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Louisiana's Non-Uniform Variations in U.C.C. Chapter 9

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I. INTRODUCTION

Louisiana was the last of the fifty states to adopt Article 9 of the Uniform Commercial Code,[1] which took effect in Louisiana on January 1, 1990, long after the other states and the District of Columbia. Ironically, in that same year, a comprehensive revision and restatement of Uniform Commercial Code Article 9 commenced. After a decade long process, Revised Article 9 was promulgated by the National Conference of Commissioners on Uniform State Laws and The American Law Institute in 1999.[2]

Louisiana's former Chapter 9 was adopted with multiple changes from the uniform model version of former U.C.C. Article 9. Recognizing that non-uniformity, and due to the complexity and length of the proposed legislation, when revised U.C.C. Article 9 was first introduced in the Louisiana Legislature it was referred to the Louisiana State Law Institute for study, redrafting and the addition of comments.[3] After a two year process of committee meetings and Institute Council sessions, a modified version of U.C.C. Article 9 containing Louisiana non-uniform variations was recommended by the Louisiana State Law Institute to the Legislature for the 2001 regular session.[4] With one substantive amendment made in the Senate Committee on Judiciary A,[5] this legislation was enacted, effective July 1, 2001.[6] This legislation is known officially as the Uniform Commercial Code—Secured Transactions, and is referred to in this article as "Chapter 9."[7]

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1. 1988 La. Acts No. 528; 1989 La. Acts No. 135.

2. The original official promulgation date for Revised Article 9 is 1999. However, the official uniform version of Revised Article 9 has been subject to multiple technical amendments throughout 1999 and 2000 (indeed after some states already had enacted their legislation). As this article goes to press, the American Law Institute, the National Conference of Commissioners on Uniform State Laws and the Permanent Editorial Board for the Uniform Commercial Code have approved further Modifications to the Official Text and Comments (December 2001) of Revised Article 9. In this article, when citing to the uniform version of Revised Article 9 (as opposed to a version that has been enacted in any particular state), the reference is to "U.C.C. Section 9-___" which includes the amendments and errata corrections through the end of 2000. The Louisiana enactment is referred to herein as "Chapter 9."

3. H.R. Con. Res. 241, 1999 Leg., Reg. Sess. (La. 1999).

4. H.R.B. 679, 2001 Leg., Reg. Sess. (La. 2001).

5. *See* text accompanying *infra* notes 302-03.

6. 2001 La. Acts No. 128.

7. A comparison of Chapter 9 with U.C.C. Article 9 prepared by the Louisiana State Law Institute is available on the website of the Louisiana Secretary of State, *at* http://www.sec.state.la.us/comm/ucc/ucc-v-la-comparite.htm (last visited Feb. 20, 2002). In spite of the omissions and changes in Chapter 9 from

This article reviews the material variations in Chapter 9 from U.C.C. Article 9. The four areas of largest variation are (1) the scope of collateral, which in Chapter 9 is expanded as to certain types[8] and restricted as to fixtures,[9] (2) the inventive filing system under Chapter 9,[10] (3) the inclusion in Chapter 9 of an express priority rule governing the competition between security interests and statutory privileges,[11] and (4) the remedies and damages available under Chapter 9.[12] But, there are other significant non-uniform provisions in Chapter 9 as well. This article assumes a familiarity with the provisions and workings of U.C.C. Article 9, and focuses on the Louisiana additions and omissions contained in Chapter 9. As will be discussed in detail below, in many cases the omissions made in Chapter 9 are as significant as, if not more significant, than the added text.[13]

II. DEFINITIONS

A. Louisiana Definitions

The definitions in U.C.C. Article 9 are fundamental to an understanding and application of its provisions. Many of the definitions in U.C.C. Article 9 are new. U.C.C. Article 9 also adopts a new drafting approach different from former U.C.C. Article 9, consolidating all defined terms in Section 9-102, with some exceptions.[14] U.C.C. Section 9-102 contains three subsections.

U.C.C. Article 9, the sequence of sections in Chapter 9 uses the same order as in the national official text.

8. *See* discussion *infra* Part III.A-D.
9. *See* discussion *infra* Part V.C.
10. *See* discussion *infra* Part V, especially Subpart A.
11. *See* discussion *infra* Part VII.B.
12. *See* discussion *infra* Part IX.
13. For example, the expansion of Chapter 9's scope to include consumer deposit accounts, consumer tort claims and judgments, and Chapter 9's addition of a filing requirement for perfection of a security interest in an interest in a decedent's estate, each accomplished by the mere omission in Chapter 9 of a provision contained in U.C.C. Article 9. *See* text accompanying *infra* notes 62, 90, 101, and 248. Indeed, legislation by omission is well established in U.C.C. Article 9. The much celebrated change in U.C.C. Article 9 (and Chapter 9) dropping the requirement that a financing statement bear the debtor's signature is achieved by mere omission, not by any explicit statutory statement. La. R.S. 10:9-502 (2002). *Compare* La. R.S. 10:9-502 *with* former La. R.S. 10:9-402(1) (1993), *as amended by* 2001 La. Acts No. 128, § 1. The statutory text of Chapter 9 similarly does not state that taxpayer identification numbers are no longer required to be set forth in filings; that change is by omission from former Chapter 9. *Compare* La. R.S. 10:9-502 *with* former La. R.S. 10:9-402(1) (1993).
14. A few definitions which are used only in one section are set forth in the applicable section. *See, e.g.*, La. R.S. 10:9-103(a) (Supp. 2002) (purchase-money

Subsection (a) sets forth 80 definitions. Subsection (b) adopts thirty-five definitions by cross-reference to other Articles of the U.C.C. Subsection (c) adopts by general cross-reference the definitions and principles of U.C.C. Article 1.[15]

Section 9-102 in Chapter 9 is by necessity non-uniform for several reasons. First, Louisiana has not enacted Articles 2 and 2A of the U.C.C., nor is their adoption likely in the foreseeable future.[16] As a result, Chapter 9 excludes eleven definitions relating to U.C.C. Articles 2 and 2A, and instead includes Louisiana definitions for most of those terms in a new non-uniform Subsection 9-102(d).[17]

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security interest); La. R.S. 10:9-210(a) (Supp. 2002) (request for an accounting); La. R.S. 10:9-336(a) (Supp. 2002) (commingled goods); La. R.S. 10:9-616 (Supp. 2002) (explanation of deficiency). Chapter 9 also retains the placement of the definition of "pre-effective-date financing statement" in the transition Part 7, which is used in more than one section, but moves it to a non-uniform Section 9-710 rather than U.C.C. Section 9-707(a).

15. Several terms of great importance in U.C.C. Article 9 are defined in U.C.C. Article 1, such as the definitions "security interest," "purchase"and "purchaser," "organization," and "buyer in ordinary course of business." *See* La. R.S. 10:1-201 (1993 & Supp. 2002).

16. H.R. Con. Res. 44, 1999 Leg., Reg. Sess. (La. 1999) directed the Louisiana State Law Institute to conduct a feasibility study of adopting Articles 2 and 2A of the Uniform Commercial Code and repealing the Louisiana Civil Code articles on sales and leases. The resulting Report to the Council of the Louisiana State Law Institute strongly recommended to the Louisiana Legislature that Articles 2 and 2A should not be adopted in Louisiana. Report by the U.C.C. 2, 2A Committee of the Louisiana State Law Institute (Sept. 22-23, 2000).

17. The omitted eleven definitions are the terms "contract for sale," "lease," "lease agreement," "lease contract," "leasehold interest," "lessee," "lessee in ordinary course of business," "lessor," "lessor's residual interest," "merchant," and "sale." Subsection 9-102(d) adds non-uniform Louisiana definitions for seven of these terms. The Louisiana definitions of "lease" and "sale" are derived from the La. Civ. Code arts. 2669, 2674 and 2677, and 2439, respectively. The Louisiana definitions of "leasehold interest," "lessee" and "lessor" are straightforward. The Louisiana definitions of "lessee in ordinary course of business," and "merchant," are taken from U.C.C. Articles 2A and 2, respectively. Four of the omitted definitions are not replaced in Chapter 9: "contract for sale," "lease agreement," "lease contract," and "lessor's residual interest." "Contract for sale" is used in only two places in U.C.C. Article 9. In Chapter 9 the reference to contract for sale in the definition of goods is superseded by the Louisiana non-uniform definition "recorded timber conveyance," and the reference to that term in U.C.C. Subsection 9-610(d) is unnecessary in Louisiana. Consistent with other Louisiana law, Chapter 9 has no need for definitions of "lease agreement" and "lease contract" separate from the term "lease." U.C.C. §§ 9-323(f)(2), 9-407(a), 9-407 (c). *See* La. R.S. 10:1-201 cmt. (e) (1974) (U.C.C. definitions of "agreement" and "contract" are omitted as "incomplete, inaccurate and unnecessary"). In Chapter 9 the term "lessor's residual interest" is used (without definition) only in Section 9-407. Furthermore, the non-uniform language in former Chapter 9's definition of chattel paper by which the reversionary right of the lessor in the leased goods was embodied in the chattel paper has been intentionally suppressed in Chapter 9. *See*

Subsection 9-102(d) of Chapter 9 contains nineteen additional non-uniform definitions. As noted above, seven of these definitions are added in lieu of terms defined in U.C.C. Articles 2 and 2A.[18] Four other definitions are added to translate the common law terminology used in U.C.C. Article 9 to fit within the language of Louisiana's civil law property concepts and principles. Thus, "intangible" is defined to mean "incorporeal," "personal property" to mean "movable property," "real property" to mean "immovable property and real rights therein," and "tangible" to mean "corporeal."[19] This drafting approach avoids having to change those terms innumerable times in the text of Chapter 9 to these parallel but not identical Louisiana counterparts which—unlike these four common law terms—have meaning in Louisiana. For a similar reason, definitions of "bailee," "bailor,"[20] "lien," and "lienholder"[21] are included in Subsection 9-102 (d) because such terms do not have established and recognized meanings in Louisiana's civil law. For similar reasons, Chapter 9 replaces the phrase "rule of law" used in U.C.C. Article 9 with the terms "statute or regulation."[22]

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former La. R.S. 10:9-105(1)(b) (1993), *as amended by* 2001 La. Acts No. 128, § 1.

18. *See supra* note 17.

19. La. R.S. 10:9-102(d)(3), 10:9-102(d)(14), 10:9-102(d)(15), and 10:9-102(d)(18) (Supp. 2002). However, the definition of "real property," and its subset definition of "mineral rights," are defined broader perhaps for purposes of Chapter 9 than may be the case for other purposes of Louisiana law, by inclusion of leases and net profits interests, respectively. *See* text accompanying *infra* note 28. The civil law majority view is that a lease creates personal rights, not real rights. A. N. Yiannopoulos, Property §226 at 422, *in* 2 Louisiana Civil Law Treatise (1996). *Compare with* La. R.S. 31:16 (1989) (mineral leases and other unenumerated mineral rights are real rights).

20. La. R.S. 10:9-102(d)(1) (Supp. 2002). The definition of "bailee" in Chapter 9 is a simplified version suitable for its limited use and purpose in Chapter 9, but does not include all of the concepts found in the definition of bailee and bailment under common law. *See* La. R.S. 10:9-310(b)(4), 10:9-312, and 10:9-505 (Supp. 2002).

21. La. R.S. 10:9-102(d)(9), 10:9-102(d)(10) (Supp. 2002). U.C.C. Article 9 refers throughout to "security interests and *other* liens" (emphasis added), but in Louisiana a privilege is not a security interest. Thus Chapter 9 makes a non-uniform change throughout to delete the reference to "other" liens in places where reference is made to "security interests and liens." *See also infra* Part VII.B (dealing with non-uniform Chapter 9 provisions regarding the relative priority of liens versus security interests).

22. La. R.S. 10:9-201, 10:9-333 (Supp. 2002). *Compare* La. R.S. 10:9-109(d)(2) (Supp. 2002) *with* U.C.C. § 9-109(d)(2) (2001). *But see* La. R.S. 10:9-406(f), 10:9-408(c), and 10:9-409(a) (Supp. 2002). The sources of law in Louisiana are legislation and custom. La. Civ. Code art. 1. The phrase "rule of law" is rejected in Chapter 9 to avoid its intended inclusion of jurisprudence as an authoritative source of law in Louisiana. Doerr v. Mobil Oil Corp., 774 So. 2d 119, 128 (La. 2000). *See infra* notes 280 and 376; A. N. Yiannopoulos, *Louisiana Civil*

Five other non-uniform definitions are added to Chapter 9 in Subsection 9-102(d). A definition of "collateral mortgage note" is used to permit the inclusion of special non-uniform provisions pertaining only to collateral mortgage notes in Chapter 9, and to restrict their application to collateral mortgages encumbering Louisiana immovable property.[23] At the request of the Law Institute Council a non-uniform definition of "local law" was added. "Local law" is a term used in U.C.C. Article 9 without definition to mean the substantive law of a particular jurisdiction and not its choice-of-law rules.[24] Definitions of "mineral rights,"[25] "recorded timber conveyance,"[26] and "titled motor vehicle"[27] are included in Chapter 9 for convenience in drafting.

The application of the definitions in Chapter 9 is intended to be restrictive in two respects. First, consistent with U.C.C. Article 9, the introductory language in Section 9-102 regarding definitions has been changed from prior law in former Chapter 9 and former U.C.C. Article 9. In former Louisiana Revised Statutes 10:9-105(1), the introductory clause specified that the context in which a defined word was used might require a different meaning to be given to the word. That language gave the courts some latitude in determining whether the precise definition provided in the U.C.C. should be applied in a particular case. In Chapter 9, each definition is only used in the context in which it was intended. Thus, the prior statement of flexibility is deleted as no longer appropriate. Second, the definitions in Chapter 9 take precedence over the general definitions in Article 1. Furthermore, it is the express intent of the language "in this Chapter" that these definitions be used by the courts only in the interpretation of Chapter 9, and they not otherwise be imported or used in interpreting other matters of Louisiana law.[28]

Law: A Lost Cause?, 54 Tul. L. Rev. 830, 835 n.25 (1980). Similar changes are the omission of references to "equitable principles" of tracing proceeds in Subsection 9-315(b)(2), the replacement of "ownership interest" for "legal or equitable interest" in Section 9-318, and the omission of "equitable" proceedings in Subsection 9-334(e)(3).

23. La. R.S. 10:9-102(d)(2) (Supp. 2002). *See* discussion *infra* Part III.E. *Compare with* La. R.S. 9:5550 (1991).

24. La. R.S. 10:9-102(d)(11) (Supp. 2002). *See* U.C.C. § 9-301 cmt. 3 (2001), La. Civ. Code art. 3517 (source of phraseology).

25. La. R.S. 10:9-102(d)(13) (Supp. 2002). *See* former La. R.S. 10:9-102(4)(c) (1993), *as amended by* 2001 La. Acts No. 128, § 1. *See also supra* note 19 and *infra* Part III.G.

26. La. R.S. 10:9-102(d)(16) (Supp. 2002). *See* text accompanying *infra* note 37.

27. La. R.S. 10:9-102(d)(19) (Supp. 2002). *See infra* Part V.E.

28. *See supra* note 19 and discussion *infra* Part II.C.2.

B. Agricultural Matters

Chapter 9 contains four definitions particularly pertinent to the provisions bearing upon agricultural matters.[29] The definition of "farming operations" in Chapter 9 is uniform. It is added in U.C.C. Article 9 for clarification only.[30] However, the definition of "farm products" in Chapter 9 reproduces additional non-uniform language of former Chapter 9 by listing specific examples of crops, livestock and products.[31]

This enumeration of specific examples of farm products is less important in revised Chapter 9 due to the breadth of the expanded definition in U.C.C. Article 9, but is carried forward to avoid creating any negative implication by their removal. Goods are "farm products" if the debtor is engaged in farming operations with respect to the goods. Crops, livestock, and their products cease to be "farm products" when the debtor ceases to be engaged in farming operations with respect to them. Products of crops or livestock, even though they remain in the possession of a person engaged in farming operations, lose their status as farm products if they are subjected to a manufacturing process.[32] The terms "crops," "livestock," and "manufacturing process" are not defined.

The definition of "farm products" in Chapter 9, as in U.C.C. Article 9 and former Chapter 9,[33] excludes standing timber. However, this definition continues to differ from the definition of farm products in Louisiana Revised Statutes 3:3652(10) pertaining to the Louisiana agricultural central registry established pursuant to the Federal Food Security Act of 1985, which includes standing timber in the definition of farm products.[34] Under Section 9-311, the filing requirements set forth in Title 3 pertaining to security interests and liens affecting farm products or standing timber prevail over the rules in Chapter 9 which are inconsistent.[35]

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29. *See* discussion *infra* Part VII.A.

30. U.C.C. § 9-102 cmt. 4(a) (2001).

31. *Compare* La. R.S. 10:9-102(a)(34) (Supp. 2002) *with* former La. R.S. 10:9-109(3) (1993), *as amended by* 2001 La. Acts No. 128, § 1. The enumerated aquatic goods in Chapter 9 include crawfish, which inexplicably was not listed in former Chapter 9 despite being Louisiana's official state crustacean. La. R.S. 49:168 (1987).

32. *See* U.C.C. § 9-102 cmt. 4(a) (2001).

33. *See supra* note 31.

34. Other differences exist in the two definitions. For instance, Chapter 9 no longer requires by definition that such goods be in the debtor's possession to be farm products. *See also* La. R.S. 10:9-311(a)(2) (Supp. 2002) and former La. R.S. 10:9-302(3)(b)(ii) (1993), *as amended by* 2001 La. Acts No. 128, § 1.

35. At the time that the article is written, the requirements for filings in the Louisiana agricultural central registry still include the debtor's signature and

However, standing timber owned separately from the land is in many instances within the scope of revised Chapter 9, even though not a farm product under Chapter 9. This result arises from multiple provisions in Chapter 9. The definition of "goods," in combination with the new definition of "recorded timber conveyance," reproduces the substance of former Chapter 9 pertaining to timber. Standing timber is immovable, but trees cut down, whether carried off or not, are movables.[36] Nonetheless, the precise intersection between immovable and movable property can be difficult to elucidate, and timber is no exception. Under Chapter 9, the interest of a debtor other than a landowner in standing timber that is to be cut and removed under a recorded timber conveyance is classified as goods, and may be encumbered under Chapter 9. The definition of "recorded timber conveyance" is new in Chapter 9, although it reproduces the substance of former Chapter 9.[37] This term is used in revised Chapter 9 in the definition of "goods," pertaining to the circumstances in which standing timber is made movable by anticipation. This aspect of the treatment of timber in Chapter 9 did not change Louisiana law. Additional non-uniform language in former Chapter 9 was omitted as unnecessary and implicit, but with no intent to change Louisiana law.

If standing timber is not cut and removed within the time period provided for in the recorded timber conveyance, the standing timber ceases to be "goods" and any security interest granted in the standing timber will automatically terminate.[38] Chapter 9 is more explicit than former Chapter 9 in providing that standing timber which is made movable by anticipation is within the scope of Chapter 9. Section 9-109(a)(1) provides that standing timber that constitutes goods (that is, the interest of a non-landowner in standing timber that is subject to a recorded timber conveyance) is subject to Chapter 9. A similar non-uniform clarification is added to Section 9-109(d)(11)(F).

The fourth definition pertinent to agricultural matters is "agricultural lien."[39] As discussed below, Chapter 9 includes agricultural liens within its scope.[40] This definition varies from

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taxpayer identification number. La. R.S. 3:3654(E) (1993 & Supp. 2002).

36. La. Civ. Code arts. 463-464. *Cf.* Revision Comments - 1978 to La. Civ. Code art. 469 and La. Civ. Code art. 474 (growing crops made movables by anticipation).

37. *See* former La. R.S. 10:9-105(1)(h) (1993), *as amended by* 2001 La. Acts No. 128, § 1.

38. *Id.*

39. La. R.S. 10:9-102(a)(5) (Supp. 2002).

40. The creation or attachment of an agricultural lien is not governed by Chapter 9 (or U.C.C. Article 9), but the perfection and priority rules of Chapter 9 do apply to agricultural liens. *See, e.g.*, La. R.S. 10:9-302, 10:9-308(b), 10:9-310, 10:9-311(a)(2), 10:9-322(a), 10:9-322(f)(5), 10:9-324(d), and 10:9-334(i) (Supp.

U.C.C. Article 9 by substituting the term "lien," which is a non-uniform defined term in Chapter 9.[41] This definition also changes U.C.C. Article 9 with respect to the lessor's privilege, in order to bring all Louisiana lessor's privileges on farm products within the scope of the definition. Louisiana does not restrict the lessor's privilege only to the movable effects of the tenant. The Louisiana lessor's privilege also includes the movables of a subtenant or third party on the leased premises.[42] Thus the definition in Chapter 9 is modified so as to not require that the debtor be the direct tenant. In addition, the definition does not restrict the lien in favor of the furnisher of goods or services only to furnishers in the ordinary course of business. That requirement in U.C.C. Article 9 is not contained in all of Louisiana's statutes creating such privileges.[43]

C. Other Modifications to U.C.C. Article 9 Definitions

1. Debtor

The definition of "debtor" in Chapter 9 is substantively uniform.[44] However, the result from this uniform definition may be different in Louisiana from many other states. Louisiana is a community property state.[45] The term "debtor" is defined in relation to property, rather than the secured obligation.[46] The definition specifies that the debtor is a person having an interest in the collateral. Thus, as under former Chapter 9, each spouse is a debtor as to community property collateral, even if only one spouse acts alone to encumber the collateral with the security interest.[47] Each debtor is entitled to the protections afforded under Chapter 9. The secured party is protected from responsibility to unknown debtors by Sections 9-605 and 9-628. In circumstances where one spouse alone has the exclusive right to encumber, notice under Chapter 9 to only the debtor-spouse who by

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2002). *See infra* Part VII.A.

41. *See supra* note 21.

42. La. Civ. Code arts. 2706-2708.

43. *See, e.g.*, La. Civ. Code art. 3217(1), La. R.S. 9:4522 (1991 & Supp. 2002), and La. R.S. 9:4661 (1991). *See* further discussion in text accompanying *infra* notes 269-270.

44. The variation is the deletion of the word "other" in front of lien, done throughout Chapter 9. *See supra* note 21.

45. La. Civ. Code art. 2334.

46. La. R.S. 10:9-102(a)(28) (Supp. 2002).

47. The creation of a security interest in certain community property requires the concurrence of both spouses. La. Civ. Code arts. 2347, 2348 and 2353. With respect to certain other community property, one spouse alone has the exclusive right to encumber (although each spouse is a debtor as to such collateral). La. Civ. Code arts. 2350-2352.

law has the exclusive management of that community property collateral may be sufficient.[48] Even as to ordinary community property, where spouses reside together at the time, notice to one spouse alone may be sufficient for purposes of Chapter 9.[49] Either spouse is a proper defendant, during the existence of the marital community, in a judicial action to enforce an obligation against community property.[50]

2. Good Faith

The definition of "good faith" in Chapter 9 follows the definition in U.C.C. Article 9.[51] The definition goes beyond honesty in fact, and requires the observance of reasonable commercial standards of fair dealing. The same definition is found in other parts of the U.C.C. enacted in Louisiana.[52] However, this definition varies from the non-uniform definition of good faith in U.C.C. Article 1 previously enacted in Louisiana, which was made non-uniform to be consistent with the Louisiana Civil Code.[53] The Chapter 9 definition is applicable only to the interpretation of the term in the specific provisions in which it is used in the express language in Chapter 9.[54] This definition is not applicable generally to matters governed by Chapter 9 where the term "good faith" is not expressly stated in the statute's text. Nor is it to be used in other areas of Louisiana law outside Chapter 9.[55] In particular, the Chapter 9 definition is not used, and is not intended to apply to, the rights and duties of a secured party in its relationship with a debtor or obligor. The term is intentionally not used in Part 6 of Chapter 9 in that context. Instead, the obligation of good faith imposed on a secured party's enforcement actions under Chapter 9 uses the other, prior definition.[56]

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48. *Cf.* Chrysler Credit Corp. v. Nata, 469 So. 2d 11 (La. App. 4th Cir. 1985) (sufficient in executory process foreclosure to sue only the one spouse in whose name automobile is registered). *See* La. Civ. Code arts. 2350-2352.

49. *Cf.* Shel-Boze, Inc. v. Melton, 509 So. 2d 106 (La. App. 1st Cir. 1999) (where spouses reside together at the time, service of notice on one spouse alone does not offend the due process rights of the other spouse with respect to the enforcement of an obligation against community property).

50. La. Code Civ. P. art. 735.

51. La. R.S. 10:9-102(a)(43) (Supp. 2002).

52. La. R.S. 10:8-102(a)(10) (1993 & Supp. 2002).

53. La. R.S. 10:1-203 (1993).

54. *See* La. R.S. 10:9-102(d)(7), 10:9-315(a)(3), 10:9-321(a), 10:9-330, 10:9-405(a), 10:9-615(g), and 10:9-617(b) (Supp. 2002). *See* text accompanying *supra* note 28.

55. *See* text accompanying *supra* note 28.

56. La. R.S. 10:1-203 (1993). *See* U.C.C. § 9-620 cmt. 11 (2000). *See also infra* note 324.

3. Registered Organization

For clarification, Chapter 9 adds a non-uniform second sentence to the definition of "registered organization."[57] This definition is new in U.C.C. Article 9, and reflects the changes in the choice of law rules governing perfection and priority of security interests and agricultural liens. Official Comment 11 to U.C.C. Section 9-102 states: "[n]ot every organization that may provide information about itself in the public records is a "registered organization." For example, a general partnership is not a "registered organization," even if it files a statement of partnership authority under section 303 of the Uniform Partnership Act or an assumed name ("dba") certificate. This is because the State where the partnership is organized is not required to maintain a public record showing that the partnership has been organized. In contrast, corporations, limited liability companies, and limited partnerships are "registered organizations."

Chapter 9 clarifies this definition for use with respect to Louisiana entities. Even though a Louisiana general partnership must file its contract of partnership for registry with the Louisiana Secretary of State in order for the partnership to be deemed an owner of immovable property as to third parties,[58] this filing is not necessary for the general partnership to exist as that type of legal entity. In contrast, a Louisiana partnership *in commendam* must be filed for registry in order for such partnership to exist as that type of entity,[59] even though the partnership still may exist as a legal entity without registry of its partnership contract. The rule is that if public registration is necessary for an entity to exist as that type of entity, then such entity is a "registered organization."

