SURVEY OF RECENT DEVELOPMENTS OF THE LAW CONCERNING THE UNIFORM COMMERCIAL CODE AND A BRIEF INTRODUCTION TO REVISED UCC ARTICLE 9

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INTRODUCTION

In 2000, there were no Indiana Supreme Court cases addressing the Uniform Commercial Code (UCC). Indiana Court of Appeals' decisions addressed the applicability of the UCC in the context of products liability litigation[1] and contracts for both the sale of goods and related services.[2] Three other decisions of the court of appeals addressed issues concerning the statute of limitations,[3] stop payment orders for checks,[4] and notice requirements for the sale of collateral.[5] None of these cases represents a significant change or development in Indiana law. Rather, these cases clarify the law and offer helpful points for those engaged in commerce, as well as lawyers and judges applying the law.

However, Article 9 of the UCC has been completely redrafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Effective July 1, 2001, revised Article 9, Indiana Code section 26-1-9.1 will replace Indiana Code section 26-1-9.[6] NCCUSL indicated that as many states as possible should enact revised Article 9 effective on July 1, 2001 to minimize confusion and promote uniformity among the states. Currently, about twenty-eight states and the District of Columbia have enacted revised Article 9, with an additional eighteen states and the U.S. Virgin-Islands considering it.[7] Notably,

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1. *See, e.g.*, Hitachi Constr. Mach. Co., Ltd. v. Amax Coal Co., 737 N.E.2d 460 (Ind. Ct. App. 2000).

2. *See* Dow Chem. Co. v. Ebling, 723 N.E.2d 881 (Ind. Ct. App.), *trans. granted*, 741 N.E.2d 1249 (Ind. 2000).

3. *See* Troyer v. Cowles Products Co., 732 N.E.2d 246 (Ind. Ct. App. 2000).

4. *See* Gallant Ins. Co. v. Amaizo Fed. Credit Union, 726 N.E.2d 860 (Ind. Ct. App. 2000).

5. Walker v. McTague, 737 N.E.2d 404 (Ind. Ct. App. 2000).

6. Pub. L. No. 57, § 45 (2000).

7. For an updated list of those states that have enacted or are considering enactment of revised Article 9, see http://www.nccusl.org/uniformact-factsheets/uniformacts-fs-ucca9.htm (NCCUSL website). The following states have adopted revised Article 9: Alaska, Arizona, California, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, North Carolina, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and West Virginia. *See id.* These states are currently considering enactment of revised Article 9: Alabama, Arkansas, Colorado, Connecticut, Georgia, Idaho, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Wisconsin, and Wyoming. *See id.*

neither Ohio, where many of Indiana's banks are headquartered, nor New York have adopted revised Article 9.

In addition to revising Article 9, the Indiana legislature made numerous conforming amendments and changes to other portions of Indiana's UCC and to other provisions of Indiana law. This Article will highlight some of the more significant aspects of the revisions to Article 9 and the implications for Indiana practitioners. Obviously, Indiana courts have not yet construed revised Article 9. Thus, next year is likely to be a confusing time for businesses, consumers, and for those who represent them in transactions involving secured transactions and relegated litigation. Indiana attorneys are urged to follow the developments in other states that have adopted revised Article 9 for guidance on how Indiana courts may view the new law.

In addition, the official comments to revised Article 9 offer substantial guidance in applying and interpreting the UCC.[8] As with the original version of Article 9, Indiana has not adopted the official comments as part of its statutory enactment of the UCC. In the past, Indiana courts have nevertheless looked to the language of the official comments for assistance in construing the statute[9] and are expected to continue to do so.

I. Applicability of the UCC

A. Interplay Between the Products Liability Act and the UCC

In the past year, two Indiana Court of Appeals cases involving products liability and other claims raised issues concerning the applicability of the UCC. In *Hitachi Construction Machinery Co. v. Amax Coal Co.*,[10] Amax purchased a $2.6 million excavator from Hitachi for use in its mining operations. At Amax's request, the excavator was specially equipped with a fire suppression system. After a fire broke out on the excavator, the fire suppression system was activated, but it failed to extinguish the fire. The fire caused extensive damage to the excavator and was alleged to have been caused by defects in the design of the excavator. Hitachi moved to dismiss Amax's complaint on the ground that it failed to state a claim for relief under Indiana's Products Liability Act[11] and also moved for judgment on the evidence. Hitachi's motions were predicated on the fact that the damage to the excavator was damage to the product itself, and not damage to other property that is "wholly outside and apart from the product

8. Official comment 1 to revised Article 9, section 101 explains that the comments to the revision do not provide as much historic background as did the comments to the 1972 and earlier versions of Article 9. *See* U.C.C. § 9-101 cmt. 1 (Rev. 1999). However, these comments are helpful in describing the changes and new material in revised Article 9.

