all payments had been made defeated the purchase money character of even first transaction); *Sims Furniture Co. v. Trotter* (*In re Trotter*), 12 B.R. 72, 74 (Bankr. C.D. Cal. 1981) (noting subsequent loan consolidation destroyed purchase money status); *Quality Furniture Co. v. Cooper* (*In re Johnson*), 1 Bankr. Ct. Dec. (CRR) 1023, 1024-25 (Bankr. S.D. Ala. 1975) (concluding provision in purchase money security agreement securing future advances defeated any purchase money status).

world of commercial lending in *Southtrust Bank of Alabama, National Association v. Borg-Warner Acceptance Corp.*²⁰⁸

Courts and commentators roundly criticized the transformation rule.²⁰⁹ Revised Article 9 does something about it. Except in consumer transactions, a purchase money transaction will not lose that status even though (1) the purchase money collateral cross-collateralizes another non-purchase money transaction, (2) the purchase money obligation is also secured by non-purchase money collateral or (3) the purchase money obligation has been "renewed, refinanced, consolidated, or restructured."²¹⁰ And even the inference that otherwise might be drawn from the exclusion of consumer transactions from the coverage of Revised U.C.C. section 9-103(f) is rebutted by section 9-103(h).²¹¹

A number of courts developed the dual status rule as a means by which to avoid the draconian effect of the transformation rule.²¹² This rule permits a creditor to retain the benefits of purchase money status in situations where they would be lost by application of the transformation rule but only if there is some means by which to separate payments on the purchase money obligation from payments on the non-purchase money one.²¹³ Revised U.C.C. section 9-103 directly implements a version of the dual status rule, at least outside the consumer lending context, that should protect the purchase money status of transactions in all but the most egregious contexts.²¹⁴

²⁰⁸ 760 F. 2d 1240, 1243 (11th Cir. 1985) (holding that "BWAC's exercise of the future advances and after-acquired property clauses in its security agreements with the debtors destroyed its PMSI").

²⁰⁹ The rule has often been criticized because there was no basis for it in the text of the U.C.C. See David Gray Carlson, *Purchase Money Under the Uniform Commercial Code*, 29 IDAHO L. REV. 793, 832-33 (1992/1993); Mary Aronov, *The Transformation Rule Applied to Purchase Money Security Interests in Commercial Lending Transactions*, 16 MEM. ST. U. L. REV. 15 (1985).

²¹⁰ Revised U.C.C. § 9-103(f) (1999).

²¹¹ See Revised U.C.C. § 9-103(h) (stating intention of drafters of Revised U.C.C. § 9-103 (h) was to leave final determination of rules of consumer-goods transaction to discretion of court).

The limitation of the rules in subsections (e), (f), and (g) to transactions other than consumer-goods transactions is intended to leave to the court the determination of the proper rules in consumer-goods transactions. The court may not infer from that limitation the nature of the proper rule in consumer-goods transactions and may continue to apply established approaches.

Id.

²¹² See *Billings v. AVCO Colorado Indus. Bank (In re Billings)*, 838 F.2d 405, 408 (10th Cir. 1988) (reasoning transformation rule is inconsistent with Commercial Code, while dual-status rule is more in harmony with U.C.C.); *Pristas v. Landaus of Plymouth Inc. (In re Pristas)*, 742 F.2d 797, 801 (3d Cir. 1984) (claiming transformation rule is misguided because of its narrow view of purchase-money security device and its failure to consider critical language in § 9-107 -- "to the extent"); *In re Gibson*, 16 B.R. 257, 266 (Bankr. D. Kan. 1981) (finding transformation rule defeats purpose of having uniform system of priorities).

²¹³ See *In re Pristas*, 742 F.2d at 801 (reasoning creditor's purchase-money status will survive as long as there is method of allocation to determine extent to which payment of other purchases is affected and to which particular item secures its own price); see also *Kelley v. United American Bank in Knoxville (In re Kelley)*, 17 B.R. 770, 772 (Bankr. E.D. Tenn. 1982) (asserting apportionment between purchase money and non-purchase money obligations secured by same collateral is permissible).