III. SCOPE

In the first of several significant variations, Chapter 9 brings into its scope several kinds of property that reside outside of U.C.C. Article 9. This expansion in scope is carried forward from former Chapter 9.[60] The additional types of collateral included within the scope of Chapter 9 are consumer deposit accounts, consumer tort claims, judgments, and life insurance policies. Additionally, Chapter 9 contains special provisions pertaining to collateral mortgage notes and to public finance transactions. As discussed later, Chapter 9 also varies in the creation, perfection, priority, and remedies rules applicable to fixtures. This expansion in scope will create problems

57. La. R.S. 10:9-102(a)(70) (Supp. 2002).
58. La. Civ. Code art. 2806 and La. R.S. 9:3401-3408 (1997 & Supp. 2001).
59. La. Civ. Code art. 2841.
60. La. R.S. 10:9-104 (1993), *as amended by* 2001 La. Acts No. 128, § 1.

as to the choice of law governing perfection of security interests in collateral not covered by U.C.C. Article 9. For reasons discussed below, only some of these potential problems could be effectively addressed by Chapter 9.[61]

A. Deposit Accounts

Chapter 9 carries forward from former Chapter 9 the inclusion of all deposit accounts as eligible original collateral. U.C.C. Section 9-109(d)(13) excludes deposit accounts in a consumer transaction from the scope of U.C.C. Article 9. In one of several inclusions by omission, Chapter 9 makes consumer deposit accounts eligible as collateral within the scope of Chapter 9 by omitting and reserving that exclusion in the scope provision.[62] Louisiana was one of the few states to include deposit accounts within the scope of former U.C.C. Article 9.[63] However, Louisiana included no other special statutory provisions to accommodate properly the inclusion of commercial and consumer deposit accounts within its scope, other than a perfection method[64] and a choice of law provision[65] in former Chapter 9, plus modifications to the Louisiana banking statutes.[66] Louisiana was lucky to avoid litigation arising from the large gaps in former Chapter 9 as to the intersection of deposit accounts as original collateral and deposit accounts as proceeds of other collateral. Chapter 9 is uniform with U.C.C. Article 9 in most respects regarding deposit accounts, including the choice of law governing perfection and priority of security interests in deposit accounts under Section 9-304.[67] However,

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61. *See infra* notes 67, 98, 101, 106, 110 and accompanying text. *Compare* text accompanying *infra* note 251.

62. La. R.S. 10:9-109(d)(13) (reserved) (Supp. 2002). *See supra* note 13. Other states such as Idaho, Illinois, Mississippi and North Dakota (and Florida and Oregon in part) have made similar non-uniform changes.

63. *See* La. R.S. 10:9-103(7) (1993) (choice of law); La. R.S. 10:9-104 (1993) (exclusion (l) reserved in Louisiana); La. R.S. 10:9-305(4) (1993) (perfection), *as amended by* 2001 La. Acts No. 128, § 1. The other states were California, Hawaii, Idaho and Illinois.

64. La. R.S. 10:9-305(4) (1993).

65. La. R.S. 10:103(7) (1993).

66. La. R.S. 6:312(E), La. R.S. 6:316 (1986 & Supp. 2002). *Cf.* Chrysler Credit Corp. v. Whitney Nat'l Bank, 824 F. Supp. 587 (E.D. La. 1993) (statutory security interest in deposit account priority dispute under pre-former Chapter 9 law).

67. *See* text accompanying *supra* note 61. Otherwise Louisiana law will send the issue of perfection and priority to be governed by another state's law which does not include consumer deposit accounts within U.C.C. Article 9 and thus provides no perfection mechanism under its U.C.C. Of course, this problem is minor compared to the similar problem that existed under former Chapter 9 choice of law rule whenever the depositary bank of a commercial or consumer account

because Chapter 9 includes consumer deposit accounts within its scope, Section 9-304 has a broader application than U.C.C. Section 9-304. Thus, the choice of law rule of Louisiana governing perfection and priority of a security interest in a consumer deposit account makes it clear that this inclusion of consumer deposit accounts within the ambit of Chapter 9 applies only when Louisiana is the depositary bank's jurisdiction.

Section 9-104 is uniform in Chapter 9. This section explains the concept of "control" of a deposit account. Control under this section may serve two functions. First, "control . . . pursuant to the debtor's security agreement" may substitute for an authenticated security agreement as an element of attachment.[68] Second, when a deposit account is taken as original collateral, the only method of perfection is to obtain control under Section 9-104.[69]

This provision changes existing Louisiana law. Former Chapter 9 provided that a security interest in a deposit account maintained or established with a third party bank is perfected only by giving notice of the security interest to that bank.[70] Chapter 9 changes the law to require more than mere notice to the bank. Either the bank must agree in an authenticated record that the bank will comply with the instructions of the secured party,[71] or the secured party must become the bank's customer with respect to the deposit account.[72]

Under the transition rules of Chapter 9, a secured party which on July 1, 2001 is perfected solely by notice will have one year to comply with the new requirements.[73] Nonetheless, the practical effect of this change will be limited. First, it is rare that a secured party would have relied solely on notice, without having obtained a written acknowledgment from a third party bank. Written acknowledgment is especially important because of the need to obtain a waiver or subordination of the depositary bank's right of set-off and statutory security interest. Such waiver or subordination is necessary in order

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was located outside Louisiana. *See* La. R.S. 10:9-103(7) (1993).

68. La. R.S. 10:9-203(b)(3)(D) (Supp. 2002).

69. La. R.S. 10:9-312(b)(1), 10:9-314 (Supp. 2002).

70. La. R.S. 10:9-305(4) (1993), *as amended by* 2001 La. Acts 128, § 1. Grocery Supply Co. v. Winterton Food Stores, Inc., 655 So. 2d 555 (La. App. 2d 1995).

71. La. R.S. 10:9-104(a)(2) (Supp. 2002). *See also* La. R.S. 10:9-312(b)(1), 10:9-314 (Supp. 2002).

72. La. R.S. 10:9-104(a)(3) (Supp. 2002). *See also* La. R.S. 10:9-312(b)(1), 10:9-314 (Supp. 2002). But if the secured party is the depositary bank, the security interest is automatically perfected (albeit now by "control"), as was true under former Chapter 9. La. R.S. 10:9-104(a)(1) (Supp. 2002) and former La. R.S. 10:9-305(4) (1993).

73. *See* La. R.S. 10:9-703(b) (Supp. 2002). *See also* text accompanying *infra* note 387.

for the creditor's security interest to have commercial value.[74] Also, Chapter 9 continues the substance of former Chapter 9 where, as is usually the case, the creditor is the bank at which a deposit account is maintained. In that circumstance the security interest of the depositary bank is automatically perfected at the time the security interest attaches.[75]

Chapter 9 has suppressed the statements in former Chapter 9 that a security interest in a deposit account is not prejudiced by the debtor's right to withdraw funds from or write checks on the account at will, and that granting a security interest in such an account is not deemed to be a withdrawal of such funds.[76] These provisions are unnecessary.[77] This omission does not change the law.

Chapter 9 does change the definition of "deposit account" from former Chapter 9 to correspond to the interplay of deposit accounts and instruments in U.C.C. Article 9. Former Chapter 9 excluded "an account evidenced by a certificate of deposit" from the definition of deposit account.[78] The revised definition of "deposit account" in Chapter 9 goes further and specifically excludes all accounts evidenced by an instrument.[79]

The definition of the term "instrument" in Chapter 9[80] and in U.C.C. Article 9 is broader than the definition of that term in U.C.C. Article 3,[81] which includes only negotiable instruments. Under U.C.C. Article 9 and Chapter 9, an "instrument" is defined as "a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation . . . and is of a type that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment."[82] Thus, under the new definition an uncertificated certificate of deposit is a deposit account if, and because, there is no writing evidencing the bank's obligation to pay. On the other hand, a non-negotiable certificate of deposit is a deposit account only if it is not an "instrument," i.e., a question that turns on whether the non-negotiable certificate of deposit is "of a type

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74. *See* La. R.S. 10:9-340 (Supp. 2002). *See* text accompanying *infra* notes 89 and 305.

75. *See supra* note 72.

76. *See* former La. R.S. 10:9-305(4) (1993).

77. *See* La. R.S. 10:9-205 (1993 & Supp. 2002).

78. La. R.S. 10:9-105(e) (1993), *as amended by* 2001 La. Acts No. 128, § 1.

79. La. R.S. 10:9-102(a)(29) (Supp. 2002).

80. La. R.S. 10:9-102(a)(47) (Supp. 2002). Chapter 9 includes the non-uniform statement that a negotiable certificate of deposit is an instrument.

81. *See* La. R.S. 10:3-104 (1993) ("instrument" means a "negotiable instrument" as defined therein); U.C.C. § 9-102 cmts. 5(c) and 12 (2001). *See* Baker v. First Am. Nat'l Bank, 111 F. Supp. 2d 799 (W.D. La. 2000) ("nontransferable" certificate of deposit not a negotiable instrument).

82. U.C.C. § 9-102(47) (2001); La. R.S. 10:9-102(47) (Supp. 2002).

that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment."[83]

This revised definition is only a partial step towards clarifying the proper treatment of non-negotiable or uncertificated certificates of deposit, which have become the norm in the banking industry. The clarity is that deposit accounts and instruments are mutually exclusive by definition; the lack of clarity arises from the uncertainty as to non-negotiable CDs. A deposit account evidenced by an instrument is subject to the rules applicable to instruments generally. As a consequence, a security interest in such an instrument cannot be perfected by "control" and the special priority rules applicable to deposit accounts do not apply. Chapter 9 varies from U.C.C. Article 9 in the definition of "instrument" to expressly state in the statute, and not just in the official comments, that a negotiable certificate of deposit is an instrument.[84]

In both U.C.C. Article 9 and Chapter 9, deposit accounts are explicitly excluded from the definitions of "accounts"[85] and "general intangible[s]."[86] Thus, banks are not "account debtors"[87] with respect to deposit accounts, and are not subject to the duties imposed in Sections 9-404 through 9-406. Chapter 9 does add a non-uniform Section 9-343, to specify that the joinder by a depositary bank in a control agreement does not itself constitute a waiver or subordination of the bank's security interest in the deposit account, unless that control agreement specifically so provides.[88] Of course, a depositary bank in Louisiana not only has the right of compensation or set-off, but also a statutory security interest.[89] As a practical matter, a secured party holding a security interest in a deposit account maintained at another depositary institution must obtain an agreement with that other depositary institution that not only provides the benefit of perfection by control to the secured party but further waives or subordinates the depositary institution's security interest and rights of compensation.

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83. *See* U.C.C. § 9-102 cmts. 5(c) and 12 (2001). *See also* In re Omega Envtl., Inc. v. Valley Bank, 219 F.3d 984 (9th Cir. 2000).

84. *See supra* note 80.

85. La. R.S. 10:9-102(a)(2) (Supp. 2002).

86. La. R.S. 10:9-102(a)(42) (Supp. 2002). Thus a deposit account is not a payment intangible, which must be a general intangible. La. R.S. 10:9-102(a)(61) (Supp. 2002).

87. An account debtor is obligated on an account, chattel paper or general intangible, which does not include deposit accounts. La. R.S. 10:9-102(a)(3) (Supp. 2002).

88. *See* discussion *infra* Part VIII.D. A bank is not required to agree to enter into a control agreement even if the debtor customer requests. La. R.S. 10:9-342 (Supp. 2002). *See also* La. R.S. 6:312(E), 6:664(E) (1986 & Supp. 2002).

89. La. R.S. 6:316 (Supp. 2002). *See* text accompanying *supra* note 74.

B. Tort Claims

Chapter 9 follows former Chapter 9 in including all tort claims as eligible original collateral. Once again, this addition in scope is accomplished in Chapter 9 by deletion from U.C.C. Article 9, which limits its scope to commercial tort claims.[90] Indeed, Chapter 9 omits and reserves the definition "commercial tort claim"[91] because Chapter 9 applies to all tort claims and there is no need to refer in the Louisiana statute to commercial tort claims specifically. Chapter 9 goes beyond former Chapter 9 in including specific provisions pertaining to security interests in tort claims, both by following U.C.C. Article 9 and by adding non-uniform provisions.

Tort claims are excluded from the definition of "general intangible." Therefore, because the tortfeasor is not "obligated on a[] . . . general intangible," tortfeasors are not account debtors under U.C.C. Article 9 or Chapter 9.[92] As a result, the rules in Section 9-406 with respect to account debtors are inapplicable to tortfeasors.[93] Instead, the rights and obligations of a tortfeasor are dealt with in non-uniform Subsection 9-411(c).[94]

Once a tort claim is reduced to judgment, non-uniform Section 9-412 governs.[95] If a tort claim is settled under circumstances giving rise to a contractual obligation to pay, the right to payment becomes

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90. *See* La. R.S. 10:9-109(d)(12) (reserved) (Supp. 2002), La. R.S. 10:9-104(k) (1993), *as amended by* 2001 La. Acts No. 128, § 1, and *supra* note 13 and accompanying text. For a discussion of Chapter 9's restriction in the creation of security interests in tort claims to existing tort claims described with some specificity, see *infra* notes 155-159 and accompanying text, and for a discussion of the transition issue caused thereby, see *infra* notes 156 and 386 and accompanying text.

91. *See* La. R.S. 10:9-102(a)(13) (reserved) (Supp. 2002). An understandable but erroneous first impression by readers of Chapter 9 is that this deletion of the definition of commercial tort claims is a prelude to an exclusion of all tort claims, including commercial tort claims, from Chapter 9, rather than an inclusion of all tort claims including consumer.

92. *See* La. R.S. 10:9-102(a)(42), 10:9-102(a)(3) (Supp. 2002).

93. A tortfeasor is not an "account debtor." Because Sections 9-406, 9-407, 9-408 and 9-409 have no application to tort claims, the general rule under Section 9-401 applies. Whether a debtor's rights in a tort claim may be transferred (by a security interest or otherwise) is governed by law other than Chapter 9 (and U.C.C. Article 9 in other states). U.C.C. § 9-102 cmt. 5(g) (2000). Assignments of tort claims are permitted in Louisiana. Dupuis v. Faulk, 609 So. 2d 1190 (La. App. 3d Cir. 1992); *see* La. Civ. Code art. 2652 and discussion in the text accompanying *infra* at note 317. U.C.C. Article 9 does not determine whom the tortfeasor must pay to discharge its obligation. U.C.C. § 9-109 cmt. 15 (2000). *Contra* La. R.S. 10:9-412 (Supp. 2002).

94. *See* discussion *infra* Part VIII.G.

95. *See* discussion *infra* Part III.C and VIII.F.

a payment intangible (or an instrument) and ceases to be a claim arising in tort.[96]

Perfection as to tort claims is by filing.[97] Under the general rule established in Section 9-310, a security interest in rights under a tort claim is perfected by filing a financing statement. Because Chapter 9 does not contain a special choice of law rule governing the perfection and priority rules applicable to tort claims, the general rule applies.[98] As a result, filing a notice in the court records or intervening in any judicial proceedings in which the tort claim is pending is unnecessary. These rules pertaining to tort claims in Chapter 9 do not change Louisiana law.

Under Section 9-412, a tortfeasor may discharge his obligation until he receives notification from the secured party that payment must be made to the secured party. However, the notification required by Section 9-412 is not related to perfection of a security interest in a tort claim. Perfection of a security interest in a tort claim is relevant only as to other creditors (obligees) of the debtor, and not to the tortfeasor as an obligor of the debtor. Filing of a financing statement does not constitute notice to the tortfeasor under Section 9-412.[99]

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96. U.C.C. § 9-109 cmt. 15 (2000).

97. This conclusion results from the general rule that filing is the catch-all method of perfection unless a stated exception applies to a type of collateral. La. R.S. 10:9-310(a). There is no stated special rule for tort claim perfection. *Cf.* Dupuis v. Faulk, 609 So. 2d 1190 (La. App. 3d Cir. 1992) (no filing needed for true assignment of personal injury lawsuit claim).

98. Because none of the exceptions in U.C.C. Sections 9-303 through 9-306 apply, nor do any of the exceptions in the other subsections of U.C.C. Section 9-301, the perfection and priority of security interests in tort claims are governed by the substantive law of the debtor's location. La. R.S. 10:9-301(1) (Supp. 2002). As with other types of collateral where Chapter 9's scope is expanded, the application of this rule to consumer tort claims leaves a gap in instances where the debtor is not located in Louisiana. *See* text accompanying *supra* note 61. Of course, the same problem existed under former Chapter 9, but then included even commercial tort claims in this conundrum. If the debtor granting a security interest in a consumer tort claim is not a Louisiana resident, under Louisiana law another state's law will govern perfection and priority but that other state will not supply any applicable rules under U.C.C. Article 9. La. R.S. 10:9-307(b)(1) (Supp. 2002) and U.C.C. § 9-109(d)(12) (2000). Indeed, perhaps in the rare case where the perfection of a security interest in a consumer tort claim granted by a non-Louisiana resident is judged in a Louisiana judicial forum, the court may look to the law of the District of Columbia (with the same result, that it will not recognize U.C.C. filing as a method of perfection)! La. R.S. 10:9-307(c) (Supp. 2002). This interpretation depends upon whether the phrase "the collateral" in that subsection refers to collateral generally or only to the type of collateral at issue. U.C.C. subsection 9-307(c) appears to apply only if there is not a filing system for most collateral ("generally"), in which case Subsection 9-307(c) would not apply here.

99. *See* discussion *infra* Part VIII.G.

C. Judgments

Chapter 9 includes a right represented by a judgment as eligible original collateral, and not merely as proceeds, carrying forward the same inclusion in former Chapter 9.[100] Once again, this addition is by omission of an exclusion contained in U.C.C. Article 9.[101] Judgments are probably general intangibles and payment intangibles in which a security interest is perfected by filing.[102] But due to a non-uniform exclusion in Section 9-406,[103] Section 9-411 and the Louisiana Revised Statutes govern the rights and duties of the judgment obligor, rather than Section 9-406.[104] Again, similar to tort claims, notice by the secured party to the judgment obligor is required to trigger any obligation upon the judgment obligor, but that matter is separate from perfection. Filing of a financing statement is not notice to the judgment obligor. A security interest in rights under a judgment is perfected by filing a financing statement without the additional necessity of filing a notice in the court records or intervening in any judicial proceedings in which the judgment was rendered. Nor does perfection of a security interest in rights under a judgment require the filing of a notice in the mortgage records even if the judgment is recorded.[105]

Mere perfection of a security interest in the judgment does not bind third parties dealing with immovable property affected by a

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100. La. R.S. 10:9-104(h) (reserved) (1993), *as amended by* 2001 La. Acts No. 128, § 1.

101. La. R.S. 10:9-109(d)(9) (reserved) (Supp. 2002). However, the usefulness of this expansion of scope to include judgments may be limited to instances where the debtor is "located" in Louisiana so that the choice of law rules of Chapter 9 and U.C.C. Article 9 in other states both elect Louisiana law to govern perfection. *See supra* note 61 and *infra* note 106 and accompanying text. The same problem existed under former Chapter 9, if the debtor's chief executive office or residence (as applicable) was located outside Louisiana.

102. Although unlikely (and unintended), perhaps a judgment may fall within the expanded definition of account. La. R.S. 10-9-102(a)(2) (Supp. 2002). If not, a right represented by a judgment is a general intangible, which is the residual category. La. R.S. 10:9-102(a)(42) (Supp. 2002). Either way, the perfection and account debtor rules discussed in the text apply. La. R.S. 10:9-310(a) (Supp. 2002) (perfection) and La. R.S. 10:9-102(a)(3) (Supp. 2002) ("account debtor"). Note that both sales of accounts and payment intangibles are covered by Chapter 9, as well as security interests therein. La. R.S. 10:9-109(a)(3), 10:9-309(2), and 10:9-309(3) (Supp. 2002) (automatic perfection).

103. La. R.S. 10:9-406(a) (Supp. 2002). *See* discussion *infra* Part VIII.F.

104. In this context use of the typical term "judgment debtor" is potentially confusing, as the debtor granting a security interest in a judgment is the judgment creditor. *See* text accompanying *infra* note 106.

105. *See* La. R.S. 10:9-411(a) (Supp. 2002). *See also* discussion *infra* Part VIII.F; Sanson Four Rentals, L.L.C. v. Faulk, 803 So. 2d 1048 (La. App. 2d Cir. 2001).

judicial mortgage. A separate filing in the immovable property records is needed to affect third parties in that respect. Accordingly, as a matter of good practice a secured party taking a security interest in a judgment should not only file a financing statement, but also—if the judgment is recorded—file an assignment in the applicable mortgage records.

Chapter 9 does not contain a special choice of law provision pertaining to judgments. Accordingly, the correct choice of law governing perfection and priority of a security interest in a judgment is only clear in Chapter 9 when the debtor (the judgment creditor) is located in Louisiana.[106] Under Section 9-301, in instances where the debtor (the judgment creditor) is a registered organization formed under the laws of another state or is otherwise not located in Louisiana under Section 9-307, the substantive law of that other jurisdiction will govern perfection and priority of a security interest in the judgment, even if the judgment is rendered by a Louisiana court. But in those cases U.C.C. Article 9 will not supply any such rules.

D. Life Insurance Policies

Chapter 9 reproduces the substance of former Chapter 9 by including within its scope a transfer of an interest in or an assignment of a claim under a policy of life insurance.[107] This inclusion is created by removing life insurance policies from U.C.C. Article 9's general exclusion of all insurance policies.[108] The treatment of life insurance policies in former Chapter 9 was derived from Louisiana Civil Code Article 3158, which had formerly governed pledges of life insurance policies. In contrast, most, if not all, other states deal with the pledge of life insurance policies outside of U.C.C. Article 9.[109]

Chapter 9 does not include a special choice of law provision with respect to the perfection and priority of a security interest in a life

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106. *See* La. R.S. 10:9-301(1) (Supp. 2002). *See* text accompanying *supra* notes 61 and 101.

107. La. R.S. 10:9-104(g) (1993), *as amended by* 2001 La. Acts No. 128, § 1.

108. La. R.S. 10:9-109(d)(8) (Supp. 2002). *See also infra* note 114, and text accompanying *infra* notes 156 and 159, regarding Chapter 9's requirements to create a security interest in a life insurance policy. Serious consideration was given to including life insurance policies within the scope of U.C.C. Article 9 during its drafting process. Steven L. Harris & Charles W. Mooney, Jr., *How Successful was the Revision of U.C.C. Article 9?: Reflections of the Reporters*, 74 Chi.-Kent L. Rev. 1357, 1374-75 (1999).

109. The general pattern in other states is to allow security assignments if the policy does not prohibit them. *Compare with infra* note 122 and accompanying text. Under most state laws, the assignment is perfected by notifying the insurer. Barkley Clark, The Law of Secured Transactions Under the Uniform Commercial Code §1.08 [7][a] (Rev. ed. 2001).

insurance policy.[110] To do so would be of little avail, because the other states' rules under U.C.C. Article 9, Part 3 would be inconsistent. If the debtor is located in Louisiana under Section 9-307, then Louisiana's choice of law rule in Section 9-301 will allow the secured party to rely on these non-uniform Chapter 9 provisions. Chapter 9 therefore provides a clear application of these rules governing the perfection and priority of a security interest in a life insurance policy only when the debtor is located in Louisiana under Section 9-307. However, even in instances where the debtor is located in Louisiana, if the life insurance company is not located in Louisiana, a secured party will want to comply with the laws of the state where the life insurance company is domiciled. Generally, this is done by obtaining a written acknowledgment of the pledge and security interest from the life insurance company.

Chapter 9 changes the law from former Chapter 9 as to the method of perfection applicable to a security interest in a life insurance policy.[111] Under former Chapter 9, a secured party was required either to take possession of the life insurance policy to file a financing statement covering the policy.[112] In addition, the secured party also was required to deliver to the insurance company the written security agreement. Chapter 9 provides that the only method of perfecting a security interest in a life insurance policy is to obtain control under Section 9-107.1. Filing is neither necessary nor effective.[113] Under the transition rules of Chapter 9, secured parties with security interests in life insurance policies perfected under former Chapter 9 have one year to comply with the requirement in Chapter 9.[114]

Chapter 9 continues the requirement in former Chapter 9 of written consent of the beneficiary of the insurance policy in certain cases if the beneficiary is not the insured or his estate.[115]

The concept of possession of the life insurance policy as a method of perfection has been suppressed.[116] Modern commercial practice is

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110. *See* text accompanying *supra* note 61. The same problem existing under former Chapter 9.

111. La. R.S. 10:9-107.1 (Supp. 2002).

112. La. R.S. 10:9-305(2) (1993), *as amended by* 2001 La. Acts No. 128, § 1.

113. *See* La. R.S. 10:9-310(b)(8), 10:9-312(b)(5), 10:9-314, 10:9-329.1 (Supp. 2002).

114. *See* La. R.S. 10:9-703(b) (Supp. 2002). *See* discussion *infra* Part XI. For a discussion of Chapter 9's restriction in the creation of security interests in life insurance policies to existing policies described with some specificity, see *infra* notes 157-159 and accompanying text, and for a discussion of the transition issue caused thereby, see *infra* notes 156 and 386 and accompanying text.

115. La. R.S. 10:9-107.1(b) (Supp. 2002) and former La. R.S. 10:9-203(5), 10:9-305(2)(c) (1993), *as amended by* 2001 La. Acts No. 128, § 1.

116. *See* former La. R.S. 10:9-305(2)(a) (1993) and La. Civ. Code art. 3158.

that life insurance companies do not attribute legal consequences to possession of a sole "original" life insurance policy. Moreover, the requirement of possession is not practical as applied to an interest in a group life insurance policy.

The definition of "general intangible" in Chapter 9 explicitly excludes life insurance policies.[117] This exclusion prevents the general rules of creation, perfection, and priority applicable to general intangibles from applying to life insurance policies. Instead, specific rules under Chapter 9 apply to the creation,[118] perfection,[119] and priority[120] of a security interest in a life insurance policy.

The exclusion of life insurance policies from the definition of "general intangible" also prevents life insurance companies from being "account debtors" under Chapter 9.[121] This exclusion prevents the application of Sections 9-406 and 9-408 to life insurance companies. Instead, Section 9-401 applies, so whether a debtor's rights to a life insurance policy may be voluntarily or involuntarily transferred is governed by law other than Chapter 9, such as the Louisiana Insurance Code[122] and the terms of the life insurance policy itself. Chapter 9 also adds Section 9-344, pertaining to the rights of life insurance companies. This Section is similar to the provisions applicable to banks and securities intermediaries in U.C.C. Articles 8 and 9.[123]

Chapter 9 adds a non-uniform Section 9-329.1 governing priority of security interests in a life insurance policy, modeled upon the priority rules for deposit accounts in Section 9-327. Chapter 9 also adds a non-uniform provision in Section 9-208(b)(6) imposing a duty upon a secured party who has control of a life insurance policy to terminate under appropriate circumstances.

