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UCC DIVISION

INSIDE THIS ISSUE:

Introduction 1

Guest Article

Security interests in deposit accounts, securities accounts and equity interests 3

A UCC Article of Interest

Joint Review Committee for Article 9 of the UCC Meeting Notes for October 3-5, 2008 16

INTRODUCTION

First of all, the UCC Division of First American hopes that all our readers of the Newsletter had a very happy holiday season, we at First American wish you all the best for 2009. We all know that 2009 will be, if anything, an interesting year and we hope that living in interesting times will bring our readers good fortune.

As some of you may be aware, there is a review process underway to make certain amendments to Article 9, primarily in clarification of a number of issues through change to the Official Comments but also through certain substantive amendments to the statute itself. Jim Prendergast, general counsel of the UCC Division, is an official observer to the review process. The formal Joint Review Committee,[1] established by the American Law Institute and the Uniform Law Commission held its first meeting in Chicago from October 3-5, 2008. The next meeting of the Review Committee is currently scheduled for the first weekend in February 2009. Because of the importance of the revision process and to solicit your comments to the process, we include in this Newsletter the notes on the meeting prepared by Professor Stephen L. Sepinuck of Gonzaga University School of Law. Professor Sepinuck is the ABA Advisor to the Review Committee.

The Report of Professor Sepinuck on the results of the October meeting of the Joint Review Committee begins on page 26 of the Newsletter.

We will also report in future issues of the Newsletter the results of the deliberations of there ABA Filing Office Operations and Search Logic Joint Task Force, established by the Commercial Finance and UCC Committees of the Business Law Section of which Jim Prendergast is a co-chair. The Task Force is currently engaged in commenting on suggested changes to the safe harbor forms of financing statement and amendment and other issues involving Section 9-5231 of the UCC.

In addition to the Report of Professor Sepinuck, this Newsletter also includes an excellent article by James S. Cochran, a real estate partner resident in the Los Angeles office of Seyfarth Shaw LLP and vice chair of the firm's Distressed Asset Resolution Team, titled *Security Interests in Deposit Accounts, Securities Accounts and Equity Interests.* These collateral categories bring with them an array of very technical rules under not only Article 9 but also Article 8 of the UCC. Mr. Cochran sets out these rules in a clear and concise form and we recommend this article to any practitioner trying to perfect a security interest in such categories of collateral.

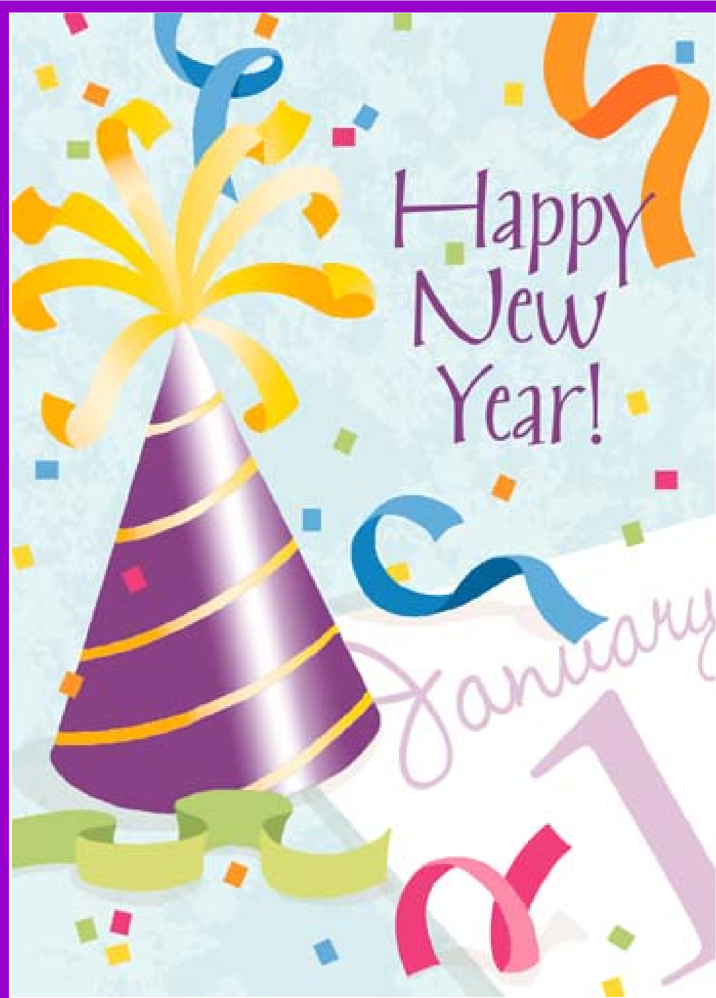
The Newsletter provides these offerings for your consideration as part of our ongoing effort to be more to the legal and lending community than merely the purveyor of UCC insurance. We try to be value added through substantive content. If there are topics you wish us to cover in the Newsletter please e-mail us at jprendergast@firstam.com.

[1] The members of the Review Committee include Edwin E. Smith, Chair, Bingham McCutchen LLP, E. Carolan Berkley, Stradley Ronon Stevens & Young, LLP, Thomas J. Buiteweg, Hudson Cook, LLP, William H. Henning, University of Alabama School of Law, John T. McGarvey, Morgan & Pottinger, P.S.C., Harry C. Sigman, Law Offices of Harry C. Sigman, Steven O. Weise, Proskauer Rose LLP, Professor Steven L. Harris, Reporter, Chicago-Kent College of Law, Carl Bjerre, University of Oregon School of Law, Neil B. Cohen, Brooklyn Law School, Gail Hillebrand, Consumers Union, Charles W. Mooney, Jr., University of Pennsylvania School of Law, Sandra S. Stern, Nordquist & Stern PLLC, and James J. White, University of Michigan School of Law. The Advisors to the Review Committee are Professor Sepinuck, ABA Advisor, and John F. Hilson, Business Law Section Advisor, Paul, Hastings, Janofsky & Walker LLP.

Volume 5, Issue 1

Also, staying with the theme of value added, we also had our first external Webinar on Article 9 Foreclosure Issues with over 800 attending. Hopefully, many of our readers attended and found the webinar valuable. We appreciate any comments you may have and solicit your suggestions for future webinar topics. Please contact Gina Sanchez at gsanchez@firstam.com for information.

Finally, remember, we are the only UCC insurance company that is also a full service search and filing company bringing our high level of expertise to that market. Remember land title expertise is one thing; UCC expertise is something else. As always, we very much appreciate your business.



Happy New Year!

Wishing you all the best in 2009

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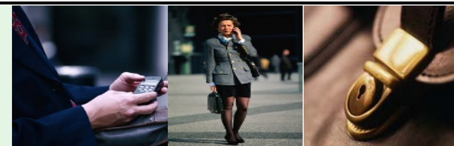
Guest Article



SECURITY INTERESTS IN DEPOSIT ACCOUNTS, SECURITIES ACCOUNTS AND EQUITY INTERESTS

JAMES S. COCHRAN
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NOVEMBER 20, 2008

I. PRELIMINARY MATTERS

A. **Focus of Outline**. The focus of this outline is on the rules of law in the Uniform Commercial Code (the "UCC")[1] that apply to *commercial* transactions in which security interests in deposit accounts, securities accounts or equity interests are involved. Unless otherwise noted, this outline does not address non-UCC rules of law (such as those relating to tax and other statutory liens) nor does it discuss the provisions of the UCC that affect *consumer* transactions.

B. **Arcane Matters**. The UCC contains a number of provisions that are of limited interest to general practitioners (*e.g.*, the special rule regarding attachment set forth in Section 9-206). For the most part, these provisions will not be discussed in this outline.

II. SECURITY INTERESTS IN DEPOSIT ACCOUNTS

A. Definition.

1. ***In general***. For Article 9 purposes, a "deposit account" is a "demand, time, savings, passbook or similar account maintained with a bank."[2]

2. ***Exclusions***. By definition, a "deposit account" excludes investment property (*e.g.*, securities accounts) and accounts evidenced by an instrument (*e.g.*, certain certificates of deposit).[3]

B. Attachment.

1. ***Governing law***. The law governing "attachment" of a security interest in a deposit account is generally determined by agreement of the debtor and the secured party.[4]

2. ***Elements of attachment***. As a general rule, a security interest "attaches" to a deposit account when it becomes enforceable against the debtor with respect to the deposit account.[5] Subject to certain exceptions,[6] a security interest in a deposit account is enforceable only if the following requirements are met:

   a. Value. "Value" (as defined in Article 1) has been given.[7]

   b. Rights. The debtor has rights in the collateral (i.e., the deposit account) or the power to transfer rights in the collateral to a secured party.[8]

   c. Evidence of agreement. One of the following conditions is met:

      i. The debtor has authenticated a security agreement that describes the collateral (i.e., the deposit account).[9]

      ii. The secured party has "control" under Section 9-104 pursuant to the debtor's security agreement.[10]

C. Perfection

1. ***Governing law***.

   a. Special choice-of-law rule. The local law of the "bank's jurisdiction" governs the perfection of a security interest in a deposit account maintained with that bank.[11]

   b. Bank's jurisdiction. The "bank's jurisdiction" is generally determined by an agreement between the bank and its customer governing the deposit account.[12] Note that the bank's customer and the debtor may not be the same person.[13]

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1 In this outline, all references to the UCC are to the current official text of the UCC promulgated by the UCC's sponsoring organizations, The American Law Institute and the Uniform Law Commission, including the amendment to Section 1-301 that was approved on May 21, 2008. Unless otherwise indicated, all "article" and "section" references in this outline are to articles and sections of the UCC.

2 UCC § 9-102(a)(29).

3 See UCC § 9-102(a)(29) & cmt. 12.

4 See UCC § 1-301(a); see also UCC § 9-301 cmt. 2.

5 See UCC § 9-203(a).

6 These exceptions are generally set forth in Section 9-203(c) through (i).

7 See UCC § 9-203(b)(1). For the definition of "value" in this context, see Section 1-204.

8 See UCC § 9-203(b)(2).

9 See UCC § 9-203(b)(3)(A). Under Article 9, the term "authenticate" is broadly defined. See UCC § 9 102(a)(7).

10 See UCC § 9-203(b)(3)(D). Note that an authenticated security agreement, although it may be advisable for evidentiary and other reasons, is not required in order to satisfy this condition. See UCC § 9-203 cmt. 4.

11 See UCC § 9-304(a). In this and similar contexts, the "local law" of a jurisdiction refers to the jurisdiction's substantive law and not its choice-of-law rules. See UCC § 9-301 cmt. 3.

12 The bank's jurisdiction for Article 9 purposes is not necessarily the same as the bank's jurisdiction for other purposes. For example, for federal diversity jurisdiction purposes, a national bank is deemed located in the state in which the bank has its "main office" as set forth in its articles of association. See Wachovia Bank v. Schmidt, 546 U.S. 303, 318 (2006).

13 For example, the bank's customer may be the secured party. See UCC § 9-104(a)(3) & cmt. 3.

i. If an agreement between the bank and its customer governing the deposit account expressly provides that a particular jurisdiction is the bank's jurisdiction for purposes of Article 9 (or, more narrowly, part 3 of Article 9) or the UCC, then that jurisdiction is the bank's jurisdiction.[14]

ii. If (i) does not apply and an agreement between the bank and its customer governing the deposit account expressly provides that the agreement is governed by the law of a particular jurisdiction, then that jurisdiction is the bank's jurisdiction.[15]

iii. If neither (i) nor (ii) applies, other rules apply to determine the bank's jurisdiction.[16]

c. Relation to general choice-of-law rule. Note that the foregoing set of rules represents a departure from the general rule that the law governing perfection of a non-possessory security interest is the law of the jurisdiction where the debtor is deemed to be located under Section 9-307.[17]

2. ***Sole method of perfection***. A security interest in a deposit account as original collateral (as distinguished from proceeds) may be perfected only by "control" under Section 9-104.[18]

3. ***Types of control***. Under Section 9-104, there are three ways for a secured party to obtain control of a deposit account:[19]

a. Type 1 – serve as depositary bank. "[T]he secured party is the bank with which the deposit account is maintained."[20]

b. Type 2 – enter into control agreement. The debtor, the secured party and the bank agree in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor.[21] This authenticated record is typically referred to as a deposit account control agreement.[22]

c. Type 3 – become bank's customer. "[T]he secured party becomes the bank's customer with respect to the deposit account."[23]

4. ***Access to funds by debtor***. A secured party may obtain control of a deposit account even if the debtor also retains the right to direct the disposition of the funds in the deposit account.[24] Often, however, the debtor's right to reach the funds in the deposit account will be cut off in the event of a default.[25]

D. **Priority**.

1. ***Governing law***. The law governing priority of a security interest in a deposit account is the same as the law governing perfection: it is the local law of the bank's jurisdiction.[26] The rules for determining the bank's jurisdiction are discussed in part II.C.1.b above.

2. ***Order of priority***. With respect to a deposit account that constitutes original collateral, following are the relative priorities of the various rights and interests in the deposit account that may be held by the depositary bank and one or more secured parties:[27]

a. Bank's recoupment right. The depositary bank's right of recoupment has priority over a conflicting security interest of any type.[28]

b. Type 3 control. A security interest perfected by "type 3" control has priority over a security interest held by the depositary bank[29] or, if based on a claim against the debtor, a right of set-off held by the depositary bank.[30]

c. Bank's set-off right. Except as provided in 2.b. above, the depositary bank's right of set-off has priority over a conflicting security interest held by a secured party.[31]

d. Bank's security interest. Except as provided in 2.b. above, a security interest held by the depositary bank has priority over a conflicting security interest held by another secured party.[32]

e. Multiple secured parties with control. Except as provided in 2.b. and 2.d. above, security interests perfected by control rank according to priority of time in obtaining control.[33]

f. Secured party with control versus secured party without control. A security interest held by a secured party that has control has priority over a conflicting security interest held by a secured party that does not have control.[34]

14 See UCC § 9-304(b)(1). Note that, in a number of jurisdictions, the relevant agreement for this purpose is between the bank and the debtor rather than between the bank and its customer. See, e.g., § 9304(b)(1), N.Y. U.C.C. Law § 9-304(b)(1).

15 See UCC § 9-304(b)(2).

16 See UCC § 9-304(b)(3)-(5).

17 See UCC § 9-301 cmt. 4 (regarding the general choice-of-law rule), cmt. 5 (regarding the exception to that rule for deposit accounts).

18 See UCC §§ 9-312(b)(1), 9-314(a). For the special rules applicable to perfection of a security interest in a deposit account that constitutes proceeds, see Section 9-315(c) and (d). Under these rules, if a security interest in the original collateral was perfected, a security interest in any "identifiable cash proceeds" of that collateral will remain perfected indefinitely. See UCC § 9-315(d)(2) & cmt. 7. The defined term "cash proceeds" includes, among other things, deposit accounts. See UCC § 9-102(a)(9).

19 Certain jurisdictions may have non-uniform provisions providing additional methods for obtaining control. For example, Delaware's version of the Uniform Commercial Code provides two additional ways of obtaining control of a deposit account. See Del. Code Ann. tit. 6, § 9-104(a)(4)-(5).

20 UCC § 9-104(a)(1).

21 See UCC § 9-104(a)(2).

22 For a model form of deposit account control agreement prepared by a special ABA task force, see Initial Report of the Joint Task Force on Deposit Account Control Agreements, 61 Business Lawyer 745, 781-96 (2006), available at http://meetings.abanet.org/webupload/commupload/CL710060/otherlinks_files/int14.PDF. For various additional provisions or "inserts" prepared by the ABA task force for possible use in connection with the model form, see http://www.abanet.org/dch/committee.cfm?com=CL710060.

23 UCC § 9-104(a)(3). For this purpose, the term "customer" has the meaning specified in Section 4-104. See UCC § 9-104 cmt. 3.

24 See UCC § 9-104(b).

25 Generally, the debtor's ability to reach the funds on deposit is cut off by the secured party giving a special written notice to the depositary bank and allowing the depositary bank a reasonable time to act on the notice. In many forms of deposit account control agreement, this notice is referred to as a "notice of exclusive control." In the model form of deposit account control agreement mentioned in note 22 above, this notice is called an "Initial Instruction," the form of which is intended to be attached as an exhibit to the agreement.

