

Changes in the Uniform Commercial Code

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I. INTRODUCTION

Effective January 1, 1986, Indiana took its place among the vast majority of jurisdictions which have adopted the 1972 Official Text of the Uniform Commercial Code ("UCC").¹ Indiana's version of the Official Text amends thirty-five sections of the UCC (including thirty of the fifty-seven sections in Article 9), adds two new sections,² and adds a new Article 11 which creates a transition period and repeals the greater part of former Article 10. The changes are confined almost entirely to Article 9, which deals with secured transactions, and a number of sections are changed very little.³

II. THE SCOPE OF ARTICLE 9

The basic scope provision remains section 9-102,⁴ but the section was revised by deleting the phrase "personal property and fixtures within the jurisdiction of this state" so that revised Article 9 may now cover all consensual security interests in personal property (and fixtures) other than the twelve exceptions enumerated in section 9-104,⁵ regardless of whether or not the collateral is physically located within the state. Certain sales of accounts and chattel paper are also included, hence the title "Secured Transactions, Sales of Accounts and Chattel Paper." In addition, new section 9-114 imposes upon "real" consignors⁶ filing and notice responsibilities comparable to those imposed upon inventory secured parties.⁷

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¹Indiana's adoptions of the UCC are codified in Title 26 of the Indiana Code.

²The additions, taken from §§ 9-114 and 9-412 of the UCC, are codified in IND. CODE §§ 26-1-9-114 and -9-412 (Supp. 1985).

³The most striking illustration of this proposition is provided by the inclusion in the 1985 amendments of a number of sections for the sole purpose of deleting the now superfluous term "contract right." The authors of the model act concluded that if "contract right" were enlarged to include *prospective* or future accounts as well as present ones, the expanded term plus the term "general intangible" would suffice. See IND. CODE § 26-1-9-106 (Supp. 1985).

⁴IND. CODE § 21-1-9-102 is supplemented by §§ 26-1-9-103, -104, -113, and § 26-1-1-201(37) (1982 & Supp. 1985).

⁵IND. CODE § 26-1-9-104 (Supp. 1985).

⁶*Id.* § 26-1-9-114. In this context, a "real consignment" is one which is not a security interest, but which, nonetheless, requires perfection by filing as indicated in IND. CODE § 26-1-2-326(3)(c) (1982).

⁷See IND. CODE § 26-1-2-326 (1982).

III. CONTROLLING LAW IN MULTIPLE STATE TRANSACTIONS

The question of which jurisdiction's version of the Code *controls* a transaction had been treated primarily under section 9-103.⁸ The 1962 version of section 9-103 addressed the validity *and* the perfection aspects of a variety of types of collateral and the law applicable to each. Revised Article 9-103 addresses the perfection of security interests in five different types of collateral in multiple state transactions, including the effect of perfection (or non-perfection), but does not address the validity of a security interest.⁹ In general, controlling law will depend upon whether the collateral is tangible or intangible. If the collateral is tangible (or likely to remain in one place once it is installed or delivered), the basic rule under revised section 9-103 concludes that the law of the jurisdiction where the collateral was located when the last event necessary for perfection occurred controls the issue of perfection and the effect of perfection.¹⁰ If intangible, the law of the jurisdiction where the debtor is located tends to control.¹¹ Revised section 9-103, then, identifies applicable law as to documents, instruments, and ordinary goods,¹² goods evidenced by certificates of title,¹³ accounts, general intangibles and mobile goods,¹⁴ chattel paper,¹⁵ and minerals.¹⁶

IV. CHOICE OF LAW

Under amended section 1-105,¹⁷ the parties' ability to choose applicable law is expanded because the area *not* within the parties' choice with respect to Article 9 has been reduced. Under the former section 1-105 rule, the parties appeared to be able to select the jurisdiction whose law would apply to their secured transaction, assuming the transaction bore a reasonable relationship to that jurisdiction.¹⁸ However, an enormous exception existed with respect to Article 9. This exception was phrased in section 1-105(2) as "Policy and Scope of the Article on Secured Transactions."¹⁹ For purposes of Article 9, at least, the exception

⁸*Id.* § 26-1-9-103 (Supp. 1985).

⁹Note that IND. CODE § 26-1-9-103 (Supp. 1985) does not deal with *choice* of law, which is covered by IND. CODE § 26-1-9-105 (Supp. 1985), but with *controlling* law. Choice of law considerations are addressed at *infra* notes 17-21 and accompanying text. Validity (enforceability) is now addressed in IND. CODE § 26-1-9-203 (Supp. 1985).

¹⁰IND. CODE § 26-1-9-103(1)(b) (Supp. 1985).

¹¹*Id.* § 26-1-9-103(3)(b).

¹²*Id.* § 26-1-9-103(1).

¹³*Id.* § 26-1-9-103(2).

¹⁴*Id.* § 26-1-9-103(3).

¹⁵*Id.* § 26-1-9-103(4).

¹⁶*Id.* § 26-1-9-103(5).