²¹⁴ Revised U.C.C. § 9-103(e) (1999):

Consumer lien avoidance actions under Bankruptcy Code section 522(f) will sustain the greater part of the impact of Revised Article 9 on the transformation and dual status rules.²¹⁵ In most commercial purchase money transactions the battle involves two secured creditors, not the debtor (or the trustee) and the putative purchase money financier.²¹⁶ A loss of purchase money status rarely entails the loss of a security interest in its entirety.²¹⁷ The question of the relative priority between those creditors generally does not impact the ultimate distribution to unsecured creditors. Bankruptcy Code section 522(f)(1)(B), however, provides that an individual debtor whose exemptions are impaired by a "nonpossessory, nonpurchase-money security interest" in certain personal, family or household goods may avoid that security interest.²¹⁸ The Bankruptcy Code does not define

[I]f the extent to which a security interest is a purchase-money security interest depends on the application of a payment to a particular obligation, the payment must be applied:

- (1) in accordance with any reasonable method of application to which the parties agree;
- (2) in the absence of the parties' agreement to a reasonable method, in accordance with any intention of the obligor manifested at or before the time of payment; or
- (3) in the absence of an agreement to a reasonable method and a timely manifestation of the obligor's intention, in the following order:
 - (A) to obligations that are not secured; and
 - (B) if more than one obligation is secured, to obligations secured by purchase-money security interests in the order in which those obligations were incurred.

See id. § 9-103, Official. Cmt. 7; *see also In re Pristas*, 742 F.2d at 801 (stating purchase money status of creditor will survive as long as security agreement provides method of allocation for subsequent purchases).

²¹⁵ *See In re Pristas*, 742 F.2d at 801 (stating creditor's interest will only be nullified if his interest is non-purchase money security; otherwise, as long as method of allocation exists, purchase-money security status will survive); *see also In re Billings*, 838 F.2d at 410 (claiming exemption provisions of § 522(f) allows debtor to undo consequences of contracts of adhesion, thereby eliminating any unfair advantage previously enjoyed by creditors). However, such exemptions only applies to invalidation of creditor's non-purchase money security interest, thus making it extremely difficult for a debtor to avoid lien pursuant to § 522 (f) when creditor has purchase money security interest. *See id.*

²¹⁶ *See In re Sunrise R.V. Inc.*, 107 B.R. 277, 278-79 (Bankr. E.D. Cal. 1989) (exemplifying another commercial purchase money suit involving controversy between two creditors, not debtor versus creditor); *United States v. Williams (In re Williams)*, 82 B.R. 430, 431-32 (Bankr. N.D. Miss. 1988) (showing dispute in commercial purchase money case to be between two creditors); *ITT Diversified Credit Corp. v. Daniels (In re Daniels)*, 35 B.R. 247, 248 (Bankr. W.D. Okla. 1983) (depicting priority conflict among two creditors).

²¹⁷ *See Lee v. Davis/McGraw, Inc. (In re Lee)*, 169 B.R. 790, 792 (Bankr. S.D. Ga. 1994) (asserting purchase money security interest may be "transformed" into non-purchase money security interest but there is not entire loss of security interest); *see also Roberts Furniture Co. v. Pierce (In re Manuel)*, 507 F.2d 990, 992 (5th Cir 1975); *Snap-On Tools Corp. v. Freeman (In re Freeman)*, 124 B.R. 840, 843 (N.D. Ala. 1991) (reasoning that purchase money status may be "transformed" to non-purchase status but security interest still remains).

²¹⁸ *See* 11 U.S.C. § 522 (f)(1)(B) (1994) (stating debtor may avoid a lien pursuant to exemptions from

"purchase-money" for this purpose.²¹⁹ And although the Official Comments to Revised U.C.C. section 9-103 gratuitously disclaim the authority to define a term of federal bankruptcy law,²²⁰ bankruptcy courts may be persuaded that neither the transformation nor dual status rules should continue to apply even for consumer lien avoidance purposes.²²¹

The goal of the Drafting Committee to reduce the means by which debtors as well as trustees can avoid liens, whether under Bankruptcy Code section 544(a) or section 522(f), is well-served by the changes relating to purchase money security interests under Revised Article 9.²²² The values of party autonomy and freedom of contract may have been

Bankruptcy Code); 11 U.S.C. § 522(f)(1)(B) (1999):

(1) [T]he debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is –

(B) a nonpossessory, nonpurchase-money security interest in any –

- i. household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
- ii. implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or
- iii. professionally prescribed health aids for the debtor or a dependent of the debtor.