26 See UCC § 9-304(a).

27 Note that other claimants may have priority over a secured party under certain circumstances. For example, a security interest may be subordinate in whole or in part to the rights of a person who becomes a lien creditor before the security interest is perfected or, in some situations involving future advances, after the security interest is perfected. See UCC §§ 9-317(a), 9-323(b). Similarly, in some jurisdictions the law may provide that specified statutory liens and other claims have priority over a security interest. See, e.g., Cal. Com. Code § 9201(b) (listing various statutes to which a transaction subject to California's version of Article 9 is subject); see also UCC Committee, State Bar of California, Hidden Liens Report (2008) (providing a detailed analysis of certain statutory liens arising under California law).

28 See UCC § 9-340(a).

29 See UCC § 9-327(4).

30 See UCC § 9-340(c).

31 See UCC § 9-340(a), (c).

32 See UCC § 9-327(3).

33 See UCC § 9-327(2).

34 See UCC § 9-327(1) & cmt. 3.

g. Other situations. Priority among conflicting security interests not addressed by the above rules is determined by the general priority rules set forth in Section 9-322.[35]

E. **Special Issues**.

1. ***Proceeds***. If and to the extent that a deposit account constitutes identifiable cash proceeds of other collateral in which a secured party had a perfected security interest, the secured party's interest in such proceeds will remain perfected indefinitely.[36]

2. ***Transfers of deposit account funds***. A transferee of funds from a deposit account generally takes the funds free of a security interest in the deposit account.[37] For this purpose, the term "transferee" excludes the debtor.[38]

3. ***Securities accounts***. If by agreement the funds in a bank account are to be invested in debt or equity securities, the bank account is likely to be a securities account rather than a deposit account. In that event, different rules regarding attachment, perfection and priority apply. For details, see part III below.

III. SECURITY INTERESTS IN SECURITIES ACCOUNTS

A. **Key Definitions**.

1. ***Securities account.*** A "securities account" is "an account to which a financial asset is or may be credited in accordance with an agreement under which the person maintaining the account undertakes to treat the person for whom the account is maintained as entitled to exercise the rights that comprise the financial asset."[39]

2. ***Financial asset.*** A "financial asset" is any of the following:

a. Security. A "security" as defined in Article 8.[40]

b. Traded obligation or medium of investment. "[A]n obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person, which is, or is of a type, dealt in or traded on financial markets, or which is recognized in any area in which it is issued or dealt in as a medium for investment."[41]

c. Property treated as financial asset by agreement. "[A]ny property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under [Article 8 of the UCC]."[42]

d. Interest in partnership or LLC. If held in a securities account, an interest in a partnership or limited liability company.[43]

e. Negotiable instrument. If held in a securities account, a negotiable instrument governed by Article 3.[44]

f. Option issued by clearing corporation. "[A]n option or similar obligation issued by a clearing corporation to its participants."[45]

Note: depending on the context, the term "financial asset" may mean either the interest itself or the means by which a person's claim to the interest is evidenced.[46]

3. ***Securities intermediary.*** A "securities intermediary" is, in general, "a person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity."[47]

4. ***Entitlement holder.*** An "entitlement holder" is "a person identified in the records of a securities intermediary as the person having a security entitlement against the securities intermediary."[48]

5. ***Security entitlement.*** A "security entitlement" refers to the rights and property interest of an entitlement holder with respect to a financial asset specified in part 5 of Article 8 of the UCC.[49]

6. ***Entitlement order.*** An "entitlement order" is "a notification communicated to a securities intermediary directing transfer or redemption of a financial asset to which the entitlement holder has a security entitlement."[50]

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35 See UCC § 9-322(a).
36 See UCC § 9-315(d)(2) & cmt. 7. If the proceeds are commingled with other property, the secured party may identify the proceeds by using methods of tracing that other law permits with respect to the type of property involved, including (in the case of a deposit account) equitable methods such as the lowest intermediate balance rule. See UCC § 9-315(b)(2) & cmt. 3.
37 See UCC § 9-332(b). This rule does not apply if the transferee acts in collusion with the debtor in violating the rights of the secured party. See UCC § 9-332(b).
39 See UCC § 9-332 cmt. 2.
39 UCC § 8-501(a).
40 See UCC § 8-102(a)(9)(i). For more on the definition of "security," see part IV.A.1 below.
41 UCC § 8-102(a)(9)(ii).
42 UCC § 8-102(a)(9)(iii). Some commentators have opined that this provision is sufficiently broad that even a ham sandwich may constitute a financial asset if the parties so agree. See, e.g., Kenneth C. Kettering, Can a ham sandwich be a financial asset?, http://lists.washlaw.edu/mailman/private/ucclaw-l/2006-October/012375.html (note that, in order to view this post, one must subscribe to the UCCLaw-L listserv by completing the form at http://lists.washlaw.edu/mailman/listinfo/ucclaw-l if one is not already a subscriber).
43 See UCC § 8-103(c).
44 See UCC § 8-103(d).
45 UCC § 8-103(e). The term "clearing corporation" is defined in Section 8-102(a)(5).
46 See UCC § 8-102(a)(9). For example, in the case of a certificated security, the defined term may refer either to the underlying intangible interest or to the security certificate representing that interest. Similarly, in the case of a security or other asset held through a securities account, the defined term may refer either to the underlying security or other asset or to the related security entitlement." See UCC § 8-102 cmt. 9.
47 UCC § 8-102(a)(14)(ii). The defined term also includes a "clearing corporation." See UCC § 8-102(a)(14)(i).
48 UCC § 8-102(a)(7). The defined term also includes a person who acquires a security entitlement with respect to a financial asset pursuant to Section 8-501(b)(2) (providing that a person acquires a security entitlement if a securities intermediary receives a financial asset from the person or acquires a financial asset for the person and, in either case, accepts it for credit to the person's securities account) or Section 8-501(b)(3) (providing that a person acquires a security entitlement if a securities intermediary becomes obligated under other law, regulation, or rule to credit a financial asset to the person's securities account). See UCC § 8-102(a)(7).
49 See UCC § 8-102(a)(17). From the perspective of an entitlement holder, a "security entitlement" is "both a package of personal rights against the securities intermediary and an interest in the property held by the securities intermediary." UCC § 8-102 cmt. 17. The package of personal rights consists of the rights correlative to the five core duties of a securities intermediary: (i) the duty to maintain financial assets corresponding the security entitlements of the entitlement holder as set forth in Section 8-504; (ii) the duty to take appropriate action to obtain payments or distributions with respect to financial assets as set forth in Section 8-505; (iii) the duty to exercise rights with respect to financial assets as directed by the entitlement holder as set forth in Section 8-506; (iv) the duty to comply with entitlement orders as set forth in Section 8-507; and (v) the duty to change a security entitlement to another form of holding as set forth in Section 8-508. See UCC §§ 8-504 to 8-508. The interest in property is primarily outlined in Section 8-503, which provides (among other matters) that to the extent necessary for the securities intermediary to satisfy all security entitlements with respect to a particular financial asset, all interests in that financial asset held by the securities intermediary are held by the securities intermediary for the related entitlement holders, are not property of the securities intermediary and, subject to certain exceptions, are not subject to claims of creditors of the securities intermediary and, further, that an entitlement holder's property interest with respect to a particular financial asset is a pro rata property interest in all interests in that financial asset held by the securities intermediary. See UCC § 8-503(a), (b).
50 UCC § 8-102(a)(8). Note that the term "entitlement order" does not cover all directions that a customer might give a broker concerning securities held through the broker. For example, the term "entitlement order" does not refer to instructions to a broker to enter into contracts for the purchase of securities. See UCC § 8-507 cmt. 5.

7. ***Investment* property.** Under Article 9, "investment property" includes (among other things) securities accounts and security entitlements.[51]

8. ***Adverse claim***. An "adverse claim" means "a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset."[52]

B. Attachment.

1. ***Governing law***. The law governing attachment of a security interest in a securities account is generally determined by agreement of the debtor and the secured party.[53]

2. ***Elements of attachment***. As a general rule, a security interest attaches to a securities account when it becomes enforceable against the debtor with respect to the securities account.[54] Subject to certain exceptions,[55] a security interest in a securities account is enforceable only if the following requirements are met:

   a. Value. "Value" (as defined in Article 1) has been given.[56]

   b. Rights. The debtor has rights in the collateral (e.g., the securities account) or the power to transfer rights in the collateral to a secured party.[57]

   c. Evidence of agreement. One of the following conditions is met:

      i. The debtor has authenticated a security agreement that describes the collateral (e.g., the securities account).[58]

      ii. The secured party has "control" under Section 9-106 pursuant to the debtor's security agreement.[59]

C. Perfection.

1. ***Governing law***.

   a. Perfection by filing. If a security interest in a securities account is perfected by filing, the law governing perfection is the local law of the jurisdiction in which the debtor is deemed to be located under Section 9-307.[60]

   b. Perfection by control. If a security interest in a securities account is perfected by "control" under Section 9-106, the law governing perfection is the local law of the "securities intermediary's jurisdiction" as specified in Section 8-110(e).[61]

      i. The "securities intermediary's jurisdiction" is generally determined by an agreement between the securities intermediary and its entitlement holder governing the securities account.[62]

         a. If the agreement between the securities intermediary and its entitlement holder expressly provides that a particular jurisdiction is the securities intermediary's jurisdiction for purposes of Article 8 (or, more narrowly, part 1 of Article 8) or the UCC, then that jurisdiction is the securities intermediary's jurisdiction.[63]

         b. If (a) does not apply and the agreement between the securities intermediary and its entitlement holder expressly provides that the agreement is governed by the law of a particular jurisdiction, then that jurisdiction is the securities intermediary's jurisdiction.[64]

         c. If neither (a) nor (b) applies and the agreement between the securities intermediary and its entitlement holder expressly provides that the securities account is maintained at an office in a particular jurisdiction, then that jurisdiction is the securities intermediary's jurisdiction.[65]

      ii. If the rules set forth in (i) above do not apply, other rules apply to determine the securities intermediary's jurisdiction.[66]

2. ***Methods of perfection***.

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51 See UCC § 9-102(a)(49).

52 UCC § 8-102(a)(1). As noted above, if a person holds a security or other financial asset through a securities account, the term "financial asset" may, as context requires, refer either to the underlying security or other financial asset or to the person's security entitlement. See UCC § 8-102 cmt. 9.

53 See UCC § 1-301(a); see also UCC § 9-301 cmt. 2.

54 See UCC § 9-203(a).

55 These exceptions are generally set forth in Section 9-203(c) through (i).

See UCC § 9-203(b)(1). On the meaning of "value" for this purpose, see note 7 above.

57 See UCC § 9-203(b)(2).

58 See UCC § 9-203(b)(3)(A). For purposes of attachment, it is not necessary to describe either generally or specifically all of the security entitlements carried in the securities account: under Article 9, attachment of a security interest in a securities account also constitutes attachment of a security interest in the security entitlements carried therein. See UCC § 9-203(h).

59 See UCC § 9-203(b)(3)(D). Under Article 9, a secured party having control of all security entitlements carried in a securities account has "control" over the securities account. See UCC § 9-106(c).

60 See UCC § 9-305(c)(1).

61 See UCC § 9-305(a)(3).

62 See UCC § 8-110(e)(1)-(3).

63 See UCC § 8-110(e)(1).

64 See UCC § 8-110(e)(2).

65 See UCC § 8-110(e)(3).

66 See UCC § 8-110(e)(4)-(5).

a. Filing. A security interest in a securities account may be perfected by filing a financing statement.[67] Note that perfection of a security interest in a securities account also constitutes perfection of a security interest in the security entitlements carried in the securities account.[68]

b. Control. A security interest in a securities account may also be perfected by "control" under Section 9-106, which for this purpose has the meaning set forth in Section 8-106.69 As noted above with respect to filing, perfection of a security interest in a securities account also constitutes perfection of a security interest in the security entitlements carried in the securities account.[70]

3. ***Types of control***. Under Section 8-106, there are four ways for a secured party to obtain control of a security entitlement carried in a securities account:[71]

a. Type A – become entitlement holder. The secured party becomes the entitlement holder.[72]

b. Type B – enter into control agreement. The securities intermediary has agreed that it will comply with entitlement orders originated by the secured party without further consent by the entitlement holder.[73] This agreement is often referred to as a securities account control agreement.[74]

c. Type C – use agent having control. Another person has control of the security entitlement on behalf of the secured party or, having previously acquired control of the security entitlement, acknowledges that it has control on behalf of the secured party.[75]

d. Type D – serve as securities intermediary. With respect to a security entitlement, the secured party is the entitlement holder's own securities intermediary and the entitlement holder grants to the secured party an interest in the security entitlement.[76]

D. Priority.

1. ***Governing law***. The law governing priority in a securities account is the local law of the "securities intermediary's jurisdiction" as specified in Section 8-110(e).[77] The rules for determining the securities intermediary's jurisdiction are discussed in part III.C.1.b above.

2. ***Order of priority***. Following are the relative priorities of the rights of secured parties and other persons asserting competing claims to or interests in a securities account and/or the security entitlements carried therein:

a. Article 9 rules. The Article 9 priority rules are as follows:

(i) Priority among conflicting security interests.

a. "A security interest held by a securities intermediary in a security entitlement or a securities account maintained with the securities intermediary has priority over a conflicting security interest held by another secured party."[78]

b. Except as set forth in rule (a) above, conflicting security interests held by secured parties, each of which has control under Section 8-106, rank according to priority in time of the following:

1. If the secured party obtained control under Section 8-106(d)(1) (i.e., "type A" control), the secured party's becoming the person for which the securities account is maintained.[79]

2. If the secured party obtained control under Section 8-106(d)(2) (i.e., "type B" control), the securities intermediary's agreement to comply with the secured party's entitlement orders with respect to security entitlements carried or to be carried in the securities account.[80]

3. If the secured party obtained control through another person under Section 8-106(d)(3) (i.e., "type C" control), the time on which priority would be based under the above rules if the other person were the secured party.[81]

67 See UCC §§ 9-312(a) (a security interest in investment property may be perfected by filing), 9-102(a)(49) (investment property includes securities accounts).

68 See UCC § 9-308(f).

69 See UCC §§ 9-314(a) (a security interest in investment property may be perfected by control under Section 9 106), 9-102(a)(49) (investment property includes a security entitlement), 9-106(a) (a person has control of a security entitlement as provided in Section 8-106), 9-106(c) (a secured party having control of all security entitlements carried in a securities account has control over the securities account).

70 See UCC § 9-308(f).

71 Certain jurisdictions may have non-uniform provisions providing additional methods for obtaining control. For example, Delaware's version of the Uniform Commercial Code provides a fifth way of obtaining control of a security entitlement. See Del. Code Ann. tit. 6, § 8-106(d)(4).

72 See UCC § 8-106(d)(1).

73 See UCC § 8-106(d)(2). Note that a secured party who satisfies the requirements of this provision has control of the security entitlement even if the entitlement holder retains the right to make substitutions for the security entitlement, to originate entitlement orders to the securities intermediary or otherwise to deal with the security entitlement. See UCC § 8-106(f).

74 For a model form of securities account control agreement, see Howard Darmstadter, Sandra M. Rocks & Steven O. Weise, A Model "Account Control Agreement" Under the New Article 8 of the Uniform Commercial Code, 53 Business Lawyer 139 (1997). An updated version of the model form contained in that article is available at http://www.abanet.org/buslaw/newsletter/0013/materials/accountcontrol.pdf.

75 See UCC § 8-106(d)(3).

76 See UCC § 8-106(e). A common transaction covered by this type of control is a margin loan from a broker to its customer. See UCC § 8-106 cmt. 6.

