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Article 9 of the Uniform Commercial Code as It Relates to Secured Transactions in Which the Collateral Is Consumer Goods or Equipment

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ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE
AS IT RELATES TO SECURED TRANSACTIONS IN
WHICH THE COLLATERAL IS CONSUMER
GOODS OR EQUIPMENT

Jerrold L. Strasheim*

The Uniform Commercial Code¹ becomes operative in Nebraska at midnight on September 1, 1965.² From that time, Article 9 of the Code—the Article on Secured Transactions—will regulate, regardless of its form, practically any transaction within the jurisdiction of the State in which the intention is to create a security interest in personal property or fixtures.³ The term “security interest” is defined in the Code as follows:⁴

‘Security interest’ means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2-401) is limited in effect to a reservation of a ‘security interest.’ The term also includes any interest of a buyer of accounts, chattel paper, or contract rights which is subject to article 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under Section 2-401 is not a ‘security interest,’ but a buyer may also acquire a ‘security interest’ by complying with article 9. Unless a lease or consignment is intended as security, reservation of title thereunder is not a ‘security interest’ but a consignment is in any event subject to the provisions on con-

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¹The UNIFORM COMMERCIAL CODE (hereinafter referred to as U.C.C.) which, as L.B. 49, was enacted into law by the Seventy-third Session, Nebraska State Legislature, 1963.

²U.C.C. § 10-101 provides: “This Act shall become operative at midnight on September 1, 1965. It applies to transactions entered into and events occurring after that date.”

³U.C.C. § 9-102. The important element is intention; the official comments explain that “the principal test whether a transaction comes under this Article is: is the transaction intended to have effect as security?” The rules of the article specifically apply without reference to where the title to the personal property or fixtures is located. U.C.C. § 9-202. In terms of pre-Code security devices for tangible personal property, the article regulates conditional sales contracts, chattel mortgages, trust receipts, consignments, and leases intended to be security devices, to name only a few. See U.C.C. § 9-102 and the official comments thereto.

⁴U.C.C. § 1-201(37).

signment sales (Section 2-326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

Most of the sections of Article 9 apply to all transactions within the scope of the Article. Some sections of the Article, however, state special rules with reference to transactions involving security interests in particular classifications of collateral.⁵

The term "collateral" is a general term used in the Article to describe both tangible and intangible property subject to a security interest.⁶ The term "goods" is the term used to denote tangible collateral only.⁷ There are four subdivisions of goods recognized: (1) consumer goods; (2) equipment; (3) farm products; (4) inventory.⁸ All goods—that is, all tangible collateral—must and do fall within one of the four classifications.⁹

The purpose of this paper is to delineate and explain the rules of Article 9 which apply to and regulate transactions intended to create security interests in collateral which is either consumer goods or equipment.

DEFINITIONS

At the outset it is necessary to have clearly in mind the meanings of the terms "consumer goods" and "equipment" as used in Article 9. The meaning of the term "equipment" depends to some extent upon the meanings of the terms "farm products" and "inventory" and so these must be familiar also. The Code states that:¹⁰

Goods are

(1) 'consumer goods' if they are used or bought for use primarily for personal, family or household purposes;

(2) 'equipment' if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a nonprofit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods;

⁵ U.C.C. § 9-102 (Official Comments).

⁶ U.C.C. § 9-105(c).

⁷ U.C.C. §§ 9-105(f), 9-109.

⁸ See U.C.C. § 9-109 and the official comments thereto.

⁹ *Ibid.*

¹⁰ U.C.C. § 9-109.

(3) 'farm products' if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool-clip, maple syrup, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory;

(4) 'inventory' if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has so furnished them, or if they are raw materials, work in process or materials used or consumed in a business. Inventory of a person is not to be classified as his equipment.

It will be observed that the definition of "consumer goods" used in Article 9 does not depend upon physical characteristics of the goods. The pivotal language in the definition is "used or bought for use." Thus, it is the function which the goods are performing or are being purchased to perform which is crucial.

Likewise, it should be observed that the definition of "equipment" does not depend upon the physical characteristics of the goods. Two alternative tests are included. The first concerns what the goods are "used or bought for use" for. The second is a negative test; this is whether the goods can be classified as any type of goods other than equipment. Thus, the definition of equipment also centers around function. Under the first test, it is the function which the goods are performing or being purchased to perform which results in the goods being termed "equipment." Under the second test, it is because the goods do not perform and are not being purchased to perform the functions normally attributed to any other kind of goods that the goods in question are classified as "equipment."

Since it is the function which the goods are performing or being obtained to perform which is significant both with respect to consumer goods and equipment, the same goods at different times and under different circumstances can be first consumer goods and subsequently equipment or vice versa.¹¹ One writer¹² illustrates this principle by reference to a television set. If a television set is purchased by an individual and a security interest is granted to the vendor to secure the purchase price, and if the television set is to be used for the entertainment of the purchaser's family, the television set is a consumer good. But if the purchaser should

¹¹ U.C.C. § 9-109 (Official Comments).

¹² Spivack, *Secured Transactions (Under the Uniform Commercial Code)* (March, 1963) (published by the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association).

completely pay for the set, and if it should then be purchased by a physician for use in his waiting room to entertain patients, and if the physician should grant a security interest in the set to secure the purchase price, then the same set would be equipment. It will be noted, however, that goods cannot be consumer goods and equipment at the same time. The key word here is "primarily" which appears in the definition of each kind of goods.

One essential difference between transactions in which the collateral is consumer goods and transactions in which the collateral is equipment should be emphasized. In the former transactions, one party will generally be a businessman and one party will be a consumer; in the latter transactions both parties ordinarily are businessmen. It will be noted from the rules of Article 9 to be hereinafter set out that this difference is recognized by Article 9. Often the consumer is not held to the same standards of conduct as the businessman.

ATTACHMENT

What are the requirements for the existence of a security interest in consumer goods or equipment?

Article 9 imposes three requirements for the existence of a security interest which apply to any transaction within its scope regardless of the collateral. First, there must be an agreement which creates or provides for a security interest. Second, there must be value given. Third, the debtor must have rights in the collateral. When these three requirements co-exist, a security interest, in the terminology of Article 9, "attaches."¹³

The agreement is called simply a "security agreement."¹⁴ The parties to the security agreement are called the "debtor"¹⁵ and the "secured party."¹⁶ As indicated above, the property involved is a species of "collateral."¹⁷

I. SECURITY AGREEMENT

The formal requisites for a security agreement have been reduced to a minimum.¹⁸ They have been patterned after those in

¹³ U.C.C. § 9-204.