9. *See, e.g.*, HCC Credit Corp. v. Springs Valley Bank & Trust, 712 N.E.2d 952, 954 (Ind. 1999).

10. 737 N.E.2d 460 (Ind. Ct. App. 2000).

11. Ind. Code § 34-20-2-1 (1999).

itself."[12] Hitachi's motions were denied, and the case proceeded to trial, resulting in a damage award of a little over $2 million.[13]

The court of appeals finding that the evidence did not show that the fire suppression system was "other property" concluding that the Products Liability Act distinguishes between "product" and "property" and "contemplates the defective product acting on some other property causing some harm to it."[14] Therefore, Amax's product liability claim for damages failed as a matter of law.[15]

At trial, Amax attempted to assert an alternative theory of liability based on a breach of implied warranties under Article 2 of the UCC. The trial court refused to instruct the jury on that alternative theory because it believed that Amax's claim for breach of the implied warranties of merchantability and fitness for ordinary and customary uses were subsumed under the products liability claims. The court of appeals disagreed and explained that "[a]ctions brought under the [Products Liability] Act and the Uniform Commercial Code 'represent two different causes of action .... [T]he Product Liability Act governs product liability actions in which the theory of liability is negligence or strict liability in tort, while the UCC governs contract cases which are based on breach of warranty.'"[16] The UCC and Products Liability Act represent two separate causes of action and provide for alternative remedies. "'[T]he adoption of the Products Liability Act did not vitiate the provisions of the UCC.'"[17] The court of appeals emphasized that actions for breach of implied warranties under Article 2 of the UCC "sound[] in contract, and may not be considered an allegation of negligence or strict liability in tort."[18] Because Amax was precluded from presenting its breach of warranty claims to the jury, the case was remanded to the trial court for further proceedings.[19]

This case follows other Indiana cases maintaining a bright line between causes of action sounding in tort and contract.[20] This case is also an important reminder of the need to plead alternative theories for relief. In a case such as this, where the product at issue had been modified, but it could not be shown that the modification was other property and not part of the excavator for purposes of the Products Liability Act, the UCC provided the only possibility of recovery for the loss. Such is commonly the case when specially manufactured or modified goods are involved.

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12. 737 N.E.2d at 463.

13. *See id.* at 462-64.

14. *Id.* at 464 (quoting Interstate Cold Storage v. Gen. Motors Corp., 730 N.E.2d 727, 730 (Ind. Ct. App. 1999)).

15. *See id.* at 465.

16. *Id.* (quoting B&B Paint Corp. v. Schrock Mfg., Inc., 568 N.E.2d 1017, 1020 (Ind. Ct. App. 1991)).

17. *Id.* (quoting *B&B Paint Corp.*, 568 N.E.2d. at 1020).

18. *Id.*

19. *See id.* at 466.

20. Miller Brewing Co. v. Best Beers, 608 N.E.2d 975, 984 (Ind. 1993).

In *Dow Chemical Co. v. Ebling*,[21] the court of appeals applied the "predominate thrust test" for determining whether a transaction is a transaction in goods and therefore governed by the UCC. The predominate thrust test was adopted by the Indiana Supreme Court in *Insul-Mark Midwest, Inc. v. Modern Materials, Inc.*[22] The test is used to determine "whether the transactions predominant factor, [its] thrust, [its] purpose, reasonably stated, is the rendition of service, with goods incidentally involved . . . or is a transaction of sale [of goods], with labor incidentally involved."[23] The test applies four factors: (1) the words and terms used by the parties to describe their relationship and the performance to be rendered under the contract; (2) the circumstances of the parties and their primary purpose for the contract; (3) the final product for which the purchaser bargained and whether that product may best be described as goods or service; and (4) the costs for the goods and services provided and whether the price is based on goods or service or both.[24] The court of appeals applied all four factors to the purchase of pesticides and a service program to identify and control pest infestations and found that the service aspects of the transaction predominated, and therefore the UCC did not apply.[25]

B. UCC Statute of Limitations

In *Troyer v. Cowles Products Co.*,[26] on rehearing, the court of appeals clarified that the four-year statute of limitations applicable to a sale of goods under Indiana Code section 26-1-10-102 and Indiana Code section 26-1-2-725 takes precedence over the six-year limitation period for a suit on an account under Indiana Code section 34-11-2-7.[27] Specifically, Indiana Code section 26-1-10-102 provides that "[t]o the extent that . . . IC 34-11-2 prescribe[s] statutes of limitations inconsistent with IC 26-1-2-725, IC 26-1-2-725 prevails."[28] Thus, this action for failure to pay for goods purchased and delivered was time barred. Additionally, the court of appeals made the important observation that Indiana Code section 34-11-2-7 was not repealed by the Indiana legislature, and therefore its six-year limitation period "is still applicable to actions on accounts dealing with, for example, services or labor; in other words, any accounts not otherwise covered by the UCC."[29]