E. Collateral Mortgage Notes

For purposes of Chapter 9, a collateral mortgage note is an instrument.[124] However, the definition of investment property excludes

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117. La. R.S. 10:9-102(a)(42) (Supp. 2002).

118. La. R.S. 10:9-108(e)(3), 10:9-109(d)(8), 10:9-203(b)(3), and 10:9-204(b)(4) (Supp. 2002).

119. La. R.S. 10:9-107.1, 10:9-208(b)(6), 10:9-310(b)(8), 10:9-312(b)(5), and 10:9-314 (Supp. 2002).

120. La. R.S. 10:9-329.1 (Supp. 2002).

121. *See* La. R.S. 10:9-102(a)(3) (Supp. 2002).

122. Subject to the terms of the policy relating to its assignment, life insurance policies (other than group life insurance policies) under the terms of which the beneficiary may be changed upon the sole request of the insured, may be assigned either by pledge or transfer of title, by an assignment executed and delivered to the insurer. *See* La. R.S. 22:642 (1995) and *supra* note 109 and accompanying text. *See also* La. R.S. 22:170(A)(7), 22:634, 22:636(A)(2), 22:643, 22:647 (1995).

123. *See* discussion *infra* Part VIII.E.

124. *See* La. R.S. 10:9-102(d)(2), 10:9-102(a)(47) (Supp. 2002). For the special

collateral mortgage notes in order to prevent the rules applicable to the creation, perfection, and priority of security interests in investment property from applying to collateral mortgage notes.[125] Similarly, in multiple places in Chapter 9, collateral mortgage notes are expressly excluded from many rules pertaining to creation, perfection, and priority which are otherwise applicable to instruments generally.[126]

Most importantly, Chapter 9 reproduces longstanding Louisiana law requiring possession of a collateral mortgage note for perfection.[127] While Chapter 9 follows U.C.C. Article 9 in changing the law to permit perfection by filing with respect to instruments generally, Chapter 9 varies to exclude collateral mortgage notes in that respect.[128] Without this variation, a financing statement covering instruments might have the unintended effect of giving the secured party a mortgage upon the debtor's immovable property.

Chapter 9 provides a special choice of law rule with respect to collateral mortgage notes.[129] By definition, a collateral mortgage note for purposes of Chapter 9 is limited to an instrument secured by a collateral mortgage on immovable property located in Louisiana.[130] A security interest in a collateral mortgage note may be perfected only by possession under the non-uniform provisions of Section 9-313. Because a collateral mortgage note is by definition secured by a mortgage on Louisiana immovable property and because filing is not an appropriate method of perfection as to collateral mortgage notes,[131] Chapter 9 includes this special choice of law provision to prevent another state's laws from governing perfection and priority

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nature of a collateral mortgage note in Louisiana, see Max Nathan, Jr., & H. Gayle Marshall, *The Collateral Mortgage,* 33 La. L. Rev. 497 (1973); David S. Willenzik, *Future Advance Priority Rights of Louisiana Collateral Mortgages: Legislative Revisions, New Rules, and a Modern Alternative,* 55 La. L. Rev. 1 (1995). A collateral mortgage note is not just like any other promissory note, and itself is not a separate debt instrument. Diamond Servs. Corp. v. Benoit, 780 So. 2d 367, 371 (La. 2001). *See also* La. R.S. 9:5551-5554 (Supp. 2002).

125. La. R.S. 10:9-102(a)(49) (Supp. 2002).

126. *See, e.g.*, La. R.S. 10:9-108(e)(7), 10:9-204(b)(7), 10:9-301(5), 10:9-310(b)(5), 10:9-312(a), 10:9-312(b)(4), 10:9-312(e), 10:9-312(g), 10:9-322(f)(6) (Supp. 2002).

127. La. R.S. 10:9-312(b)(4) (Supp. 2002). However, former Chapter 9 dealt with collateral mortgage notes as instruments with no specific reference thereto. *See* La. R.S. 10:9-304(1) (1993), *as amended by* 2001 La. Acts No. 128, § 1. *See also* La. Civ. Code art. 3158 and La. R.S. 9:5551 (1991).

128. La. R.S. 10:9-310(b)(5), 10:9-310(b)(6), 10:9-312(b)(4), and 10:9-313(a) (Supp. 2002). Thus Subsection 9-330(d) has no application to collateral mortgage notes because a security interest in a collateral mortgage note, although an instrument, cannot be "perfected by a method other than possession."

129. La. R.S. 10:9-301(5) (Supp. 2002).

130. La. R.S. 10:9-102(d)(2) (Supp. 2002). *Compare with* La. R.S. 9:5550(1) (1991).

131. *See supra* notes 127-128 and accompanying text.

of a security interest in a collateral mortgage note. Chapter 9 is the sole source of law governing perfection, the effect of perfection or non-perfection, and the priority of a security interest in a collateral mortgage note.

A security interest in a collateral mortgage note requires a specific description of the collateral mortgage note for attachment.[132] Chapter 9 does not change traditional Louisiana law with respect to the priority of collateral mortgages derived from the pledge and possession of a collateral mortgage note. Under Section 9-322(f)(6), the general priority rules under Section 9-322 are subject to Louisiana Revised Statutes 9:5551 with respect to collateral mortgages. This statute preserves the longstanding Louisiana rule governing the ranking of a collateral mortgage in instances in which the debt owed to a pledgee of a collateral mortgage note is reduced to zero, but debt secured by the pledge is incurred later, with no interruption in the possession of the collateral mortgage note.[133]

F. Public Finance Transactions

Chapter 9 contains a uniform definition of "public-finance transaction."[134] However, this term is used only in Section 9-515(b) to increase the time period during which an initial financing statement filed in connection with a public-finance transaction is effective from five years to thirty years after the date of filing. The term is also used in Section 9-525(a)(12) to increase the filing fee for such a financing statement to one hundred dollars.

The real operative provision pertaining to security interests granted by governmental entities is the definition of "governmental unit."[135] Chapter 9 adds non-uniform language to this definition to specify that a public trust such as the Louisiana Public Facilities Authority[136] is a governmental unit. The definition also expressly includes the public entities covered by the statutes on public finance.[137] The definition of "governmental unit" is used in the

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132. La. R.S. 10:9-108(e)(7) (Supp. 2002). Although certainly the normal practice, the collateral mortgage note must also already be in existence. *See* La. R.S. 10:9-204(b)(7) (Supp. 2002). For a discussion of the presumably rare transition problem caused thereby, see *infra* notes 157 and 386 and accompanying text.

133. La. Civ. Code art. 3158(1) (pledges before Jan. 1, 1990).

134. La. R.S. 10:9-102(a)(67) (Supp. 2002).

135. La. R.S. 10:9-102(a)(45) (Supp. 2002).

136. *See* La. R.S. 9:2341 (1991) and 40:1487 (2001). *See also* Louisiana Pub. Facilities Auth. v. Foster, 795 So. 2d 288 (La. 2001).

137. La. R.S. 10:9-102(2)(45) (Supp. 2002). *See also* La. R.S. 39:1421(2) (1989) and text accompanying *infra* note 145.

definitions of "account,"[138] "public-finance transaction,"[139] in the scope provision,[140] and in the non-uniform provisions in Section 9-406[141] and 9-408.[142]

Chapter 9 applies to security interests created by a governmental unit, except to the extent that another statute governs the issue in question.[143] This scope provision changes the law. Security interests created by public entities in connection with the issuance of securities were excluded under former Chapter 9.[144] A special statute was enacted in connection with the adoption of Chapter 9 to displace the application of Chapter 9 as to the creation, perfection, and priority of security interests in taxes, income, revenues, monies or receipts granted by public entities.[145] That statute, however, makes no reference to enforcement.

G. As-Extracted Collateral

The term "as-extracted collateral" is a definition new to U.C.C. Article 9, but does not reflect a change in the law.[146] The term refers to minerals and related accounts resulting from the sale of minerals at the wellhead or minehead to which special rules for perfecting security interests apply. Chapter 9 carries forward Louisiana's non-uniform variations, made to mesh Chapter 9 with Louisiana's mineral law.[147]

The definition of "as-extracted collateral" is modified in Chapter 9 to substitute Louisiana terminology from Louisiana's mineral law for common law language, and reproduces the language used in former Chapter 9. The definition uses the term "mineral rights," which is a non-uniform definition added in Chapter 9.[148] This definition carries forward the substance of the same defined term

138. La. R.S. 10:9-102(a)(2) (Supp. 2002) (account includes winnings from governmental unit's lottery).
139. La. R.S. 10:9-102(a)(67)(C) (Supp. 2002).
140. La. R.S. 10:9-109(c)(2) (Supp. 2002).
141. La. R.S. 10:9-406(i) (Supp. 2002).
142. La. R.S. 10:9-408(f) (Supp. 2002).
143. La. R.S. 10:9-109(c)(2) (Supp. 2002). Chapter 9 clarifies the Louisiana scope provision by adding a reference to the Louisiana Constitution too: Chapter 9 does not apply to the extent that another statute or the constitution of Louisiana expressly governs the creation, perfection, priority, or enforcement of a security interest created by the state or a Louisiana governmental unit.
144. La. R.S. 10:9-104(e) (1993), *as amended by* 2001 La. Acts No. 128, § 1.
145. 2001 La. Acts No. 128, §14 (enacting La. R.S. 39:1430.1).
146. *See* La. R.S. 10:9-102(a)(6) (Supp. 2002); U.C.C. § 9-102 cmt. 4(c) (2000).
147. La. R.S. 10:9-103(5) (1993), *as amended by* 2001 La. Acts No. 128, § 1.
148. La. R.S. 10:9-102(d)(13) (Supp. 2002).

under former Chapter 9.[149] It also is another illustration of the purpose underlying the intent that the definitions in Chapter 9 are intended solely for use in Chapter 9 and not in interpreting other matters of Louisiana law.[150] Mineral rights are defined under Chapter 9 to be immovable property, but also specifically include net profit interests, which in fact may or may not be immovable property interests under the Louisiana Mineral Code.

The definition of "accounts" in Chapter 9 contains a non-uniform addition, including within "accounts" rights to payment arising under mineral rights, even if such rights to payment are characterized as rentals under Louisiana law.[151] The exception to this inclusion is rentals payable to a landowner or mineral servitude owner. A corresponding change is made in the scope provision in Section 9-109, to include these rights to payment under mineral rights within the scope of Chapter 9 and the definition of accounts.[152]

Louisiana's non-uniform filing rules apply to as-extracted collateral. Under Chapter 9, filings pertaining to as-extracted collateral are made in the regular Uniform Commercial Code records, not the mortgage records for immovable property, even though immovable property descriptions are attached.[153] Also, Chapter 9 continues the Louisiana system in permitting financing statements covering as-extracted collateral to be filed in any parish selected by the filer, rather than only in the parish where the pertinent immovable property is located.[154]

Pertaining to minerals upon severance, Chapter 9 omits and reserves Subsection 9-320(d). Subsection 9-320 (d) is included in U.C.C. Article 9 to provide a rule in those states in which a mortgage encumbers minerals both before extraction and after extraction. Neither part of that rule is law in Louisiana.

IV. CREATION

A. Description

U.C.C. Section 9-108(e) lists several types of collateral which require greater specificity when described in a security agreement.

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149. *See* former La. R.S. 10:9-102(4)(c) (1993), *as amended by* 2001 La. Acts No. 128, § 1.

150. *See supra* note 19 accompanying text. *See also* text accompanying *supra* note 28.

151. La. R.S. 10:9-102(a)(2) (Supp. 2002). *See* former La. R.S. 10:9-106 (1993), *as amended by* 2001 La. Acts No. 128, § 1.

152. *See* La. R.S. 10:9-109(d)(11)(E) (Supp. 2002).

153. *See* La. R.S. 10:9-501, 10:9-502(b) (Supp. 2002).

154. La. R.S. 10:9-501, 10:9-502(b) (Supp. 2002). *See* discussion *infra* Part V.A.

For these types of collateral, description only by type of collateral using the statutory U.C.C. definitions is an insufficient description in a security agreement for purposes of creating a security interest. The purpose of requiring greater specificity of description is to prevent debtors from inadvertently encumbering certain property. Under U.C.C. Article 9 the types of collateral subject to this specificity requirement are commercial tort claims, or, in a consumer transaction, a security entitlement, securities account, or commodity account.

Chapter 9 adds more collateral types to its Subsection (e). Because Chapter 9 includes all tort claims and not just commercial tort claims, this requirement necessarily applies to all tort claims. In addition, this section's requirement of more specific description is applied in Chapter 9 to life insurance policies, judgments, beneficial interests in a trust, interests in an estate, and collateral mortgage notes.[155] It was considered appropriate policy to require such collateral to be described with greater specificity than, for instance, picking up a judgment or an interest in a trust or estate merely by reference to "all general intangibles." Subsection 9-108(e) changes Louisiana law from former Chapter 9. This change in the law may require action by secured parties under the transition rules.[156]

It should be noted that clauses (1) and (4) of Subsection 9-108(e) also provide an exception to this description requirement. Each clause provides that a description only by definition type is an insufficient description of a tort claim or a judgment, other than as a form of proceeds under Section 9-315.[157] In instances where a tort claim or a judgment is proceeds of a perfected security interest in other collateral, the general rule of continued automatic perfection under Section 9-315 will usually apply. That basic rule provides that a security interest in proceeds remains perfected beyond the period of automatic perfection if a filed financing statement covers the original collateral and the proceeds (tort claim or judgment) are collateral in which a security interest may be perfected by filing. In such situations, the secured party is not relying on the generally applicable perfection (and attachment) rules under Subsection 9-315(d)(3), but instead under Subsection 9-315(d)(1). Even without the non-uniform

155. *See also* text accompanying *infra* note 159.

156. A security interest created by general description that is enforceable (validly created) under former Chapter 9 but does not satisfy the rules under Chapter 9 for attachment due to an insufficient description under Section 9-108(e) will become unenforceable on July 1, 2002. La. R.S. 9-703(b) (Supp. 2002). *See* discussion *infra* Part XI, especially text accompanying *infra* note 386. *See also* U.C.C. § 9-703 cmt. 2 (2002).

157. The scope provisions of U.C.C. Article 9 include judgments taken on a right to payment that was collateral, and tort claims constituting proceeds of collateral. U.C.C. § 9-109(d)(9); § 9-109(12); § 9-102 cmt. 5(g); § 9-109 cmt. 15 (2002).

additions in Subsection 9-108(e)(1) and (4), which add the phrase "other than as a form of proceeds," the result should be that either a tort claim or a judgment which constitute proceeds of collateral is exempt from the requirement for specific description for attachment.

B. After-Acquired Collateral

Chapter 9 has non-uniform additions to Section 9-204, which must be read and applied in conjunction with Section 9-108. U.C.C. Article 9 makes after-acquired property clauses in a security agreement ineffective as to two types of collateral: certain consumer goods and commercial tort claims. Chapter 9 is uniform with respect to the after-acquired consumer goods provision. However, Chapter 9 applies the after-acquired property clause restriction to all tort claims, and also to security interests in a judgment, a life insurance policy, a beneficial interest in a trust, an interest in an estate, or a collateral mortgage note.[158] The consequence is that under Chapter 9, in order for a security interest to attach to a tort claim, a judgment, a life insurance policy, a beneficial interest in a trust, an interest in an estate, or a collateral mortgage note, such collateral must be in existence when the security agreement is authenticated. In addition, the security agreement must describe such collateral with greater specificity than simply "all tort claims," or "all judgments," or the like.[159]

The combined effect of Sections 9-108 and 9-204 is that an after-acquired collateral clause in a security agreement will not reach future tort claims, judgments, life insurance policies, beneficial interests in a trust, interests in an estate or collateral mortgage notes. In contrast, and uniform with U.C.C. Article 9, a security entitlement, a securities account or a commodity account, each in a consumer transaction, is subject to Section 9-108, but not Section 9-204.

C. Supporting Obligation

The new term "supporting obligation" covers the most common types of credit enhancements: suretyship obligations and letter-of-credit rights that support one of the types of collateral specified in the definition.[160] U.C.C. Article 9 now contains rules explicitly governing attachment, perfection, and priority of security interests in supporting obligations. These provisions reflect the principle that a supporting obligation is an incident of the collateral it supports.

158. La. R.S. 10:9-204(b) (Supp. 2002). *See also* text accompanying *supra* note 156. *But see* text accompanying *supra* note 158.
159. *See* U.C.C. § 9-108 cmt. 5 (2002).
160. *See* La. R.S. 10:9-102(a)(77) (Supp. 2002).

Chapter 9 varies the language of these U.C.C. Article 9 rules pertaining to supporting obligations. These modifications in Chapter 9 do not change the meaning or intent of these rules, but instead substitute language consistent with Louisiana principles pertaining to accessory obligations. A security interest in a supporting obligation automatically follows from a security interest in the underlying supported collateral.[161]

D. Repledge by Secured Party

U.C.C. Section 9-207 deals with the rights and duties of a secured party having possession or control of collateral. One of those rights is the right of a secured party to repledge such collateral. Subsection 9-207(c)(3) in U.C.C. Article 9 eliminates the qualification in former U.C.C. Article 9 and former Chapter 9 to the effect that the terms of a "repledge" of collateral may not "impair" a debtor's right to redeem collateral.[162] Under U.C.C. Article 9, if the secured party repledges collateral, the debtor's right to redeem is unimpaired as against the debtor's original secured party, but nevertheless may not be enforceable as against the new secured party. Indeed, in the vast majority of cases where repledge rights are significant, the security interest of the second secured party will be senior to the debtor's interest under U.C.C. Article 9. The new language in U.C.C. Article 9 is intended to eliminate any limitation on the secured party's statutory right to repledge collateral to those repledge transactions in which the collateral does not secure a greater obligation than that of the original debtor.[163] U.C.C. Article 9 leaves the burden on the debtor to restrict this right in its agreement with the secured party. These rules follow common law precedents which apply unless the parties otherwise agree. The merits of the expanded right of repledge afforded by U.C.C. Article 9 are debatable.[164]

Chapter 9 rejects this approach. Non-uniform Subsection 9-207(c) in Chapter 9 provides that a secured party's repledge is subject to and on terms that do not impair the debtor's right to redeem the

161. Under Chapter 9 a security interest in collateral "also includes the rights to" a supporting obligation under Chapter 9, and perfection does the same. *See* La. R.S. 10:9-203(f) and La. R.S. 10:9-308(d) (Supp. 2002). Chapter 9 is similarly modified with respect to other accessory obligations transferred with collateral constituting the principal obligation, avoiding the questionable concept of granting a security interest in another security interest. *See* La. R.S. 10:9-203(g) and La. R.S. 10:9-308(e) (Supp. 2002).

162. *See* former La. R.S. 10:9-207(2)(e) (1993), *as amended by* 2001 La. Acts No. 128, § 1.

163. *See* U.C.C. § 9-207 cmt. 5; § 9-314 cmt. 3 (2002).

164. *See* Kenneth C. Kettering, *Repledge and Pre-Default Sale of Securities Collateral Under Revised Article 9*, 74 Chi.-Kent L.Rev. 1109, 1119 (1999).

collateral, unless otherwise agreed by the parties. Thus, under Chapter 9 the burden is on the secured party, rather than the debtor, to provide different treatment in the security agreement. This change is consistent with Louisiana civil law principles.[165]

E. Proceeds

U.C.C. Article 9 continues the former rule that a security interest automatically attaches to proceeds of the collateral.[166] U.C.C. Article 9 has expanded the former definition of proceeds to encompass rights arising out of the license of property and distribution on stock.[167] Former Chapter 9 already contained an expanded definition of proceeds to include whatever is collected on, or distributed on account of, collateral, such as stock dividends.[168] Because U.C.C. Article 9 has adopted this expanded approach, Chapter 9 reproduces the substance of the expanded language from former Chapter 9, but uses the uniform language of U.C.C. Article 9. This expansion of the definition of "proceeds" does not change Louisiana law.

However, former Chapter 9 also contained a non-uniform provision expressly excluding from "proceeds" receipts that are derived from the disposition of collateral by a secured party by way of public or private sale or by judicial sale.[169] This provision has been suppressed. Under Chapter 9 "proceeds" do include such receipts.[170] This provision changes Louisiana law.

The definition of "proceeds" is also narrower in scope. Under the definition in former U.C.C. Section 9-306, proceeds included not only whatever was received from the sale, exchange, or other disposition of collateral but also whatever was received from the sale, exchange or other disposition of proceeds. Thus, there could be

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165. Except in limited circumstances, Louisiana rejects the doctrine of *la possession vaut titre*. *See also* La. Civ. Code arts. 3165, 3166, and 3179. Louisiana Civil Code Articles 3145 and 3146 provide that one person may pledge the property of another, provided it be with the express or tacit consent of the owner. But this tacit consent must be inferred from the circumstances, so strong as to leave no doubt of the owner's intention.

166. La. R.S. 10:9-315 (Supp. 2002). *See* former La. R.S. 10:9-306 (1993), *as amended by* 2001 La. Acts No. 128, § 1; Henry Gabriel, Louisiana Security Rights in Personal Property, ch. 8(B) (3d ed. 1994).

167. La. R.S. 10:9-102(a)(64) (Supp. 2002).

168. La. R.S. 10:9-306(1)(a)(ii) (1993).

169. La. R.S. 10:9-306(1)(a)(i) (1993).

170. *See* La. R.S. 10:9-615 (Supp. 2002). But if after a disposition the junior secured party remits surplus proceeds to the debtor, it is questionable whether a senior secured party can claim such proceeds. *See* Timothy R. Zinnecker, The Default Provisions of Revised Article 9 of the Uniform Commercial Code 92 (1999). The junior secured party is protected by Section 9-615(g). *See* U.C.C. § 9-610 cmt. 5 (2002).

proceeds of proceeds, and so on. This chain of collateral consisting of proceeds and proceeds of proceeds could technically go on until the secured party could no longer show that the proceeds were received upon disposition of the collateral or proceeds. Under the new definition, proceeds are limited to the first generation, being what is acquired from, collected on, distributed on account of, or arising from the collateral. Proceeds of proceeds are covered as "collateral" directly. No change in meaning is intended, and the essential test remains the identification requirement.

The new definition resolves an issue under former law concerning whether lease rentals constitute proceeds of the secured party's collateral when the debtor has granted a security interest in goods and then later leases those goods and receives rent payments under the lease. This definition makes it clear that the lease rentals from a later lease are proceeds of the collateral.[171] Other revenue derived from the use of collateral may present a more difficult question. It is not clear how to characterize income from fares to ride a bus or income from game or slot machines installed in a restaurant, bar or other facility, when the bus or machine is collateral. Perhaps this income is "proceeds," as what is acquired upon the license of collateral. Beyond a certain point, the secured party should not be able to claim income as proceeds without a more explicit provision in the security agreement.

This definition continues existing law that casualty insurance proceeds from collateral may be considered as proceeds to the extent of the value of the insurance payable by reason of loss or damage to the collateral, except to the extent the insurance is payable to a person other than the debtor or the secured party. This result includes insurance proceeds for property damage paid by a third party tortfeasor's liability insurer, and not just by the debtor's property insurer.[172] This result, however, does not mean that a secured party can hold a tortfeasor's insurance company liable for payment to the debtor.[173] If the insurance contract specifies the person to whom insurance proceeds are payable, then the insurance proceeds should be paid according to the loss payable clause in the insurance contract

171. *See* former U.C.C. § 9-306 cmt. 6 (1972); Permanent Editorial Board for the Uniform Commercial Code, Commentary No. 9 (June 25, 1992). *But see* In re Clearly Bros. Constr. Co., Inc., 9 B.R. 40 (Bankr. S.D. Fla. 1980). The answer is not clear if instead the lease of the goods already exists at the time the security interest in the goods (only, without express inclusion of the lease as collateral) is created. It is debatable whether or not rental proceeds under a prior lease would be proceeds subject to the security interest.

172. General Motors Acceptance Corp. v. Wausau Ins. Co., 669 So. 2d 619 (La. App. 2d Cir. 1996).

173. Scholfield Bros. v. State Farm Mutual Auto. Ins. Co., 752 P.2d 661 (Kan. 1988); Fidelity Fin. Servs. v. Blaser, 889 P.2d 268 (Okla. 1994).

and not according to the security agreement. Thus, if a secured party desires to have insurance proceeds from collateral paid directly to it, its name should be set out in the loss payable clause of the insurance contract, as well as in the security agreement.

F. True Sale

U.C.C. Article 9 makes it clear that a seller of accounts retains no interest in the property sold.[174] This provision rejects the much criticized holding in *Octagon Gas Systems, Inc. v. Rimmer*.[175] Chapter 9 goes further and carries forward in Section 9-109 a non-uniform provision from former Chapter 9. Subsection 9-109(e) provides that the application of Chapter 9 to the sale of accounts should not result in the sale transaction being recharacterized as a transaction to secure debt. The predecessor language to Subsection 9-109(e) was added to former Chapter 9 in 1997 as a rebuttal to the *Octagon* decision.[176]

V. PERFECTION BY FILING

A perfected security interest is an attached security interest that will prevail over a competing creditor, including a trustee in bankruptcy having the status of a lien creditor on the commencement of the debtor's bankruptcy.[177] There are three primary ways in which an attached security interest may be perfected. A security interest may be perfected by filing, the secured party's taking possession of the collateral[178] or, in certain cases, control.[179] In a few instances, U.C.C. Article 9 provides that a security interest may be perfected automatically upon attachment.[180]

The primary method of perfection is for the secured party to file a proper financing statement in the appropriate Uniform Commercial Code filing office. For most security interests, perfection either is

174. *See* La. R.S. 10:9-318 (Supp. 2002).

175. 995 F.2d 948 (10th Cir. 1993). *See* Permanent Editorial Board for the Uniform Commercial Code, Commentary No. 14 (June 14, 1994).

176. *See* former La. R.S. 10:9-102(1) (1993), *as amended by* 2001 La. Acts No. 128, § 1.

177. 11 U.S.C. § 544(c)(1) (1994). *See* La. R.S. 10:9-317(a) (Supp. 2002). "Lien creditor" is a defined term in U.C.C. Article 9, and should not be confused with "lienholder." *Compare* La. R.S. 10:9-102(a)(52) (Supp. 2002) *with* U.C.C. § 9-102(d)(10) (2000).

178. *See* La. R.S. 10:9-313 (Supp. 2002).

179. *See* La. R.S. 10:9-314 (Supp. 2002).

180. *See* La. R.S. 10:9-309 (Supp. 2002). *See also* La. R.S. 10:9-308, 10:9-312 (Supp. 2002).

permitted or is mandatory by filing.[181] Chapter 9 has multiple non-uniform changes regarding perfection by filing, resulting in a significant variation from U.C.C. Article 9.