77 See UCC § 9-305(a)(3).78 UCC § 9-328(3).

79 See UCC § 9-328(2)(B)(i).

80 See UCC § 9-328(2)(B)(ii).

81 See UCC § 9-328(2)(B)(iii).

c. A security interest held by a secured party having control of a securities account and/or the security entitlements carried therein has priority over a security interest held by a secured party that does not have control.[82]

d. In all other cases, priority among conflicting security interests in a securities account and/or the security entitlements carried therein is governed by the general rules set forth in Sections 9-322 and 9-323.[83]

ii. Priority between security interest and rights of lien creditor.[84]

a. Rule 1: A security interest is subordinate to the rights of a person that becomes a lien creditor before the earlier of the following times: (1) the time when the security interest is perfected; and (2) the time when one of the conditions specified in Section 9-203(b)(3) is met and a financing statement covering the collateral (e.g., the securities account) is filed.[85]

b. Rule 2: A security interest is subordinate to the rights of a person who becomes a lien creditor to the extent that the security interest secures an advance made more than 45 days after the person becomes a lien creditor unless either (1) the advance is made without knowledge of the lien or (2) the advance is made pursuant to a commitment entered into without knowledge of the lien.[86]

c. Caveat: Rule 1 does not elevate the priority of a security interest that is subordinate to the rights of a lien creditor under Rule 2; it only subordinates.[87]

iii. Priority between unperfected security interest and rights of buyer.

a. A buyer of investment property other than a certificated security takes free of a security interest if the buyer gives value without knowledge of the security interest and before the security interest is perfected.[88]

b. As noted in part III.A.7 above, "investment property" includes securities accounts and security entitlements.[89]

b. Article 8 rules. The Article 8 priority rules are as follows:[90]

i. Under Section 8-502, an action based on an adverse claim to a financial asset, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against a person (e.g., a secured party) who acquires a security entitlement under Section 8-501 for value and without notice of the adverse claim.[91] In addition, if an adverse claim could not have been asserted against an entitlement holder under Section 8-502, the adverse claim cannot be asserted against a person who purchases a security entitlement, or an interest therein, from the entitlement holder.[92] This is the familiar "shelter" principle.[93]

ii. In a case not covered by the priority rules in Article 9, a securities intermediary as purchaser has priority over a conflicting purchaser who has control.[94]

iii. In a case not covered by the priority rules in Article 9, except as set forth in rule (ii) above, purchasers who have control rank according to priority in time of the following:

a. If the purchaser obtained control under Section 8-106(d)(1) (i.e., "type A" control), the purchaser's becoming the person for whom the securities account, in which the security entitlement is carried, is maintained.[95]

b. If the purchaser obtained control under Section 8-106(d)(2) (i.e., "type B" control), the securities intermediary's agreement to comply with the purchaser's entitlement orders with respect to security entitlements carried or to be carried in the securities account in which the security entitlement is carried.[96]

c. If the purchaser obtained control through another person under Section 8-106(d)(3) (i.e., "type C" control), the time on which priority would be based under this rule (iii) if the other person were the secured party.[97]

iv. In a case not covered by the priority rules in Article 9, a purchaser for value of a security entitlement, or an interest therein, who obtains control has priority over a purchaser of a security entitlement, or an interest therein, who does not obtain control.[98]

82 See UCC § 9-328(1).

83 See UCC § 9-328(7).

84 Under Section 9-102, a "lien creditor" is defined as any of the following persons: (i) a creditor that has acquired a lien on the property involved by attachment, levy or the like; (ii) an assignee for benefit of creditors from the time of assignment; (iii) a trustee in bankruptcy from the date of the filing of the petition; and (iv) a receiver in equity from the time of appointment. See UCC § 9-102(a)(52).

85 See UCC § 9-317(a)(2). Here, the only conditions specified in Section 9-203(b)(3) that a secured party can meet are (i) obtaining from the debtor an authenticated security agreement that describes the collateral (e.g., the securities account) and (ii) acquiring "control" of the securities account under Section 9-106 pursuant to the debtor's security agreement. See UCC § 9-203(b)(3)(A), (D).

86 See UCC § 9-323(b).

87 See UCC § 9-323 cmt. 4.

88 See UCC § 9-317(d).

89 See UCC § 9-102(a)(49).

90 For purposes of these priority rules, the terms "purchase" and "purchaser" have the respective meanings assigned to such terms in Section 1-201, the term "value" has the meaning assigned to such term in Section 1-204, the term "notice of an adverse claim" has the meaning assigned to such term in Section 8-105, and the term "control" has the meaning assigned to such term in Section 8-106.

91 See UCC § 8-502. Note that by acquiring a security entitlement under Section 8-501 (in other words, by becoming the entitlement holder), the person obtains control of the security entitlement. See UCC § 8-106(d)(1). Note also that under Section 8-105, the mere filing of a financing statement under Article 9 does not constitute notice of an adverse claim to a financial asset. See UCC § 8-105(e). On the other hand, in some cases if the person acquiring the security entitlement is aware that a filing covering the related financial asset has been made and fails to investigate the circumstances that gave rise to the filing, the person will be deemed to have notice of an adverse claim. See UCC § 8-105(a)(2) (providing that a person has notice of an adverse claim if the person is aware of facts sufficient to indicate that there is a significant probability that the adverse claim exists and deliberately avoids information that would establish the existence of the adverse claim). For a discussion of notice under the "willful blindness" test contained in Section 8-105(a)(2), see James D. Prendergast & Keith Pearson, How to Perfect Equity Collateral under Article 8, The Practical Real Estate Lawyer, Nov. 2004, at 33, 37-38. Although Article 9 contains a rule regarding the effect of a filing similar to that of Section 8 105(e), there is no analog to the "willful blindness" test of Section 8-105(a)(2). See UCC § 9-331(c) (providing in part that filing under Article 9 does not constitute notice of a claim either to a protected purchaser of a security or to a person protected against the assertion of a claim under Article 8).

92 See UCC § 8-510(b).

93 See UCC § 8-510 cmt. 3.

94 See UCC § 8-510(d).

95 See UCC § 8-510(c)(1).

96 See UCC § 8-510(c)(2).

97 See UCC § 8-510(c)(3). Presumably, "secured party" should be read as "purchaser" in this particular rule.

98 See UCC § 8-510(c).

v. In a case not covered by the priority rules in Article 9 or by rules (iii) and (iv) above, an action based on an adverse claim to a financial asset or security entitlement, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against a person who purchases a security entitlement, or an interest therein, from an entitlement holder if the purchaser (a) gives value, (b) does not have notice of the adverse claim and (c) obtains control.[99]

c. Interplay between Article 8 and Article 9 priority rules. As a general matter, Section 9-201 provides that a security agreement is effective according to its terms against purchasers of the subject collateral, except as otherwise provided in Article 9 or any other Article of the UCC (e.g., Article 8).[100] More specifically, Section 9-331 provides that Article 9 does not limit the rights of or impose liability on a person to the extent that the person is protected against the assertion of a claim (e.g., an adverse claim) under Article 8.[101]

E. Special Issues.

1. ***Proceeds***. If and to the extent that a securities account constitutes identifiable cash proceeds of other collateral in which a secured party had a perfected security interest, the secured party's interest in such proceeds will remain perfected indefinitely.[102] Under certain circumstances, a money-market account may represent such a securities account.[103]

2. ***Bank accounts.*** As noted in part II.E.2 above, a bank account may constitute a securities account.[104]

3. ***Treasury securities.*** The Code of Federal Regulations contains special rules that apply in the case of certain Treasury securities and similar obligations (including obligations issued or guaranteed by government-sponsored enterprises).[105] Consideration of these rules is often relevant in defeasance transactions involving securitized commercial real estate loans.

IV. SECURITY INTERESTS IN EQUITY INTERESTS

A. Key Definitions.

1. ***Security***. A "security" is, except as otherwise provided in Section 8-103, an obligation of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer that satisfies all of the following requirements:

a. Transferability test. It is represented by a security certificate in bearer or registered form, or the transfer of it may be registered upon books maintained for that purpose by or on behalf of the issuer.[106]

b. Divisibility test. It is one of a class or series or by its terms is divisible into a class or series of shares, participations, interests, or obligations.[107]

c. Functional test. It is either of the following:

i. It is, or is of a type, dealt in or traded on securities exchanges or securities markets.[108]

ii. It is a medium for investment and by its terms expressly provides that it is a security governed by Article 8.[109]

Section 8-103 provides that a share or similar equity interest issued by a corporation, business trust, joint stock company or similar entity is a security.[110] However, Section 8-103 also provides that an interest in a partnership or limited liability company is not a security unless (1) it is dealt in or traded on securities exchanges or in securities markets, (2) its terms expressly provide that it is a security governed by Article 8, or (3) it is an investment company security.[111]

2. ***Certificated security***. "Certificated security" means "a security that is represented by a certificate."[112]

3. ***Uncertificated security***. "Uncertificated security" means "a security that is not represented by a certificate."[113]

4. ***Security certificate***. "Security certificate" means a certificate representing a security, such as a traditional paper certificate.[114]

5. ***Bearer form***. "Bearer form," as applied to a certificated security, refers to a form in which the security is payable to the bearer of the security certificate according to its terms but not by reason of an indorsement.[115]

99 See UCC § 8-510(a).
100 See UCC § 9-201(a) & cmt. 2.
101 See UCC § 9-331(b). Provisions in Article 8 that protect against the assertion of a claim (including, but not limited to, an adverse claim) include Sections 8-502, 8-503(d) and (e), 8-510 and 8-511. See UCC § 9-331 cmt. 4.
102 See UCC § 9-315(d)(2) & cmt. 7.
103 See UCC § 9-102 cmt. 13.e.
104 See UCC § 8-102(a)(14)(ii) & cmt. 14 (noting that a bank may act as a securities intermediary and, in that capacity, maintain securities accounts).
105 See, e.g., 31 C.F.R. pt. 357 (certain Treasury securities); 24 C.F.R. pt. 81 (certain Fannie Mae or Freddie Mac securities); 24 C.F.R. pt. 350 (certain Ginnie Mae securities).
106 See UCC § 8-102(a)(15)(i).
107 See UCC § 8-102(a)(15)(ii).
108 See UCC § 8-102(a)(15)(iii)(A).
109 See UCC § 8-102(a)(15)(iii)(B).
110 See UCC § 8-103(a).
111 See UCC § 8-103(c). The term "investment company security" is defined in Section 8-103(b).
112 UCC § 8-102(a)(4).
113 UCC § 8-102(a)(18).
114 See UCC § 8-102(a)(16) & cmt. 16.
115 See UCC § 8-102(a)(12).

6. ***Registered form***. "Registered form," as applied to a certificated security, refers to a form in which both of the following apply: (a) the security certificate specifies a person entitled to the security; and (b) a transfer of the security may be registered upon books maintained for that purpose by or on behalf of the issuer or the security certificate so states.[116]

7. ***Investment prop***erty. Under Article 9, "investment property" includes (among other things) certificated and uncertificated securities.[117]

8. ***General intangible***. A "general intangible" is 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.[118]

9. ***Payment intangible***. A "payment intangible" is "a general intangible under which the account debtor's principal obligation is a monetary obligation."[119]

B. Attachment.

1. ***Governing law***. The law governing attachment of a security interest in an equity interest is generally determined by agreement of the debtor and the secured party.[120]

2. ***Elements of attachment***. As a general rule, a security interest attaches to an equity interest when it becomes enforceable against the debtor with respect to the equity interest.[121] Subject to certain exceptions,[122] a security interest in an equity interest is enforceable only if the following requirements are met:

   a. Value. "Value" (as defined in Article 1) has been given.[123]

   b. Rights. The debtor has rights in the collateral (i.e., the equity interest) or the power to transfer rights in the collateral to a secured party.[124]

   c. Evidence of agreement. One of the following conditions is met:

      i. The debtor has authenticated a security agreement that describes the collateral (i.e., the equity interest).[125]

      ii. The collateral is a certificated security in registered form and the related security certificate has been delivered to the secured party under Section 8-301 pursuant to the debtor's security agreement.[126]

      iii. The collateral is investment property (e.g., a certificated or uncertificated security) and the secured party has "control" under Section 9-106 pursuant to the debtor's security agreement.[127]

C. Perfection.

1. ***Certificated and uncertificated securities***.

   a. Governing law.

      (i) Certificated securities.

         a. If a security interest in a certificated security is perfected by filing, the law governing perfection is the local law of the jurisdiction in which the debtor is deemed to be located under Section 9-307.[128]

         b. If a security interest in a certificated security is perfected other than by filing, the law governing perfection is the local law of the jurisdiction in which the related security certificate is located.[129]

      (ii) Uncertificated securities.

         a. If a security interest in an uncertificated security is perfected by filing, the law governing perfection is the local law of the jurisdiction in which the debtor is deemed to be located under Section 9-307.[130]

         b. If a security interest in an uncertificated security is perfected other than by filing, the law governing perfection is the local law of the "issuer's jurisdiction" as specified in Section 8-110(d).[131] Generally, the issuer's jurisdiction is the jurisdiction under which the issuer of the security is organized.[132]

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116 See UCC § 8-102(a)(13).

117 See UCC § 9-102(a)(49).

118 See UCC § 9-102(a)(42) .For purposes of this definition, the terms "account," "chattel paper," "commercial tort claim," "deposit account," "document," "goods," "instrument," "investment property" and "letter-of-credit rights" have the respective meanings assigned to such terms in Section 9-102, the term "letter of credit" has the meaning assigned to such term in Section 5-102, and the term "money" has the meaning assigned to such term in Section 1-201. In addition, the term "oil, gas, or other minerals before extraction" has the meaning set forth in official comment 4.c to Section 9-102.

119 See UCC § 9-102(a)(61). In this context, the term "account debtor" means a person obligated on the general intangible. See UCC § 9-102(a)(3).

120 See UCC § 1-301(a); see also UCC § 9-301 cmt. 2.

121 See UCC § 9-203(a).

122 These exceptions are generally set forth in Section 9-203(c) through (i).

123 See UCC § 9-203(b)(1). On the meaning of "value" for this purpose, see note 7 above.

124 See UCC § 9-203(b)(2).

125 See UCC § 9-203(b)(3)(A).

126 See UCC § 9-203(b)(3)(C).

127 See UCC § 9-203(b)(3)(D).

128 See UCC § 9-305(c)(1).

129 See UCC § 9-305(a)(1). Under this rule, if the security certificate is located in a foreign jurisdiction (i.e., a jurisdiction that has not adopted the UCC), the law governing both perfection and priority will be the local law of the foreign jurisdiction, which may not produce the result desired by the secured party. A partial solution to this problem is first to rely on perfection by filing and then, if and when the security certificate is physically transferred to a jurisdiction that has adopted the UCC, to rely on perfection by another method (e.g., delivery or control). Of course, this approach will work only if, under the various rules contained in Section 9-307, the debtor is deemed located in a jurisdiction that has adopted the UCC. Also, because perfection by filing only affects the law governing perfection, this approach will not change the law governing priority until the security certificate is physically transferred to the UCC jurisdiction.

130 See UCC § 9-305(c)(1).

131 See UCC § 9-305(a)(2).

132 See UCC § 8-110(d).

b. Methods of perfection.

(i) Certificated securities.

a. A security interest in a certificated security may be perfected by filing a financing statement.[133]

b. A security interest in a certificated security may also be perfected by "control" under Section 9-106, which for this purpose has the meaning set forth in Section 8-106.[134]

1. A secured party has control of a certificated security in bearer form if the certificated security is delivered to the secured party.[135]

2. A secured party has control of a certificated security in registered form if (A) the certificated security is delivered to the secured party and (B) either the certificate is endorsed to the secured party or in blank by an effective endorsement or the certificate is registered in the name of the secured party, upon original issue or registration of transfer by the issuer.[136]

c. A security interest in a certificated security may be perfected by taking "delivery" under Section 8-301.[137]

d. A security interest in a certificated security may be perfected on a temporary basis under the limited circumstances described in Section 9-312.[138] In each case, the period of temporary perfection is 20 days.[139] After the 20-day period expires, perfection depends upon compliance with other provisions of Article 9.[140]

(ii) Uncertificated securities.

a. A security interest in an uncertificated security may be perfected by filing a financing statement.[141]

b. A security interest in an uncertificated security may also be perfected by "control" under Section 9-106, which for this purpose has the meaning set forth in Section 8-106.[142] Under Section 8-106, a secured party has control of an uncertificated security if either (A) the uncertificated security is delivered to the secured party[143] or (B) the issuer has agreed that it will comply with instructions originated by the secured party without further consent by the registered owner.[144]

2. ***General intangibles***.

a. Governing law. The law governing perfection of a security interest in a general intangible is the local law of the jurisdiction in which the debtor is deemed to be located under Section 9-307.[145]

b. Methods of perfection.

i. A security interest in a general intangible that is not a payment intangible may only be perfected by filing a financing statement.[146]

ii. A security interest in a payment intangible may be perfected by filing a financing statement.[147] In certain situations, a security interest in a payment intangible may also be perfected automatically upon attachment.[148]

iii. Caveat: if an equity interest that constitutes a general intangible (including a payment intangible) is evidenced by a certificate, the equity interest continues to be a general intangible.

133 See UCC § 9-312(a).

134 See UCC §§ 9-314(a) (a security interest in investment property may be perfected by control under Section 9 106), 9-102(a)(49) (investment property includes a security, whether certificated or uncertificated), 9-106(a) (a person has control of a certificated or uncertificated security as provided in Section 8-106).