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21. 723 N.E.2d. 881 (Ind. Ct. App), *trans. granted*, 741 N.E.2d 1249 (Ind. 2000).
22. 612 N.E.2d 550, 553-54 (Ind. 1993).
23. *Id.* at 554.
24. *See Dow Chemical*, 723 N.E.2d. at 905 (citing *Insul-Mark Midwest*, 612 N.E.2d at 555).
25. *See id.*
26. 732 N.E.2d. 246 (Ind. Ct. App. 2000).
27. *See id.* at 247.
28. IND. CODE § 26-1-10-102 (1995).
29. *Troyer*, 732 N.E.2d at 247.

II. ARTICLE 4—STOP PAYMENT ORDERS

In *Gallant Insurance Co. v. Amaizo Federal Credit Union*,[30] the court of appeals addressed the rights and obligations of a payor when a stop payment order is issued for a check. Jack Blanton's car was stolen in late December 1995. Blanton notified his insurer (Gallant), and the credit union (Amaizo) that held a purchase money security interest in the vehicle. On February 26, 1996, Gallant prepared a check for the value of the vehicle, naming Blanton and the credit union as co-payees. Two days later, the police mailed Blanton a notice stating that his car had been recovered. However, on March 1, 1996, Blanton forwarded the insurance check to the Credit Union before he had received the notice of recovery from the police. On March 7, 1996, Amaizo forwarded the car's title to Gallant, as Gallant had requested. Amaizo deposited the check into its account on March 8, 1996. By March 14, 1996, Blanton had obtained another loan from Amaizo and purchased a replacement car. That same day, Gallant first learned that Blanton's original car had been recovered and was repairable. Later that same day, Gallant informed the credit union it was stopping payment on the check, and Gallant instructed its bank to do so. Subsequently, Gallant sent the recovered car to an auto body shop for repair. Gallant then paid all the repair fees except for the $500 deductible it claimed was owed by Blanton. When the auto body shop threatened to sell the car at auction for the unpaid repair and storage charges, litigation was commenced by the credit union against Gallant and the auto body shop. The trial court ruled in favor of the credit union and against Gallant. Gallant appealed, and two issues were presented to the appellate court: (1) whether Indiana Code section 26-1-4-303 prevented Gallant from issuing the stop payment order on the settlement check, and (2) whether stopping payment on the check was a breach of the insurance contract between Gallant and Blanton.[31]

The court of appeals correctly observed that Indiana Code section 26-1-4-303 addresses the obligations of the payor's bank with respect to stop payment orders, but it does not address the rights of the payor who is requesting the stop payment order.[32] The court concluded that the trial court erred in basing its ruling on Indiana Code section 26-1-4-303 because that provision "is simply not relevant in determining whether a party that may have the statutory power to stop payment also has a legal right to do so."[33]

The determination of whether Gallant had breached the insurance contract turned on the interpretation of policy language providing that the insurance company may pay for a loss in money, or before the loss was *paid*, may repair or replace the property or return stolen property to the insured.[34] The appellate court found that the policy language was ambiguous as to the meaning of the

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30. 726 N.E.2d 860 (Ind. Ct. App. 2000).

31. *See id.* at 863-64.

32. *See id.*

33. *Id.*

34. *See id.*

word "paid" and would strictly construe the meaning of "paid" in the insurance contract against the insurer. Here, whether Gallant "paid" Blanton before it elected to repair the car depends on a determination of when payment by check becomes "final." The court of appeals looked to *O'Donnell v. American Employers Insurance Co.*[35] and Indiana Code section 26-1-2-511 for guidance and concluded that "Blanton's loss was 'paid' when Gallant tendered the check to Blanton and the Credit Union."[36] In support of its conclusion, the appellate court observed that the conduct of the parties supported the view that they both considered the loss "paid."[37] Specifically, the court focused on the fact that Gallant had requested and received the title to the then missing car upon mailing of the settlement check and not upon the check's payment by Gallant's bank. Thus, the stop payment order was issued by Gallant after the loss was already "paid," and thereby breached the insurance contract.[38]

Under the UCC, a party may be liable for stopping payment on a check if the party does not have "valid legal cause" to do so.[39] "Valid legal cause" may include "a recognized legal defense at the trial instituted to collect on the check."[40] Because the credit union was successful against Gallant in the action to collect on the check, Gallant did not have a valid legal cause to stop payment on the check. Under Indiana Code section 26-2-7-5(3), those who wrongfully stop payment on a check are liable for reasonable attorney's fees,[41] and the appellate court affirmed an award of attorney's fees to the credit union.