A. Filing System

Section 9-501 of Chapter 9, governing filing of financing statements in Louisiana, is entirely non-uniform. Chapter 9 continues the unique filing system adopted by former Chapter 9. In Louisiana, a financing statement may be filed in the Uniform Commercial Code records of the Clerk of Court in any parish, or if in Orleans Parish with the Recorder of Mortgages, without regard to the location of the debtor or the collateral within the state.[182] Each parish is linked by computer to the office of the Louisiana Secretary of State, which maintains a master, state-wide computer index of all Uniform Commercial Code filings.[183] This system is not an alternative suggested in U.C.C. Article 9,[184] but is fully consistent with the policy of central filing strongly promoted by U.C.C. Article 9. This Louisiana system combines the principal advantage of state-wide filing, which is ease of searches and access to information, with the convenience of local filing offices.

The Louisiana Secretary of State is not a "filing office."[185] It accepts no filings of Uniform Commercial Code records, nor does that office perform searches. Instead, search requests are processed by the Clerks of Court and in Orleans Parish by the Recorder of Mortgages. This system has worked exceedingly well in Louisiana since its adoption in 1990. Louisiana has avoided the serious time delays encountered by states which have adopted pure central filing, with a solitary office handling all Uniform Commercial Code filings and searches in a state.

Chapter 9 also carries over other derogations of Louisiana's filing system from former Chapter 9. One such difference from

181. *See* La. R.S. 10:9-310(a), 10:9-312(a) (Supp. 2002).

182. La. R.S. 10:9-501(a)(2) (Supp. 2002). In Orleans Parish, financing statements are filed with the Recorder of Mortgages. *Id.* There is one exception for titled motor vehicles not held as inventory for sale or lease, for which filings are made with the Office of Motor Vehicles. *See* La. R.S. 10:9-501(a)(1) (Supp. 2002). *See* former La. R.S. 10:9-406 (1993), *as amended by* 2001 La. Acts No. 128, § 1. This system also had the political benefit of preserving a share of the filing fees revenue for the local Clerks of Court. Under U.C.C. Article 9, Georgia has adopted a similar system designating filing with the clerk of the superior court of any county, but (unlike Louisiana) excepting as-extracted collateral, timber to be cut, and (non-uniform) crops (presumably intending growing crops).

183. La. R.S. 10:9-519(a)(4) and (c) (Supp. 2002).

184. Nor was it in former U.C.C. Article 9.

185. *See* La. R.S. 10:9-102(a)(37) (Supp. 2002) and *supra* note 182.

U.C.C. Article 9 pertains to real property related filings covering fixtures, as-extracted collateral (minerals), or timber to be cut. Chapter 9's filing system follows former Chapter 9 in placing fixture filings and filings of financing statements covering as-extracted collateral or timber to be cut in the regular Uniform Commercial Code records.[186] Unlike U.C.C. Article 9, such filings are not made in the mortgage records for immovable property, even though immovable property descriptions are attached.[187] Also, unlike U.C.C. Article 9, Chapter 9 follows former Chapter 9 in permitting these initial filings to be made in any parish selected by the filer, regardless of the location of the pertinent immovable property within the state.[188] Accordingly, in Louisiana a "fixture filing" does not require the filing of a separate financing statement. One financing statement may be effective to perfect a security interest in both ordinary collateral and fixtures.[189] The same is true with respect to as-extracted collateral or timber to be cut.

Because Chapter 9 does not require local real estate filings for fixture filings, the special rule for transmitting utilities in Subsection 9-501(b) of U.C.C. Article 9 is unnecessary in Louisiana and is omitted and reserved.[190] This omission follows existing Louisiana law.[191]

Chapter 9 also carries forward the rule from former Chapter 9 requiring all subsequent filings to be filed in the same parish in which the pertinent original financing statement was filed.

B. Rejection

Chapter 9 varies significantly from U.C.C. Article 9 on the authority of the filing officer to reject a tendered filing. U.C.C. Subsection 9-520(a) makes it mandatory for the filing officer to reject the filing for the reasons set forth in U.C.C. Section 9-516(b). However, under Chapter 9 the authority of the filing officer to reject

186. *See* La. R.S. 10:9-501(a)(1) (non-uniform); 10:9-502(b)(2) (reserved) and 10:9-502(c) (reserved); 10:9-514(c) (reserved); 10:9-515(g) (reserved) (Supp. 2002). Likewise there is no special place of filing rule in Louisiana for transmitting utilities. *See* La. R.S. 10:9-501(b) (reserved) (Supp. 2002). *See* text accompanying *infra* notes 214-216.

187. La. R.S. 10:9-502(b)(3) (Supp. 2002) (but using Louisiana non-uniform terminology) and La R.S. 10:9-516(b)(3)(D) (reserved) (Supp. 2002).

188. *See supra* note 182. Subsequent filings pertaining to an initial filing must be made in the same parish as that initial filing. *See* La. R.S. 10:9-512(a), 10:9-513(b), 10:9-514(b), 10:9-514.1, and 10:9-515(d) (Supp. 2002).

189. *See* discussion *infra* Part V.C.

190. *See supra* note 186.

191. *Compare* former La. R.S. 10:9-401 (1993), *as amended by* 2001 La. Acts No. 128, § 1, *with* former U.C.C. § 9-401(5) (1972).

a Uniform Commercial Code filing is discretionary, rather than mandatory. Nonetheless, like U.C.C. Article 9, Chapter 9 provides an exclusive list of grounds upon which the filing office, in its discretion, may reject a filing.[192] The Louisiana approach of discretionary authority is consistent with former Chapter 9.[193] The critical point of emphasis is that Chapter 9 limits this discretionary authority to the exclusive list of reasons set forth in Subsection 9-516(b).

Chapter 9 varies from other filing provisions of U.C.C. Article 9. U.C.C. Subsection 9-516 (d) deals with a filing office's unjustified refusal to accept a record. Under U.C.C. Article 9, an improperly rejected filing is considered filed. However, a financing statement that is communicated to the filing office but which the filing office refuses to accept provides no public notice. Louisiana's public records doctrine necessitates that Chapter 9 reject this approach.[194] Therefore, Subsection 9-516(d) is omitted and reserved in Chapter 9. Such an approach will not prejudice creditors because under Louisiana's filing system a filer has a choice of sixty-four filing offices for Uniform Commercial Code filings, one in each parish. In the rare event that a filing officer in Louisiana improperly rejects a filing, the Louisiana filer has the easy option of filing in another parish.

U.C.C. Subsection 9-516(d) also contains an exception to protect a third-party purchaser of collateral who gives value in reliance upon the apparent absence of the record from the files. In that instance, an improperly rejected filing will be deemed ineffective as to the third party purchaser. Chapter 9, however, has no need for this provision and it is omitted. This is because under Chapter 9 an improperly rejected filing is considered as never having been filed and is ineffective. As a result, a third party purchaser of collateral will never run the risk of being prejudiced by a rejected, yet effective, filing.

1. Organizational Identification Number

In U.C.C. Article 9, there are several debtor-related informational items required to be set forth in a properly completed financing statement. Most of these requirements are clearly explained in the

192. *See* La. R.S. 10:9-516(b), 10:9-520(a) (Supp. 2002) ("may refuse," not shall). *See also* La. R.S. 10:9-516(b)(3)(D) (reserved), 10:9-520(c) (Supp. 2002) ("permitted," not required, to refuse) and text accompanying *infra* note 194.

193. *See* former La. R.S. 10:9-402 (1993).

194. *See* La. R.S. 10:9-516(a) (non-uniform), 10:9-516(d) (reserved) (Supp. 2002). Thus La. R.S. 10:9-520(b) (Supp. 2002) omits the requirement that the date and time of rejection be noted.

statute but the requirement that the debtor's organizational identification number be listed on the financing statement is cryptic. While U.C.C. Article 9 does not require for legal sufficiency that a financing statement list the organizational identification number of a debtor,[195] it does require a filing officer to reject a financing statement that does not contain either the number or a statement that the organization has no such number.[196] As noted above, Chapter 9 permits such rejection, but does not mandate it.

The term "organizational identification number" is not defined in U.C.C. Article 9 or Chapter 9. The reference is to the number assigned to that organization by the agency where an organization's charter or similar organizational document was filed, if any.[197] As suggested by the statutory provision, some states do not assign such numbers.[198] Moreover, a few states, including Louisiana, that do assign organizational identification numbers to domestic organizations also assign organizational identification numbers to foreign organizations registering to do business in that state. If a record is filed in Louisiana pertaining to a foreign organization, the organizational identification number for the debtor to be included in the filed record is the number assigned by the foreign organization's home jurisdiction, not the number assigned by Louisiana. If the home jurisdiction does not assign the number, the filed record should state "none." The record should not include the number assigned by Louisiana to the non-Louisiana organization.

2. Property Description

Subsection 9-516(b)(3)(D) is omitted and reserved in Chapter 9, because the determination of the sufficiency of property descriptions in Louisiana is not the task of filing officers.[199] The responsibility for the sufficiency of information contained in Louisiana filings is with the filer, not the filing officer.

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195. *Compare* La. R.S. 10:9-502(a) (Supp. 2002) (legal sufficiency) *with* La. R.S. 10:9-516(b)(5)(C)(iii) (Supp. 2002) (filing rejection).

196. U.C.C. § 9-516(b)(5)(C)(iii) (2000).

197. *Cf.* discussion *supra* Part II.C.3 ("registered organizations").

198. Ironically, the state that is receiving the largest increase in filings under the new U.C.C. Article 9 filing system, Delaware, does not require organizational identification numbers for Delaware U.C.C. filings. Delaware omitted U.C.C. Subsection 9-516(b)(5)(C)(iii) (although Delaware does assign such numbers). Although the author has not verified the following list, it is being reported at the time this article is written that the following states do not issue organizational identification numbers: Massachusetts, New Hampshire, New York, Oklahoma and South Carolina.

199. *See supra* notes 187 and 192 and accompanying text.

C. Fixtures

Chapter 9 is significantly non-uniform in the provisions pertaining to fixtures. Although the language of the provisions has been modified in Chapter 9 from the earlier provisions of former Chapter 9, there is no change in Louisiana law as to fixtures and fixture filings.

Under U.C.C. Article 9, fixtures are goods that have become so related to real estate that an interest in the goods arises under applicable real estate law.[200] But fixtures are still goods. The uniform definition of "goods" includes "fixtures," even though goods are defined as things that are movable when a security interest attaches.[201] A security interest under U.C.C. Article 9 (i) may be created in goods that are fixtures already or (ii) may continue in goods that become fixtures. There is an exception for goods that are ordinary building materials incorporated into an improvement on land. No security interest in them exists under Chapter 9 or U.C.C. Article 9.[202]

In U.C.C. Article 9, a security interest in fixtures may be perfected either by a regular Article 9 financing statement filing or by a fixture filing in the real estate records. The importance to a secured party in making a fixture filing is for priority purposes against a competing real estate claimant.[203] One of the available priority rules under U.C.C. Article 9 is that a purchase-money security interest in goods can obtain priority over certain real property interests by a fixture filing made within twenty days after the goods become fixtures.[204] Unless a fixture filing is made, and other requirements are met, a security interest in fixtures is subordinate to a conflicting real estate interest.[205] But the critical distinction between U.C.C. Article 9 and Chapter 9 is that under the former's rules fixtures retain their personal property nature.

Accordingly, as described in the official comments, U.C.C. Article 9 recognizes three categories of goods: "(1) those that retain

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200. U.C.C. § 9-102(a)(41) (2001).
201. U.C.C. § 9-102(a)(44)(i) (2001).
202. La. R.S. 10:9-334(a) (Supp. 2002).
203. *See* La. R.S. 10:9-334(c) (Supp. 2002). The competing real estate claimant may be an "encumbrancer," which is not defined in U.C.C. Article 9 but is defined in Chapter 9 because it is a term unknown to Louisiana law. *See* La. R.S. 10:9-102(a)(32) (Supp. 2002). Thus an ordinary (non-fixture filing) financing statement covering goods suffices for priority over judicial liens. *See* La. R.S. 10:9-334(e)(3) (Supp. 2002) (perfected "by any method permitted by this Chapter") and *infra* note 220.
204. U.C.C. § 9-334(d)(3) (2001). The twenty day grace period is not the law in Louisiana. *See* text accompanying *infra* notes 217-218.
205. *See supra* note 204.

their chattel character entirely and are not part of the real property; (2) ordinary building materials that have become an integral part of the real property and cannot retain their chattel character for purposes of finance; and (3) an intermediate class that has become real property for certain purposes, but as to which chattel financing may be preserved."[206]

In stark contrast, Chapter 9 carries forward from former Chapter 9 a fundamentally different approach to security interests in fixtures, consistent with long established Louisiana legal principles relating to property and chattel mortgages. In Louisiana, a security interest cannot be created in goods that already have become fixtures. The definitions of "fixtures" and "fixture filing"[207] in Chapter 9 are significantly non-uniform, as is the pertinent portion of the definition of "goods."[208] Even the scope provision in Chapter 9 is non-uniform, with Subsection 9-109(a)(1) providing that Chapter 9 applies "as to fixtures only if the security interest has been perfected by a fixture filing when the goods become fixtures." These definitions, in combination with the non-uniform language in the scope provision in Subsection 9-109(a)(1), the fixtures provisions in Subsection 9-334(a), and the non-uniform filing provisions in Chapter 9 Part 5, establish the four major variations of Chapter 9 as it applies to fixtures.

First, in order for a security interest in fixtures to exist and continue, a fixture filing must be made before the goods become fixtures, i.e., component parts. Second, a security interest may not be retained under Chapter 9 in consumer goods that become component parts of immovable property. This is because by definition a consumer good cannot become a "fixture." Third, fixture filings under Chapter 9 are not filed in the immovable property records, but instead are filed in the regular Louisiana Uniform Commercial Code records. Fourth, the remedies applicable to fixtures are narrower under Chapter 9.

1. Component Parts

Chapter 9's definition of fixtures utilizes the terminology and principles pertaining to "component parts" in the Louisiana Civil Code.[209] In Chapter 9, goods "includes fixtures but only if they were movable when a fixture filing covering them was made."[210] Thus,

206. *See* U.C.C. § 9-334 cmt. 3 (2001).
207. La. R.S. 10:9-102(a)(40), 10:9-102(a)(41) (Supp. 2002).
208. La. R.S. 10:9-102(a)(44)(i) (Supp. 2002).
209. *See* La. Civ. Code arts. 462-469.
210. La. R.S. 10:9-102(a)(44) (Supp. 2002); *accord* La. R.S. 10: 9-102(a)(44) (Supp. 2002) ("goods" includes fixtures "but only if they were movable when a

unlike U.C.C. Article 9, under Chapter 9 the secured party's fixture filing must be made prior to the goods becoming component parts in order for the security interest to be preserved. This requirement reproduces the substance of former Chapter 9.[211]

This timing requirement continues the substance of former Chapter 9 as well as Louisiana's former chattel mortgage statutes. Language from the former chattel mortgage statutes and former Chapter 9[212] that, "[a]s to a secured party with a security interest in fixtures perfected by a fixture filing, the fixtures shall remain movables, and no sale or mortgage of the immovable property shall affect or impair the priority of the security interest," has been omitted as conceptually incorrect on the first point and unnecessary and implicit on the second. The omission does not change Louisiana law.

2. Consumer Goods

Chapter 9 reproduces former Chapter 9's exclusion of consumer goods from classification as fixtures. Except for manufactured homes, a Chapter 9 security interest may not be retained in consumer goods that become component parts of immovable property. A consumer good cannot become a "fixture" under Chapter 9 even though it has become a component part under Louisiana property law.[213]

Manufactured homes are not dealt with as fixtures, but instead are encumbered either as titled motor vehicles under Chapter 9 as supplemented by the Louisiana Manufactured Home Property Act or as component parts of immovable property following a declaration of immobilization made under that statute.[214]

3. Filing

Chapter 9 continues the special Louisiana filing rule under former Chapter 9 with respect to fixture filings. Unlike U.C.C. Article 9, fixture filings in Louisiana are not filed in the immovable property mortgage records, but instead are filed in the regular Uniform Commercial Code records.[215] Accordingly, in Louisiana a "fixture

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fixture filing covering them was made") and La. R.S. 10:9-334 (Supp. 2002).

211. La. R.S. 10:9-313 (1993), *as amended by* 2001 La. Acts No. 128, § 1.

212. *See* former La. R.S. 10:9-313 (1993) and La. R.S. 9:5357 (repealed 1989).

213. La. R.S. 10:9-102(a)(40), 10:9-102(a)(41), and 10:9-334(a) (Supp. 2002). *See also* La. R.S. 10:9-334(e)(2)(C) (reserved) (Supp. 2002).

214. *See* discussion *infra* Part V.D. *See also* Comments 53 and 54, Revision Comments - 2001 to La. R.S. 10:9-102(a)(53) (Supp. 2002).

215. *See* La. R.S. 10:9-501, 10:9-502 (Supp. 2002). *See also supra* notes 186-188 and accompanying text.

filing" does not require the filing of a separate financing statement. One financing statement may be effective both to cover ordinary collateral and also to be a "fixture filing."[216]

Consistent with the principles described above, Chapter 9 contains a non-uniform variation regarding purchase-money security interest fixture filings. U.C.C. Article 9 permits a purchase-money security interest fixture filing to be effective for priority purposes if the fixture filing is made within twenty days after the goods become fixtures. In Chapter 9, a fixture filing by definition is "made before the goods become fixtures."[217] Accordingly, Subsection 9-334(d)(3) omits the twenty day rule entirely.[218]

4. Remedies

The remedies available to a secured party having a security interest in fixtures is also significantly non-uniform.[219] U.C.C. Section 9-604 significantly changes the former law in other states as to the remedies available to a secured party. U.C.C. Article 9 overrules cases in other states holding that a secured party's only remedy after default is the removal of the fixtures from the real property. U.C.C. Article 9 permits the secured party to sell the fixtures in place or use self-help to render the fixtures inoperative but left in place.

In contrast, Chapter 9 omits and reserves these provisions. The only remedy applicable to fixtures under Chapter 9 is judicial sale by the secured party. Section 9-604 is modified to eliminate any right, or implication thereof, of the secured party to self-help action with respect to fixtures, except in the very narrow circumstances set forth in Section 9-609. Section 9-604 also carries forward a non-uniform provision from former Chapter 9 authorizing a secured party to demand separate appraisal of the fixtures where the immovable property is sold in foreclosure proceedings by a mortgagee or other encumbrancer.

Notwithstanding the incorporation of Louisiana property law principles and terminology into Chapter 9's definitions and provisions pertaining to fixtures, one U.C.C. Article 9 provision has been

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216. *See supra* notes 186-189 and accompanying text. Conversely, in Louisiana a mortgage filing in the real estate records cannot do double duty as a fixture filing. *See* La. R.S. 10:9-502(c) (reserved); 10:9-519(d) (non-uniform); and 10:9-519(e) (reserved) (Supp. 2002). There is no need in Louisiana for a special place of filing rule for transmitting utilities. *See supra* note 186 and accompanying text. *See also* text accompanying *supra* note 190.

217. La. R.S. 10:9-102(a)(40) (Supp. 2002). *See also* La. R.S. 10:9-102(a)(44)(i) (Supp. 2002) and text accompanying *supra* notes 211-212.

218. *See supra* note 205 and accompanying text.

219. *See* discussion *infra* Part IX.A.

retained in Chapter 9 in order to avoid creating doubt by its deletion. In U.C.C. Subsection 9-334(e)(2), there is an exception to the usual first-to-file-or-record rule of Subsection 9-334(e)(1). This exception affords priority to the holders of security interests in certain types of readily removable goods: factory and office machines, and equipment that is not primarily used or leased for use in the operation of the immovable property. This rule is necessary in U.C.C. Article 9 because of the confusion in the common law as to whether certain readily removable machinery, equipment, and appliances become fixtures. It protects a secured party who, perhaps in the mistaken belief that the readily removable goods will not become fixtures, makes only a regular financing statement filing instead of making a fixture filing.[220] In many common law states such readily removable goods of the type described in Subsection 9-334(e)(2) will not be considered to become part of the real property. In Louisiana, it is unlikely that such readily removable goods will become component parts under Louisiana law. When such goods of the type described in this subsection are not considered to have become part of the immovable property under Louisiana property law, a security interest in those goods does not conflict with an immovable property interest, and resort to Section 9-334's provisions is unnecessary. Nonetheless, this provision is included in Chapter 9 to avoid creating any unintended negative implication by its deletion.

There is another non-uniform provision in Chapter 9 pertaining to the relative priority of a secured party's fixture security interest and a mortgagee's mortgage of the pertinent immovable. Section 9-334(h) reproduces the variation in former Chapter 9 that omits the requirement that a mortgage indicate that it is a "construction mortgage" in order to have priority afforded thereto.[221]

D. Manufactured Homes

Chapter 9 varies from U.C.C. Article 9 with respect to manufactured homes in order to preserve existing Louisiana law.

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220. In contrast to priority under Subsections 9-334(d)(3) and (e)(1)(A), Subsection 9-334(e)(2) does not require a fixture filing for priority but instead only simple perfection "by any method permitted by this Chapter." *See supra* note 203 and accompanying text. This exception for readily removable factory and office machines is carried forward from former U.C.C. Article 9, but the added exception category of readily removable equipment not primarily used in the real property's operation is new. For the relevancy of equipment's use and "societal expectations" with regard thereto in determining whether such equipment is a component part of other property, see Prytania Park Hotel v. General Star Indem. Co., 179 F.3d 169 (5th Cir. 1999); Showboat Star P'ship v. Slaughter, 789 So. 2d 554 (La. 2001); A. N. Yiannopoulos, *Of Immovables, Component Parts, Societal Expectations, and the Forehead of Zeus,* 60 La. L. Rev. 1379 (2000).

221. *See* La. R.S. 10:9-313(1)(c) (1993).

Under Louisiana law, manufactured homes are encumbered either as titled motor vehicles under Chapter 9[222] as supplemented by the Louisiana Manufactured Home Property Act[223] or as component parts of immovable property following a declaration of immobilization. Although Chapter 9 contains the defined term "manufactured home," both the definition and its use are non-uniform.

The non-uniform definition of "manufactured home" in Chapter 9 adopts by cross-reference the similar existing definition in the Louisiana Manufactured Home Property Act.[224] This approach is used in order to avoid a gap that would result between that statute and Chapter 9 from using different definitions. Because of the entirely different use in Chapter 9 for this definition, Chapter 9 does not include the definition "manufactured-home transaction" contained in U.C.C. Article 9, and that definition is omitted and reserved in Chapter 9.[225]

In U.C.C. Article 9, the term "manufactured home" is used only in the definition of "goods," in the fixtures provision in Section 9-344, and in U.C.C. Section 9-515. Under U.C.C. Subsection 9-334(e)(4), a security interest noted on the manufactured home's certificate of title will have priority over the interests of competing real estate claimants, even if the manufactured home has already become a fixture and no fixture filing is filed in the real property records. In addition, the other fixture priority rules also apply to manufactured homes. If the state statute does not require notation on the certificate of title for perfection, then U.C.C. Section 9-515 permits an ordinary financing statement in a "manufactured-home transaction" to be effective for thirty years.

In contrast, under Chapter 9, security interests in manufactured homes are not perfected by the filing of ordinary financing statements. Instead, the security interest is noted on the certificate of title.[226] Accordingly, the thirty-year rule in U.C.C. Article 9 is omitted in Louisiana as unnecessary. A security interest noted on a certificate of title remains effective until terminated.[227]

More importantly, in Chapter 9 the term "manufactured homes" is instead used in the non-uniform provisions pertaining to fixtures. These non-uniform provisions in Chapter 9 exclude manufactured homes from being fixtures, pursuant to exclusionary language in the

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222. *See* La. R.S. 10:9-501(a)(1), 32:702(9), and 32:710 (Supp. 2002). *See also* La. R.S. 32:707(A) (Supp. 2002). In addition, La. R.S. 9:5363.1 was expressly retained in effect. 2001 La. Acts No. 128, §19.

223. La. R.S. 9:1149.1-1149.7 (2000).

224. *See id.* and La. R.S. 10:9-102(a)(53) (Supp. 2002).

225. La. R.S. 10:9-102(a)(54) (reserved) (Supp. 2002).

226. *See supra* note 222.

227. La. R.S. 10:9-515(h) (Supp. 2002).

definition and other operative provisions.[228] Thus the priority rules of the Louisiana Manufactured Home Property Act are left in effect, and U.C.C. Subsection 9-334(e)(4) is omitted and reserved in Chapter 9.

E. Titled Motor Vehicles

Chapter 9 has a non-uniform definition of "titled motor vehicle."[229] This definition is added for convenience and ease of drafting the provisions in Chapter 9, Part 5 pertaining to the filing of financing statements covering titled motor vehicles.[230] Chapter 9 continues former Louisiana law in its non-uniform treatment of the perfection of security interests in titled motor vehicles.[231]

U.C.C. Section 9-311 exempts from its filing requirements transactions governed by state certificate-of-title statutes covering motor vehicles and the like. Chapter 9 continues former Chapter 9 in omitting this exclusion.[232] In Louisiana, the method of perfecting a security interest in automobiles and other titled motor vehicles is provided in Chapter 9 itself.[233] These filings are made with the Department of Public Safety and Corrections of the Office of Motor Vehicles, unless the collateral is held as inventory for sale or lease as discussed below.[234] It should be noted that in Louisiana financing statements covering titled motor vehicles are required to contain additional descriptive information,[235] and filing is effective only if later validated by the secretary.[236]

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228. *See* La. R.S. 10:9-102(a)(40), 10:9-102)(a)(41), 10:9-334(a), and 10:9-334(e)(4) (reserved) (Supp. 2002). *See also* La. R.S. 10:9-102(a)(44)(v) (Supp. 2002).

229. La. R.S. 10:9-102(d)(19) (Supp. 2002).

230. *See, e.g.*, La. R.S. 10:9-501, 10:9-504,10:9-506(c), 10:9-515(h), 10:9-516(a), 10:9-519(i), 10:9-525(b), and 10:9-526 (Supp. 2002). *See also* La. R.S. 32:710 (Supp. 2002).

231. *See, e.g.*, former La. R.S. 10:9-401(1)(a) (1993), *as amended by* 2001 La. Acts No. 128, § 1.

232. *See* former La. R.S. 10:9-401(1)(a), 10:9-402(1), 10:9-403(1)(b), and 10:9-403(10) (1993).

233. *See* La. R.S. 10:9-501(a)(1) (Supp. 2002). *See also* La. R.S. 10:9-303, 10:9-504(3), and 10:9-516(a)(2) (Supp. 2002). Thus, Chapter 9 deletes the exclusion that makes perfection governed solely by the Louisiana Vehicle Certificate of Title Law, instead leaving perfection within Chapter 9. La. R.S. 10:9-311(a)(2) (Supp. 2002) (non-uniform).