¹⁴ U.C.C. § 9-105(h).

¹⁵ U.C.C. § 9-105(d).

¹⁶ U.C.C. § 9-105(i).

¹⁷ U.C.C. § 9-105(c).

¹⁸ U.C.C. § 9-203 (Official Comments).

Section 2 of the Uniform Trust Receipts Act,¹⁹ and are in the nature of a Statute of Frauds. Absent the formal requisites, the security agreement is not enforceable against either the debtor or third persons.²⁰

If the secured party has possession of the collateral, the security agreement need not be in writing.²¹

With respect to transactions in which security interests are created or provided for in collateral which is consumer goods or equipment, it will be rare for the parties not to contemplate that possession of the collateral be retained or delivered to the debtor. If possession is so retained or delivered, the first formal requisite is that the security agreement be in writing.²²

The second formal requisite is that the security agreement be signed by the debtor; there is no requirement that the security agreement be signed by the secured party.²³

The third formal requisite is that the security agreement contain a description of the collateral. In this regard, Article 9 provides that in the security agreement "any description of personal property . . . is sufficient whether or not it is specific if it reasonably identifies what is described."²⁴ The official comments elaborate on the language just quoted by saying that it should require courts to refuse to follow holdings often found in older chattel mortgage cases that descriptions are insufficient unless they are of the most exact in detailed nature, the so-called "serial number" test.²⁵ In other words, all that Article 9 requires is that the description in the security agreement make *possible* the identification of the collateral; if the security agreement contains information that will enable one to ascertain what the collateral in fact is, even if that fact cannot be ascertained from the agreement itself, the description will be sufficient.²⁶

¹⁹ NEB. REV. STAT. §§ 69-701 to -720 (Reissue 1958). This Uniform Act, of course, is repealed by the Code. See U.C.C. § 10-102.

²⁰ U.C.C. § 9-203 (Official Comments).

²¹ U.C.C. § 9-203(a).

²² U.C.C. § 9-203(b).

²³ *Ibid.*

²⁴ U.C.C. § 9-110.

²⁵ For an example of a "serial number" case from another jurisdiction, see *First Mortgage Loan Co. v. Durfee*, 193 Iowa 1142, 188 N.W. 777 (1922) where a chattel mortgage described an automobile by the serial number 3558516, the correct serial number being 2558516. The description was held inadequate.

²⁶ Spivack, *op. cit. supra* note 12, at 27.

These are the only formal requisites for a security agreement, but perhaps it should be observed that sometimes it will be convenient for the security agreement to satisfy the formal requisites of a *financing statement*, also. As will subsequently be explained (under the notice filing of Article 9) what is filed is a financing statement, and the formal requisites of a financing statement are not identical to the formal requisites for a security agreement. One writing, however, may serve as both the security agreement and the financing statement, providing it satisfies the formal requisites of both.²⁷ The combination will be useful for simple transactions.

II. VALUE

The second requirement for the existence of a security interest is that value be given. The term value is broadly defined in the Code as follows:²⁸

'Value.' Except as otherwise provided with respect to negotiable instruments and bank collections (Sections 3-303, 4-208 and 4-209) a person gives 'value' for rights if he acquires them

(a) in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; or

(b) as security for or in total or partial satisfaction of a pre-existing claim; or

(c) by accepting delivery pursuant to a pre-existing contract for purchase; or

²⁷ For some time after the Code becomes operative, pre-Code security devices such as the conditional sales contracts, chattel mortgages, or the like probably will continue to be used. Article 9 does not in terms abolish these security devices, and the experience elsewhere has been that they continue in use at least for some time. But Article 9 does govern these pre-Code security devices if they are used. Accordingly, if after the Code becomes operative, a pre-Code security device is used, and if in accordance with pre-Code practice the pre-Code security device itself is to be filed, then care should be used to insure that the pre-Code security device satisfies the formal requisites of both the security agreement and the financing statement. Probably it will do so; the formal requisites are not onerous. On the other hand, the formalities required by existing law will not have to be satisfied. An example of one such formality to be eliminated is found in NEB. REV. STAT. § 36-301 (Reissue 1960) which requires that a chattel mortgage on household goods be acknowledged by both husband and wife. The obvious purpose of the statute has never been effectively accomplished; most security interests in household goods are obtained by conditional sales contracts, which apparently—but not clearly—are outside the statute.

²⁸ U.C.C. § 1-201(44).

(d) generally, in return for any consideration sufficient to support a simple contract.

To this definition the official comments add the following:²⁹

All the Uniform Acts in the commercial law field (except the Uniform Conditional Sales Act) have carried definitions of 'value.' All those definitions provided that value was any consideration sufficient to support a simple contract, including the taking of property in satisfaction of or as security for a pre-existing claim. Subsections (a), (b) and (d) in substance continue the definitions of 'value' in the earlier acts. Subsection (c) makes explicit that 'value' is also given in a third situation: where a buyer by taking delivery under a pre-existing contract converts a contingent into a fixed obligation.

III. DEBTOR'S RIGHTS IN THE COLLATERAL

The third requirement for existence of a security interest is that the debtor have rights in the collateral. With respect to this little need be said.³⁰ Perhaps, however, this point should be made: a security agreement may be executed and value given by the lender before the debtor acquires rights in the collateral. This will always be true with respect to the operation of an after-acquired property clause. The security interest will be created in after-acquired property when the debtor acquires rights in such property.³¹

PERFECTION

As noted above, Article 9 states that when the three requirements for the existence of a security interest co-exist—that is, when there is a security agreement, value given, and rights in the collateral—the security interest "*attaches.*" The term "*attaches*" is used to denote that the security interest in the collateral is enforceable against the debtor. Stated differently, attachment indicates that as between the secured party and the debtor, the rights of ownership in the collateral are restricted by the rights of the secured party.³²

²⁹ U.C.C. § 1-201 (Official Comments). In Nebraska under pre-Code law a pre-existing debt was sufficient consideration to support a chattel mortgage. See *Chafee v. Atlas Lumber Co.*, 43 Neb. 224, 61 N.W. 637 (1895).

³⁰ Discussion of this point in greater detail is more appropriate where the secured financing involves inventory, the so-called "floating lien."

³¹ After acquired property clauses and when they may effectively be used in a security agreement for consumer goods or equipment will be later discussed.

³² Spivack, *op. cit. supra* note 12, at 33.

Even though the security interest has attached, it generally³³ is not superior to rights of third persons in the collateral. For the security interest to be superior to the rights of third persons (insofar as Article 9 permits), the security interest must have been "perfected."³⁴

In the broadest terms, and speaking of all transactions within the scope of Article 9, a security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken.³⁵ What applicable steps will be required may depend upon the collateral involved and upon whether the security interest is a purchase money security interest or not.