Id.; see also *Keller v. Household Finance Corp. Retail Servs., Inc. (In re Keller)*, 29 B.R. 91, 92 (Bankr. M.D. Fla. 1983); *In re Hoffman*, 11 B.R. 689, 690 (Bankr. D. Mass. 1981) (stipulating that § 522 (f) provide ways for debtor to avoid lien on his property interests).

²¹⁹ See *In re Hillard*, 198 B.R. 620, 622 (Bankr. N.D. Ala. 1996); *In re Carter*, 169 B.R. 227, 228 (Bankr. M.D. Ga. 1993); *Fickey v. Bank of LaFayette (In re Fickey)*, 23 B.R. 586, 588 (Bankr. E.D. Tenn. 1982) (claiming that because definition of "purchase money security interest" is not in Bankruptcy Code, courts must look to relevant state law).

²²⁰ See Revised U.C.C. § 9-103, Official Cmt. 8 (discussing proper authority to define "purchase-money security interest"). "[D]ecisions under Bankruptcy Code Section 522(f) have applied both the dual-status and the transformation rules. The Bankruptcy Code does not expressly adopt the state law definition of 'purchase-money security interest.' Where federal law does not defer to this Article, this Article does not, and could not, determine a question of federal law." *Id.* § 9-103 Official Cmt. 8; see also *In re Adoptante*, 140 B.R. 940, 941-42 (Bankr. D.R.I. 1992); *In re Manuel* 507 F.2d at 993 (finding definition of "purchase money security interest" comes from state law, not Bankruptcy Code).

²²¹ Of course, most courts in bankruptcy cases *do* look to the U.C.C. for the definition of "purchase money." See *Billings v. AVCO Colorado Indus. Bank (In re Billings)*, 838 F.2d 405, 406 (10th Cir. 1988) (stating "[t]he Bankruptcy Code does not define 'purchase money security interest.' For this definition, the courts have uniformly looked to the law of the state in which the security interest is created."); *Pristas v. Landaus of Plymouth, Inc. (In re Pristas)*, 742 F.2d 797, 800 (3d Cir. 1984) (noting "[t]he Bankruptcy Act does not define 'purchase-money security interest.' Therefore, we look to state law."); *In re Adoptante*, 140 B.R. at 941 (finding state law must be used to define "purchase money security interest").

²²² See *Bond's Jewelers, Inc. v. Linklater (In re Linklater)*, 48 B.R. 916, 919 (Bankr. D. Nev. 1985) (observing policies underlying both transformation rule and dual status rule are to "encourage security agreements that benefit both buyer and seller, and to facilitate the roles of consumer good.") This policy is best served by applying dual status rule which does make it more difficult for debtors to avoid liens pursuant to § 522 (f) or § 544 (a) because it is less likely that creditor will lose his purchase money status. See *id.*

successfully advanced at some slight cost to the presumed benefits of the fresh start principle.²²³

B. *Consignments*

Consignments have bedeviled lawyers and judges applying the U.C.C. since its inception, although many of the problems concern the interpretation of U.C.C. section 2-326 more than Article 9.²²⁴ Notwithstanding the recognition of true consignments by the U.C.C., many bankruptcy courts have uncritically applied U.C.C. section 2-326 to defeat the interests of true consignors who have failed to file a financing statement publicizing their interests.²²⁵

Surrendering to popular legal (mis)understanding, adoption of Revised Article 9 will involve amending U.C.C. section 1-201(37) to delete the exclusion of consignments from the definition of security interest.²²⁶ And, rather than waiting for the conclusion of the work of the committee charged with redrafting Article 2,²²⁷ Revised Article 9 will also remove U.C.C. section 2-326(3), which was the

see also In re Pristas, 742 F.2d at 801 (stating same); *In re Gibson*, 16 B.R. 257, 267-68 (Bankr. D. Kan. 1981) (stating same).