135 See UCC § 8-106(a). For this purpose, "delivery" has the meaning set forth in Section 8-301. See UCC § 8-106 cmt. 2. Under Section 8-301, delivery of a certificated security to a purchaser (such as a secured party) generally occurs when the purchaser or another person (other than a securities intermediary) acting on the purchaser's behalf acquires physical possession of the related security certificate. See UCC § 8-301(a)(1)-(2) & cmt. 2.

136 See UCC § 8-106(b). On the meaning of "delivery" for this purpose, see note 135 above.

137 See UCC § 9-313(a). On the meaning of "delivery" for this purpose, see note 135 above.

138 See UCC §§ 9-312(e) (a security interest in a certificated security is perfected without filing or the taking of possession or control for a period of 20 days from the time the security interest attaches to the extent that it arises for new value given under an authenticated security agreement), 9-312(g) (a perfected security interest in a certificated security remains perfected for 20 days without filing if the secured party delivers the security certificate to the debtor for the purpose of either (i) ultimate sale or exchange or (ii) presentation, collection, enforcement, renewal or registration of transfer).

139 See UCC §§ 9-312(e), 9-312(g).

140 See UCC § 9-312(h). Note that "if the security interest is not perfected by another method until after the 20-day period expires, there will be a gap during which the security interest is unperfected." See UCC § 9-312 cmt. 9.

141 See UCC § 9-312(a).

142 See UCC §§ 9-314(a) (a security interest in investment property may be perfected by control under Section 9 106), 9-102(a)(49) (investment property includes a security, whether certificated or uncertificated), 9-106(a) (a person has control of a certificated or uncertificated security as provided in Section 8-106). Currently, the UCC provides two methods for obtaining control of an uncertificated security. See text accompanying notes 143-44. However, certain jurisdictions may have non-uniform provisions providing additional methods for obtaining control. For example, Delaware's version of the Uniform Commercial Code provides a third method for obtaining control of an uncertificated security. See Del. Code Ann. tit. 6, § 8-106(c)(3).

143See UCC § 8-106(c)(1). "Delivery," for this purpose, is defined in Section 8-301(b). See UCC § 8-106 cmt. 3. Under Section 8-301(b), delivery of an uncertificated security to a purchaser (such as a secured party) generally occurs when the purchaser or another person (other than a securities intermediary) acting on the purchaser's behalf becomes the registered owner of the uncertificated security. See UCC § 8-301(b) & cmt. 3.

144 See UCC § 8-106(c)(2). Note that a secured party who satisfies the requirements of this provision has control of the uncertificated security even if the registered owner retains the right to make substitutions for the uncertificated security, to originate instructions to the issuer or otherwise to deal with the uncertificated security. See UCC § 8-106(f).

145 See UCC § 9-301(1).

146 See UCC § 9-310(a).

147 See UCC § 9-310(a).

148 See UCC § 9-309(2) (providing perfection upon attachment to certain assignments of payment intangibles), (3) (providing perfection upon attachment to sales of payment intangibles). In general, sales of payment intangibles are covered by Article 9. See UCC § 9-109(a)(3). In limited circumstances, however, an exception may apply that takes the transaction outside the scope of Article 9. See UCC § 9 109(d)(4), (5), (7).

D. **Priority**.

1. ***Certificated and uncertificated securities***.

a. Governing law. The law governing priority in certificated and uncertificated securities is as follows:

i. In the case of a certificated security, the law governing priority is the local law of the jurisdiction in which the related security certificate is located.[149]

ii. In the case of an uncertificated security, the law governing priority is the local law of the "issuer's jurisdiction" as specified in Section 8-110(d).[150] Generally, the issuer's jurisdiction is the jurisdiction under which the issuer of the security is organized.[151]

b. Order of priority. Following are the relative priorities of the rights of secured parties and other persons asserting competing claims to or interests in certificated and uncertificated securities:

(i) Article 9 priority rules.

(a) Priority among conflicting security interests.

1. Conflicting security interests held by secured parties, each of which has control under Section 8-106, rank according to priority in time of obtaining control.[152]

2. A security interest held by a secured party having control of a certificated or uncertificated security has priority over a security interest held by a secured party that does not have control.[153]

3. A security interest in a certificated security in registered form which is perfected by taking delivery under Section 8-301 and not by control has priority over a conflicting security interest perfected by a method other than control.[154]

4. In all other cases, priority among conflicting security interests in a certificated or uncertificated security is governed by the general rules set forth in Sections 9-322 and 9-323.[155]

(b) Priority between security interest and rights of lien creditor.

1. Rule 1: A security interest is subordinate to the rights of a person that becomes a lien creditor before the earlier of the following times: (1) the time when the security interest is perfected; and (2) the time when one of the conditions specified in Section 9-203(b)(3) is met and a financing statement covering the collateral (i.e., the certificated or uncertificated security) is filed.[156]

2. Rule 2: A security interest is subordinate to the rights of a person who becomes a lien creditor to the extent that the security interest secures an advance made more than 45 days after the person becomes a lien creditor unless either (1) the advance is made without knowledge of the lien or (2) the advance is made pursuant to a commitment entered into without knowledge of the lien.[157]

3. Caveat: Rule 1 does not elevate the priority of a security interest that is subordinate to the rights of a lien creditor under Rule 2; it only subordinates.[158]

(c) Priority between unperfected security interest and rights of buyer.

1. In the case of a certificated security, the rule is that a buyer of a security certificate takes free of a security interest if the buyer gives value and receives delivery of the security certificate without knowledge of the security interest and before the security interest is perfected.[159]

2. In the case of an uncertificated security, the rule is that a buyer of investment property other than a certificated security takes free of a security interest if the buyer gives value without knowledge of the security interest and before the security interest is perfected.[160] As noted in part IV.A.7 above, "investment property" includes uncertificated securities.[161]

(ii) Article 8 priority rules.

a. Section 8-303(b) provides that, in addition to acquiring the rights of a purchaser as set forth in Section 8-302, a protected purchaser acquires its interest in a certificated or uncertificated security free of any adverse claim.[162] For purposes of this

149 See UCC § 9-305(a)(1).

149 See UCC § 9-305(a)(2).

150 See UCC § 8-110(d).

151 See UCC § 8-110(d).

152 See UCC § 9-328(2)(A).

153 See UCC § 9-328(1).

154 See UCC § 9-328(5).

155 See UCC § 9-328(7).

156 See UCC § 9-317(a)(2). Here, there are three conditions specified in Section 9-203(b)(3) that a secured party can meet: (i) obtaining from the debtor an authenticated security agreement that describes the collateral (i.e., the certificated or uncertificated security); (ii) if the collateral is a certificated security in registered form, taking delivery of the security certificate under Section 8-301 pursuant to the debtor's security agreement; and (iii) acquiring control of the certificated or uncertificated security under Section 9-106 pursuant to the debtor's security agreement. See UCC § 9-203(b)(3)(A), (C), (D).

157 See UCC § 9-323(b).

158 See UCC § 9-323 cmt. 4.

159 See UCC § 9-317(b).

160 See UCC § 9-317(d).

161 See UCC § 9-102(a)(49).

162 See UCC § 8-303(b).

provision, a "protected purchaser" means "a purchaser of a certificated or uncertificated security, or of an interest therein, who (1) gives value; (2) does not have notice of any adverse claim to the security; and (3) obtains control of the certificated or uncertificated security."[163]

b. Section 8-302 generally provides that a purchaser of a certificated or uncertificated security acquires all rights in the security that the transferor had or had power to transfer.[164] Two exceptions apply: (1) a purchaser of a limited interest in a security acquires rights only to the extent of the interest purchased;[165] and (2) a purchaser of a certificated security who as a previous holder had notice of an adverse claim does not improve its position by taking the security from a subsequent protected purchaser.[166] Subject to the above exceptions, this statutory provision implements the familiar "shelter" principle.[167]

c. For purposes of the foregoing, a "purchaser" includes a secured party,[168] and an "adverse claim" means "a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset."[169]

(iii) Interplay between Article 8 and Article 9 priority rules.

a. Section 9-201 provides generally that a security agreement is effective according to its terms against purchasers of the subject collateral, except as otherwise provided in Article 9 or any other Article of the UCC (*e.g.*, Article 8).[170]

b. Section 9-331 provides specifically that Article 9 does not limit the rights of a protected purchaser of a security.[171] Section 9-331 further provides that a protected purchaser takes priority over an earlier security interest, even if perfected, to the extent provided in Article 8.[172]

2. *General intangibles*.

a. Governing law. The law governing priority in equity interests that constitute general intangibles is the same as the law governing perfection: the local law of the jurisdiction in which the debtor is deemed to be located under Section 9-307.[173]

b. Order of priority. Following are the relative priorities of the rights of secured parties and other persons asserting competing claims to or interests in equity interests that are classified as general intangibles:

(i) Priority among conflicting security interests.

a. Generally speaking, priority among conflicting security interests in equity interests that constitute general intangibles is determined by the general priority rules set forth in Section 9-322.[174]

b. An exception to the foregoing arguably exists if the equity interests are classified as payment intangibles. To illustrate, imagine that one person ("SP-1") is the first to file but not to perfect and that another person ("SP-2") is the first to perfect. Imagine further that SP-2's security interest arises out of the sale to it of the equity interests and that the sale is a transaction covered by Article 9.[175] Under those circumstances, even if SP-1 subsequently attempts to take all actions necessary for attachment to occur under Section 9-203(b), SP-1 will be unable to do so: as a result of the sale to SP-2, the debtor no longer has any rights in the equity interests[176] and, therefore, SP-1's purported security interest cannot attach. Without attachment, SP-1's purported security interest cannot be perfected.[177] Bottom line: even though SP-1 is the first to file or perfect, SP-2's rights in the equity interests will take priority over SP-1's rights.

(ii) Priority between security interest and rights of lien creditor.

a. Rule 1: A security interest is subordinate to the rights of a person that becomes a lien creditor before the earlier of the following times: (1) the time when the security interest is perfected; and (2) the time when one of the conditions specified in Section 9-203(b)(3) is met and a financing statement covering the collateral (*i.e.*, the equity interests classified as general intangibles) is filed.[178]

163 UCC § 8-303(a). For purposes of this provision, the term "value" has the meaning assigned to such term in Section 1-204, the term "notice of an adverse claim" has the meaning assigned to such term in Section 8-105, and the term "control" has the meaning assigned to such term in Section 8-106(a)-(c). For a brief discussion of the circumstances under which the filing of a financing statement may or may not constitute notice of an adverse claim to a financial asset, see note 90 above.

164 See UCC § 8-302(a).

165 See UCC § 8-302(b).

166 See UCC § 8-302(c) & cmt. 1.

167 See UCC § 8-302 cmt. 1.

168 See UCC § 1-201(b)(29), (30); see also UCC § 8-303 cmt. 1.

169 UCC § 8-102(a)(1).

170 See UCC § 9-201(a) & cmt. 2.

171 See UCC § 9-331(a).

172 See UCC § 9-331(a). Note that this rule protects a qualifying secured party whose later-in-time security interest would otherwise be subordinate to the earlier-in-time security interest of another secured party.

173 See UCC § 9-301(1).

174 See UCC § 9-322(a).

175 In general, a sale of payment intangibles is within the scope of Article 9. See UCC § 9-109(a)(3).

176 See UCC § 9-318(a) (providing in part that a debtor that has sold a payment intangible does not retain a legal or equitable interest in the collateral sold).

177 See UCC § 9-308(a) (providing that, as a general rule, a security interest is perfected if it has attached and all of the applicable requirements for perfection in Sections 9-310 through 9-316 have been satisfied).

178 See UCC § 9-317(a)(2). Here, there is only one condition specified in Section 9-203(b)(3) that a secured party can meet: obtaining from the debtor an authenticated security agreement that describes the collateral (i.e., the equity interests classified as general intangibles). See UCC § 9-203(b)(3)(A).

b. Rule 2: A security interest is subordinate to the rights of a person who becomes a lien creditor *to the extent that* the security interest secures an advance made more than 45 days after the person becomes a lien creditor unless either (1) the advance is made without knowledge of the lien or (2) the advance is made pursuant to a commitment entered into without knowledge of the lien.[179]

c. Caveats: Rule 1 does not elevate the priority of a security interest that is subordinate to the rights of a lien creditor under Rule 2; it only subordinates.[180] Also, Rule 2 does not apply to a security interest held by a secured party that is a buyer of payment intangibles.[181]

(iii) Priority between unperfected security interest and rights of buyer.

a. In the case of equity interests classified as general intangibles other than payment intangibles, a buyer of the equity interests takes free of a security interest if the buyer gives value without knowledge of the security interest and before the security interest is perfected.[182]

b. In the case of equity interests classified as payment intangibles, a buyer of the equity interests will have rights superior to the rights of a holder of an unperfected security interest under the general priority rules set forth in Section 9-322.[183]

E. **Special Issues**.

1. ***Shifting collateral***.

a. Problem. Unlike shares or similar equity interests issued by a corporation, interests in a partnership or limited liability company are uniquely susceptible to changes in collateral classification for Article 9 purposes.[184] If a partnership or limited liability company whose interests do not otherwise constitute securities under Article 8 “opts in” to Article 8 with respect to the interests,[185] the interests will no longer be classified as general intangibles but instead will be classified as investment property under Article 9.[186] Similarly, if a partnership or limited liability company whose interests do not otherwise constitute securities under Article 8 “opts out” of Article 8 with respect to its interests,[187] the interests will no longer be classified as investment property but instead will be classified as general intangibles under Article 9.[188] Because the rules governing perfection and priority of security interests in investment property and general intangibles differ in many respects, a secured party who takes a security interest in partnership or limited liability company interests without considering the impact on its security interest of a “shift” in collateral classification runs the risk that its security interest will become unperfected or, worse, will be subordinated to or even “cut off” by the interest of another person.[189]

b. Solutions. Following are certain approaches that a secured party taking a security interest in partnership or limited liability company interests might consider in order to mitigate the risk of shifting collateral:

i. “Hardwire” into the organizational documents of the partnership or limited liability company whose interests are being pledged a prohibition against opting in to or out of Article 8 (depending on the desired collateral classification) without the secured party’s consent.[190] Some state laws, in fact, expressly validate this sort of approach.[191]

ii. Obtain from the pledgor of the partnership or limited liability company interests an Article 8 matters proxy, *i.e.*, an irrevocable proxy agreement granting the secured party the exclusive right to vote the interests on all matters related to Article 8.[192]

iii. For partnership or limited liability company interests that constitute securities, file a financing statement even if perfecting by delivery or control.[193] Supplement this by obtaining appropriate insurance covering (among other things) loss sustained or damage incurred by reason of a subsequent purchaser of the interests taking the interests free of the secured party’s security interest.[194]

iv. For partnership or limited liability company interests that constitute general intangibles, use the financing statement as a “bulletin board”: insert in the financing statement a prominent notice to the effect that (A) the secured party has a property interest in the interests and (B) it is a violation of the secured party’s rights for another person to hold, transfer or deal with the interests.[195]

179 See UCC § 9-323(b).

180 See UCC § 9-323 cmt. 4.

181 See UCC § 9-323(c).

182 See UCC § 9-317(d).

183 See UCC § 9-322(a)(1).

184 Under Article 8, a share or similar equity interest issued by a corporation is always classified as a security, but an interest in a partnership or limited liability company may or may not be so classified. See UCC § 8-103(a), (c).

185 A partnership or limited liability company “opts in” to Article 8 with respect to its interests if the terms of the interests expressly provide that they are securities governed by Article 8. See UCC § 8-103(c) & cmt. 4. Interests in a partnership or limited liability company may otherwise constitute securities under Article 8 if the interests are dealt in or traded on securities exchanges or in securities markets or if the interests constitute investment company securities. See UCC § 8-103(c).

186 For the definitions of the terms “investment property” and “general intangible,” see parts IV.A.7 and IV.A.8 above.

187 A partnership or limited liability company “opts out” of Article 8 if, after having previously elected to opt in to Article 8, the partnership or limited liability company modifies the terms of its interests so that they no longer expressly provide that the interests are securities governed by Article 8. See UCC § 8-103(c).

188 See definitional cross-references in note 186 above.

189 Cf., e.g., UCC § 9-312 cmt. 4 (noting generally that, in the case of securities and other kinds of investment property, a security interest perfected by filing will be subordinate to a conflicting security interest perfected by control and, accordingly, a secured party who perfects its security interest by filing runs the risk that its rights will become subordinated to the rights of another secured party who perfects its security interest by control).