III. Article 9—Notice of Sale of Collateral

Walker v. McTague[42] construes the provisions of Article 9 of the UCC dealing with the notice requirements for a commercially reasonable sale of collateral. Indiana Code section 26-1-9-504 gives a secured party the right to sell or otherwise dispose of the collateral after the default of the debtor.[43] However, such sales must in all respects be "commercially reasonable," and prior notice of the impending sale must be provided to the debtor.[44] If adequate notice is not given to the debtor within a reasonable time before the sale, the statute raises a rebuttable presumption that the value of the collateral at the time of the sale was equal to the amount of the debt, thus depriving the creditor from seeking any "deficiency" amount from the debtor.[45] In this case, the letter notifying the

35. 622 N.E.2d 570 (Ind. Ct. App. 1993).
36. *Gallant*, 726 N.E.2d at 866.
37. *See id.* at 866-67
38. *See id.* at 867.
39. Ind. Code § 26-2-7-4(1) (1995).
40. *Gallant*, 726 N.E.2d at 867 (quoting Dishman v. Hill, 578 N.E.2d 654, 656 (Ind. 1991)).
41. *See* Ind. Code § 26-2-7-5(3) (1995).
42. 737 N.E.2d 404 (Ind. Ct. App. 2000).
43. *See* Ind. Code § 26-1-9-504 (1995).
44. *Id.* § 26-1-9-504(1).
45. *See* Vanek v. Ind. Nat'l Bank, 540 N.E.2d. 81, 83 (Ind. Ct. App. 1989), *aff'd*, 551

McTagues' lawyer[46] of the sale was misaddressed and never received.[47] Thus, the trial court presumed that notice was not given to the debtors, and the presumptions regarding the value of the collateral under Indiana Code section 26-1-9-504(3) came into play, thereby requiring Walker to prove that the sale was commercially reasonable and the value of the collateral less than the debt.[48]

The court examined several factors to determine whether the sale was commercially reasonable including: (1) whether a fair sale price was received at the sale, (2) the extent to which the sale price differed from the amount of the debt, (3) whether the sale was on a retail or wholesale basis, (4) the number of bids solicited or received, and (5) whether the time and place of the sale was "reasonably calculated to bring a satisfactory turnout of bidders."[49] Whether a sale is commercially reasonable is a question of fact, and no single factor, including the price obtained, is determinative. All of the relevant factors must be considered together.[50]

The evidence in this case showed that the value of the business was about $250,000, which was only slightly less than the $256,499 debt. However, the business was sold for only $50,000 at a closed-bid auction where only one bid was received. Under these circumstances, the appellate court concluded that it was not error to find that the sale was not commercially reasonable and that Walker should be denied a judgment for the deficiency between the sale amount and the debt.[51]

Under revised Article 9, the disposition of collateral must still be conducted in a commercially reasonable manner[52] and with advance notice to the debtor.[53] However, revised Article 9 provides additional details for giving such notices and several "safe harbor" rules for complying with the requirement to give adequate notice for a commercially reasonable sale.[54] Separate rules are provided for consumer-goods transactions.[55] These rules generally provide additional

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N.E.2d.1143 (Ind. 1990).

46. The McTagues were guarantors of the debt of McTague Properties, but under Indiana Code section 26-1-9-504(3), they were entitled to the same notice as the primary debtor. *See Walker*, 737 N.E.2d at 409. Furthermore, the rights of a guarantor to have notice of the post-default disposition of collateral may not be waived. *See id.* at 409 n.3; *see also* McEntire v. Ind. Nat'l Bank, 471 N.E.2d 1216, 1226 (Ind. Ct. App. 1984). Under revised Article 9, the obligation to provide notice of a sale or other disposition of collateral to secondary debtors such as guarantors is made explicit. *See* IND. CODE § 26-1-9.1-611(c)(2) (Supp. 2000).

47. *See Walker*, 737 N.E.2d at 409.

48. *See id.*

49. *Id.* at 410.

50. *See id.* (citing Hall v. Owen County State Bank, 70 N.E.2d 918, 930 (Ind. Ct. App. 1977)).

51. *See id.* at 410-11.

52. *See* IND. CODE § 26-1-9.1-610 (Supp. 2000).

53. *See id.* § 26-1-9.1-611.

54. *See id.* §§ 26-1-9.1-612 and -613.