¹⁷*Id.* § 26-1-1-105.

¹⁸*See id.* § 26-1-1-105 (1982).

¹⁹*Id.* § 26-1-1-105(2).

appeared to swallow the rule. Under amended section 1-105(2), this restriction on the parties' ability to choose applicable law was reduced to matters "concerning perfection of secured transactions."²⁰ Perfection, in this context, would concern only the effect of a security interest on third parties. Therefore, non-perfection issues, such as validity between the immediate parties and rights upon default, are now governed by the section 1-105 choice of law rules.²¹ Admittedly, choice of law was a far more significant subject when the UCC was new and adopted in only a handful of states. Nonetheless, variations continue from state to state, not to mention the unique law of Louisiana.

V. ATTACHMENT AND ENFORCEABILITY

Sections 9-203 and 204²² have been substantially modified and their components shifted. The concept of "attachment" (dealt with in former section 9-204) and "enforceability" (dealt with in former section 9-203) have been consolidated into a single section.²³ The conceptual elements of (1) agreement, (2) value, and (3) rights on the debtor's part in the collateral have been switched from section 9-204 to section 9-203 where they now supplement the elements necessary to make a security interest enforceable against the debtor and third parties, i.e., physical possession of the collateral or a signed security agreement.²⁴ Also deleted from amended section 9-203(1)(b) is the troublesome reference to proceeds which implied that a security agreement had to specify proceeds if a security interest was to attach to proceeds.²⁵ Under amended Article 9, a security interest grant respecting proceeds need no longer appear in the security agreement. Instead, amended 9-203(3) presumes proceeds as a derivative right.²⁶ These changes reduce the scope of new section 9-204 to after-acquired collateral and future advances, and eliminate the near useless one-year limitation of crop security interests under old section 9-204(4)(a).²⁷ The priority of future advances, however, is limited by a

²⁰*Id.* § 26-1-1-105(2) (Supp. 1985).

²¹*Id.* § 26-1-1-105. Under this provision, whenever a transaction between parties bears a reasonable relation to Indiana and also to another state or nation, the parties may choose which state or nation's law will govern their rights. Absent such an agreement, the Indiana provisions apply to transactions which bear an appropriate relation to the state. *Id.*

²²*See id.* §§ 26-1-9-203, -204.

²³*Id.* § 26-1-9-203.

²⁴*Id.*

²⁵*See id.* § 26-1-9-203(1)(b).

²⁶*Id.* § 26-1-9-203(3).

²⁷The one-year limit respecting a security interest in crops was largely ineffective because the crop financing statement could last for five years, and priority normally depends upon date of filing rather than date of grant. Assuming the farmer would sign each spring when asked to do so, the holder of the earliest financing statement effectively

new forty-five day provision in sections 9-301(4), 307(3), and 312(7), unless these advances are made "pursuant to commitment," a term defined in section 9-105(k).²⁸ Apparently the forty-five day period was chosen to correspond to the Internal Revenue Code provision concerning federal tax liens.²⁹

VI. PRIORITIES

Part 3 of Article 9, which deals with priorities among purchasers, lien creditors (and bankruptcy trustees), and secured creditors, may very well be the most important segment of Article 9. Unlike Article 2, for example, which attempts to construct a set of rules by which the parties to a sales agreement can measure the scope and effect of their bargain, Article 9 focuses on the effect of a (secured transaction) bargain upon third parties. To do so, Article 9 establishes a set of rules for ranking a particular security interest against other security interests and non-Article 9 liens. It is for this reason that priority considerations join validity and rights on default as the major substantive contributions of Article 9.

Although Part 3 has eighteen sections, its heart is to be found in section 9-312.³⁰ In turn, the heart of section 9-312, i.e., the general rule, is to be found in subsection (5), which addresses conflicting security interests in the same collateral. In place of the old three-way ranking system (in order of filing, in order of perfection, in order of attachment), a two-way ranking system is substituted (in order of filing *or* perfection and in order of attachment) and a new subsection (7) addresses future advances and distinguishes between those made pursuant to commitment and otherwise.³¹

controlled crop financing for a five-year period. The rewriting of § 9-204(2) had a second consequence which may be less salutary. The statutory definitions of precisely when the debtor acquires rights in planted crops, caught fish, extracted minerals and the like have disappeared.

²⁸IND. CODE § 26-1-9-301(4) (Supp. 1985) appears to subject the lien creditor (defined in § 26-1-9-301(3)) not only to the 45-day protected period but also to an indefinite further extension if the secured creditor making future advances lacks knowledge of the lien. The new 45-day limitation is also found in IND. CODE § 26-1-9-307(3) and -312(7) (Supp. 1985). "Pursuant to commitment" is defined in IND. CODE § 26-1-9-105(k) (Supp. 1985). The effect of this provision in bankruptcy is unclear, especially in light of the bankruptcy trustee's avoidance powers under 11 U.S.C. § 544 (1982), powers which do not depend upon a competing creditor's factual ignorance.

²⁹26 U.S.C. § 6323(c)(2), (d) (1982).