The general rule of Article 9 is that a "financing statement" must be filed to perfect all security interests. To this general rule, however, there are several exceptions, and some of those exceptions apply to transactions in which the security interests are in consumer goods or equipment. The general rule and the exceptions are as follows:³⁶

(1) A financing statement must be filed to perfect all security interests except the following:

(a) a security interest in collateral in possession of the secured party under section 9-305;

* * *

(c) a purchase money security interest in farm equipment having a purchase price not in excess of twenty-five hundred dollars; but filing is required for a fixture under section 9-313 or for a motor vehicle required to be licensed;

(d) a purchase money security interest in consumer goods; but filing is required for a fixture under section 9-313 or for a motor vehicle required to be licensed;

* * *

(2) If a secured party assigns a perfected security interest, no filing under this article is required in order to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

(3) The filing provisions of this article do not apply to a security interest in property subject to a statute

³³ It subsequently will be shown that with respect to consumer goods and farm equipment attachment will protect the secured party against lien creditors. Generally speaking, however, for other collateral, attachment is not enough.

³⁴ The term "perfected" is used in Article 9 much as it is used in Section 60 of the Bankruptcy Act, Bankruptcy Act, 11 U.S.C. § 96 (1958). It means different things at different times.

³⁵ U.C.C. § 9-302.

³⁶ *Ibid.*

(a) of the United States which provides for a national registration or filing of all security interests in such property; or

(b) of this state which provides for central filing of, or which requires either retained possession of manufacturer's certificate of origin or indication on a certificate of title of, such security interests in such property.

(4) A security interest in property covered by a statute described in subsection (3) can be perfected only by registration or filing under that statute or by indication of the security interest on a certificate of title or a duplicate thereof by a public official.

The exception to the requirement of filing a financing statement for perfection of a security interest in Section 9-302(1) (a) is a statement of the common law of pledge.³⁷ At common law, the secured party who took possession of the collateral had done everything required to insure his rights in the collateral. Under Section 9-302(1) (a), construed with Section 9-305, in lieu of filing a financial statement, a security interest in goods—including, of course, both consumer goods and equipment—may be perfected by the secured party's taking possession of the goods. Possession may be by the secured party himself or by an agent on his behalf.³⁸ The debtor cannot qualify as an agent for the secured party.³⁹ The time of perfection is the time of taking possession.⁴⁰ Where the goods are held by a bailee, the secured party will be deemed to have possession from the time the bailee receives notification of the secured party's interest; it is not necessary for the bailee to acknowledge that he holds the goods for the secured party.⁴¹

The exceptions stated in Section 9-302(1) (c) and (d) relate to "purchase money security interests," defined as follows:⁴²

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

(a) taken or retained by the seller of the collateral to secure all or part of its price; or

(b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

It will be noted that a purchase money security interest may either

³⁷ U.C.C. §§ 9-302 and -305 (Official Comments).

³⁸ U.C.C. § 9-305.

³⁹ U.C.C. § 9-305 (Official Comments).

⁴⁰ U.C.C. § 9-305.

⁴¹ U.C.C. § 9-305 (Official Comments). They state, *inter alia*, that "this rule rejects the common law doctrine that it is necessary for the bailee to attorn to the secured party"

⁴² U.C.C. § 9-107.

be a security interest retained by a seller or a security interest acquired by a lender.

In many jurisdictions under pre-Code law, security interests in consumer goods under conditional sale or bailment lease have not been subjected to filing requirements.⁴³ Such security interests are of course purchase money security interests. Section 9-302 (1) (c) and (d) follow the policy of those jurisdictions by providing that no financing statement need be filed to perfect a purchase money security interest in farm equipment having a purchase price not to exceed \$2,500.00⁴⁴ or a purchase money security interest in consumer goods. Such security interests are perfected merely by attachment. Note, however, that the form of the security device is not significant as it was under pre-Code law;⁴⁵ the transaction need not be a conditional sale or a bailment lease to have the benefit of the exceptions from filing. What is significant is the collateral and the purchase money security interest—nothing more. Note also that non-purchase money security interests in either consumer goods or farm equipment are not perfected unless a financing statement is filed.

The exceptions appearing in Section 9-302(1) (b) and (c) are themselves subject to exceptions. Even if a security interest is a purchase money security interest in consumer goods or in farm equipment having a purchase price not to exceed \$2,500.00, a financing statement must be filed to perfect that purchase money security interest if the consumer goods or farm equipment are fixtures under Section 9-313. That Section provides that the "law of this state other than this Act determines when and where . . . goods become fixtures."⁴⁶ If either the farm equipment or the consumer goods are motor vehicles required to be licensed, then no financing statement is filed; the security interests, purchase money or not, can be perfected only by having the security interests noted on the certificates of title for the vehicles.

If none of the foregoing exceptions of Section 9-302 apply, then to perfect a security interest in consumer goods or in equipment the requirement is that a financing statement be filed.

⁴³ U.C.C. § 9-302 (Official Comments).

⁴⁴ Since farm equipment prices often depend upon trade-ins, it may be wondered how this sale price will be determined.

⁴⁵ Only conditional sales and bailment leases were included under pre-Code law. Chattel mortgages were excluded.

⁴⁶ The leading case in Nebraska on what constitutes fixtures is apparently *Frost v. Schinkel*, 121 Neb. 784, 238 N.W. 659 (1931).

THE FINANCING STATEMENT

A financing statement is a simple notice. The formal requisites to a financing statement are not the same as the formal requisites for a security agreement. These requisites are (1) signatures and addresses of both parties (note the security agreement required only the signature of the secured party); and (2) a description of the collateral by type or item. Where the collateral is fixtures, the financing statement must also contain a description of the land concerned.

The financing statement is patterned after the filing required by the Uniform Trust Receipts Act.⁴⁷ Its purpose is to provide an inquiring person with a source from which information may be obtained, not to place all information desired of record.⁴⁸

A form of financing statement appears in the Code as follows:⁴⁹

(3) A form substantially as follows is sufficient to comply with subsection (1):

Name of debtor (or assignor) _____

Address _____

Name of secured party (or assignee) _____

Address _____

1. This financing statement covers the following types (or items) of property:

(Describe) _____

2. (If collateral is crops) The above described crops are growing or are to be grown on:

(Describe real estate) _____

3. (If collateral is goods which are or are to become fixtures) The above described goods are affixed or to be affixed to:

(Describe real estate) _____

4. (If proceeds or products of collateral are claimed) Proceeds—Products of the collateral are also covered.