55. *See id.* § 26-1-9.1-614.

protections for consumers and apply an objective standard regarding good faith and commercial reasonableness to transactions.[56]

Given the requirement in revised Article 9 to provide timely and adequate notice to debtors before disposition of the collateral, the outcome in *Walker v. McTague* would not likely be any different under revised Article 9. What is a reasonable time for providing such notices is still a question of fact, but under revised Article 9, ten days is deemed sufficient for non-consumer transactions.[57] However, where no notice was received due to the secured party's error, the result would likely be the same under revised Article 9. Similarly, where the price is substantially below the amount of the debt and other evidence shows the value of the collateral to be significantly greater than price obtained at the sale, the result under revised Article 9 is not likely to be different.

IV. Revised Article 9

As stated above, this article cannot cover all the changes that have been made to Article 9. Several publications have attempted to outline all of the changes, and each covers hundreds of pages.[58] Indiana's enactment of revised Article 9 took place in early 2000, but does not include all of the 2000 refinements.

This revision of Article 9 is the first major revision undertaken by the NCCUSL since Article 9 was first adopted in 1972. The changes are significant, including an expansion of the scope of the Article and changes to many procedural and substantive rules. The stated purpose of the revision is to make the rules more consistent among the states and to make secured transactions more predictable.[59] It is intended that this consistency and predictability will reduce the cost of secured transactions and thereby reduce the cost of credit.[60] Although revised Article 9 does not depart radically from its predecessor statute with respect to the concepts of attachment, priority, and enforcement of security interests, it does add definitions and greater specificity to procedural rules. The rules pertaining to the perfection of security interests have been completely revised, and the revisions are so extensive that they will only be discussed here in cursory fashion. Revised Article 9 is meant to build upon prior law, while modernizing it to reflect technological advances, bringing greater clarity and predictability to secured transactions.[61]

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56. *See id.* § 26-1-9.1-102(a)(43).

57. *See id.* § 26-1-9.1-612.

58. *See, e.g.*, THE NEW ARTICLE 9: UNIFORM COMMERCIAL CODE (Corinne Cooper ed., 2d ed. 2000); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (1999). In addition, Article 9 may still be a moving target because, in August 1999, October 1999, January 2000, March 2000, May 2000, and July 2000, NCCUSL promulgated numerous amendments and corrections to the revised text. Other revisions or refinements may follow. *See supra* note 11 and accompanying text.

59. *See* U.C.C. § 9-101 cmt. 1 (rev. 1999).

60. *See id.*

61. *See id.*

By expanding the scope of Article 9 and applying it to additional types of collateral, recognizing electronic forms of commerce[62] and simplifying certain rules for creating, perfecting and enforcing security interests, the drafters attempted to make Article 9 more "user friendly" and nationally consistent.[63] In addition, revised Article 9 now contains specific rules for certain consumer transactions.[64] Revised Article 9 applies to *all* transactions that come within its scope,[65] including those transactions that were not covered by prior Article 9 and transactions entered into before the effective date of revised Article 9.[66] This broad application may cause some surprises during the transition period. Existing security agreements and financing statements may require revision to continue to protect the interests for which they were intended, and affirmative steps may be required to maintain the priority and status of secured creditors in existing collateral.[67]

It will take some time before the provisions of this revised statute are tested in the courts and before decisions applying the new statute are published to provide guidance for interpreting and applying the statute. All of those who deal with the creation or enforcement of security interests in personal property are well advised to study the new statute.

A. Expanded Scope of Revised Article 9

Revised Article 9 covers certain types of collateral not previously included in Article 9. Specifically, the definition of "accounts"[68] has been expanded to include payment obligations that arise out of a sale, lease or license of all types of tangible and intangible property. Thus, certain property, that might have been considered "general intangibles" under prior Article 9, is now included in the definition of "accounts." Credit card receivables are now included in the definition of accounts, as are license fees for the use of software.[69] Under revised Article 9, obligations in which the debtor's primary obligation is the payment of money, but where the payment rights do not arise out of an "instrument," remain in the category of "general intangibles."[70] The sale of these payment intangibles

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62. For example, revised Article 9 provides for "authentication" of "records" rather than signatures on written documents. *See* IND. CODE §§ 26-1-9.1-102(7), (69) (2000).

63. *See* U.C.C. § 9-101 cmt. 1 (rev. 1999).

64. *See, e.g.*, IND. CODE §§ 26-1-9.1-102(22)-(26) for relevant definitions and IND. CODE ANN. § 26-1-9.1-201 regarding applicability of other laws in consumer transactions. The rules for consumer transactions are interspersed throughout Article 9 and are not found in any single portion of the Article.

65. *See id.* § 26-1-9.1-109(a).