³⁰IND. CODE § 26-1-9-312 (Supp. 1985). IND. CODE § 26-1-9-313 (Supp. 1985), which concerns fixtures, deals extensively with priorities but will be separately treated in this article. See *infra* notes 47-63 and accompanying text.

³¹IND. CODE § 26-1-9-312(7) (Supp. 1985). The irony of the presupposed "commitment" in § 26-1-9-105(k) lies at the end of the definition, which recognizes a commitment

Section 9-312 also preserves the purchase money priority over pre-existing security interests in non-inventory, assuming perfection is within fifteen days following delivery.³² However, the changes concerning purchase money security interests in inventory are more significant. First, perfection by the time of delivery remains a requirement,³³ as does the need for a pre-filing notification.³⁴ Second, the pre-filing notification must now be *written* and lasts for *five years*.³⁵ On balance, inventory lenders are probably supported by these two changes because doubt clouded both of these issues. The newly created five-year duration corresponds to the five-year duration of a financing statement under amended section 9-403(2).³⁶

Third, an inventory purchase money security interest extends only to identifiable *cash* proceeds received on or before delivery of the inventory to a buyer; a sale on credit (which creates an account) divests the purchase money supplier of his "super" priority.³⁷ This reflects a compromise between the competing claims of those who finance inventory and those who finance accounts receivable. Even so, because most sales of inventory are not for cash, the compromise favors those who finance accounts. Finally, the hotly debated issue of whether, as between conflicting security interests, a priority as to the original collateral automatically conferred the same priority as to proceeds is resolved in the affirmative in section 9-312(6).³⁸

Section 9-312(2), the largely ineffective subsection which supposedly encourages suppliers to offer new credit to encumbered farmers remains unchanged.³⁹ Elimination of the restrictive phrase "due more than six months before the crops become growing crops" would have made this subsection meaningful because most competing secured claims will not have been *due* for at least six months when the farmer applies in the spring for his annual crop financing.

"whether or not a subsequent event of default or other event not within [the secured party's] control has relieved or may relieve him from his obligation." If the creditor, for whatever reason, has been relieved of his obligation to make a future advance, one cannot describe such an advance as being pursuant to commitment. For additional comments regarding lender "commitments," see Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477, 506 n.79 (1973).

³²IND. CODE § 26-1-9-312(4) (Supp. 1985). This 15-day period is a heterodox provision. The standard period under § 9-312(4) in most jurisdictions is 10 days.

³³IND. CODE § 26-1-9-312(3)(a) (Supp. 1985).

³⁴*Id.* § 26-1-9-312(3)(d).

³⁵*Id.* § 26-1-9-312(3)(b), (c).

³⁶*See id.* § 26-1-9-403(2).

³⁷*Id.* § 26-1-9-312(3).

³⁸*Id.* § 26-1-9-312(6).

³⁹*Id.* § 26-1-9-312(2).

VII. PROCEEDS

When collateral is sold, the security interest automatically attaches under amended section 9-203(3) to whatever property is received in exchange.⁴⁰ This substitute constitutes the "proceeds" of the sale. The basic proceeds provision is section 9-306,⁴¹ although it is supplemented by section 9-312(4), the automatic attachment of non-inventory proceeds, and by section 9-312(3), the corresponding, but more limited, automatic attachment of *cash* inventory proceeds.⁴² The elimination of the mysterious proceeds reference in old section 9-203(1)(b)⁴³ means that proceeds no longer need be claimed specifically in the security agreement. The controversy concerning whether payments under an insurance policy which insured collateral are "proceeds" has been resolved in the affirmative under new section 9-306(1) *if* the secured party makes certain that either he or the debtor is designated as loss payee under the insurance policy.⁴⁴ Section 9-306(2) attempts to codify a significant body of case law holding that the security interest does not attach to proceeds if the "disposition" was "authorized."⁴⁵ The changes in *filing requirements* concerning proceeds are significant, but are treated in this article in Part XI.⁴⁶

VIII. FIXTURES

As a general rule, Article 9 deals only with personal property. The most notable exception to this rule involves fixtures. Section 9-313 addresses conflicting priorities arising under real estate law and Article 9 with respect to what Comment 3 to the 1972 Official Text identifies as "an intermediate class which has become real estate for certain purposes, but as to which chattel financing may be preserved."⁴⁷ The

⁴⁰*Id.* § 26-1-9-203(3).

⁴¹*Id.* § 26-1-9-306.

⁴²*Id.* § 26-1-9-312(2) and (3).

⁴³The mystery concerned why old § 9-203(1)(b) seemed to imply the need to grant a security interest in proceeds. The UCC-1 official form should be modified to eliminate the proceeds box. It is unclear whether continued use of the existing form and the absence of a checkmark in the proceeds box imply that the parties had agreed proceeds were not within the security interest they had created. Even if this *were* their agreement, it might not be controlling. *See* IND. CODE § 26-1-9-203(1)(b) (Supp. 1985).

⁴⁴*Id.* § 26-1-9-306(1).