²²³ Revised Article 9 also makes it easier for purchase money financiers of inventory to attain priority for all inventory. *See* Revised U.C.C. § 9-103(b)(2) (1999). This provision will not be discussed further because its application will almost always involve the relative priority of two secured creditors, not the existence *vel non* of the security interest itself. Revised U.C.C. § 9-103(a)(2) also makes it clear that the obligation secured by the purchase money collateral includes expenses incurred in connection with acquiring and delivering the collateral to the debtor *plus* costs of collection upon default. *See also*, Official Comment 3 to Revised U.C.C. § 9-103 (1999).

²²⁴ *See* Ingrid Michelsen Hillinger, *The Treatment of Consignments in Bankruptcy: Two Codes and Their Fictions, At Play, in the Fields*, 6 BANKR. DEV. J. 73, 77-85 (1989) (discussing confusion wrought by multiple distinctions introduced by U.C.C. § 2-326 into straightforward common law conception of consignments). Under the current Article 1, a true consignment is not a security interest. *See* U.C.C. § 1-201(37) (1994). Consignments intended as security are controlled by Article 9. *See id.* Even true consignments, however, are subject to U.C.C. § 2-326. *See id.* The effect of Article 2 on such consignments is to make the filing of a financing statement the most efficient means of preserving the consignor's ownership interest. *See* Hillinger, *supra*, at 83-85.

²²⁵ *See* First Interstate Bank of California v. Great Am. Veal, Inc. (*In re* Great Am. Veal, Inc.), 59 B.R. 27, 31-33 (Bankr. D.N.J. 1985) (finding consignor subordinate to secured creditor under U.C.C. § 9-114 because it failed to file financing statement); *Star Furniture Warehouse, Inc. v. Marcoly* (*In re* Marcoly), 32 B.R. 423, 425 (Bankr. W.D. Pa. 1983) (denying reclamation claim of true consignor because it failed to file financing statement); *Yugorsky v. New York Diamond and Jewelry Exch., Inc.* (*In re* New York Diamond and Jewelry Exch., Inc.), 26 B.R. 32, 33-34 (Bankr. S.D. Fla. 1982) (treating consignor's interest as unperfected security interest subject to avoidance by bankruptcy trustee).

²²⁶ "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The term also includes any interest of a consignor." Revised U.C.C. § 1-201(37). *See In re Chicago Coastal Motor Express, Inc.*, 1992 WL 309184, at *7-8 (Bankr. N.D. Ind. 1992) (stating definition of "security interest" according to U.C.C. § 1-201 (37)(b)); *In re Loop Hospital Partnership*, 35 B.R. 929, 933 (Bankr. N.D. Ill. 1983) (stating same).

²²⁷ The ALI approved drafts of a Revised Article 2 and Revised Article 2A in May 1999. The NCCUSL, however, rebuffed submitting them to the states for adoption. The NCCUSL and ALI have appointed a new drafting committee to try to salvage the previous efforts. *See ALI and NCCUSL Announce New Drafting Committee for UCC Articles 2 and 2A*, (August 18, 1999) <<http://www.nccusl.org/pressrel/ucc2a2.htm>>.

source of much of the confusion about the functionally equivalent transactions: those "deemed to be on sale or return".²²⁸ Virtually all consignments,²²⁹ whether true or intended as security, and whether deemed to be on sale or return or not, will now be governed by Revised Article 9.²³⁰ Consignors will have even less ground on which to defend against a trustee's avoidance action under Bankruptcy Code section 544(a) after adoption of Revised Article 9 than they do today.²³¹ Consignors must file financing statements to protect their ostensible ownership interests.²³²

²²⁸ See U.C.C. § 2-326 Revised Official Cmt. 4. ("Certain true consignment transactions were dealt with in former Sections 2-326(3) and 9-114. These provisions have been deleted and have been replaced by new provisions in Article 9."); *supra* text accompanying note 227.

²²⁹ "Consignment" is now defined in Revised U.C.C. § 9-102(20):

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

- A. the merchant
 - (i) deals in goods of that kind under a name other than the name of the person making delivery;
 - (ii) is not an auctioneer; and
 - (iii) is not generally known by its creditors to be substantially engaged in selling the goods of others;
- B. with respect to each delivery, the aggregate value of the goods is \$1,000 or more at the time of delivery;
- C. the goods are not consumer goods immediately before delivery; and
- D. the transaction does not create a security interest that secures an obligation.