234. La. R.S. 10:9-311(d) (Supp. 2002).

235. The financing statement is required to list "the year of manufacture, make, model, body style and manufacturer's serial or other identification number." La. R.S. 10:9-504(3) (Supp. 2002). *See* former La. R.S. 32:710(A)(1) (repealed 1989).

236. *See* La. R.S. 32:710(A), La. R.S. 10:9-516(a)(2) (Supp. 2002). There is a change in Louisiana law on this timing matter from former Chapter 9. Previously, the filing of a financing statement covering a titled motor vehicle

U.C.C. Subsection 9-311(d) provides an exception to Section 9-311's general exclusion of security interests in titles motor vehicles from the perfection rules of U.C.C. Article 9. Under U.C.C. Subsection 9-311(d), perfection of a security interest in the inventory of a person in the business of selling goods of that kind is governed by the normal perfection rules of U.C.C. Article 9, even if the inventory is subject to a certificate-of-title statute. Compliance with a certificate-of-title statute is both unnecessary and ineffective under U.C.C. Article 9 to perfect a security interest in inventory to which Subsection 9-311(d) applies. Under U.C.C. Article 9, a secured party who finances an automobile dealer can perfect a security interest in the entire inventory of automobiles by filing a financing statement, but not by compliance with a certificate-of-title statute. However, the U.C.C. Subsection 9-311(d) exception does not apply if the inventory is of a kind that the debtor is not in the business of selling and is subject to certificate-of-title statute. Thus, if a secured party finances a company that is in the business of leasing but not selling motor vehicles, U.C.C. Subsection 9-311(d) does not apply, and the perfection of a security interest in the automobiles is governed by the applicable certificate-of-title statute. The fact that the debtor eventually sells the goods does not, alone, mean that the debtor "is in the business of selling goods of that kind" under U.C.C. Article 9.

Chapter 9 contains its own, slightly modified, Subsection 9-311(d) exception. Chapter 9 varies from U.C.C. Subsection 9-311(d) by the retention of the words "or leasing." In U.C.C. Article 9, these words "or leasing" were deleted in the technical corrections effective January 15, 2000. However, the retention of these words in Chapter 9 is intentional and is not an oversight. Thus, under Chapter 9 if a secured party finances a company that is in the business of selling or leasing automobiles, it can perfect a security interest in the entire inventory of automobiles by filing a financing statement. Like U.C.C. Article 9, this cannot be done by compliance with a certificate of title statute.

The provisions of Chapter 9 appear to contain two minor errors or ambiguities pertaining to the perfection rules applicable to titled motor vehicles. First, Section 9-309 is uniform in providing that a purchase-money security interest in consumer goods is perfected when it attaches, but there is the uniform exception "as otherwise provided in" Subsection 9-311(b) with respect to consumer goods that

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became effective only when (at the time) the filing was validated by the Secretary of the Office of Motor Vehicles. *See* former La. R.S. 10:9-403(1)(b) (1993). The new rule is that the filing is effective when received, so long as such receipt is subsequently validated by the Secretary. La. R.S. 32:710(A) (Supp. 2002). *See* U.C.C. § 9-311 cmt. 5 (2001). *But see* La. R.S. 32:706(D) (Supp. 2002). *Compare with* La. R.S. 9:1149.5 (uses the prior formulation of the timing rule).

are subject to a statute described in Subsection 9-311(a). In U.C.C. Article 9, this provision has the effect of excluding from the automatic perfection rule purchase-money security interests in titled motor vehicles, under both the in-state certificate-of-title statute and the certificate-of-title statutes of other jurisdictions. However, as noted above, in Chapter 9 the reference to the Louisiana (in-state) certificate-of-title statute is omitted from Subsection 9-311(a).[237] Consumer titled motor vehicles that are subject to an out-of-state certificate-of-title statute are still excluded under Chapter 9 from the automatic perfection purchase-money security interest rule.[238] However, read literally, a consumer titled motor vehicle subject to the Louisiana certificate-of-title statute is arguably not properly excluded from that automatic perfection purchase-money security interest rule.[239] Nonetheless, it unquestionably is the intent of Louisiana law that any non-inventory security interest, even a purchase-money security interest granted by a consumer, covering a titled motor vehicle be perfected solely by notation on the certificate of title under the Louisiana statute.[240]

The second issue in Chapter 9 pertaining to titled motor vehicles is in Section 9-513. That section provides that a secured party shall cause the secured party of record on a financing statement to file a termination statement if the financing statement covers consumer goods (generally, not just titled goods) and the secured obligation has been fully satisfied.[241] Under Section 9-513, this filing of the

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237. *See supra* note 233.

238. La. R.S. 10:9-309(1), 10:9-311(a)(3), and 10:9-311(b) (Supp. 2002).

239. Section 9-309(1) excludes from automatic attachment only "as otherwise provided in" Section 9-311(b) and only "with respect to consumer goods that are subject to a statute . . . described in" Section 9-311(a). But Section 9-311(a) is non-uniform and describes only the out-of-state certificate of title statutes in paragraph (3), but does not describe the Louisiana Vehicle Certificate of Title Act in its non-uniform paragraph (2). *Compare with* former La. R.S. 10:9-302(1)(d) (1993).

240. *See* 2001 La. Acts No. 128, §12 (amending La. R.S. 32:710(A)). *See also* La. R.S. 32:704(A), 32:706(D), 32:708(A), and 32:710(E) (Supp. 2002). Another method of perfection not allowed under Chapter 9 for titled motor vehicles is possession by pawn brokers making "automobile title loans," whereby the practice is for the borrower to deliver the certificate of title to be held by the pawn broker as collateral for the loan. The pawn broker's security interest is not noted on the certificate of title. Such a purported possessory security interest by means of possession of the certificate of title is not perfected. *See* In re Davis, 269 B.R. 914 (Bankr. M.D. Ala 2001). Nor could even possession of the vehicle itself under such circumstances result in perfection. *See* La. R.S. 10:9-313(b) (Supp. 2002). *See also* U.C.C. § 9-311 cmt. 7, § 9-313 cmt. 7 (2001).

241. This requirement is a special rule for consumer goods, requiring the secured party itself to file the termination statement. In all other transactions, the secured party is only required to act upon request, and then has the option to make the filing itself or simply to send the termination statement to the debtor. *See* La. R.S. 10:9-513(c) (Supp. 2002).

termination statement is made in the filing office where the financing statement was originally filed. This provision is correct as to ordinary financing statements. However, this requirement is at variance with the common practice as it applies to titled motor vehicles. When a Louisiana motor vehicle loan or credit sale is paid in full, the secured party typically completes the lien release on the back of the debtor's certificate of title, which the secured party has been holding, and delivers the original title to the debtor.[242] The debtor then simply retains the vehicle title, and neither the debtor nor the secured party files anything with the Louisiana Department of Public Safety to cancel officially the security interest from the public records. The filing of a termination statement in such circumstances is of little benefit to the debtor, and in fact may be prejudicial, since both a filing fee and a fee to issue a new certificate of title may be incurred.[243] It is hoped that Louisiana courts will find that the secured party's completion of the lien release on the vehicle's certificate of title and delivery of such original title to the debtor is sufficient to comply with the requirement of Subsection 9-513.[244]

Chapter 9 is uniform in its treatment of the conflicts arising when a debtor obtains a certificate of title for titled goods in a new jurisdiction and the security interest noted on the original certificate of title is not noted on the new certificate of title. Under U.C.C. Section 9-316, the secured party's interest continues to be perfected

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242. *See* La. R.S. 32:708(A) (Supp. 2002). Upon the final discharge of any security interest, a filing with the office of motor vehicles appears optional. *See* La. R.S. 32:708(B) (Supp. 2002) (any lien holder "may" present). *But see* La. R.S. 32:710(F) (Supp. 2002) (requiring compliance with La. R.S. 32:708(B) [not (A)]). But in any event that latter provision only refers to the filing of a termination statement in the context of a lost certificate of title previously endorsed with a satisfaction of security interest. *See* La. R.S. 32:708(B)(2)(b) (Supp. 2002).

243. *See* La. R.S. 32:708(B)(1) (present the fee prescribed by law, if not prepaid), 32:728(1), and 32:728(6) (Supp. 2002). It is true that a Louisiana financing statement covering a titled motor vehicle does not lapse by the passage of time and remains effective until a termination statement is filed. La. R.S. 10:9-515(h) (Supp. 2002). *Accord* former La. R.S. 9:403(10) (2000). But the filing of the termination statement with the office of motor vehicles, in addition to the delivery to the debtor of the certificate of title endorsed with the release of security interest, would appear to benefit the debtor only in instances where the title is later lost. *See* La. R.S. 32:708(B)(2)(b) (Supp. 2002).

244. *Cf.* Kirkpatrick v. BankAmerica Hous. Servs., 799 So. 2d 831 (La. App. 2d Cir. 2001). The debtor executed a voluntary surrender in favor of the lender holding a security interest in the manufactured home. Although the voluntary surrender expressly reserved deficiency rights, the lender executed and delivered to the Department of Public Safety (in connection with a private sale of the manufactured home by the lender) a release of lien form stating that the debtor's debt had been paid in full. The court nonetheless held that the execution and delivery of the release did not constitute a remission of the debt.

following the issuance of the new certificate of title for four months from issuance of the new certificate of title, so long as the security interest would have remained perfected if the goods had not been covered by the new certificate of title. However, such security interest will be ineffective as against certain parties as provided in Sections 9-316 and 9-337.

F. Interest In An Estate

Chapter 9 contains a clarifying exclusion in its scope provision pertaining to security interests in an interest in an estate. Subsection 9-109(c)(5) provides that Chapter 9 does not apply to the extent that the rights of a successor in an estate are interests in real property. This exclusion simply makes more express the general applicability of the exclusion in Subsection 9-109(d)(11), stating that Chapter 9 does not apply to the creation or transfer of an interest in real property. Civil Code Article 872 provides that the estate of a deceased means the property, rights, and obligations that a person leaves after his death.

Paragraph (13) of U.C.C. Section 9-309 provides that a security interest created by an assignment of a beneficial interest in a decedent's estate is perfected automatically upon attachment. This continues the rule under former U.C.C. Section 9-302(1)(c). The rationale stated in the Official Comments to former U.C.C. Article 9 is that these assignments are not ordinarily thought of as subject to U.C.C. Article 9, and a filing rule might operate to defeat many assignments.[245]

However, former Chapter 9 varied from former U.C.C. Article 9. Under former Chapter 9 the filing of a financing statement was not required to perfect a security interest created by an assignment of a beneficial interest in a decedent's estate.[246] Instead, former Chapter 9 had a non-uniform requirement that a security interest in rights of a succession under administration is perfected only by giving notice to the succession representative.[247]

Chapter 9 changes the law from former Chapter 9 and new U.C.C. Article 9 with respect to the perfection of a security interest in an interest in an estate. Under Chapter 9, no special perfection rule or exception is provided for this collateral.[248] Therefore, because an interest in an estate falls within the catch-all definition of general

245. *See* former U.C.C. § 9-302 cmt. 9 (1977). *But see* U.C.C. § 9-309 cmt. 7 (2001); Clark, *supra* note 109, at §2.07[3].

246. La. R.S. 10:9-302(1)(c) (1993).

247. La. R.S. 10:9-305(3) (1993).

248. This change is another example of the importance of omissions in the drafting of Chapter 9. *See supra* note 13.

intangibles, perfection under Chapter 9 is accomplished by filing. Even though notice of the security interest to the succession representative is required to obligate the succession representative to pay the secured party, such notice is not a useful mechanism for perfection.[249] Perfection by such notice, like U.C.C. Article 9's approach of automatic perfection, would create a "secret security interest" not readily determinable by creditors of the debtor, and might imply an obligation on the part of succession representatives to respond to inquiries from third parties. Filing is easy and inexpensive. For those reasons, Chapter 9 rejects the "secret security interest" obtainable under former Chapter 9's rule of perfection by notice and U.C.C. Article 9's rule of automatic perfection.

Because Chapter 9 changes the law from former Chapter 9 as to the method of perfection of a security interest in a debtor's interest in an estate, under the transition rules even existing transactions are affected. Under the transition rules of Chapter 9, a secured party who has a perfected security interest in such collateral under the former method of notice has a deadline of one year to perfect its security interest under the new requirement of filing.[250]

This variation in method of perfection will create issues in a multi-state factual situation.[251] The choice of law governing perfection will be the location of the debtor-beneficiary of the estate under Section 9-301, resulting in different rules pertaining to security interests in the same estate if beneficiaries are residents versus non-residents of Louisiana.

In numerous provisions, including this section, Chapter 9 follows U.C.C. Article 9 in referring to the "assignment" or the "transfer" of property interests. But these terms and their derivatives are not defined. As explained in the official comments to U.C.C. Article 9, the intent is generally to follow common usage by using the terms "assignment" and "assign" to refer to transfers of rights to payment, claims, liens, and security interests. Generally, the term "transfer" refers to other transfers of interests in property. Except when used in connection with a letter-of-credit transaction, "no significance should be placed on the use of one term or the other. Depending on the context, each term may refer to the assignment or transfer of an outright ownership interest or to

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249. Comment (c), Revision Comments - 2001 to La. R.S. 10:9-309 (Supp. 2002). *Compare with infra* Part V.G.

250. *See* La. R.S. 10:9-703(b) (Supp. 2002) and *infra* Part XI. For a discussion of the transition issue caused by Chapter 9's restriction in the creation of security interests in estates to existing estates described with some particularity, see *supra* notes 157-160 and *infra* note 387 and accompanying text.

251. *Compare with* text accompanying *supra* note 61.

the assignment or transfer of a limited interest, such as a security interest."[252]

G. Beneficial Interest In A Trust

Chapter 9 also changes the law from former Chapter 9 as to the perfection of a security interest in a beneficial interest in a trust. Under former Chapter 9 filing a financing statement was not required, and perfection of a security interest in a beneficiary's interest in a trust was perfected only by giving notice to the trustee.[253] U.C.C. Article 9 also changes the perfection rule from former U.C.C. Article 9. Under former U.C.C. Article 9 perfection of a security interest in a beneficial interest in a trust was automatically perfected.[254] However, U.C.C. Article 9 has changed this rule because beneficial interests in trusts are now often used as collateral in commercial transactions.[255] Under U.C.C. Article 9, filing is required to perfect a security interest in a beneficial interest in a trust. For the same reasons, Chapter 9 requires filing of a financing statement to perfect a security interest in a beneficial interest in a trust.[256] It should be noted that notice to the trustee is still required in order to obligate the trustee with respect to the secured party, but that issue is separate from perfection.[257]

Section 9-410 is a new, non-uniform provision in Chapter 9, but it does not change prior Louisiana law. It adds an express cross-reference to the controlling provisions of the Louisiana Trust Code, which permit a trust instrument to prohibit a beneficiary from alienating or encumbering a beneficial interest in a trust.[258] If a security interest is permitted, notice to the trustee is required for the security interest to be effective as to the trustee, but as noted above, that issue is separate from perfection.

Like security interests in estates,[259] existing transactions involving a security interest in a trust are affected by Chapter 9's change in the law as to the method of perfection for a security interest in a debtor's beneficial interest in a trust. Under the transition rules of Chapter 9,

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252. U.C.C. § 9-102 cmt. 26 (2001).
253. *See* La. R.S. 10:9-302(1)(c), 10:9-305(3) (1993).
254. *See* former U.C.C. § 9-302(1)(c) (1985).
255. *See* U.C.C. § 9-309 cmt. 7 (2001).
256. No express statutory provision so states; the result derives from Section 9-310(a) and the absence of an exemption in Sections 9-309, 9-310(b) or elsewhere.
257. *See* La. R.S. 9:2003 (Supp. 2002) in the Louisiana Trust Code.
258. *See* La. R.S. 9:2001-2007 (1991 & Supp. 2002). *See also* La. R.S. 10:9-406(d) and 10:9-408(a) (Supp. 2002), which contain non-uniform cross-references to Section 9-410 as exceptions to the provisions otherwise overriding anti-assignment clauses. Thus Subsection 9-401(a) applies to this issue.
259. *See* text accompanying *supra* note 250.

a secured party whose security interest in such collateral was perfected under the former method of notice has a deadline of one year to perfect its security interest under the new requirement of filing.[260]

VI. PERFECTION BY CONTROL

The concept of perfection by control was introduced into former U.C.C. Article 9 as part of the 1994 revisions to U.C.C. Article 8. Under U.C.C. Article 9, perfection of a security interest through control is expanded and is now allowed not only in investment property but also in deposit accounts, electronic chattel paper, and letter-of-credit rights. Chapter 9 is uniform in those control provisions.[261]

However, Chapter 9 does contain two non-uniform provisions pertaining to collateral in which a security interest may be perfected by control. First, Section 9-107.2 governs situations where control of the collateral is subject to some condition. Under this statutory provision, an agreement by the depository bank, securities intermediary, letter of credit bank or similar pertinent party to comply with the secured party's instructions suffices for "control" of the pertinent collateral even if such party's agreement is subject to specified conditions, e.g., that the secured party's instructions be accompanied by a certification that the debtor is in default.[262] This provision makes express a concept that is implicit in U.C.C. Article 9 and in U.C.C. Article 8. It should be noted that if the condition is the debtor's further consent, the statute explicitly provides that such agreement would not confer control.

Also, Section 9-107.2 appears to contain a minor error, in referring only to a default by the debtor instead of a default by the debtor or the obligor. It is hoped that the courts will interpret the term "debtor" in this provision to mean "obligor."

Second, as discussed above, Chapter 9 allows for perfection of a security interest in a life insurance policy by "control." In reality, this control is somewhat more implicit than the control achieved with respect to a deposit account or investment property, where control

260. *See* La. R.S. 10:9-703(b) (Supp. 2002) and *infra* Part XI. For a discussion of the transition issue created by Chapter 9's restriction in the creation of security interests in trusts to existing trusts described with some particularity, see *supra* note 386 and accompanying text.

261. *See* La. R.S. 10:9-104, 10:9-105, 10:9-106, and 10:9-107 (Supp. 2002). *See also* La. R.S. 10:9-310(b)(8), 10:9-314 (Supp. 2002). Chapter 9 is also uniform in the choice of law rules pertaining to such control. La. R.S. 10:9-304, 10:9-305, and 10:9-306 (Supp. 2002). *But see* text accompanying *supra* note 61 and *supra* note 67 regarding perfection by control of consumer deposit accounts.

262. *See* U.C.C. § 9-104 cmt. 3, § 8-106 cmt. 7 (2001).

means that the parties have agreed expressly that the secured party can direct disposition of the collateral. Under Section 9-107.1, control of an insurance policy is achieved simply by the life insurance company's bare acknowledgment of the security interest, without the further requirement of an express agreement to follow the secured party's directions pertaining to the life insurance policy.[263]

VII. PRIORITY

Chapter 9 contains several important non-uniform provisions pertaining to priority in the areas of security interests in crops, the priority of security interests versus privileges, and purchase-money security interests.

A. Crops

U.C.C. Article 9 has a new provision which provides that a perfected security interest in crops[264] has priority over the interest of an owner or mortgagee if the debtor is the owner, or is in possession, of the real estate.[265] Under former U.C.C. Article 9, whether a perfected security interest in crops prevailed over the interest of an owner or mortgagee of the real estate depended upon how crops are treated under the applicable state's real estate law. However, in Chapter 9, Subsection 9-334(i) varies from U.C.C. Article 9 by limiting its application to security interests in unharvested crops granted by debtors with interest of record in the land.[266] Chapter 9 omits the language "or in possession" of the land as contrary to the Louisiana public records doctrine.[267]

Chapter 9 also varies from U.C.C. Article 9 in its provision pertaining to the relative priority of agricultural liens.[268] Under U.C.C. Subsection 9-322(g), the priority of an agricultural lien is treated differently than the priority of other liens under U.C.C. Article 9. The general U.C.C. priority rules apply to an agricultural lien under U.C.C. Article 9, unless the agricultural lien is given by statute which provides otherwise. This result arises from the interplay of

263. *See* discussion *infra* Part VIII.E. and *supra* Part III.D.

264. The term "crops" is not defined. *See* text accompanying *supra* note 32 regarding farm products.

265. U.C.C. § 9-334(i) (2001).

266. Subsection 9-334(i) deals with the rights of an "encumbrancer" of the land versus a secured party. Encumbrancer is defined in Chapter 9. *See* La. R.S. 10:9-102(a)(32) (Supp. 2002) and *supra* note 203.

267. La. Civ. Code arts. 474, 491 and 493; La. R.S. 9:2721 (1991); Flower & King v. Pearce & Son, 45 La. Ann 853, 13 So. 150 (1893). *See also infra* notes 283 and 312 and accompanying text.

268. *See also* text accompanying *supra* notes 39-43.

U.C.C. Subsections 9-322(a) and (g). In contrast, Chapter 9 omits Subsection 9-322(g). Instead, Chapter 9 provides in non-uniform Subsection 9-322(f)(5) that the priority among conflicting security interests and agricultural liens in the same collateral is subject to Louisiana Revised Statutes 9:4521.[269]

Chapter 9 is uniform with respect to the treatment, or lack thereof, of proceeds of an agricultural lien.[270] U.C.C. Article 9 does not address proceeds of an agricultural lien, and leaves to other law the question of whether the agricultural lien extends to proceeds, whether the agricultural lien in proceeds is perfected, and what priority it has over a competing claimant. Presumably, this "other law" is the state statute under which the agricultural lien is created. An interesting situation arises when the proceeds of farm products encumbered by an agricultural lien are themselves farm products on which an agricultural lien arises under other law. In such a case the agricultural lien provisions of U.C.C. Article 9 apply to the agricultural lien on the proceeds in the same way in which they would apply had the farm products not been proceeds.

B. Priority Versus Privileges

One of the most significant variations in Chapter 9 is its non-uniform provision expressly dealing with the relative priority among conflicting security interests and liens in the same collateral. Under the common law it is not clear whether a consensual security interest is or is not a "lien."[271] Thus U.C.C. Article 9 refers throughout to "security interests and other liens." Under Louisiana law, however, privileges are solely statutory. Privileges attach by reason of status

269. Thus Chapter 9 generally retains existing Louisiana law on the relative priority of agricultural liens and security interests affecting unharvested crops. *See* Bayou Pierre Farms v. Bat Farms Partners, 693 So. 2d 1158 (La. 1997); Howard v. Stokes, 607 So. 2d 868 (La. App. 2d Cir. 1992). Because Louisiana (like the vast majority of states) did not enact the model provisions of revised U.C.C. Article 9 for "production-money security interests" in "production-money crops," Chapter 9 changes Louisiana law to the extent there is no corresponding provision to former Subsection 9-312(2) relating to growing crops. As to farm products other than unharvested crops, the general rules of Subsection 9-322(a) apply to set priority among conflicting security interests and agricultural liens, because no exception in Section 9-322 exists. Non-uniform Subsection 9-322(h) by its terms does not apply to agricultural liens. As noted, Chapter 9 omits U.C.C. Subsection 9-322(g). Subsection 9-322(f)(5) and La. R.S. 9:4521 only apply to unharvested crops, not all farm products. *See also* La. R.S. 10:9-311(a)(2) (Supp. 2002) (filing in central registry of security interests and liens affecting farm products).

270. *Compare* La. R.S. 10:9-315(a)(1) *with* 10:9-315(a)(2) (Supp. 2002). *See* U.C.C. § 9-322 cmt. 12 (2001). *Cf.* text accompanying *supra* notes 39-43 (discussing agricultural liens).

271. *See supra* note 21.

and not by consent of the parties or, as is often the case in the common law, by jurisprudence. As a result, Chapter 9 varies from U.C.C. Article 9 by providing a definition of the term "lien."

Chapter 9 defines a "lien" as "a privilege on personal property created by operation of law that entitles the privileged creditor to be preferred before other creditors."[272] This definition reproduces the substance of former Chapter 9,[273] but clarifies the intent. The definitional phrase "created by operation of law" encompasses all statutes, whether the Louisiana Civil Code, the Louisiana Revised Statutes of 1950, or other statutory authority. Because a privilege under Louisiana law is not a consensual security interest, Chapter 9 makes a consistent change throughout by deleting the reference to "other" liens in places where reference is made to security interests and liens.

Chapter 9 adds a non-uniform provision of major importance in Subsection 9-322(h).[274] Under Subsection 9-322(h), a security interest has priority over a conflicting lien, other than an agricultural lien, in the same collateral except as otherwise provided in Chapter 9 or except to the extent the lien is created by a statute that provides otherwise. This provision continues prior Louisiana law, although it states the result in strikingly clear fashion.[275] Thus, as a general rule a security interest has priority over a conflicting lien in the same collateral, regardless of perfection.

There are, however, three exceptions to this rule. The first is when the conflicting lien is an agricultural lien, as discussed above. The second exception is found in Chapter 9 itself, in Section 9-333. Section 9-333 deals with possessory liens[276] and, although reworded in Chapter 9, is substantively uniform. The third exception is where the statute creating the lien expressly provides that the lien has priority over the security interests. There are multiple examples of statutes which provide that certain privileges have priority over

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272. *See* La. R.S. 10:9-102(d)(9) (Supp. 2002) and *supra* note 21. The term is not defined in U.C.C. Article 9.

273. *See* La. R.S. 10:9-102(4)(b) (1993).

274. *See also* La. R.S. 10:9-109(d)(1) and (2) (Supp. 2002) (expanding scope of Chapter 9).

275. Former Chapter 9 reached the same result, but in an awkward and confusing fashion. *See* former La. R.S. 10:9-201 (1993), *as amended by* 2001 La. Acts No. 128, § 1, and former La. R.S. 10:9-104(b) and (c) (1993). Instead, Chapter 9 contains an express provision placed in the proper place among the priority provisions. *See* La. R.S. 9:4770 (Supp. 2002) (expressly preserved in 2001 La. Act No. 128, §19); First Nat'l Bank of Boston v. Beckwith Mach. Co., 650 So. 2d 1148 (La. 1995) (especially discussion contained in footnote 17).