⁴⁵In *Anon v. Production Credit Association of Scottsburg*, 446 N.E.2d 656 (Ind. Ct. App. 1983), the court held that a secured creditor which allowed the debtor to sell hogs upon condition that the debtor remit the proceeds of sale thereby allowed its security interest in the hogs to be cut off by the sale. The cases are summarized well in *Moffat County State Bank v. Producers Livestock Marketing Association*, 598 F. Supp. 1562 (D. Col. 1984). Much of the controversy in this area originated with *Clovis Nat'l Bank v. Thomas*, 77 N.M. 554, 425 P.2d 726 (1967). In *Clovis*, the court concluded that a bank which held a security interest in a debtor's cattle and later consented to a sale of the cattle lost its security interest.

⁴⁶*See infra* notes 77-94 and accompanying text.

⁴⁷IND. CODE § 26-1-9-313 (Supp. 1985). *See* U.C.C. § 9-313 comment 3.

compromise reached in the 1972 Official Text between these competing positions was that if a secured party sought priority only over those claiming security interests or liens in personalty,⁴⁸ he could perfect by filing under the normal chattel filing rules. On the other hand, if he sought priority over those claiming interests under real estate law, he would have to file under a new procedure called "fixture filing."⁴⁹ Such a filing, accomplished under section 9-402(5), must identify the collateral, contain a description of the real estate that would suffice for local recording purposes, and *recite* that it is to be filed in the real estate records.⁵⁰ It must also identify the record owner if other than the debtor.⁵¹ Conversely, the recordation of a real estate mortgage that satisfies these requirements (and describes the goods by item or type) "is effective as a financing statement" under section 9-402(6).⁵²

The priority rules dealing with fixtures are difficult to summarize; indeed, they are difficult to understand. Certain guidelines can be offered:

1. State law determines what constitutes a fixture.⁵³
2. An encumbrance upon fixtures can be created under real estate law.⁵⁴
3. Unless some exception applies, fixture security interests are subordinate to conflicting real estate interests.⁵⁵
4. If a fixture secured party has priority over owners and encumbrancers of the underlying real estate, he may remove his collateral but must pay for actual damage caused by the removal.⁵⁶
5. A construction mortgagee has priority over a fixture filing made at any time before completion of construction so long as the mortgage was recorded before the goods became fixtures, absent the mortgagee's waiver.⁵⁷
6. A purchase money security interest in a fixture arising before and perfected within ten days after affixation prevails over the conflicting interest of the real estate owner and encumbrancers *other than construction mortgagees*.⁵⁸

⁴⁸Examples of such secured parties include lien creditors, those who have consented to the security interest, and those who allowed (or permitted others to allow) one who installed a chattel to remove it.

⁴⁹The new term "fixture filing" is defined in amended § 9-313(1)(b).

⁵⁰IND. CODE § 26-1-9-402(5) (Supp. 1985).

⁵¹*Id.*

⁵²*Id.* § 26-1-9-402(6).

⁵³*Id.* § 26-1-9-313(1)(l).

⁵⁴*Id.* § 26-1-9-313(3).

⁵⁵*Id.* § 26-1-9-313(7).

⁵⁶*Id.* § 26-1-9-313(4)(a), (6).

⁵⁷*Id.* § 26-1-9-313(6).

⁵⁸*Id.* § 26-1-9-313(4)(a), (6).

Obviously, the real estate construction industry has improved its position very effectively in its continuing battle with fixtures claimants. The only way to attain priority over a construction mortgagee is to perfect before the mortgage is recorded. It is important to note, however, the unusual requirement in section 9-313(1)(c) that the construction mortgage not only secure an obligation incurred for the acquisition of land or the construction of an improvement on land, but also *that the recorded instrument indicate* the existence of such an obligation.⁵⁹ Real estate practitioners and mortgage lenders must be sure to supply such a provision in construction mortgage instruments.

There are two ways to accomplish a fixture filing. One is by recording a mortgage that contains an adequate description of the collateral by item or type.⁶⁰ Otherwise, a fixture filing requires: (1) a filing that contains the normal financing statement information and is conducted at the same location at which a mortgage on affected real estate would be recorded,⁶¹ and (2) a showing that it covers fixtures, a recital that it is to be filed for record in the real estate records,⁶² a description of the real estate, and, if the debtor has no interest in the affected real estate, an identification of the record owner.⁶³

IX. CONSIGNMENTS AND LEASES

One of the most serious discrepancies between commercial practice and the UCC concerned consignment sales to merchants. Consignors delivered, and even litigated, in the firm belief that the goods they consigned to merchants still belonged to them. Unfortunately, the UCC

⁵⁹*Id.* § 26-1-9-313(1)(c). Exceptions to these general priority rules are enumerated in IND. CODE § 26-1-9-313(4) and (5) (Supp. 1985). These exceptions to the general priority scheme of § 9-313 are removable factory and office machines and certain domestic appliances (§ 9-313(4)(c)), the lien of the bankruptcy trustee (§ 9-313(4)(d)), the effect of written consent or disclaimer by the rival party (§ 9-313(5)(a)), and the consequence of a debtor having a right to remove the goods, as, for example, under a lease between a tenant and the owner of the real estate (§ 9-313(5)(b)). In each case those who fit within one of these exceptions will prevail over the conflicting interest of an owner or encumbrancer. Regarding the § 9-313(5)(b) exception, if the right arises under a lease of the underlying real estate, and the mortgagee is not a party to a lease which is not recorded, it is unclear whether the mortgagee falls within the exception.