Revised U.C.C. § 9-102(20) (1999). According to Official Comment 6 to Revised U.C.C. § 9-109, a conceptual category of "bailments for sale" even remains outside the broadened penumbra of consignment under Revised Article 9. Whether this small gap will have any impact in bankruptcy cases remains to be seen. Given the courts' willingness to subject even true consignments under the current U.C.C. to analysis as unperfected secured transactions, it seems unlikely that any consignment for sale will escape the same result under Revised Article 9. *But see* cases cited *infra* note 233 (giving examples of bailment situations that will probably remain outside scope of Revised Article 9).

²³⁰ "[T]his article applies to: . . . (4) a consignment." Revised U.C.C. § 9-109(a)(4); *see* *Multibank National of Western Massachusetts v. State Street Auto Sales, Inc.* (*In re State Street Auto Sales, Inc.*), 81 B.R. 215, 217-18 (Bankr. D. Mass. 1988) (asserting consignments are not governed by U.C.C. Article 9); *Finance America Corporation v. Morris* (*In re KLP, Inc.*), 7 B.R. 256, 257 (Bankr. N.D. Ga. 1980) (stating same).

²³¹ Revised U.C.C. § 9-319(a) makes it clear that "for purposes of determining the rights of creditors of, and purchasers for value of goods from, a consignee, while the goods are in the possession of the consignee, the consignee is deemed to have rights and title to the goods identical to those the consignor had or had power to transfer." Revised U.C.C. § 9-319(a). The trustee's avoidance power under Bankruptcy Code § 544(a) will not reach the consigned goods if they have been returned to the consignor. If those goods were returned within the 90 days prior to bankruptcy, some bankruptcy courts have concluded that a preferential transfer has taken place. *See Bakst v. Wheeler Oil Co.* (*In re Denmark Co.*), 73 B.R. 325, 326 (Bankr. S.D. Fla. 1987); *Makoroff v. Butler Tire Center* (*In re Castle Tire Center, Inc.*), 56 B.R. 180, 182-83 (Bankr. W.D. Pa. 1986). This result seems clearly incorrect if applied to cases of true consignment where the consignor-consignee relationship is not one of creditor-debtor and thus the return of the consigned

The changes made to the U.C.C. concerning consignments may marginally increase the number of transactions that bankruptcy trustees may avoid.²³³ In contrast to most of the modifications previously discussed, those in connection with a consignment reduce the sphere of party autonomy.²³⁴ These changes, however,

goods cannot be "to or for the benefit of a creditor" as required by Bankruptcy Code § 544; *See* Hillinger, *supra* note 224, at 106-19.

²³² Consignments will be treated as a purchase-money security interest in inventory (Revised U.C.C. § 9-103(d)) which requires the filing of a financing statement. Revised U.C.C. § 9-310(a). The consignor will also be obliged to comply with the requirements of Revised U.C.C. § 9-324(b) to have priority over a competing secured claim in inventory:

[A] perfected purchase-money security interest in inventory has priority over a conflicting security interest in the same inventory . . . if:

- (1) the purchase-money security interest is perfected when the debtor receives possession of the inventory;
- (2) the purchase-money secured party sends an authenticated notification to the holder of the conflicting security interest;
- (3) the holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory; and
- (4) the notification states that the person sending the notification has or expects to acquire a purchase-money security interest in inventory of the debtor and describes the inventory.

Revised U.C.C. § 9-324(b). *See generally*, Chase Manhattan Bank v. Nemko, Inc. (*In re* Nemko, Inc.), 209 B.R. 590, 608 (Bankr. E.D.N.Y. 1997) (holding primary lender failed to file financing statement as required in New York under U.C.C. § 9-103 thus losing his security interest in debtors, inventory, equipment and accounts receivable). *Compare* ATG Aerospace, Inc., v. High-Line Aviation Ltd., (*In re* High-Line Aviation, Inc.), 149 B.R. 730, 736 (Bankr. N.D. Ga. 1992) (noting defendant, ATG, concedes that by not filing financing statement its interest in parts was not perfected under U.C.C. Article 9), *with* Gennet v. Fason (*In re* P.C. Systems, Inc.), 163 B.R. 382, 386-87 (Bankr. S.D. Fla. 1994) (noting creditors interest in items that have been submitted by debtor as collateral is perfected upon filing financial statement in state where property is located).

