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SALES OF PERSONAL PROPERTY AS SECURED TRANSACTIONS UNDER ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE

*D. Fenton Adams**

The principal focus of Article 9 of the Uniform Commercial Code (UCC) has always dealt with transactions intended by the parties to create security interests in personal property. Prior to the revision of the Article in 1998,¹ section 9-102(1) provided: “[E]xcept as otherwise provided in Section 9-104 on excluded transactions, this Article applies to (a) any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures.”² The term “security interest” was defined in section 1-201(37) of the UCC as meaning, primarily, “an interest in personal property or fixtures which secures payment or performance of an obligation.” That such interests were created by contract may have been implicit in section 9-102(1)(a), but any doubt was removed by subsection (2), which provided that “[t]his Article applies to security interests created by contract.”³ These provisions did not say how a security interest worked to provide security, but a study of later provisions of Article 9 made it apparent that the person entitled to payment or performance of the obligation secured had rights to resort to the personal property subject to the security interest, in the event of default on the obligation, to collect payment of, or compensation for nonperformance of, the se-

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1. In this article there will be frequent references to Article 9 as revised in 1998 and to its text and comments prior to the 1998 revision. Article 9 as it stood immediately prior to the 1998 revision will be referred to as “former Article 9” and the 1998 revision (as somewhat modified since) will be referred to as “revised Article 9.”

2. The application of the Article to security interests in “fixtures” did not really extend the scope of the Article beyond security interests in personal property, as a “fixture” (or at least the type of fixture to which Article 9 applied), was a hybrid type of property, having both real property and personal property characteristics, and Article 9’s application to fixtures was to security interests in them as personal property. See D. Fenton Adams, *Security Interests in Fixtures Under Mississippi’s Uniform Commercial Code*, 47 MISS. L.J. 831, 836–841, 898–900 (1976).

3. Professor Grant Gilmore, one of the principal draftsmen of the original version of Article 9, has written that former UCC § 9-102(2) (1972) “repeats the same idea [as subsection (1)] in different language.” GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY*, vol. 1, § 10.1, at 296 (Little, Brown & Co. 1965) [hereafter Gilmore].

cured obligation, and also priority over some or all rival claimants to the property.

In 1998 the sponsors of the UCC⁴ approved a sweeping revision of Article 9; however, the main focus of the Article was not changed. Section 9-109(a)(1) of revised Article 9 provides: “[e]xcept as otherwise provided in subsections (c) and (d), this Article applies to (1) a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract,”⁵ and section 1-201(37) of the Code, though modified to conform to some changes made in Article 9, retained the general definition of security interest quoted above without change.⁶

Nevertheless, Article 9 continues to apply to some transactions that are not intended to create security interests. Section 9-102(1) of former Article 9 provided that, except as otherwise provided in section 9-104, “this Article applies . . . also (b) to any sale of accounts or chattel paper.” A “sale” of property is a transaction by which ownership is transferred from one person to another for a price.⁷ Even if the

4. The American Law Institute and the National Conference of Commissioners on Uniform State Laws. The latter has recently been renamed the Uniform Law Conference.

5. There is a subtle shift in wording in revised Article 9. Instead of saying that the Article applies to “any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures,” as former U.C.C. § 9-102(1)(a) (1972) had it, the revision makes the Article applicable to “a transaction, regardless of its form, that creates a security interest in personal property or fixtures” (emphasis added). Why this change? A comment to revised U.C.C. § 9-505 (1999) explains that the phrase “intended as security” misleadingly “created the erroneous impression that the parties to a transaction can dictate how the law will classify it . . . and thus affect the rights of third parties. This Article deletes the phrase wherever it appears.” Revised § 9-505, Cmt 3, ¶2. Still, whether an interest in personal property or fixtures “secures an obligation” is a matter of contract, controlled by the agreement of the parties. Apparently, the draftsmen of the revision were concerned about the possibility that the wording used in former Article 9 might be taken to mean that how the parties label the transaction conclusively establishes its nature, rather than the substance of the agreement as found by accepted techniques of contract interpretation. One might have supposed that “regardless of its form” in former Article 9, it was adequate to avert such misreading of the statute, but the draftsmen of the revision were not satisfied that such wording was sufficient.

6. In 2001, a revision of Article 1 was approved by the Code’s sponsors. The definition of security interest now appears in § 1-201(b)(35), and a portion of the text that was formerly in § 1-201(37), has been transferred to revised § 1-203. The section of the passage quoted above in the text of this article remains unchanged in revised § 1-201(b)(35).

7. Section 2-106(1) of the UCC provided: “A ‘sale’ consists in the passing of title from the seller to the buyer for a price.” Article 2 is concerned with sales of “goods,” not sales of “accounts” or “chattel paper,” but § 9-105(3) of former Article 9 provided

intent of the parties was for the buyer to acquire complete ownership of the property and the seller to retain no interest in it, if the subject matter of the sale was accounts or chattel paper, the transaction was one within the scope of Article 9 (unless excluded by section 9-104). Furthermore, section 1-201(37) defines security interest to include "any interest of a buyer of accounts or chattel paper which is subject to Article 9."⁸

The 1998 revision of Article 9 extended the reach of the Article to some additional sales.⁹ Revised section 9-109(a)(3) provides that, subject to exceptions in subsections (c) and (d), the Article applies to "a sale of accounts, chattel paper, payment intangibles, or promissory notes."¹⁰

This article has two objectives: (1) to explore the reasons for including some outright sales of personal property within the scope of Article 9 and the effect of such inclusion on the status of buyers and sellers of such property, and (2) to identify the differences between the two versions of the Article in their treatment of sales of personal property as secured transactions.

I. RATIONALE AND ANALYSIS OF SCOPE

Why should an article of the UCC that is primarily concerned with transactions intended to create security interests also be applicable to some sales that, by definition, are not transactions of that type? The comments to former Article 9 merely said that the purpose was "to avoid difficult problems of distinguishing between transactions intended for security and those not so intended."¹¹

Professor Gilmore has explained that the extension of the scope of Article 9 to sales of accounts followed the precedent of pre-Code "accounts receivable statutes."¹² These statutes were designed to protect the interests of persons engaged in the business of financing the operations of sellers of goods and services on credit, with the financiers taking assignments of their debtors' contract rights to payment for

that the definition of "sale" in § 2-106 also applied when the term was used in Article 9.

8. U.C.C. § 1-201(37)(1998).

9. In addition, revised Article 9 applies to consignments and agricultural liens, as well as many security interests arising under other articles of the UCC. Revised § 9-109(a)(2), (4), (5) and (6).

10. Subsection (b) of § 9-102 in revised Article 9 incorporates by reference the definition of "sale" in § 2-106.

11. U.C.C. § 9-102, cmt, ¶ 1 (1972).

12. Gilmore, *supra* note 3, vol. 1, § 10.5 at 308.

goods sold or services (accounts receivable) rendered as security for advances made. In its typical form, the advances made by the financiers were repaid by the debtors from the payments made to the debtors from their credit customers, who were not notified that their accounts had been assigned; if credit customers defaulted on their obligations, the debtors were liable to their financiers for the deficiencies.¹³ Accounts receivable statutes were widely enacted during the 1940s and 1950s to protect the financiers' interests from invalidation by the debtors' trustees in bankruptcy.¹⁴

These statutes, however, were usually broad in coverage so that they were also applicable to financiers who operated in a different manner. These financiers were "factors" who typically took "non-recourse" assignments of accounts receivable in exchange for their advances to credit sellers (they bought the accounts).¹⁵ The persons obligated on the accounts were notified to make payments to the factors, and in the event of defaults by the persons obligated on the accounts, the sellers were not liable to the factors for the deficiencies.¹⁶

The application of former Article 9 of the Code to a "sale of accounts" (an "account" being defined as "any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance")¹⁷ is thus explainable as following the precedent of the accounts receivable statutes which Article 9 replaced.¹⁸

Professor Gilmore noted that the broad coverage of the accounts receivable statutes gave trouble because many of them, if taken literally, would cover numerous assignments that were not part of financing arrangements.¹⁹ Presumably conscious of this history,²⁰ the drafters of

13. *Id.* at vol. 1, § 5.2, at 132. The history of this type of financing is related in Chapter 8 of Professor Gilmore's text.

14. *See id.* at vol.1, § 8.6.

15. *Id.* at vol. 1, § 5.2, at 132.

16. *Id.* at vol. 1, § 5.2, at 132. Professor Gilmore explained the statutory coverage of these "factoring" arrangements (which, in their usual form, were not in danger of invalidation by trustees in bankruptcy) were designed to protect non-typical factors who took assignments without notifying the account debtors of their assignments. The non-notification feature would expose the factors to the danger of losing out to their debtors' trustees in bankruptcy unless the statute protected them. *Id.* at vol. 1, § 8.7, at 276.

17. Former U.C.C. § 9-106 (1972).

18. Gilmore, *supra* note 3, vol. 1, §10.5, at 308.

19. *Id.* at vol. 1, § 8.7, at 276.

20. *Id.* at vol. 1, § 10.5, at 309.

Article 9 cut down the coverage of sales of accounts by exclusions which, in former Article 9, appeared in section 9-104(f):

[t]his Article does not apply . . . (f) to a sale of accounts . . . as part of a sale of the business out of which they arose, or an assignment of accounts . . . which is for the purpose of collection only, or a transfer of a right to payment under a contract to an assignee who is also to do the performance under the contract, or a transfer of a single account to an assignee in whole or partial satisfaction of a preexisting indebtedness.

In retrospect, Professor Gilmore concluded that this list of exclusions was too narrowly drawn, and he urged courts construing the list to treat it as “illustrative, not as exhaustive” and to be guided by the underlying objective of excluding from Article 9 coverage all sales of intangibles not made in connection with “institutionalized financing transactions (such as factoring).”²¹

The pre-UCC accounts receivable statutes generally did not apply to transfers of what Article 9 refers to as “chattel paper,”²² which was defined in former Article 9 as “a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods.”²³ Sales of chattel paper were, however, included within the coverage of Article 9 from its earliest version.²⁴ Professor Gilmore did not explain the reason for this additional coverage. Professors Summers and White, however, have attributed it to the practice of some “floor plan” financiers of dealer inventory to make advances partly in exchange for chattel paper arising from the sales of the inventory, the floor planners taking the paper “without recourse”²⁵ and thus buying it.

21. *Id.*

22. *Id.*

23. Former U.C.C. § 9-105(1)(b) (1972). The definition continued: “[b]ut a charter or other contract involving the use or hire of a vessel is not chattel paper. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or series of instruments the group of writings taken together constitutes chattel paper.” *Id.*

24. Gilmore, *supra* note 3, vol. 1, § 10.5, at 308–309. The relevant provision in former Article 9 was in § 9-102(1)(b).

25. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE, § 21-10, following n. 11 (3rd student ed., West 1988) [hereafter WHITE & SUMMERS 3d]. For further discussion of reasons for the application of Article 9 to sales of accounts and chattel paper, see Steven L. Schwarcz, *The Impact on Securitization of Revised U.C.C. Article 9*, 74 CHI.-KENT L. REV. 947, 948–949 (1999) [hereafter Schwarcz].

The definitions of “chattel paper” and “sale” were broad enough to bring many transfers of such paper which were not made in a financing context within the coverage of Article 9. In an attempt to confine Article 9 coverage to that context, two of the exclusions in section 9-104 of the former text of the UCC were expressly made applicable to sales of chattel paper, as well as to sales of accounts. The section stated that “[t]his article does not apply . . . to a sale of . . . chattel paper as part of a sale of the business out of which they arose, or an assignment of . . . chattel paper that is for the purpose of collection only.”²⁶ As was true of these exclusions in their application to sales of accounts, Professor Gilmore’s urging that the specific exclusions be treated as illustrative only²⁷ would presumably be applicable here as well. He added the practical advice that in case of any doubt as to whether a sale of an account or chattel paper was within Article 9 coverage, the assumption should be made that the Article and its requirements did apply.²⁸ Revised Article 9 also provides that it applies, generally, to sales of “accounts” and “chattel paper.” The correspondence in wording is deceptive because the meaning of both terms is broader in the revision than it was in former Article 9.

The definition of “account” has been substantially expanded in coverage. It now appears in section 9-102(a)(2), which defines the term (except when it is being used as a verb) as

a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a vessel under a charter or other contract, (vii) arising out of the use of a credit or charge card or information contained on or for use with the card, or (viii) as winnings in a lottery or other game of chance operated or sponsored by a State, governmental unit of a State, or person licensed or authorized to operate the game by a State or governmental unit of a State. The term includes health-care-insurance receivables. . . .²⁹

26. The exclusion of former U.C.C. § 9-104(f) (1972) for “a transfer of a right to payment under a contract to an assignee who is also to do the performance under the contract” could apply also to a sale of chattel paper if it was made on such terms.

27. See also former U.C.C. § 9-104(f) (1972), Gilmore, *supra* note 20.

28. Gilmore, *supra* note 3, vol. 1, § 10.5, at 309.

29. Revised U.C.C. § 9-102(a)(2)(2000).

Compare this with the much simpler previous definition of “account” as “a right to payment for goods sold or leased or for services rendered . . . whether or not it has been earned by performance.”³⁰

Sales of all accounts, as revised Article 9 defines them, are within the coverage of the revised Article, except those excluded by subsections (c) and (d) of section 9-109. Subsection (c) excludes transactions governed by federal law that preempts Article 9 and secured transactions governed by certain other state statutes.³¹ Subsection (d)(4)–(7) tracks subsection (f) of former section 9-104 in its exclusions of accounts almost verbatim.³²

The term “chattel paper” has been given significantly broadened scope as well. A general definition of the term in revised Section 9-102(a)(11) is

a record or records which evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and a license of software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods. In this paragraph ‘monetary obligation’ means a monetary obligation secured by the goods or owed under a lease of the goods and includes a monetary obligation with respect to software used in the goods.³³

The elaborateness of this definition is primarily due to the drafters’ decision in the revision to treat computer software that is collateral for an obligation as part of the goods for Article 9 purposes.³⁴

30. Former U.C.C. § 9-106(1972). This section also expressly included rights to payment under charters or other contracts for use or hire of a vessel.

31. Former Article 9 contained the equivalent of revised § 9-109(c)(1) (federal preemption) in § 9-104(a), and of course both merely state what would be so even without an express provision. Paragraphs (2)–(4) of revised § 9-109(c) are new and replace an exclusion from UCC coverage of all transfers by governments or governmental subdivisions or agencies which appeared in former § 9-104(e).

32. See also U.C.C. § 9-104(f), Gilmore, *supra* note 20.

33. U.C.C. § 9-102(a)(11). The definition continues:
[t]he term does not include (i) charters or other contracts involving use or hire of a vessel or (ii) records that evidence a right to payment arising out of the use of a credit or charge card or information contained or information on or for use with the card. If a transaction is evidenced by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper.

34. See revised U.C.C. § 9-102, cmt. 5(b) (1999). See also Steven O. Weise, *An Overview of Revised Article 9*, in ABA, *The New Article 9*, 1, 2 (Corinne Cooper, ed., 2d ed., ABA 2000).

A more notable change in the definition is that the revision speaks of "a record or records," although the former definition referred to "a writing or writings." The significance of the change is that revised Article 9 treats some computerized records and communications as the legal equivalent of writings. The term "record" is defined in revised section 9-102(a)(69) as "information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form." Similarly, whereas former Article 9 referred to "signed" writings, revised Article 9 uses the adjective "authenticated" to describe the records, where authenticate means to sign or to take steps to identify the person whose electronic record it is and to "adopt or accept" the record.³⁵

"Chattel paper" under revised Article 9, can be paper, as it has previously been, or it can be paperless, recorded only electronically. The difference between the two types of chattel paper is substantial enough to require some variation of the rules applicable to their use, and for this purpose revised Article 9 gives us two new terms: "tangible chattel paper" and "electronic chattel paper." Tangible chattel paper is chattel paper of the traditional sort,³⁶ and electronic chattel paper is the new paperless variety of chattel paper.³⁷

Whether tangible or electronic chattel paper is involved, sales of it are generally within the coverage of revised Article 9. There are some exclusions, found in subsection (d)(4)–(7) of revised section 9-109, and they follow those of subsection (f) of former section 9-104 without substantial change.³⁸ The exclusions of subsection (c) of revised Section 9-109³⁹ are also applicable to chattel paper.

The coverage of sales of personal property in revised Article 9 has been further broadened by inclusion of sales of two other types or

35. See revised U.C.C. § 9-102(a)(7) (1999).

36. See revised U.C.C. § 9-102(a)(78) (1999). This term can be a source of confusion as traditional chattel paper has often been referred to as a type of intangible property, because the essence of the property is a contract right, which cannot be seen or felt. The paper serves as evidence of a right, as contrasted from goods, where the property focuses on movable physical objects. It is true that the paper evidence of the contract rights, which were the focus of chattel paper and some other types of intangibles, had come to be treated as so closely associated with the contract rights that a transfer of the chattel paper was often affected by delivery of the paper. For that reason, the term "semi-tangible" was sometimes used. In Article 9, the term "tangible chattel paper" refers to what traditionally would be thought of as "semi-tangible" at best.

37. See revised U.C.C. § 9-102(a)(31) (1999).

38. See revised U.C.C. § 9-104(f) (1999), *supra* note 25.

39. See revised U.C.C. § 9-109 (1999), *supra* note 31.

property: “payment intangibles” and “promissory notes.” The term promissory note is not novel and is defined in revised section 9-102(a)(65) as “an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds.”⁴⁰ The idea of a “note” is that of a written promise to pay money in such form that the obligation it represents is treated, to some degree, as merged into the writing so that if a transfer of the right to payment is intended, the writing is usually delivered to the transferee to effect the transfer. Notes are to be distinguished from drafts and checks (orders to pay money) and from certificates of deposit (promises by banks to repay sums of money which have been deposited with them).

The term “payment intangible” is one coined by the drafters of revised Article 9. It is defined, in section 9-102(a)(61) as “a general intangible under which the account debtor’s principal obligation is a monetary obligation.” To understand this definition, one must know the meaning of “general intangible” and “account debtor.”

The effect of Article 9 is to break down the field of personal property within its scope into defined subcategories. Such classification is necessary to cope with variations in the rules of the Article based on differences in the characteristics of the several types of personal property and in the way they are customarily used. There is a basic distinction between tangible and intangible personal property. All tangible personal property is referred to as “goods” (and the category of goods being further broken down into inventory, equipment, consumer goods, and agricultural products). Intangibles are divided into numerous categories (even more so in revised Article 9 than in the former version of the Article), such as accounts and chattel paper, instruments, documents, investment property, and a final category, general intangibles, which is a catchall that includes all forms of personal property that do not fall into any of the other defined categories. In both Article 9 and the revised version, general intangibles is defined as including: “any personal property . . . other than” followed by a listing all of the other defined categories of personal property.⁴¹ The list of “other-thans” in revised Article 9 is longer than that of former

40. The term “instrument” is defined by revised section 9-102(a)(47) as “a negotiable instrument or any other writing that evidences a right to payment of a monetary obligation, is not itself a security agreement or a lease, and is transferred by delivery with any necessary indorsement or assignment.”

41. See former U.C.C. § 9-106,(1972); see also revised U.C.C. § 9-102(a)(42) (1999).

Article 9 because the scope of the definition was broadened under the revision to include more distinct types of personal property. "General intangible means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software."⁴²

Defining general intangible in an affirmative way by describing what it is, rather than what it is not, is a practical impossibility because of its catch-all nature. "Payment intangible," on the other hand, is a more limited concept than general intangible, although it is a type of general intangible. It is a right to payment of money, which is not within the definition of any other defined category of intangible personal property. A simple example would be a right to repayment of a loan which is not evidenced by chattel paper or an instrument.⁴³ Even the broadened definition of "account" does not apply to it.

The term "account debtor" refers to "a person obligated on an account, chattel paper, or general intangible."⁴⁴ The term is needed because a secured transaction involving an account, chattel paper, or a general intangible as collateral has two debtors involved. The first is the person whose obligation is represented by the account, chattel paper, or general intangible, and the second is the person who enters into the secured transaction with the secured party, transferring a security interest in the account, chattel paper, or general intangible. The simple term "debtor" could apply to both of them; "account debtor" serves to distinguish the debtor whose contract is being used as collateral from the debtor who so uses it.⁴⁵

Subsections (c) and (d) of revised section 9-109 carve out some exceptions to the general rule that sales of payment intangibles and promissory notes are governed by Article 9. Those of subsection (c),

42. Revised U.C.C. § 9-102(a)(42) (1999).

43. See revised U.C.C. § 9-102, cmt. 5(d) (1999). See also *In re Wiersma*, 324 B.R. 92 (B.A.P. 9th Cir. 2005) (where an action arguably in tort was settled by agreement of the parties, the right to payment arising from the settlement was a "payment intangible").

44. Revised U.C.C. § 9-102(a)(3) (1999).

45. See revised U.C.C. § 9-102, cmt. 5(h) (1999). The term "account debtor" is not applied to the person obligated on a promissory note that serves as collateral because some of the rules of Article 9 that deal with rights and duties of account debtors are inappropriate for application to a person obligated to pay a promissory note, at least if the note is a negotiable one, as Article 9 generally defers to Article 3's rules governing the rights and duties of persons obligated on promissory notes.

excepting cases governed by federal law which preempts the rules of Article 9 or governed by certain other state laws, apply to all forms of property which otherwise would be within the scope of Article 9. Those of subsection (d), paragraphs (4) through (7), which follow the pattern of former section 9-104(4),⁴⁶ specifically mention sales of promissory notes and payment intangibles in all paragraphs except the section referring to assignments of contract rights to assignees who are also obligated to perform duties under the contracts.

Why does revised Article 9 expand the types of personal property and sales that are treated as secured transactions? The comments to the revision explain the continuation of the prior coverage of sales of accounts and chattel paper on the ground that such coverage “generally has been successful in avoiding difficult problems of distinguishing between transactions in which a receivable secures an obligation and those in which the receivable has been sold outright. In many commercial financing transactions the distinction is blurred.”⁴⁷ The expansions of coverage to include sales of payment intangibles and promissory notes is noted, but not explained, in the same comment.⁴⁸ Steven Weise, an American Bar Association (ABA) Advisor to the revised Article 9 drafting committee, has attributed these expansions to awareness that the types of obligations involved are often sold in the course of financing transactions.⁴⁹

The broadened scope of revised Article 9 appears to reflect a consensus among the revisers that modernization of the law to adapt to changing business practices called for making the Article applicable, as much as was practicable, to all financing based on rights to payment, whether the rights were intended to serve as security for obligations or were subjects of outright sales, and that called both for making the Article applicable to additional categories of personal property and for coverage of sales of more types of receivables.⁵⁰ The

46. See *supra* note 23.

47. Revised U.C.C. § 9-109, cmt. 4, ¶ 1(1999). The term “receivable” is used in this comment as a short-form way of referring to the types of property of which the sales are within the scope of revised Article 9. In this article, the term will be used the same way.

48. Revised U.C.C. § 9-109, cmt. 4, ¶ 2 (1999).

49. STEVEN O. WEISE, AN INTRODUCTION TO REVISED U.C.C. ARTICLE 9, West, Selected Commercial Statutes, 1396 (West, 1999 ed.).

50. See 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, 1368–69 (1999) [hereafter Harris & Mooney].

rapid growth in recent years of a financing device called "securitization" seems to have been a prime example of need for such revision.⁵¹

Professor Gilmore's urging that the specific exclusions of certain sales of intangibles be treated as illustrative only and that courts construe them as designed to exclude from the Article all sales not occurring in an institutionalized financing context⁵² has not found favor with subsequent draftsmen of Article 9. Neither the text nor the Official Comments of former Article 9 contained language suggesting that the specific exclusions of the Article were merely illustrative, and an opinion of the Permanent Editorial Board for the UCC issued in 1994 suggested that the Board had the view that the only exclusions were those expressed in section 9-104.⁵³ The 1998 revision also appears to adopt this position. One comment points out the distinction between full sales of receivables and transactions that are intended to create security interests in such property, but it asserts: "This article applies to both types of transactions," though it does distinguish between them in some of its rules.⁵⁴ The impact of this comment is that unless a sale of a receivable is excluded by the express language of section 9-109(c) or (d), it is governed by Article 9; whether the transaction involved is conducted in a commercial financing context is immaterial. Such a reading is consistent with the revisers' general objective to provide rules of more certain application than some of the rules of the prior text.⁵⁵

II. ATTACHMENT OF THE SECURITY INTEREST

The creation of an Article 9 security interest is termed its "attachment" to the property that serves as the security (the collateral). Section 9-203(1) of former Article 9 provided that

a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless: (a)

51. See Schwartz, *supra* note 25, 948-50; See also John C. Murray, *Rechristening Issues in Participating Loans*, 19 PROB. & PROP. 36, 40 (Sept./Oct. 2005); See also JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE*, § 21-6 (5th student ed., West 2000) [hereafter WHITE & SUMMERS 5th].

52. See discussion *supra* Part I., Gilmore, *supra* notes 19 & 21.

53. Permanent Editorial Board for the Uniform Commercial Code, Commentary No. 14 (1994).

54. Revised U.C.C. § 9-109 cmt. 5 (1999).

55. See Steven O. Weise, *An Overview of Revised U.C.C. Article 9*, in ABA, *The New Article 9 Uniform Commercial Code*, 1 (Corrine Cooper, ed., ABA, 2d ed. 2000); Schwarcz, *supra* note 25 at 950-51.

the collateral is in the possession of the secured party pursuant to agreement . . . , or the debtor has signed a security agreement which contains a description of the collateral . . . ; (b) value has been given; and (c) the debtor has rights in the collateral.⁵⁶

Subsection (2) of the same section stated that, “[a]ttachment occurs as soon as all of the events specified in subsection (1) have taken place unless explicit agreement postpones the time of attaching.” Did these rules apply to sales of accounts and chattel paper? As section 1-201(37) expressly declared that the term security interest included “any interest of a buyer of accounts or chattel paper which is subject to Article 9” and nothing in the language of section 9-203 or any other section suggested that the security interests of buyers of accounts and chattel paper were not subject to the normal rules for attachment; presumably those rules did apply.

The requirement that value have been given was unlikely to cause trouble in a sale of receivables.⁵⁷ The same would be true of the requirement that the debtor have rights in the collateral. A sale, by definition, is a transfer of title from seller to buyer for a price.⁵⁸ The remaining requirement, found in section 9-203(1)(a), is in the nature of a Statute of Frauds and might, at times, catch a buyer unaware, though the probability was very likely small. “Accounts” are pure intangibles; there is no realistic way in which a buyer could take possession of them. Therefore, to have an enforceable security interest, he would have to obtain a signed security agreement from the debtor that described the property sold. That requirement would have been satisfied as a matter of routine in professional financing transactions and transactions involving collateral of considerable value, but there was no

56. The omissions from the quoted language are not relevant to sales of receivables.

57. “Value” is defined in § 1-201(44), which treats several specific types of action as a giving of value and adds “any consideration sufficient to support a simple contract.” That definition was moved in 2001 to § 1-204 without change in substance.