⁶⁰*Id.* § 26-1-9-402(6).

⁶¹*Id.* §§ 26-1-9-313(1)(b), 26-1-9-402.

⁶²The distinction between "recorded" in § 9-402(6)(d) and "filed in the estate records" in § 9-402(6)(c) suggests that fixture filings need not be acknowledged or recorded, but that the recorder must key or index the fixture filings to the recorded information. If this is true, however, there does not appear to be any need for § 9-402(9) to disclaim the applicability of IND. CODE § 36-2-11-15 (1982), under which the preparer of a recorded instrument must be identified. IND. CODE § 26-1-9-412(6), (9) (Supp. 1985).

⁶³The description must be sufficient, if contained in a mortgage, to give constructive notice of the mortgage to third parties. *Id.* § 26-1-9-402(5) (Supp. 1985).

provided in section 2-326 that such goods, regardless of the owner, were subject to the claims of the merchant's creditors and bankruptcy trustee absent a filing.⁶⁴

More confusing was the question of whether the consignor of inventory owed existing inventory secured parties the kind of notice which a purchase money inventory supplier was required to give under section 9-312(3), or whether the consignor would receive the priority promised by this subsection *if* he gave such a notice. The result of this confusion was the creation of a new section⁶⁵ which requires filing *and* notice but provides for the *true* consignor the same priority status a *secured transaction* consignor would receive.⁶⁶ It also validates the consignor's section 9-312(3) notice.⁶⁷

An analogous problem existed for lessors of equipment. The UCC's definitional section for determining what constitutes a true lease and whether the lease was intended as security⁶⁸ invited difficult judgments in specific situations. Lessors were reluctant to concede (by making a UCC filing) that they were not true lessors, and that they might have foreclosure responsibilities under Article 9, Part V. New section 9-412 *allows* a lessor (or consignor) to file, providing that any such filing shall not, of itself, be a factor in determining whether or not the consignment or lease was intended as security.⁶⁹

X. DEFINITIONAL CHANGES

The main definitional changes are confined to sections 9-105 and 106.⁷⁰ Several significant UCC terms are now defined: "encumbrance," "mortgage," "advance pursuant to commitment," and "transmitting utility." The term "account" is *redefined* to include the contents of the abolished term "contract right."⁷¹ Under amended section 9-106, an account means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, *whether or not it has been earned by performance*.⁷² The newly added concept of "advance pursuant to commitment" has produced not only a definition⁷³ but also substantive changes in sections 9-301(4),

⁶⁴See IND. CODE § 26-1-2-326 (1982).

⁶⁵IND. CODE § 26-1-9-114 (Supp. 1985).

⁶⁶*Id.* § 26-1-9-114.

⁶⁷See *id.* § 26-1-9-114(1).

⁶⁸*Id.* § 26-1-1-201(37) (1982).

⁶⁹*Id.* § 26-1-9-412 (Supp. 1985).

⁷⁰*Id.* §§ 26-1-9-105, -106.

⁷¹*Id.* § 26-1-9-106.

⁷²*Id.*

⁷³*Id.* § 26-1-9-105(k).

307(3) and 312(7).⁷⁴ As previously noted in Part VI,⁷⁵ the phrase “pursuant to a commitment” is surprisingly loosely defined to the advantage of the “committed” lender. The newly important term “construction mortgage” is defined in section 9-313(1)(c).⁷⁶

XI. FILING CHANGES

Section 9-401(1)(b) expands the number of items requiring filing in the office where a real estate mortgage would be filed to include not only fixtures, but also timber to be cut and minerals (including oil and gas) and the resulting accounts.⁷⁷ Section 9-401(5) calls for a filing in the office of the Secretary of State by a transmitting utility both as to fixtures *and non-fixtures*.⁷⁸ This filing serves as a fixture filing under section 9-313.⁷⁹ It is uncertain whether titled (“certificated”) vehicles owned by the utility also require a lien notation on the title certificate because of section 9-302(3)(b) or whether this generalized filing by a transmitting utility in the office of the Secretary of State will suffice.⁸⁰

Section 9-402, dealing with formal requirements of a financing statement, offers a number of changes.⁸¹ The following are the most significant:

1. the requirement that the secured party sign the statement⁸²— Because the secured party need not sign the security agreement, there appeared to be no public policy served by requiring him to join the debtor in signing the financing statement which was ancillary to that security agreement.
2. permission for a secured party to file a copy of the financing statement if the original so provides, or is filed in Indiana⁸³
3. permission to file a statement signed only by the secured party when the debtor moves or enters the state or changes his name or when a statement lapses⁸⁴
4. clarification that a partnership name *shall* be used and a trade name *may* also be used⁸⁵

⁷⁴See *id.* §§ 26-1-9-301(4), -307(3), -312(7).