Signature of debtor (or assignor) _____

Signature of secured party (or assignee) _____

Section 9-401 of the Code provides where the financing statement is to be filed. The Official Text of the Code contains two alternatives from which the enacting state may select. The version passed by the Nebraska Legislature is neither of the Code's al-

⁴⁷ See note 19 *Supra* for citation of Uniform Trust Receipts Act in Nebraska.

⁴⁸ U.C.C. § 9-208 (Official Comments). These comments are quoted later in the text of this paper.

⁴⁹ U.C.C. § 9-402(3).

ternatives; it is a version invented in Nebraska. The Nebraska provision is as follows:⁵⁰

(1) The proper place to file in order to perfect a security interest is as follows:

(a) When the collateral is unharvested crops, then in the office of the county clerk in the county where the land, on which the crops are growing or are to be planted and grown, is located.

(b) When the collateral is goods which at the time the security interest attaches are or are to become fixtures, then in the office where a mortgage on the real estate concerned would be filed or recorded.

(c) When the collateral is any other type of tangible or intangible personal property, the following rules apply: When the debtor is a resident of this state, then in the office of the county clerk in the county of the debtor's residence. When debtor is a nonresident and the collateral is located within the state, then in the office of the county clerk in the county where the collateral is located at the time of the execution of the security instrument; *Provided*, that if the debtor intends to immediately move and keep the collateral in another county, then in the office of the county clerk of the county in which the collateral is to be kept. If the debtor is a nonresident and the collateral is not located in this state at the time of the execution of the security instrument but the debtor intends to immediately bring it into and keep it in this state, then in the office of the county clerk in the county where the collateral is to be kept. If the debtor is a nonresident and part of the collateral is to be kept in different counties, then in the office of the county clerk in each county where any part of the collateral is kept; *Provided*, if it is only filed in one county it shall be sufficient to protect the lien on the collateral kept in the county where it is filed. If the debtor shall be a Nebraska corporation, a foreign corporation qualified to do business in Nebraska or a foreign corporation domesticated under Nebraska law, then it shall be deemed a resident, and its residence for purpose of filing shall be the county where the office of its last appointed resident agent is located. If the debtor is a partnership or other unincorporated entity maintaining a place of business in this state, then the debtor shall be deemed a resident, and its residence for purpose of filing shall be its principal place of business in this state, and any designation of such place of business in the security instrument shall be controlling. If the debtor consists of two or more persons, unincorporated entities, partnerships or corporations having a common interest in the security, and if any of them are residents as herein defined, then the debtor shall be deemed a resident, and its residence for purpose of filing shall be the residence of any one of them as herein defined.

⁵⁰ U.C.C. § 9-401.

The Nebraska version of Section 9-401, as applied to transactions involving consumer goods or equipment, requires: (1) that the financing statement be filed in the office of the county clerk—unless the collateral is or is about to become fixtures, in which case the filing must be in the office where a real estate mortgage would be filed, and (2) that the financing statement be filed in the county of residence of the debtor—unless the debtor be a non-resident, in which case the filing must be in the county where the collateral is or is to be located.

The Nebraska version of Section 9-401 has already been severely criticized. It is not uniform with the comparable statutory provisions of other states, and hence defeats a major purpose of the Code. It coins a new term not appearing elsewhere in Article 9 or the Code—"security instrument."⁵¹ Although it probably does set up workable rules to govern the place of filing financing statements for transactions involving collateral which is either consumer goods or equipment,⁵² it does not do so for transactions involving other collateral.⁵³ It probably will be amended.⁵⁴

PRIORITIES

As stated earlier, if a security interest is perfected, then it will be superior to the rights of third persons in the collateral. This does not mean, however, that a perfected security interest necessarily is superior to the rights of *all* third persons.

A perfected security interest in consumer goods or equipment will always protect the secured party against creditors who acquire

⁵¹ U.C.C. § 9-105(1) (g) defines "instrument" to mean negotiable instrument. This is the only usage of the term in the Code.

⁵² Its rules are workable with respect to fixed tangible collateral, if the collateral is already in existence, and if the filing is required in the place where the collateral is located. If the tangible collateral is not already in existence—for example products—or if the filing is required in the principal place of business, problems can arise.

⁵³ Article 9, it must be remembered, regulates secured transactions involving not only tangible collateral, but also intangible collateral. With respect to the latter—as for example a contract right—often it is next to impossible to determine its location and requirements of filing based on location of collateral are not workable; only central filing is workable.

⁵⁴ When experts from other jurisdictions appeared at the 1963 Annual Institute For Practicing Attorneys at Creighton University Law School and suggested that the Nebraska version of § 9-401 had shortcomings, statements were made by Bar Association officials that an effort would be made to correct these shortcomings at the next meeting of the Legislature.

liens on the collateral by attachment, levy, or the like, subsequent to the perfection. Protection is also granted against a trustee in bankruptcy of the debtor's estate asserting the trustee's equivalent of such a lien. To state the same point differently, a perfected security interest is never subordinate to the rights of a lien creditor.⁵⁵ The term "lien creditor" is defined as follows:⁵⁶

A 'lien creditor' means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes 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.

A perfected security interest in consumer goods or equipment will generally protect the secured party against buyers from the debtor; but there are significant exceptions to this rule.⁵⁷ These exceptions apply to perfected purchase money security interests in consumer goods and to perfected purchase money security interests in equipment which is farm equipment.

It will be recalled that a purchase money security interest in consumer goods (except for fixtures and motor vehicles) is perfected by attachment, and without filing. The same is true of a purchase money interest in farm equipment (except for fixtures and motor vehicles) having a purchase price not in excess of twenty-five hundred dollars. Such purchase money security interests so perfected are subordinate to the interest of a buyer if he "buys without knowledge"⁵⁸ of the security interest, for value⁵⁹ and for his own personal, family or household purposes or for his own farming operations unless prior to the purchase the secured party has filed a financing statement covering such goods.⁶⁰

It should be emphasized that not all perfected purchase money security interests in consumer goods or farm equipment are subordinate to the interests of such buyers. A secured party may file a financing statement (although filing is not required for perfection), and if he does, all buyers take subject to the security interest. It

⁵⁵ U.C.C. § 9-301.

⁵⁶ U.C.C. § 9-301(3).

⁵⁷ There are significant exceptions for other kinds of collateral also. A buyer of inventory in the ordinary course of business will always take free of a perfected security interest, even if he knows of it, so long as he is in good faith. See U.C.C. § 9-307.

⁵⁸ "A person 'knows' or has 'knowledge' of a fact when he has actual knowledge of it." U.C.C. § 1-201(25).