58. See *supra* note 8. If the seller had transferred ownership to someone else before the sale to a buyer, the seller would not have rights in the collateral at the time of the sale. Nevertheless, he might, under the law, have power to transfer rights in the collateral, and perhaps such a power could be treated as the equivalent of having rights in the collateral. As will be shown, the 1998 revision of Article 9 expressly allows attachment if the debtor has either rights in the collateral or power to transfer rights to a secured party. Revised § 9-203(b)(2). Such power was conferred on the debtor by the prior version of Article 9; arguably, the requirement that the debtor must have rights in the collateral should be construed as satisfied if the debtor has such a power. This power will be dealt with in the following text under the heading “Priorities.”

minimum value specified in the statute to make the signed writing requirement inapplicable. A buyer of chattel paper could satisfy the formality requirement by taking possession of the paper,⁵⁹ and if the buyer did not take possession, the signed writing requirement would apply. While the statute required a written “security agreement,” presumably a written contract for the sale of described accounts or chattel paper would satisfy the requirement.⁶⁰

Under revised Article 9, similar rules apply. Section 9-203(a) provides that: “[a] security interest attaches to the collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.” Subsection (b) of that section provides that, as a general rule,

[a] security interest is enforceable against the debtor or third parties with respect to the collateral only if: (1) value has been given; (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and (3) one of the following conditions is met: (A) the debtor has authenticated a security agreement that provides a description of the collateral . . . ; (B) the collateral . . . is in the possession of the secured party under Section 9-313 pursuant to the debtor’s security agreement; . . . or (D) the collateral is . . . electronic chattel paper and the secured party has control under Section . . . 9-105 . . . pursuant to the debtor’s security agreement.⁶¹

As under former Article 9, the term “security interest” is expressly made applicable to the interest of buyers of receivables for sales within the scope of Article 9.⁶²

This version of the rules on attachment further articulates what was at best implied by former Article 9, that even if the debtor does

59. The text of former Article 9 did not say that it was so, as to chattel paper for attachment purposes, but the rules on perfection of security interests provided that a security interest in chattel paper could be perfected by the secured party’s taking possession of the collateral (former § 9-305), and it would be anomalous to treat chattel paper as deliverable for perfection purposes, but not to effect attachment of the security interest.

60. Former U.C.C. § 9-105 (1972) defined security agreement as “an agreement which creates or provides for a security interest.” A written agreement for sale of described receivables would create a security interest, given the definition of “security interest” as including the interest of a buyer of accounts or chattel paper. Former U.C.C. § 1-201(37) (1972); U.C.C. § 1-201(b)(35) since the 2001 revision of Article 1.

61. The omitted portions of this subsection would not apply to cases involving sales of receivables.

62. See U.C.C. § 1-201(37) as it read prior to the 2001 revision of Article 1; revised U.C.C. § 1-201(b)(35) (1999).

not have an interest in the collateral, a security interest can attach if the debtor has power to transfer rights in the collateral to a secured party.⁶³

Another difference between the two versions of section 9-203 is the substitution of the term “authenticated” for “signed” in the requirement that a formalized security agreement have been made if the collateral is not in the possession of the secured party or, in the case of electronic chattel paper, if the debtor does not have control of it.⁶⁴

A third difference is the provision for a third type of formality; “control” of the collateral as an alternative to an authenticated security agreement or possession of the collateral, applicable where the collateral is electronic chattel paper.⁶⁵

A fourth difference is the inclusion of a reference to Section 9-313 in connection with possession of the collateral as a means of formalizing a security agreement. Subsection (a) of that section provides that Aa secured party may perfect a security interest in instruments . . . or tangible chattel paper by taking possession of the collateral.” Thus, the revision makes it clear that a “possession” which will perfect a security interest is also a means of making the security interest enforceable, a point not explicitly made in prior Article 9.⁶⁶ Possession, as a means of making a security interest enforceable, as far as sales of receivables are concerned, is available only with respect to tangible chattel paper and promissory notes (a promissory note being an “instrument”). An authenticated security agreement is required for attachment of a security interest in an account or a payment intangible; either an authenticated security agreement or possession will suffice for tangible chattel paper or a promissory note, and either an authenticated security agreement or the secured party’s having “control” of the collateral is required when the collateral is electronic chattel paper.

A final observation about the differences between the two versions of section 9-203 is that the revision makes it clearer than the earlier version that a security agreement is a requirement for attachment of any security interest. In cases where attachment is based on possession or control of the collateral, the agreement need not be in an authenticated record, but there must be a security agreement and the

63. *See supra* note 56.

64. *See supra* note 36.

65. The concept of “control” as a means of formalizing a security agreement with respect to electronic chattel paper is also a means of perfecting a security interest in such property; it will be discussed in more detail. *See infra* Part III.

66. *See supra* note 59.

secured party's possession or control is required to be pursuant to the debtor's security agreement.

III. PERFECTION

Even though a security interest has attached to certain collateral and is enforceable against the debtor, it might not be effective to bar claims to the collateral by third persons. These third persons may be persons to whom the debtor has undertaken to transfer ownership of the collateral or some more limited property interest in it, or they might be creditors of the debtor who have acquired interests in the property by operation of law. For purposes of dealing with conflicts between a secured party and rival claimants to the collateral, the Code employs the concept of "perfection" of the security interest. If a security interest is "unperfected" it is substantially more vulnerable to third-party claims to the collateral than it would be if it were "perfected."

A. How Perfection is Achieved

There are several ways in which a security interest might be perfected under Article 9. The principal method is the filing of a public notice by the secured party, so that persons interested in the collateral can learn of the secured party's interest in it, by searching the record and following up on the notice. This method of perfection brings out the basic idea of perfection, avoidance of secret liens that may harm third-party purchasers of the collateral or creditors of the debtor. The predominance of filing for purposes of perfection of Article 9 security interests is emphasized in both former Article 9 and its successor by rules which prescribe it as the general rule for perfection. Former Section 9-302(1) declared that "[a] financing statement must be filed to perfect all security interests except the following," and revised Section 9-310(a) provides: "[e]xcept as otherwise provided in subsection (b) and Section 9-312(b), a financing statement must be filed to perfect all security interests."

The type of filing that Article 9 calls for is "notice filing." A filing of a copy of the security agreement or a detailed account of the secured transaction is not required; indeed, a filing can be made before any security agreement has been made. All that is required is a notice that a particular person may, now or in the future, have a security interest in a certain type or types of personal property owned by a des-

ignated person.⁶⁷ If a searcher of the record finds this notice and desires further information of what security interest, if any, actually exists, then the searcher must inquire about the parties named in the filing.⁶⁸ Should the secured party designated in the filing prove uncooperative, the Code provides means by which disclosure of information can be compelled.⁶⁹

The first questions to be addressed are: 1) whether this method of perfection is a required, or at least permissible, method of perfecting the security interests of buyers of receivables whose purchases are within the scope of Article 9; and 2) what other methods of perfection are available as alternative or exclusive means of perfection. The applicable rules vary depending on the type of receivable involved.

1. *Perfection of Security Interests in Accounts*

Filing was, and is, the sole method of perfection available with respect to most sales of accounts covered by Article 9. Former Article 9 excepted from the general requirement of filing only “an assignment of accounts which does not, alone or in conjunction with other assignments to the same assignee, transfer a significant part of the outstanding accounts of the assignor”⁷⁰ and “an assignment for the benefit of all of the creditors of the transferor, and subsequent transfers by the assignee thereunder.”⁷¹ In revised Article 9 the same exceptions are made to the general rule, though in a somewhat more roundabout way.⁷²

The 1998 revision also exempts from the filing requirement “a security interest created by the assignment of a health-care-insurance receivable to the provider of the health-care goods or services.”⁷³ The term “health-care-insurance receivable” is defined in revised section 9-102(a)(46) as “an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health-care

67. Former U.C.C. § 9-402 cmt. 2 (1972); revised U.C.C. § 9-502 cmt. 2 (1999).

68. *Id.*

69. Former U.C.C. § 9-208 (1972); revised U.C.C. § 9-210 (1999). Filing of a copy of a security agreement was expressly authorized by former Article 9 as a substitute for a simple notice filing, but that encouragement has been eliminated from the revision. *See* former U.C.C. § 9-402(1) (1972). *See also* revised U.C.C. § 9-502, cmt. 4 (1972) (saying that the authorization in former § 9-402(1) has been omitted because it seems unnecessary and unwise).

70. Former U.C.C. § 9-302(1)(e)(1972).

71. *Id.* § 9-302(1)(g).

72. Revised U.C.C. §§ 9-309(2) & (12), 9-310(b)(2) (1999).

73. *Id.* §§ 9-309(5) & 9-310(b)(2).

goods or services provided.”⁷⁴ This is a type of collateral not recognized as original collateral by former Article 9, as all transfers of interests in or claims under insurance policies were expressly excluded from the scope of the Article except when the interests or claims were proceeds of original collateral.⁷⁵ Revised section 9-102(a)(2) declares that a health-care-insurance receivable is a type of “account.”⁷⁶ Hence, sales of such receivables are within the scope of the Article, as well as transfers of such receivables intended as security.

The exemption from filing made for assignments of health-care-insurance receivables is limited to assignments made to the providers of the goods or services which are the bases for the receivables.⁷⁷ For example, the exception would apply in a case where an insured under a health-care insurance policy had received goods or services from a health-care provider (a doctor, hospital, supplier of wheel chairs, or the like) and, as a result, had a right under the policy to have the insurer pay for the goods or services, and the insured assigned his right under the policy to the supplier of the goods or services either as a sale or as security. No filing would be required as to that assignment. If the supplier of the goods or services in turn made an assignment of the account to another person, however, either as a sale or as security, the normal filing requirement for security interests in accounts would apply to perfection of the security interest of that assignee.⁷⁸

Another innovation in the revised version of Article 9, is an exemption from the filing requirement for “a sale by an individual of an account that is a right to payment of winnings in a lottery or other game of chance.”⁷⁹ The general requirement of filing with respect to sales of accounts was explained in a comment to former Article 9 as following the precedent of about half of the pre-Code “accounts receivable” statutes; it was considered the sounder precedent because “there [was] no valid reason why public notice [was] less appropriate for assignments of accounts than for any other type of nonpossessory interest.”⁸⁰ The exception for assignments of accounts which do not transfer a “significant part of the outstanding accounts of the assignor” was explained by a comment to former Article 9 as intended to save from ex post facto invalidation casual or isolated assignments . . .

74. Former U.C.C. § 9-102(a)(46) (1972).

75. *Id.* § 9-104(g).

76. Revised U.C.C. § 9-102(a)(2)(1999).

77. *Id.* § 9-309 cmt. 5.

78. *See id.* § 9-309, cmt. 5.

79. *Id.* § 9-309(14).

80. Former U.C.C. § 9-302 cmt. 5 (1972).

which no one would think of filing,”⁸¹ and this comment is echoed in the comments to revised Article 9.⁸² Similar reasoning may account for the exception made in revised Article 9 for an assignment of a health-care-insurance receivable to the provider of the goods or services.

As to the exception for sales of rights to payment of game or lottery winnings, a comment explains that payments of accounts of this sort “typically extend for periods of twenty years or more. It would be unduly burdensome for the secured party, who would have no other reason to maintain contact with the seller, to monitor the seller’s whereabouts for such a length of time.”⁸³ How are the assignments of accounts that are excepted from the general filing requirement perfected? They are automatically perfected; i.e., the buyer need do nothing to perfect them other than to acquire an attached security interest in them. Former Article 9 did not say that; it had to be inferred from the facts that such assignments were expressly exempted from the filing requirement and no other rule which required action of the secured party to achieve perfection was applicable. In revised Article 9, automatic perfection is expressly stated.⁸⁴

2. *Perfection of Security Interests in Chattel Paper*

Under former Article 9 a security interest in chattel paper could be perfected by filing,⁸⁵ but there was an alternative method of perfection available: “the secured party’s taking possession of the collateral.”⁸⁶ If the secured party had possession of the collateral, filing was unnecessary,⁸⁷ but the perfection so achieved would last only as long as possession.⁸⁸ This alternative method of perfection was apparently approved because the secured party’s possession of the collateral would serve as notice to third parties of the secured party’s claim to an interest in the property. Perhaps more importantly, the debtor’s lack

81. *Id.* § 9-302 cmt. 3, ¶3.

82. Revised U.C.C. § 9-309 cmt. 4, ¶1 (1999).

83. Revised U.C.C. § 9-309 cmt. 4, ¶3 (2007). If filing of a financing statement is required to perfect a buyer’s security interest, the buyer would need to keep track of the debtor’s location because of the possibility of need to make a new filing if the debtor moves to another state. The applicable law will be discussed a bit later in this article.

84. All numbered parts of revised U.C.C. § 9-309 (1999) are prefaced by the words: “The following security interests are perfected when they attach.”

85. Former U.C.C. § 9-304(1) (1972).

86. *Id.* § 9-305.

87. *Id.* § 9-302(1)(a).

88. *Id.* § 9-305.

of possession would serve as a warning to anyone contemplating purchasing the chattel paper or an interest in it that inquiry should be made of the one in possession as to what claim that person had to the property.⁸⁹ The term "possession" was not defined in the statute, though a comment indicated that possession by an agent of the secured party could qualify as the equivalent of possession by the secured party.⁹⁰

In revised Article 9 we must deal with the extension of the concept of "chattel paper" to include a computerized record evidencing both a monetary obligation and a security interest in or lease of specific goods, termed "electronic chattel paper."⁹¹ When chattel paper of the traditional written type ("tangible chattel paper")⁹² is involved, the methods of perfection recognized by former Article 9 continue to be authorized in the revision. A security interest in tangible chattel paper may be perfected by filing,⁹³ but taking possession of the paper by the secured party is a permissible alternative.⁹⁴ The revision deals in some detail with situations where goods in the possession of a third person may be treated as possessed by the secured party.⁹⁵

When electronic chattel paper is involved, filing is a permissible method of perfection.⁹⁶ Possession of such "paper," in any realistic sense, is not possible, since there is nothing physical to possess, but revised Article 9 supplies another alternative method of perfection called "control" of the collateral.⁹⁷ Revised section 9-105 defines "control" of electronic chattel paper in terms of the characteristics that the electronic record must have:

A secured party has control of electronic chattel paper if the record or records comprising the chattel paper are created, stored, and assigned in such a manner that: (1) a single authoritative copy of the record or records exists which is unique, identifiable and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable; (2) the authoritative copy identifies the secured party as the assignee of the record or records; (3) the authoritative copy is communicated to and maintained by the secured party or its designated cus-

89. See WHITE & SUMMERS 5th, *supra* note 51, § 22-1, ¶ 3.

90. Former U.C.C. § 9-305, cmt. 2 (1972).

91. Revised U.C.C. § 9-102(a)(11) & (31) (1999).

92. *Id.* at § 9-102(a)(78).

93. *Id.* at § 9-312(a).

94. *Id.* at § 9-313(a).

95. *Id.* at § 9-313(c), (f)-(i).

96. *Id.* at § 9-312(a).

97. Revised U.C.C. § 9-314(a) (1999).

todian; (4) copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the participation of the secured party; (5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and (6) any revision of the authoritative copy is readily identifiable as an authorized or unauthorized revision.⁹⁸

“Control,” as a method of perfection of a security interest, seems to have been visualized as the functional equivalent of possession of tangible or semi-tangible property where pure intangibles are involved.⁹⁹ From the standpoint of the secured party, it seems to be a quite satisfactory equivalent to possession. From the standpoint of a person contemplating purchase of the intangible from the debtor, however, doesn’t it differ in visibility? If tangible chattel paper were involved, the prospective purchaser could say, “Show me the paper,” and follow up on that if the debtor is unable to produce the paper. Is the same true of electronic chattel paper? Probably so. If the secured party can gain control of the electronic chattel paper in the manner described in revised section 9-105, it would have to be done with the cooperation of the debtor—or the seller in the case of a sale of the property—and a “Show me” statement addressed to the debtor would lead to a computer record which shows that the property has been transferred to another.

3. *Perfection of Security Interests in Promissory Notes and Payment Intangibles*

How does a buyer of a promissory note or a payment intangible perfect the security interest? This question arises, of course, only under revised Article 9, and the answer there is clear and simple. The buyer doesn’t have to do anything at all beyond obtaining an attached security interest; the security interest is automatically perfected upon attachment.¹⁰⁰ Why is this? The only explanation offered by the Offi-

98. *Id.* § 9-105. For a study of methods to satisfy these requirements, see ABA Cyberspace Committee Working Group on Transferable Records, *Emulating Documentary Tokens in an Electronic Environment: Practical Models for Control and Priority of Interests in Transferable Records and Electronic Chattel Paper*, 59 BUS. LAW. 379 (2003).

99. See Jane Kaufman Winn, *Electronic Chattel Paper Under Revised Article 9: Updating the Concept of Embodied Rights for Electronic Commerce*, 74 CHI.-KENT L. REV. 1055, 1055–70 (1999).

100. Revised U.C.C. § 9-309(3)–(4) (1999).

cial Comments is that this “reflect[s] the practice under former Article 9. Under that Article, filing a financing statement did not affect the rights of a buyer of payment intangibles or promissory notes, inasmuch the former Article did not cover those sales.”¹⁰¹

That explanation is not very informative and is, in fact, misleading. A more enlightening explanation has been provided by Steven L. Harris and Charles W. Mooney, Jr., who were Reporters for the Article 9 revision Drafting Committee.¹⁰² In their account of the committee’s work as it related to the scope of the Article,¹⁰³ Professors Harris and Mooney explained that the expansion of Article 9 coverage to include payment intangibles was part of an effort to bring sales of most contractual rights to payments within its scope.¹⁰⁴ Initially, the committee expected to require filing for perfection of buyers’ security interests in payment intangibles, but bankers opposed the requirement because their sales of loan participations would be sales of payment intangibles, and they feared that a filing requirement would seriously interfere with their way of doing business.¹⁰⁵ The Drafting Committee sought to overcome the bankers’ opposition by providing for automatic perfection of security interests in payment intangibles but narrowing the scope of the “payment intangible” concept by expanding the definition of “account” to make it include as follows:

nearly every type of payment stream the Committee could think of, other than payment streams represented by chattel paper or instruments. Treating these rights to payment as accounts had the effect of imposing a filing requirement for both outright sales and assignments that secure obligations. It also had the effect of leaving in the residual category of ‘payment intangibles’ the right to repayment of a loan.¹⁰⁶

Subsequently, when the Drafting Committee decided to bring sales of promissory notes into the coverage of Article 9, such sales were also treated as automatically perfected “so as not to interfere with the loan-participation market.”¹⁰⁷

It may seem that treating sales of promissory notes and payment intangibles as automatically perfected is inconsistent with the goal of

101. *Id.* § 9-309 cmt. 4.

102. *See* Harris & Mooney, *supra* note 50.

103. *Id.* at 1368–73.

104. *See id.*

105. *Id.* at 1370–1373.

106. *Id.* at 1372.

107. *Id.* at 1374 n. 68.

requiring public notice of financing transactions involving receivables. The exception for sales of loan participations does little harm as a practical matter, however, since the business was transacted before the revision of Article 9 without public notice of such transactions and caused little dissatisfaction.¹⁰⁸ Thus, the revision's automatic perfection rule does not make matters worse than they were before.¹⁰⁹

The provision for automatic perfection of security interests of buyers of promissory notes and payment intangibles could give automatic perfection to buyers of such receivables in cases where loan participations were not involved. It has been suggested, however, that in most cases involving sales of promissory notes and payment intangibles, the buyers would be wise to file financing statements even though they are not required to for perfection in order to protect themselves if courts were later to conclude that the transactions were not sales of the receivables, but were intended to create true security interests.¹¹⁰

Another reason why a buyer of a promissory note might be reluctant to rely on the automatic perfection rule is that there are circumstances in which the holder of such an automatically perfected security interest could lose priority to another purchaser who has taken possession of the note.¹¹¹ To guard against that possibility, it could be wise for the buyer to take possession of the instrument himself. Thus, although buyers of promissory notes and payment intangibles do not have to file or (in the case of a note) take possession of the collateral in order to obtain perfected security interests, it might be in their best interests to take such steps for increased security.

One other point should be made with respect to perfection of security interests in all cases involving sales of receivables that are within the scope of Article 9. Perfection cannot be achieved until the security interest has "attached" to the collateral. Former section 9-303(1) provided: "A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. . . . If such steps are taken before the security interest attaches, it is perfected at the time when it attaches."¹¹² Revised Section 9-308(a), slightly differently worded, is to the same effect. The principal situa-

108. See Harris & Mooney, *supra* note 50 at 1371-72.

109. See *id.* at 1372-73.

110. See John C. Murray, *Recharacterization Issues in Participating Loans*, 19 PROB. & PROP. 36, 40 (Sept./Oct. 2005) (referring to buyers of promissory notes, though the same caution would be appropriate if payment intangibles were involved).

111. See *infra* Part IV.

112. Former U.C.C. § 9-303(1) (1972).

tions where perfection would be postponed despite the fact that the steps necessary for perfection have been taken would be where filing preceded attachment of a security interest.

B. The Filing System

A filing to perfect a security interest requires a written or electronic message called a “financing statement.”¹¹³

1. *Form of Financing Statement*

Former section 9-402(1) prescribed the form of a financing statement and, by implication, seemed to call for a written document because it required that the statement be “signed.”¹¹⁴ It provided:

A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral.¹¹⁵

Subsection (3) of the same section offered a specimen form of financing statement, which it declared would “comply with subsection (1).”¹¹⁶ The form suggested that if the filing was made with respect to a sale of receivables, the financing statement did not have to show that a sale was involved.¹¹⁷ The form called simply for “Name of debtor (or assignor)” and “Name of secured party (or assignee)”¹¹⁸; in the case of a sale, the seller would be the “assignor” and the buyer would be the “assignee.”

As has been explained before, the type of filing contemplated is “notice filing,” which could be made before any security interest in specific collateral came into existence. The notice was required to show no more than that a specified person might have a security interest(s) in property of one or more types belonging to a specified person

113. Revised U.C.C. § 9-310(a) (2003).

114. Former U.C.C. § 9-402(1) (1972). However, a Commentary of the Permanent Editorial Board for the Uniform Commercial Code took the position that electronic filing could be valid under the 1995 Official Text. *See Id.* § 9-502 cmt. 3.

115. Former U.C.C. (1972).

116. *Id.* § 9-402(3).

117. *Id.*

118. *Id.*

(although, if a security interest had already arisen, the statement could, but was not required to, describe the particular items of collateral subject to the security interest).¹¹⁹ This requirement differed from the kind of description of collateral which was required in a written security agreement. In a security agreement, the UCC called for “a description of the collateral”;¹²⁰ a description of the specific property that was to be subject to the security interest, specifically one adequate to permit identification of the collateral for the interest. Though former section 9-110 provided that, “[f]or the purposes of this Article any description of personal property . . . is sufficient whether or not it is specific if it reasonably identifies what is described,”¹²¹ what had to be described in a security agreement was “the collateral,” not merely the type of collateral, and the description had to be adequate to “reasonably identify” the collateral. The purpose of section 9-110 was to encourage courts not to be excessively strict in their application of the “description of the collateral” requirement.¹²²

Revised Article 9 section 9-502(a) prescribes the form a financing statement must take: “[A] financing statement is sufficient only if it: (1) provides the name of the debtor; (2) provides the name of the secured party or a representative of the secured party; and (3) indicates the collateral covered by the financing statement.”¹²³ This differs substantially from former section 9-402(1). Gone is the requirement of signature by the debtor, as well as the requirements that the statement give addresses for the debtor and secured party; additionally, the description of the collateral required is worded differently. There is also the insertion of an alternative to supplying the name of the secured party; the name of a representative of the secured party may be provided instead.¹²⁴

The deletion of the signature requirement is explained in a comment as facilitating paperless filings.¹²⁵ Although some argue that the elimination of the requirement would facilitate fraudulent filings, under former Article 9 a person could forge the debtor’s signature and

119. *Id.* at § 9-402(1).

120. Former U.C.C. § 9-203(1)(a) (1972).

121. Former U.C.C. § 9-110 (1972).

122. *See id.* § 9-110 cmt.

123. Revised U.C.C. § 9-502(a) (1999).

124. *Id.* § 9-502(a)(2).

125. *Id.* § 9-502, cmt. 3, ¶ 2. See John J. Eikenburg, Jr., *Filing Provisions of Revised Article 9*, 53 SMU L. REV. 1627, 1641 (2000). (The change “will eliminate the inconvenience of obtaining an actual signature from the debtor and the expense of developing software for a digital signature.”)

file the forged financing statement, for the filing office would have no way to check the validity of the signature.¹²⁶

The 1999 revision replaces the debtor's-signature requirement with a debtor's-authorization requirement.¹²⁷ Revised section 9-510(a) provides that "a filed record is effective only to the extent that it was filed by a person that may file it under section 9-509."¹²⁸ Revised section 9-509(a) provides that "[a] person may file an initial financing statement . . . only if: (1) the debtor authorizes the filing in an authenticated record."¹²⁹ Subsection (b) of that section provides that a debtor, "[b]y authenticating or becoming bound . . . by a security agreement, . . . authorizes the filing of an initial financing statement . . . covering: (1) the collateral described in the security agreement."¹³⁰

The deletion of the former requirements that addresses of the debtor and secured party appear in the financing statement has not eliminated the requirements from the Article, as a watered-down version of them appears in sections 9-516 and 9-520. Revised section 9-520(a) declares that, "[a] filing office shall refuse to accept a record for filing for a reason set forth in Section 9-516(b)."¹³¹ Revised section 9-516(b) provides that "[f]iling does not occur with respect to a record that a filing office refuses to accept because [of a variety of defects, including] (5) in the case of an initial financing statement . . . , the record does not provide a . . . mailing address for the secured party of record; [or] in the case of an initial financing statement . . . , the record does not: (A) provide a mailing address for the debtor."¹³² But section 9-520(c) provides that "[a] filed financing statement satisfying Section 9-502(a) . . . is effective, even if the filing office is required to refuse to accept it for filing under subsection (a)."¹³³ Thus, addresses of the debtor and the secured party (or his representative) ought to appear in a financing statement, and the filing office has a duty to reject a statement that does not contain these addresses. If the filing office does refuse, the refusal prevents an effective filing, but if the filing office fails to perform its duty and accepts the statement for filing, there is an

126. STEVEN O. WISE, *An Introduction to Revised U.C.C. Article 9*, IN THE NEW ARTICLE 9 UNIFORM COMMERCIAL CODE, 1, 7 (Corinne Cooper ed., 1999)..

127. Revised U.C.C. § 9-502 cmt. 3 (1999)

128. *Id.* § 9-510(a).

129. *Id.* § 9-509(a).

130. *Id.* § 9-509(b). There is also a special provision in subsection (c) applicable only to security interests in agricultural liens.

131. *Id.* § 9-520(a).

132. *Id.* § 9-516(b).

133. Revised U.C.C. § 9-520(c) (1999).

effective filing despite the absence of these addresses. Professors Summers and White have suggested that eliminating the addresses of the debtor and secured party from the unconditionally required contents of a financing statement is justified because such information would not likely be of critical importance to searchers for filings against particular debtors; given the name of the secured party or his representative, the searcher would normally be able to find that person's address, and the searcher would probably already have the address of the debtor.¹³⁴

The change in the wording of the description of the collateral required in a financing statement was rather puzzling until amendments were made in the text and comments of the revision after its initial publication. The comments to revised section 9-502 suggested that no change in meaning was intended.¹³⁵ Comment 2 described the filing system as one of "notice filing" and its subsequent discussion indicates that the description of collateral need not be sufficient to enable identification of particular items of property as collateral as long as the description given "is sufficient to cover the collateral concerned."¹³⁶

Section 9-504 of revised Article 9, however, dealt specifically with the meaning of "indicates the collateral covered by the financing statement,"¹³⁷ and provided that "[a] financing statement sufficiently indicates the collateral that it covers if the financing statement provides: (1) a description of the collateral pursuant to Section 9-108; or (2) an indication that the financing statement covers all assets or all personal property."¹³⁸ This was puzzling.