⁷⁵See *supra* note 31 and accompanying text.

⁷⁶IND. CODE § 26-1-9-313(1)(a) (Supp. 1985).

⁷⁷*Id.* § 26-1-9-401(1)(b).

⁷⁸*Id.* § 26-1-9-401(5).

⁷⁹*Id.* § 26-1-9-313.

⁸⁰See *id.* § 26-1-9-302(3)(6).

⁸¹*Id.* § 26-1-9-402.

⁸²*Id.* § 26-1-9-402(1).

⁸³*Id.*

⁸⁴*Id.* § 26-1-9-402(2).

⁸⁵*Id.* § 26-1-9-402(7).

5. the requirement of a new filing within four months after the debtor's name change or corporate restructuring⁸⁶—This change gently lessens the significant policing burden on the collective shoulders of the secured lending fraternity.

Section 9-403 eliminates the sixty-day grace period for financing statement renewals,⁸⁷ extends the perfection period throughout the duration of an insolvency proceeding,⁸⁸ prescribes preservation duties and options for filing officers,⁸⁹ and omits the five-year maturity for transmitting utilities and for real estate mortgages filed as financing statements.⁹⁰ The discussion in Part VIII concerning the newly created fixture filing system under section 9-402(5) need not be repeated here.⁹¹ Section 9-404 imposes the duty to file appropriate termination statements upon written demand, regardless of demand in the case of consumer goods.⁹²

Section 9-306(3)(a) deletes the reference to a financing statement covering proceeds but adds the onerous requirement that the financing statement be filed *where* the proceeds collateral would have required a filing had it been original rather than second generation collateral, and the even more onerous requirement that if the proceeds are acquired with cash proceeds the statement must describe *all types* of potential proceeds.⁹³ This naturally raises the question of how the secured party can know his debtor's *reinvestment* plans when the *original* loan or purchase is being negotiated.⁹⁴

XII. EXCEPTIONS TO THE GENERAL FILING REQUIREMENTS

Section 9-302 sets out the general filing requirement for secured transactions and then lists various exceptions. The most far-reaching is

⁸⁶*Id.*

⁸⁷*Id.* § 26-1-9-403(3). Practitioners are accustomed to attributing an effective life of five years and two months to financing statements because of the language of former § 9-403(2). They must adjust their tickler files after January 1, 1986.

⁸⁸*Id.* § 26-1-9-403(2). It is uncertain what would happen if the bankruptcy court modified the automatic stay so that the secured party may foreclose, or if the bankruptcy court authorized an abandonment of the collateral. Surely the eventual termination of the bankruptcy becomes an irrelevancy at such a point.

⁸⁹*Id.* § 26-1-9-403(3), (4).

⁹⁰*Id.* § 26-1-9-403(5).

⁹¹*See supra* notes 49-52 and accompanying text.

⁹²IND. CODE § 26-1-9-404 (Supp. 1985).

⁹³*Id.* § 26-1-9-306(3)(a).

⁹⁴For example, assume that a lender finances a home computer system used by a housewife in her rural tax return business and perfects by filing with the Secretary of State. If this debtor trades the computer for a farm tractor which her husband, a farmer, needs after January 1, 1986, the tractor, although proceeds from the sale of the computer, would not be automatically perfected because tractors in the hands of a farmer require a local filing in the county of the farmer's residence. In addition, if the computer were

the new omnibus exception in section 9-302(3)(a) which includes unidentified national (and international) registration or filing systems and unidentified federal statutes which specify a different place of filing than would be proper under Article 9.⁹⁵ Three other new exceptions may prove significant. Under section 9-302(1)(c), the assignment of a beneficial interest in a trust is excluded.⁹⁶ It is unclear whether this exception covers *all* assignments, including collateral assignments for security purposes.⁹⁷ Farm lenders will note with interest that "secret liens" on farm equipment costing no more than five hundred dollars are no longer excused from filing.⁹⁸ The unusual treatment of transmitting utilities under section 9-401(5) has already been mentioned in Part XI.⁹⁹

XIII. DEFAULT

Changes in Part Five of Article 9 are surprisingly few. The most significant change concerns a post-default waiver of notice. Under section 9-504(3), as amended, the defaulting debtor may renounce or modify his right to receive notice of a proposed foreclosure sale.¹⁰⁰ The fact that this was not already the law is quite possibly the greatest single misunderstanding maintained by the financing industry and by its customers.