190 On the advantages of this approach, see James D. Prendergast, Secured Real Estate Mezzanine Lending (with Form), The Practical Real Estate Lawyer, Mar. 2007, at 35, 43, 48.

191 See, e.g., Del. Code Ann. tit. 6, §§ 17-101(12) (providing that, in the case of a limited partnership, “[a] partnership agreement may provide rights to any person, including a person who is not a party to the partnership agreement, to the extent set forth therein”), 18-101(7) (providing that “[a] limited liability company agreement may provide rights to any person, including a person who is not a party to the limited liability company agreement, to the extent set forth therein”).

192 See Prendergast, cited in note 187 above, at 44. A model Article 8 matters proxy may be found in the appendix to that particular article. See Prendergast, cited in note 187 above, at 49-51.

193 Because the secured party’s collateral package will often include property that does not constitute a security under Article 8 and is not classified as investment property under Article 9, filing a financing statement will normally be advisable in any event.

194 An example of an appropriate insurance policy may be found at http://www.eagle9.com/downloads/MEFK.pdf (describing First American Title Insurance Company’s EAGLE 9 UCC Insurance Policy for Lenders and the related Mezzanine Endorsement).

195 These are the two elements of an adverse claim under Article 8. See UCC § 8-102(a)(1). Of course, as noted previously, the mere filing of a financing statement under Article 9 does not constitute notice of an adverse claim under Article 8. See UCC § 8-105(e). Arguably, however, if a subsequent purchaser of the interests reviews the financing statement in the course of its due diligence activities, the purchaser will have notice of an adverse claim to the interests. See UCC § 8-105(a). In that event, the purchaser will not be able to qualify as a protected purchaser under Section 8-303 and, accordingly, will acquire the interests subject to (rather than free of) the secured party’s security interest. See UCC §§ 8-303(a)(2), 8-302(a).

2. ***Warranties upon redelivery of certificated securities***.

    a. Implied warranty. Under Article 8, a secured party who redelivers a security certificate to the debtor, or after payment and on order of the debtor delivers a security certificate to another person, is deemed to warrant (among other things) that the secured party does not know of any adverse claim to the certificated security.[196] This implied warranty is not limited to adverse claims created by the secured party or a person claiming through the secured party. As a result, if at the time of redelivery the secured party knows of an adverse claim to the certificated security asserted by any person whatsoever, the secured party will be exposed to potential liability on a breach-of-warranty claim.

    b. Disclaimer of warranty. To avoid being deemed to make this particular warranty, the secured party should insert an express disclaimer of the warranty in the underlying security agreement.[197]

3. ***Anti-assignment provisions***.

    a. Problem. Partnership and limited liability company agreements often contain provisions that purport to restrict or prevent the assignment of interests in the related partnerships and limited liability companies. Even agreements that are more liberally drafted may provide that, unless the other partners or members expressly agree otherwise, an assignment of interests does not entitle the assignee to be admitted as a partner or a member.

    b. Preferred approach. The preferred approach to this problem is to obtain the written consent of all the other partners or members. The consent should cover not only the pledge of the interests to the secured party but also any transfer of the interests pursuant to a public or private disposition under Section 9-610 or an acceptance under Section 9-620. If necessary, the consent should also cover the admission as a partner or a member of (i) any transferee of the interests following a public or private disposition and (ii) the secured party following an acceptance.

    c. Less desirable approach. Another approach to this problem is to rely on the statutory overrides of contractual anti-assignment provisions set forth in Sections 9-406 and 9-408.[198] This approach has a number of serious limitations, however. The principal limitations are as follows:

        i. Sections 9-406 and 9-408 are applicable only to partnership or limited liability company interests that constitute payment intangibles or other general intangibles and not to partnership or limited liability company interests that constitute certificated or uncertificated securities.[199]

        ii. In many cases, the security interest in the partnership or limited liability company interests cannot be enforced.[200]

        iii. Certain jurisdictions expressly exclude interests in partnerships and limited liability companies from the benefit of these statutory overrides.[201]

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196 See UCC § 8-108(g), (h).

197 See UCC §§ 8-108 cmt. 5 (noting that the warranty provisions in Section 8-108 apply "unless otherwise agreed" and that the parties to a transaction may enter into express agreements to allocate the risks of possible defects differently), 1-302(a) (generally permitting variation by agreement of the effect of the UCC's provisions).

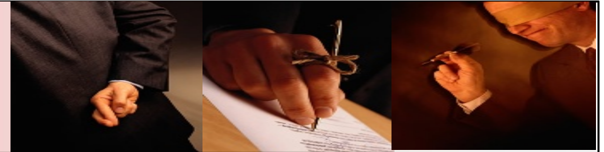
198 See UCC §§ 9-406(d) (providing that, subject to certain exceptions, a term in an agreement between an account debtor and an assignor or in a promissory note that purports to restrict assignment of an account, chattel paper, payment intangible or promissory note is generally ineffective), 9-408(a) (providing that, subject to certain exceptions, a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health-care-insurance receivable or a general intangible that purports to restrict assignment of the promissory note, health-care-insurance receivable or general intangible is generally ineffective).

199 See UCC §§ 9-406(d) & (e) (covering assignments for security, but not sales, of payment intangibles), 9-408(a) & (b) (covering assignments for security of ordinary general intangibles and sales of payment intangibles).

200 See UCC § 9-408(d) (providing in pertinent part that, to the extent that a term in an agreement described in Section 9-408(a) would be effective under law other than Article 9 but is ineffective under Section 9-408(a), the creation, attachment, or perfection of a security interest in the general intangible is unenforceable).

201 See, e.g., Del. Code Ann. tit. 6, §§ 9-406(i)(5), 9-408(e)(4), Va. Code Ann. §§ 9-406(k), 9-408(g).

A UCC Article of Interest



Joint Review Committee for Article 9 of the UCC Meeting Notes for October 3-5, 2008

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Administrative Matters

The Joint Review Committee will deal with issues identified in the June 2008 report of the Article 9 Review Committee. Other issues will be discussed after the main list is resolved, but the Joint Review Committee needs to seek approval to discuss them from its sponsoring groups to address anything else.

Despite the Joint Review Committee's name, it is a drafting committee. It was not labeled as a drafting committee because this project is not intended to be a major rewrite.

The Committee will not meet again in 2008. Its next meeting will be after the reporter has had a chance to draft changes consistent with the Committee's tentative conclusions. That will probably be in February or March of 2009.

Substantive Issues

The "issue" and "explanation" portions of each of the first 39 numbered items below are reprinted from the June 2008 report of the Article 9 Review Committee. That is followed by a brief note on the deliberations or preliminary decisions of the Joint Review Committee. The remaining numbered items were raised at the meeting but were not included in the June report.

1. Issue: Whether § 9-607(b) should permit a buyer of a payment right secured by a real estate mortgage to record an assignment of the mortgage upon the default of the account debtor or other person obligated on the collateral.

Explanation: A secured party may have a security interest in a payment right secured by a real estate mortgage. Section 9-607(b) permits the secured party, in connection with the non-judicial enforcement of the mortgage, to record documents in the real estate records to establish the secured party's right as assignee to enforce the mortgage. Prior to default, the secured party does not have the right to record. Section 9-607(b)'s reference to "default" appears to refer to the debtor's (mortgagee's) default on its obligations to the secured party. However, if the secured party is a buyer of the payment right, § 9-607(b) does not appear to permit the secured party to record the documents upon the default of the account debtor or any other person obligated on the collateral (mortgagor). The result is that the benefit of the subsection may not extend to buyers of payments rights when it likely should.

The Committee agreed that § 9-607(b) allows a SP with an interest in a mortgage note to file an assignment of the mortgage upon default, but it is ambiguous whether the default is by the debtor

(the mortgagee) or by the account debtor (the mortgagor). If it is the debtor (the mortgagee) who is in default, what happens if someone buys the mortgage note, so there is no "default" by the assignor? In other words, should the Code effectively give buyers a power of attorney to file an assignment if they didn't bother to get one?

A tentative decision was reached to draft the clarification that § 9-607(a) refers to default by the debtor; § 9-607(b) refers to default by the account debtor. Before a final decision is made, the Committee will seek input from real estate groups.

2. Issue: Whether it should be clarified that, even if the debtor agrees otherwise, a secured party may not acquire collateral at its own private disposition except in accordance with § 9-620.

Explanation: It is commonly understood that a debtor may not waive the application of the prohibition in § 9-610(c)(2), which generally prohibits a secured party from acquiring collateral at its own private disposition. However, a reference to § 9-610(c)(2) is not contained in § 9-602's list of provisions of Part 6 not capable of being waived by the debtor. The explanation for the omission is that a secured party's acquisition of collateral at its own private disposition is equivalent to an acceptance by the secured party of collateral in whole or, in a transaction that is not a consumer transaction, partial satisfaction of the secured obligations. See Official Comment 2 to § 9-624. Because the consent or acquiescence (failure to object) of the debtor is required for the acceptance and because the requirement of the debtor's consent or acquiescence may not under § 9-602(10) be waived by the debtor, the waiver issue under § 9-610(c)(2) appears to be addressed.

However, the question of whether § 9-610(c)(2) may be waived by the debtor continually arises in practice, and the explanation set forth above, which requires a reading of an Official Comment to an entirely different section of Article 9, may not be apparent to many practitioners.

There was general agreement that the only way for a SP to buy at a private disposition (outside the situation described in § 9-610(c)(2)) is in accordance with § 9-620. In other words, any attempted private sale to itself is in fact a strict foreclosure and needs to be treated as such. The comment to 9-624 says this. The reporter was given task of drafting something to clarify this, including making a preliminary decision of whether to do this by comment or Code change.

3. Issue: Whether § 9-610(c)(2), which generally prohibits a secured party from acquiring collateral at its own private disposition, should also prohibit an affiliate of the secured party from doing so.

Explanation: Pursuant to § 9-610(c)(2), the secured party may purchase collateral at a public disposition, but may do so at a private disposition "only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations." It is clear that the rationale is that only in a private disposition of the sort described in the quoted language is the situation such that, like a public disposition, the private disposition will be at a market price or will it be obvious that the private sale was commercially reasonable. Although § 9-615(f) gives special scrutiny to a disposition not only to a secured party but also to "a person related to the secured party, or a secondary obligor," nothing in § 9-610(c)(2), prohibits an affiliate of the secured party from purchasing the collateral at a private disposition at which the secured party cannot purchase. In light of the presence of the quoted language in § 9-615(f), juxtaposed with its absence in § 9-610(c)(2), it may be less likely that courts would read § 9-610(c)(2) as also covering "persons related to the secured party" that are not agents of the secured party. Yet, the dangers associated with a disposition to a person related to a secured party are no less in § 9-610(c)(2) than in § 9-615(f).

A drafting committee might consider revising § 9 610(c)(2) to prohibit private dispositions to persons related to the secured party to the same extent as they are prohibited to the secured party itself. In doing so, the drafting committee might consider whether such a revision would reflect a policy change that would need to be justified.

Should you be able to sell to affiliate, such as new subsidiary formed solely to buy the assets)? It happens frequently when hedge funds shop around and sell to a related entity. Similarly, the finance arms of auto manufacturers often sell back (at 100 cents/dollar) to the manufacturer. The Committee decided not to make any changes in connection with this issue because § 9-615(f) provides an adequate safeguard.

4. Issue: Whether the caption to § 9-625(c) referring to consumer-goods transactions should be changed to refer to consumer goods to conform to the text of § 9-625(c)(2).

Explanation: The text of § 9-625(c)(2) covers consumer goods even if the transaction itself is not a consumer-goods transaction. However, the caption suggests that the text applies only if the security interest arises in a "consumer-goods transaction". For example, a security interest in the debtor's personal automobile (a consumer good) that secures a loan to the debtor's business would not fall within the definition of "consumer-goods transaction" in § 9-102(a)(24) because the transaction is not primarily for the debtor's personal, family or household purposes. Although the caption indicates that § 9-625(c) does not cover such a security interest, the text does cover it

The Committee decided to change caption of § 9-625(c)(2) to refer merely to consumer goods and to leave the text of the provision as it is. This will remove the conflict and keep the law as it was under old Article 9.

5. Issue: Whether the reference in § 9-627(a) to "acceptance" should be deleted.

Explanation: Section 9-627 provides that the fact that a higher price might have been obtained from the enforcement of a security interest is not of itself sufficient to preclude the secured party from showing that "the collection, enforcement, disposition, or acceptance [of the collateral] was made in a commercially reasonable manner." The reference to "acceptance" is inappropriate, because an "acceptance" of collateral under § 9-620 is not subject to a commercial reasonableness test.

The Committee agreed that the stray word "acceptance" makes no sense in § 9-627(a), (c), (d) but nevertheless concluded that this does not create a significant problem and thus decided to make no change.

6. Issue: Whether Article 11 should be repealed as no longer relevant.

Explanation: When the Uniform Commercial Code was originally promulgated, it included a separate Article - Article 10 - that provided, inter alia, for its effective date and transition rules for transactions entered into before the effective date. When Article 9 was revised in 1972, it was similarly accompanied by an Article - Article 11 - containing provisions for the effective date of the revisions as well as transition rules for transactions entered into before the effective date of the revisions. It is now 36 years since the promulgation of the 1972 amendments and over a quarter-century since their widespread enactment. As such, it is quite unlikely that there are more than a trivial number of outstanding transactions (if any) that were entered into before the effective date of the 1972 amendments and for which transition rules to the 1972 text of Article 9 (now supplanted by revised Article 9) remain relevant.

There was some discussion about whether Article 11 might remain relevant to an old transactions. The Committee decided to delete it from the official text but include a legislative note to States about whether they should repeal it or retain it for old transactions.

7. Issue: Whether § 9-210 should be expanded to require the secured party to provide a "pay off" letter as of a date designated in a request by the debtor so long as the secured party receives the request within a period, consistent with the periods in current § 9-210, of not less than 14 days before the date designated.

Explanation: Section 9-210 permits the debtor at any time to request from the secured party a statement of account or a list of collateral. The secured party has 14 days to respond. Anecdotal evidence indicates that the section is seldom used in practice. More typical would be for a debtor to request a "pay off" letter as of a specific date so that the debtor may refinance the secured obligations on that date. A drafting committee might consider expanding § 9-210 to impose on a secured party the obligation to provide a "pay off" letter to the debtor as of a date designated by the debtor so long as the debtor's request allows the secured party an identical period of at least 14 days following the debtor's request to provide the pay-off letter.

If the drafting committee decides to address § 9-210 in this respect, it might consider whether any change to § 9-210 would require amendments to the "safe harbor" notice forms in §§ 9-613 and 9-614.

The Committee discussed whether existing lenders can effectively prevent the debtor from re-financing by refusing to issue a payoff letter and whether adding a requirement to issue a payoff letter would be sufficient to solve the problem. The Committee decided to defer any decision on this issue until it receives more information from Bob Zadek about what would be necessary to solve the problem.

8. Issue: Whether § 9-317(d) should be expanded to cover commercial tort claims and perhaps also other collateral not addressed in § 9-317(b) or (d) and for which a trading market might exist.

Explanation: Section 9-317 provides the rules governing priority between an unperfected security interest and a competing claim to the collateral. As a general matter, buyers of collateral who give value (and, in the case of tangible collateral, receive delivery) without knowledge of an unperfected security interest take free of the unperfected security interest. *See* §§ 9-317(b) (tangible collateral) and (d) (intangible collateral). Section 9-317(d) addresses only accounts, electronic chattel paper, electronic documents, general intangibles, and investment property other than certificated securities. Because an unperfected security interest generally is enforceable against third parties, *see* § 9-203 (b), buyers of other intangible collateral, such as commercial tort claims, take subject to an unperfected security interest. Members of the Review Committee who were active in the drafting of Article 9 think that this outcome is inadvertent.

The Committee concluded that this was an oversight in the 1998 revisions. It then decided to expand the rule in § 9-317(d) to all types of collateral other than types of collateral covered in subsections (b) and (c).

9. Issue: Whether the definition of "authenticate" should be conformed to the definition of "sign" in Article 7 (as well as the unenacted revisions to Articles 2 and 2A) insofar as the latter definition applies to electronic forms of signing.

Explanation: The definition of "authenticate" in § 9-102(a)(7) indicates that the term means not only to sign (as that term is defined in Article 1)

but also "to execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person and adopt or accept a record." The second portion of this definition is not entirely consistent with the parallel provision in the subsequently-drafted definitions of "sign" in Articles 2, 2A, and 7. In those definitions, drawn from the Uniform Electronic Transactions Act and the federal Electronic Signatures in Global and National Commerce Act (E-SIGN), the relevant language provides that to sign means "with present intention to authenticate or adopt a record, ... to attach to or logically associate with the record an electronic sound, symbol, or process."