Section 9-108(a) echoes former section 9-110 in providing that, "a description of personal . . . property is sufficient, whether or not it is specific, if it reasonably identifies what is described."¹³⁹ This is followed by several new subsections, however, that are clearly addressed to what sort of description of collateral in a security agreement is acceptable, and it continues the idea that the description must be adequate to enable identification of the particular item or items of prop-

134. WHITE & SUMMERS 5th, *supra* note 51, §§ 22-11, 22-12 at 783-787. For a more thorough exploration of the complexity of rules in revised Article 9 on required contents of financing statements and the duties of filing offices in relation thereto, see Jean Wegman Burns, *New Article 9 of the U.C.C.: the Good, the Bad, and the Ugly*, 2002 U. ILL. L. REV. 29 (2002) [hereafter Burns].

135. Revised U.C.C. § 9-502, cmt. 2 (1999).

136. *Id.* § 9-502 cmt. 2.

137. *Id.* § 9-502(a)(3).

138. *Id.* § 9-504.

139. *Id.* § 9-108(a).

erty constituting the collateral.¹⁴⁰ Subsection (b) indicates that the description may take any of several forms, provided that “the identity of the collateral is objectively determinable.”¹⁴¹ Furthermore, subsection (c) declares that, “[a] description of collateral as ‘all the debtor’s assets’ or ‘all the debtor’s personal property’ or using words of similar import does not reasonably identify the collateral.”¹⁴² Confusingly, section 9-504 called for the description of collateral in a financing statement to either comply with the requirements of section 9-108 for security agreements or take the form of the extremely broad “super-generic” descriptions that section 9-108 condemns, and nothing else would do.¹⁴³

Fortunately, the problem quickly came to the attention of the sponsoring organizations and changes were made. In 1999, section 9-504 was amended by deletion of the word “only” from the section, the change being accompanied by an explanation that the purpose of the section was merely to provide safe harbors, without rendering ineffective any description that would have been effective under former Article 9.¹⁴⁴ In the following year Comment 2 to revised section 9-504 was amended to provide that

[a] financing statement sufficiently indicates collateral claimed to be covered by the financing statement if it satisfies the purpose of conditioning perfection on the filing of a financing statement, i.e., if it provides notice that a person may have a security interest in the collateral claimed. . . . In particular, an indication of collateral that would have satisfied the requirements of former Section 9-402(1) . . . suffices under Section 9-502(a). An indication may satisfy the requirements of Section 9-502(a), even if it would not have satisfied the requirements of former Section 9-402(1).¹⁴⁵

The reason for changing the wording of the description requirement applicable to financing statements may have been that the former wording was considered too restrictive in requiring either a description adequate for a security agreement or a description of collateral by type.

140. *Id.* § 9-108(b)(1)–(6).

141. Revised U.C.C. § 9-504 (1999).

142. *Id.* § 9-102(c). There are several other more specific provisions applicable to investment property, commercial tort claims, and consumer transactions.

143. *Id.* § 9-504.

144. See ABA, *THE NEW ARTICLE 9 UNIFORM COMMERCIAL CODE*, 433 (Corrine Cooper, ed., ABA, 1999).

145. Revised U.C.C. §9-504 cmt. 2 (2000).

Turning to another aspect of the form of a financing statement, former section 9-408 recognized that whether a “lease” was really a transaction creating a security interest or was a true lease might be doubtful, and that the lessor might wish to file for safety even though he considered the transaction a true lease.¹⁴⁶ The section therefore provided that a lessor of goods could file a financing statement using the terms “lessor” and “lessee,” rather than “secured party” and “debtor,” and that if it should later be determined that the “lease” was actually a secured transaction, a filing made in this manner would perfect the security interest.¹⁴⁷ The fact that a filing was made, however, should not be a factor in classifying the transaction’s true character. A similar problem could arise in connection with a consignment, and section 9-408 applied the same principle to it, allowing the use of the terms “consignor” and “consignee.”¹⁴⁸ In revised Article 9, section 9-505 follows the lead of former section 9-408, but it expands its coverage to include, inter alia, sales of payment intangibles and promissory notes, allowing the use of the terms “buyer” and “seller,” rather than “secured party” and “debtor.”¹⁴⁹

A buyer of payment intangibles or promissory notes may be uncertain whether a court would hold the transaction to be one intended to create a security interest rather than a sale, even though the buyer considers the transaction a sale. If it is a sale, no filing is needed to perfect the security interest; however, if it is held to be a true secured transaction, some action is necessary to perfect the security interest; filing is one method of perfection for notes, although it is the only method of perfection for payment intangibles. Thus, it may be wise for the buyer to file for full protection, and section 9-505 permits that to be done, using the words “seller” and “buyer” to describe the parties but being assured that if a true secured transaction is found to have been entered into, the security interest will be perfected but the filing will not be treated as an admission that the transaction is other than a sale.

2. *Place of Filing*

Two aspects must be considered when questioning where the financing statement should be filed in order to perfect a security interest in certain collateral: (a) which state’s or country’s law governs per-

146. Former U.C.C. § 9-408 (1972).

147. *Id.*

148. *Id.*

149. Revised U.C.C. § 9-505 (1999).

fection of the security interest, and (b) in which office of that state or country the governing law requires that filing be made.

a. Which jurisdiction's law governs

When a secured transaction has contacts with two or more states of the United States, or with one or more states of the United States and a foreign country, a choice may have to be made by the court in which suit is brought to enforce or challenge the security interest as to which jurisdiction's law is to be treated as governing the relations of the parties. Significant multiple contacts may be found, for example, where the parties to the transaction have their residences or places of business in different jurisdictions; or because the security agreement was formed in a jurisdiction other than that of the residence or place of business of one or both parties; or because the collateral is located in a jurisdiction different from that in which the security agreement was made or different from the residence or place of business of one or both parties.

The method of determining which jurisdiction's law is to be treated as controlling may vary from one jurisdiction to another. Moreover, the law of one jurisdiction may be treated as governing some aspects of the transaction and that of another jurisdiction as the controlling law for other aspects of it. No attempt will be made here to explore these choice-of-law questions comprehensively, but if we assume that a court finds that the Article 9 of a particular state's Uniform Commercial Code is generally to be treated as the governing law of the transaction, we should note that Article 9 itself may direct the court to apply the law of some other jurisdiction to resolve questions relating to perfection of the security interest involved.

Former section 9-103(5) dealt with security interests in accounts arising when minerals were extracted from a well or mine and were sold at the time of extraction.¹⁵⁰ The subsection provided that the law governing "[p]erfection and the effect of perfection or non-perfection" of a security interest in such an account was "the law (including the conflict of laws rules) of the jurisdiction wherein the wellhead or minehead is located."¹⁵¹ Perfection of security interests in all other accounts was governed by subsection (3) of the same section, and its basic rule was that the "law (including the conflict of laws rules) of the

150. Former U.C.C. § 9-103(5) (1972).

151. *Id.*

jurisdiction in which the debtor is located governs the perfection and the effect of perfection or non-perfection of the security interest.”¹⁵²

As to chattel paper, subsection (4) of former section 9-103 provided that “[t]he rules stated for goods in subsection (1) apply to a possessory security interest in chattel paper. The rules stated for accounts in subsection (3) apply to a non-possessory security interest in chattel paper, but the security interest may not be perfected by notification to the account debtor.”¹⁵³ The basic rule of subsection (1) for goods was that perfection questions were “governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected.”¹⁵⁴

Obviously, these rules were quite complex and in some respects difficult to understand and apply. They have now been superseded by a complex set of rules—revised section 9-301 through 9-307—that are quite differently presented and somewhat simpler in operation, at least where receivables are the collateral. The most general of the rules appears in revised section 9-301(1): “[W]hile a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral.”¹⁵⁵ This rule is supplemented by revised section 9-307, which deals with how to determine the debtor’s “location.”¹⁵⁶

Subsequent subsections of section 9-301 and sections 9-302 to 9-306 appear to greatly complicate the choice-of-law problem by setting

152. *Id.* § 9-103(3)(b). Subsections (3)(c) and (e) also contained special rules for a case where the debtor was located in a jurisdiction not part of the United States whose law did not provide for perfection of the security interest by filing or recording in that jurisdiction, and for a case where a security interest was perfected under the law of the jurisdiction where the debtor was located and the debtor’s location changed to another jurisdiction. *Id.* § 9-103(3)(c) & (e). Subsection (3)(d) also provided rules for determining the “location” of a debtor. *Id.* § 9-103(3)(d).

153. *Id.* § 9-103(4).

154. *Id.* § 9-103(1)(b). Again, the basic rule was supplemented by some special ones, for a case where a transaction created a purchase money security interest in goods that were in one jurisdiction at the time the security interest attached but the parties understood that the goods would be kept in a different jurisdiction, and for a case where collateral was brought into and kept in “this state” while subject to a security interest perfected under the law of the place from which the goods were removed. *Id.* § 9-103(1)(c)–(d).

155. Revised U.C.C. § 9-301(1) (1999).

156. *Id.* § 9-307. The references to “local law” in this and the other rules of revised Article 9 dealing with choice of law are meant to refer to the substantive law of the specified jurisdictions, not to their conflict-of-laws [choice-of-law] rules. *Id.* § 9-301 cmt. 3.

up different rules of narrower application. Most of these rules will be largely irrelevant to sales of receivables. Revised sections 9-302 through 9-306 deal with security interests in other types of collateral;¹⁵⁷ they can be ignored, except as the law of "proceeds" may require reference to them. The same can be said of revised section 9-301(3)(A) and (B) dealing with perfection of security interests in goods where fixture filing is employed as a method of perfection or where the collateral is timber to be cut.¹⁵⁸

That leaves three special rules to be considered. One appears in revised section 9-301(4), which provides: "The local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in as-extracted collateral."¹⁵⁹ Since the definition of "as-extracted collateral" in revised section 9-201(a)(6) includes "accounts arising out of the sale at the wellhead or minehead of oil, gas, or other minerals in which the debtor had an interest before extraction,"¹⁶⁰ this rule could apply to a sale of accounts which is within the scope of Article 9. This exception to the general rule is of very narrow scope and is readily accounted for by the real-property-related character of the collateral.

Subsection (2) of revised section 9-301 provides that "[w]hile collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral."¹⁶¹ Here we have an echo of the location-of-the-collateral basis for choice of law which was prominent in former Article 9, but it is another narrowly limited rule. First, it applies only to collateral which can be "possessed," tangible or semi-tangible collateral. The only sales of receivables that are within the scope of Article 9 that fall into this class are promissory notes and tangible chattel paper. Second, the rule applies to such collateral only if it is in the possession of the secured party. In addition, choice of the relevant law in cases covered by the rule is likely to be of small importance as the revision of Article 9 becomes generally adopted throughout the country, for the rules on perfection and

157. *Id.* §§ 9-302 to 9-306 (agricultural liens, goods covered by certificates of title, deposit accounts, investment securities, and letter-of-credit rights, respectively).

158. *Id.* § 9-301(3)(A)-(B).

159. *Id.* § 9-301(4).

160. *Id.* § 9-102(a)(6)(B).

161. Revised U.C.C. § 9-301(2) (1999).

the effect of perfection or nonperfection, including the rules of priority, are likely to be nationally uniform.¹⁶²

The remaining special rule is in section 9-301(3)(c), which provides: “[W]hile negotiable documents, goods, instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs . . . the effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral.”¹⁶³ This rule, applicable to promissory notes and tangible chattel paper, if not carefully read, appears to make subsection (1) a dead letter where these types of collateral are involved, even if the collateral is not in the secured party’s possession. But what subsection (3)(C) does not say is that the law governing “perfection” of the security interest is that of the jurisdiction where the collateral is located. Choice of law as to perfection rules for such collateral is governed by subsection (1) of revised section 9-301, and that rule invokes the law of the jurisdiction where the debtor is located.¹⁶⁴ Again it can be argued that as the revised version of Article 9 becomes enacted on a nation-wide basis, the rules as to the effect of perfection or nonperfection and as to priorities are likely to become nationally uniform, so that choice of law as to such questions will be of little or no importance.¹⁶⁵

Because of the likelihood that the rules of law governing perfection and its effects, including priorities, are likely to become nationally uniform, Professors Summers and White contend that the “real function” of the choice-of-law rules of the Article “is to answer a single question: where to file.”¹⁶⁶ Most of the rules, if they are identical in all jurisdictions, will work the same way regardless of which jurisdiction’s law is applied. One type of rule will not, however. Each enacting jurisdiction’s local law as to where a filing should be made in order to perfect a security interest will call for filing in one or another office in that jurisdiction. Therefore, there will continue to be a need to select the state or other jurisdiction whose law governs where to file, and the answer will be, in most instances, the jurisdiction where the debtor is located.¹⁶⁷

It should be noted also that if the debtor’s location changes to another jurisdiction, the law of the new jurisdiction will govern perfection, and filing in that jurisdiction will probably be required in order to

162. *Id.* § 9-301, cmt. 5(a); WHITE & SUMMERS, *supra* note 51, § 22-15, at 801–802.

163. Revised U.C.C. § 9-301(3)(c)(1999).

164. *Id.* § 9-301(1).

165. *See* WHITE & SUMMERS, *supra* note 51, § 22-15, at 802.

166. *Id.* § 22-15, at 799.

167. *Id.*

continue the perfection achieved in the first jurisdiction. Section 9-316(a) of revised Article 9 will usually have the effect of continuing for a limited time perfection achieved in the place of the debtor's former location, but another filing, in the new jurisdiction, will usually be called for within four months after the change of location occurs.¹⁶⁸ Thus, the secured party, having filed in the state of the debtor's current location, needs to keep track of any changes in that location.

b. Where filing is proper

Under the former version of Article 9 there were three sets of rules in section 9-401(1) governing the place to file a financing statement, and any legislature enacting the Code as the law of its state was invited to choose the option it preferred.¹⁶⁹ Under the first option, most accounts collateral filings were made in a central state office, typically the office of the Secretary of State.¹⁷⁰ The only exception was for accounts arising from sales of minerals at the wellhead or minehead, as to which filing was to be made in the office where a mortgage on the real estate where the wellhead or minehead was located would be filed or recorded. Under the second option, filing of accounts was to be: (a) in the case of accounts arising from or related to the sale of farm products by a farmer, in a designated office of the county of the debtor's residence or, if the debtor did not reside in the state, in the county where the farm products were kept; (b) in the case of accounts arising from sales of minerals at the wellhead or minehead, in the office where a mortgage on the wellhead or minehead land was located would be filed or recorded; and (c) in all other cases of filing as to accounts, in a central state office.¹⁷¹ Under the third option, the rules as to accounts arising from sales of farm products by farmers and accounts arising from sales of minerals at the wellhead or minehead were the same as under the second option.¹⁷² As to all other accounts, filing was to be made in a central state office, and if the debtor had a place of business in only one county of the state, in an office in that county, or if the debtor had no place of business in the state but it was a resident of that state, then in an office of the county of the debtor's residence.¹⁷³ With regard to chattel paper filings, filings were to be

168. Revised U.C.C. § 9-316(a)(2) (1999).

169. Former U.C.C. § 9-401 (1972).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

made in a central state office under all three options and, under the third option, also in the county offices where filings as to accounts would be made under the catch-all rule of that alternative. Subsection (5) of former section 9-401 provided a special rule for filings as to collateral of transmitting utilities.¹⁷⁴ All such filings were to be made in a central state office, even if subsection (1) would call for local filing.¹⁷⁵

Former section 9-401(2) provided that “[a] filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless . . . effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement.”¹⁷⁶

The 1999 revision of Article 9 simplifies the place-of-filing rules, as there are no alternative versions of the rules.¹⁷⁷ With respect to accounts arising from sales of minerals at the wellhead or minehead, revised section 9-501(a) follows the lead of the earlier version by requiring filing in the office where a mortgage on the related real estate would be filed or recorded.¹⁷⁸ In all other cases of filing as to accounts and all filings as to chattel paper and other types of collateral, section 9-501(a) calls for filing to be made in a central state office.¹⁷⁹

The provision in former Article 9 that a good faith filing made in the wrong place or not in all places called for by section 9-401 was nevertheless effective against a person who had knowledge of the contents of the financing statement was not carried over into the 1999 version of the Article because it was deemed unnecessary.¹⁸⁰ It seems likely that the rule was considered unwise, rather than unnecessary, as it was inconsistent with the race-to-the-filing-office rule¹⁸¹ for determining priority between perfected security interests because this rule, under a party’s knowledge or ignorance of a rival claim, is irrelevant.¹⁸²

174. *Id.* § 9-401(5). “Transmitting utility” was defined in former U.C.C. § 9-105(1)(n) (1995).

175. Former U.C.C. § 9-401(5) (1972).

176. *Id.* § 9-401(2).

177. Revised U.C.C. § 9-501 (2000).

178. *Id.* § 9-501(a)(1).

179. *Id.* § 9-501(a)(2). “Transmitting utility” is defined in revised § 9-102(a)(80) in somewhat broader terms than it was in the prior version of Article 9. Compare revised U.C.C. 9-102(a)(8) (2000) with former U.C.C. 9-105(1)(n) (1995). With respect to property of a transmitting utility, subsection (b) of section 9-501, like its predecessor, calls for central filing for all security interests in all property of such a utility. *Id.* § 9-501 (2000).

180. See revised U.C.C. § 9-501(1999).

181. See *infra* Part IV.

182. See also Burns, *supra* note 134, at 40 (Asserting that former § 9-401(2) “caused nothing but trouble as courts tried to determine how much knowledge trig-

c. Duration of effectiveness of filing

Under both versions of Article 9, a filing remains effective, as a general rule, for five years;¹⁸³ however, a filing as to collateral of a transmitting utility is effective until a “termination statement” is filed.¹⁸⁴ Filings other than those of transmitting utilities can also be terminated at any time by the secured party’s filing of a termination statement, and the secured party can be required by the debtor to do so when the secured obligation has been discharged.¹⁸⁵ On the other hand, the effectiveness of a filing can be extended for additional periods of five years each by the filing of a “continuation statement” by the secured party within six months before any prior period’s expiration.¹⁸⁶

Former section 9-404(1) contained a general rule that the secured party was to send the debtor a termination statement “whenever there [was] no outstanding secured obligation and no commitment to make advances . . . or otherwise give value,” if the debtor made demand for such a statement.¹⁸⁷ Taken literally this rule, when applied to most accounts and chattel paper sales filing would have permitted the seller to demand a termination statement as soon as a financing statement was filed because there would be neither a secured obligation nor any commitment to give future value.¹⁸⁸ Under revised section 9-513(c), a termination statement is required after the debtor’s demand regarding financing statements covering sold accounts or chattel paper only when the obligations represented by the accounts or chattel paper have been discharged by the persons obligated on them, or if the debtor did not authorize the filing of the financing statement.¹⁸⁹

There are numerous additional rules relating to the filing system and its operation in both versions of Article 9 that will not be reviewed here. The purpose of this summary was simply to provide an introduction to the system.

gered it, when knowledge was relevant, and whether the section might apply to financing statements filed in the wrong state. With the elimination of this section, not only do these issues disappear, but also diligent creditors who do their searches are now not penalized.”).

183. Former U.C.C. § 9-403(2) (1972); revised § 9-515(a) (1999).

184. Former U.C.C. § 9-403(6) (1972); revised U.C.C. § 9-515(f) (1999).

185. Former U.C.C. § 9-404(1) (1972); revised U.C.C. § 9-513 (1999).

186. Former U.C.C. § 9-403(3) (1972); revised U.C.C. § 9-515(d)–(e) (1999).

187. Former U.C.C. § 9-404(1) (1972).

188. See revised U.C.C. § 9-513, cmt. 4 (2000).

189. *Id.* § 9-513(c)(2) & (4).

IV. PRIORITIES

In dealing with the rules on priorities, Article 9 treats the buyer's interest in a receivable whose sale is within the scope of the Article as a "security interest."¹⁹⁰ Hence priority rules applicable to security interests apply to the interest of such a buyer unless an exception is made for such an interest. Priority contests may develop where the seller has undertaken to grant a security interest in the same receivables to another person or otherwise to transfer a property interest in them to another person, or where a creditor of the seller asserts a claim to them to enforce his contract rights against the seller.

A. Priorities Where a Buyer's Security Interest is Unperfected

An unperfected but attached security interest is not worthless. Former section 9-201 laid down a general rule that "[e]xcept as otherwise provided by this Act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors."¹⁹¹ Revised section 9-201(a) contains the same rule in nearly identical terms.¹⁹²

The term "purchaser" is a very broad one. Section 1-201(32), as it stood in 1998, defined "purchase" as including "taking by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift or any other voluntary transaction creating an interest in property."¹⁹³ Therefore, it is assumed that an attached security interest is good against the debtor and third parties unless an exception is found in other text of the Code. Former section 9-301(1) stated a number of exceptions applicable to unperfected security interests.¹⁹⁴

First, an "unperfected security interest [was] subordinate to the rights of (a) persons entitled to priority under section 9-312."¹⁹⁵ Section 9-312 dealt with priorities among conflicting security interests in the same collateral, and it gave priority to some perfected security interests over previously perfected security interests in the collateral.¹⁹⁶ The rule of 9-301(1)(a) thus made an unperfected security interest subor-

190. *Id.* § 9-109.

191. Former U.C.C. § 9-207 (1972).

192. Revised U.C.C. § 9-201 (2000).

193. U.C.C. § 1-201 (1994). Section 1-201 was revised in 2001 and the definition of "purchase" now appears in subsection (b)(29) but its substance is the same.

194. Former U.C.C. § 9-301 (1994).

195. *Id.* § 9-301(1)(a).

196. *Id.* § 9-312.

dinate to the rights of another secured party who would have priority even if the security interest was perfected. Furthermore, section 9-312 incorporated by reference rules of other UCC sections which enabled some purchasers of interests in collateral to gain priority over previously perfected security interests.¹⁹⁷ The section also provided that, as between unperfected security interests, the first to attach had priority.¹⁹⁸

Second, an unperfected security interest was made subordinate to the rights of “(b) a person who becomes a lien creditor before the security interest is perfected.”¹⁹⁹ The term “lien creditor” was defined in subsection (3) of section 9-301 as “a creditor who has acquired a lien on the property involved by attachment, levy or the like,” i.e., through a judicial proceeding.²⁰⁰ However, the definition went on to provide that the term included “an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment.”²⁰¹ The greatest impact of this priority rule was that an unperfected security interest could not stand against the claim of the debtor’s trustee in bankruptcy.²⁰²

As applied to a case where the unperfected security interest was the interest of a buyer of accounts or chattel paper, this rule meant that sold property, in which the seller no longer had a property interest, was treated as still reachable by the seller’s creditors to satisfy their claims against him, provided that they could obtain judicial liens on the property before the buyer perfected his “security interest,” and the seller’s trustee in bankruptcy had the same power. This is a significant practical consequence of bringing some sales of personal property within the coverage of Article 9.

Subsection (2) of former section 9-301 qualified the rule of subsection (1)(b) by providing that “[i]f the secured party files with respect to a purchase money security interest before or within ten days after the debtor receives possession of the collateral, he takes priority over the rights . . . of a lien creditor which arise between the time the

197. Former U.C.C. § 9-312(1) (1972).

198. *Id.* § 9-312(5)(b).

199. *Id.* § 9-301(1)(b).

200. *Id.* § 9-301(3).

201. *Id.*

202. See WHITE & SUMMERS 3d, *supra* note 25, § 23-3, following note 3. The express inclusion of a trustee in bankruptcy in the definition of Alien creditor” in Article 9 was made merely for emphasis, as the Bankruptcy Code itself gave the trustee that status. 11 U.S.C. § 544(a) (2000).

security interest attaches and the time of filing.”²⁰³ “Purchase money security interest” was defined in former section 9-107 as a security interest “to the extent that it is (a) taken or retained by the seller of the collateral to secure all or part of its price; or (b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of the collateral if such value is in fact so used.”²⁰⁴ This special rule was inapplicable to sales of intangibles, as the buyer was the “secured party” in such a case,²⁰⁵ and the buyer’s interest could not fit the definition of “purchase money security interest.”²⁰⁶ Moreover, that term was arguably a concept peculiar to sales of goods—tangible personal property²⁰⁷—and the article’s focus here is on sales of intangibles and semi-tangibles.

What would be the status of a lien creditor who acquired a lien on a receivable before a sale within the scope of Article 9 occurred? That lien should have had priority over the buyer’s security interest, whether the security interest was perfected. The rule of former section 9-301(1)(b) could be applied to reach that result because the lien would have been acquired before the security interest was perfected.²⁰⁸ The more basic reason for the lien creditor’s priority, however, was that the property was already subject to the lien when it was sold, and the seller could not transfer a better interest to the receivable than the seller had.²⁰⁹ That is the general principle of property law, and although former Article 9 made some exceptions to this general rule,²¹⁰ none were applicable here.

A third exception to the general rule of invulnerability of security interests, applicable where the security interest was unperfected, was that “in the case of . . . chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business . . . [has priority] to the extent that he gives value

203. Former U.C.C. § 9-301(2) (1994).

204. Former U.C.C. § 9-107 (1972).

205. Former U.C.C. § 9-105(1)(m) (1995).

206. See Former U.C.C. § 9-107 (1972).

207. That the concept was limited to sales of goods was, at best, implied in former Article 9. A comment to § 9-107 (cmt. 1, ¶ 2) seemed to assume that it was so limited. *But see* BARKLEY CLARK & BARBARA CLARK, *THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE*, § 3.09[2][b] (rev. ed., A. S. Pratt & Sons 2002).

208. Former U.C.C. § 9-301(1)(b) (1994).

209. See revised U.C.C. § 9-203, cmt. 6 (2000).

210. *Id.* For example, as will be shown below, after the sale the seller would have the power to transfer a security interest to a third person, despite the fact that he no longer had a property interest in it.

and receives delivery of the collateral without knowledge of the security interest and before it is perfected.”²¹¹ This provision gave priority to some transferees to whom the seller undertook to sell interests in chattel paper that had already been sold. What sort of transferees it referred to is a bit difficult to understand. A comment explained that the purpose of this and the subsequent paragraph of section 9-301(1) was to protect from unperfected security interests innocent purchasers for value who would be subordinated to perfected security interests.²¹²

This rule would not likely trouble a “secured party” who was a buyer of chattel paper, if such buyer had acquired possession of the paper, for a subsequent purchaser would probably be unable to satisfy the stated conditions for priority. Even if the buyer/secured party did not have possession, this priority rule did not apply if the second purchaser was a buyer also, for Article 9 would treat the second buyer’s interest as a security interest and this rule did not apply to a purchaser who acquired a security interest in the chattel paper. If the second purchaser was a “secured party,” the applicable priority rules would be those of section 9-312, and the first buyer would prevail if both security interests were unperfected. The second buyer, however, would probably have priority if the security interest of that buyer was perfected. Only a buyer whose purchase would not be treated as a secured transaction could use this rule to acquire priority over the prior buyer. For example, a buyer whose purchase was excluded from the scope of the Article by section 9-104 could use this rule.²¹³

An implication in this rule applied to buyers of chattel paper whom Article 9 treated as secured parties. The implication was that, although such a buyer had acquired title to the paper, and the seller might have lost all property rights in the paper, as long as the buyer’s security interest remained unperfected the seller still had power to transfer property interests in the paper to third-party purchasers, just as would be the case if the seller had merely transferred a security interest in the paper to the first purchaser and had remained the owner of the paper. The same observation could be made with respect to the next priority rule to be discussed.