⁵⁹ See note 28 *supra*.

⁶⁰ U.C.C. § 9-307.

should also be emphasized that even if the secured party does not file, only those buyers who meet the qualifications described in the preceding paragraph take free of the security interests. Other buyers—for example, a businessman who intends to resell the collateral—take subject to the security interest.

A perfected security interest in consumer goods or equipment may or may not protect the secured party against other secured parties. There may be conflicting perfected security interests in the same consumer goods or equipment and, in that event, protection depends upon priority. In situations involving a conflict between a purchase money security interest and non-purchase money security interests, the former is given a special priority.

Section 9-312(4) provides as follows:⁶¹

A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within ten days thereafter.

If neither of conflicting security interests in consumer goods or equipment is entitled to a special priority, the priority shall be determined as follows:⁶²

(a) in the order of filing if both are perfected by filing, regardless of which security interest attached first under section 9-204(1) and whether it attached before or after filing;

(b) in the order of perfection unless both are perfected by filing, regardless of which security interest attached first under section 9-204(1) and, in the case of a filed security interest, whether it attached before or after filing; and

(c) in the order of attachment under section 9-204(1) so long as neither is perfected.

The rule of subparagraph (a) is best illustrated by the following example from the official comments:⁶³

Example 1. A files against X (debtor) on February 1. B files against X on March 1. B makes a non-purchase money advance against certain collateral on April 1. A makes an advance against the same collateral on May 1. A has priority even though B's advance was made earlier and was perfected when made. It makes no difference whether or not A knew of B's interest when he made his advance.

The problem stated in the example is peculiar to a notice filing system under which filing may be made before the security interest attaches (see Section 9-402). The Uniform Trust Receipts

⁶¹ U.C.C. § 9-312(4).

⁶² U.C.C. § 9-312(5).

⁶³ U.C.C. § 9-312 (Official Comments).

Act, which first introduced such a filing system, contained no hint of a solution and case law under it has been unpredictable. This Article follows several of the accounts receivable statutes in determining priority by order of filing. The 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 each time having, as a condition of protection, to check for filings later than his. Note, however, that his protection is not absolute: if, in the example, B's advance creates a purchase money security interest, he has priority under subsection (4), or, in the case of inventory, under subsection (3) provided he has properly notified A.

The rule of subparagraph (b) is best illustrated by another example from the official comments:⁶⁴

Example 2. A and B make non-purchase money advances against the same collateral. The collateral is in the debtor's possession and neither interest is perfected when the second advance is made. Whichever secured party first perfects his interest (by taking possession of the collateral or by filing) takes priority and it makes no difference whether or not he knows of the other interest at the time he perfects his own.

With respect to the rule in subparagraph (c) the official comments state:⁶⁵

Subsection (5)(c) adds the thought that so long as neither of the interests is perfected, the one which first attached (i.e. under the advance first made) has priority. The last mentioned rule may be thought to be of merely theoretical interest, since it is hard to imagine a situation where the case would come into litigation without either A or B having perfected his interest. If neither interest had been perfected at the time of the filing of a petition in bankruptcy, of course neither would be good against the trustee in bankruptcy.

A perfected security interest in consumer goods or equipment will generally not protect the secured party against persons who obtain liens on the consumer goods or equipment by operation of law. The rule is stated as following:⁶⁶

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

A perfected security interest in consumer goods or equipment which are fixtures will protect the secured party against persons having claims to the consumer goods or equipment which are

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ U.C.C. § 9-310.

based on an interest in the realty, if the security interest attached to the consumer goods or equipment before they became affixed to the realty.⁶⁷ But if the security interest attached to the consumer goods or equipment after they were affixed to the realty, the security interest is invalid against any person with an interest in the real estate at the time the security interest attaches⁶⁸ and may be invalid as against persons who acquire interests in the real estate after the security interest attaches but before perfection.⁶⁹ A perfected security interest in consumer goods or equipment which are installed or affixed to other goods—that is, which are accessions—will protect the secured party against persons having claims to the consumer goods or equipment which are based on an interest in the whole goods generally to the same extent that a security interest in consumer goods or equipment which are fixtures protects the secured party against persons having claims to the consumer goods or equipment which are based on an interest in the realty.⁷⁰

Thus, a perfected security interest in consumer goods or equipment should be understood to give the secured party protection against the rights of third persons in the collateral, but not protection against the rights of *all* third persons.

THE SECURITY AGREEMENT PROVISIONS

During the existence of a secured transaction, the specific rights, obligations and remedies which, to a large extent,⁷¹ govern the immediate parties to the transaction are those rights, obligations and remedies provided for in the security agreement. The general rule is that the security agreement may provide for any rights, obligations or remedies upon any conditions unless specifically prohibited. In the language of the Code: "Except as otherwise provided by this Act, a security agreement is effective according to its terms between the parties. . . ."⁷² After perfection, the specific rights, obligations and remedies provided for in the security agree-

⁶⁷ U.C.C. § 9-313.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ U.C.C. § 9-314.

⁷¹ Some rights, obligations and remedies are specifically set out in the statute. These are discussed, for the most part, subsequently.

⁷² U.C.C. § 9-201. The section further provides that "nothing in this Article validates any charge or practice illegal under any statute or regulation thereunder governing usury, small loans, retail installment sales, or the like, or extends the application of any such statute or regulation to any transaction not otherwise subject thereto."

ment will also control over the rights of third persons (but not all third persons). The security agreement is also "effective according to its terms" as against them.⁷³ Accordingly, with reference to transactions in which the collateral is consumer goods or equipment, the security agreement is effective after perfection and according to its terms between the immediate parties and as against those third persons already indicated.

Earlier in this paper,⁷⁴ the formal requisites of the security agreement were discussed. These formal requisites are the "minimums" of the security agreement. It is also manifestly important, however, to consider the "maximums" of the security agreement.

I. SANCTIONED

As indicated above, the general rule under Article 9 is that freedom of contract prevails between the immediate parties to a secured transaction.⁷⁵ Unless there is a specific prohibition in the Code against a provision, the parties may effectively include it in the security agreement if desired.⁷⁶

It is not feasible to enumerate completely each provision which may properly become a part of a security agreement for consumer goods or equipment. The variety of such provisions will depend upon the needs and inventiveness of the parties.