276. *See, e.g.*, La. Civ. Code art. 3217(2). Chapter 9 does not apply to non-agricultural liens except under Sections 9-322(h) and 9-333. La. R.S. 10:9-109(d)(2) (Supp. 2002).

certain security interests.[277] In addition, other statutes provide that the statutory privilege has priority over all security interests.[278]

C. Consumer Purchase-Money Security Interests

Section 9-103 reproduces a change made in former Chapter 9 from former U.C.C. Article 9. Chapter 9 applies its rules in Section 9-103 to consumer goods transactions in the same manner as all other purchase-money security interest transactions. Former Chapter 9 contained a non-uniform addition which preserved purchase-money security interest status notwithstanding cross-collateralization.[279] U.C.C. Article 9 has adopted this Louisiana rule for non consumer good transactions, rejecting the "transformation" rule in some states' jurisprudence under which any cross-collateralization destroys the purchase-money status entirely. Chapter 9 goes further and continues the rule under former Chapter 9 that the principles in this section apply to all purchase-money security interest transactions, consumer and commercial. Chapter 9 rejects the approach of U.C.C. Article 9, which expressly leaves it to the courts to fashion a rule applicable to consumer-goods transactions. Under Louisiana civil law, such decisions are appropriately made by legislation, not by judge-made common law.[280]

VIII. THIRD PARTIES

A. Purchasers

The term "purchaser" is defined in U.C.C. Article 1 and Louisiana Chapter 1 as "a person who takes by purchase." To "purchase" is defined in U.C.C. Article 1 and Louisiana Chapter 1 as "taking by sale, discount, negotiation, mortgage, pledge, lien, security interest, issue or re-issue, gift, or any other voluntary transaction creating an

277. *See, e.g.*, La. R.S. 9:4501 (1991) (repairman); La. R.S. 9:4502 (1991) (maker/repairman); La. R.S. 9:4512 (Supp. 2002) (aircraft); La. R.S. 9:4758 (1991) (self storage facility); and La. R.S. 9:4870 and 9:4888 (Supp. 2002) (hydrocarbons). *See* also La. R.S. 9:4770 (Supp. 2002) and 2001 La. Acts No. 218, §19.

278. *See, e.g.*, La. R.S. 9:5001 (Supp. 2002) (attorneys); 37:218(A) (2000) (attorneys).

279. La. R.S. 10:9-107 (1993), *as amended by* 2001 La. Acts No. 128, § 1.

280. *See infra* note 376 and accompanying text and *supra* note 22. *See also* Doerr v. Mobil Oil Corp., 774 So. 2d 119 (La. 2000); Yiannopoulos, *supra* note 22, at 846. Other states such as Florida, Idaho, Maryland, Nebraska, North Dakota and South Dakota (and Tennessee and Virginia in part) made similar non-uniform decisions.

interest in property."[281] Therefore, "purchaser" under U.C.C. Article 9 and Chapter 9 includes not only a buyer of collateral, but also other secured parties or lienholders.[282]

Chapter 9 contains several non-uniform provisions pertaining to the rights of purchasers. First, Chapter 9 varies from U.C.C. Article 9 with respect to the requirements that a buyer, lessee or licensee of collateral must meet in order to take free of a security interest or agricultural lien. Section 9-317 deals with the rights of such parties versus unperfected security interests. Subsections 9-317(b), (c) and (d) omit the requirement contained in U.C.C. Article 9 that such buyer, lessee, or licensee act without knowledge of the security interest or agricultural lien in order to take free of the unperfected security interest. This omission is consistent with the Louisiana public records doctrine, which is predicated on filings and not knowledge. The Louisiana rule is that actual knowledge by third parties of an unrecorded interest is immaterial. Proper filing is alone dispositive.[283] This policy promotes judicial efficiency by facilitating proof in contested cases.

Second, Section 9-320 of Chapter 9 also omits the requirement contained in U.C.C. Article 9 that a buyer of consumer goods buy without knowledge of the security interest in order to take free of a perfected security interest. Subsection 9-320(b) applies to buyers of goods that the debtor-seller holds as "consumer goods." The omission of this requirement that the buyer act without knowledge of the security interest is a change in Louisiana law.[284] The reason for this deletion is both to give greater protection to the consumer buyer and to align this provision with the public records doctrine. In reality, this provision deals with purchase-money security interests in non-titled consumer goods, which are perfected automatically without filing.[285] If the secured party does file, all buyers take subject to the security interest.

Third, Section 9-320 contains another variation from U.C.C. Article 9, in the omission of Subsection (d). This subsection was

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281. La. R.S. 10:1-201(32) and (33) (1993).

282. Lienholder is a defined term in Chapter 9. La. R.S. 10:9-102(b)(10) (Supp. 2002). *See supra* notes 21 and 177. A buyer at a judicial sale, however, is not a purchaser, because the transfer is not voluntary as required by the definition.

283. McDuffie v. Walker, 125 La. 152, 167, 51 So. 100, 105 (La. 1909); Dallas v. Farrington, 490 So. 2d 265, 269 (La. 1986); F.D.I.C. v. McFarland, 243 F.3d 876 (5th Cir. 2001); La. R.S. 9:2721 (1991); *see also* Lee Hargrave, *Public Records & Property Rights,* 56 La. L. Rev. 536, 537 (1996); Max Nathan, Jr. & Anthony Dunbar, *The Collateral Mortgage: Logic and Experience*, 49 La. L. Rev. 39, 44 n.22 (1988); Lee Hargrave, *Presumptions and Burdens of Proof in Louisiana Property Law*, 46 La. L. Rev. 225, 234 (1985).

284. *See* La. R.S. 10:9-307 (1993), *as amended* by 2001 La. Acts No. 128, § 1.

285. *See* La. R.S. 10:9-309(1) (Supp. 2002). *See also supra* Part V.E.

inserted in U.C.C. Article 9 to deal with those states that allow a mortgage to both cover minerals before extraction and continue such encumbrance on the minerals after extraction. Neither part of that rule is the law in Louisiana, and this subsection is unnecessary in Louisiana. Qualified buyers of minerals are adequately protected by Subsection 9-320(a) under Louisiana law.

Finally, Chapter 9 contains a non-uniform addition to Section 9-315. This provision carries forward a provision from former Chapter 9[286] stating that a purchaser of collateral incurs no personal liability on account of any unauthorized transfer unless the purchaser has failed to act in good faith.

B. Consignment

The definitions of "consignee," "consignment," and "consignor" in U.C.C. Article 9 and Chapter 9 are uniform. The definitions generally follow prior Louisiana law[287] without using the term "true consignment."[288] If a transaction is called a consignment but it creates a security interest that secures an obligation, it is not a consignment. The new definition of consignment also follows U.C.C. Article 9 by changing the law to exclude from Chapter 9 the delivery of goods which at the time of delivery are valued at less than one thousand dollars or are consumer goods. The reason for these exclusions is that filing would be inappropriate or of insufficient benefit to justify the costs in such transactions. A consignment excluded from the application of Chapter 9 by one of those subparagraphs may still be a true consignment; however, it is governed by non-Chapter 9 law.

The "consignor" is the person who delivers goods to the "consignee" in a consignment. The consignee is a "debtor."[289] The consignor's security interest in the consigned goods is a purchase-money security interest in inventory.[290] Although a "consignor" is a "secured party,"[291] a consignor has no duties under Part 6.[292] This Chapter, like U.C.C. Article 9, applies to every "consignment" within the definition.[293]

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286. *See* La. R.S. 10:9-306(2) (1993). As to the definition of good faith, see *supra* notes 51-54 and accompanying text. *Compare with* La. R.S. 10:9-617(b) (Supp. 2002) (transferee in good faith).

287. *See* La. R.S. 10:9-114 (1993), *as amended* by 2001 La. Acts No. 128, § 1 (non-uniform definition of true consignment).

288. La. R.S. 10:9-102(a)(19)-(21) (Supp. 2002).

289. La. R.S. 10:9-102(a)(28)(C) (Supp. 2002).

290. La. R.S. 10:9-103(d) (Supp. 2002).

291. La. R.S. 10:9-102(a)(72)(C) (Supp. 2002).

292. La. R.S. 10:9-601(g) (Supp. 2002).

293. *See* La. R.S. 10:9-109(a)(4) (Supp. 2002) and U.C.C. § 9-109 cmt. 6

Subsection 9-319 (a) is identical to U.C.C. Article 9 in providing that the consignee may pass title to the purchaser to the detriment of the consignor. However, Section 9-319(b) pertaining to the rights and title of a consignee with respect to creditors and purchasers is non-uniform in Chapter 9. Subsection 9-319(b) in Chapter 9 varies from U.C.C. Article 9 by providing that other laws determine the rights of purchasers of goods from a consignee if the consignor perfected its security interest. U.C.C. Section 9-319(b) only applies to creditors of a consignee.[294] The addition of purchasers in Chapter 9's Subsection 9-319(b) has relevance with respect to a consignor's rights as against the rights of a non-ordinary course buyer from the consignee. Pursuant to Subsection 9-319(b), the respective rights between a consignor who has filed a financing statement to perfect the consignor's purchase money security interest[295] and a non-ordinary course purchaser (even not for value) (example, a donee/by donation is a purchaser not for value in U.C.C. language) from the consignee are determined by other law, such as mandate (agency) and transfer of ownership by agreement in the Civil Code. If the consignor's security interest is unperfected, then Subsection 9-319(a) applies. If the buyer is in the ordinary course of business, then Section 9-320 applies.

C. Anti-Assignment Provisions

U.C.C. Sections 9-406 and 9-408 represent one of the most significant changes contained in new U.C.C. Article 9. U.C.C. Article 9 continues former law by rendering ineffective a clause restricting the creation or enforcement of a security interest in an account or a general intangible.[296] U.C.C. Article 9 also renders ineffective an anti-assignment clause affecting payments under other chattel paper or promissory notes. In addition, and more importantly, U.C.C. Article 9 renders ineffective a provision of law that would prevent the attachment, perfection, or enforcement of a security interest in accounts or chattel paper. Finally, and of critical importance, U.C.C. Article 9 renders ineffective a clause in any general intangible or any provision of law relating to any general

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(2001).

294. *See* U.C.C. § 9-103 cmt. 6, § 9-109 cmt. 6 (2001). So unlike in Chapter 9, under U.C.C. Article 9 even a perfected consignor cannot derive protection against a purchaser from this Section, relying instead upon other law. *Cf.* U.C.C. § 2-403(3) (2001) (entrustment).

295. *See* La. R.S. 10:9-103(d) (Supp. 2002).

296. The strong policy in U.C.C. Article 9 is to make such rights assignable as a matter of public policy and to obligate the account debtor to pay an assignee after notice. *See* In re Advanced Systems Inc., 257 B.R. 457 (E.D. La. 2001).

intangible, even if not for money due or to become due, that prevents a security interest from attaching and becoming perfected, so long as the rights of the account debtor or other party imposing the anti-assignment clause or provision of law are not disturbed. The security interest in such a general intangible may attach and be perfected notwithstanding the anti-assignment clause or provision of law, but the secured party may not enforce the security interest without the consent of the account debtor or other party imposing the anti-assignment clause. The key goal is to make the security interest valid and protected despite the debtor's bankruptcy. For purposes of these provisions, an assignment of a health-care-insurance receivable is treated as if it were a general intangible, not as an account. As a result, an assignment of a health-care insurance receivable is subject to the limited override rule for general intangibles rather than the stronger override rule for accounts.[297]

Chapter 9 varies from U.C.C. Article 9 in Sections 9-406 and 9-408 in several respects. First, Section 9-406 deletes references to U.C.C. Article 2, which Louisiana has not enacted.[298] Each subsection adds a specific provision stating that the section prevails over any inconsistent provisions of Louisiana Civil Code Article 2653, as suggested by the Legislative Enactment Note to U.C.C. Article 9.[299] Each section adds cross-references[300] to non-uniform provisions added in Chapter 9, discussed below.

More importantly, Chapter 9 makes two substantive additions. First, Chapter 9 adds in each section a provision preventing that section from overriding anti-assignment provisions in statutes pertaining to government benefits, such as pensions, worker's compensation, unemployment compensation and public assistance, as well as statutes providing for crime victim reparation payments or lottery payments.[301] Second, each section adds a provision preventing

297. *See* La. R.S. 10:9-408 (Supp. 2002). *See also* La. R.S. 10:9-404(e), 10:9-405(d), and 10:9-406(i) (Supp. 2002) (each making such section not apply to an assignment of a health-care-insurance receivable).

298. *See* La. R.S. 10:9-406(d) and (f) (Supp. 2002). *See also* La. R.S. 10:9-407(a) and (b) (Supp. 2002). *See also supra* note 16.

299. La. R.S. 10:9-406(j), 10:9-408(e) (Supp. 2002).

300. *See* La. R.S. 10:9-406(a) (referring to Section 9-411); 10:9-406(d) (referring to 9-410); 10:9-408(a) (referring to Subsection (f) and 9-410); 10:9-408(b) and 10:9-408(c) (referring to Subsection (f)).

301. *See* La. R.S. 10:9-406(i), 10:9-408(f) (Supp. 2002). For examples of such statutes, see La. R.S. 11:570, 11:704, 11:952.3, 11:1526, 11:3389, 23:731, 23:1205, 46:111 and 47:9025. Other states such as Arkansas, Colorado, Delaware, Florida, Georgia, Kansas, Idaho, New Jersey, North Carolina, Oregon, Pennsylvania and Wisconsin have made similar non-uniform changes, either in their scope provision (U.C.C. Section 9-109) or in U.C.C. Sections 9-406 and 9-408.

that section from overriding anti-assignment provisions in, among other things, structured settlements.[302] These provisions were not part of the bill recommended by the Louisiana State Law Institute, but instead are the result of an amendment drafted and proposed by the American Insurance Association in Senate Committee on Judiciary A.[303]

An aside concerning U.C.C. Article 9 drafting terminology is relevant here. In numerous provisions, including Sections 9-406 and 9-408, Chapter 9 follows revised U.C.C. Article 9 in referring to the "assignment" or the "transfer" of property interests. These terms and their derivatives are not defined. As discussed previously, the official comments explain that the intent is generally to follow common usage by using the terms "assignment" and "assign" to refer to transfers of right to payment, claims, liens, and security interests. Generally, the term "transfer" is used to refer to other transfers of interests in property. Except when used in connection with a letter-of-credit transaction, "no significance should be placed on the use of one term or the other. Depending on the context, each term may refer to the assignment or transfer of an outright ownership interest or to the assignment or transfer of a limited interest, such as a security interest."[304]

D. Banks

U.C.C. Article 9 provides that unless a secured party has control over a deposit account, which requires the depositary bank's agreement, the depositary bank has no obligation to deal with the secured party with respect to the deposit account. Furthermore, a depositary bank has no obligation to enter into a control agreement with a secured party relating to the deposit account, even if the debtor customer requests. Chapter 9 adds an additional new non-uniform Section 9-343, to clarify that the joinder by a depositary bank in a control agreement does not in and of itself constitute a waiver or

302. *See* La. R.S. 10:9-406(k), 10:9-408(g) (Supp. 2002). *See also* La. R.S. 9:2715 (Supp. 2002). *See also* text accompanying *infra* note 320.

303. *See* 2001 La. Acts No. 128 and Senate Committee Amendments Nos. 1 & 2, Proposed by Judiciary Committee A for the Louisiana Senate (May 1, 2001). A majority of the other states have made similar non-uniform changes either in their scope provision (U.C.C. Section 9-109) or in U.C.C. Sections 9-406 and 9-408 [scope: Arizona, Hawaii, Illinois, Indiana, Iowa, Kansas, Maine, Minnesota, Missouri, Rhode Island, South Dakota, Tennessee and Vermont; assignment sections: Arkansas, California, Colorado, Connecticut, Delaware, Florida, Massachusetts, Michigan, Montana, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina and Virginia.]

304. U.C.C. § 9-102 cmt. 26 (2001).

subordination of the bank's security interest in the deposit account, unless that control agreement specifically so provides.[305]

E. Life Insurance Companies

As discussed above,[306] Chapter 9 contains a significant variation from U.C.C. Article 9 by including life insurance policies as eligible collateral. Although that inclusion carries forward prior Louisiana law,[307] Chapter 9 contains a new Section 9-344 pertaining to the rights of life insurance companies. Section 9-344 is modeled on similar provisions pertaining to the rights and duties of persons in possession of collateral, including the duties of a person who voluntarily acknowledges that it holds possession for a secured party's benefit and the rights and duties of a depositary bank and securities intermediary.[308] A life insurance company is not obligated by Chapter 9 to enter into a control agreement with a secured party even if the debtor-insured so requests.[309] An insurer who does agree to allow "control" does not thereby assume any duty to such secured party.[310]

F. Judgment Debtors

Section 9-411 in Chapter 9 is non-uniform and new. As discussed above, Chapter 9 permits judgments to be original collateral.[311] Under Civil Code Article 3300, a money judgment filed in the mortgage records creates a judicial mortgage upon the immovable property of the debtor. Subsection 9-411(a) prevents even a perfected security interest in such a judgment from affecting third parties in contravention of the Louisiana public records doctrine.[312] Even if a secured party has a perfected security interest in a recorded judgment, third parties dealing with the immovable property burdened by a judicial mortgage may deal with the holder of the judicial mortgage

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305. *See* discussion *supra* Part III.A.
306. *See* discussion *supra* Part III.D.
307. *Id.*
308. *See* La. R.S. 10:9-313(f) and (g); 10:9-341 and 10:9-342; 10:9-409(b) (Supp. 2002). *See also* La. R.S. 10:8-106(g) (Supp. 2002).
309. La. R.S. 10:9-344(a) (Supp. 2002). But other law may so require, such as the Louisiana Insurance Code. *See supra* note 122.
310. La. R.S. 10:9-344(b) (Supp. 2002). But other law may so require. *See supra* note 122. *See also supra* Part VI.
311. *See supra* Part III.C. A judgment debtor may not assert any rights under Civil Code Article 2652 against a secured party. La. R.S. 10:9-411(c) (Supp. 2002). *See* text accompanying *infra* note 317.
312. *See* text accompanying *supra* notes 267 and 283.

as reflected in the mortgage records.[313] A secured party, therefore, also may desire to file its assignment in the mortgage records.

Subsection 9-411(b) supplies a cross-reference to longstanding Louisiana statutes governing a creditor's seizure of a litigant's rights in a pending lawsuit. It corresponds with Subsection 9-412(d). Each provision is added in Chapter 9 for purposes of emphasis. Louisiana Revised Statutes 13:3864 through 13:3868 apply in all instances applicable by their terms, which include other litigation rights besides judgments and tort claims dealt with in these sections. The specific references in Chapter 9 to the application of those statutes to judgments and tort claims is not intended as a restriction upon the applicability of those statutes to their full extent. These statutes serve to limit the rights of a secured party to interfere in the progress of the litigation, while providing protection regarding payment of monies to the secured party who properly notifies the other parties to the litigation.[314] It should be noted that filing of a financing statement for perfection is not notification under this section or those statutes.[315]

G. Tortfeasors

Chapter 9 contains several non-uniform provisions pertaining to security interests in tort claims. First, as discussed above, Chapter 9 includes all tort claims, even consumer tort claims, within its scope.[316]

Second, Subsection 9-411(c) removes the creation and enforcement of security interests in litigious rights, including tort claims, from the application of Civil Code Article 2652. The policy underlying Civil Code Article 2652 is to prevent parties from trading in and attempting to profit from lawsuits. The rights of a secured party under Chapter 9 in a tort claim or other litigious right is limited to the secured debt otherwise incurred, and does not involve the negative consequences of independently trafficking in tort claims or other lawsuits.[317]

Section 9-412 of Chapter 9 is also non-uniform and new. It is modeled on Section 9-406. Tort claims are excluded from the definition of "general intangible" and therefore also are not payment intangibles.[318] Accordingly, the rules in Section 9-406 with respect to account debtors have no application to persons obligated on a tort claim. Instead, Section 9-412 applies, and if the tort claim is reduced to judgment then Section 9-411 applies.[319] If a tort claim is settled under circumstances giving rise

313. *See* La. R.S. 9:5556 (Supp. 2002).
314. *See* La. R.S. 10:9-406(a) (Supp. 2002) ("subject to" La. R.S. 10:9-411). *See also* discussion *supra* Part III.C. *Cf.* La. R.S. 9:4753 (Supp. 2002).
315. *See* text accompanying *supra* notes 104-105.
316. *See supra* Part III.B.
317. *See* text accompanying *supra* note 311.
318. *See* La. R.S. 10:9-102(a)(42) (Supp. 2002).
319. *See* discussion *supra* Part III.B-C.

to a contractual obligation to pay, the right to payment becomes a payment intangible and ceases to be a claim arising in tort.[320]

The notification required by Section 9-412 does not pertain to perfection of a security interest in a tort claim, which is done by filing a financing statement. Filing of a financing statement does not constitute notification to the tortfeasor.[321]

Subsection 9-412(d) corresponds to Subsection 9-411(b).[322] Each provision is added in Chapter 9 for purposes of emphasis as explained above.

IX. REMEDIES

The fourth major variation in Chapter 9 from U.C.C. Article 9 is in the area of remedies and damages. There are several important non-uniform remedies[323] provisions in Chapter 9.[324] Some are carried forward from former Chapter 9, while others were added in response to new provisions in U.C.C. Article 9. Although not the most significant, the variation which receives the most attention is the absence in Chapter 9 of a general authorization of self-help repossession of collateral by secured parties.

A. Self-Help

Louisiana has long had an established public policy against self-help action by creditors with respect to corporeal property.[325] That

320. But Sections 9-406 and 9-408 have exclusions that prevent application of the rules overriding anti-assignment provisions to tortfeasors and their insurers. *See* text accompanying *supra* note 302. *See also* La. R.S. 9:2715 (Supp. 2002).

321. *See* La. R.S. 10:9-310(a) (Supp. 2002).

322. *See* text accompanying *supra* note 314.

323. The term "rights" in Chapter 9 Part 6 includes "remedies." La. R.S. 10:1-201(36) (1993). *See also* La. R.S. 10:9-601-9-603 (Supp. 2002). Such remedies are to be liberally administered. La. R.S. 10:1-106 (1993). *Cf.* Terrebonne Fuel & Lube, Inc. v. Placid Refining Co., 681 So. 2d 1292 (La. App. 4th Cir.), *writ denied*, 692 So. 2d 1066 (1996) (no reason to construe security agreement remedy provisions strictly against the secured party).

324. One non-uniform provision in Louisiana Chapter 1 bears upon Chapter 9's Part 6 enforcement provisions. The term "good faith" is not used in Part 6, and the uniform definition of that term in Chapter 9 has no application to those provisions. *See* discussion *supra* Part II.C.2. Instead, the non-uniform definition of good faith in Louisiana Chapter 1 is used in the application of the non-waivable obligation of good faith imposed by law on a secured party's enforcement actions under Chapter 9. *See* La. R.S. 10:1-203, 10:1-201(19), and 10:1-102(3) (1993 & Supp. 2002). *See also* Whitney Nat'l Bank v. Reliable Mailing & Printing Servs., Inc., 694 So. 2d 479 (La. App. 5th Cir. 1997) (secured party's *in globo* sale not in bad faith under La. R.S. 10:1-203).

325. *See generally* Price v. U-Haul Co. of Louisiana, 745 So. 2d 593 (La. 1999) (extended discussion). Paul J. Ory, *Nonjudicial Disposition Under Louisiana*

public policy remains firmly in place in major portions of Louisiana law. The prohibition on self-help action by landlords except in instances of abandonment is unquestionably established in Louisiana lease law.[326] Unlike most other states, Louisiana mortgage law does not provide for any non-judicial foreclosure remedies by a mortgagee of immovable property.[327] There has been no significant movement to alter the prohibitions on creditor self-help in these areas of Louisiana law.

There has been, however, a continuing push by the finance industry to obtain a broader self-help right of repossession of collateral as part of Louisiana's former Chapter 9. This concerted effort is driven by concerns linked to the quintessential American consumer collateral—the automobile. It is the significant cost, in delay and expenses, inherent in Louisiana's procedures for judicial seizure and sale of automobiles in defaulted automobile finance loans that fuels the continued push for self-help repossession.

Bills have been introduced to grant an authorization of self-help repossession in every Louisiana non-fiscal legislative session for over a decade.[328] None of these legislative efforts have been successful, however, largely due to the vehement opposition by Louisiana sheriffs. A major reason for their opposition, admitted or not, is the significant loss of revenue sheriffs would suffer due to a loss of or decrease in the foreclosure business. The political tension between the finance industry lobby and the Louisiana sheriffs has led to several attempts at legislative compromise, with enactments of an expedited judicial seizure and sale process short of self-help repossession.[329] But those

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Commercial Laws Chapter Nine, 51 La. L. Rev. 1253, 1254-56 (1991). Self-help repossession in Louisiana has been found to be a violation of the Unfair Trade Practices Act. *See, e.g.*, Bryant v. Sears Consumer Fin. Corp., 617 So. 2d 1191 (La. App. 3d Cir. 1993); Cook v. Spillers, 574 So. 2d 464 (La. App. 2d Cir. 1991). The availability of separate tort remedies beyond damages under U.C.C. Section 9-625 (but without double recovery) is suggested but not clearly answered. *See* Zinnecker, *supra* note 170, at 169 n.738; U.C.C. § 9-625 cmt. 3 (2001).

326. George Armstrong, Louisiana Landlord and Tenant Law §11.3 (7th ed. 1995); Vernon Palmer, Leases: The Law in Louisiana §3-25 (1997).

327. For that reason, Subsection 9-607(b) pertaining to non-judicial enforcement of mortgages is omitted in Chapter 9. *See* Comment (b), Revision Comments - 2001 to La. Civ. Code art. 3279. *See also* Guste v. Hibernia Nat'l Bank, 655 So. 2d 724 (La. App. 4th Cir. 1995).

328. *See, e.g.*, 1999 La. Acts No. 626 (by its terms not effective because another related bill did not become law); H.B. 2257, 1999 Reg. Sess. (La. 1999); S.B. 650, 1999 Reg. Sess. (La. 1999).

329. *See* former La. R.S. 6:965-967 (1993), *as amended by* 1993 La. Acts No. 927. This "Additional Default Remedies Act" was immediately challenged as unconstitutional by the sheriffs in litigation. *See* Randall Andre, Sheriff of West Baton Rouge v. Larry Murray, Commissioner of Financial Institutions, No. 424,027, La. 19th J.D.C. (1993). *See also* 2001 La. Acts No. 943 (amending that

legislative attempts at compromise solutions have not had real practical success to date.

In recognition of this political context, there was an express policy decision by the U.C.C. Committee of the Louisiana State Law Institute and by the Institute Council not to change significantly the provisions of former Chapter 9 as they pertain to self-help repossession. Former Chapter 9 was the source of the language used in Chapter 9 authorizing a very limited right of self-help action by secured parties. The intent of the revised language in Chapter 9 is to provide for this narrow authorization of self-help repossession in more precise language.

Section 9-609 of Chapter 9 contains fundamentally different language from U.C.C. Article 9. There was no intent by use of this non-uniform language to introduce broad or prevalent self-help repossession by subterfuge or indirection.[330] After default, a secured party in Louisiana may take possession of the collateral only (1) after the debtor's abandonment, or the debtor's surrender to the secured party of the collateral, or (2) with the debtor's consent given after or in contemplation of default.