There are several differences between the Article 9 definition and these later definitions. Most notably, only Article 9 requires that the authenticating person/signer take its action with the intent "to identify the person." It does not appear that the drafters of the subsequently-drafted Articles intended to cover different circumstances than did the drafters of Article 9. Rather, it appears that the subsequent Articles reflected an effort to define the term more precisely.

Presumably, if the drafting committee were to consider addressing the definition of "authenticate", it would consult with those at the Uniform Law Conference who were active in the drafting of the Uniform Electronic Transactions Act and those at the Uniform Law Conference and the American Law Institute who were active in the drafting of the Article 2 and 2A amendments and the Article 7 revisions.

The Committee reached general agreement that the concept should be the same throughout the Code. It decided to adopt the Article 7 definition of "signed" to the greatest extent possible.

10. Issue: Whether the definition of "certificate of title" should be modified to include a "security-interest statement" as defined in the Uniform Certificate of Title Act (UCOTA) or a similar concept.

Explanation: Under UCOTA, the term "security-interest statement" includes a record created by a secured party that indicates a security interest. The security-interest statement, when filed with the state's motor vehicle office, may be used to perfect the security interest even if, contrary to another provision of UCOTA, the motor vehicle office issues a certificate of title that does not indicate the security interest. The UCOTA perfection approach creates a possible tension with § 9-311(a)(2), which defers to certificate-of-title statutes that provide for a security interest to be "indicated on the certificate as a condition or result of perfection."

The Committee discussed slightly broader potential problem with the definition of "certificate of title" in § 9-102(a)(10). Specifically, the Article 9 definition seems to require that the COT statute contain a priority rule, but many of them do not. There was a consensus that this problem needs to be addressed. Professors Bill Henning, Linda Rusch, and Stephen Sepinuck agreed to advise the reporter on how to address the problem.

11. Issue: Whether § 9-105 should be modified to conform to § 7-106 and UETA § 16.

Explanation: Section 9-105 creates a control test applicable to electronic chattel paper. After it was drafted, UETA created a somewhat different formulation which was followed in revised Article 7 at § 7-106. In particular, the UETA and Article 7 approaches provide a general test and a safe-harbor rule; § 9-105 does not provide a general test.

Presumably, if the drafting committee were to consider addressing § 9-105 in this respect, it would consult with those at the Uniform Law Conference who were active in the drafting of the Uniform Electronic Transactions Act and those at the Uniform Law Conference and the American Law Institute who were active in the drafting of the Article 7 revisions.

The Committee agreed to adopt the Article 7 definition.

12. Issue: Whether the methods of obtaining control of a deposit account or securities account should be expanded.

Explanation: Delaware amended its §§ 9-104, 9-106 and 8-106 effective July 2007 to provide additional methods for a secured party to achieve control of a securities account and a deposit account and to clarify that the additional methods of control do not impose any implied duties not expressly agreed to by the securities intermediary or the depositary bank. New Delaware § 9-104(a)(4) provides an additional method for the secured party to achieve control: the authentication by the debtor, secured party and securities intermediary of a record that (i) is conspicuously denominated a control agreement, (ii) identifies the specific deposit account, and (iii) addresses the disposition of the funds in the deposit account or the right to direct such disposition. Parallel provisions were added to §§ 8-106(c) and 8-106(d) for uncertificated securities and securities entitlements. New Delaware § 9-104(a)(5) provides an additional method for the secured party to achieve control of a deposit account where the name on the deposit account is the name of the secured party or indicates that the secured party has a security interest in the deposit account, thus not requiring that the secured party become a customer of the bank. A parallel provision was added to § 9-106(d) for securities accounts.

To the extent that an expansion of the methods of control, along the lines of the Delaware amendments, would allow a secured party to achieve control, even if the secured party is

unable, without further action by the debtor, to direct the disposition of security entitlements from the securities account or funds from the deposit account, the expansion may reflect a policy change that would need to be justified.

The Committee noted that the DACA task force may have given some people comfort with this issue and that the issue does not seem to be preventing lawyers from giving opinions. The Committee therefore tentatively decided not to address this issue, pending hearing from people who believe there is a real problem.

13. Issue: Whether the definitions of "promissory note" and "security" may need to be clarified so that a conventional promissory note issued as part of a class or series is not viewed as a security.

Explanation: In its decision in *Highland Capital Management v. Schneider*, 866 N.E.2d 1020 (N.Y. 2007), the New York Court of Appeals concluded that promissory notes that were part of a class or series constituted "securities" under § 8-102(a)(15). In order to reach that conclusion, the court found that the promissory notes were represented by certificates "the transfer of which may be registered upon books maintained for that purpose by or on behalf of the issuer" as required by § 8-102(a)(15)(i). The court came to this conclusion even though the issuer maintained no transfer books, because, as the dissent put it, "it is always theoretically possible there could be books on which transfers of anything could be registered."

While technically the decision involves an Article 8 rather than an Article 9 issue, the decision influences the characterization of collateral under Article 9. The decision has created confusion in Article 9 practice as to the proper characterization of some types of promissory notes and even "uncertificated' certificates of deposit.

Presumably, if the drafting committee were to consider addressing the *Highland Capital* decision, it would consult with those at the Uniform Law Conference and the American Law Institute who were active in the drafting of Article 8.

The Committee agreed that this case creates a whole host of problems – on scope, anti-assignment rules, perfection – and that while a comment would normally be sufficient to respond to a single bad decision, such a comment would not be adequate to change NY law and a large portion of promissory notes choose NY law as governing law. Discussion then followed about how to fix the problem. A tentative decision was reached to have the PEB issue a Commentary in the immediate future to address law outside NY and for the Committee to work with groups in New York, such as the Association of the Bar of the City of New York, to develop a statutory proposal for changing NY statutory law.

14. Issue: Whether a financing statement filed against an original debtor in one jurisdiction should be effective for a limited period against the new debtor located in another jurisdiction with respect to collateral acquired by, or from a source other than, the original debtor.

Explanation: The public notice afforded by a financing statement filed against a debtor (the "original debtor") may become compromised when a "new debtor" succeeds to the original debtor's assets and liabilities. Consider, for example, the case where ABC Corp, an Illinois corporation, merges into XYZ Corp, a Massachusetts corporation. The financing statement filed against ABC in Illinois is seriously misleading with respect to the new debtor's name (XYZ) and is not filed in XYZ's location.

Despite the difference in names, the filed financing statement remains effective to perfect to perfect a security interest in property acquired by the new debtor before, and within four months after, the new debtor becomes bound as debtor by the original debtor's security agreement. *See* § 9-508(b). A security interest that is perfected by the filing against the original debtor in the original debtor's location generally remains effective for one year after the original debtor transfers the collateral to the new debtor. *See* § 9-316(a)(3). However, if the original debtor and new debtor are located in different jurisdictions, the financing statement filed in the original debtor's location is not effective to perfect a security interest in collateral that the new debtor acquires from a source other than the original debtor, whether before or after the merger.

Some have expressed concern that a secured party whose debtor (original debtor) merges out of existence enjoys no period of automatic perfection with respect to collateral acquired by the survivor (new debtor) from sources other than the original debtor, if the survivor is located in a different jurisdiction from the original debtor. A drafting committee might consider whether such a "grace period" is desirable and, if so, whether the creation of a grace period would require any corresponding changes to the rules governing priority between a security interest granted by the original debtor to one secured party and a security interest in the same collateral granted by the new debtor to a different secured party.

The new-debtor rules are analogous to those applicable to a single debtor who changes both its name and its location. Despite the difference in names, the filed financing statement remains effective to perfect a security interest in property acquired by the debtor before, and within four month after, the debtor changes its name. *See* § 9-507(c); *cf.* § 9-508(b). As regards collateral owned by the debtor before the relocation, a security interest that is perfected by the filing in the debtor's original location generally remains effective for four months after the debtor relocates to another jurisdiction. *See* § 9-316(a)(2); *cf*. § 9-316(a)(3). However, a financing statement filed in the debtor's original location is not effective to perfect a security interest in collat-

eral that the debtor acquires after it relocates. If a drafting committee thinks that a "grace period" is desirable in the setting of a new debtor, it may wish to consider whether a "grace period" is desirable in the debtor-relocation setting as well.

Providing "grace periods" in these contexts may reflect a policy change that would need to be justified.

The Committee agreed that, under current law, there is no temporary perfection period for collateral acquired after the transaction – whether the debtor moves (*e.g.,* converts) or we have a new debtor. It noted that there can be a similar problem following intra-state moves, but that problem deals only with priority, not perfection.

With regard to solutions, the Committee agreed that providing a temporary perfection period could cause a priority problem: a new secured party interested solely in after-acquired property filing during the grace period against the survivor of the merger could be primed by the earlier filer. The Committee agreed that if there were a temporary perfection period in after-acquired collateral following a move, conversion or merger, nothing should impair the priority of a lender who lends to the survivor during the temporary period before the original SP refiles. However, the Committee did not reach consensus on whether the problem is sufficient to merit a change, with the added complexity it would bring. The reporter will draft a proposal and the Committee will evaluate it.

15. Issue: Whether § 9-406(e) should be clarified as to whether, on an enforcement disposition by the secured party of a payment intangible or promissory note subject to a contractual anti-assignment term, the term is treated under § 9-406(d) (ineffective) or § 9-408(a) (effective if effective under other law).

Explanation: Sections 9-406(d) and 9-408(a) create a bifurcated approach for promissory notes and payment intangibles with respect to contractual anti-assignment terms. If a security interest in a promissory note or payment intangible secures an obligation, § 9-406(d) applies and fully overrides a contractual anti-assignment term. If the promissory note or payment intangible is sold, § 9-408(a) applies and only partially overrides a contractual anti-assignment term; the buyer's security interest may attach and be perfected but may not be enforced without the consent of the account debtor or the maker if the term is enforceable under other law.

However, § 9-406(e) states that § 9-406(d) does not apply to a sale of a payment intangible or promissory note. It is unclear whether § 9-406(e), when referring to a sale, refers only to a sale of payment intangible or promissory note that is itself a security interest and is therefore addressed in § 9-408(a) or whether the subsection is broader and includes a disposition by sale under § 9-610. Under the former interpretation, a contractual anti-assignment term would be overridden by § 9-406(d) on a disposition by sale; under the latter interpretation, it would not. The issue for a drafting committee is whether § 9-406(e) should be clarified and, if so, with what result.

The solution may implicate the need to clarify more generally a policy choice involving security interests in payment intangibles and promissory notes that contain contractual anti-assignment terms. If a security interest in a payment intangible or promissory note secures an obligation, § 9-406(d) permits a secured party to exercise its right of collection under § 9-607 against the account debtor or the maker notwithstanding an otherwise effective contractual anti-assignment term. However, if the security interest was the interest of a buyer of the payment intangible or promissory note, § 9-408(a) would not permit the secured party to exercise its right of collection in the face of an otherwise effective contractual anti-assignment term without the consent of the account debtor or the maker. The difference in treatment of the contractual anti-assignment term with respect to the account debtor or the maker depending upon whether the security interest secures an obligation or is a sale would seem to suggest inconsistent policy choices between §§ 9-406(d) and 9-408(a) that may need to be addressed in connection with addressing any clarification of § 9-406(e).

There was extended discussion around the following initial transaction: SP has a security interest in a payment intangible securing an obligation (not a sale). The payment intangible is subject to a transfer restriction. One option is to say that the anti-assignment terms are overridden across the board (upon a disposition by the SP, the buyer would be free of the anti-assignment terms). Option two is that the SP is free to dispose of the receivable, but the buyer is in § 9-408 (and thus subject to restrictions on transfer). Option three is to say that the SP cannot even collect. The Committee was unable to reach consensus on the best approach and will consider this issue again.

16. Issue: Whether an Official Comment should clarify how the priority rules apply to a security interest that, under § 9-309(3) or (4), is perfected upon attachment and without filing, but as to which a financing statement nevertheless has been filed.

Explanation: The "first-to-file-or-perfect" rule of § 9-322(a) governs the priority of conflicting security interests arising from successive sales of a payment intangible or promissory note. A security interest that arises upon the sale of payment intangibles or promissory notes is "automatically" perfected under § 9-309(3) or (4). There is a question whether, by filing a financing statement covering a payment intangible or promissory note that may be sold in the future, a buyer may establish priority based on the time of filing rather than on the later time when the security interest becomes automatically perfected (*i.e.*, when the security interest attaches, which normally is the time of the sale).

The Committee framed the issue as thus: can someone who plans to buy payment intangibles preserve its place in line by filing? There is disagreement about whether filing now has any effect in preserving the filer's place in line. For example, if SP1 files as to payment intangibles, SP2 then buys them and perfects automatically, and then SP1 buys them. Who wins? Is priority governed by 9-322(a), under which SP1 would win, or does § 9-318 allow SP2 to win (because the debtor had no rights to transfer to SP1)?

There was no consensus on what the law should be or whether a change is advisable. The committee members will continue to discuss with broader groups and get input from the market.

17. Issue: Whether purchase-money status should extend to consumer-goods related intangibles other than software and, if so, whether a purchase-money security interest in intangible collateral related to consumer goods should be automatically perfected.

Explanation: Frequently purchase-money transactions in consumer goods involve the extension of credit for the cost of extended warranties, maintenance services, insurance and other intangibles in addition to the consumer goods that are the focus of the underlying transaction. When the collateral is repossessed, the secured party may also have a claim for rebates due for early termination of the intangible property. In motor vehicle financing, the security interest in the primary collateral is perfected under state certificate-of-title statutes. The purchase-money security interest in other consumer goods is perfected automatically under § 9-309(1). However, any intangibles for which purchase-money credit was extended are not "consumer goods". They do not enjoy purchase-money status and are not covered by the automatic perfection provisions of § 9-309(1).

To the extent that purchase-money status or the scope of automatic perfection is expanded to encompass intangible collateral related to consumer goods, the expansion may reflect a policy change that would need to be justified.

The Committee did not want any action on this issue to affect the question of whether a consumer transaction loses PMSI status if the secured obligation includes amounts advanced to cover negative equity, service contracts, gap insurance, or the like. Still, there was some agreement that a secured party should not have to file to perfect a security interest in these ancillary rights if it need not file to perfect a security interest in the goods. In that sense, the issue is similar to the rules that provide that a security interest attaches automatically and is perfected automatically in a supporting obligation. The Committee deferred resolution of this issue until its next meeting.

18. Issue: Whether a filing designating a debtor as a transmitting utility must be made in the initial financing statement.

Explanation: Section 9-515(f) permits a financing statement to designate a debtor as a transmitting utility. If the debtor is so designated, the financing statement does not have a specific lapse date. Instead, the financing statement is effective until a termination statement is filed.

Because the definition of "financing statement" in § 9-109(a)(39) includes all amendments relating to the financing statement, filing offices have had to address the filing of an amendment designating the debtor as a transmitting utility when the initial financing statement did not designate the debtor as a transmitting utility. In such a case, a filing office, which has already given the initial financing statement a specific lapse date, is often not operationally capable, without undue cost or expense, of eliminating the lapse date in order to give effect to the amendment.

IACA has proposed that the states amend § 9-515(f) so that the debtor may be designated as a transmitting utility only in the initial financing statement. The change would make § 9-515(f) consistent with § 9-515(b), which provides a thirty-year lapse date for an initial financing statement filed in connection with a public-finance transaction or manufactured-home transaction.

The Committee agreed that a secured party should not be able to designate the debtor as a transmitting utility on an amendment. It then discussed whether this was a change in the law but decided to take no position on that point. The Committee agreed to expressly provide that transmitting utility status must be indicated on the initial financing statement, and that this will be prospective from the date of the change. Thus no transition rule is needed. If a debtor becomes a transmitting utility after the financing statement is filed, then a new filing will be required if the secured party wants something beyond a five-year life for its filing.

19. Issue: Whether Article 9 should further define the public record indicating the name of a debtor that is a registered organization.

Explanation: Under § 9-503(a)(1) a financing statement sufficiently provides the name of a debtor that is a registered organization only if it provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization. However, some states maintain more than one public record showing a debtor's name. For example, a state may maintain as a public record the charter document of the organization, and it may also maintain as a public record an on-line searchable data base for organizations of the same type. For a variety of reasons, the debtor's name in one public record may vary from the debtor's name in another public record. The International Association of Commercial Administrators ("IACA") has proposed that states amend Article 9 to provide that the name of the debtor as set forth in its charter document be determinative.