However, certain standard provisions which are acceptable may be alluded to by way of examples of clearly acceptable provisions. The security agreement may contain a provision setting forth the nature of the obligation secured and the terms of repayment.⁷⁷ It may also set forth the circumstances under which the secured party may elect to repossess the collateral, including the right to do so when the secured party deems himself insecure.⁷⁸ It may also contain provisions requiring the debtor to insure the collateral, maintain it, repair it, or even assemble it on default.⁷⁹

Also, there are certain "not-so-standard" provisions sanctioned by Article 9 with reference to equipment but not consumer goods which should be mentioned.

⁷³ U.C.C. § 9-201.

⁷⁴ See text at note 25, *supra*.

⁷⁵ U.C.C. § 9-101 (Official Comments).

⁷⁶ U.C.C. § 9-201.

⁷⁷ Spivack, *op. cit. supra* note 12, at 29.

⁷⁸ Spivack, *op. cit. supra* note 12, at 30.

⁷⁹ U.C.C. § 9-503; Spivack, *op. cit. supra* note 12, at 29.

The general rule of Article 9 is that a security agreement may validly provide that "collateral whenever acquired, shall secure all obligations covered by the security agreement."⁸⁰ Stated differently, Article 9 specifically authorizes after-acquired property clauses.⁸¹ A special rule, however, contains a prohibition with respect to consumer goods. This rule provides that "no security interest attaches under an after-acquired property clause . . . to consumer goods other than accessions . . . when given as additional security unless the debtor acquires rights in them within ten days after the secured party gives value."⁸² In other words, an after-acquired property clause may be a very useful device and certainly an approved one for use in a security agreement involving equipment as the collateral (including all farm equipment). The operation of the after-acquired property clause in a security agreement involving consumer goods, however, is restricted so as to be of little or no value.⁸³

The general rule under Article 9 is also that a security agreement may provide that obligations covered by it may include future advances or other value whether or not the advances or value are given pursuant to commitment.⁸⁴ There is no special treatment here with regard to consumer goods. Accordingly, it is likely that security agreements in which the collateral is either equipment or consumer goods will contain clauses permitting future advances.

The general rule is also that (in a situation where a security agreement is part of a sales transaction) the security agreement may validly contain the provision that the buyer agrees not to "assert . . . any claim or defense which he may have against the seller" against "an assignee who takes his assignment for value, in good faith and without notice of a claim or defense," except defenses

⁸⁰ U.C.C. §§ 9-204(1) and (3).

⁸¹ Spivack, *op. cit. supra* note 12, at 30-33.

⁸² U.C.C. § 9-204(4) (b).

⁸³ Pre-Code Nebraska law generally did not permit after-acquired property clauses to be effective. See *Battle Creek Valley Bank v. First Nat'l Bank*, 62 Neb. 825, 88 N.W. 145 (1901); *New Lincoln Hotel Co. v. Shears*, 57 Neb. 478, 78 N.W. 25 (1899); *Steele v. Ashenfelter*, 40 Neb. 770, 59 N.W. 361 (1894); *Cole v. Kerr*, 19 Neb. 553, 26 N.W. 598 (1886).

⁸⁴ U.C.C. § 9-204(5). Under pre-Code Nebraska law, future advances clauses apparently were not permitted, at least where there was no commitment to make them. No cases involving personal property have been found. See 3A NEBRASKA DIGEST, *Chattel Mortgages* § 110. There is a recently passed statute permitting real estate mortgages to secure future advances. See NEB. REV. STAT. § 76-238.01 (Supp. 1961).

of a type which may be asserted against a holder in due course of a negotiable instrument.⁸⁵ Further, a buyer "who as part of one transaction signs both a negotiable instrument and a security agreement" in effect includes such a provision in the security agreement.⁸⁶ However, a special rule of Article 9 contains a prohibition with respect to consumer goods. If there is a statute or decision in the state which establishes a different rule than the general rule for buyers of consumer goods, then that statute or decision controls.⁸⁷

II. UNSANCTIONED

There are some provisions for a security agreement which are expressly not sanctioned by the Code. One of the more basic prohibitions of the Code which applies to all secured transactions, regardless of the collateral is that "every contract or duty within this act imposes an obligation of good faith in its performance or enforcement."⁸⁸

The term "good faith" is defined to mean honesty in fact in the conduct of the transaction concerned.⁸⁹ The parties to a security agreement, by means of a provision therein, cannot waive the requirement that each party act in good faith.⁹⁰

Another of the more basic prohibitions is contained in Section 9-206 (2) which provides as follows:⁹¹

When a seller retains a purchase money security interest in goods the article on Sales (Article 2) governs the sale and any disclaimer, limitation or modification of the seller's warranties.

This provision is applicable in a situation where a security agreement is a part of a sales transaction. In the article of the Code on Sales, the transfer of personal property in a sale carries with it certain warranties both expressed and implied from the seller to the buyer. This section makes it clear that the Article on Sales governs these warranties, and the buyer may not inadvertently abandon these warranties by a clause in the security agreement.⁹²

⁸⁵ U.C.C. § 9-206(1).

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* There are virtually no such statutes or decisions. In Nebraska a case which perhaps should be examined in this regard is *Von Nordheim v. Cornelius*, 129 Neb. 719, 262 N.W. 832 (1935).

⁸⁸ U.C.C. § 1-203.

⁸⁹ U.C.C. § 1-201(19).

⁹⁰ Spivack, *op. cit. supra* note 12 at 36.

⁹¹ U.C.C. § 9-206(2).

⁹² U.C.C. § 9-206(2) (Official Comments).

III. UNDER NEBRASKA STATUTES

In passing, a note of warning should be sounded. The Code will not be the only statute governing many secured transactions involving consumer goods and equipment. The Code (as passed in Nebraska) provides as follows:⁹³

(2) A transaction, although subject to this article, is also subject to sections 8-401, to 8-432, 8-801 to 8-814, 21-1701 to 21-1753, 45-114 to 45-158, and 45-301 to 45-312, Reissue Revised Statutes of Nebraska, 1943, and amendments thereto, and in the case of conflict between the provisions of this article and any such statute, the provisions of such statute control. Failure to comply with any applicable statute has only the effect which is specified therein.

Some transactions involving consumer goods or equipment, and particularly the former, in addition to being subject to Article 9, will also be subject to some of the foregoing statutes of Nebraska. The Nebraska statutes may require that the security agreement contain information not required by the Code. An example of such a requirement is found in Section 8-809(2), which provides as follows:⁹⁴

At the time any such loan is made, the bank shall give the borrower a copy of the note or contract evidencing the loan. Every note or contract, evidencing such a loan, shall state the principle amount of the loan and rate of charge plainly expressed as a percentage per month computed on unpaid principle balances.