The concepts in the first exception of abandonment and surrender are well understood. Both terms come directly from former Chapter 9.[331] Surrender involves the voluntary yielding of the collateral by the debtor, and is not easily misconstrued. Surrender is a bilateral contractual act and occurs only through consent and mutual agreement of both parties.

Abandonment, on the other hand, is a unilateral act whereby the debtor voluntarily relinquishes all right and possession of the collateral, with the intention of not reclaiming it. Abandonment includes both the intention to abandon and an external act by which

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Additional Default Remedies Act to provide for expedited judicial repossession of motor vehicles but deleting the secured party's self-help right).

330. The author is a commercial practitioner and not a trial attorney. Neither his practice nor his law firm's involves automobile finance transactions or routine loan enforcement litigation, or material revenue from judicial foreclosure proceedings. The views expressed in this Part IX.A have no economic impact on the author and furthermore are not an assertion of the author's belief of what Louisiana public policy should be in the abstract. This discussion instead reflects the author's direct personal experience in the details of this legislation's drafting process, and corresponds to express representations on this subject made, with emphasis, both to the Law Institute Council, and to the House Civil Law Committee and the Senate Committee on Judiciary A of the Louisiana Legislative during the hearings on 2001 House Bill 679. U.C.C. Subsection 9-609(b)(2) is omitted fully in Louisiana Chapter 9, not slyly hidden in non-uniform Subsection 9-609(a).

331. *See* La. R.S. 10:9-505(3) and (4) (1993), *as amended by* 2001 La. Acts No. 128, § 1. *Cf.* Jones v. Petty, 577 So. 2d 821 (La. App. 2d Cir. 1991) (improper repossession without consent, no abandonment found).

the intention is carried into effect. Thus, in determining whether a debtor has abandoned the collateral, the debtor's intention is the critical inquiry. Abandonment differs from surrender in that the debtor gives up the collateral with the intention terminating his ownership, but without vesting it in any other person.

The second exception, contained in Subsection 9-609(a)(2), provides for self-help repossession with the "debtor's consent given after or in contemplation of default."[332] The language of this exception was carried over from former Chapter 9, and there was no intent to significantly broaden the availability of self-help repossession in Chapter 9. The purpose behind Subsection 9-609(a)(2) is to permit a debtor to consent to a secured party's self-help repossession only in two narrow circumstances, each of which is tantamount to a debtor's decision actively to surrender collateral to the secured party due to such circumstances. The purpose of allowing the debtor's consent, in addition to the debtor's surrender, is solely to permit the creditor to act where the debtor has the full intent to surrender the collateral, but is not willing to take the active step of delivery himself.

The phrase "after default" should be understood to require the debtor's consent while an uncured default exists. For example, in the case of a debtor who has missed a payment on his automobile loan, and in responding to a call from the automobile finance company says, "I have lost my job, and I can't make any more payments. You can come get the car, it's in my driveway." Such self-help authorization by the debtor is limited to the time for which the debtor remains in default, and is not a blanket general authorization of self-help repossession for any future circumstance.[333] Upon cure of the default, the debtor's authorization is automatically revoked and must be granted again by the debtor in connection with a subsequent, unrelated default. In addition to consenting to self-help "after default," Subsection 9-609(a)(2) permits the debtor to consent to self-help repossession "in contemplation of default." This provision should not be read more broadly than in that context. The debtor's consent is to be in specific expectation of a probable and proximate default, and to reasonably prompt self-help action by the secured party in response thereto. For example, the situation may arise where a debtor who has not yet missed a payment tells the secured party in the middle of the week, "I am broke and now unemployed,

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332. La. R.S. 10:9-505(3) and (4) (1993) ("after or in contemplation of the debtor's default"). *Cf.* Fassitt v. United T.V. Rental, Inc., 297 So. 2d 283 (La. App. 4th Cir. 1974) (public policy voids contract provision irrevocably authorizing self-help entry by creditor into debtor's home without consent at time of entry).

333. *See* La. R.S. 10:9-335(e), 10:9-601, 10:9-604(c), 10:9-607(a), 10:9-610(a), 10:9-612, 10:9-617, 10:9-620, 10:9-624 (Supp. 2002).

and there is no way I will make my loan payment on Friday. You can come get the car, it's in front of my apartment." The debtor's "contemplation of default" is of an anticipated likelihood of an imminent and identifiable default. The debtor's specific consent, and the secured party's self-help action based thereon, are authorized only in connection with that default, and are simply in substitution for the debtor's acting to surrender the collateral at that time.

Indefinite consent to a secured party's repossession is not authorized by Chapter 9. The debtor's consent can be neither indefinite in duration, nor indefinite as to its justifying cause. The debtor may not grant consent to self-help in general anticipation of the possibility that a default will occur. Consent to self-help also may not be given for a prolonged period. Thus, consent may not be given at the time the secured interest is created, except in extremely rare circumstances. Also, consent under Section 9-609 is not authorized to be given after a default occurs but with respect to another eventual default which is not then identifiable and probable.

Consent to self-help may be verbal.[334] If necessary, of course, the existence of such consent must be proved in the normal manner. Whether or not secured parties are willing to rely on verbal consent alone is a business decision. Also such consent inherently includes a duty on the secured party to proceed without breach of the peace as a part of the obligation of good faith.[335]

In keeping with the narrow and restricted treatment of self-help repossession in Section 9-609, other provisions of Chapter 9 have been similarly modified. U.C.C. Subsection 9-609(b) is omitted and reserved in Chapter 9. U.C.C. Subsection 9-609(c) provides that a secured party may require the debtor to assemble the collateral and make it available at a place designated by the secured party. Although this provision was contained in former Chapter 9, it was not enforced or utilized to the author's knowledge in Louisiana and is omitted and reserved in Chapter 9. U.C.C. Subsection 9-603(b), which establishes the standard of "breach of peace" for permitted self-help repossession, is omitted in Chapter 9 because U.C.C. Subsection 9-609(b) is omitted.

Subsection 9-602(6) is non-uniform in Chapter 9, providing that the restrictions on self-help repossession may not be varied, waived or avoided by contractual choice of law provisions or other agreement of the parties.

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334. *Contrast* La. R.S. 10:9-609(a)(2) (Supp. 2002) ("consent given") *with* La. R.S. 10:9-620(c) (Supp. 2002) (consent "in a record authenticated after default"), 10:9-620(f)(2) and 10:9-624 (agreement "entered into and authenticated after default"). *See* Jones v. Petty, 577 So. 2d 821 (La. App. 2d Cir. 1991); Cook v. Spillers, 574 So. 2d 469 (La. App. 2d Cir. 1991).

335. *See supra* note 324 and accompanying text.

As discussed previously,[336] Section 9-604 dealing with remedies applicable to fixtures is non-uniform in Chapter 9. In other states, U.C.C. Article 9 expands prior law to permit the secured party to sell the fixtures in place, or to use self-help to render the fixtures inoperative but left in place. The intent is to legislatively overrule cases in other states holding that a secured party's only remedy after default is the removal of the fixtures from the immovable property. Chapter 9 omits and reserves Subsection 9-604(b). The only remedy in Louisiana under Chapter 9 applicable to fixtures is judicial sale by the secured party.

Subsections 9-604(c) and (d) are modified in Chapter 9 to eliminate any right, or implication thereof, of a secured party to self-help action with respect to fixtures. Instead, a non-uniform Subsection 9-604(e) is added to Chapter 9, authorizing a secured party to demand separate appraisal of the fixtures to fix its interest in the receipts of the judicial foreclosure sale of the immovable property.

Section 9-335 pertaining to accessions is similarly modified. Subsections 9-335(e) and (f) contain similar non-uniform modifications consistent with the limitation on a secured party's self-help.

Subsection 9-607(b) is omitted and reserved in Chapter 9 as inappropriate and unnecessary, because Louisiana does not permit the non-judicial enforcement of mortgages.

B. Judicial Foreclosure

Absent the circumstances of the debtor's abandonment, surrender or consent, the normal remedy for a secured party in Louisiana as to corporeal movable property is judicial seizure and sale.

Section 9-601 reproduces the substance of former Chapter 9 with respect to Louisiana's reliance on judicial foreclosure as the normal remedy applicable to goods. Subsection 9-601(a)(1) includes the non-uniform addition of the words "execute upon" to emphasize this distinction.[337] For the most part, judicial sales are governed by other Louisiana law and not by Chapter 9.[338]

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336. *See* text accompanying *supra* note 219.

337. *See* La. Code Civ. P. art. 2291; La. R.S. 10:9-601(f), 10:9-607(f) (Supp. 2002). Subsections 9-620(e) and (f) are non-uniform in permitting a secured party to proceed by judicial sale as an alternative to private or public sale of consumer goods in such circumstances where disposition is mandated. *See* also former La. R.S. 10:9-501(1) (1993).

338. The exceptions are La. R.S. 10:9-623(d), 10:9-626(c), and 10:9-629 (Supp. 2002). The limitations in Section 9-610 on the rights of a secured party do not apply in a judicial sale. U.C.C. § 9-601 cmt. 8 (2001). The term "foreclose" is not

There are a few provisions of Chapter 9 which nonetheless bear upon judicial foreclosure proceedings. First, Subsection 9-601(e) uses non-uniform language carried forward from former Chapter 9, and clarifies that in Louisiana the privilege arising from seizure does not relate back prior to the seizure.[339] Instead, a security interest continues when a secured party reduces its claim to judgment and secures the judgment without interruption.

Another important non-uniform provision in Chapter 9 pertinent to judicial foreclosures is Section 9-629. This section reproduces the substance of a similar provision in former Chapter 9, and provides for various evidentiary matters relevant in judicial foreclosure proceedings. Subsection 9-629(a) carries forward various provisions establishing authentic evidence and presumptions for purposes of executory or ordinary process. The terminology has been modified to be consistent with Chapter 9, but there is no change in the law.

Section 9-623 adds a non-uniform Subsection (d) pertaining to the right of redemption in judicial proceedings. If collateral has been seized in a judicial proceeding, a redemption may occur at any time before the judicial sale. To redeem collateral in such circumstances, a person must also tender the cost of the proceeding. As is the case with the right of redemption generally, a person must tender fulfillment of all obligations secured, plus certain expenses. If the entire balance of a secured obligation has been accelerated, it is necessary to tender the entire balance. A tender of fulfillment obviously means more than a new promise to perform an existing obligation. It requires payment in full of all monetary obligations then due and performance in full of all other obligations then matured.[340] The right of redemption may only be waived by an agreement to that effect entered into and authenticated after default, and in a consumer-goods transaction may not ever be waived.[341]

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defined in U.C.C. Section 9-601(a), but encompasses both judicial and non-judicial action. La. R.S. 10:9-601(a) and (f) (Supp. 2002). *See* former La. R.S. 10:9-501(5) (1993). But the term "public disposition" used in U.C.C. Article 9, although also not defined, refers to competitive bidding at a public auction and not judicial action. *See* U.C.C. § 9-610 cmt. 7 (2001); William Hawkland, Hawkland's Handbook on Chapter 9 Louisiana Commercial Law §5:06 (1990). *Cf.* text accompanying *supra* note 282 (buyer at judicial sale not a "purchaser").

339. *See* former La. R.S. 10:9-501(5) (1993). A similar rule exists for mortgages. La. R.S. 9:5392 (Supp. 2002). *See* La. Code Civ. P. art. 2292.

340. U.C.C. § 9-623 cmt. 2 (2001).

341. This rule results from the interplay of multiple provisions. Subsection 9-602(11) provides that the debtor or obligor may not waive or vary the rules dealing with redemption of collateral contained in Section 9-623, except as otherwise provided in Section 9-624. In turn, Section 9-624(c) permits waivers of the right of redemption only if the transaction is not a consumer-goods transaction, thereby in conclusion prohibiting such waiver in a consumer-goods transaction.

As noted above, most of the provisions of Louisiana law pertaining to judicial foreclosure proceedings are found not in Chapter 9 but in the Louisiana Code of Civil Procedure and Title 13 of the Louisiana Revised Statutes. One part of the judicial sale process set forth in other Louisiana statutes has not been modified to reflect the changes brought by Chapter 9. At the time and place designated for the judicial sale, the sheriff is required to read aloud a mortgage certificate and any other certificate required by law.[342] Prior to the enactment of former Chapter 9, in a judicial sale of movables that certificate was a chattel mortgage certificate. For a long time, chattel mortgages were required to be recorded in the parish where the chattels were located.[343] So, when the sheriff conducted a judicial sale of movable property he would simply obtain the chattel mortgage certificate from the parish records of his jurisdiction.

When former Chapter 9 took effect, it superceded the old chattel mortgage statute. Perfection by filing as to goods under former Article 9 required only that a financing statement be filed in each state where the goods were located. There was no requirement that the financing statement be filed in the actual parish where the goods were located. However, because a financing statement was required to be filed at least somewhere in the state and because Louisiana has a state-wide Uniform Commercial Code index, these changes did not cause many problems.

The perfection rules have changed dramatically under Chapter 9 and U.C.C. Article 9. Perfection by filing as to goods no longer requires that a financing statement be filed in each state where the goods are located. Instead, if the debtor is a registered organization, the filing is made in the jurisdiction of that debtor's formation.[344] If the debtor is an organization but not a registered organization, perfection by filing as to goods requires only a filing in the state of the debtor's chief executive office.[345] Accordingly, a gap exists in the law in instances when a sheriff conducts a judicial sale of movable property in Louisiana and the debtor is a non-Louisiana resident or a non-Louisiana entity. As to such debtors, a U.C.C. search certificate obtained from any parish in Louisiana is not the appropriate certificate to show proper U.C.C. filings made on and after July 1, 2001. Until the pertinent statutes are modified in the future, it may

342. La. Code Civ. P. art. 2334. *Cf.* La. R.S. 13:844 (1999), 13:4344-4345 (1991), 9:5213 (Supp. 2002) (certificates).

343. La. R.S. 9:5353 (Supp. 1986), *as amended by* 1986 La. Acts No. 181, § 1, *repealed by* 1988 La. Acts No. 528, §§ 2, 4. Filing was also made in the parish of the mortgagor's domicile.

344. La. R.S. 10:9-307(e), 10:9-301(1) (Supp. 2002). *See supra* Part II.C.3.

345. La. R.S. 10:9-307(b)(3), 10:9-301(1) (Supp. 2002).

be advisable for the seizing creditor to provide the sheriff with a U.C.C. search certificate for the debtor from the appropriate jurisdiction outside Louisiana.[346] Admittedly, sheriff's sales under these facts are relatively infrequent.

C. Waiver of Warranties

U.C.C. Section 9-610 provides the transferee of a non-judicial disposition[347] of collateral by a secured party with the benefit of any title, possession, quiet enjoyment and similar warranties that would have accompanied the disposition by operation of other law had the disposition been conducted under other circumstances. U.C.C. Article 9 expressly provides that these warranties can be disclaimed either under other applicable law or by communicating a record containing an express designation, and provides a sample of wording that will effectively exclude such warranties even if the exclusion would not be effective under other applicable law. Of course, U.C.C. Section 9-610 requires that non-judicial dispositions be made on terms that are commercially reasonable. However, U.C.C. Article 9 does not specify whether a disclaimer of warranties by a secured party in a non-judicial disposition is commercially reasonable, therefore leaving that determination to potential after-the-fact review.

Section 9-610 in Chapter 9 is non-uniform in several respects. First, it expressly states that a disclaimer of modification of warranties in a secured party's disposition of collateral is commercially reasonable.[348]

Second, Subsection 9-610(d) drops the litany of common law warranties and instead simply provides that a disposition by the secured party includes the warranties which by operation of Louisiana law accompany such voluntary disposition.

Third, Chapter 9 rejects the rule in U.C.C. Article 9 that provides a sample of wording for an effective waiver of warranties. Instead, Chapter 9, by omitting Subsections 9-610(e)(2) and (f),

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346. *Cf.* General Motors Acceptance Corp. v. Stoma, 241 So. 2d 816 (La. App. 3d Cir. 1970) (sheriff is not required to obtain written statement from motor vehicle commissioner of any other state).

347. *See supra* note 338.

348. *See* La. R.S. 10:9-610(b) (Supp. 2002). In contrast, judicial sales resulting from a seizure are not subject to the rules of redhibition. La. Civ. Code art. 2537; La. R.S. 9:3169 (Supp. 2002). As to matters of title, see La. Code Civ. P. arts. 2342, 2371, 2379 and 2381. Chapter 9 therefore avoids the debate that will arise under U.C.C. Article 9 as to whether or not the warranty disclaimer is one of the "other terms" under U.C.C. Section 9-610 that must be commercially reasonable. *See* Zinnecker, *supra* note 170, at 57.

leaves the determination of the validity of waivers of warranties to other Louisiana law.[349]

Finally, Section 9-610 adds a non-uniform provision in Subsection (c)(2) permitting a secured party to purchase collateral at a private disposition if the secured party, or a person related to the secured party, is obligated by statute to purchase or repurchase the collateral from the debtor. Normally the secured party may buy at a public disposition but not at a private disposition.[350] An example of such a statutory requirement is in the area of manufacturer-dealer relationships.[351]

D. Timeliness of Consumer Notification

As part of the "consumer compromise" made during the drafting process of U.C.C. Article 9, U.C.C. Section 9-612 does not provide a "safe harbor" for consumer transaction notices of disposition. U.C.C. Section 9-611(b) requires the secured party to send a reasonable authenticated notification before disposition of collateral. One aspect of a reasonable notification is its timeliness in advance of the date of the disposition. U.C.C. Subsection 9-611(b) creates a "safe harbor" for non-consumer transactions by providing that a notification of disposition sent after default and at least ten days before the earliest time of disposition set forth in the notification is considered sent within a reasonable time before the disposition. This ten-day notice period is a safe harbor, and not a minimum requirement.[352]

The question of whether a notification is sent within a reasonable time in a consumer transaction is left solely as a question of fact under U.C.C. Subsection 9-612(a) for each case, with no safe harbor provided in U.C.C. Article 9. In contrast, Chapter 9 adds a non-uniform Subsection 9-612(c) to establish a "safe harbor" in consumer transactions of twenty-one days prior notice before disposition. This provision applies to consumer transactions, not just consumer-goods transactions. Again, this notice period is established as a safe harbor and not as a minimum requirement in all circumstances. One concern of the creditor lobby is that by providing a safe harbor of twenty-one days in the statute, the courts will adopt that time period as a

349. *See* La. Civ. Code arts. 2503 and 2548.

350. *See supra* note 338 for the distinction of public versus private dispositions.

351. *See, e.g.*, La. R.S. 51:481 (Supp. 2002). *See also* La. R.S. 10:9-618 (Supp. 2002). *Cf.* Clark, *supra* note 109, at §10.05[5].

352. *See* U.C.C. § 9-612 cmt. 3 (2001). For discussion of the consumer compromise, see *infra* note 376. A twenty-one day safe harbor consumer notice provision was included in U.C.C. Article 9 during much of the drafting process but was deleted near the end. Zinnecker, *supra* note 170, at 70.

requirement rather than as a safe harbor. Such judicial action would be unfortunate. The courts should recognize that there are significant costs to forced delays in foreclosure, and that forced delay can harm the debtor by increasing the size of the deficiency due to increased sale costs. Notices of shorter duration may be reasonable when exigent circumstances exist. In all instances, notification also must be sent in a commercially reasonable manner.[353]

E. Partial Dation By Consumers

U.C.C. Section 9-620(g) prohibits the secured party in consumer transactions from accepting collateral in partial satisfaction of the obligation it secures. This prohibition is a paternalistic exclusion from the general rules governing "strict foreclosure."[354] Chapter 9 varies from U.C.C. Article 9 in permitting a partial *dation en paiement* in a consumer transaction. Chapter 9 omits and reserves Subsection 9-620(g), and adds a non-uniform Subsection (h). Both former Chapter 9,[355] and other Louisiana law pertaining to immovable property,[356] permit a partial *dation en paiement*.[357] Under Subsection 9-620(c)(1), in a partial *dation* the debtor's agreement must be express and cannot be achieved by mere silence following a secured party's proposal. Chapter 9 does change the law from former Chapter 9 by requiring specific terms pertaining to the proposed partial *dation en paiement* and the proposed remaining deficiency be explained to the consumer debtor. This non-uniform provision in Subsection 9-620(h) is modeled upon Section 9-616.[358] If the collateral is consumer goods, the collateral cannot still be in the possession of the debtor when the debtor consents to the *dation*.[359]

F. Damages

Chapter 9, like former Chapter 9, is non-uniform in its provisions pertaining to damages for a secured party's failure to comply with

353. U.C.C. § 9-612 cmt. 3.

354. This term is the unofficial label given to this procedure. *See* U.C.C. § 9-620 cmt. 2 (2001). For discussion of the "consumer compromise" of which this exclusion is a part, see *infra* note 376. For criticism of the exclusion, see Zinnecker, *supra* note 170, at 124.

355. *See* La. R.S. 10:9-505(5) (1993).

356. *See* La. R.S. 13:4108.2 (1991).

357. *See* Dunaway v. Spain, 493 So. 2d 577 (La. 1986).

358. *Compare with* La. R.S. 13:4108.2 (1991).

359. *See* La. R.S. 10:9-620(B)(3) (Supp. 2002). This limitation is designed to prevent a consumer debtor from unknowingly consenting by silence to a secured party's strict foreclosure based on the belief that he may ignore such proposals because he and not the proposing secured party has physical possession of the collateral. *See* Zinnecker, *supra* note 170, at 127.

Chapter 9. U.C.C. Article 9 provides that the secured party is generally liable to the debtor for any loss caused by the secured party's failure to comply with the enforcement provisions of U.C.C. Article 9.[360] Much of the litigation under former U.C.C. Article 9 arose in connection with the enforcement of security interests. U.C.C. Article 9 has attempted to provide an expanded list of legislative solutions to many of these disputes that have arisen in the past. Louisiana Chapter 9 goes even further in that attempt.

Section 9-625 of Chapter 9 contains multiple non-uniform changes designed to ensure that, as a general rule, only the recovery of actual damages for failure to comply with the requirements of Chapter 9 is authorized.[361] Thus, Subsections 9-625(b), (c), (e) and (f) all refer to "actual damages" under Subsection (b), which establishes the basic remedy for non-compliance of a damage recovery as the amount of loss caused by the non-compliance. Although perhaps unnecessary, the addition of the word "actual" was retained from former Chapter 9.[362] Furthermore, consistent with Louisiana's general prohibition on the recovery of punitive damages, Chapter 9 adds a statement in Subsection 9-625(b) that punitive or exemplary damages cannot be recovered under Chapter 9.

Section 9-625 contains other non-uniform changes with the intent that damages thereunder be available to the damaged party individually, but not in class action lawsuits.[363] Subsection 9-625(c) provides that the damaged party may recover actual damages individually but not as a representative in a class action.[364] The source of this language is the Louisiana Unfair Trade Practices Act, which does not permit private class actions.[365]

Subsection 9-625(e) provides statutory damages that supplement the recovery, if any, under the general actual damages rule of Subsection (b), for failure to comply with specified duties. In Chapter 9, those provisions have been modified for the purpose of

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360. *See* U.C.C. § 9-625 cmt. 3 (2001).

361. *See* Bryant v. Sears Consumer Fin. Corp., 617 So. 2d 1191 (La. App. 3d Cir. 1993). *Compare* La. Code Civ. P. art. 2721(B); U.C.C. § 9-625 cmt. 3 (2001); U.C.C. § 9-626 cmt. 2 (2001).

362. *See* former La. R.S. 10:9-507(1) (1993), *as amended by* 2001 La. Acts No. 128, § 1; Hawkland, *supra* note 338, at §5:13. The source provision was the Louisiana Unfair Trade Practices Act. La. R.S. 51:1409(A) (1987).

363. Some states (such as North Dakota and Tennessee) have made similar non-uniform modifications, while other states (such as Maryland, Nebraska and Virginia) have omitted these provisions entirely.

364. The reference to representative capacity is to class action plaintiffs under Code of Civil Procedure Article 591, and should not bar a trustee, succession representative or other representative from being the proper plaintiff to sue to enforce this Section 9-625.

365. *See* La. R.S. 51:1409(A) (1987); Morris v. Sears Roebuck and Co., 765 So. 2d 419 (La. App. 4th Cir. 2000).

preventing class action lawsuits for such statutory damages. Subsections 9-625(e)(4) and (5) have been modified in Chapter 9 to trigger the statutory $500 liability only if the secured party fails to comply with a statutory duty after the secured party receives a demand from a debtor. Under U.C.C. Article 9, in certain circumstances the statutory duty for which non-compliance triggers the $500 liability does not require prior demand upon the secured party. Beyond elemental fairness, a specific purpose of these non-uniform changes in Chapter 9 is to require that the aggrieved party prove the facts behind his particular notice to the secured party, with the intent that this proof requirement will prevent the availability of class action lawsuits under this section.

Chapter 9 is also non-uniform in its omission of the provision for statutory damages in consumer-goods transactions in an amount not less than 10 percent of the secured obligation. U.C.C. Section 9-625(c)(2) continues this minimum statutory damage recovery for a debtor and secondary obligor in a consumer-goods transaction from former U.C.C. Article 9. Obviously, its intent is to ensure that every non-compliance with the requirements of the remedy provisions of U.C.C. Article 9 in a consumer-goods transaction results in liability, regardless of any injury that may have resulted. However, former Chapter 9 omitted this provision.[366] Chapter 9 carries forward this deletion, by omitting and reserving Subsection (c)(2). Because of that deletion of Subsection 9-625(c)(2), Chapter 9 further varies from U.C.C. Article 9 by the omission of Subsections 9-628(d) and (e). These subsections provide limitations on a secured party's liability under U.C.C. Subsection 9-625(c)(2), but those limitations obviously are unnecessary in Chapter 9. Thus, under Chapter 9, in both commercial and consumer transactions, only actual damages may be recovered, plus any statutory damages under Subsections 9-625(e) and (f).