211. Former U.C.C. § 9-301(1)(c) (1994). The quotation has been trimmed to eliminate language not pertinent to sales of receivables.

212. Former U.C.C. § 9-301, cmt. 4, ¶ 1 (1972). The description of the type of purchaser protected by the rule had been drawn to exclude purchasers of security interests, who were covered by the first rule discussed above, and also to exclude purchasers who could gain priority over perfected security interests under other sections of Article 9.

213. *See supra* note 26.

The fourth special rule of former Section 9-301(1) applied to cases involving accounts and general intangibles.²¹⁴ It gave priority over a security interest to “a person who is not a secured party and who is a transferee to the extent that he gives value without knowledge of the security interest and before it is perfected.”²¹⁵ This rule speaks of “transferees” rather than “buyers,” but it would surely include buyers. The only significant difference between it and the third rule seems to be that there is no requirement in this rule that the transferee acquire delivery of the property before the security interest is perfected. The reason for its omission is obviously that pure intangibles cannot be “delivered” in any realistic sense.²¹⁶ Since transferees who are secured parties were excluded from the scope of this rule, the only sort of second buyer who could take advantage of it would be one whose purchase was not treated as a secured transaction under Article 9 because of the exclusions of section 9-104.²¹⁷

In light of these exceptions from the general rule of invulnerability of attached security interests, the general rule remained that a buyer of accounts or chattel paper had superior rights if the subsequent buyer had not perfected his security interest.²¹⁸ Such parties included: (1) the debtor (the seller of the property); (2) unsecured creditors of the debtor; (3) a holder of an unperfected security interest in the same collateral if that person’s security interest attached later than that of the buyer; (4) a buyer of chattel paper (other than a secured party or a buyer in ordinary course of business) who did not both give value and receive delivery of the collateral without knowledge of the original buyer’s interest; and (5) a buyer of accounts (other than a secured party) who did not give value without knowledge of the original buyer’s interest.

In revised Article 9, the counterpart of former section 9-301 is section 9-317. Its rules are similar to those of section 9-301, but not identical. First, “[a] security interest . . . is subordinate to the rights of . . . a person entitled to priority under [s]ection 9-322.”²¹⁹ Revised section 9-322 deals with priorities between conflicting security interests in the same collateral.²²⁰ Like former section 9-312, revised section 9-322 gives some perfected security interests priority over earlier-perfected

214. Former U.C.C. § 9-301(1)(d)(1994).

215. *Id.*

216. *See* former U.C.C. § 9-301, cmt. 4.

217. *See supra* note 25.

218. Former § 9-207 (1994).

219. Revised U.C.C. § 9-317(a)(1) (2000).

220. *See id.* § 9-322.

security interests,²²¹ and it also contains a rule that as between unperfected security interests, the earlier to attach has priority.²²² The section also makes explicit what may have been implied in section 9-312, that a perfected security interest has priority over an unperfected one.²²³ Section 9-317 simply adopts the rules of section 9-322 for determining priorities between conflicting security interests.²²⁴

Second, a security interest is subordinate to the rights of, “except as otherwise provided in subsection (e), a person that becomes a lien creditor before the earlier of the time: (A) the security interest . . . is perfected; or (B) one of the conditions specified in [s]ection 9-203(b)(3) is met and a financing statement covering the collateral is filed.”²²⁵ Section 9-203(b)(3)(B) requires that a security agreement be made and the formality requirement for an attached security interest be satisfied.²²⁶ To rephrase the rule as it would apply to sales of receivables, a buyer’s security interest is subordinate to the rights of a person who becomes a lien creditor as to the collateral, unless the security interest has already been perfected, or unless the buyer has made a proper filing and (i) the seller has signed a security agreement covering the collateral, or (ii) in the case of tangible chattel paper, the secured party took possession of it pursuant to a security agreement, or (iii) in the case of electronic chattel paper the secured party has taken control of the paper pursuant to a security agreement (the “security agreement” in each of these cases being the agreement of sale).²²⁷ The “except” clause of the rule prescribes a special priority rule for purchase-money security interests, however, this rule is irrelevant to security interests of buyers of receivables because, under revised Article 9, the definition of “purchase-money security interest” in section 9-103

221. *Id.* § 9-322.

222. *Id.* § 9-322(a)(3).

223. *Id.* § 9-322(a)(3).

224. *Id.* § 9-317(a)(1).

225. Revised U.C.C. § 9-317(a)(2) (2000). The quotation is of the text of the rule as it was amended in 2000. Prior to the amendment, the section gave priority to a person who became a lien creditor before the earlier of the time the security interest was perfected or the time a financing statement covering the collateral was filed.

226. *Id.* § 9-203(b)(3).

227. Revised U.C.C. § 9-102(a)(73) defines “security agreement” as its predecessor did—“An agreement that creates or provides for a security interest”—and a comment to the section underscores the point that it does not matter what the parties call their agreement; if the interest transferred fits the definition of “security interest,” the agreement “creates” a security interest and is a “security agreement.” See revised U.C.C. § 9-102, cmt. 3(b) (2000).

restricts it to interests in “goods” collateral and software closely associated with electronic goods.²²⁸

The chief significance of the departure from the wording of the corresponding rule in former section 9-301 is that the holder of an unperfected security interest can now gain priority over a lien creditor, even though the security interest had not attached to the collateral when the lien arose, because the secured party had not yet given value; even if he had made a security agreement, satisfied the formality requirement for an attached security interest, and filed as to the collateral. This is a notable change in the law. The explanation for this change given in the comments is that the former version of Article 9 treated a secured party’s first advance differently than subsequent advances to the same debtor on the security of the same collateral.²²⁹ The revision corrects this discrepancy.²³⁰

This comment points out that under former section 9-301(4), a person with a perfected security interest who made advances to the debtor could gain priority as to those advances over a person who became a lien creditor after the security interest was perfected but before the advances were made, provided that the secured party made the advances within forty-five days after the creditor acquired his lien or the advances were made without knowledge of the lien or pursuant to a commitment made without knowledge of the lien.²³¹ If the security interest had not been perfected when the creditor acquired his lien, however, because the secured party had not yet made any advance and the security interest had not yet attached, the lien creditor would have priority under former section 9-301(1)(b) over the security interest insofar as the secured party’s first advance was concerned (because the security interest would not be perfected until that advance was made), although the secured party could be protected under former section 9-301(4) as to future advances.²³²

In revised Article 9, section 9-317(a)(2)(B) gives the secured party priority over a person who becomes a lien creditor before the security interest is perfected if the secured transaction then has advanced to the point where a security agreement is made and formalized in a manner permitted by the rules on attachment and there was a proper

228. Revised U.C.C. § 9-103 (2000).

229. *See id.* § 9-317 cmt. 4.

230. *Id.* § 9-317 cmt. 4.

231. *Id.* (citing former U.C.C. § 9-301(4) (1994).)

232. *Id.*

filing.²³³ Thus the secured party is protected as to the first advance to the same extent as with regard to future advances.²³⁴

It would seem unlikely that buyers of receivables treated as secured parties would make future advances on the security of the receivables they bought. If such a buyer satisfied the requirements of section 9-317(a)(2)(B), the buyer would have a perfected security interest because the only thing left for the attachment of the security interest and perfection would be assigning value, the debtor's having rights in the collateral, and a sale.²³⁵ The new rule is thus not likely to improve the status of a buyer of receivables.

The third rule of revised section 9-317 corresponds to former section 9-301(1): "Except as otherwise provided in subsection (e), a buyer, other than a secured party, of tangible chattel paper . . . takes free of a security interest . . . if the buyer gives value and receives delivery of the collateral without knowledge of the security interest . . . and before it is perfected."²³⁶ (The rule also refers to buyers of "instruments" and a promissory note is an "instrument."²³⁷ A sale of a promissory note produces a security interest that is perfected automatically as soon as it attaches,²³⁸ however, this priority rule could not apply to the interest of a buyer of a promissory note.) Subsection (e), referred to in this rule, gives special priority to a holder of a purchase-money security interest. The rule is irrelevant to security interests in receivables because under revised Article 9, purchase-money security interests can exist only in "goods" collateral and software closely associated with the goods.²³⁹

This rule is very similar to that of former section 9-301(1)(c) and it involves the same distinction. A buyer of chattel paper is treated as a secured party if the sale is within the scope of Article 9, and the priority rule does not apply if the second buyer is a secured party.²⁴⁰ The rule would operate against an earlier buyer of tangible chattel paper only if the sale to the second buyer is not one that Article 9 treats as a secured transaction.²⁴¹

233. Revised U.C.C. § 9-317(a)(2)(B) (2000).

234. *Id.* § 9-317 cmt. 4. The sale, by definition is the transfer of title for a price. The subject of future advances will be more fully discussed later in this article.

235. *Id.*

236. *Id.* § 9-317(b). The omissions have been made to focus the application of the rule on sales of receivables.

237. Revised U.C.C. § 3-103 (1999).

238. Revised U.C.C. § 9-309(4) (2000).

239. *Id.* § 9-103.

240. *See supra* note 217.

241. *See supra* note 217.

The fourth rule of section 9-317 traceable to former section 9-301(1) is that “[a] . . . buyer, other than a secured party, of accounts [or] electronic chattel paper . . . takes free of a security interest if the . . . buyer gives value without knowledge of the security interest and before it is perfected.”²⁴² This rule is very much like that of former section 9-301(1)(d), except that the revised rule is expanded to include sales of electronic chattel paper and its explicit application to “buyers,” rather than “transferees.” The same observation made above with respect to subsection (b) of revised section 9-317 applies here: most buyers of receivables would not be able to use this rule to acquire priority over a prior security interest.²⁴³

Under the revision of Article 9, an unperfected security interest, though quite vulnerable to third party claims, is not worthless. The list of persons against whom the unperfected security interest is enforceable would be much the same as that offered above under former Article 9,²⁴⁴ with the addition of a lien creditor who acquires the lien after the secured party has filed with respect to the collateral and made a security agreement satisfying the requirements for attachment.²⁴⁵

B. Priorities When a Buyer’s Security Interest is Perfected

The holder of a perfected security interest is considerably better protected against third-party claims than an unperfected holder, but generalizations are difficult to make as to all forms of collateral in all circumstances.²⁴⁶ Perhaps the best approach to the law on this subject is to deal separately with the several types of receivables, the sales of which are treated as secured transactions by Article 9.

1. *Accounts*

Assume that a buyer of accounts has received assignment of them from the original obligee of the accounts, who is still the owner of them at the time of the sale, and that the buyer has made a proper filing of a financing statement covering the accounts, so that the buyer

242. Revised U.C.C. § 9-317(d) (2000).

243. Revised U.C.C. § 9-317 goes beyond the scope of former § 9-301 in laying down some priority rules for lessees of goods and licensees of general intangibles, but as they are irrelevant to the topic of this paper, they will not be discussed.

244. *See supra* note 217.

245. *See supra* notes 225–234.

246. The closest valid generalization is that the interest of a person becoming a lien creditor after a security interest was perfected is subordinate to the interest of the secured party, however, even that proposition has an exception. *See infra* Part VI.

has acquired a perfected security interest. What priorities has the buyer acquired?

a. Conflicting security interests

After the sale has occurred, there is a possibility that the seller will undertake to transfer the same accounts to someone else, either as security for an obligation or as a sale within the scope of Article 9. (Former Article 9's treatment of the original sale as a secured transaction implied that the seller had a power to do that in some circumstances. It must have also meant that the subsequent transferee could acquire a security interest despite the seller's lack of rights in the collateral, i.e., that the seller's power to transfer rights in the collateral was the equivalent of having a property interest in the collateral, for purposes of satisfying the requirement for attachment that the debtor have "rights in the collateral.")²⁴⁷ A contest might then develop between the first transferee and the second, posing the question as to which of them has the better claim to the collateral, which are the accounts.

Section 9-312 of former Article 9 was applicable. It laid down a general rule, in subsection (5)(a), that,

[c]onflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection.²⁴⁸

This rule rewarded the early filer. If a person anticipated either making a loan on the security of another's accounts or becoming a buyer of such accounts, the prospective secured party could file in advance of the actual loan or sale, and thereby be assured of priority over any rival secured party who later filed and perfected, regardless of when his own security interest attached and became perfected.²⁴⁹ Moreover, knowledge or lack of knowledge of the other party's interest in the collateral at the time of filing or perfection was immaterial.²⁵⁰

A comment explained that "[t]he justification for the rule lies in the necessity of protecting the filing system—that is, of allowing the secured party who has first filed to make subsequent advances without

247. See former ' 9-203(1)(c).

248. Former U.C.C. § 9-312(5)(a) (1994).

249. See *id.* § 9-312 cmt. 5, ex. 1.

250. See *id.* § 9-312 cmt. 5, ex. 2.

each time having, as a condition of protection, to check for filings later than his.”²⁵¹ As for the losing party, that person could have learned of a possible prior claim by the other party by searching the records for filings against the debtor with respect to accounts collateral.²⁵²

There was a type of assignment of accounts within the scope of former Article 9 that was exempt from the requirement of filing for perfection: “an assignment of accounts which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts of the assignor.”²⁵³ Security interests arising from such assignments were automatically perfected.²⁵⁴ Professor Gilmore, in his treatise on the original version of Article 9, commented on this exemption from the filing requirement and described it as “more a line of defense in litigation or bankruptcy proceedings than a guide to prospective action,” since no assignee could know, at the time an assignment was made, that it would qualify for exemption from filing.²⁵⁵ Therefore, “all right-minded assignees will file.”²⁵⁶ The rule served to protect assignees who had both insignificant assignments and were ignorant of the risk they took in not filing.²⁵⁷ But if there was a case within the rule, what priority rule would apply to it? A comment to Section 9-302 explained the exemption from filing as designed “to save from ex post facto invalidation casual or isolated assignments,” which suggests that the security interest was to have priority over all subsequent assignments.²⁵⁸ The applicable priority rule appeared to be the first-to-file-or-perfect rule of section 9-312(5), and since the assignee’s security interest was perfected as soon as it arose, the assignee would be likely to prevail against any subsequent security interest as the first to perfect. Still, there was a possibility that a subsequent assignee could take priority by reason of having filed before the first assignment occurred.

In revised Article 9, the rules governing priorities between conflicting security interests, as they apply to accounts collateral, follow

251. *Id.* § 9-312 cmt. 5.

252. *See* WHITE & SUMMERS 3d, *supra* note 25, § 24-4.

253. Former U.C.C. § 9-302(1)(e). *See* text *supra* notes 70 & 81. Another exemption from filing was for assignments for the benefit of creditors “because they are not financing transactions and the debtor will not ordinarily be engaging in further credit transactions.” Former U.C.C. § 9-302 cmt. 5 (1994).

254. *See supra* note 81.

255. Gilmore, *supra* note 3 at vol. 1, § 19.6.

256. *Id.*

257. *Id.*

258. *See* E. Allan Farnsworth, *Contracts*, § 11.9, at n. 26 (2d ed. Little, Brown 1990).

much the same pattern of those of the earlier version, but there are some differences. First, it should be noted that the revision spells out what was only implied by former Article 9, that although a person who has made a sale of a receivable will have given up title to it, and thus probably have no remaining interest in the receivable, if the sale is within the scope of Article 9 the seller is treated by the UCC as if title had not passed, for purposes of determining rights of creditors of and purchasers from the seller against the buyer, although the new provision terminates that power when the buyer's security interest becomes perfected, and it limits its application to purchasers who purchase for value. Revised section 9-318 provides:

(a) [Seller retains no interest.] A debtor that has sold an account, chattel paper, payment intangible, or promissory note does not retain a legal or equitable interest in the collateral sold. (b) [Deemed rights of debtor if buyer's security interest unperfected.] For purposes of determining the rights of creditors of, and purchasers for value of an account or chattel paper from, a debtor that has sold an account or chattel paper, while the buyer's interest is unperfected, the debtor is deemed to have rights and title to the account or chattel paper identical to those the buyer sold.²⁵⁹

For contests between a buyer of receivables and another secured party, these rules of priority are laid down by Section 9-322(a), which provides that:

(1) [c]onflicting perfected security interests . . . rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest . . . is first perfected, if there is no period thereafter when there is neither filing nor perfection; (2) A perfected security interest . . . has priority over a conflicting unperfected security interest . . . ; (3) The first security interest . . . to attach or become effective has priority if conflicting security interests are unperfected.²⁶⁰

259. Revised U.C.C. § 9-318 (2000). Professors Summers and White have expressed doubt that the proposition stated in this section (that although the seller has power to transfer interests in the collateral after the sale, as long as the buyer's security interest remains unperfected, the seller retains no property interest in the sold receivable) will be accepted in bankruptcy cases. See WHITE & SUMMERS 5th, *supra* note 51 at § 21-6, note 2.

260. Revised U.C.C. § 9-322(a). These rules also applied to "agricultural liens." Those references have been deleted as not pertinent to the subject of this article.

Although these rules are quite similar to those of former section 9-312(5)(a), the principal differences are the addition of an express provision giving a perfected security interest priority over an unperfected one²⁶¹ and the express limitation of the first-to-file-or-perfect rule to contests between holders of perfected security interests.

The interaction of these rules of the revision is interesting. If a buyer of accounts perfected his security interest by filing, under the 1998 revision of the Article, no one to whom the seller subsequently attempts to sell the same accounts or grant a security interest in them can gain priority over the original buyer. Under revised section 9-318(b), once the original buyer's security interest is perfected, the seller no longer has any power to transfer interests to third persons in the sold accounts. That would be so even though the subsequent transferee was the first to file, because the first-to-file-or-perfect rule applies only where a conflict between perfected security interests exists. If the seller had no power to transfer an interest in the accounts, then no subsequent transferee from the seller could acquire an attached security interest which could be perfected.²⁶² Thus the first-to-file-or-perfect rule could apply to a contest between a buyer of accounts and a subsequent purchaser from the seller of an interest in the accounts only where the original buyer's security interest was unperfected at the time of the subsequent purchase and both were later perfected. If one was perfected and the other not, the perfected security interest would have priority. If both were unperfected, the original buyer would prevail.

What if, at the time a sale of accounts is made, the seller has already sold them or granted a security interest in them to another person? The same rules apply. In the case of a prior sale, if the first buyer had perfected the security interest that arose from the sale before the second sale was made, the second buyer would acquire no interest in the accounts by operation of the rule of revised Section 9-318(b).²⁶³ Otherwise, the priority rules of revised Section 9-322(a) would apply. If both interests were perfected, the first-to-file-or-perfect rule would determine priority. If one was perfected and the other not, the per-

261. See *supra* note 223. Cf. Edwin E. Smith, *Overview of Revised Article 9*, 73 AM. BANKR. L. J. 1, 24 (1999) (calling the rule one "implicit under [former] Article 9").

262. Recall that attachment requires that the "debtor" have "rights in the collateral or the power to transfer rights in the collateral to a secured party" (revised U.C.C. § 9-203(b)(2)) and that attachment is a condition of perfection (revised U.C.C. § 9-308(a)).

263. See Revised U.C.C. § 9-318(b) (1999).

fectured interest would prevail. And if both were unperfected, the earlier transferee would take priority over the later one.

Revised section 9-309(2) continues the rule that an assignment of accounts which does not alone, or in conjunction with other assignments to the same assignee, transfer a significant part of the transferor's outstanding accounts is automatically perfected, and filing is unnecessary.²⁶⁴ Because the buyer's security interest is automatically perfected when the assignment occurs, the seller who made the sale would thereafter have no power to transfer an interest in the assigned accounts to anyone else because of the rule of revised section 9-318(b).²⁶⁵ A contest could develop only between a buyer of an interest of the sort described in section 9-309(2) and a person to whom the seller had previously sold the account or granted a security interest in it. If the prior transfer was a sale and the earlier buyer had perfected his security interest by the time of the second sale, the second buyer would acquire no interest in the accounts. Otherwise, the applicable rule would be either the rule that a perfected security interest takes priority over an unperfected one or the first-to-file-or-perfect rule.

b. Contests with other third parties

Subject to possible qualification where proceeds are involved, a subject to be addressed later, and in the situation discussed under part c. below, no rule in either version of Article 9 gives any third party, other than a rival secured party, priority over the holder of a perfected security interest in accounts. Hence, if such a secured party has perfected the security interest before a lien creditor of the debtor acquires the lien, and before the debtor undertakes to transfer a non-security property interest in the accounts to a third person, he will be immune from all such third-party challenges, insofar as Article 9 of the UCC is concerned.

c. Interrelation between priority rules and rules as to effectiveness of filing

There is an interesting interplay between the rules of revised Article 9 regarding the duration of effectiveness of filing and those applying to contests between buyers of receivables and creditors or purchasers from the seller. Recall that revised section 9-318 provides that,

264. See also revised U.C.C. § 9-310(b)(2) (2000).

265. See *id.* § 9-318(b).

although the seller of a receivable retains no interest in property sold, for purposes of determining the rights of creditors of or purchasers of interests in the property from the seller, “while the buyer’s security interest is unperfected” the seller is to be treated as having the rights in and title to the property that the seller had before the sale.²⁶⁶ Suppose the buyer of an account has perfected the security interest in the account by filing a financing statement but fails to file a continuation statement in time to continue the effectiveness of the filing beyond the initial five-year period. Suppose, also, that shortly prior to the loss of effectiveness of the filing (1) a creditor of the seller acquired a judicial lien on the account and (2) the seller sold the same account to another buyer, who immediately filed a financing statement covering the account.

At the time of the creditor’s levy and the second sale of the account, the original buyer still had a perfected security interest in the account by reason of the original filing, and neither the levying creditor nor the second buyer would have priority over the original buyer because, under section 9-318, the seller would not be treated as having any rights in the account when the original buyer’s security interest was perfected.²⁶⁷ But what would happen when the effectiveness of the original buyer’s filing lapsed? Revised section 9-515(c) provides that upon lapse the security interest becomes unperfected, and “[i]f the security interest . . . becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value.”²⁶⁸ How would that affect the relations between the original buyer of the account and (1) the lien creditor and (2) the second buyer?

As far as the lien creditor is concerned, although the original buyer’s security interest is now unperfected, the creditor’s status is not improved, for the rule of section 9-515(c) does not treat the loss of perfection as retroactive to the time of the creditor’s levy. Only a creditor acquiring a lien on the account after the buyer’s security interest became unperfected could prevail against the buyer.²⁶⁹

266. Revised U.C.C. §9-318(b) (1999).

267. *Id.* § 9-318.

268. *Id.* § 9-515(c).

269. See Harry C. Sigman, *Twenty Questions About Filing Under Revised Article 9: The Rules of the Game Under New Part 5*, 74 CHI-KENT L. REV. 861, 888–89 (1999). The author suggests that a creditor who levied before the buyer’s security interest became unperfected might prevail if local law treated a judicial lien as a “continuing levy, i.e., treated as a fresh levy each day.” *Id.* at 889.

A second buyer from the seller purchasing before the first buyer's filing lapsed would fare better, because the loss of perfection suffered by the first buyer when the filing lapsed would be treated as retroactive in favor of a purchaser for value from the seller under section 9-515(c).²⁷⁰ The first buyer's security interest would be treated as if it had been unperfected at the time of the second sale, and the seller would thus be treated as having power to transfer title at the time of the second sale. The second buyer would then be treated as having priority over the first under the priority rule of revised section 9-322(a)(2), that a perfected security interest has priority over an unperfected one.²⁷¹ The rule of revised section 9-515(c) applies also to a case where a buyer of chattel paper has perfected by filing and allows the effectiveness of the filing to expire.

It may well be that this rule will seldom have any effect on the rights of a buyer of accounts or chattel paper, because such receivables are usually of short life and loss of perfection by expiration of the initial five-year period of effectiveness of a filing is not likely to occur before the accounts or chattel paper have been discharged by payment or otherwise.

2. *Chattel Paper*

Assuming that a buyer of chattel paper has received assignment of the chattel paper from the original obligee, who still owns the paper at the time of the sale, and that the buyer has perfected the security interest in the collateral, what priorities has the buyer acquired?

There is more than one way that a security interest in chattel paper can be perfected. Filing is a permissible method of perfection as to all chattel paper under both versions of Article 9. In the case of chattel paper of the traditional type, a writing, an alternative way to achieve perfection under both versions of Article 9 is for the secured party to take possession of the paper. In the case of "electronic chattel paper" (recognized only by revised Article 9), perfection by gaining "control" of the chattel paper is an available alternative to filing.

a. *Conflicting security interests*

The general priority rules of former section 9-312(5)(a) is applied to conflicts between security interests in chattel paper as well as ac-

270. *Id.*

271. *See id.* at 889-91.

counts. If the rival security interest was unperfected, a secured party with a perfected security interest probably had priority.²⁷² If both security interests were perfected, the first-to-file-or-perfect priority rule would govern. Revised section 9-322(a) has similar general rules.²⁷³ The discussion above of these rules as they affect security interests in accounts is equally applicable to security interests in chattel paper.²⁷⁴

The situation was further complicated in former Article 9 by a special rule, applicable where a security interest in chattel paper had been perfected by filing. Former section 9-308 provided that

[a] purchaser of chattel paper . . . who gives new value and takes possession of it in the ordinary course of his business has priority over a security interest in the chattel paper . . . (a) which is perfected under Section 9-304 (permissive filing . . .) if he acts without knowledge that the specific paper . . . is subject to a security interest.²⁷⁵

The rule would apply either to a purchaser of a security interest in the chattel paper or to a buyer of it, as the term “purchaser” is broad enough to include both.²⁷⁶

The idea behind this exceptional rule was that if a financier who took a security interest in or bought chattel paper chose to leave the paper in the debtor’s possession and filed to perfect, the financier created a situation where prospective buyers of the collateral from the debtor and prospective lenders to the debtor on the security of the collateral were likely to assume that the debtor was the owner of the paper and entitled to deal with it as such. Because collateral of that sort was usually delivered to buyers or secured parties, the prospective buyers or lenders were likely to give value to the debtor without first searching for filings as to the collateral. Hence, the burden was placed on the earlier financier to see that prospective purchasers were informed of the earlier security interest. If a purchase was made by another and value given and possession taken without knowledge of the earlier security interest, the later purchaser was granted priority over the earlier one.²⁷⁷

272. See *supra* note 258.

273. See *supra* notes 259–260.

274. See *supra* note 261.

275. Former U.C.C. § 9-308 (1972).

276. See U.C.C. § 1-201(33),(32) (1999). Since 2001 these definitions have appeared in § 1-201(b)(30),(29).

277. See former U.C.C. § 9-308 cmt. 3 (1972).

This special priority rule was of quite limited application. First, it applied only where the later purchaser gave “new value,” obviously a narrower term than simply “value,” which was defined in section 1-201(44).²⁷⁸ “New value” was not defined in former Article 9, although Section 9-108 gave some examples of what would qualify (making an advance, incurring an obligation, releasing a perfected security interest).²⁷⁹ A comment to that section stated that these examples, and the definition of “purchase money security interest” indicated “the nature of the concept,” and in other situations it was “left to the courts to distinguish between ‘new’ and ‘old’ value, between present considerations and antecedent debt.”²⁸⁰ If we consider what section 1-201(44) defined as “value,” the most obvious type of value, which would be “old” value, would be taking property as security for a preexisting debt without making any new exchange or commitment.