The resolution of this issue may also relate to the definition of "registered organization" in § 9-

102(a)(70). The definition states that a "registered organization" is "an organization organized solely under the law of a single State or the United States and as to which the State or the United States *must maintain* a public record showing the organization to have been organized" (emphasis added). Most state public records laws were written without Article 9 in mind. Thus, in many states the duty of the state to maintain public records relating to organizations is not always clear, even if the state does in practice maintain the public records. Because the public record that provides the debtor's name for purposes of § 9-503(a)(1) would likely be the public record that the state "must maintain" for the organization, consideration might also be given to providing a further explanation of the "must maintain" reference in the definition, perhaps in an expanded Official Comment if not in the definition of "registered organization" itself.

The Committee agreed that there are two related issues in this problem: (1) which public record controls (the organic documents, a certificate of good standing, or the searchable database); and (2) must the office be required to maintain the records. As to the first issue, the point was made that electronic records can changed without the consent of the filer (for example, the filing office might choose to "correct" them) and there might be no evidence preserved of when or how the change was made. The issue thus comes down to whether the name used should be the one on the entity's organic documents, a state-generated certificate of organization, a certificate of good standing, or the state's electronic database. The consensus was that the name on the organic documents should be the only correct name, and that this should be a statutory change.

As to the second issue, there was a consensus that the "must maintain" language is problematic and should be changed. There was also consensus that "registered organizations" should include anything that is created by the state or for which filing with the state is required for it to exist. It was not clear whether this phrasing would include business trusts. The Committee charged the reporter with the task of crafting a proposal that removes the ambiguity while also covering the types of statutory and business trusts that meet this standard.

20. <u>Issue</u>: Whether § 9-503(a)(3) should be stated expressly not to apply to a business trust that is a registered organization.

<u>Explanation</u>: Section 9-503(a)(3) sets forth the rules for determining the name of a debtor that is a trust or a trustee acting with respect to property held in trust. However, it is possible that a trust may be a business trust that is itself a registered organization. In that case, there has been some confusion in practice as to whether the debtor's name should be determined under § 9-503(a)(3) or, alternatively, under § 9-503(a)(1) which provides the rules for determining the name of a registered organization. While the Review Committee believes that the better interpretation is that the debtor's name should be determined under the registered organization rules, Delaware has enacted a non-uniform amendment that makes this result clear under the statute.

There was agreement that if the debtor is a trust and the trust is a registered organization then the rule of § 9-503(a)(1) should apply, not the rule in paragraph (a)(3), and that a statutory change is needed to clarify that this is the rule. If, on the other hand, the debtor is a trustee, then even if the trustee is a registered organization, paragraph (a)(3) should apply. The reporter will clarify this. No transition rule is needed because this is a clarification of the law.

21. <u>Issue</u>: Whether to clarify that § 9-307(c) has no application to a registered organization.

<u>Explanation</u>: Determining which jurisdiction's law governs perfection, the effect of perfection or non-perfection, or priority of a security interest under the choice-of-law rules in §§ 9-301 and 9-305(c) often requires a preliminary determination of where a debtor is "located." That location is determined by § 9-307. The rules in that section are complex, consisting of a three-part general rule in § 9-307(b) and a series of exceptions. The general rule is that a debtor who is an individual is located at his or her residence, and a debtor that is an organization is located at its place of business or chief executive office, as applicable.

Two important exceptions to the general rule are found in §§ 9-307(c) and 9-307(e). Section 9-307(c) provides that subsection (b) "applies only if [the law of the jurisdiction to which subsection (b) points] generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral. If subsection (b) does not apply, the debtor is located in the District of Columbia." Subsection (e) provides that "a registered organization that is organized under the law of a State is located in that State."

Consider the case of a debtor incorporated in Delaware but whose chief executive office is in a foreign jurisdiction whose law does not generally require filing as a condition of priority over a lien creditor. A fair reading of § 9-307(c) reflects the clear intent of the drafters: the debtor is located in Delaware by virtue of § 9-307(e). But it may be possible to read § 9-307(c) incorrectly as providing that the debtor is located in the District of Columbia. This is because the first sentence of that subsection provides that, in light of the law of the foreign jurisdiction, subsection (b) does not apply and the second sentence provides that "if subsection (b) does not apply, the debtor is located in the District of Columbia." This reading is possible because, unlike subsection (b), subsection (c) does not state that its rules are subject to rules appearing elsewhere in § 9-307.

A drafting committee might consider revising § 9-307 to avoid the incorrect reading or providing an expanded Official Comment to do so. The drafting committee might also consider clarifying that subsection (c) has no application to a debtor described in subsections (f), (i), and (j), or alternatively it might consider an expanded Official Comment to guide the reader to the same result.

There was consensus that the rule of § 9-307(e) should and does apply, and that this should be clarified by comment.

22. Issue: Whether § 9-307(f)(2) should be modified to state more completely how federal law may designate the location of a debtor that is a registered organization organized under federal law.

Explanation: 9-307(f)(2) locates a registered organization organized under the law of the United States "in the State that the registered organization, branch, or agency designates, if the law of the United States authorizes the registered organization, branch, or agency to designate its State of location." Official Comment 5 to § 9-307 notes that banking law often permits a registered organization to designate a main office, home office, or other comparable office, and states that "[d]esignation of such an office constitutes the designation of the State of location for purposes of Section 9-307(f)(2)."

Delaware has adopted a non-uniform version of § 9-307(f)(2) that adds a sentence in the text of the statute similar in substance to the quoted portion of Official Comment 5: "For purposes of paragraph (2) above, if a registered organization designates a main office, a home office, or other comparable office in accordance with the law of the United States, such registered organization is located in the State that such main office, home office, or other comparable office is located."

The basis for the non-uniform amendment is that a literal reading of the statute itself would not provide a clear rule for the location of a national bank, because the National Bank Act does not, in terms, authorize a bank to designate "its State of location." As the issuance of Official Comment 5 indicates, the Article 9 drafters understood this point. The Delaware legislature, however, sought to provide more definitive treatment by putting this material in the statute.

The issue often arises in practice, especially opinion practice.

There was general agreement that the comment should be elevated to the statute, as in Delaware, if the general policy is not changed. The Committee discussed whether, because of the difficulty of determining the state designated, the place to file against national banks should simply should be a designed jurisdiction, such as the District of Columbia. No decision was reached, in part because of the problems of transition.

23. Issue: Whether Article 9 should provide a more certain rule to determine the name of a debtor who is an individual.

Explanation: Section 9-502(a)(1) provides that a financing statement must, among other requirements, provide the name of the debtor in order for the financing statement to be sufficient. Section 9-503(a)(4)(A) states that, if the debtor is an individual who has a name, the financing statement must provide the individual debtor's name. Because under § 9-519 financing statements are indexed by the filing office of each state under the debtor's name, a subsequent searcher will need to know under what debtor name to search for a financing statement. Accordingly, § 9-506 provides that a financing statement is seriously misleading, and is therefore ineffective, if the financing statement provides a debtor name other than the name required by§ 9-503(a)(4)(A) unless a search under the required name, using the fling office's standard search logic, will disclose the financing statement.

Article 9 tells us what the debtor's name is if the debtor is a corporation or other registered organization. Under § 9-503(a)(1) that name is the name of the organization indicated on the public record of the debtor's jurisdiction of organization. However, Article 9 does not tell us what the debtor's name is if the debtor is an individual. And courts, in interpreting §§ 9-503(a)(4)(A) and 9-506, have struggled in determining whether a particular financing statement that contains the debtor's name as reflected on his or her birth certificate, driver's license, passport or other identification, or even a debtor's nickname or commonly used name, is the correct name of the debtor for the financing statement to be sufficient.

Recently, several states – Nebraska, Tennessee and Texas - have passed non-uniform amendments to their Article 9 to attempt to resolve this issue. Nebraska has enacted legislation to the effect that a financing statement containing the debtor's last name is sufficient. Tennessee and Texas permit the name of the debtor as reflected on his or her driver's license to be sufficient.

If a drafting committee considers a uniform statutory solution for determining the name of an individual debtor for purposes of satisfying the sufficiency requirements for a financing statement, that solution would logically apply as well to the sufficiency on a financing statement of the name of an individual who is a trustee or a settlor of a trust for purposes of § 9-503(a)(3) or who is a decedent for purposes of § 9-503(a)(2).

There was a very extended discussion centered around having a safe harbor rule or mandatory rule, possibly based on the debtor's driver's license. The discussion included the reliability of driver's licenses (what happens if the name on the license changes; what if not all of the characters that can appear on a license cannot be input into the filing office's records), whether any safe harbor should have multiple options or only one, and whether any safe harbor for perfection should also preserve priority. The greatest support was for a single

safe harbor based on driver's license issued by the state in which the debtor is deemed to be located under § 9-307, and that the safe harbor should work for both perfection and priority. Nevertheless, no final resolution was reached. The Committee anticipates receiving an extensive report on the subject from the UCC Committee of the State Bar of California.

The Committee discussed the possible transition problems of using a safe harbor based on the debtor's driver's license, but tentatively concluded that they were not likely to be severe (they would arise only if there was an incorrect filing based on the debtor's driver's license that would not be deemed effective under current law and it was followed by a correct filing – a prospect that seemed unlikely).

24. Issue: Whether the provisions of Article 9 providing for a correction statement should be reexamined.

Explanation: To address concerns about "bogus" filings against a debtor, § 9-518 permits a debtor to file a "correction statement" to indicate that a filed record is incorrect or wrongfully filed. The filing of a correction statement is for informational purposes only. It does not affect the effectiveness of a filed financing statement.

In practice secured parties have attempted to file correction statements even though § 9-518 permits a correction statement to be filed only by a debtor. This practice has often arisen when a secured party's financing statement has been wrongfully terminated by another secured party's termination statement that incorrectly referred to the file number of the financing statement of the first secured party. Of course, under § 9-510 the termination statement, filed without authorization of the first secured party, would be ineffective.

IACA has proposed that states amend their Article 9 so that a correction statement would be capable of being filed by a secured party or by anyone else who was entitled to file the initial financing statement. The California State Bar UCC Committee has objected to the proposal out of concern that the amendment would encourage the filing of extraneous records that do not affect the effectiveness or lack of effectiveness of financing statements, thus "clogging" the records of the filing offices and burdening both filing offices and subsequent searchers.

If the IACA proposal is not considered favorably by a drafting committee, consideration might also be given to whether Sec. 9-518 should be retained. Under other provisions of Article 9, the financing statement is not effective. The correction statement itself has no legal effect. Even a termination statement would produce only the consequence that the financing statement has become ineffective. That is a consequence that would already be the case for a "bogus filing". Furthermore, non-Article 9 law in various states provides a debtor with some additional remedies, ranging from tort claims for slander of title and the like to judicial procedures by which a "bogus filing" may be removed from the record. In addition, the misuse of the public records and the intentional conduct of the sort involved in making a bogus filing might be a crime under the laws of some states.

The Committee discussed situations in which someone other than the debtor might wish to file a correction statement. For example, if SP1 improperly terminates SP2's filing, SP1 might wish be able to file a correction statement to reduce its liability (to SP2 or other potential SPs) and SP2 might wish be able to file a correction statement to put others on notice that the termination statement *might* be inaccurate. However, it was noted that SP2 has an alternative way to give notice: to file a new financing statement.

Moreover, if the facts are different, if SP1 inadvertently terminates its own filing, the termination statement is effective. A later correction statement would have no legal effect (whereas filing a new financing statement would have legal effect) and the Committee does not want to confuse filers in that situation into thinking that the correction statement would be effective.

There was no support for getting rid of § 9-518 because it fulfills its purpose of helping debtors deal with bogus filings. There was some support for expanding the scope of § 9-518 beyond its original purpose and along the lines IACA suggests but the tentative consensus was to not invite further clutter of the filing system with "correction" statements that have no effect. However, the Committee will listen further on this issue, from both filers and filing officers.

25. Issue: Whether the approval of changes to the initial financing statement form and amendment form should be delegated to IACA or to a state's secretary of state.

Explanation: Section 9-521(a) provides that, if a filing office accepts an initial financing statement in written form, it must accept an initial financing statement in the form set forth in that subsection. Section 9-521(b) contains a similar provision for an amendment and also sets forth a statutory form of amendment. Now that the statutory forms of initial financing statement and amendment have been in use since 2001, IACA has recommended a few changes to the forms. To accommodate these and possible further changes over time, IACA has proposed that states amend their Article 9 so that the forms of initial financing statement and amendment would be deleted from the statute and so that IACA itself would approve the forms from time to time. In a state that is not permitted by its constitution or other law to delegate the approval process to IACA, IACA recommends that the state's Article 9 be amended to provide that the forms be approved by the state's secretary of state. The California State Bar UCC Committee has objected to the proposal to amend § 9-521 out of concern that the amendment might result in no single written form of financing statement or amendment being accepted in all states.

Under current law, states are free to create their own form that will be effective, but states must accept the official form. In short, the official form is a safe harbor. The IACA proposal would undermine the uniform effectiveness of the official safe-harbor form.

Several states have already amended their statutes to eliminate the safe harbor because it includes the debtor's social security number, and this seems to be the driving force behind the proposal. The consensus was to preserve a safe harbor form, to change the official form to remove the social security box or black out that box, but not to delegate to IACA the authority to revise the official form.

26. It was suggested that some state filing offices currently apply different rules for paper and electronic filings. For example, there may be no explanation given for why an electronic record is rejected (although an explanation is given for why a written financing statement is rejected) and some filing offices have a system in place to reject electronic filings with certain key words common to bogus filings. The offices also have differing standards on what characters can be input and how many characters can be input for the debtor's name (and other fields). The Committee discussed the ramifications of these differences and whether the Code should include standards for electronic filings. The Committee agreed to review an upcoming report by the Task Force on Filing Office Operations and Search Logic.

27. Issue: Whether a right to payment on chattel paper, if assigned separately from the chattel paper, should be characterized as chattel paper, a payment intangible or an account.

Explanation: The decision in *In re Commercial Money Center*, 350 B.R. 465 (9th. Cir. BAP 2006), raised the question of whether a payment right "stripped" from chattel paper was still "chattel paper" or whether the payment right becomes a "payment intangible." The answer is important because the sale of a payment intangible enjoys "automatic" perfection under § 9-309(3), while a buyer of chattel paper, to perfect its interest in the chattel paper, must either take possession or control of the chattel paper or file a financing statement against the debtor covering the chattel paper. In addition, the answer would affect certain priority rules, such as the "super-priority" in favor of certain purchasers of chattel paper who take possession or control of the chattel paper. *See* §§ 9-330(a) and (b).

The existing Official Comments to Article 9 are inconclusive on the characterization issue. *Compare* § 9-109, Official Comment 5 *to* § 9-102, Official Comment 5.d. There is also a question as to whether the problem is limited to "true lease" chattel paper given that § 9-203(g) would already appear to address chattel paper in which the payment right is secured by a security interest. That section provides that a security interest securing a payment right is transferred with the payment right and would support a characterization that the payment right, when transferred, is still chattel paper unless perhaps the security interest is disclaimed by the transferee.

If a drafting committee determines that a payment right "stripped" from chattel paper should not be characterized as chattel paper, it might consider whether the payment right should be characterized as an account instead of a payment intangible.

The *Commercial Money Center* decision has created priority concerns for chattel paper purchasers in practice, and the California State Bar UCC Committee has urged that the PEB address the issue.

There was consensus that a purchaser of chattel paper who takes possession of the chattel paper should beat a previous buyer of the payment stream. As to how to achieve that, there seemed to be consensus that the best way to deal with it was to provide that stripped payment rights from chattel paper remain chattel paper. There was concern about whether this should be expressed generally for all stripped rights or, if phrased only with respect to chattel paper, whether it would create a negative implication regarding other stripped rights (*e.g.*, from a promissory note, general intangible, or security). A tentative decision was to phrase the point narrowly with respect only to chattel paper and to make the point by comment rather than by change to the Code.

28. Issue: Whether an Official Comment should indicate by illustration what is sufficient for an e-mail to be "authenticated."