66. *See id.* § 26-1-9.1-702.

67. *See id.*

68. *See id.* § 26-1-9.1-102(a)(2) (Supp. 2000).

69. *See id.*

70. *See id.* § 26-1-9.1-102(a)(42).

and software are both transactions covered by revised Article 9.[71] The inclusion of these additional types of "accounts" and payment intangibles within the scope of revised Article 9, reflects the use of these types of collateral in myriad financing transactions. Other revisions to Article 9 are intended to strengthen existing provisions, to preclude any restriction that limits the creation, perfection or enforcement of secured interests in payment intangibles.[72]

Revised Article 9 also extends to security interests in bank deposit accounts given as original collateral,[73] and to the insurance receivables arising from the provision of health care services.[74] Official Comment 4 to Revised Article 9 section 109(a) recognizes that the distinction between outright sales of receivables and sales to secure an obligation may still be somewhat blurred, as both are used in financing transactions, but the distinction between the two "is left to the courts."[75] In addition, other collateral, such as agricultural liens[76] and letter of credit rights are now included within the scope of revised Article 9.[77] Consignments are also now included in Article 9.[78]

For the first time, commercial tort claims are included within the parameters of Article 9.[79] Commercial tort claims, as defined by revised Article 9, include any claim of an organization or any claim of an individual that "(i) arose in the course of the claimant's business or profession; and (ii) does not include damages arising out of personal injury to or the death of an individual."[80] Revised Article 9 permits creditors to acquire security interests in after-acquired property, but does not permit a security interest to attach to after-acquired commercial tort claims.[81] Thus, only commercial tort claims existing at the time the security agreement is authenticated are included.

B. Parties

Revised Article 9 modifies the terminology used in secured transactions. Under prior Article 9, the "debtor" is the party who owns the collateral or the party who owes the payment or performance obligation secured by the collateral, in which the security interest has been taken.[82] Under revised Article 9, a "debtor" may be any party who has a property interest other than a security

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71. *See id.*
72. *See id.* §§ 26-1-9.1-406, 26-1-9.1-408.
73. *See id.* § 26-1-9.1-104.
74. *See id.* § 26-1-9.1-102(a)(46).
75. U.C.C. § 9-109 cmt. 4 (Rev. 1999).
76. *See* IND. CODE § 26-1-9.1-109(a)(2) (Supp. 2000).
77. *See id.* § 26-1-9.1-109(a).
78. *See id.* § 26-1-9.1-109(a)(4).
79. *See id.* § 26-1-9.1-109(d)(12).
80. *Id.* § 26-1-9.1-102(a)(13).
81. *See id.* § 26-1-9.1-204(b)(2).
82. *See id.* § 26-1-9-105(1)(d).

interest or lien in the collateral.[83] This new definition of "debtor" includes the seller of a payment intangible, a consignee, and one who has a property interest in collateral subject to an agricultural lien.[84] The party who owes the obligation being secured is referred to as the "obligor."[85] A "secured party" under revised Article 9 is still the party to whom the security interest is granted.[86] However, "secured party" also now includes the buyer of payment intangibles and promissory notes, a consignor, the holder of an agricultural lien, and agents and trustees of secured parties.[87] Those who are drafting security agreements should be cognizant of this new terminology and seek to use the terms in a manner that avoids confusion and conforms with the definitions in the revised act.

C. Collateral

Under prior law, a secured party must either possess the collateral (or, in the case of investment property, have a right to control the property) or have a signed security agreement describing the collateral. Now, under revised Article 9, a secured party may possess collateral when the collateral is in the hands of a third party pursuant to an agreement signed by the debtor and the third party or an authenticated record providing for such possession by the third party.[88] If the collateral is a registered security in certificate form, it must be delivered to the secured party in accordance with Indiana Code section 26-1-8.1-301.[89] The concept of control of collateral has been expanded to accommodate security interests in deposit accounts, electronic chattel paper and letter of credit rights.[90]

The rules for identification of collateral in security agreements have not changed substantially. However, a reference in a security agreement to "all assets" or "all of the debtor's personal property" is insufficient under revised Article 9.[91] Descriptions of collateral are generally sufficient if the "identity of the collateral is objectively determinable."[92] However, a financing statement may still refer to "all assets" or "all personal property" of the debtor under revised Article 9.[93]

Specific identification is required in security agreements for commercial tort claims and, in consumer transactions, for consumer goods, securities or commodities accounts.[94] Where the collateral is timber to be cut, the security