²³³ Nonetheless, it appears unlikely that Revised Article 9 would change the result in the following cases. *See* Glenshaw Glass Co. v. Ontario Grape Growers' Marketing Bd. (*In re* Keystone Foods, Inc.), 67 F.3d 470, 477 (3d Cir. 1995) (concluding that grapes delivered for processing into juice, even when coupled with option by processor to purchase juice, remained bailment free from competing claims of secured lender and bankruptcy trustee); *In re* Oriental Rug Warehouse Club, Inc., 205 B.R. 407, 410-11 (Bankr. D. Minn. 1997) (asserting classification of particular transaction between debtor and creditor, as governed by U.C.C. as true consignment or secured transaction, dependant on parties' intent); Robbins v. Comerica Bank-Detroit (*In re* Zwagerman), 125 B.R. 486, 491-92 (Bankr. W.D. Mich. 1991) (holding delivery of cattle for custom feeding to livestock grower, who also raised cattle for sale, constituted true bailment that was free of rival claims); U.C.C. states that secured party, (creditor) has burden of establishing security interest was formed upon sale of collateral. *See In re* Oriental Rug Warehouse Club, Inc., 205 B.R. at 411.

²³⁴ *See* GBS Meat Industry Pty. Ltd. v. Kress-Dobkin Co., Inc., 474 F.Supp. 1357, 1363 (W.D. Pa. 1979) (holding secured creditor's actual knowledge of consignment prevents that same creditor from asserting priority interest in consigned goods); *In re* Payless Cashways, Inc., 215 B.R. 409, 417 (Bankr. W.D. Mo. 1997) (noting party claiming that entitlement to superior treatment over other creditors, in distribution of assets, has burden of proving such entitlement); Budsberg v. Premier Credit Co. (*In re* Kincaid), 218 B.R. 965, 968 (Bankr. W.D. Wash. 1998) (noting U.C.C. drafters attempted to keep with objectives of reducing costs of secured transactions by attempting to allocate burdens to those who can best handle them).

appear to have more to do with recognizing how courts were applying the current version of the U.C.C. and less to do with importing distributional values into revised Article 9.

C. *Disposition of Collateral*

Revised Article 9 settles two long-simmering disputes that will have an impact on the extent of a deficiency the secured creditor may claim in a bankruptcy case.²³⁵ Various courts have adopted three approaches to the remedy available to debtors when the secured creditor fails to dispose of collateral in a commercially reasonable manner.²³⁶ A majority of courts have concluded that there is a rebuttable presumption that the value of the collateral was at least equal to the amount of the debt.²³⁷ In these jurisdictions the court must determine what the sale price should have been and apply that amount to reduce any deficiency. In contrast, are those cases that stand for the proposition that a creditor who violates the sale provisions of Article 9 loses the right to a deficiency in its entirety.²³⁸ Revised Article 9 makes the rebuttable presumption rule the standard for non-consumer transactions.²³⁹

²³⁵ See generally *Firststar Bank Burlington, N.A. v. Stark Agricultural Services, Inc. (In re Kevin W. Emerick Farms, Inc.)*, 201 B.R. 790, 797 (Bankr. C.D. Ill. 1996) (asserting while purpose of Article 9 § 203 is commercial certainty, document entitled "security agreement" solely defines extent of creditor security interest); *Hoagland v. Beabout (In re Beabout)*, 110 B.R. 883, 887 (Bankr. S.D. Ill. 1990) (clarifying Revised Article 9 states that security interest over personal property is lost unless its interest is recorded against real estate by making a fixture filing; and therefore, Revised Article 9 allows notice to real estate owners and encumbrances of purchase money securities in personalty); *Multibank Nat'l of Western Mass. v. State Street Auto Sales, Inc. (In re State Street Auto Sales, Inc.)*, 81 B.R. 215, 217 (Bankr. D. Mass. 1988) (observing Revised Article 9 requires filing consignor to give written notification to secured creditor of his interest in goods, and failure to comply with filing provisions of Article 9 results in interest junior to that of secured creditor).