Second, the purchaser of the chattel paper had to have given value and taken possession of the paper “in the ordinary course of his business.”²⁸¹ This is another expression not defined by the UCC. As used here it seems to mean two things: (a) that the purchaser had to be in the business of purchasing chattel paper and (b) that the particular purchase had to be consistent with the usual course of the purchaser’s business.

Third, the purchaser was required to have acted “without knowledge that the specific paper . . . is subject to a security interest.”²⁸² Mere knowledge that there was a security interest was enough to bar the purchaser from priority.²⁸³ “Knowledge” was defined by section 1-201(25) as “actual knowledge” and was distinguished from “reason to know.”²⁸⁴ A comment to former section 9-308, however, indicated that the holder of a prior security interest could protect himself from loss under this section by “stamping or noting on the paper the fact that it has been assigned to him,” suggesting that the subsequent purchaser

278. See *supra* note 57. In 2001 Article 1 was revised, and the definition of “value” was shifted to § 1-204, without substantial change in meaning.

279. See former U.C.C. § 9-108 (1972).

280. *Id.* § 9-108 cmt. 2.

281. *Id.* § 9-108.

282. *Id.* § 9-308(a).

283. Compare the definition of “buyer in ordinary course of business” in § 1-201(9), where the buyer’s knowledge of a preexisting interest in goods being sold is not enough to bar him from the status and potential priority over the holder of the preexisting interest; he must be “without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods.”

284. In 2001 the definition of “knowledge” was shifted to § 1-202, but it is still defined as “actual knowledge.”

would be barred from priority even if he did not notice the stamp or notation on the paper.²⁸⁵

Rather oddly, however, the rule of section 9-308 did not expressly require that the purchaser act in “good faith” to have the benefit of the rule, a requirement which did appear in most UCC rules protecting innocent purchasers from preexisting property interests. It is true that section 1-203 declared that “[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement,” but it is doubtful that the rule would apply to the sort of fact situation under consideration here.

In the 1998 revision of Article 9, section 9-330(b) replaces former section 9-308(a) and states a similar, but not identical, rule:

A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed other than merely as proceeds of inventory subject to a security interest if the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under Section 9-105 in good faith, in the ordinary course of the purchaser’s business, and without knowledge that the purchase violates the rights of the secured party.

This rule differs from its predecessor in several ways:

First, although the revised rule continues to call for the purchaser to take the chattel paper for “new value,” the term “new value” is defined in revised Article 9, in section 9-102(a)(57). It means “(i) money, (ii) money’s worth in property, services, or new credit, or (iii) release by a transferee of an interest in property previously transferred to the transferee. The term does not include an obligation substituted for another obligation.”

Second, action by the transferee “in good faith” is now expressly required, and although section 1-201(19) in 1998 contained a general definition of “good faith” as meaning simply “honesty in fact in the conduct or transaction concerned,” revised section 9-102(a)(43) provided that in Article 9 “good faith” means “honesty in fact and the observance of reasonable commercial standards of fair dealing.”²⁸⁶

285. See former U.C.C. § 9-308 cmt. 3 (1972).

286. In 2001 the definition of “good faith” in revised § 9-102(a)(43) was deleted and the definition of “good faith” in Section 1-201 was modified by adding a requirement of observance of reasonable commercial standards of fair dealing. See revised U.C.C. § 1-201(b)(20) (2001). In effect, the definition of “good faith” adopted for Article 9 in 1998 has now become the standard meaning of the term throughout the Code.

Third, the purchaser must now be “without knowledge that the purchase violates the rights of the secured party.”²⁸⁷ This involves two departures from the prior text: First, knowledge that the chattel paper is subject to a security interest is now not enough to prevent the purchaser from gaining priority; only knowledge that the rights of the secured party are being violated will bar the purchaser from priority. Second, subsection (f) of revised section 9-330 has the effect of making an exception to the requirement, by providing that “[f]or purposes of [subsection (b)] . . . , if chattel paper . . . indicates that it has been assigned to an identified secured party other than the purchaser, a purchaser of the chattel paper . . . has knowledge that the purchase violates the rights of the secured party.”

Fourth, adapting the rule to the expansion of the “chattel paper” concept to include “electronic chattel paper,” the rule now requires that the purchaser either have taken possession of the chattel paper or have gained “control” of it, as well as having given new value, all in good faith, in the ordinary course of the purchaser’s business, and without knowledge of violation of rights of the secured party.

Fifth, section 9-330(b) does not say, as former section 9-308(a) did, that the priority a purchaser can acquire under this rule is a priority over a security interest that has been perfected by filing. As stated, the rule grants priority over any security interest which is not claimed merely as proceeds of inventory, whether perfected or not and, if perfected, regardless of how perfection was achieved. This modification seems relatively unimportant. If the original security interest was perfected by possession or control, a subsequent purchaser will be unlikely to be able to gain priority by taking possession or gaining control. If the original security interest is unperfected, a purchaser who gains possession or control will very likely have a perfected security interest and thus be entitled to priority under the general rule that a perfected security interest takes priority over an unperfected one. Thus, as a practical matter, the rule is limited to granting priority over a security interest perfected by filing.

Suppose the earlier security interest is that of a buyer of chattel paper and has been perfected by filing before a second purchase occurs of the sort described in section 9-330(b). Would not the rule of revised section 9-318(b) prevent the second purchaser from gaining priority on the ground that when the buyer’s security interest became perfected, the seller lost his power to make effective transfers of interests in the sold chattel paper? An argument could be made that the

287. Revised U.C.C. § 9-330(b) (1999).

purpose of the rule of section 9-330(b) would be best served by treating that special priority rule as creating an implied exception to the rule of 9-318(b). Comment 2 to section 9-330 states that the purpose of the rule is to enable “secured parties and other purchasers of chattel paper . . . to obtain priority over earlier-perfected security interests,” and the rationale for such priority is probably the same as that given in the comment to former section 9-308(a).²⁸⁸ Nothing in the text of revised Article 9 recognizes such an exception, nor did the comments as originally published, but in 2001 comment 4 to section 9-318 was revised. After noting that the usual effect of perfection of the security interest of a buyer of a receivable is to deprive the seller of power to transfer interest to third persons, the comment provides:

However, in certain circumstances a purchaser who takes possession of a promissory note will achieve priority, under Sections 9-330 or 9-331, over the security interest of an earlier buyer of the promissory note. It necessarily follows that the seller in those circumstances retains the power to transfer the promissory note, as if it had not been sold, to a purchaser who obtains priority under either of those sections.²⁸⁹

Although this comment refers only to purchasers of promissory notes, a similar interpretation of section 9-330(b) seems equally appropriate in the light of the purpose of the rule.

Finally, we need to note that the priority rule of revised section 9-330(b) excludes from its operation a security interest which is claimed “merely as proceeds of inventory.” The subject of security interests in proceeds is one of considerable complexity, and further discussion of it will be deferred.

b. Conflicts with other third parties

Except where proceeds are involved and in the situation described above in part c²⁹⁰ of the discussion of accounts, there is no other rule in Article 9 which would give a lien creditor priority over a perfected security interest in chattel paper or give priority to any transferee of chattel paper over a perfected security interest in chattel paper.

288. *See supra* note 277.

289. Revised U.C.C. § 9-318(a) cmt. 4 (1999).

290. *See supra* Part IV.B.1.c.

3. *Promissory Notes*

Only revised Article 9 treats sales of promissory notes as secured transactions, so discussion will be limited to the provisions of the revision.

a. *Conflicting security interests*

A security interest arising from the sale of a promissory note is automatically perfected at the time of the sale.²⁹¹ Thereafter, according to section 9-318(b), any attempt by the seller to create a security interest in it or to sell it will be ineffective, and so there can be no problem of priorities under the general rules of revised section 9-322 insofar as subsequent claimants are concerned.

If a buyer finds his rights challenged by one who bought the note at an earlier time, the second buyer would lose under the general rule of section 9-318(b) if it applies; the seller would have no power to transfer any rights in the note after the original sale, as the first buyer's security interest would be perfected when that sale was made. If the rival claimant is one who previously purchased a security interest in the note, the case would be governed by the rule of revised section 9-322(a)(2), that a perfected security interest has priority over an unperfected one, or by the rule of section 9-322(a)(1), which is the first-to-file-or-perfect rule for resolving conflicts between perfected security interests.

There are two special priority rules, however, for security interests in promissory notes that may change the results. One such rule is found in section 9-331(a): "This article does not limit the rights of a holder in due course of a negotiable instrument . . . [Such a holder] take[s] priority over an earlier security interest, even if perfected, to the extent provided in [Article 3]." A promissory note is an "instrument,"²⁹² and it may be "negotiable," depending on its form, as prescribed by section 3-104 of the UCC.²⁹³ A "holder in due course" is a

291. See revised U.C.C. § 9-309(4) (1999).

292. *Id.* § 9-102(a)(65).

293. Revised U.C.C. § 3-104(a) (1999) provides that

Except as provided in subsections (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it: (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder; (2) is payable on demand or at a definite time; and (3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power

type of innocent purchaser for value, but the requirements for the status are quite strict. Section 3-302(a) defines the term as meaning the following: (1) a “holder” of a negotiable instrument (i.e., one in possession of an instrument that is, because of its original terms or, by reason of one or more indorsements, payable to that person),²⁹⁴ (2) that does not bear evidence of forgery or alteration or such irregularity as to call into question its authenticity, (3) who takes the instrument (a) in good faith, (b) for value, and (c) “without notice that the instrument is overdue or has been dishonored or that there is an uncured default” in payment on another instrument that was issued as part of the same series, without notice that the instrument bears an unauthorized signature or has been altered, and without notice of any claim against the instrument or any defense to it of any party.

One who qualifies as a holder in due course is in a very powerful position. A holder in due course takes the instrument free from many defenses that persons who have become obligors on the instrument may have and also takes the instrument free of preexisting property interests in it.²⁹⁵ It is the clear-title rule of Article 3 that is being recognized in revised section 9-331(a).

This rule could work for or against a buyer of a promissory note. A buyer who becomes a holder in due course will have priority over all preexisting claims to the note, but if someone else becomes a holder in due course of it after the sale, the buyer will lose ownership of the instrument. Of course, a buyer who has taken possession of the note can prevent any subsequent purchaser from becoming a holder in due course of it.

The other special priority rule is in revised section 9-330(d) and provides that “a purchaser of an instrument has priority over a security interest in the instrument perfected by a method other than possession if the purchaser gives value and takes possession of the instrument in good faith and without knowledge that the purchase violates the rights of the secured party.” This rule could apply to a case involv-

to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

Subsection (c), referred to in this rule, is a special rule for checks, not applicable to promissory notes. Subsection (d) provides that even if the instrument does satisfy the requirements of subsection (a), it is not negotiable if it contains a conspicuous statement that it is not negotiable or is not an instrument governed by Article 3. *Id.*

294. See revised U.C.C. § 1-201(20) (1999). This rule, revised in wording but not in substance, has, since 2001, appeared in § 1-201(b)(21).

295. See *id.* § 3-306.

ing a non-negotiable note, and it could be applicable where a negotiable note was involved but the purchaser did not qualify as a holder in due course. To be a holder in due course, for example, a purchaser must take the instrument without "notice" of any preexisting claim to it, but a purchaser can qualify for priority under this special rule if the purchaser does not have "knowledge that the purchase violates the rights of the secured party."²⁹⁶

A buyer of a promissory note could lose title to the note under this rule if the buyer relies on the automatic perfection conferred by section 9-309(4) and does not take possession of the note.²⁹⁷ The reason for the rule is probably much like that supporting the rule of former section 9-308(a) applicable to chattel paper²⁹⁸ and its counterpart in revised section 9-330(b).²⁹⁹ According to the revised comment to revised section 9-318, this rule creates an implied exception to the rule that once the security interest of a buyer of receivables is perfected, the seller no longer has power to transfer interests in the collateral to third persons.³⁰⁰

b. Conflicts with other third parties

With the possible exception of cases involving proceeds, Article 9 has no other rule which would give a lien creditor priority over a buyer of a promissory note or grant priority to a transferee other than a secured party.

4. *Payment Intangibles*

Sales of payment intangibles are treated as secured transactions only by revised Article 9. Like buyers of promissory notes, buyers of most payment intangibles are treated as secured parties and their interests in the intangibles as security interests. Therefore, those interests are automatically perfected upon attachment under revised section 9-309(3).

296. See revised U.C.C. § 9-330 cmt. 7 (1999), and compare definitions of "notice" and "knowledge" in § 1-201(25). In 2001 these definitions, in revised form, were moved to § 1-202. Section 3-102(b) provides that if there is a conflict between Article 3 and Article 9, Article 9 governs.

297. See revised U.C.C. § 9-330 cmt. 7 (1999).

298. See *supra* note 277.

299. See *supra* note 287.

300. See revised U.C.C. § 9-318 cmt. 4 (1999), as amended in 2001, quoted *supra* note 287.

a. Conflicting security interests

A buyer of payment intangibles need not worry about subsequent purchasers from the seller, as revised section 9-318(b) terminates the seller's power to make effective transfers to third parties when the buyer's security interest is perfected, and that occurs at the time of the sale.

As to security interests which arise before payment intangibles are sold, if the earlier security interest arises from a sale of the intangible, the seller would have no power thereafter to make an effective sale because of the rule of revised section 9-318(b). If the earlier security interest was one actually intended for security, the general priority rules of revised section 9-322(a) would apply. If the earlier security interest was unperfected, the buyer would take priority. If the earlier security interest was perfected, the first-to-file-or-perfect priority rule would apply. There is a question as to whether the buyer could gain priority by filing before there is either filing or perfection as to the earlier interest because the filing is not needed to perfect the buyer's security interest when it arises, but it seems probable that the buyer could gain priority by such a filing before the sale to him occurs, since the text of the UCC makes no exception to the priority rule for such a case.

b. Conflicts with other third parties

With the possible exception of cases involving proceeds, revised Article 9 has no other rule giving a lien creditor priority over a buyer of payment intangibles or granting priority to a transferee who is not a secured party.

V. PROCEEDS

Under former Article 9 "proceeds" were defined by subsection (1) of section 9-306 as including:

whatever is received upon the sale, exchange, collection, or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security

agreement. Any payments or distributions made with respect to investment property collateral are proceeds.³⁰¹

The idea of proceeds that emerges is that the term refers to property that can be regarded as replacing, substituting for, or growing out of original collateral, though the definition is stated in a more limited fashion.

The significance of the concept of "proceeds" was found in subsection (2) of former section 9-306, which provided that "[e]xcept where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor." In other words, the secured party's interest in identifiable proceeds of original collateral served as additional collateral if the secured party had not authorized the disposition of the collateral, and it served as substitute collateral if the disposition had been authorized; this extension of the security interest occurred automatically. The authorization referred to was an authorization to dispose of the collateral free of the security interest, not a mere consent to disposition without waiver of a continuing security interest.³⁰²

In revised Article 9, section 9-315(a) continues this treatment of "proceeds" and expressly indicates that the authorization referred to is one of disposition free of the security interest. The definition of "proceeds" which appears in section 9-102(a)(64) is broader in scope, although it embodies the same general concept. It is as follows:

"Proceeds," except as used in Section 9-609(b) [where it is used as a verb], means the following property: (A) whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral; (B) whatever is collected on, or distributed on account of, collateral; (C) rights arising out of collateral; (D) to the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringements of rights in, or damage to, the collateral; or (E) to the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or noncon-

301. Former U.C.C. § 9-306(1) (1972).

302. See Permanent Editorial Board Commentary No. 3, Part 1 of Discussion (1990).

formity of, defects or infringements of rights in, or damage to, the collateral.³⁰³

This definition is both broader and more precise than its predecessor. It does not say that proceeds of proceeds are included, but a comment to revised section 9-102 asserts that “[t]hat idea is expressed in the revised definition of ‘collateral’ in section 9-102. No change in meaning is intended.”³⁰⁴

A further distinction in the terminology is between the terms “cash proceeds” and “non-cash proceeds.” In former Article 9 section 9-306(1) provided that “[m]oney, checks, deposit accounts, and the like are ‘cash proceeds.’ All other proceeds are ‘non-cash proceeds.’” In the revised Article, section 9-102(a)(9) and (58) provides nearly identical definitions of these terms.

Under both versions of Article 9, a security interest in proceeds is treated as automatically perfected if the security interest in the original collateral was perfected at the time the proceeds were acquired, although the perfection as to the proceeds might be temporary. Former Article 9 described the security interest in proceeds as “a continuously perfected security interest” but provided that it would become unperfected “ten days after receipt of the proceeds by the debtor unless”: (1) the proceeds were identifiable cash proceeds and (a) a filed financing statement covered the original collateral,³⁰⁵ or (b) the original collateral was investment property;³⁰⁶ or (2) the security interest in the proceeds was perfected within the ten-day period by a method that would be appropriate for perfection as to the type of property constituting the proceeds;³⁰⁷ or (3) a filed financing statement covered the original collateral and the proceeds were a type of property in which a security interest could be perfected by filing in the same office where the original filing was made; but if the proceeds had been acquired with cash proceeds, it was also necessary that the description of the collateral in the filed financing statement have included the type of property constituting the proceeds.³⁰⁸

In revised Article 9 the perfection rules are somewhat altered and simplified. Again it is provided, in section 9-315(c), that if the security interest in the original collateral was perfected, a security interest in

303. Revised U.C.C. § 9-102(a)(64) (1999).

304. *Id.* § 9-102 cmt.13(c).

305. Former U.C.C. § 9-306(3)(b) (1972).

306. *Id.* § 9-306(3)(c).

307. *Id.* § 9-306(3)(d).

308. *Id.* § 9-306(3)(a).

proceeds of that collateral is automatically perfected. The section goes on to provide, however, that perfection is lost on the twenty-first day after the security interest attaches to the proceeds unless: (1) a filed financing statement covered the original collateral, the proceeds are a type of collateral in which a security interest may be perfected by filing in the same office, and the proceeds have not been acquired with cash proceeds;³⁰⁹ or (2) "the proceeds are identifiable cash proceeds";³¹⁰ or (3) the security interest in the proceeds is perfected by a method other than the automatic perfection provided for in subsection (c) at the time the security interest attaches or within twenty days thereafter.³¹¹

This version of the rules makes the automatic perfection provided for in subsection (c) permanent as to all cash proceeds, that simple rule replaces the narrower rules of former section 9-306(3)(b) and (c).³¹²

Under the revision, the automatic perfection provided for by subsection (c) of section 9-315 continues as to all proceeds for at least twenty days (a doubling of the period specified by former Article 9). Except as to cash proceeds, termination occurs at the end of the twenty-day period unless either of two requirements is met.

One requirement is that a filed financing statement covers the original collateral. The proceeds are a type of property in which a security interest can be perfected by filing in the same office, and the proceeds have not been acquired with cash proceeds. This rule essentially mimics former section 9-306(3)(a), except that the additional language of that rule dealing with cases where the collateral was acquired with cash proceeds has been deleted.³¹³

The other case in which, under the revision, perfection does not terminate at the end of the twenty-day period of automatic perfection is if there has been a continuing perfection of the security interest in the proceeds by some method which would be appropriate for the type of collateral constituting the proceeds if they were original collateral and that has occurred before the expiration of the twenty-day period of automatic perfection. This rule duplicates the rule of former section 9-306(3)(c)³¹⁴ (except for the change in the length of the period of automatic perfection). This rule also absorbs the rule of former sec-

309. Revised U.C.C. § 9-315(d)(1) (1999).

310. *Id.* § 9-315(d)(2).

311. *Id.* § 9-315(d)(3).

312. *See text supra* notes 305–306.

313. *See text supra* note 308.

314. *See text supra* note 306.

tion 9-306(3)(a), insofar as it dealt with proceeds acquired with cash proceeds.³¹⁵ If proceeds have been acquired with cash proceeds and there is a financing statement covering the original collateral on file that includes in its description of collateral the type of property constituting the proceeds, and filing in the same office would be appropriate for the type of property constituting the proceeds, a perfection of the security interest in the proceeds by filing will occur as soon as the security interest attaches to the proceeds.³¹⁶

A. Are Proceeds Rules of Concern to a Buyer of Receivables?

A buyer of receivables whose purchase is treated as a secured transaction by Article 9 may find the rules as to proceeds important. The receivables one buys may be proceeds of collateral in which another person had a security interest, and a question of priorities may arise from the conflicting interests in the receivables. A very common source of accounts and chattel paper is from sales of goods that constitute inventory of a merchant. The merchant may have borrowed funds on the security of the inventory, and if the merchant then sells accounts or chattel paper arising from the sales of the goods, the buyer of the receivables may be faced with a conflicting claim to the receivables asserted by the inventory financier who claims the receivables as proceeds of the original inventory collateral. Even if the receivables are not proceeds in which another has a security interest at the time of the sale, the debtor's dealings with the receivables after the sale may produce proceeds to which the buyer wishes to assert a claim, and that claim may be opposed by another person claiming an interest in the proceeds either as original collateral or as proceeds.

The Article 9 rules on priorities with respect to proceeds are quite complex and more so under revised Article 9 than they were under the former version of the Article. It would unduly lengthen this paper to attempt an exhaustive survey of the priority rules relating to proceeds, as most of them work the same way whether a security interest is based on a sale of receivables or results from a transaction actually intended to create a security interest. The more general of the rules, however, will be covered here, as well as a few special rules that seem likely to be of interest to buyers of receivables.

The basic priority rule under former Article 9 was that a security interest in proceeds had the same priority as the security interest had

315. See text *supra* note 308.

316. See Burns, *supra* note 134.

with respect to the original collateral. This proposition was not stated that broadly, but it was reflected in section 9-312(6), which provided that for purposes of the first-to-file-or-perfect rule for priority between perfected security interests in the same collateral “[the] date of filing or perfection as to collateral is also [the] date of filing or perfection as to proceeds.”³¹⁷ This idea also lay behind the seemingly peculiar wording of section 9-306(2) in stating that a security interest “continues in any identifiable proceeds,”³¹⁸ and of section 9-306(3), which described a security interest in proceeds as a “continuously perfected”³¹⁹ one for at least ten days. The security interest in proceeds was to be treated as a continuation of the security interest in the original collateral and not as a new, independent security interest.

The inherited priority of a security interest in proceeds could be lost, however. The first-to-file-or-perfect priority rule, for example, was a rule of priority as between perfected security interests. If the security interest in the proceeds should become unperfected, perhaps because the ten day period of automatic perfection has expired and there has been no new perfection of the security interest, the interest in the proceeds would probably become subordinate to a conflicting perfected security interest in them under section 9-312(5).³²⁰

The basic priority rule was also subject to some exceptions which will not be reviewed here because they have been superseded by different rules in revised Article 9. In the 1998 revision of Article 9, the priority rules for proceeds start with the same general rule that, as between perfected security interests, for purposes of the first-to-file-or-perfect rule of section 9-322(a)(1), “the time of filing or perfection as to a security interest in collateral is also the time of filing or perfection as to a security interest in proceeds.”³²¹ The same section of revised Article 9 states two rules of more limited application which control over the general rule.

First, revised section 9-322(c)(2) applies to cases where a secured party has a security interest that, as it applied to the original collateral, qualified for priority over a conflicting security interest in that collateral by virtue of one of the rules in section 9-327 to 9-331. The rule is that the security interest in the original collateral confers priority as to its proceeds if: (a) the security interest in the proceeds is perfected; (b) the proceeds are cash proceeds or property of the same type as the

317. Former U.C.C. § 9-312(6) (1972).

318. *Id.* § 9-306(2).

319. *Id.* § 9-306(3).

320. *See supra* note 224.

321. Revised U.C.C. § 9-322(b)(1) (1999).

original collateral; and (c) if the proceeds are proceeds of other proceeds, all intervening proceeds are cash proceeds, proceeds of the same type as the original collateral, or an account relating to the collateral.

The other sections referred to in this rule contain special rules for priority for security interests in deposit accounts,³²² investment property,³²³ letter-of-credit rights,³²⁴ chattel paper and instruments,³²⁵ and rights in collateral given priority by provisions in certain other articles of the UCC.³²⁶ All of these sections deal with the effect of achieving perfection by some method other than filing a financing statement. They also grant priority to a secured party so perfecting as to collateral even though a rival secured party has previously filed as to the collateral or achieved perfection in some other way. A comment refers to these types of collateral as “non-filing collateral,” meaning not that perfection by filing as to such collateral is impossible, but that perfection by some other method (chiefly, by taking possession or achieving control) is not only possible as to such collateral but is also customary, so that secured parties who do perfect by these methods generally do not expect to need to conduct a filing search.³²⁷ The special priority rule of section 9-322(c)(2) enables a secured party who would have priority as to original collateral under one of the cited sections to gain priority as to some proceeds that would not be granted by the first-to-file-or-perfect priority rule.

For example, suppose that SP-1 buys a non-negotiable promissory note (an “instrument”) from Debtor but leaves it with Debtor to have Debtor collect payment on SP-1's behalf. SP-1 promptly files a financing statement covering promissory notes. Debtor then sells the same note to SP-2, who takes possession of the note in good faith without knowledge that the sale violates the rights of any third person, but SP-2 allows Debtor to collect payment of the note when it comes due. Debtor does not remit the proceeds of the note to either SP-1 or SP-2; instead the payment is deposited in Debtor's checking account. As between SP-1 and SP-2, which of them would have the prior right to the proceeds? (The proceeds would qualify as “cash proceeds,” and assume that they are identifiable proceeds despite being commingled with other funds in the checking account.)

322. *Id.* § 9-327.

323. *Id.* § 9-328.

324. *Id.* § 9-329.

325. *Id.* § 9-330.

326. *Id.* § 9-331.

327. *See* revised U.C.C. § 9-322 cmt. 7 (1999).