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83. *See id.* § 26-1-9.1-102(a)(28)(A).
84. *See id.* § 26-1-9.1-102(a)(28).
85. *See id.* § 26-1-9.1-102(a)(59).
86. *See id.* § 26-1-9.1-102(a)(72)(A).
87. *See id.* § 26-1-9.1-102(a)(72).
88. *See id.* §§ 26-1-9.1-203(b)(3)(B), 26-1-9.1-313(c)(1).
89. *See id.* § 26-1-9.1-203(b)(3)(C).
90. *See id.* § 26-1-9.1-203(b)(3)(D).
91. *See id.* §§ 26-1-9.1-108(c), 26-1-9.1-203(b)(3)(A).
92. *Id.* § 26-1-9.1-108(b)(6).
93. *Id.* § 26-1-9.1-504.
94. *See id.* § 26-1-9.1-108(e).

agreement must contain a description of the real estate.[95] Revised Article 9 continues to allow a security interest to attach to collateral in the case of future advances, but no longer requires the advances to be related to the original debt or to be of the same type of obligation.[96]

D. Perfection and Financing Statements

The principles pertaining to perfection of security interests are included in Part 3 of revised Article 9. Under revised Article 9, as with its predecessor, filing a financing statement remains the primary method of perfecting a security interest. However, along with the expanded scope of revised Article 9, the rules for perfection by control of the property are also expanded.[97] These rules are complex and their application will be affected by the location of the debtor.[98] A thorough discussion of these rules is beyond the scope of this survey article.

The requirements for filing a financing statement are simplified in revised Article 9. Now, the identity of the debtor, the identity of the secured party, a description of the collateral and authentication by the debtor are generally sufficient.[99] Identification of a debtor by a trade name is insufficient.[100] Because the rules for where financing statements must be filed have changed, the security agreement should contain representations and warranties regarding the nature of the debtor and state of formation of the debtor.[101] As a general rule, new financing statements must be filed in the state of the debtor's formation.[102] Financing statements for foreign debtors must be filed in Washington, D.C.[103] Secured parties are automatically authorized to file a financing statement consistent with a security agreement, but must obtain authorization from the debtor to file a financing statement before the security agreement has been authenticated.[104]

E. Transition Rules

During the next few months, the transition rules found in part 7 of revised Article 9 will be very important to practitioners and those attempting to perfect or enforce a security interest. Because of important differences between Article 9 and revised Article 9 with respect to the scope and the mechanisms for perfecting security interests, a set of transition rules has been included in revised

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95. *See id.* § 26-1-9.1-203(b)(3)(A).

96. *See id.* § 26-1-9.1-204.

97. *See id.* §§ 26-1-9.1-304-306, 26-1-9.1-312 to -314.

98. *See id.* §§ 26-1-9.1-304-306.

99. *See id.* §§ 26-1-9.1-502, 26-1-9.1-503.

100. *See id.* § 26-1-9.1-503.

101. *See generally id.* § 26-1-9.1-516(b) (governing the filing of financing statements).

102. *See id.* § 26-1-9.1-502; *see also id.* § 26-1-9.1-307(a) (defining the debtor's location and place of business).

103. *See id.* § 26-1-9.1-307.

104. *See id.* § 26-1-9.1-509(b).

Article 9.[105] As a general rule, the transition rules in part 7 apply during the twelve-month period following July 1, 2001. Further, revised Article 9 applies to any transaction or lien within its scope, even if the transaction or lien was entered into or created before July 1, 2001.[106] All liens and transactions that were effective before adoption of revised Article 9 remain unaffected, except as specifically provided in part 7 of revised Article 9.[107]

Those security interests that were perfected under Article 9 before the revision, or were perfected under law other than Article 9, remain perfected after July 1, 2001 as long as the acts necessary to perfect the security interest under prior law or law outside Article 9 would also be sufficient to perfect the security interest under revised Article 9.[108] In other words, if the perfection of a lien complies with the requirements for perfection under revised Article 9, the secured creditor need take no further action, and the security interest will continue in effect under revised Article 9.[109]

However, security interests perfected under prior Article 9 law or perfected under law outside of Article 9, where the steps for perfecting the lien do not comply with those required under revised Article 9, remain effective for only one year, or until June 30, 2002, unless either the security interest becomes enforceable under the terms of Indiana Code section 26-1-9.1-203 before July 1, 2002, or the lien holder complies with the perfection requirements of revised Article 9 before July 1, 2002.[110] Thus, holders of these types of security interests must take additional steps during the year following July 1, 2001 to insure that their security interests remain perfected.[111] Because of the expanded scope of revised Article 9, perfection requirements now apply to transactions, such as commercial tort claims, that were not previously covered, and the lienholder must take additional steps to protect such interests.