²³⁶ See Revised U.C.C. § 9-610(a) (1999) (stating "[a]fter default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing"); *id.* § 9-610 (b) (1999) (stating "[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable."); *In re After Six, Inc.*, 177 B.R. 219, 227 (Bankr. E.D. Pa. 1995) (holding U.C.C. does not apply to bank's sale of note unless note was pledged as security, thus creating secured transaction); *Cummings v. Cummings (In re Cummings)*, 147 B.R. 738, 746 (Bankr. D.S.D. 1992) (holding secured creditor could not assert deficiency claim against debtor nor enforce secured interest in remaining collateral).

²³⁷ See *Presidential Financial Corp. v. Snead (In re Snead)*, 231 B.R. 823, 827 (Bankr. N.D. Ga. 1999) (affirming when creditor fails to give notice, rebuttable presumption rule applies and presumption is raised that value of collateral is equal to indebtedness); *In re Darling*, 207 B.R. 253, 255 (Bankr. M.D. Fla. 1997) (observing that persuasive authority supports rebuttable presumption rule when secured party disposes of collateral in commercially unreasonable manner); *id.* (stating presumption is fair market value of collateral at time of repossession is equal to outstanding balance of debt); *LOPUCKI, ET AL.*, *supra* note 200, at 702 (stating majority of jurisdictions hold rebuttable presumptions that value of collateral was not at least equal to value of debt).

²³⁸ See *LOPUCKI, ET AL.*, *supra* note 200, at 702 (indicating minority of courts hold "any significant irregularity in the sale procedure is sufficient to deny the deficiency altogether"); see also *J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE*, 933 (4th ed. 1995) (noting minority of states allow deficiency reduced by damages due to commercially unreasonable sale that debtor can prove). See generally Revised

Courts also disagree about the effect of a secured creditor's retention of collateral after repossession when there has been no agreement to accept the collateral in discharge of the secured obligation consistent with the requirements of current U.C.C. section 9-505.²⁴⁰ Some courts have held that prolonged retention amounts to a constructive strict foreclosure.²⁴¹ Again, Revised Article 9 advances the doctrine of party autonomy and makes acceptance of collateral by a secured party effective as a satisfaction of the secured obligation only if the secured party affirmatively assents.²⁴²

The cumulative effect of these two modifications to the current regime of calculation of deficiencies will increase the amount of unsecured claims of secured

U.C.C. § 9-626, Official Cmt. 4 (recognizing § 9-626 allows court to determine applicable rules when amount of deficiency or surplus is issue in non-consumer transactions).

²³⁹ See Revised U.C.C. § 9-626(a):

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

(3) [I]f a secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney's fees exceeds the greater of:

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

Id.; see also Revised U.C.C. § 9-626 (a), Official Cmt. 3 (affirming rebuttable presumption rule is established for transactions other than consumer transactions).

²⁴⁰ See *In re Durastone Co. Inc.*, 223 B.R. 396, 405 (Bankr. D. R.I. 1998) (claiming debtor's deficiency claim is barred because his conduct manifests intent to retain collateral in full satisfaction of debt); see also *Lamp Fair, Inc. v. Perez-Ortiz*, 888 F.2d 173, 176 (1st Cir. 1989) (referring to U.C.C. § 9-505 stating that retention of collateral normally satisfies debt completely and secured party must abandon any claim for deficiency); *Deephouse Equip. Co., Inc. v. Knapp (In re Deephouse Equipment Co., Inc.)*, 38 B.R. 400, 404 (Bankr. D. Conn. 1984) (finding when creditor takes possession of collateral that secures debt and debtor subsequently gives notice that act was in accord and satisfaction, burden is on debtor to prove that debt was intended to be discharged).

²⁴¹ See Gail Hillebrand, *Symposium: Consumer Protection and The Uniform Commercial Code, The Uniform Commercial Code Drafting Process: Will Articles 2, 2b And 9 be Fair to Consumers?*, 75 WASH. U. L.Q. 69, 130-31 (1997) (discussing virtues of doctrine of constructive strict foreclosure); see also Steven O. Weise, *1991 Survey: Uniform Commercial Code, U.C.C. Article 9--Personal Property Secured Transactions*, 46 BUS. LAW. 1711, 1775 (1991) (criticizing rule while noting that excessively long retention of collateral is factor that may be considered in connection with commercial reasonableness of sale); see e.g. *Vogel v. Carolina Int'l, Inc.*, 711 P.2d 708, 712 (Colo. App. 1985) (observing that to obtain valid strict foreclosure, creditor must first give proper notice to debtor and debtor fails to object within 21 days of such notice).