G. Deficiency Judgment

U.C.C. Article 9 has resolved one of the most litigated issues under former U.C.C. Article 9, but only in commercial transactions. The jurisprudence under former U.C.C. Article 9 is inconsistent among the various states in determining what additional sanctions may be imposed on a secured party who failed to comply with the enforcement provisions, other than damages for any loss caused by the non-compliance. The majority of states apply a presumption, rebuttable by the secured party, that the collateral equaled the amount of the secured debt. But a significant number of states subscribe to

366. *See* La. R.S. 10:9-507(1) (1993).

the view that the failure creates an absolute bar to the secured party pursuing a deficiency against the debtor. Also, a few states follow the so-called "offset" rule which requires a debtor to prove its loss. Former Chapter 9 adopted this offset rule by statute.[367] U.C.C. Article 9 adopts the rebuttable presumption rule for commercial transactions. Therefore, if a secured party forecloses improperly and brings a deficiency action against the debtor in a commercial transaction, under U.C.C. Article 9 the value of the collateral is presumed to have equaled the entire secured debt and the deficiency claim is barred, unless the secured party is able to rebut this presumption. This rule is established in U.C.C. Section 9-626, which only applies to non-compliance in connection with the "collection, enforcement, disposition or acceptance" under Part 6.[368]

But U.C.C. Article 9 is silent as to the effect on a non-complying secured party's right to deficiency judgment in consumer transactions. U.C.C. Subsection 9-626(b) affirmatively states that the limitation of the rebuttable presumption rule to non-consumer is intended to leave the delineation of the proper rules in consumer transactions to the courts. It also instructs the court not to draw any inference from this statutory limitation as to the proper rules for consumer transactions and leaves the courts free to apply established approaches to those transactions.

Chapter 9 contains several non-uniform provisions pertaining to deficiency judgment. First, Chapter 9 applies the rebuttable presumption rule to consumer transactions, but applies the offset rule to commercial transactions.

Subsection 9-626(a) is modified to apply to all transactions, expressly including a consumer transaction, rather than expressly excluding a consumer transaction. U.C.C. Subsection 9-626(b), which leaves the consumer rule to be formulated by the courts, is omitted in Chapter 9.

Subsection 9-626(a) contains two additional non-uniform provisions which are relevant to the application of the burden of proof rules. Understanding those changes requires a detailed examination of the uniform text. U.C.C. Section 926 uses general language regarding the pleading requirements in formulating the rebuttable presumption. Under U.C.C. Article 9, the secured party in a commercial transaction is not required to prove compliance with the relevant provisions of Part 6 as part of its *prima facie* case. If, however, the debtor or a secondary obligor raises the issue in

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367. *Id.*

368. *See* La. R.S. 10:9-626(a)(1) and (3); 10: 9-625(d) (Supp. 2002). For other types of non-compliance with Part 6, the general rule of actual damages applies. U.C.C. § 9-626 cmt. 2 (2001). The non-application of these rules to consumer transactions is part of the "consumer compromise." *See infra* note 376.

accordance with the forum's rules of pleading and practice, then the secured party bears the burden of proving that the collection, enforcement, disposition or acceptance complied. In the event the secured party is unable to meet this burden of proving compliance, then the debtor or obligor is to be credited with the greater of the actual proceeds of the disposition or the proceeds that would have been realized had the secured party complied with the relevant provisions. The next step creates the rebuttable presumption. That is, unless the secured party proves that compliance with the relevant provisions would have yielded a smaller amount, the amount that a complying collection, enforcement or disposition would have yielded is deemed to be equal to the amount of the secured obligation, together with expenses and attorney's fees. Thus, the secured party may not recover any deficiency unless it meets this burden of proof.

Chapter 9 contains two non-uniform changes in these provisions. First, Subsection 9-626(a) requires that the debtor or a secondary obligor plead the secured party's non-compliance in its petition, answer, or in connection with a motion for summary judgment. The purpose of this specificity is to avoid this issue being raised for the first time at trial.

The second non-uniform change is in Subsection 9-626(a)(4). In Chapter 9, that part of the rule is limited expressly to consumer transactions. Thus, under Chapter 9 it is only in a consumer transaction that the amount that a complying collection, enforcement, or disposition would have yielded is deemed by operation of law to be equal to the amount of the secured obligation unless the secured party proves that compliance with the relevant provisions would have yielded a smaller amount.

Stated another way, Chapter 9 varies significantly in the allocation of the burdens of proof in deficiency judgment cases. First, under Chapter 9 the secured party need not prove compliance with the remedies provisions whether in a commercial or a consumer transaction unless the debtor or secondary obligor properly pleads non-compliance. U.C.C. Article 9 applies this rule only to commercial transactions. Second, if the secured party's non-compliance is pleaded, under Chapter 9 the secured party has the burden of establishing compliance in both commercial and consumer transactions. Again, this rule under U.C.C. Article 9 is applied only to commercial transactions. It is a likely expectation, however, that courts will leave this burden of proof on the secured party in consumer transactions in other states. Third, there is an additional burden of proof if the secured party fails to carry its earlier burden of proof that its remedies action was in compliance. Under Chapter 9, if the secured party in a consumer transaction fails that second burden, then the secured party bears the burden of proving that the

amount of proceeds that would have been realized had the secured party complied is less than the sum of the full secured obligation.

In commercial transactions under Chapter 9, there is no such presumption. Section 9-626 in Chapter 9 continues to provide that if in a commercial transaction the secured party fails to carry its burden of proof of compliance, then the deficiency liability is still reduced by the amount of proceeds that compliance would have yielded. But, under Chapter 9 the rebuttable presumption burden of proof, that the non-complying secured party is barred from recovering a deficiency unless it overcomes the presumption that compliance would have yielded an amount sufficient to satisfy the debt, applies only to consumer transactions.[369]

Former Chapter 9 contained a non-uniform provision adopting the "offset" rule for both commercial and consumer transactions. The debtor could offset against a claim for deficiency all damages recoverable under former Chapter 9 resulting from the secured party's non-compliance, but the secured party's right to a deficiency was not otherwise extinguished or forfeited as a result of non-compliance.[370] Under Chapter 9, Louisiana has adopted the rebuttable presumption rule for consumer transactions, more favorable to Louisiana consumers than former Chapter 9. For commercial transactions, Chapter 9 has, in effect, retained the "offset" rule of former Chapter 9 because the core rebuttable presumption is limited in Chapter 9 to consumer transactions. In Chapter 9 the burden of proving compliance is on the secured party, as in U.C.C. Article 9. However, since in commercial transactions there is no rebuttable presumption that compliance would have yielded an amount sufficient to satisfy the debt, the burden is on the debtor to prove the extent of offset to which he is entitled.

Chapter 9 is significantly non-uniform with regard to another aspect of the deficiency judgment rules in Section 9-626. U.C.C. Article 9 contains a special rule where a secured party, a person related to the secured party,[371] or a guarantor of the secured debt, purchases the collateral at a foreclosure sale and the purchase price is "significantly below the range of proceeds that a complying disposition to a person [other than one of those persons] would have

369. The last sentence of uniform Section 9-625(d) eliminates the possibility of double recovery in connection with a reduction or elimination of a deficiency based on non-compliance with such collection and enforcement provisions. U.C.C. § 9-625 cmt. 3 (2001). The language is confusing. Zinnicker, *supra* note 170, at 175. But in U.C.C. Article 9 this provision applies only in commercial transactions and the statute is silent as to the rule in consumer transactions, while in Chapter 9 this provision in Section 9-625(d) applies to consumer transactions.

370. *See* La. R.S. 10:9-507(1) (1993).

371. *See* La. R.S. 10:9-102(a)(62) (Supp. 2002). *See also* U.C.C. § 9-615 cmt. 7 (2001).

brought."[372] In that circumstance, even though the disposition was commercially reasonable and in compliance with the remedies rules, U.C.C. Section 9-615(f) reduces the secured party's deficiency claim by the amount that the foreclosure sale would have brought had some other unrelated third party purchased the collateral at the foreclosure sale. Stated differently, if a secured party, a person related to a secured party, or a secondary obligor acquires collateral at a foreclosure sale and the proceeds are significantly below the range of proceeds that a complying disposition to an unrelated purchaser would have brought, the debtor will receive a credit for the excess over what was actually paid and what would have been paid by an unrelated purchaser.

Thus, this rule addresses the problem of procedurally regular dispositions of collateral to such a person whose alignment with the second party could be expected to bring a low price. In these situations there is reason to suspect that the secured party lacks the incentive to maximize the price. As a consequence, the disposition may comply with the procedural requirements of U.C.C. Article 9, being conducted in a commercially reasonable manner following reasonable notice, but nonetheless bring a low price. The rule adjusts for this lack of incentive.[373] Consequently, instead of calculating a deficiency based on the actual net proceeds, the deficiency is calculated based on the proceeds that would have been received in a disposition to an unrelated person.

Under U.C.C. Article 9, in a non-consumer transaction, the debtor or obligor has the burden of proving that the proceeds of such a disposition are so low that the actual proceeds should not serve as the basis upon which a deficiency or surplus is calculated. The justification in U.C.C. Article 9 for placing this burden of proof on debtors or obligors is that if the burden were placed on the secured party, then debtors might be encouraged to challenge the price received in every disposition to the secured party, a person related to the secured party, or a secondary obligor.

Chapter 9 rejects this shifting of the burden of proof as inappropriate policy. Subsection 9-626(a)(5) is omitted in Chapter 9. One reason is that the only effect of a foreclosure price when the sale is to a recourse party (which by definition is a secondary obligor) is to fix the deficiency owed from the debtor. The price has no effect on the recourse party's liability to the secured party, which is to pay

372. U.C.C. §§ 9-615(f), 9-626(a)(5) (2001).

373. The rule rejects the view that the secured party's receipt of such a price necessarily constitutes non-compliance with Part 6. However, such a price may suggest the need for greater judicial scrutiny. *See* U.C.C. § 9-615 cmt. 6, § 9-610 cmt. 10 (2001). For factors to be considered in such scrutiny, see Zinnecker, *supra* note 170, at 96 n.424.

the full debt. This purported fear is insufficient justification to shift the burden to the debtor when sales are to the secured party or a person related to the secured party. The burden of proof should not be placed on the debtor in instances where the sale was to any person who may lack the incentive to maximize the price. Finally, the fact that Chapter 9 varies from U.C.C. Article 9 by applying Section 9-626 to all debtors, including consumers, is all the more reason to omit Subsection(a)(5)'s burden of proof shifting. The secured party is in a far better position to bear the burden of proof regarding the propriety of the price, especially in a deficiency judgment battle with a consumer.

Finally, Chapter 9 contains another non-uniform provision bearing upon deficiency judgments. Subsection 9-626(c) states that the provisions of the Louisiana Deficiency Judgment Act do not apply to enforcement of a security interest or agricultural lien governed by Chapter 9. This provision carries forward the substance of existing Louisiana law, but does so in a far more straightforward and express manner.[374]

X. CONSUMER PROVISIONS

U.C.C. Article 9 contains many provisions with special rules for consumer transactions.[375] In some instances, the "consumer compromise" reached in the drafting process was to say nothing in U.C.C. Article 9 on a particular issue as to consumer transactions, leaving it to the courts or other state law to decide the rules applicable on that issue in consumer transactions.[376] Chapter 9 has multiple non-

374. *See* La. R.S. 13:4106(C), 13:4108.2(B)(1), 13:4108.3 (1991). *See also* Code Civ. P. art. 2723; Gulfco Fin. Co. v. Boyd, 702 So. 2d 342 (La. App. 2d Cir. 1997); Ford Motor Credit Co. v. Melancon, 677 So. 2d 145 (La. App. 3d Cir. 1996). *But see* Chrysler Fin. Co., L.L.C. v. Cloutier, 785 So. 2d 255 (La. App. 3d Cir. 2001).

375. These consumer protection provisions in Chapter 9 include La. R.S. 10:9-108, 10:9-403, 10:9-404, 10:9-612-9-614, 10:9-616, 10:9-620, 10:9-626 (Supp. 2002).

376. The treatment of consumer issues in U.C.C. Article 9 became the most difficult problem confronted by the Drafting Committee. Late in the drafting process, a package of proposed revisions was adopted relating to consumer transactions. This "consumer compromise" grew out of discussions among creditor and consumer representatives and mediation by the chairman, with the ultimate compromise being one that enabled the U.C.C. Article 9 enactment process to proceed without encountering organized political opposition. The compromise included the deletion of several draft provisions that would have impacted consumers. It also resulted in the modification of other provisions to make them not apply to consumer transactions: U.C.C. Sections 9-103(f), (g) and (h) (purchase-money security interests), 9-612(b) (disposition notice period), 9-620(g) (partial strict foreclosure), and 9-626(b) (rebuttable presumption rule). In the first

uniform variations that apply to consumer transactions. All of these variations have been discussed previously in this article, but are briefly repeated here in a collected list for the reader's convenience.

Chapter 9 provides by definition that consumer goods cannot become fixtures and cannot be the subject of a fixture filing.[377] This rule continues the non-uniform variation set forth in former Chapter 9. The effect is to prevent finance companies from obtaining a security interest encumbering a portion of a home residence. A lender financing a good that is to become a component part of a home residence, such as air conditioning systems, must obtain a mortgage on the entire immovable in order for its debt to be secured.

Chapter 9 applies the "dual-status" rule for purchase-money security interest transactions to consumer-goods transactions.[378] This application is a variation from U.C.C. Article 9, which leaves to the courts the determination of the proper purchase-money security interest rules to apply in consumer-goods transactions and instructs the courts not to draw any inference from this statutory limitation as to the proper rules for consumer-goods transactions. Chapter 9 also applies to consumer-good transactions the provisions rejecting the "transformation" rule and permitting cross-collateralization and refinancing without loss of purchase-money security interest status. Once again, Chapter 9 carries forward a non-uniform variation from former Chapter 9 and rejects the "consumer compromise" in U.C.C. Article 9.

Chapter 9 includes consumer deposit accounts and consumer tort claims as eligible collateral within the scope of Chapter 9.[379] Again, these non-uniform provisions are carried forward from former Chapter 9.

Chapter 9 provides a twenty-one days *per se* reasonable notice rule for notices of the secured party's disposition of the collateral.[380] In contrast, U.C.C. Article 9 has no safe harbor provision for notices of disposition of consumer collateral.

Chapter 9 permits the remedy of retention of collateral in partial satisfaction of the secured debt in a consumer transaction, and provides special notice and other procedural rules applicable to such

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and last instances, U.C.C. Article 9 goes further and instructs the courts not to draw any inference from the limitation of those rules to non-consumer transactions when the courts determine the proper rules for consumer transactions. Zinnecker, *supra* note 170, at 123 n.548. For a contrast of the approach of Chapter 9 with respect to these issues, see text accompanying *supra* notes 280, 352, 354 and 368.

377. *See* text accompanying *supra* note 213.

378. *See supra* Part VII.C.

379. *See supra* Part III.A. and Part III.B.

380. *See supra* Part IX.D.

partial *dations en paiement*.[381] In contrast, U.C.C. Article 9 prohibits a secured party from retaining the collateral in partial satisfaction of the secured debt in a consumer transaction.

Chapter 9 carries forward the non-uniform deletion from former Chapter 9 of the minimum statutory ten percent damage recovery in a consumer-goods transaction.[382]

Chapter 9 applies the rebuttable presumption rule to consumer transactions when a secured party fails to comply with the remedies provisions and, essentially, the offset rule to commercial transactions.[383] In contrast, U.C.C. Article 9 limits the application of the rebuttable presumption rule to commercial transactions, leaving to the courts the determination of the proper rules in consumer transactions. Again, U.C.C. Article 9 instructs the court not to draw any inference from this statutory limitation as to the proper rules for consumer transactions. Chapter 9 changes the law from former Chapter 9, which applied the offset rule to both commercial and consumer transactions in Louisiana.

XI. TRANSITION

The transition provisions of U.C.C. Article 9 are among the most difficult to understand and apply. Chapter 9 is largely uniform, and reference to the national Official Comments to Part 7 of U.C.C. Article 9 is indispensable. But Chapter 9 does contain a few non-uniform variations in the transition provisions.

Under U.C.C. Section 9-702, except as affected by the express transition rules in Part 7, transactions that were not governed by former U.C.C. Article 9 and were validly entered into before July 1, 2001, may be terminated, completed, consummated and enforced by the law that otherwise would have applied if revised U.C.C. Article 9 had not taken effect. Chapter 9 contains a non-uniform clarification to this transition provision, by adding a reference to "including law repealed by this Act."[384] In other states which enacted former U.C.C. Article 9 decades ago, the pre-U.C.C. chattel mortgage statutes and the like are distant memory. However, in Louisiana former Chapter 9 only became effective in 1990. Louisiana's chattel mortgage statutes and the Louisiana Assignment of Accounts Receivable Act were not repealed at that time, but instead were repealed only as a part of the enactment of Chapter 9.[385] This reference to "law repealed by this Act" is therefore appropriate.

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381. *See supra* Part IX.E.
382. *See* text accompanying *supra* note 366.
383. *See supra* Part IX.G.
384. La. R.S. 10:9-702(b)(2) (Supp. 2002).
385. 2001 La. Acts No. 128, §18.

Louisiana attorneys must also remember that they face certain transition issues which are unique to Louisiana because of changes in non-uniform provisions from former Chapter 9 to Chapter 9. For instance, the change in Louisiana law under Section 9-108(e) requiring more specific description of tort claims, consumer securities accounts, life insurance policies, judgments, interests in a trust or an estate, or collateral mortgage notes will make security interests created under general descriptions unenforceable on and after July 1, 2002, absent curative action.[386] Subsection 9-703(b) also applies in instances where the method of perfection in a type of collateral has changed from former law. In such instances the security interest becomes unperfected on July 1, 2002, absent additional action. That uniform rule has special non-uniform application to certain collateral under Louisiana Chapter 9. The perfection rules under Chapter 9 applicable to security interests in a deposit account, a life insurance policy, an interest in an estate, and a beneficial interest in a trust have all changed from the perfection rules under former Chapter 9.[387] Thus, secured parties with existing transactions for which the applicable new choice of law rules elect Chapter 9 as the law governing perfection must take action before July 1, 2002 to comply with the new requirements of Chapter 9 with respect to such collateral.

The major Louisiana-specific transition issues arise from the repeal of various global chattel mortgage statutes and the Louisiana Assignment of Accounts Receivable Act.[388] As with other repealed statutes, secured transactions under those statutes (that were not under former Chapter 9) retain their validity under Subsection 9-702(b) despite such repeal, except to the extent the transition rules specifically supersede. The difference is that special non-uniform Chapter 9 provisions apply to some of these repealed statutes as discussed below, but not to all these repealed statutes. The general one year rule of Section 9-703(b) will apply to such transactions in the absence of special Louisiana non-uniform provisions.

The most significant non-uniform variations in the transition provisions in Chapter 9 are the additions of Subsection 9-705(g) and

386. La. R.S. 10:9-703(b)(2) (Supp. 2002). *See supra* note 156 and accompanying text. *See also* text accompanying *supra* note 158 regarding the unenforceability of certain after-acquired collateral clauses.

387. *See* text accompanying *supra* notes 73 (deposit account), 114 (life insurance), 250 (estate), and 260 (trust). *See* U.C.C. § 9-701 cmt. (2001).

388. 2001 La. Acts No. 128, §18, repealed the two main chattel mortgage statutes and the Louisiana Assignment of Accounts Receivable Act. But it also repealed La. R.S. 12:704 and 32:704(B). But Subsection 9-705(g) applies to transactions under La. R.S. 12:704, making the extended transitional grace period discussed below available, but does not include La. R.S. 32:704(B).

Subsection 9-710.[389] These non-uniform provisions pertain to the continued enforceability and perfection of Louisiana chattel mortgages and assignments of accounts receivable.

Chapter 9 contains a non-uniform definition of "pre-effective-date financing statement" in Section 9-710.[390] Chapter 9 expands this definition to include filings made in the Louisiana uniform commercial code records between January 1, 1990 and June 30, 2001, pertaining to former Chapter 9 chattel mortgages and assignments of accounts receivable. Through this expansion of the definition and its use in Subsection 9-705(c), Chapter 9 allows those filings in the Louisiana U.C.C. system to continue to be effective for the balance of their five-year filing period[391] as to Louisiana debtors rather than having their effectiveness terminated within one year. Financing statements filed under former Chapter 9 are treated in a like manner. Because these filings are already in the Louisiana uniform commercial code records, no benefit to the public would be obtained by shortening their effective filing period.

However, the impact of the choice of law rules for perfection contained in U.C.C. Article 9 and Chapter 9 must always be taken into account. If the debtor in such a chattel mortgage or assignment of accounts receivable filing is a non-Louisiana resident, a non-Louisiana registered organization, or a non-registered organization which has its chief executive office outside Louisiana, those choice of law rules governing perfection, both in Louisiana and elsewhere, elect a jurisdiction other than Louisiana.[392] Accordingly, in those situations the benefits of the non-uniform provisions of Chapter 9 will not be available to the secured party if Louisiana law is not applied to the evaluation of the security interest's perfection. In those situations, secured parties will be well advised to comply with the requirements of Chapter 9 and U.C.C. Article 9 before July 1, 2002, and not rely on the purported protection of this non-uniform Louisiana transition rule.

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389. Indispensable to the effectiveness of that first non-uniform addition is a matching non-uniform cross-reference thereto in Section 9-705(a). Another critical cross-reference is the uniform exception in Section 9-703(b) made by reference therein to 9-705. Finally, use of the non-uniform defined term "pre-effective-date financing statement" throughout Section 9-705 is critical to the expansion of the transition provisions to include those pre-U.C.C. Louisiana security devices. *See* text accompanying *infra* notes 390-391.

390. La. R.S. 10:9-710(b) (Supp. 2002). Although U.C.C. Article 9 defines the term solely for use in U.C.C. Section 9-707, which was added as part of the January 15, 2000 post-promulgation national corrections, the term actually is used in U.C.C. Article 9 in other sections as well.

391. *See* former La. R.S. 9:5356(K) (1991), 9:3112(C) (1997).

392. La. R.S. 10:9-301, 10:9-307(b) and (e) (Supp. 2002). *Cf.* U.C.C. § 9-707 cmt. 2 (2001) (applicable law governing amendments).

The non-uniform addition of Subsection 9-705(g) to Chapter 9 has a similar purpose. This provision pertains to mortgages encumbering chattels entered into before January 1, 1990, when former Chapter 9 became effective in Louisiana. The two chattel mortgage statutes repealed as part of the enactment of Chapter 9 provided for two different rules of perfection.[393] Chattel mortgages under Louisiana Revised Statutes 9:5351-5366.2 were perfected by filing in the chattel mortgage records. However, mortgages of movables used in commercial or industrial activity under Louisiana Revised Statutes 9:5367-5373 were perfected by recordation solely in the immovable mortgage records if the chattel mortgage was included in the same act as a mortgage of the immovable upon which the chattels were located. Under the law in effect at the time of their creation, such mortgage liens under the latter statute still may continue to be effective in 2001 without any requirement for a filing to have been made in the Louisiana uniform commercial code records.[394] Furthermore, chattel mortgages under the first statute entered into before January 1, 1990, recorded in the chattel mortgage records which secure obligations with a maturity longer than nine years do not require reinscription until one year after the described maturity.[395]

Absent a special transition provision, under Chapter 9, all mortgages within these categories would become unperfected and unenforceable as to chattels on July 1, 2002, one year after the effective date.[396] The non-uniform addition of Subsection 9-705(g) provides an extended transition time for these chattel mortgages under certain circumstances.[397] If the debtor is a Louisiana resident, a Louisiana registered organization, or is otherwise "located" in Louisiana, then under this special Louisiana rule the perfection of

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393. *See supra* note 388 and accompanying test (pertaining to repealed La. R.S. 12:704).

394. *See* former La. R.S. 9:5369(A) (1991) (repealed) and former La. Civ. Code art. 3369 (repealed). 1992 La. Acts No. 1132, §7, declares that mortgages created before January 1, 1993 shall continue to be regulated by the laws in existence before the restatement of the Civil Code mortgage articles effective January 1, 1993.

395. *See* former La. R.S. 9:5356(E) (1991) (repealed). In contrast, collateral chattel mortgages had an inscription duration of ten years, and therefore either have all been reinscribed in the Louisiana U.C.C. records or have had their inscriptions lapse.

396. La. R.S. 10:9-703(b) (Supp. 2002). *See* U.C.C. § 9-703 cmt. 2 (2001) ("Subsection (b) deals with security interests that are enforceable and perfected under former Article 9 or other applicable law . . . .")

397. Section 9-702(b) allows such a transaction to remain valid except to the extent one of the other sections expressly makes it invalid. Subsection 9-703(b) is subject to the critical exception "except as otherwise provided in Section 9-705." Subsection 9-705(a) has a non-uniform cross-reference to Subsection 9-705(g).

Louisiana chattel mortgages existing on July 1, 2001 remains valid until the earlier of (i) the time the effect of recordation of the mortgages ceases or (ii) June 30, 2006. However, if another state's law governs perfection under the choice of law rules provided in Part 3 of U.C.C. Article 9, and of Chapter 9, this special Louisiana transition provision may be of no avail.

For the type of such mortgage which under its governing statute encumbered chattels even though recorded only in the real estate records, a timely reinscription in the mortgage records after July 1, 2001 will continue the "effect of recordation" of the mortgage and thus perfection of the security interests and chattels until, but in no event later than, June 30, 2006.[398] This extended time is similar to the extended transition period provided for transmitting utility filings.[399] However, in contrast, a chattel mortgage (i) filed only in the chattel mortgage records, and (ii) not previously reinscribed before July 1, 2001, by a continuation filing in the Louisiana uniform commercial code records, retains its perfection only until arrival of the date on which its reinscription is required. This different result is because reinscription of that chattel mortgage to continue its "effect of recordation," whether in the chattel mortgage records, or the uniform commercial code records, under the repealed chattel mortgage statutes is no longer available. Such a chattel mortgage cannot have the effect of its recordation extended beyond the period fixed as of July 1, 2001. Thus the secured party must meet the requirements of Chapter 9 when its current inscription in the chattel mortgage records expires.[400]

XII. CONCLUSION

The non-uniform variations in Chapter 9 present a challenge to the Louisiana practitioner. When participating in a transaction subject to Chapter 9, a Louisiana attorney must always remember to compare carefully the applicable provisions of Chapter 9 to their counterparts in U.C.C. Article 9. Of course, in the large majority of provisions, Chapter 9 is uniform with U.C.C. Article 9. But, as discussed above, in many critical areas there are important non-uniform variations in Chapter 9 that must be taken into account by

398. La. R.S. 10:9-705(g)(1) (Supp. 2002). *See* La. Civ. Code arts. 3333, 3334 and *supra* note 394.

399. La. R.S. 10:9-705(e) (Supp. 2002).

400. The "effect of recordation" of such chattel mortgage will cease at the time its inscription period ends. *See* former La. R.S. 9:5356(E) and (K) (1991) (repealed). *Cf.* La. Civ. Code arts. 3320, 3328-3335 ("effect of recordation"). There is no longer a method available under Louisiana law to extend or continue their inscriptions and "effect of recordation."

Louisiana practitioners. Reference to this article, together with a review of both the Official Comments to U.C.C. Article 9 and the Louisiana Official Revision Comments to Chapter 9, should provide assistance in identifying these non-uniform provisions and applying them to particular transactions.