Explanation: Several provisions in Article 9 require that a record be "authenticated." Many have noted that the definition of "authenticate" in § 9-102(a)(7)(B) does not provide clear guidance as to whether an e-mail is authenticated. Consider three situations in which a person composes and sends and e-mail. In the first situation, the person types the text of the message and also types his or her name at the end of the message, and then enters the command to send the message to the recipient. In the second situation, the person types the text of the message, but does not type his or her name at the end of the message, and enters the command to send the message to the recipient. In the third situation, the person types the text of the message and does not type his or her name at the end of the message; when the sender enters the command to send the message to the recipient, however, the sender's name is automatically added to the bottom of the message as a result of an option previously selected by the sender in configuring his or her e-mail system. It seems clear that the first situation describes an authenticated e-mail. It is less clear, though, whether the second and third situations fulfill the requirements for authentication.

The Committee decided not to address this question.

29. Issue: Whether the *Enron* debt trading case, distinguishing between a "sale" and an "assignment" of a loan, should be addressed in the Official Comments.

Explanation: In connection with claims trading the question sometimes arises as to whether the obligor on a debt may assert claims and defenses against the transferee of the claim. Traditionally this issue has been analyzed by considering whether the transferee qualifies as a holder in due course (in the case of a claim embodied in a negotiable instrument) or other good faith purchaser for value (in the case of other claims), in which case the obligor generally may not assert claims and defenses against the transferee. In addressing this issue with respect to the bankruptcy rights of a transferee, the court in *In re Enron Corp.*, 379 B.R. 425 (S.D.N.Y. 2007), by interpreting several cases under state law, has articulated a distinction between "assignments" and "sales." According to the court, a claim of a transferee who takes by sale is not subject to equitable subordination or disallowance under the Bankruptcy Code, while a claim that is taken by assignment is subject to these disabilities. No such distinction appears in the Uniform Commercial Code. The Official Comments might confirm that, when the term "assignment" is used in the Uniform Commercial Code, the term includes a sale and is not distinct from a sale. *Cf.* Official Comment 26 to § 9-102.

The Committee decided not to address this issue.

30. Issue: Whether an Official Comment to § 9-104 should clarify that § 8-106(d)(3) reflects a principle of agency law that is also applicable to § 9-104.

Explanation: Section 8-106(d)(3) provides that a purchaser may achieve control of a security entitlement if another person has control on behalf of the purchaser or, if the person already has control, acknowledges that it has control on behalf of the purchaser. No similar provision is contained in § 9-104 addressing control of a deposit account. However, under § 1-103, the law of principal and agent applies to the Uniform Commercial Code unless displaced by a particular provision. An Official Comment might be provided to § 9-104 to overcome any negative inference regarding the ability of an agent to have control for its principal under § 9-104.

The Committee acknowledged that agency law supplements the Code in many places and that this point does not need to be expressed in every place it may be relevant. However, the Committee concluded that the rule in § 8-106(d)(3) goes beyond agency principles, and thus if it were to be made applicable to control in §§ 9-104 and 9-106, statutory change is necessary. The Committee decided that such a statutory change is appropriate and that it should be accompanied by a comment that makes clear that agency principles have always applied and continue to apply.

31. Issue: Whether an Official Comment should address the role, if any, of the parties' intent in interpreting § 9-109(a)(1).

Explanation: Section 9-109(a)(1) restates the traditional rule that Article 9's rules apply to a transaction "regardless of its form" if it creates what amounts to a security interest in personal property. Thus, courts have felt free to recharacterize sales as secured transactions when the economic effects of the transaction made that appropriate. It is inherent in that rule that the parties cannot control application of the statute by mere pronouncement that a transaction is not (or is) intended to create a security interest. Nevertheless, some courts have continued to look to the intent of the parties, as reflected in the transaction documents, to determine whether to characterize the transaction as a security interest.

The Committee concluded that § 9-109 comment 2 is misleading in its statement that no change was intended by the removal of the word "intent." It therefore concluded that a change to that comment was needed.

32. Issue: Whether an Official Comment might clarify that § 9-307(c) should apply to the specific collateral in question in contrast to collateral generally.

Explanation: As mentioned above, § 9-307(b) provides the general rules for determining where a given debtor is located for purposes of the choice-of-law rules in Article 9. Under § 9-307(b), a non-US debtor normally would be located in a foreign jurisdiction and foreign law would govern perfection. If foreign law affords no public notice of security interests, the general rules yield unacceptable results. Accordingly, § 9-307(c) provides that the general rules for determining the location of a debtor apply only if they yield a location that is "a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral." If the location lacks such a public-notice system for the collateral in question, then the general rules in § 9-307(b) do not apply, the debtor is located in the District of Columbia, and the law of the District of Columbia governs perfection. Some have read § 9-307(c) to refer to collateral generally rather to the particular collateral at issue. The latter reading would require a broader and more difficult inquiry than § 9-307(c) requires.

The Committee concluded that the reference to "the collateral" is to the collateral in the deal, not merely to collateral generally. A new comment will be drafted to this effect. The comment will not address whether the foreign filing system must apply to the particular type of debtor or the particular transaction. The Committee will then decide whether the draft comment would be a net benefit.

33. Issue: Whether an Official Comment to § 9-316(d) should make clear that § 9-316(d) does not apply in cases where perfection is accomplished in one state by a method other than compliance with that state's certificate-of-title law, the debtor relocates to a state whose certificate-of-title law governs perfection, and then the goods become covered

by a certificate in the new state.

Explanation: § 9-316(d) is not ambiguous, but its application when a secured party is perfected in one state by a method other than notation of its security interest on the certificate-of-title and the goods then become covered by a certificate of title issued by another state is complex and might be clarified by an Official Comment. More specifically, there is some concern that the distinction between § 9-316(a) and § 9-316(d) might not be obvious. For example, assume that perfection of a security interest in a boat in State A is not governed by a certificate-of-title statute in State A whereas the opposite is true in State B. If a secured party's security interest in the boat is perfected by filing (or otherwise, as by automatic perfection in the case of a purchase-money security interest in consumer goods) in State A and the debtor relocates to State B, § 9-316(a) applies and § 9-316(d) does not. The reason subsection (d) does not apply is that as soon as the debtor relocates, the law of State B governs perfection under § 9-301(1) and the requirement of subsection (d) that the goods "be perfected by the law of another jurisdiction when the goods become covered by a certificate of title" issued by State B cannot be satisfied. An explanatory Official Comment might note that subsection (d) applies only when the debtor remains in the jurisdiction where non-certificate-of-title perfection was accomplished and the goods become covered by a certificate of title issued by another jurisdiction.

A new comment will be drafted to make this clarification.

34. Issue: Whether, in a priority dispute between SP1 and SP2 as to the post-merger accounts in the following fact pattern, an Official Comment should clarify that the dispute is resolved under § 9-326, not § 9-322(a).

ABC and XYZ are registered organizations located in the same state. SP1 has a filed perfected security interest in existing and after-acquired accounts of ABC. SP2 has a filed perfected security interest in existing and after-acquired accounts of XYZ. ABC merges into XYZ. SP1 files against XYZ during § 9-508(b)'s four-month grace period.

Explanation: In this fact pattern, XYZ is a "new debtor" from SP1's perspective, and so SP1's security interest attaches to accounts acquired by XYZ after the merger. *See* § 9-203(d), (e). Even if SP1 takes no action, the financing statement that SP1 filed against ABC is effective to perfect a security interest in accounts that XYZ acquires during the four-month period following the merger. *See* §§ 9-509(a) and (b). SP2's security interest also attaches to accounts acquired by its debtor, XYZ, after the merger. Section 9-326(a) operates to subordinate SP1's security interest to SP2's with respect to "collateral in which a new debtor has or acquires rights," but only if SP1's security interest is "perfected by a filed financing statement that is effective solely under Section 9 508." Without § 9-508, SP1's financing statement would have no effect with respect to the accounts acquired by XYZ after the merger. Accordingly, SP1's financing statement would be "effective solely under Section 9-508" with respect to that collateral, and § 9-326(a) would subordinate SP1's security interest in that collateral to SP2's.

Note, however, that even without § 9-508, SP1's financing statement would be effective against other collateral owned by XYZ, specifically, any accounts acquired from ABC as part of the merger. *See* §§ 9-507(a) and 9-508(c). An Official Comment might provide guidance to the effect that one must look only at the collateral in question when determining whether a financing statement "is effective solely under Section 9 508."

The Committee agreed and a new comment to this effect will be drafted.

35. Issue: Whether an Official Comment should explain that a fixture filing for a debtor that is a transmitting utility must be made in the central filing office in each state in which the fixtures are located rather than in the central filing office in the state in which the debtor is located.

Explanation: Section 9-501(b) permits a financing statement for which the debtor is a transmitting utility to be filed in the central filing office of the state. Under § 9-301(1), as a general matter, the financing statement would be filed in the state in which the transmitting utility debtor is located. Section 9-501(b) goes on, though, to provide in a second sentence that a fixture filing against a transmitting utility debtor may also be filed in the central filing office. Some have read this sentence to suggest that the fixture filing should be made in the central filing office of the state in which the transmitting utility debtor is located. However, because under § 9-301(3)(A) the perfection of a security interest in fixtures is governed by the law of the state in which the fixtures are located, the better reading of the sentence, when considered together with § 9-301(3)(A), is that a transmitting utility debtor fixture filing must be made in the central filing office of each state in which the fixtures are located, not as a single fixture filing in central filing office of the state in the which the debtor is located.

A new comment will be drafted to indicate that the filing must be made in each state where the collateral is located.

36. Issue: Whether an Official Comment to § 9-509 should explain the circumstances in which an assignee of a security interest may be impliedly authorized by the assignor to file an assignment to the assignee of the assignor's filed financing statement covering the collateral.

Explanation: Section 9-509(d)(1) provides that, in the case of an assignment of a security interest, the "secured party of record" must authorize the

filing of any amendment to the financing statement that shows the new holder of the security interest as the successor secured party of record. In some transactions involving the sale of an obligation secured by a security interest, the parties may not think to include an express authorization for the transferee of the security interest to file an amendment to the financing statement to show the transferee as the successor secured party of record. Article 9 does not require that the "authorization" be in an authenticated record, and it would seem that the authorization would often be implied as part of the transfer itself.

A new sentence will be inserted in § 9-509 comment 6 that provides that authorization to file need not be in an authenticated record.

37. Issue: Whether the last two sentences of Official Comment 3 to § 9-509, providing for later ratification by the debtor of the filing of a financing statement by the secured party without the debtor's authorization in an authenticated record, should be modified to refer to the Restatement 3d of Agency's provisions addressing the ratification by a principal of the prior acts of its agent.

Explanation: Section 9-510 provides that a filed record (e.g., a financing statement) is effective only to the extent that it was filed by a person that may file it under § 9-509. Section 9-509 generally provides that a person may file an initial financing statement only if the debtor authorizes the filing in an authenticated record. The section specifically provides that, by authenticating a security agreement, a debtor authorizes the filing of an initial financing statement covering the collateral described in the security agreement. Secured parties often file an initial financing statement while the details of a financing are being negotiated and before the debtor authenticates a security agreement. If the debtor has not authorized the filing of such a financing statement in an authenticated record, then the financing statement is ineffective. However, the debtor's subsequent authentication of the security agreement would ratify the filing and make the financing statement effective. See Official Comment 3 to § 9-509 (explaining that law other than Article 9, "including the law with respect to ratification of past acts, generally determines whether a person has the requisite authority to file a record" under § 9-509).

Some have questioned whether, for purposes of the first-to-file-or-perfect rule in § 9-322(a), the priority of a financing statement whose filing has been ratified should date from the date of filing or from the date of ratification. Inasmuch as the public notice afforded by an unratified financing statement is equal to that of a financing statement whose filing was authorized ab initio, there is no reason not to date the priority of a ratified filing from the date of filing. Although Restatement (3d) of Agency § 4.02 might be read to suggest otherwise, Comment e to that section explains that "If other law provides rules for priority of rights, that other law governs. *See, e.g.*, U.C.C. §§ 9-322 and 9-509 and Comment 3 to § 9-509 (last sentence)." The last two sentences of Official Comment 3 to § 9-509 might be modified to refer to Comment e to § 4.02 of the Restatement (3d) of Agency.

The Committee decided that the comment should be clarified to expressly state that subsequent authorization to file makes the filing effective to perfect. The comment should also make it clear that the subsequent authorization makes the filing effective – for priority purposes – from when it was filed. If the comment cannot be drafted in a manner that will be effective, a statutory change will be pursued.

38. Issue: Whether the Official Comments to §§ 9-613 and 9-614 should explain how a notification of an internet disposition may comply with those sections.

Explanation: Sections 9-613 and 9-614 provide that a notification of a disposition of collateral must provide the time and place of a public disposition or the time after which any other disposition is to be made. Each section also provides a safe-harbor form of notification that, when properly completed, is sufficient to comply with the requirements of the section. The use of on-line auctions for the disposition of collateral has become widespread. Secured parties have found that the internet expands the marketplace for repossessed goods and other collateral and that it is an efficient marketplace that benefits both secured party and debtor. However, neither §§ 9-613 and 9-614, nor the Official Comments, give guidance to secured parties on how to comply with the notification requirements, or use the safe harbor forms, when disposing of collateral through on-line sales and auctions.

The Committee decided a comment should be drafted to clarify how the notification requirements can be satisfied for internet sales.

39. Issue: Whether it should be clarified by an Official Comment to § 9-706 that § 9-506(c) applies to an "in lieu" initial financing statement.

Explanation: During the transition period following the enactment of revised Article 9, and today under more limited circumstances, secured parties file "in-lieu" initial financing statements in a new filing office to move filing office records evidencing perfection by filing of a security interest from one jurisdiction to another as required by the choice-of-law and filing rules of Article 9. In addition to the information required by Part 5 of Article 9 for an initial financing statement, the "in-lieu" initial financing statement must contain the information required by §§ 9-706(c)(2) and (3). The additional information relates to the financing statement filed in the original filing office and dates the priority of the secured party's security interest from a date established by the original filing. However, if there is a minor error in the additional information required by § 9-706, a court could find the error

not to be covered by the minor errors rule of § 9-506 because of a reference in § 9-506 to "the requirements of this part. . . ." The reference to "this part" of Article 9 is to Part 5 of Article 9, suggesting that the provision has no application to the transition rules in Part 7.

The Committee decided that a new comment to Part 7 should be drafted to clarify that § 9-506 applies to in lieu filings.

Committee members and observers raised the following additional issues. The Committee's authority is limited to addressing the issues identified in the June 2008 report of the Article 9 Review Committee. If the Committee wishes to address other issues, it must seek authorization to do so.

40. Should the Code or comments make it clear that a secured party may take an assignment of a filing if there is no underlying security agreement or security interest?

The Committee decided not to seek the authority to address this issue.

41. Whether section 9-318 should be clarified to make it clear that it does not alter the 9-322 priority rules in the following situation:

SP1 files as to accounts. SP2 files and buys them. SP1 then buys (or takes a security interest) in the same accounts.

Section 9-318 would seem to indicate that SP1 gets no interest at all, but the result should be that SP 1 wins.

The Committee agreed to clarify this (treating it as related to the § 9-318 issues it was already authorized to address)

42. Should the rules of § 9-322(c) be modified to clarify that they relate only to disputes between a secured party with non-temporal perfection and another secured party with temporal perfection? The Committee agreed to explore at a later time whether this issue is something the Committee should seek authority to address. Professor Ken Kettering agreed to provide material to the Committee on this issue.

43. Should the choice-of-law rule that applies when the collateral is held in trust be changed to the law chosen in the trust agreement? Currently, there is substantial confusion about where to file because it is often difficult to determine whether the trust or the trustee is considered the owner.

The Committee concluded that the problems associated with transitions, non-uniformity (from non-simultaneous enactments) would make this proposed change extremely difficult. In addition, it noted that the law chosen in the trust agreement could change at any time. The Committee therefore chose not to pursue this issue.

44. Do we need to conforming amendments to § 3-302(e) and § 3-303(a)(2), or to their comments, to make it clear that "security interest" in those provisions refer only to security interests that secure an obligation (not a sale of a promissory note)? For example, with regard to § 3-302(e), the law prior to the Article 9 amendments would not have allowed a buyer of a promissory note who has not yet paid to qualify as a holder in due course. The amendments to Article 9 may have inadvertently changed this.

The Committee agreed to a pursue a change to the comments.

45. Should there be a change to § 9-105 to make clear that you can have a written amendment to electronic chattel paper without affecting control? This is particularly important since the servicer of the chattel paper, which might agree to the amendment, is often not the originator.

The Committee asked Tom Buiteweg for a memo on whether it should address this issue.

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