²⁴² See Revised U.C.C. § 9-620(a) (commenting in non-consumer transactions, secured creditor may also agree to accept collateral in partial satisfaction of indebtedness). *But see* Revised U.C.C. § 9-620(g) (1999) (stating acceptance of surrendered collateral in consumer context mandates full satisfaction). See also *In re Nardone*, 70 B.R. 1010, 1016 (Bankr. D. Mass. 1987) (noting to have claim barred because of retention of collateral, secured creditor must give written notice of its proposal to retain in satisfaction of debt).

creditors in bankruptcy cases. However, given the low percentage of distributions on unsecured claims, secured creditors will generally not receive significantly more money.²⁴³ Yet the increased amount of unsecured claims may give partially secured creditors control, or at least greater leverage within the class of unsecured creditors in reorganization cases.²⁴⁴ This will certainly dilute recoveries for other unsecured creditors. More significantly, these revised provisions again demonstrate the commitment of the Drafting Committee to a jurisprudence emphasizing the significance of the objective manifestations of assent by the parties, rather than substantive policies of social equity or redistribution of wealth.²⁴⁵

CONCLUSION

Revised Article 9 clarifies several areas of confusion that exist under current law. It also broadens the scope of transactions covered by Article 9 and simplifies perfection. Revised Article 9 also extends the secured creditors' interests in proceeds of collateral. With few exceptions these changes expand the range of private agreements that will be judicially enforceable. Because persons who were not parties to a particular secured transaction did not participate in the creation of the parties' private law agreement,²⁴⁶ broadening the domain of Article 9 will reduce the rights of third parties.

Enhancing private party autonomy is not the principal goal of the Bankruptcy Code. Rather, its twin goals are the collective enforcement of claims recognized by state law and rehabilitation of the debtor. The potential for collision between the private law-making legitimated by Article 9 and the public/private mix of the Bankruptcy Code pervades the decisions in bankruptcy cases. The border between recognition of party autonomy and distributional values is not always clear, but

²⁴³ See *Point Wylie Co. v. Tega Cay Dev. Co., Inc. (In re Point Wylie Co.)*, 78 B.R. 453, 459-60 (Bankr. D.S.C. 1987) (asserting distribution of unsecured claims will lessen percentage of distribution for unsecured creditors).

²⁴⁴ See, e.g., *First Fed. Bank of California v. Weinstein (In re Weinstein)*, 227 B.R. 284, 293 (B.A.P. 9th Cir. 1998) (claiming undersecured creditor can elect to have its claim treated as fully secured); *In re Smeltzer*, 47 B.R. 77, 79 (Bankr. W.D. Wisc. 1985) (holding that because trustee plan did not provide for all partially secured creditors to share in distribution it was discriminatory).

²⁴⁵ See generally *In re Purity Ice Cream Co., Inc.*, 90 B.R. 183, 188 (Bankr. D. S.C. 1998) (stating while evidence of intention between parties to create security interest was lacking, evidence of true lease was sufficient to perfect interest); *In re Housecraft Indus., USA, Inc.*, 155 B.R. 79, 90 (Bankr. D. Vt. 1993) (asserting Article 9 reiterates that notification to bailee perfects interest in collateral).

²⁴⁶ Revised U.C.C. § 9-601(d) elevates the duties of the secured creditor to guarantors to a plane equivalent to the debtor. See Revised U.C.C. § 9-601(d) (noting "[e]xcept as otherwise provided . . . after default, a debtor and an obligor have the rights provided in this part and by agreement of the parties"). Even without explicit statutory support many courts had reached this conclusion under current Article 9. See, e.g., *Earl of Loveless, Inc. v. Gabele*, 2 Cal. App. 4th 27, 33 (1991) (asserting when third party assumes obligations to creditor, debtor remains liable on promissory note); *First American Bank of New York v. Wassel*, 601 N.Y.S.2d 994, 995 (1993) (recognizing guarantor may not waive his right to commercially reasonable sale).

Revised Article 9 expands the sweep of private law farther than it extends now. Whether this increase enhances productive economic activity is an empirical question awaiting analysis. But there can be no question that Revised Article 9 will further reduce assets available for distribution to unsecured creditors in bankruptcy.