Moreover, it may be noted that certain provisions in security agreements apparently are prohibited by these statutes. In general, a confession of judgment, power of attorney to confess judgment, power of attorney to appear for a borrower in a judicial proceeding or agreement to pay the costs of collection or the attorneys fees is not allowed.⁹⁵

IV. UNDER CODE

During the existence of a secured transaction, in addition to the specific rights, obligations and remedies provided for in the security agreement, there are some specific rights, obligations and remedies provided for in the statute which may control. Those that

⁹³ U.C.C. § 9-203(2). Since the passage of the Code, some of the Nebraska statutes referred to in § 9-203(2) above quoted were amended by L.B.11 enacted by the Seventy-fourth (Extraordinary) Session of the Legislature of Nebraska, 1963, and then L.B.11 was held unconstitutional in *State Securities Co. v. Ley*, 177 Neb. 251, 128 N.W.2d 766 (1964).

⁹⁴ NEB. REV. STAT. § 8-809(2) (Reissue 1962).

⁹⁵ NEB. REV. STAT. §§ 8-430, 8-809 (Reissue 1962) and § 45-143 (Reissue 1960).

affect transactions involving consumer goods and equipment (they all have wider applicability also) will briefly be commented upon, reserving for later discussion most of those that arise upon default.

If the secured transaction should be in the nature of a pledge and the secured party should have possession of the collateral, then Section 9-207 comes into play. It provides in part as follows:⁹⁶

Rights and duties when collateral is in secured party's possession.

(1) A secured party must use reasonable care in the custody and preservation of collateral in his possession. . . .

(2) Unless otherwise agreed, when collateral is in the secured party's possession.

(a) reasonable expenses (including the cost of any insurance and payment of taxes or other charges) incurred in the custody, preservation, use or operation of the collateral are chargeable to the debtor and are secured by the collateral;

(b) the risk of accidental loss or damage is on the debtor to the extent of any deficiency in any effective insurance coverage;

(c) the secured party may hold as additional security any increase or profits (except money) received from the collateral, but money so received, unless remitted to the debtor, shall be applied in reduction of the secured obligation;

(d) the secured party must keep the collateral identifiable but fungible collateral may be commingled;

(e) the secured party may repledge the collateral upon terms which do not impair the debtor's right to redeem it.

(3) A secured party is liable for any loss caused by his failure to meet any obligation imposed by the preceding subsections but does not lose his security interest.

(4) A secured party may use or operate the collateral for the purpose of preserving the collateral or its value or pursuant to the order of a court of appropriate jurisdiction or, except in the case of consumer goods, in the manner and to the extent provided in the security agreement.

This section also applies if the secured party takes possession upon default.⁹⁷ The duty of due care in Section 9-207(1) may not be disclaimed by a provision in the security agreement; however, the parties in the security agreement may provide in any manner not manifestly unreasonable what shall constitute care in a particular case.⁹⁸ The rules in 9-207(2) may be varied in the security agreement. Note also the exception in the case of consumer goods to the

⁹⁶ U.C.C. § 9-207.

⁹⁷ U.C.C. § 9-207 (Official Comments).

⁹⁸ U.C.C. § 1-102(3). See also U.C.C. § 9-207 (Official Comments).

right of the secured party to use or operate the collateral in 9-207(4).

During the existence of the secured transaction the secured party has the duty to provide the debtor with information with respect to the obligation secured and with respect to the collateral.

The Code provides as follows:⁹⁹

Request for statement of account or list of collateral.

(1) A debtor may sign a statement indicating what he believes to be the aggregate amount of unpaid indebtedness as of a specified date and may send it to the secured party with a request that the statement be approved or corrected and returned to the debtor. When the security agreement or any other record kept by the secured party identifies the collateral a debtor may similarly request the secured party to approve or correct a list of the collateral.

(2) The secured party must comply with such a request within two weeks after receipt by sending a written correction or approval. If the secured party claims a security interest in all of a particular type of collateral owned by the debtor he may indicate that fact in his reply and need not approve or correct an itemized list of such collateral. If the secured party without reasonable excuse fails to comply he is liable for any loss caused to the debtor thereby; and if the debtor has properly included in his request a good faith statement of the obligation or a list of the collateral or both the secured party may claim a security interest only as shown in the statement against persons misled by his failure to comply. If he no longer has an interest in the obligation or collateral at the time the request is received he must disclose the name and address of any successor in interest known to him and he is liable for any loss caused to the debtor as a result of failure to disclose. A successor in interest is not subject to this section until a request is received by him.

(3) A debtor is entitled to such a statement once every six months without charge. The secured party may require payment of a charge not exceeding ten dollars for each additional statement furnished.

The section is elaborated upon by the official comments:¹⁰⁰

2. The financing statement required to be filed under this Article (see Section 9-402) may disclose only that a secured party may have a security interest in specified types of collateral owned by the debtor. Unless a copy of the security agreement itself is filed as the financing statement third parties are told neither the amount of the obligation secured nor which particular assets are covered. Since subsequent creditors and purchasers may legitimately need more detailed information, it is necessary to provide a procedure under which the secured party will be required to make disclosure. On the other hand, the secured party should not be

⁹⁹ U.C.C. § 9-208.

¹⁰⁰ U.C.C. § 9-208 (Official Comments).

under a duty to disclose details of business operations to any casual inquirer or competitor who asks for them. This Section gives the right to demand disclosure only to the debtor, who will typically request a statement in connection with negotiations with subsequent creditors and purchasers, or for the purpose of establishing his credit standing and proving which of his assets are free of the security interest. The secured party is further protected against onerous requests by the provisions that he need furnish a statement of collateral only when his own records identify the collateral and that if he claims all of a particular type of collateral owned by the debtor he is not required to approve an itemized list.

Whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, Section 9-404 requires that, on written demand by the debtor, the secured party must send the debtor a statement that he no longer claims a security interest under the financing statement. If the secured party fails to do so within ten days after the demand, he is liable to the debtor for one hundred dollars and in addition for actual loss his failure has caused the debtor.¹⁰¹

DEFAULT

The essence of a secured transaction are the rights, obligations, and remedies of the parties in the event of default. The potential satisfaction of the obligation by resort to the collateral is what distinguishes the secured transaction from the unsecured.

Although the rights, obligations and remedies which arise upon default may to some extent be created in the security agreement,¹⁰² for the most part they are created by express provisions of the statute.¹⁰³ In the discussion to follow, all rules regarding default are explicitly stated in Article 9, unless otherwise described.

Generally, a secured party on default has the right to possession of the collateral.¹⁰⁴ In taking possession, a secured party may proceed without judicial process if this can be done without breach of peace; otherwise, he must proceed by judicial process.¹⁰⁵ As already noted, if the security agreement so provides, the secured

¹⁰¹ These rules are modified from § 12 of the Uniform Conditional Sales Act which was never enacted in Nebraska.