Security interests that attached or became enforceable, but were not perfected, under prior law, remain enforceable for one year, or until June 30, 2002, under revised Article 9, only to the extent that they were enforceable under prior law.[112] Such a security interest may be perfected under revised Article 9 by complying with its provisions before or after July 1, 2001.[113]

There are additional provisions for continuing the attachment and perfection of security interests found in section 705.[114] As a general rule, perfection of security interests will continue to be effective only where acts taken to perfect the

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105. *See id.* §§ 26-1-9.1-701 to -709.
106. *See id.* § 26-1-9.1-702.
107. *See id.* §§ 26-1-9.1-702(a), (b).
108. *See id.* § 26-1-9.1-703(a).
109. *See id.* § 26-1-9.1-703(a).
110. *See id.* § 26-1-9.1-703(b).
111. *See id.* § 26-1-9.1-703(b)(3).
112. *See id.* § 26-1-9.1-704.
113. *See id.* §§ 26-1-9.1-704(2) and (3).
114. *See id.* § 26-1-9.1-705.

security interest meet the requirements of revised Article 9.[115] Financing statements filed before July 1, 2001 that do not meet revised Article 9 requirements because, for example, the descriptions of collateral are insufficient or they were not filed in the right place, remain effective only during the one-year transition period.[116] To avoid losing priority over other lienholders or being relegated to the status of an unsecured creditor, creditors must assure themselves that any previously filed financing statements are sufficient under revised Article 9.

Financing statements filed under prior law, but which nevertheless fulfill the requirements of revised Article 9, remain effective until the earlier of (a) the normal date on which the financing statement would lapse (usually five years after filing) or (b) June 30, 2006, which is five years from the effective date of the new statute.[117] Continuation statements may be filed before July 1, 2001, to continue the effectiveness of financing statements filed under prior law, only in the same state as the original financing statement and will be effective as continuation statements only if that state is also the correct state for filing a financing statement under revised Article 9.[118] In addition, the continuation statement must bring the financing statement into compliance with all requirements under revised Article 9 and must be filed within six months of the date before the financing statement would lapse.[119]

A financing statement filed under prior law and before July 1, 2001 may also be continued by filing a new financing statement under revised Article 9.[120] To be effective as a continuation, this new financing statement must also be filed in the proper state and must make reference to the prior statement so that the new statement can be identified as a continuation of the prior statement.[121] This identification requires reference to the date of the prior statement, prior filing numbers, the office where the original statement was filed, and any other continuation statements.[122] This statement must also indicate the lienholder's intent that the prior statement continue in effect.[123] New financing statements filed under this provision and intended to continue a prior statement may be filed at any time before the original statement lapses.[124]

Financing statements filed under prior law may also be terminated or amended by filing new financing statements that conform with revised Article 9. A prior financing statement may be terminated, but not amended, after July 1, 2001, only by filing a new statement in the state where the original financing

115. *See id.*
116. *See id.*
117. *See id.* § 26-1-9.1-705(c).
118. *See id.* § 26-1-9.1-705(d)-(f).
119. *See id.*
120. *See id.* § 26-1-9.1-706(a).
121. *See id.* § 26-1-9.1-706(c).
122. *See id.*
123. *See id.*
124. *See id.*

statement was filed, even if that is not the state where a financing statement would otherwise be required to be filed under revised Article 9.[125] However, if a financing statement has been filed under revised Article 9 to continue a prior law financing statement, that statement may only be terminated in the state with jurisdiction under revised Article 9.[126] In addition, if a financing statement is governed by prior Indiana law, it may be continued in Indiana only by complying with the provisions of Indiana Code section 26-1-9.1-705 (d), 26-1-9.1-705(f) or 26-1-9.1-706. The filing of new or continuation financing statements requires the consent of the secured party of record and must be necessary under revised Article 9.[127]

Prior Article 9 will continue to determine the relative priority of competing liens when established prior to July 1, 2001.[128] In all other cases, revised Article 9 will determine the relative priority of competing lienholders.[129] Under revised Article 9, priority will be established on the basis of the date on which Article 9 requirements were satisfied, unless both competing lienholders relied on Indiana Code section 26-1-9.1-704, in which case filing date of the prior statement will determine relative priorities.[130]

CONCLUSION

Although there was little change to UCC law through judicial pronouncements, the legislative changes to UCC Article 9 are significant. Though judicial interpretations of these changes are not likely to be available for some time, debtors, creditors, and their legal advisors will feel their impact immediately. Whether the NCCUSL has succeeded in making the law of secured transactions simpler and more predictable will soon become apparent.

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125. *See id.* § 26-1-9.1-707(b).

126. *See id.*

127. *See id.* § 26-1-9.1-708.

128. *See id.* § 26-1-9.1-709.

129. *See id.*

130. *See id.*