If the first-to-file-or-perfect rule of section 9-322(a)(1) applies, it would give SP-1 priority in claim to the original collateral, the promissory note, for SP-1 was the first to file and also the first to perfect with respect to the note. Moreover, section 9-318 would point to the conclusion that SP-2 didn't acquire any property interest in the note at all because SP-1's perfection would have cut off Debtor's power to make any further transfers of interests in the note thereafter.³²⁸ But section 9-330(d) takes the case out of both of these rules; it operates to give Debtor power to make transfers of the note as if he were still the owner of it,³²⁹ and it grants SP-2 priority over SP-1 in claim to the note "as a purchaser who gave value and took possession of the note in good faith and without knowledge that the purchase violated the rights of the [prior] secured party."³³⁰

Does SP-2 have the same priority with respect to the proceeds of the note? Not necessarily. Section 9-330 does not deal with priority as to proceeds of the instrument purchased. If we look to the general rules of priority in section 9-322, and we seek to apply the first-to-file-or-perfect rule to this case, we would have to conclude that SP-1 has priority as to the proceeds, since SP-1 was the first to file and the first to perfect as to the original collateral, and subsection (b)(1) of section 9-322 instructs us to treat the time of filing or perfection of the security interest in the original collateral as the time of filing or perfection of the a security interest in proceeds of the collateral. Here again, however, we are provided with a special rule to deal with the case, the rule of section 9-322(c)(2), and it gives SP-2 priority as to the proceeds. Where a secured party has priority over an earlier security interest under the rules of several specified sections, including Section 9-330, that secured party also has priority as to proceeds of the original collateral if the security interest in the proceeds is perfected and the proceeds are cash proceeds or proceeds of the same type as the original collateral. (There is an additional restriction applicable if the proceeds are proceeds of other proceeds, but we do not have such a case here.) We have cash proceeds, and SP-2 has a perfected security interest in them; it was automatically perfected for twenty days, and it continues to be perfected after that because the proceeds are identifiable cash proceeds.³³¹

328. See *supra* note 259.

329. See *supra* note 300.

330. See *supra* notes 296-299.

331. For another illustration see revised U.C.C. § 9-322 cmt. 8, ex. 6 (1999).

The illustrations to revised section 9-322 indicate that the priority rule of subsection (c)(2) applies even though the secured party invoking it has filed with respect to the original collateral, provided that the secured party has also taken such action as would suffice in itself to perfect the security interest and entitles the secured party to priority under one of the rules in sections 9-327 to 9-331. One of the examples given³³² is that SP-1 perfects a security interest in investment property by filing, and SP-2 perfects subsequently by filing and also by taking control of the investment property, a certificated security. Debtor then receives proceeds of the original collateral consisting of a new certificated security issued as a stock dividend of the collateral. Does SP-1 or SP-2 have the prior claim to the proceeds? If the general first-to-file-or-perfect rule applies, SP-1 has the senior claim. SP-1 was the first to file and perfect as to the original collateral. The perfected security interest SP-1 has would continue in the proceeds and be deemed to date back to the time of filing as to the original collateral, and the perfection would continue beyond the twenty-day period of automatic perfection under section 9-315(d)(1) because the proceeds are of a type in which a security interest could be perfected by filing in the office where SP-1's filing as to the original collateral was made and the proceeds were not acquired with cash proceeds.

But SP-2 would claim a security interest in the proceeds that is entitled to priority. SP-2 has control of the original collateral and, under section 9-328(1), such control entitles SP-2 to priority over SP-1, who does not have control. That control opens the door for SP-2 to invoke section 9-322(c) to claim priority as to the proceeds. To use that rule SP-2 must show a perfected security interest in the proceeds, and that can be done by using the same reasoning that SP-1 would use to show a perfected security interest in the proceeds. SP-2 must also show that the proceeds are cash proceeds or proceeds of the same type as the original collateral; the proceeds are not cash proceeds, but they are property of the same type as the original collateral—investment property. Because the proceeds are not proceeds of proceeds, SP-2 need not worry about the additional requirement that applies in such a case.

Further complicating the picture is the realization that even if we have a case that seems to fit neatly into the rule of 9-322(c), it may turn out not to be the governing rule because it is overridden by some Article 9 rule of more limited application. Subsection (c) begins with the words “[e]xcept as otherwise provided in subsection (f).” Subsec-

332. Revised U.C.C. § 9-322 cmt. 8, ex. 8 (1999).

tion (f) subordinates the rules of subsections (a) through (e) to a number of other specifically cited rules and to "the other provisions of this part." "This part" covers sections 9-301 through 9-342. If we find in any of those sections (other than 9-322) a rule which would also fit our case and would change the result produced by subsection (c), we must apply the other rule. For example, we have noted before that Section 9-328(1) has a rule that if one secured party has control of investment property and another secured party does not have control, the one with control takes precedence. In the example just discussed, this rule would not change the result. But suppose that SP-1 were able to gain control of the certificated security constituting the proceeds. If SP-2 lacks control of that security, the result would be that SP-1 would have the superior claim to the proceeds. The rule of 9-328(1) would trump that of 9-322(c).³³³

The other special priority rule for security interests in proceeds in revised section 9-322 is found in subsections (d) and (e). Subsection (d) provides that:

[s]ubject to subsection (e) and except as otherwise provided in subsection (f), if a security interest in chattel paper, deposit accounts, negotiable documents, instruments, investment property, or letter-of-credit rights is perfected by a method other than filing, conflicting perfected security interests in proceeds of the collateral rank according to priority in time of filing.³³⁴

Subsection (e) provides that "[s]ubsection (d) applies only if the proceeds of the collateral are not cash proceeds, chattel paper, negotiable documents, instruments, investment property, or letter-of-credit rights."³³⁵

These provisions are difficult to understand on first reading. They begin to make sense when, as the comments point out, it is realized that the exclusion of subsection (e) has the effect of confining the application of the priority rule of subsection (d) to cases in which the proceeds of "non-filing collateral" are "filing collateral," or property of a type as to which filing is the only method by which perfection can be achieved or at least property as to which filing is the usual method of perfection, so that secured parties who perfect by some method other than filing nevertheless normally expect and need to conduct a

333. Suggested by revised § 9-322 (1999) cmt. 8 in the paragraph following Example 6.

334. Revised U.C.C. § 9-322(d) (1999).

335. *Id.* § 9-322(e).

filing search. Such property includes accounts, commercial tort claims, general intangibles, goods, non-negotiable documents, and payment intangibles.³³⁶

The rule of subsection (d), then, is that if a security interest in “non-filing collateral” is perfected by a method other than filing conflicting perfected security interests in proceeds that are “filing collateral” rank according to priority in filing, not priority in filing or perfection, either as to the original collateral if there has been no interruption in the perfection of the security interest, or as to the proceeds.

The comments offer the following illustration of the operation of the rule.³³⁷

SP-1 perfects a security interest in Debtor’s deposit account by obtaining control. Thereafter, SP-2 files against Debtor’s equipment, (presumably) searches, finds no indication of a conflicting security interest, and advances against Debtor’s equipment. SP-1 then files as to Debtor’s equipment. Debtor uses funds from the deposit account to purchase equipment, which SP-1 can trace as proceeds of its security interest in Debtor’s deposit account.³³⁸

Which secured party has priority as to the equipment proceeds? If the first-to-file-or-perfect priority rule of Section 9-322(a)(1) applied, SP-1 would have priority. SP-1 was the only one to perfect as to the deposit account, the original collateral for SP-1’s security interest; that perfection would “continue” as to the equipment proceeds and the perfection as to the proceeds would be considered to relate back to the time of perfection as to the original collateral. Furthermore, the perfection as to the proceeds would not expire at the end of the twenty-day period of automatic perfection because SP-1 had filed as to Debtor’s equipment before the expiration of that twenty-day period, a proper means of perfecting a security interest in equipment.

The first-to-file-or-perfect priority rule would not apply, because the special rule of section 9-322(d) would. SP-1’s security interest in the deposit account (“non-filing collateral”) was perfected by a means other than filing—control. The proceeds, “equipment,” are “goods,” a type of “filing collateral.” Priority as to the proceeds goes to the first to file, and that was SP-2. The comment asserts that this result “corresponds with the likely expectations of the parties,”³³⁹ probably because when “filing collateral” is involved a person considering making

336. *See id.* § 9-322 cmt. 7.

337. *Id.* § 9-322 cmt. 9, ex. 12.

338. *Id.* § 9-322 cmt. 9, ex. 12.

339. *Id.* § 9-322 cmt. 9, ex. 12.

an advance against that sort of collateral would expect to find a filing with respect to that sort of property if there were a security interest in it that would be entitled to priority.

How does the special priority rule of subsection (d) relate to the priority rule of subsection (c)? There should be no overlapping. The rule of subsection (c) applies where the original collateral is "non-filing collateral" and the proceeds to which conflicting security interests apply are also "non-filing collateral."³⁴⁰ The proceeds must be "cash proceeds" or proceeds "of the same type as the collateral." "Cash proceeds" are defined as "money, checks, deposit accounts, or the like."³⁴¹ Money and deposit accounts are "non-filing collateral" because an original security interest in money can be perfected only by taking possession,³⁴² and one in a deposit account can be perfected only by obtaining control of it.³⁴³ Checks are "instruments,"³⁴⁴ and although perfection by filing is possible,³⁴⁵ perfection by taking possession is also possible.³⁴⁶ Instruments are normally delivered when they are sold or are intended as security and therefore qualify as "non-filing collateral."³⁴⁷ The words "or the like,"³⁴⁸ following the listing of specific types of property in the definition of "cash proceeds" are a bit ambiguous, but it seems likely that courts would read this language as referring to "non-filing collateral" too, and because the original collateral is "non-filing collateral," proceeds "of the same type as the collateral" would be "non-filing collateral" also.

Priority rules found in sections other than revised Section 9-322 which could affect proceeds are varied. Some do not expressly refer to proceeds but could apply to proceeds. Others are expressly applicable to proceeds. To try to catalog them all would unduly lengthen this paper, but two are especially notable, insofar as buyers of receivables are concerned. They concern purchase-money security interests and purchasers of chattel paper and instruments.

Revised section 9-324 contains the rules regarding priority accorded to purchase-money security interests against conflicting securi-

340. Revised U.C.C. § 9-322 cmts. 7 & 9 (1999).

341. *Id.* § 9-102(a)(9).

342. *Id.* § 9-312(b)(3).

343. *Id.* § 9-312(b)(1).

344. *Id.* §§ 9-102(a)(48) & 9-102 cmt. 5(c).

345. *Id.* § 9-312(a).

346. Revised U.C.C. § 9-313(a) (1999).

347. *See id.* § 9-322 cmt. 7.

348. *Id.* § 9-102(a)(9).

ty interests.³⁴⁹ The definition of “purchase-money security interest” in revised section 9-103 is rather complex, but the basic idea is that it is an interest in goods that secures an obligation to pay the purchase price of the goods or secures an obligation to repay an advance made to enable the debtor to acquire the goods.³⁵⁰ Holders of purchase-money security interests are especially favored in Article 9. The basic priority rule applicable to such interests is found in subsection (a) of 9-324. The Rule states that “a perfected purchase-money security interest has . . . priority over any conflicting security interest in the same goods, and . . . a perfected security interest in its . . . proceeds also has priority, if the purchase-money security interest is perfected when the debtor receives possession of the collateral or within [twenty] days thereafter.”³⁵¹

A rule of more limited scope, however, applies to a purchase-money security interest in inventory. Subsection (b) of section 9-324 provides that this sort of security interest has priority over a conflicting non-purchase-money security interest in the same inventory if: (i) “the purchase-money security interest is perfected when the debtor receives possession of the inventory”³⁵² (with no grace period for perfection); and (ii) before the debtor receives possession of the inventory, the purchase-money secured party has given notification to the other secured party that he has or expects to acquire a purchase-money security interest in such inventory.³⁵³ Subsection (c) adds that the purchase-money secured party is not required to give such notification to the other secured party if that party has not filed a financing statement covering the same type of inventory before the date of the purchase-money secured party’s filing.³⁵⁴

The reason for this special treatment of purchase-money security interests in inventory has been a concern about fairness of treatment of competing secured parties in cases of this sort. Suppose that Debtor, a merchant, makes an arrangement with a bank for SP-1 to make periodic loans to the merchant to finance Debtor’s business operations, with each loan to be secured by Debtor’s inventory. As inventory is sold, the merchant will pay over the proceeds to the SP-1 to reduce the outstanding debt, and as new inventory is acquired, SP-1 will be called upon to make additional advances. SP-1 files a financing

349. *Id.* § 9-324.

350. *See id.* § 9-103.

351. *Id.* § 9-324(a).

352. Revised U.C.C. § 9-324(b)(i) (1999).

353. *Id.*

354. *See id.* § 9-324(c).

statement covering Debtor's inventory. This financier's security interest would probably not be considered a "purchase-money security interest" because the advances are not made for the specific purpose of financing the specific inventory that secures the resulting obligation. Now suppose that Debtor acquires a new lot of inventory by persuading SP-2 to pay for it, and Debtor grants SP-2 a security interest in the inventory so acquired. Before SP-2 files, however, Debtor notifies SP-1 of his acquisition of a new lot of inventory and asks for an advance against it. The requested advance is made. Then SP-2 files within twenty days after Debtor's receipt of the inventory. There are two secured parties, each with a perfected security interest in the same collateral, but SP-2's security interest is a purchase-money security interest, while the SP-1's interest is not.

Under the general priority rule of section 9-324(a), SP-2 would have priority over SP-1 as to the inventory in which SP-2 has a purchase-money security interest, and it could be argued that such priority is deserved because the inventory was acquired at the SP-2's expense. But SP-1 has been tricked into making an advance on the security of that newly acquired inventory in accordance with a standing arrangement with the merchant, and SP-1 was unaware that the goods were already subject to a purchase-money security interest and could not have found a filing with respect to them if a search for a filing had been made before the SP-1's advance was made as to those goods. The drafters of Article 9 thought that one in a position such as SP-1's deserved some additional protection, and they provided it by conditioning the priority of the holder of a purchase-money security interest on its having perfected the security interest by the time the debtor received possession of the collateral, and on the purchase-money secured party having gotten notification to the other secured party before the debtor received possession of the collateral that the notifier had or expected to acquire a purchase-money security interest in described inventory of the debtor. As a result, before SP-1 made a requested new advance on the security of newly acquired inventory, SP-1 would have been warned to look for a filing as to that inventory and, having found the filing, would be able to avoid loss by refusing to make the advance.³⁵⁵

Under this rule, even if the purchase-money secured party is entitled to priority as to the inventory, that priority does not extend to all proceeds of the inventory collateral. It has

355. See *id.* § 9-324 cmt. 4.

priority over a conflicting security interest in chattel paper or an instrument constituting proceeds of the inventory and in proceeds of the chattel paper, if so provided in Section 9-330, and, except as otherwise provided in Section 9-327 [dealing with conflicting security interests in deposit accounts], also has priority in identifiable cash proceeds of the inventory to the extent the identifiable cash proceeds are received on or before the delivery of the inventory to a buyer.³⁵⁶

A comment adds that this priority as to proceeds applies only if the purchase-money secured party's interest in the proceeds is perfected.³⁵⁷ The comment goes on to explain that,

As a general matter . . . the purchase-money priority in inventory does *not* carry over into proceeds consisting of accounts or chattel paper. Many parties financing inventory are quite content to protect their first-priority security interest in the inventory itself. They realize that when the inventory is sold, someone else will be financing the resulting receivables (accounts or chattel paper), and the priority for inventory will not run forward to the receivables constituting the proceeds. Indeed, the cash supplied by the receivables financier often will be used to pay the inventory financing.³⁵⁸

It is clear, because they are not mentioned in subsection (b), that the priority of the purchase-money secured party does not carry over to accounts proceeds of the inventory.³⁵⁹ Because chattel paper proceeds are expressly mentioned,³⁶⁰ it is not so clear that the priority does not apply to them, and it is mentioned in a manner that could be understood to mean that the priority applies to all chattel paper proceeds that are not proceeds of chattel paper proceeds. Comment eight to section 9-324, however, tells us that we are to read the words "if so provided in Section 9-330" as applicable to "has priority over a conflicting security interest in chattel paper or an instrument constituting proceeds of the inventory," as well as to the words "and in proceeds of the chattel paper."³⁶¹ What it appears to mean, insofar as chattel paper or instrument proceeds are concerned, is that a person with a purchase-money security interest in inventory can acquire a

356. *Id.* § 9-324(b).

357. *Id.* § 9-324 cmt. 8.

358. Revised U.C.C. § 9-324 cmt. 8 (1999).

359. *See id.* § 9-324(b).

360. *Id.* § 9-324(b).

361. *Id.* § 9-324 cmt. 8.

priority as to chattel paper or instrument proceeds only under the priority rules of section 9-330.

Revised section 9-330 contains rules enabling purchasers of chattel paper and instruments to gain priority over previously perfected or filed security interests.³⁶² Subsections (b)³⁶³ and (d)³⁶⁴ have been noted previously. Subsection (d) is applicable to purchasers of instruments and gives a purchaser of an instrument priority over a security interest in it which has been perfected by a method other than possession (mainly, by filing), "if the purchaser gives value and takes possession of the instrument in good faith and without knowledge that the purchase violates the rights of the secured party."³⁶⁵ Subsection (b) states a similar (but not identical) rule for purchasers of chattel paper: a purchaser of chattel paper can gain priority over a conflicting security interest in the chattel paper by giving new value and taking possession or control of the chattel paper in good faith, in the ordinary course of the purchaser's business, and without knowledge that the purchase violates the rights of the secured party. Subsection (b) has to be read along with subsection (f), which provides that, for purposes of subsection (b), "if the chattel paper . . . indicates that it has been assigned to an identified secured party, . . . a purchaser of the chattel paper" is to be treated as having "knowledge that the purchase violates the rights of the secured party."³⁶⁶

Subsection (b), however, is limited to cases where the conflicting security interest is in "chattel paper which is claimed other than merely as proceeds of inventory subject to a security interest," so there is need for a rule dealing with purchasers of chattel paper subject to a security interest that is claimed "merely as proceeds of inventory subject to a security interest."³⁶⁷ That rule appears in subsection (a) of revised section 9-330. It is that such a purchaser has priority over the conflicting security interest if:

- (1) in good faith and in the ordinary course of the purchaser's business, the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under Section

362. *See id.* § 9-330.

363. *See text supra* note 274.

364. *See supra* note 296.

365. Revised U.C.C. § 9-330(d) (1999).

366. *Id.* § 9-330(f).

367. There is also the question of when a security interest in chattel paper is to be deemed claimed "merely as proceeds of inventory subject to a security interest." *See* Permanent Editorial Board Commentary No. 8 as amended to apply to Revised Article 9 (1991).

9-105, and (2) the chattel paper does not indicate that it has been assigned to an identified assignee other than the purchaser.³⁶⁸

Is there really any difference between the rules of subsection (a) and subsection (b)? There may be one. Subsection (b) conditions the priority of the purchaser on his acting “without knowledge that the purchase violates the rights of the secured party,”³⁶⁹ and subsection (f) adds that the purchaser is to be treated as having such knowledge if the chattel paper shows that it has been previously assigned to an identified secured party.³⁷⁰ Under the rule of subsection (b), even if the chattel paper does not show an assignment, the purchaser may fail to gain priority because he actually has knowledge that the purchase violates the rights of the secured party.³⁷¹ The rule of subsection (a) does not expressly require that the purchaser be without knowledge of violation of rights of the secured party; it requires only that the chattel paper not show that there has been an assignment of the paper.³⁷²

The distinction is pointed out in a comment to section 9-330. The comment observes that

subsection (a) recognizes the common practice of placing a ‘legend’ on the chattel paper to indicate that it has been assigned. This approach, under which the chattel paper purchaser who gives new value in ordinary course can rely on possession of unlegended, tangible chattel paper without any concern for other facts that it may know, comports with the expectations of both inventory and chattel paper financiers.³⁷³

But subsection (a) also has the requirement that the purchaser act “in good faith.”³⁷⁴ If a purchaser has actual knowledge that his purchase violates the rights of an earlier secured party, it is hard to see how the purchaser could be found to be acting in good faith in going ahead with the purchase. If he is not, then there appears to be no significant difference between the priority rules of these two subsections.

To return now to the interrelation between section 9-330 and section 9-324(b), the intent of the revisers of Article 9 seems to be that the holder of a perfected purchase-money security interest in invento-

368. Revised U.C.C. §9-330(a)(1)–(2) (1999).

369. *Id.* § 9-330(b).

370. *Id.* § 9-330(f).

371. *Id.* § 9-330(b).

372. *Id.* § 9-330(a).

373. *Id.* § 9-330 cmt. 5.

374. Revised U.C.C. § 9-330(a)(1) (1999).

ry does not automatically acquire priority over a conflicting security interest in chattel paper or instrument proceeds of the inventory, even if the secured party has a perfected security interest in the proceeds. The secured party, however, can acquire a priority over a competing security interest in the chattel paper or instrument as a "purchaser" of the chattel paper or instrument under revised section 9-330. The purchaser would apparently have to establish that subsection (a) or subsection (b) of 9-330 would give him such priority, if the proceeds are chattel paper, or that subsection (d) of Section 9-330 fits the case, if the proceeds are an instrument or instruments.

For example, assuming that the proceeds are tangible chattel paper and the governing rule is subsection (a), the purchase-money secured party would have to take possession of the chattel paper, acting in good faith and in the ordinary course of the secured party's business, and the chattel paper would have to be free of any indication that it had been assigned to the rival secured party. Wouldn't the purchase-money secured party also have to give new value? The answer is no, because revised section 9-330(e) provides that, for the purposes of the priority rules of subsections (a) and (b), "the holder of a purchase-money security interest in inventory gives new value for chattel paper constituting proceeds of the inventory."³⁷⁵ That is, the purchase-money secured party is to be treated as having given new value, even if that is not so in fact.³⁷⁶

The rule of subsection (e), treating the purchase-money secured party as having given new value for a "purchase" of proceeds of inventory, is limited to chattel paper proceeds.³⁷⁷ It does not apply to instruments that are proceeds of inventory, as which subsection (d) governs priority.³⁷⁸ Subsection (d), however, requires the purchaser of an instrument to give "value," not "new value,"³⁷⁹ and the definition of "value" includes acquiring rights in property "as security for a . . . preexisting claim."³⁸⁰

375. *Id.* § 9-330(e).

376. Since a "purchase" is defined as "a voluntary transaction creating an interest in property," the consent of the debtor to the secured party's taking possession of the chattel paper would presumably be needed, but the terms of the security agreement might be found to authorize the secured party's action. Former U.C.C. § 1-201(32) (1972). In 2001 this definition was shifted to U.C.C. § 1-201(b)(29) (2001).

377. Revised U.C.C. § 9-330(e) (1999).

378. *Id.* § 9-330 (e)-(d).

379. *Id.* § 9-330(d).

380. *Id.* § 1-201(44) (current version at U.C.C. § 1-204 (2001)).

Another provision in revised section 9-330 relevant to security interests in proceeds is subsection (c). It states that

[e]xcept as otherwise provided in Section 9-327 [which deals with security interests in deposit accounts], a purchaser having priority in chattel paper under subsection (a) or (b) also has priority in proceeds of the chattel paper to the extent that: (1) Section 9-322 provides for priority in the proceeds; or (2) the proceeds consist of the specific goods covered by the chattel paper or cash proceeds of the specific goods, even if the purchaser's security interest in the proceeds is unperfected.³⁸¹

Section 9-322 states the more general rules of priority relating to proceeds and has been discussed previously.³⁸² An extensive commentary on the operation of paragraph (2) of this rule in the comments to section 9-330³⁸³ indicates that the comment is focused on cases where goods have been sold by a dealer and the seller has taken chattel paper in exchange from the buyer. Later the dealer reacquires the sold goods, either because they have been returned to the dealer by the buyer or because the dealer has repossessed them after the buyer has defaulted on the obligation represented by the chattel paper. The returned or repossessed goods can be considered proceeds of the chattel paper.

VI. AFTER-ACQUIRED COLLATERAL AND FUTURE ADVANCES

Section 9-204 of former Article 9 provided that, as a general rule, "a security agreement may provide that any or all obligations covered by the security agreement are to be secured by after-acquired collateral,"³⁸⁴ and that "[o]bligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment."³⁸⁵ These rules made no express reference to possible application to sales of receivables. In revised Article 9, however, section 9-204(c) explicitly authorizes future advance clauses in agreements for sale of receivables within the scope of the Article: "A security agreement may provide that collateral secures, or that accounts, chattel paper, payment intangibles, or promissory notes are sold in connection with, future advances or other value,

381. *Id.* § 9-330(c).

382. *See text supra* Part IV.B beginning in the sixth paragraph.

383. *See Revised U.C.C. § 9-330 cmts. 8-11 (1999).*

384. *Former U.C.C. § 9-204(1) (1972).*

385. *Id.* § 9-204(3).

whether or not the advances or value are given pursuant to commitment.³⁸⁶ Furthermore, although subsection (a) of the same section authorizes after-acquired property clauses without mentioning sales of receivables,³⁸⁷ a comment³⁸⁸ asserts that both subsection (c) and subsection (a) “expressly validate after-acquired property and future advance clauses not only when the transaction is for security purposes but also when the transaction is the sale of accounts, chattel paper, payment intangibles, or promissory notes,”³⁸⁹ and that “[t]his result was implicit under former Article 9.”³⁹⁰

One may wonder why a buyer of receivables would want to stipulate in the agreement of sale for a security interest in after-acquired property or to have the receivables secure future advances because in a sale, there is no obligation running to the buyer to be secured by the property sold and the property that would be serving as the collateral would be the buyer’s own property. Professor Charles Mooney, one of the reporters for the drafting committee that drafted revised Article 9, has explained, however, the reference to receivables in revised section 9-204(c) as intended simply to indicate that the original sales agreement can be made to operate as a security agreement effective for attachment of security interests in receivables subsequently sold by the same seller to the same buyer.³⁹¹ Article 9 would treat such subsequent sales as secured transactions too, and to be enforceable against lien creditors of and purchasers from the seller, the requirements for attachment of any security interests would have to be satisfied.³⁹² Furthermore, to be treated as perfected, the buyer’s interest would need to have become attached to the newly acquired receivables.³⁹³ If a security agreement adequate for attachment has been made with respect to the first sale and that agreement includes clauses indicating that the current sale is being made in connection with future sales, there would be no need for authentication of new records in order to have security interests attach to similar property sold to the buyer in the future.³⁹⁴

386. Revised U.C.C. § 9-204(c) (1999).

387. *Id.* § 9-204(a).

388. *Id.* § 9-204 cmt. 6.

389. *Id.* § 9-204 cmt. 6.

390. *Id.* § 9-204 cmt. 6

391. E-mail from Charles W. Mooney, Jr., Charles A. Heimbolt, Jr., Professor of Law, U. Pa. L. Sch., to the author (June 28, 2005, 09:30 a.m.) (on file with author). The explanation in the following text is the author’s paraphrase of Professor Mooney’s comments.

392. *Id.*

393. *Id.*

394. *Id.*

Moreover, with attachment effected, the path would open to immediate perfection if there is a financing statement on file covering such receivables, or for automatic perfection if the receivables are promissory notes or payment intangibles.³⁹⁵ In view of the demonstrated relevance of revised section 9-204 to sales of receivables, some consideration of potential problems that could arise from it is in order.

A. Attachment

Neither version of Article 9 has much to say about attachment or perfection of security interests when after-acquired collateral or future advances are concerned. Under both versions of section 9-204, it is made fairly clear that a security interest will not automatically apply to after-acquired property unless the security agreement so provides, since both versions say that the security agreement “may provide” for such property to be covered.³⁹⁶ That is also consistent with the general requirement for attachment that the security agreement identify the property that is to serve as collateral. An after-acquired property provision might be implied if, for example, the security agreement describes the collateral as all of the debtor’s “inventory” or “accounts receivable,” on the ground that these terms describe changing stocks of the debtor’s property.³⁹⁷

The need for the security agreement to provide for the security interest to attach to after-acquired property clearly implies that the type of after-acquired property referred to is property that does not fit the definition of proceeds. No security agreement claim to an interest

395. *Id.*

396. The revision says that the security agreement “may create or provide for a security interest in” such collateral. It should be added that both versions of section 9-204 provide an exception to the general rule, invalidating an after-acquired property clause applicable to consumer goods, other than accessions when given as additional security, unless the debtor acquires rights in the goods within ten days after the secured party gives value. Former UCC § 9-204(2) (1972); revised UCC § 9-204(b)(1) (1999). Further, the revision also invalidates an after-acquired property clause applicable to a commercial tort claim. Revised UCC § 9-204(b)(2) (1999).