Regardless of whether such a post-default waiver is signed by the debtor, the foreclosing secured party must send notice of sale¹⁰¹ to "any other secured party from whom the secured party has received . . . written notice of a claim of an interest in the collateral."¹⁰² In contrast, under the former language of section 9-504(3), the foreclosing secured party had to send notice of sale to ". . . any other person who has a security interest in the collateral and *who has duly filed* a financing statement indexed in the name of the debtor in this state *or who is known by the secured party to have a security interest in the collateral.*"¹⁰³ An automatic entitlement to notice through the mere fact of filing a financing statement was a significant protection to other secured creditors

sold for cash and the cash were used to purchase a piano, the original filing would be ineffective as to the proceeds because the original financing statement, although filed in the correct office, did not describe these proceeds by type as required under amended § 26-1-9-306(3)(1).

⁹⁵See IND. CODE § 26-1-9-302(1)(c) (Supp. 1985).

⁹⁶*Id.* § 26-1-9-302(1)(c).

⁹⁷Time will tell, of course, but it would make no sense to exclude from the filing requirements a particular type of collateral (the beneficial interest under a trust) when the basic premise of Article 9 was to invalidate secret consensual liens.

⁹⁸IND. CODE § 26-1-9-302(1)(c) (Supp. 1985).

⁹⁹See *supra* notes 78-80 and accompanying text.

¹⁰⁰IND. CODE § 26-1-9-504(3) (Supp. 1985).

¹⁰¹In consumer goods cases *no* other notification need be given.

¹⁰²IND. CODE § 26-1-9-504(3) (Supp. 1985).

¹⁰³*Id.* § 26-1-9-504(3) (1982) (emphasis added).

against a "give-away" sale of their common collateral. This amendment to subsection (3) has made one significant change and preserved one significant problem. The problem arises out of the last sixteen words of this requirement emphasized in the above quotation. There is a question whether the regional credit manager of a national corporation is likely to know whether someone employed by his giant employer was once told about a possible rival security interest. Without this knowledge, it is doubtful that he can fulfill this notice requirement. The significant change arises out of the substitution of written notice by other claimants for the prior recognition that the filed financing statement itself was sufficient notice of their interest in being notified of any proposed sale.¹⁰⁴

It seems reasonably clear under amended section 9-504(3) that, while a debtor after default can waive his right to notification of sale, he cannot waive his right to the sale itself.¹⁰⁵ Also, it appears that he cannot waive his right that the sale be commercially reasonable.¹⁰⁶

Section 9-505(2) has been amended to provide a defaulting debtor with a *comparable* right to renounce his ability to resist the secured party's retention of collateral. The amendment also imposes a comparable restriction on the foreclosing creditor's notification duties.¹⁰⁷ The axiom that comparability has its limits finds expression in this "comparable" right. A debtor under section 9-504(3) waives notice of the disposition but not his right to the disposition itself.¹⁰⁸ The section 9-505(2) debtor may be able to waive both.¹⁰⁹

¹⁰⁴Surely all who have duly filed financing statements describing the collateral in question are entitled to notice. There is no reason to restrict notice of the pending sale to those who have sent the foreclosing party a written notice of rival claim, timely received. The words "received" and "written notice" strongly suggest that the rival's mere perfection by filing will not suffice as the requisite written notice. It almost appears necessary for each secured party to *mail* copies of his filed financing statement to all others he discovers when he files. If such action is necessary, it is unclear what he must do about those who file after he does. Curiously, the new, and soon to be controversial, wording imposes no limit on the *duration* of the written notice. The Code does not indicate whether the purchase money notification sent pursuant to § 9-312(3) will suffice if the proposed sale is by some other secured party who received a copy of that notice almost five years before. A heavy policing burden has been placed on each secured creditor: the burden of attempting to notify all rival secured parties of the obvious fact that he (or it) would like to be notified of any disposition of the common collateral.

¹⁰⁵IND. CODE § 26-1-9-504(3) (Supp. 1985).

¹⁰⁶Much case law has now accumulated concerning how much public notice is necessary to make the "public sale" a fair one and the corresponding publicity a secured party need provide for a private sale. For a discussion of various issues arising under this section, see Quinn, *Uniform Commercial Code Commentary and Law Digest* 9-321 and 59-405 (1978 & Supp. I 1985).

¹⁰⁷IND. CODE § 26-1-9-505(2) (Supp. 1985).

¹⁰⁸*Id.* § 26-1-9-504(3).

¹⁰⁹IND. CODE § 26-1-9-505(2). The critical wording in amended § 9-505(2) is "if he has not signed, after default, a statement renouncing or modifying his rights under this

XIV. MISCELLANEOUS

Section 2-702, which governs the seller's right to cancel a credit sale to an insolvent, has received a boost in effectiveness by the deletion in section 2-702(3) of the words "or lien creditor."¹¹⁰ Under former section 2-702(3), the seller's right to reclaim is "subject to the rights of a buyer in ordinary course or other good faith purchaser *or lien creditor*."¹¹¹ The most prevalent lien creditor today is the trustee in bankruptcy (or a Chapter 11 debtor-in-possession). This change should significantly reduce the scope of the exception to the credit seller's cancellation capacity. The elimination of "contract right" as a concept has required the term "account" to be redefined in the present *and* future tense, i.e., amounts due or *to become* due.¹¹² Fine tuning under section 9-318(4), which deals with the assignment of accounts, correspondingly broadens the coverage to include amounts not yet fully earned by performance.¹¹³ This subsection does attempt to end the account debtor practice of barring assignments indirectly by requiring the account debtor's consent.