¹⁰² U.C.C. § 9-501(1).

¹⁰³ U.C.C. § 9-501(1)(3). The latter subsection contains a lengthy list of the sections of Article 9 which deal with default and which cannot be waived in the security agreement.

¹⁰⁴ U.C.C. § 9-503. The security agreement may effectively waive this right of the secured party.

¹⁰⁵ *Ibid.*

party may require the debtor to assemble the equipment.¹⁰⁶ Without removal a secured party may render equipment usable on the debtor's premises, and may dispose of collateral on the debtor's premises.¹⁰⁷

After obtaining possession, the secured party may prepare or process the collateral for disposal in any commercially reasonable manner.¹⁰⁸ He may then dispose of the collateral in any reasonably commercial manner, including public sale, private sale, lease, or other form of disposal.¹⁰⁹ Unless the collateral is perishable or threatens to decline speedily in value or is a type customarily sold on a recognized market, reasonable notification of time and place of any public sale, or of the time *after* which a private sale or other disposition is to be made, must be sent by the secured party to the debtor.¹¹⁰ With reference to equipment, such notification must also be sent to any person who has a security interest therein and who has duly filed a financing statement or who is known to have a security interest therein.¹¹¹ With reference to consumer goods, such notification need not be sent to any person who has a security interest therein.¹¹² The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market at a private sale.¹¹³

When the collateral is disposed of after default, the disposition transfers to a purchaser for value all of the debtor's rights therein and discharges the security interest of the secured party and any security interest or lien subordinate thereto. The purchaser, if he acts in good faith, generally takes free of all such rights or interests even though the secured party fails to comply with the requirements of Article 9 or of judicial proceedings.¹¹⁴

The proceeds of the disposition shall be applied in the following order to:¹¹⁵

- (a) the reasonable expenses of retaking, holding, preparing for sale, selling and the like and, to the extent provided for in the

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ U.C.C. § 9-504(1).

¹⁰⁹ *Ibid.* There are no requirements for advertising a public sale. The only restriction on disposition is that it be commercially reasonable.

¹¹⁰ U.C.C. § 9-504(3).

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ U.C.C. § 9-504(4).

¹¹⁵ *Ibid.*

agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;¹¹⁶

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

If there is a surplus of the sale price over the indebtedness, the secured party must account to the debtor for any surplus.¹¹⁷ This obligation of the secured party may not be waived in the security agreement.¹¹⁸ If there is a deficiency, the debtor is liable therefore, but this may be waived in the security agreement.¹¹⁹

It may be that the parties will be better off if the collateral is not disposed of but is accepted by the secured party in satisfaction of the obligation. To regulate this contingency, Article 9 includes the rules in the next paragraph.

In the case of consumer goods, if the debtor has paid sixty per cent of the price or loan, and has not signed *after* default a statement renouncing his rights or modifying his rights, the secured party who has taken possession of the collateral *must* dispose of it in accordance with the rules heretofore discussed¹²⁰ within ninety days after he takes possession; otherwise, the debtor may have recovery for conversion.¹²¹ In the case of equipment, or in the case of consumer goods if the debtor has paid less than sixty per cent of the price or loan, the secured party may propose in writing to retain the collateral in satisfaction of the obligation. Notification of the proposal must be sent to the debtor and, if the collateral is equipment, to other secured parties; as in the case of disposition, if the collateral is consumer goods, no notification of the proposal need be given to persons having other security interests.¹²² If the debtor or any other person entitled to notification objects in writing

¹¹⁶ Attorneys' fees generally are not recoverable in Nebraska. See, e.g. NEB. REV. STAT. § 8-809 (Supp. 1961).

¹¹⁷ U.C.C. § 9-504(2).

¹¹⁸ U.C.C. § 9-501(3) (a).

¹¹⁹ U.C.C. § 9-504(2).

¹²⁰ U.C.C. § 9-504.

¹²¹ U.C.C. § 9-505(1).

¹²² U.C.C. § 9-505(2).

within thirty days after receipt of the notification or if any other secured party objects in writing within thirty days after the secured party obtains possession, the secured party must dispose of the collateral.¹²³

At any time before the secured party has disposed of the collateral, or has entered into a contract for its disposition the debtor may redeem by tendering fulfillment of all obligations secured by the collateral as well as the secured party's expenses.¹²⁴

The secured party may be restrained if he proceeds improperly upon default or he may be liable for failing to proceed properly. Section 9-507(1) provides these remedies:¹²⁵

If it is established that the secured party is not proceeding in accordance with the provisions of this Part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with provisions of this Part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus ten per cent of the cash price

Its meaning is explained in the official comments as follows:¹²⁶

The principal limitation on the secured party's right to dispose of collateral is the requirement that he proceed in good faith (Section 1-203) and in a commercially reasonable manner. See Section 9-504. In the case where he proceeds, or is about to proceed, in a contrary manner, it is vital both to the debtor and other creditors to provide a remedy for the failure to comply with the statutory duty. This remedy will be of particular importance when it is applied prospectively before the unreasonable disposition has been concluded. This Section therefore provides that a secured party proposing to dispose of collateral in an unreasonable manner, may, by court order, be restrained from doing so, and such an order might appropriately provide either that he proceed with the sale or other disposition under specified terms and conditions, or that the sale be made by a representative of creditors where insolvency proceedings have been instituted. The Section further provides for damages where the unreasonable disposition has been concluded, and, in the case of consumer goods, states a minimum recovery.

¹²³ *Ibid.*

¹²⁴ U.C.C. § 9-506.

¹²⁵ U.C.C. § 9-507(1).

¹²⁶ U.C.C. § 9-507(1) (Official Comments).

CONCLUSION

The foregoing constitute most of the rules of Article 9 which apply generally to transactions within the scope of the article including those involving consumer goods and equipment and which apply specifically to transactions involving consumer goods and equipment and no others. There are some rules which have not been discussed.¹²⁷

In the belief that much more benefit results from approaching Article 9 positively with primary concern for its provisions than from approaching it negatively with primary concern for the existing law it changes, little attention was given to pre-Code Nebraska law, noting it only in the footnotes and only occasionally. No cases interpreting the Code have been cited because the cases that exist are few in number, often unreported, and when reported, with reference to the transactions being here considered at least, merely restate the clear language of the Code. It is hoped that this paper will be of some small assistance to its readers.

¹²⁷ For example, the rules stating the rights of the secured party in proceeds have not been covered, to name only one significant area.