397. See RAY D. HENSON, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 6-3, at 206, n.58 (2d ed. West 1979) [hereafter Henson, *Secured Transactions*]. Similarly, it may be argued that a description of collateral as all of the debtor’s “equipment” is sufficient to cover subsequently-acquired equipment. However, courts are divided on the issue under former Article 9, and Comment 3 to revised § 9-108, discussing the description of collateral in a security agreement as it applies to after-acquired property, says merely that these are questions of contract interpretation, not susceptible to a more precise statutory rule. See WHITE & SUMMERS 5th., *supra* note 51, § 22-12, n.3.

in proceeds is necessary for a security interest to attach to proceeds of collateral, and there is an elaborate set of rules governing perfection and priorities with respect to proceeds, which has been discussed in Part V above.

Former section 9-204 did not deal clearly with the question of whether a security agreement had to contain a future advance clause in order for the security interest to be automatically applicable to secure future advances. It provided that “[o]bligations covered by the security agreement may include future advances or other value.”³⁹⁸ Although this wording could be taken to mean that the security agreement must contain a term making the security interest applicable to secure future advances, it might also be taken to imply that the security agreement could be found to “cover” future advances in some other way.³⁹⁹ Such an implication, however, is negated by the changed wording of revised section 9-204, subsection (c) of which provides that “[a] security agreement may provide that collateral secures, or that accounts, chattel paper, payment intangibles, or promissory notes are sold in connection with, future advances or other value.”⁴⁰⁰

When a sale of receivables is being made and the parties desire to have their sales agreement serve not only as a security agreement covering the property being sold, but also as a security agreement adequate for attachment and perfection purposes with respect to receivables sold in the future, there is the question of how they should word the agreement. Revised section 9-204 offers very little guidance. It is a matter of contract drafting that will be governed by standard principles of contract interpretation. Because the focus is on future sales, however, and the intent is not to provide for a security interest, but rather to adapt to a law that treats what is not a transaction intended to create a security interest as if it were such a transaction, how it should be worded presents a nice problem. It may be that the best way to handle the problem would be to make clear what the problem is, saying something like the following: This transaction is a sale of [describing the receivable or receivables sold]. It is anticipated that under Article 9 of the U.C.C., however, it may be treated as creating a security interest in favor of the buyer. It is the intent of the parties to have this agreement serve as the security agreement necessary for attachment of such security interest to the property now sold, and it is further intended that in the event of any future sale of [describing the

398. Former U.C.C. § 9-204(3) (1972).

399. See, e.g., HENSON, *supra* note 397 at § 5-12, n. 54.

400. Revised U.C.C. § 9-204(c) (1999).

type or types of receivables contemplated] between us, this agreement is to serve as a security agreement sufficient for attachment of a security interest in favor of the buyer to the property then sold. Care should also be taken to be clear about what future sales are intended to be covered by the agreement.

With regard to perfection, it seems logical that even if the terms of the original security agreement provided that after-acquired property was to serve as collateral, there could be no perfected security interest in any item of after-acquired property until the debtor acquired it. Under both versions of Article 9, a security interest in collateral cannot be perfected until it has attached to the property,⁴⁰¹ and (except where the debtor has a power to transfer rights in property in which he has no property interest) that a security interest cannot attach to any property until the debtor “has rights” in that property.⁴⁰² Whether the security interest would be perfected when it attached would depend on the secured party’s having taken the steps appropriate for perfecting a security interest in the type of collateral constituting the after-acquired property. No new filing would be necessary, for example, where accounts or chattel paper are involved, if a filing had already been made, that filing was still effective, the filed financing statement described the collateral by type, and the after-acquired property was property of that type. If the new sale is of promissory notes or payment intangibles, perfection would be automatic. If the perfection is achieved as to the new property, however, it would occur as of the date of the debtor’s acquisition of the property.

Another view of this question has been expressed with regard to some types of property that become collateral, particularly inventory and accounts. Where a financier makes advances on the security of a business debtor’s “inventory,” for example, the intent of the parties is typically that the financier is to have a security interest in whatever composes the debtor’s inventory at any time while the advance remains unpaid. The items composing the inventory are expected to change in the normal course of the debtor’s business, with some items leaving the inventory and others being added to it in a constant progression. Is it necessary to identify each item of inventory as it is added to the whole and find a security interest attaching to each item at the time of the debtor’s acquisition of it? The argument is that the “collateral” in this arrangement should not be thought of as a group of individual items of collateral, but rather as a body of “inventory,” a

401. Former U.C.C. § 9-303(1) (1972); revised U.C.C. § 9-308(a) (1999).

402. Former U.C.C. § 9-203(1)(c) (1972); revised U.C.C. § 9-203(a)–(b)(2) (1999).

stream composed of many constantly changing individual items. The security interest, once established as having attached to the inventory, should be thought of as a continuing interest in the stream, without regard to changes in its composition. A financier of a business debtor's body of "accounts" can be, and arguably should be, thought of the same way.⁴⁰³

The comments to neither version of Article 9 indicate which theory is adopted by the Article.⁴⁰⁴ They do explain the after-acquired property provisions of former and revised section 9-204 as adopting the principle of a "continuing general lien"⁴⁰⁵ or "floating lien,"⁴⁰⁶ but that seems to mean merely that the "lien" of the security interest "floats" from the original collateral to the new collateral as it is acquired without the need for a new security agreement relating to the newly acquired property.⁴⁰⁷

The reason for the failure of either version of Article 9 to endorse one theory or the other is probably because the priority rules applicable to security interests in after-acquired property are not likely to be affected by the choice. The principal area of law where the choice of theories would be of potential significance is bankruptcy law, where the application of rules as to "voidable preferences" might have been affected by the theory adopted, and that is no longer true because of changes in the Bankruptcy Code.⁴⁰⁸

As to future advances, a security interest in collateral described in the security agreement could attach to the collateral as soon as some value was given and the debtor had rights in the collateral. If that security agreement provided that the collateral was to secure future indebtednesses of the debtor to the secured party, it seems that as new debts arise, the security interest would change only to the extent of expansion of the amount secured (as it would contract if part of secured indebtedness was discharged). It is still the same security interest in the same collateral, and if it was perfected before a new obligation arose, it should continue to be perfected afterward. Indeed, the

403. See, e.g., HENSON, *supra* note 397 at §§ 6-3, 7-8.

404. See former U.C.C. § 9-204 cmts. 1-7 (1972); revised U.C.C. § 9-204 cmts 1-7 (1999).

405. Former U.C.C. § 9-204 cmt. 2 (1979); revised U.C.C. § 9-204 cmt. 2 (1999).

406. Revised U.C.C. § 9-204 cmt. 2 (1999). See also WHITE & SUMMERS 3d, *supra* note 25 at § 23-6. Former U.C.C. § 9-204 cmt. 2 (1979), referred to it also as a "floating charge."

407. See WHITE & SUMMERS 3d, *supra* note 25, § 23-5; E. ALLAN FARNSWORTH, CONTRACTS, § 11.5 (2d ed., Little, Brown 1990).

408. For a discussion of the history of this phase of bankruptcy law, see WHITE & SUMMERS 3d, *supra* note 25 at § 23-6.

same conclusion could be reached if the original security agreement did not say anything about future advances but the secured party made a subsequent advance and the parties agreed that it should be secured by the same collateral; arguably, this is not creation of a new security interest but expansion of the scope of the existing one, and if that security interest is perfected, it should continue as such. Pre-Code law did not always accept this view. There was a theory that if a mortgagee made advances after the original advance, unless there was a contractual obligation to make the additional advances, each new advance should be treated as a new secured transaction and could not be treated as covered by the original mortgage.⁴⁰⁹

Neither version of Article 9 takes a clear position on the theoretical question of whether a security interest covering an obligation arising from subsequent advances which the secured party was not contractually obligated to make is a new security interest. Instead, the rules on future advances deal with the effects that may flow from differing theories. Both versions of section 9-204 make it clear that if a security agreement provides that the collateral is to secure future advances that provision is to be honored without regard to whether the secured party is contractually obligated to make future advances.⁴¹⁰ The effects of such advances on third persons are spelled out in other sections, those dealing with priorities.

B. Priorities

1. *After-Acquired Collateral*

Neither version of Article 9 has any special rules relating to priorities as far as after-acquired collateral is concerned. The principal priority rules applicable to conflicts between security interests in which the collateral, from the standpoint of at least one of the claimants is after-acquired, would be those of former section 9-312(5) and revised section 9-322(a), that are: the first-to-file-or-perfect rule for conflicts between perfected security interests;⁴¹¹ the rule that a perfected security interest has priority over an unperfected one (ex-

409. See Gilmore, *supra* note 3 at vol. 2, § 35.3. Professors White & Summers found this theory at work in the view of some authorities construing former Article 9, in cases where a security interest was perfected without filing (as by possession) and the secured party made subsequent advances that were not made pursuant to contractual commitments. WHITE & SUMMERS 3d, *supra* note 25 at § 24-4, n. 22.

410. See former U.C.C. § 9-204(3) (1972); revised U.C.C. § 9-204(c) cmt. 5 (1999).

411. Former U.C.C. § 9-312(5)(a) (1972).

pressed in section 9-322 and arguably implied by former section 9-312);⁴¹² and the rule that unperfected security interests rank according to their order of attachment to the collateral.⁴¹³ The first-to-file-or-perfect rule can be a problem for buyers of payment intangibles or promissory notes. Even though revised section 9-204 may operate to give such a buyer an immediately-perfected security interest without a new security agreement having to be made, the buyer could lose out to a rival secured party who had filed a financing statement covering that type of collateral and made the filing between the times of the original and subsequent sales.⁴¹⁴ There are also more specialized priority rules that might apply, such as the rules granting special priority to holders of purchase-money security interests and those of former section 9-308 and revised section 9-330, which deal with purchasers of chattel paper and instruments.⁴¹⁵

2. *Future Advances*

Both versions of Article 9 have a number of special provisions relating to future advances. Some of these rules are concerned with conflicts between claimants to goods and can be by-passed here. This discussion will be limited to the application of the rules to cases where revised section 9-204(c) would apply because an original security agreement provided that receivables were being sold in connection with future advances or other value. In the case of a later sale of more receivables, there really is no "future advance" but there is a giving of "other value," the price for the later-sold receivables, and thus there is a potential problem of applicability of some special rules of priority related to future advances.

For conflicts between rival secured parties, former section 9-312(7) provided that

If future advances are made while a security interest is perfected by filing, the taking of possession, or under Section 9-115 or Section 9-116 on investment property, the security interest has the same priority for the purpose of subsection (5) . . . with respect to future advances as it does with respect to the first advance. If a commitment is made before or while the security interest is so perfected, the security interest has the same priority with respect to advances

412. Revised U.C.C. § 9-322(a)(2) (1999).

413. *Id.* § 9-322(a)(1).

414. Professor Mooney mentioned this peril in his e-mail to the author. *See supra* note 391.

415. *See* former U.C.C. § 9-308 (1972); revised U.C.C. § 9-330 (1999).

made pursuant thereto. In other cases a perfected security interest has priority from the date an advance is made.⁴¹⁶

The first sentence of this subsection appeared to lay down a basic rule for priority as to future advances that only if a future advance was made while the security interest was perfected would the security interest have the same priority with respect to the future advance as it would have with respect to the first advance. Moreover, the perfection had to have been achieved by filing, taking of possession of the collateral, or under rules relating to perfection of security interests in investment property appearing in sections 9-115 and 9-116 (which allowed for perfection by filing, possession, control, and automatically, in various contexts).⁴¹⁷ Left out were a number of cases of automatic perfection not dealt with in sections 9-115 and 9-116, so the rule did not apply to most cases of automatic perfection. These were among the "other cases" referred to in the last sentence of section 9-312(7),⁴¹⁸ the rule applicable there being that future advances had priority from the time they were made. The reason for making such a distinction was perhaps that, in cases of automatic perfection, third persons giving value on the security of the collateral would not have notice of the existence of the security interest.⁴¹⁹

It appeared that any case in which a future advance was made while a security interest was unperfected would also be an "other case," in which the advance would have priority only from the time the advance was made. This may not have been the intended meaning, but it certainly could be understood from the subsection as it was written.⁴²⁰

A qualification of the basic rule was that a secured party could take advantage of it even if the security interest was no longer perfected in one of the methods referred to in the first sentence of the subsection. That was so if, before or while the security interest was so perfected, the secured party had made a commitment to make a later advance or advances. In legal theory, the secured party was contractually bound to make the advance or advances,⁴²¹ and apparently the

416. Former U.C.C. § 9-312(7) (1972).

417. *See id.* §§ 9-115 & 9-116.

418. *See id.* § 9-312(7).

419. *See* HENSON, *supra* note 397, § 5-13 at 171.

420. *See* revised U.C.C. § 9-312(7) (1999).

421. *But see* Gilmore, *supra* note 3, vol. 2, § 35.4 (contending that the distinction between voluntary and involuntary advances is "nonsense," since a contract to lend money is virtually unenforceable).

thought was that the secured party should not be penalized for honoring a contractual commitment.

The priority afforded by the basic priority rule of that subsection did not depend on the original security agreement having provided that future advances were to be secured by the same collateral. A later advance made under a new security agreement but describing the same property as security for the debt would be entitled to the same priority as the original advance.⁴²²

Another special priority rule for future advances appeared in former section 9-301(4). It gave some protection to a lien creditor who acquired a lien on the collateral while a security interest in the collateral was perfected in any manner, and it provided that the lien creditor "takes subject to the security interest only to the extent that it secures advances made before he becomes a lien creditor or within [forty-five] days thereafter or made without knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien."⁴²³ Under this rule the secured party was assured of priority over a lien creditor as to all future advances made before a judicial lien was acquired as to the collateral or within forty-five days after the creditor acquired the lien, and also as to advances made more than forty-five days after the lien was acquired if they were made while the secured party was ignorant of the lien or made pursuant to a commitment entered into without knowledge of the lien. A comment explained that the primary purpose of the rule was to coordinate Article 9 with the Federal Tax Lien Act of 1966 by providing for an initial forty-five day period of unconditional immunity for advances made after a creditor had acquired a judicial lien on the collateral.⁴²⁴

A reworded version of former section 9-312(7) is in revised Article 9, section 9-323(a). It does not state an affirmative rule as to whether and when a security interest is to have the same priority for a future advance, as it does with respect to the first advance, because, says a comment, "a proper reading" of the first-to-file-or-perfect rule of former section 9-312(5) and revised section 9-322(a)(1) will yield that result.⁴²⁵ The first-to-file-or-perfect rule is the general rule for determining priorities between perfected security interests. It would apply with respect to future advances unless some other rule provided otherwise.

422. See former U.C.C. § 9-312 cmt. 7 (1972), and HENSON, *supra* note 397 at § 5-12, n. 55.

423. Former U.C.C. § 9-301(4) (1972).

424. See *id.* § 9-301 cmt. 7; HENSON, *supra* note. 397 at § 5-15.

425. See revised U.C.C. § 9-323 cmt. 3(1999).

Section 9-323(a) states an exception to that general rule that is similar to the exception contained in former section 9-312(7)⁴²⁶ but differs from it in wording and, to some extent, in substance. Furthermore, the rewording of the subsection avoids any suggestion that the general rule applies only if future advances are made while a security interest is perfected.⁴²⁷ The subsection provides:

Except as otherwise provided in subsection (c), for purposes of determining the priority of a perfected security interest under Section 9-322(a)(1), perfection of the security interest dates from the time that an advance is made to the extent that the security interest secures an advance that: (1) is made while the security interest is perfected only: (A) under Section 9-309 when it attaches [automatic perfection without time limit]; or (B) temporarily under Section 9-312(e), (f), or (g); and (2) is not made pursuant to a commitment entered into before or while the security interest is perfected by a method other than under Section 9-309 or 9-312(e), (f), or (g).⁴²⁸

Why is it important to clarify the point that a future advance will generally have the same priority as the original advance, even if the future advance is made while the security interest is unperfected? The motive is to preserve the full operation of the first-to-file-or-perfect rule for all cases where perfection is not automatic. Under the first-to-file-or-perfect rule, priority can be achieved as to an original advance even though the advance is made while the security interest is unperfected and perfection follows the advance; that is so where the secured party has filed before the advance is made and priority is achieved as the first to file. The thought is that there ought to be the same possibility of priority with respect to a future advance that is made after a filing but prior to perfection.⁴²⁹

The revised rule treating future advances as having priority only from the time they are made has been extended to apply to all cases of automatic perfection, presumably because no reason is seen to exclude any instances of automatic perfection.⁴³⁰ The revised rule continues to allow the general rule to apply to advances made pursuant to commitments entered into while the security interest is perfected other

426. *See supra* note 419.

427. *See* revised U.C.C. § 9-323 cmt. 3 (1999).

428. *Id.* § 9-323(a)(1)–(2).

429. *See id.* § 9-323 cmt. 3.

430. *Id.* § 9-323.

than automatically.⁴³¹ Professor Gilmore's criticism of this idea⁴³² has apparently had no influence on the drafters of the revision.

Subsection (b) of revised section 9-323 is the revised version of former section 9-301(4), dealing with priority as to future advances when the rival claimant is a lien creditor.⁴³³ Although differently worded, it is in substance the same as the former rule.⁴³⁴

Subsection (c) of revised section 9-323 is new. It provides that "[s]ubsections (a) and (b) do not apply to a security interest held by a secured party that is a buyer of accounts, chattel paper, payment intangibles, or promissory notes."⁴³⁵ This leaves the priority of all security interests acquired by buyers of receivables to be governed by the same priority rules, and that is quite appropriate, because any case in which a buyer of receivables makes a subsequent purchase of other receivables is not really one in which a "future advance" is being made, but involves a new sale and creation of a new security interest. As to conflicts between security interests, the first-to-file-or-perfect rule will be the principal applicable rule. For conflicts between the buyer and lien creditors, the rule of section 9-317(a)(2) will apply.⁴³⁶

VII. RIGHT AND DUTIES OF SECURED PARTIES

Former Article 9 had two sections dealing with rights and duties of secured parties, other than rights and duties arising from defaults by the debtors. The revision deals with these topics and also contains some new provisions.

A. Secured Party in Possession of Collateral

Former section 9-207 dealt with situations where the secured party had possession of the collateral. Section 9-207 could apply to situations where there had been a default, but it was also applicable to pre-default situations where the secured party had possession of the collateral.⁴³⁷ There were four subsections.

Subsection (1) required the secured party to "use reasonable care in the custody and preservation of the collateral in his possession,"

431. *Id.* § 9-323.

432. *See supra* note 421.

433. Revised U.C.C. § 9-323 (1999).

434. *Id.*

435. *Id.* § 9-323(c).

436. *See supra* note 225.

437. Former U.C.C. § 9-207 cmt. 4 (1972).

which included when the collateral was an instrument or chattel paper, “taking necessary steps to preserve rights against prior parties unless otherwise agreed.”⁴³⁸

Subsection (2) provided that, unless otherwise agreed: (a) a secured party in possession could charge the debtor with reasonable expenses incurred in the custody, preservation, use or operation of the collateral, and such charges would be secured by the collateral; (b) the debtor bore the risk of accidental loss or damage “to the extent of any deficiency in effective insurance coverage”; (c) the secured party was authorized to hold as additional security any “increase or profits . . . received from the collateral,” except that money so received, unless remitted to the debtor, was to be applied in reduction of the secured obligation; (d) the secured party had a duty to “keep the collateral identifiable,” except that fungible collateral could be commingled; and (e) the secured party had a right “to repledge the collateral upon terms which [did] not impair the debtor’s right to redeem it.”⁴³⁹

Subsection (3) provided that, for any loss resulting from failure to perform the duties imposed by subsections (1) or (2), the secured party would be liable for the loss but did not lose the security interest.⁴⁴⁰ Subsection (4) declared the secured party entitled to use or operate the collateral for the purpose of preserving it or its value, pursuant to a court order, or (except in cases of consumer goods collateral) “in the manner and to the extent provided in the security agreement.”⁴⁴¹

A number of these rules were inappropriate if applied to buyers of chattel paper who were treated as secured parties by Article 9 because they were rules that assumed that the collateral belonged to someone other than the secured party. Their purpose was to protect the interests of the owner, but the statutory language made no exception for such cases and the official comments did not discuss the question.

In revised Article 9, section 9-207 deals with the same general topic and, with one exception, is not greatly different in substance. There are four subsections. Subsection (a) is nearly identical to subsection (1) of the former version.⁴⁴² Subsection (b) reproduces the rules of former subsection (2)(a), (b) and (d) and former subsection (4) in very similar language.⁴⁴³ Subsection (c) contains the substance of

438. *Id.* § 9-207(1).

439. *Id.* § 9-207(2).

440. *Id.* § 9-207(3).

441. *Id.* § 9-207(4).

442. *See* revised U.C.C. § 9-207(a) (1999); former U.C.C. § 9-207(1) (1972).

443. *See* revised U.C.C. § 9-207(b) (1999), former U.C.C. § 9-207(2) (a), (b), &

former subsection (2)(c) and (e), although it applies, not only when the secured party has possession of collateral, but also when the secured party has control of intangible collateral under sections 9-104 through 9-107.⁴⁴⁴ (Former subsection (3) is omitted because its content is covered in Part 6, Subpart 2 of revised Article 9.)

Subsection (d), however, is new by making subsections (b) and (c) entirely inapplicable to buyers of receivables.⁴⁴⁵ Further, subsection (d) provides that subsection (a) does not apply to such a buyer unless the buyer has a right of recourse against the seller or a secondary obligor if the collateral turns out to be uncollectible or there is a default by an obligor on the collateral.⁴⁴⁶ This new provision corrects the oversight that occurred in the drafting of former section 9-207.

B. Request for Statement of Account or List of Collateral

Former section 9-208 dealt with the debtor's right to have the secured party either confirm or correct a statement of indebtedness or a list of collateral.⁴⁴⁷ A comment to the section explained that it was aimed primarily at protecting the interests of creditors of and purchasers from the debtor who needed more detailed information about a security interest than might be disclosed by a filed financing statement.⁴⁴⁸ To protect the secured party's interest in not being required to disclose details of the secured party's business to casual inquirers or competitors, however, the section gave the right to demand disclosures to the debtor only.⁴⁴⁹ The debtor would typically make such a demand in connection with negotiations with subsequent creditors or purchasers for purposes of establishing credit standing.⁴⁵⁰ These rules would be of questionable appropriateness to "secured transactions" in the form of sales of accounts or chattel paper, but no exception was made for such cases.

In revised Article 9, section 9-210 is the successor to former section 9-208.⁴⁵¹ Although differently worded, it makes few substantive changes from the former version. One significant change, however, is

(d)(4) (1972).

444. See revised U.C.C. § 9-207(c) (1999), former U.C.C. § 9-207(2)(c) & (e) (1972).

445. See revised U.C.C. § 9-207(d) (1999).

446. See *id.*

447. See former U.C.C. § 9-208 (1972).

448. See *id.* § 9-208, cmt. 2.

449. See *id.* § 9-208.

450. *Id.* § 9-208 cmt. 2.

451. See *id.* § 9-208, revised U.C.C. § 9-210 (1999).

that subsection (b) declares that “a secured party, other than a buyer of accounts, chattel paper, payment intangibles, or promissory notes” has a duty to comply with the debtor’s demands for information as to the collateral or the secured obligations.⁴⁵² The effect of the “other than” part of this rule is to exclude sales of receivables from the operation of the section entirely.

C. Other Provisions in Revised Article 9

Revised Article 9 contains two new sections dealing with duties of the secured party. Section 9-208 states some additional duties of secured parties having control of collateral. The section applies to cases in which there are no outstanding obligations and the secured parties are not committed to make future advances or to otherwise give value.⁴⁵³ The only portion of the section that might be of concern to a buyer of receivables would be subsection (b)(3), which deals with secured parties having control of electronic chattel paper and requires the secured party, on demand from the debtor, to terminate the control.⁴⁵⁴ This rule, however, applies only to “a secured party, other than a buyer, having control of electronic chattel paper,” so even this rule need not worry a buyer of receivables.⁴⁵⁵

Section 9-209 applies where an account debtor has been notified of an assignment of the obligation and that payment is to be made to the assignee, but there is no outstanding secured obligation and the secured party is not committed to make future advances or otherwise give value.⁴⁵⁶ On demand of the debtor, the secured party must send the account debtor a release from further obligation to the secured party.⁴⁵⁷ The term “account debtor” is defined in revised section 9-102(a)(3) as “a person obligated on an account, chattel paper, or general intangible,” which would include a person obligated on a receivable other than an instrument.⁴⁵⁸ Subsection (c) of Section 9-209 provides, however, that “[t]his section does not apply to an assignment constituting the sale of an account, chattel paper, or payment intangible,” so buyers of receivables whose purchases are treated as “secured

452. Revised U.C.C. § 9-210(b) (1999).

453. *Id.* § 9-208.

454. *Id.* § 9-208(b)(3).

455. *Id.* § 9-208(b)(3).

456. *See id.* § 9-209(a) (1)–(2).

457. *See id.* § 9-209(b).

458. *See* revised U.C.C. § 9-102(a)(3) (1999).

transactions” by revised Article 9 are not affected by the requirement of this section.⁴⁵⁹

VIII. RESTRICTIONS ON TRANSFERS OF RECEIVABLES

A. Restrictions Arising From the Terms of Security Agreements

Former section 9-311 provided that “[t]he debtor’s rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default.”⁴⁶⁰ A comment explained that under pre-UCC law some jurisdictions held that if the secured transaction was one in which “title” to the collateral was transferred to the secured party, the debtor’s remaining “equitable” interest in the collateral was not subject to the claims of the debtor’s creditors when they proceeded by legal process.⁴⁶¹ The object of section 9-311 was to repudiate such holdings and make it clear that in all secured transactions under Article 9 “the debtor has an interest . . . which he can dispose of and which his creditors can reach,”⁴⁶² and also, evidently, to render ineffective contract terms that would hamper the debtor’s freedom to effect transfers of his interest in the collateral.⁴⁶³

This rule could be read as meaning that if the “security interest” was the interest of a buyer of accounts or of chattel paper, the seller, as “debtor,” retained a transferable interest in the sold “collateral,” but it was probably not so intended. The rule seemed to assume that a case in which it applied was one in which the debtor retained some sort of property interest in the collateral by operation of the agreement of the parties, whether that interest was “legal” or “equitable.” Although a seller of receivables whose sale was treated by Article 9 as a secured transaction had power in some circumstances to make transfers of interests in the receivables after the sale and lien creditors of the seller had a limited power to acquire legal claims to the receivables, this was not on the theory that the seller retained a property interest in the sold property, but rather that the seller had power to

459. *Id.* § 9-209(c).

460. Former U.C.C. § 9-311 (1972).

461. *Id.* § 9-311 cmt. 2.

462. *Id.* § 9-311 cmt. 1.