XV. THE PRESERVATION OF INDIANA VARIATIONS

As a whole, Indiana's heterodox variations have been preserved under the 1985 amendments to the UCC. The following provisions represent continuing departures from the 1972 Official Text:

1. Indiana's most significant departure from the uniform act is probably to be found in section 9-307(1), dealing with buyers of encumbered goods in the ordinary course of business. This exception is preserved.¹¹⁴
2. Section 9-402(2)(c) allows a secured party to file a financing statement signed only by the secured party if so authorized by the debtor in the security agreement. This provision has survived the amendments.¹¹⁵
3. The "secret lien" on farm machinery under section 9-307(2) had a

subsection." Arguably, the debtor's right to resist retention of collateral as a substitute for foreclosure through sale is a right granted to the debtor under this subsection separate from his right to receive notice of the secured parties' proposal. Note also the convoluted wording of § 9-501(3).

Id. § 26-1-9-501(3).

¹¹⁰*Id.* § 26-1-2-702(3) (Supp. 1985).

¹¹¹*Id.* (emphasis added).

¹¹²See *id.* § 26-1-9-106. See also *supra* notes 71-72 and accompanying text.

¹¹³IND. CODE § 26-1-9-318(4) (Supp. 1985).

¹¹⁴*Id.* § 26-1-9-307(1).

¹¹⁵*Id.* § 26-1-9-402(2)(c).

\$500 rather than a \$2,500 maximum.¹¹⁶ Farm equipment has been removed from the subsection entirely.¹¹⁷

4. Section 9-312(4) provided a fifteen-day rather than a ten-day period within which to perfect a purchase money security interest. The fifteen-day period is preserved.¹¹⁸

XVI. TRANSITION PERIOD

Sections 42 through 47 of Senate Enrolled Act No. 108 adopt most of Article 11. The effective date is January 1, 1986.¹¹⁹ While prior transactions under the Act remain valid and perfected after January 1, 1986, they will thereafter be subject to the new Act for purposes of termination, enforcement, and the like.¹²⁰ As an example of how this abstract statement is transformed into a particular application, consider the matter of after-acquired collateral. Under new section 11-105(2), after-acquired property which would have attached as late as December 31, 1985, pursuant to an old act security interest, will not attach on or after January 1, 1986, unless the perfection filing was consistent with new Act requirements.¹²¹ Under new section 11-105(1), the sixty-day grace period for renewing financing statements after the five-year duration has expired will not be available after January 1, 1986.¹²² Note also the December 31, 1988 deadline in section 11-106,¹²³ and the July 1, 1986 "springing fixture filings" provision under section 11-105(4).¹²⁴

XVII. CONCLUSION

This short article can do little more than identify the most significant changes in the UCC made by the 104th General Assembly. Future authors, it is hoped, will focus in depth on these changes to offer guidance to the courts. Article 9 was by far the most innovative of the nine

¹¹⁶See *id.* § 26-1-9-307(2) (1982).

¹¹⁷*Id.* § 26-1-9-307(2) (Supp. 1985).

¹¹⁸*Id.* § 26-1-9-312(4).

¹¹⁹The effective date and transition provisions of Public Law 93-1985, by which the 1972 amendments to the U.C.C. were adopted, are not considered a part of the Official Code.

¹²⁰The UCC approach under which old act transactions become subject to the new act for purposes of termination, enforcement, and the like is quite unlike the bankruptcy statutes which establish that pending bankruptcy cases filed before October 1, 1979, are still being conducted under the superseded "Bankruptcy Act" rather than the current Bankruptcy Code.

¹²¹Pub. Law No. 93-1985, Senate Enrolled Act 108, § 44(2).

¹²²*Id.* § 44(1).

¹²³*Id.* § 45(1), (2).

¹²⁴*Id.* § 44(4).

articles comprising the UCC when it was originally proposed in the early 1950's. The 1962 Official Text (Indiana's former statute) served the public quite well over the years, but the accumulated experience of the various states revealed various problem areas, particularly in Article 9. The 1972 Official Text reflected the combined efforts of the National Conference of Commissioners on Uniform State Laws and the American Law Institute to update Article 9, with incidental amendments to other articles only when necessary for the sake of consistency. Because all major commercial states, most of Indiana's neighbors, and over four-fifths of all American jurisdictions have now adopted the 1972 Official Text, Indiana's adoption of this text is most welcome. This article ends with a *caveat*: the general public and the typical commercial enterprise will assume that nothing of consequence flows from this "rewriting" of an existing statute. The responsibility rests with the practitioners and house counsel to analyze these changes in the context of each particular enterprise and make such changes in forms and procedures as the circumstances warrant. Those who fail to do so will be left behind.