463. *Id.* § 9-311 cmt. 1.

deprive the buyer of all or part of his ownership interest in the receivables.⁴⁶⁴

In revised Article 9, section 9-401 is the successor to former section 9-311.⁴⁶⁵ It provides that, as a general rule, “whether a debtor’s rights in collateral may be voluntarily or involuntarily transferred is governed by law other than this Article.”⁴⁶⁶ Subsection (b) of that section provides, however, that an “agreement between the debtor and the secured party which prohibits the transfer of the debtor’s rights in collateral or makes the transfer a default does not prevent the transfer from taking effect.”⁴⁶⁷ This rule is quite similar to its predecessor, but it does not nullify a provision making a transfer a default; it merely makes it clear that an effective transfer can be made despite such a term in the security agreement.⁴⁶⁸ A comment points out that the rule of subsection (b) has no application to sales of receivables, because “the debtor has no remaining rights to transfer.”⁴⁶⁹ Section 9-318(a) expressly provides that a debtor that has sold a receivable retains no “legal or equitable interest” in the property sold.⁴⁷⁰

B. Restrictions Arising From the Terms of Contracts Creating Receivables

It has been pointed out previously that transactions involving sales of receivables or creating security interests in receivables involve transfers of interests in collateral that is itself contractual in nature. If, for example, an account is sold by its original owner, the subject of the sale is the owner’s contract right to payment of a debt. If Article 9 treats the sale as a secured transaction, as it usually does, the buyer of the account is treated as a “secured party” and the seller as a “debtor,” but the right the buyer acquires is a contract right owed to the seller by a third person, usually called “account debtor” by Article 9.⁴⁷¹ Restrictions on the transferability of the contract right that a receivable represents may arise from the terms of the contract that produced the receivable, or perhaps from law applicable to that sort of contract.

464. See Permanent Editorial Board Commentary No. 14 (1994) (which, discussing the transfer of title entailed in a sale of receivables, does not mention § 9-311 as relevant).

465. Former U.C.C. § 9-311 (1972); revised U.C.C. § 9-401 (1999).

466. Revised U.C.C. § 9-401(a) (1999).

467. *Id.* § 9-401(b).

468. See *id.* § 9-401 cmt. 5.

469. *Id.* § 9-401 cmt. 7.

470. *Id.* § 9-318(a).

471. *Id.* § 9-102(a)(3).

In former Article 9, section 9-318(4) had a rule applicable to restrictions arising from the terms of such a contract.⁴⁷² It provided that

[a] term in any contract between an account debtor and an assignor is ineffective if it prohibits assignment of an account or prohibits creation of a security interest in a general intangible for money due or to become due or requires the account debtor's consent to such assignment or security interest.⁴⁷³

The subsection implemented a policy of free assignability of contract rights in recognition of an economic need for such rights to be available as collateral in financing transactions.⁴⁷⁴ The rule did not, however, apply to all contract rights that might be used as collateral for Article 9 security interests. It applied to assignments of accounts, whether the transaction was one of sale or one intended as security, and it applied to assignments as security of "general intangible[s] for money due or to become due"⁴⁷⁵ (what revised Article 9 calls "payment intangibles"⁴⁷⁶). Sales of payment intangibles were not within the coverage of former Article 9. Neither chattel paper nor instruments were mentioned, and general intangibles were not covered unless they were contracts for the payment of money.

In revised Article 9, the topic is dealt with considerably more broadly and in a more complex manner. Sections 9-406 through 9-409 are involved. Section 9-407 deals with restrictions on creation and enforcement of security interests in lessors's and lessees's interests in leased goods.⁴⁷⁷ Section 9-409 deals with restrictions on assignments of letter of credit rights.⁴⁷⁸ Only sections 9-406 and 9-408 have application to restrictions on assignments of receivables.⁴⁷⁹

Section 9-406(d) provides that, as a general rule,

a term in an agreement between an account debtor and an assignor or in a promissory note is ineffective to the extent that it: (1) prohibits, restricts, or requires the consent of the account debtor or person obligated on the promissory note to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account, chattel paper, payment intang-

472. Former U.C.C. § 9-318(4) (1972).

473. *Id.*

474. *See id.* § 9-318 cmt. 4.

475. *Id.* § 9-318(4).

476. Revised U.C.C. § 9-318(a) (1999); former U.C.C. § 9-318(9) (1972).

477. Revised U.C.C. § 9-407 (1999) is derived from § 2A-303.

478. Revised U.C.C. § 9-409 (1999).

479. *Id.* §§ 9-406 & 9-408.

ible, or promissory note, or (2) provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account, chattel paper, payment intangible, or promissory note.⁴⁸⁰

This rule is a more elaborate statement of the rule of former section 9-318(4).⁴⁸¹ Much of the new verbiage appears to be intended to clarify the former rule, but there are changes in content as well. The application of the rule has been expanded to cover all four types of intangibles the sales of which are treated as secured transactions by revised Article 9.⁴⁸² In addition, the revision nullifies provisions that would treat an assignment, transfer of, or grant of a security interest in, any of the four types of receivables as a breach of contract, though not as a default.

The general rule of revised section 9-406(d) is subject to several exceptions.⁴⁸³ One is that the rule does not apply to accounts that are health-care-insurance receivables.⁴⁸⁴ Another is that if law other than Article 9 would establish a different rule for an individual account debtor who incurred an obligation primarily for personal, family, or household purposes that other law controls.⁴⁸⁵ A third is that the rule is subject to sections 2A-303 and 9-407, which deal with leases of goods.⁴⁸⁶ And the rule does not apply to sales of payment intangibles and promissory notes.⁴⁸⁷ That leaves it applicable to most sales of accounts and chattel paper and to most transactions intended to create security interests in all four types of receivables.

Subsection (f) of revised section 9-406 contains another innovation.⁴⁸⁸ It declares ineffective any law, statute, or governmental regulation other than the Code that “prohibits, restricts, or requires the consent of a government, governmental body or official, or account debtor to the assignment or transfer of, or the creation of a security interest in, an account or chattel paper,” or that would treat such action as

480. *Id.* § 9-406(d).

481. Former U.C.C. § 9-318(4) (1972).

482. *See* revised U.C.C. § 9-406 cmt. 5 (1999). *But see infra* next paragraph of text.

483. *Id.* § 9-406(d).

484. *Id.* § 9-406(i).

485. *Id.* § 9-406(h).

486. *Id.* § 9-406(d).

487. *Id.* § 9-406(e).

488. Revised U.C.C. § 9-406(f) (1999).

a breach of contract.⁴⁸⁹ This declaration amounts to applying the same nullification rule that subsection (d) applies to restrictive contract terms to other laws of the same jurisdiction that has adopted revised Article 9, which would place restrictions on transfers of interests in receivables, but its application is limited to accounts and chattel paper. Furthermore, it is subject to the same exceptions as is subsection (d).⁴⁹⁰

Revised section 9-408 picks up where 9-406 leaves off and provides rules for restrictions on most of the assignments of intangibles that are not covered by 9-406.⁴⁹¹ Subsection (a) declares ineffective a term of a contract which prohibits, restricts or requires the consent of the person obligated on the contract to the assignment or transfer of the contract or the creation, attachment, or perfection of a security interest in it, or that would treat such action as a breach of contract.⁴⁹² This rule is much the same as that of section 9-406(d), but this one applies to sales of payment intangibles or promissory notes,⁴⁹³ to sales of and transactions intended to create security interests in health-care-insurance receivables, and to transactions intended to create security interests in general intangibles other than payment intangibles.⁴⁹⁴

Subsection (c) of revised section 9-408 declares ineffective a

rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, person obligated on a promissory note, or account debtor to the assignment or transfer of, or creation of a security interest in, a prom-

489. *Id.*

490. There is no express exception for sales of payment intangibles and promissory notes, but there is no need for one, as subsection (f) doesn't apply at all where those types of receivables are involved. Revised U.C.C. § 9-406(f) (1999).

491. Revised U.C.C. § 9-408 (1999).

492. *Id.* § 9-408(a).

493. Although subsection (a) refers to payment intangibles and promissory notes without distinguishing between sales of such intangibles and transactions intended to create security interests in them, subsection (b) provides: "Subsection (a) applies to a security interest in a payment intangible or promissory note only if the security interest arises out a sale of the payment intangible or promissory note." Revised U.C.C. § 9-408(b) (1999).

494. These intangibles are referred to in subsection (a) without distinguishing between sales and transactions intended as security, and there is no other provision in § 9-408 that makes such a distinction. Thus, as far as health-care-insurance receivables are concerned, the rule of subsection (a) applies to both types of transactions, since "health-care-insurance receivables" are "accounts" and Article 9 treats sales of accounts as secured transactions. With respect to general intangibles that are not payment intangibles, subsection (a) would apply only to transactions intended to create security interests in them, since sales of such general intangibles are not treated as secured transactions by revised Article 9.

issory note, health-care-insurance receivable, or general intangible⁴⁹⁵

or that would treat such action as a breach of contract. This rule is virtually the same as that of section 9-406(f), except that it applies to promissory notes, health-care-insurance receivables and general intangibles (including payment intangibles), whether sold or intended as security, whereas 9-406(f) applies only to accounts (other than health-care-insurance receivables) and chattel paper.⁴⁹⁶

Since section 9-408 applies the same rules as does section 9-406, differing only in the types of intangibles to which they apply, why deal with them in separate sections? The reason is that section 9-408 contains a modification of its free-assignability rules that does not appear in section 9-406.⁴⁹⁷ Subsection (d) of section 9-408 provides that if a term in a promissory note or an agreement between an account debtor and the person with whom the account debtor contracts, or if a law of the sort described in subsection (c) would be effective under law other than Article 9, but is ineffective under subsection (a) or (c) of this section, the security interest created in violation of the contract term or law is entirely unenforceable against the account debtor or person obligated on the promissory note, and that person need pay no attention to it.⁴⁹⁸ A comment explains that subsections (a) and (c), overriding anti-assignment contract terms and laws, enhance the ability of some debtors to obtain credit,⁴⁹⁹ but subsection (d) protects a person obligated on a note or an account debtor from adverse effects arising from the security interest if the restriction which subsection (a) or (c) invalidates would be effective under other law.⁵⁰⁰

What sort of fact situation is the target of this rule? The comments offer the example of an owner of a cable television franchise who is prohibited by law from assigning the franchise without the consent of the municipality that granted it. A lender is willing to extend credit to the franchisee, provided that the loan is secured by the debtor's "going business" value. To secure the loan, the debtor grants the lender a security interest in all of the debtor's existing and future property. The franchise is the principal source of the value of the

495. Revised U.C.C. § 9-408(c) (1999).

496. *Id.* § 9-406(f).

497. *Id.* § 9-406, § 9-408.

498. The actual text of the subsection states the proposition much more elaborately, but the statement made here is believed to be an accurate summary of it. See revised U.C.C. § 9-408, cmts. 2 & 6 (1999).

499. *See* revised U.C.C. § 9-408 cmt. 4 (1999).

500. *Id.* § 9-408 cmt. 2.

business, but the municipality refuses to consent to its assignment as collateral. Under subsection (c) of section 9-408, the anti-assignment law would not prevent creation of a valid security interest in the franchise (a general intangible, in which the franchisee is the debtor and the franchisor is the account debtor), but the law requiring the municipality's consent remains in effect to trigger the operation of subsection (d), and it would protect the municipality by preventing the secured party from enforcing its security interest to the detriment of the municipality.⁵⁰¹

Of course, the secured party in this example would have a security interest that seems worthless, because it is totally unenforceable against the account debtor, but the comments to section 9-408 insist that "under some circumstances a secured party may ascribe value to the collateral to which its security interest has attached, even if this section precludes the secured party from enforcing the security interest without the agreement of the account debtor or person obligated on a promissory note."⁵⁰² This may be the case where the secured party sees a likelihood of obtaining that agreement in the future. This may also be the case where the secured party anticipates that the collateral will give rise to a type of proceeds as to which this section would not apply.⁵⁰³ There may be further advantages for the secured party in the event that the assignor goes into bankruptcy.⁵⁰⁴

IX. ENFORCEMENT

Part 5 of former Article 9 and Part 6 of the 1998 revision deal with remedies available to a secured party for default on the part of the debtor. The term "default" has traditionally referred to a breach of contract by the debtor of such nature as to justify the secured party in foreclosing on the collateral to obtain payment of the secured obligation. At common law, a very restrictive concept of default was employed by the courts being limited to failure by the debtor to pay the secured debt as promised.⁵⁰⁵ Neither version of Article 9 defines "default," though former section 9-501(1) provided that "when a debtor is in default under a security agreement, a secured party has the rights

501. See *id.* § 9-408 cmt. 7, ex. 4.

502. *Id.* § 9-408 cmt. 8.

503. *Id.* § 9-408 cmt. 8.

504. See *id.* § 9-408 cmt. 7.

505. WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES, § 9-501:2 at n.3 (West 2008).

and remedies provided in this Part”⁵⁰⁶ and that has been taken to mean that the security agreement is to define what conduct of the debtor is to constitute a default.⁵⁰⁷ In revised Article 9, there is a comment stating that “[a]s did former Section 9-501, this Article leaves to the agreement of the parties the circumstances giving rise to a default.”⁵⁰⁸

The remedies for default provided by Article 9 are diverse and the rules detailed. Only the main features are described here. The secured party is entitled to sell or otherwise dispose of the collateral and apply the proceeds to: (a) the expenses of the disposition, (b) the satisfaction of the indebtedness secured by the security interest, and (c) the satisfaction of any subordinate security interest in the collateral if demand has been made by the junior secured party.⁵⁰⁹ If any proceeds remain, the debtor is entitled to them,⁵¹⁰ and the debtor remains liable for any deficiency.⁵¹¹ This is the most common method of foreclosure on a security interest.⁵¹²

Where the collateral takes the form of a right to payment, such as accounts, chattel paper, payment intangibles and promissory notes, the secured party may enforce the security interest by notifying the account debtor or obligor on the collateral that payment is to be made to the secured party and, if necessary, may enforce the obligation represented by the collateral by legal proceedings.⁵¹³ The proceeds of collection are applied to the cost of collection and the debt secured by the collateral, and under revised Article 9, to satisfaction of subordinate security interests and liens on the collateral, if the junior creditors have made demand to share in the proceeds.⁵¹⁴ The debtor is entitled to anything remaining, and if the secured debt has not been completely discharged, the debtor is liable for the deficiency.⁵¹⁵

Under some circumstances the foreclosing secured party has the option to retain the collateral in satisfaction or (under revised Article 9) partial satisfaction of the secured obligation.⁵¹⁶ This procedure is often referred to as “strict foreclosure.”⁵¹⁷

506. Former U.C.C. § 9-501 (1) (1972).

507. HAWKLAND, *supra* note 505, § 9-501:2 at n.4.

508. Revised U.C.C. § 9-601 cmt. 3 (1999).

509. *Id.* §§ 9-610(a) & 9-615(a); former U.C.C. § 9-504(1) (1972).

510. Revised U.C.C. § 9-615(d)(1) (1999); former U.C.C. § 9-504(2) (1972).

511. Revised U.C.C. § 9-615(d)(2) (1999); former U.C.C. § 9-504(2) (1972).

512. *See* WHITE & SUMMERS 5th, *supra* note 51, § 25-1.

513. Revised U.C.C. § 9-607(a) (1999); former U.C.C. § 9-502 (1972).

514. Revised U.C.C. § 9-608(a) (1999); former U.C.C. § 9-502(2) (1972).

515. Revised U.C.C. § 9-608(a) (1999); former U.C.C. § 9-502(2) (1972).

516. Revised U.C.C. § 9-620(a) (1999); former U.C.C. § 9-505(2) (1972).

517. *See, e.g.*, WHITE & SUMMERS 3d, *supra* note 25, § 25-8.

In aid of the remedies of strict foreclosure and disposition of the collateral, the secured party is entitled to take possession of the collateral if he does not already have possession⁵¹⁸ (and if the collateral is tangible or semi-tangible property, so that taking possession is possible). Instead of proceeding directly against the collateral, the secured party may bring action on the secured debt, recover judgment, and then enforce the judgment against any property of the debtor, including the collateral for the debt.⁵¹⁹

Both versions of Article 9 contain elaborate restrictions on the manner in which the secured party may proceed to foreclose on the collateral. These restrictions are designed to protect the debtor from abuses of the secured party's powers over the collateral, and to offer reasonable protection of the debtor's interest in maximizing the amount of the secured debt that is discharged through the foreclosure proceedings and safeguarding the debtor's right to receive any surplus recovery. As an example, former section 9-504(3), dealing with the secured party's right to dispose of the collateral after default,⁵²⁰ although it was fairly liberal about the methods of disposition that could be employed, sternly insisted that "every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable,"⁵²¹ and it went on to deal in more specific terms with the sort of advance notice of disposition that had to be given to the debtor. Revised Article 9 has similar but more detailed provisions in sections 9-610(b) and 9-611 through 9-614.⁵²²

Another type of debtor-protection that may also be used by other secured parties is a right to redeem the collateral by tendering full payment of the secured obligation as well as the secured party's foreclosure expenses to date. The tender has to be made before the foreclosure process has gone too far "i.e., before the secured party has collected on receivables collateral, disposed of the collateral or contracted to do so, or completed the process of strict foreclosure."⁵²³

Superficial as this survey of Article 9 default rules has been, it is sufficient to demonstrate that the rules are largely inappropriate for application to the case of a buyer of receivables whose purchase is within the scope of Article 9. The very concept of "default" fits awkwardly the relationship between the buyer and the seller of recei-

518. Revised U.C.C. § 9-609 (1999); former U.C.C. § 9-503 (1972).

519. Revised U.C.C. § 9-601(a) (1999); former U.C.C. § 9-501(1) (1972).

520. See former U.C.C. § 9-504(3) (1990).

521. *Id.*

522. Revised U.C.C. §9-610(b) & §§ 9-611–9-614 (1999).

523. *Id.* § 9-623; former U.C.C. § 9-506 (1972) was similar.

vables. The traditional meaning of the term, failure to pay the secured debt when due, is inapplicable. The seller (“debtor”) has no debt to the buyer (“secured party”); if there were a debt arising from the sale, it would be more likely to run the other way, with the buyer owing the seller a future payment of the agreed price. Moreover, the main focus of the remedies for default is on the secured party’s ability to collect payment of an amount owed by the debtor by foreclosing on the collateral, and that would not be the objective of any enforcement action brought by a buyer of receivables against the seller, nor would the buyer wish to foreclose on the buyer’s own property. Finally, why should a buyer of receivables be bound by restrictive rules designed for the debtor’s protection when the buyer deals with property of which he is full owner?

The buyer of receivables may have some legitimate concerns. In the case of a buyer of tangible chattel paper or promissory notes, if the buyer has left the property in the hands of the seller, to have the seller collect payment on the buyer’s behalf, the buyer may learn that the seller has been collecting payments on such receivables without accounting to the buyer for the amounts collected or that the seller has failed to live up to some other commitment the seller has made. The buyer may then wish to take possession of the paper and to hold the seller liable for the withheld collections, and the buyer may need legal support to do so. Even if pure intangibles are involved, the buyer may not have notified the account debtors of the sale, the arrangement with the seller being that the seller will collect payments and remit them to the buyer, and the seller may keep collections which should have been turned over to the buyer. Moreover, the UCC’s treatment of sales of receivables as secured transactions has the effect, in some circumstances, of empowering the seller to deprive the buyer of title to the receivables that have been sold or to subject them to security interests that would be entitled to priority over the buyer’s claim to them. If the seller does engage in such conduct, the buyer needs remedies against the seller. Indeed, even the seller may need legal protection, especially if the buyer has a right to charge back to the seller uncollectible collateral or to hold the seller responsible for failure of the collateral to bring an adequate resale price.

The former version of Article 9 made no distinction in most of the default rules between outright sales of property which are treated as secured transactions and transactions actually intended to create security interests. It did, however, contain a few provisions which made such distinctions.

Section 9-502 was the section which authorized a secured party, after a default, to demand that the account debtors or obligors on re-

ceivables serving as collateral make payments to the secured party, and to enforce such receivables against the account debtors and obligors.⁵²⁴ Subsection (2) provided as follows:

A secured party who by agreement is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor and who undertakes to collect from the account debtors or obligors must proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections. If the security agreement secures an indebtedness, the secured party must account to the debtor for any surplus, and unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.⁵²⁵

Section 9-504 was the section of former Article 9 which dealt with the secured party's right to sell or otherwise dispose of collateral after default.⁵²⁶ Subsection (2) was a word-for-word copy of the second and third sentences of section 9-502(2).⁵²⁷ Its requirement of commercial reasonableness in every aspect of the disposition, however, appeared in subsection (3).⁵²⁸ As worded, it would require commercial reasonableness in all cases of disposition of the collateral after default.⁵²⁹

Professor Gilmore commented on these passages, which also appeared in the original version of Article 9.⁵³⁰ He wrote that

a better way of making the point would have been to say that the default provisions of Part 5 do not apply to non-recourse sales of accounts . . . and chattel paper. If there is no right to a surplus, no liability for a deficiency and no provision for recourse, neither the debtor nor any of his creditors has a legitimate concern with what the secured party does with his own property. That is what the provisions of [section] 9-502 and [section] 9-504 . . . were meant to say.⁵³¹

524. Former U.C.C. § 9-502(2) (1972).

525. *Id.*

526. *See id.* § 9-504.

527. *See id.* §§ 9-504 & 9-502.

528. *Id.* § 9-504(3).

529. *See id.* § 9-504(3).

530. The original passages differed from those described above in that they referred also to sales of "contract rights," a reference which was later dropped from the Article.

531. Gilmore, *supra* note 3 at vol. 2, § 44.4, n.6.

In the 1998 revision of Article 9, section 9-601(g) provides that “[e]xcept as otherwise provided in section 9-607(c), this part imposes no duties upon a secured party that is . . . a buyer of accounts, chattel paper, payment intangibles, or promissory notes.”⁵³² The provision “otherwise” in section 9-607(c) is that a

secured party shall proceed in a commercially reasonable manner if the secured party: (1) undertakes to collect from or enforce an obligation of an account debtor or other person obligated on collateral; and (2) is entitled to charge back uncollected collateral or otherwise to full or limited recourse against a debtor or a secondary obligor.⁵³³

Two other provisions of Part 6 of the revised Article refer to sales of receivables. Section 9-615(e) provides that after disposition of the collateral, “[i]f the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes: (1) the debtor is not entitled to any surplus; and (2) the obligor is not liable for any deficiency.”⁵³⁴ Section 9-608(b) contains a similarly worded exclusion for buyers of receivables in dealing with the application of proceeds of collection or enforcement of collateral against an account debtor or other obligor on the collateral.⁵³⁵

The revision thus does not follow Professor Gilmore’s recommendation of a provision that the default rules of Article 9 do not apply to buyers of receivables, but it does clearly relieve buyers in most instances from the burdens placed on secured parties by the default rules. Further, it makes it clear that the debtor is not liable for a deficiency nor entitled to a surplus after disposition of the receivable or its enforcement by the buyer. The exceptional cases where duties to the seller are imposed on the buyer are unusual cases⁵³⁶ where the sale has included terms allowing the buyer to have recourse against the seller if the buyer is unable to collect from the account debtor or a person obligated on the receivable or has other difficulties with the receivable. In this case, the seller would have a legitimate interest in requiring the buyer to proceed in a commercially reasonable manner in his handling or enforcement of the receivable. The revised Article confers that protection. Beyond that, it is probable that the drafters of the revision felt that there was no need for further reference to sales of receivables in

532. Revised U.C.C. § 9-601(g) (1999).

533. *Id.* § 9-607(c).

534. *Id.* § 9-615(e).

535. *Id.* § 9-608(b).

536. *See id.* § 9-607 cmt. 9.

the default rules because buyers of receivables would simply not try to use the default remedies described because they would see no advantage in their actions.

A buyer of receivables may, of course, see fit to sell the receivables he has bought, but no special rule of law is needed since the right of sale is a normal incident of ownership. The buyer may wish to sue on a receivable bought from its prior owner, but no default rule is needed to justify the action; what the buyer has bought is an enforceable legal right and the right to enforcement is a natural incident to that right.

It is conceivable that a buyer of tangible chattel paper or a promissory note who has left the paper in the hands of the seller may wish to have legal assistance to gain possession of the paper if the seller does not live up to the seller's obligations as bailee. To use the default rule dealing with the right to take possession of the collateral, however, the buyer would need to have had the foresight to define the seller's misconduct as a "default" in the terms of the agreement of sale. If the buyer had sufficient foresight to act, the buyer would probably have realized that a simpler, more effective way of gaining protection would be to reserve the right to take possession on demand. Surely, such a term would be legally valid, and the seller has no superior interest to be protected.

In a case in which the seller has been allowed to make collections on sold receivables on behalf of the buyer and the seller has proved faithless in his handling of the proceeds, the buyer would surely have remedies against the seller under the law of contracts or, perhaps, the law of torts. Therefore, the default rules are not needed.

As to the possibility that the seller would sell the receivables to another person or grant a security interest to another person, and the second purchaser would gain priority over the original buyer, nothing in the default rules of Article 9 offers useful protection for the original buyer. The buyer must again find a remedy in the law of torts or of contracts. As early as possible, of course, the buyer should perfect the "security interest" that Article 9 treats the buyer as having acquired to minimize the seller's power to transfer rights to others that would be superior to the buyer's under the rule of revised section 9-318(b). As we have seen, however, that rule does not provide complete protection, so it would be wise to include in the agreement of sale a commitment of the seller not to make sales or grant security interests in the sold receivables.

The default rules can be somewhat more useful to the seller in the event that the buyer has a right under the sales agreement to require the seller to make good on receivables that turn out to be uncollectible

or not fully so. The UCC expressly requires that in such a case the buyer must proceed in a “commercially reasonable” manner in collection efforts against the obligors on the receivables. “Commercial reasonableness” is not defined in the UCC. The idea is that in enforcing obligations represented by the receivables, the secured party must take whatever steps are appropriate to achieve the maximum recovery realistically possible.⁵³⁷ For failure to comply with this requirement, the buyer can be held liable for damages.⁵³⁸

The “commercial reasonableness” requirement does not apply under revised Article 9 when a buyer of receivables undertakes to sell them. Since the seller normally has neither liability for a deficiency, nor any right to a surplus recovery under the default rules, the outcome of the sale would normally be of no concern to the seller. However, no express exception is made to the general rule that a buyer of receivables is not subject to the duties imposed by the default rules for a case where the buyer has a contractual right of recourse against the seller if the sales attempt turns out to be disappointing. Perhaps the drafters of the 1998 revision considered such a term in an agreement for sale of receivables to be too rare to require explicit treatment in the default rules.

X. CONCLUSION

This analysis of Article 9’s treatment of sales of receivables leads to no grand conclusion on the topic. Accepting the finding of the drafters of difficulty in predicting court rulings on whether transactions involving receivables are really intended to create interests in the property as collateral for obligations, or rather intended as outright sales of the property, it is understandable that it is felt that it would be wise to provide potential creditors of or purchasers from the “seller” of receivables with notice of the “buyer’s” interest as a condition of attaining priority over such creditors and purchasers, even if an outright sale may be involved. That is obviously the primary objective of the rules treating sales of receivables as “secured transactions,” with the buyers as “secured parties” and the sellers as “debtors.” There is little basis for quarreling with the decision to extend the coverage of the article to all, or nearly all, types of receivables on the basis that they are frequently found to be used in financing transactions.

537. See Gilmore, *supra* note 3 at vol. 2, § 44.5.

538. See revised U.C.C. § 9-625(b) (1999).

If a true sale is involved, however, it would be overkill to apply all of the Article 9 rules governing secured transactions to transactions which are not truly of that nature (involving debts secured by protective interests in property of the debtors). There is a need to recognize the reality of the transaction when it can be proved and provide different treatment when appropriate for true sales than for transactions actually intended for security.

Revised Article 9 goes further than its predecessor to make such distinctions when they are appropriate. In the process, it has created some new problems of application of the rules, and it has not dealt with all logically appropriate distinctions. It is expected that in the coming years, these problems, which are far from monumental, will be resolved.