MEMORANDUM

TO: Julie L. Flynn, Deputy Secretary of State

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RE: **Bar Committee Report on Revised Article 9**

DATE: December 30, 1999

As you know, the National Conference of Commissioners on Uniform State Laws and the American Law Institute recently approved a complete rewrite of Article 9, Secured Transactions. Revised Article 9 was introduced in Maine during the last legislative session and was held over for consideration during the upcoming term. If adopted, the legislation has a proposed effective date of July 1, 2001.

Revised Article 9 embodies a complex statutory structure that is of paramount importance to commercial and consumer finance transactions in the State. Consequently, in June of this year, in consultation with you and the committee appointed by the Secretary of State's office to study Revised Article 9, a committee of nine (9) members from the Business, Bankruptcy and Consumer and Financial Institutions sections of the Maine State Bar Association began a comprehensive review of Revised Article 9. Our goal was to study each part of Revised Article 9, to identify issues of particular relevance to commercial and consumer finance in Maine, to highlight industries and/or constituencies particularly affected by the proposed revisions, to recommend non-uniform provisions and/or Maine comments where appropriate, and ultimately to recommend approval or disapproval of the legislation. Our group, which included lawyers that represent a wide range of commercial and consumer interests in the State, met a total of seven (7) times and at each meeting conducted a detailed review of individual parts of Revised Article 9.

Based on our review of the proposed legislation, we recommend adoption of the Uniform Act, with the proposed non-uniform provisions and specific Maine comments set forth in our report, which is attached hereto as Exhibit A. Our report identifies, either in the proposed non-uniform provision or in the proposed Maine comment, changes in Article 9 that appear to affect particular constituencies as well as changes in existing Maine law. Although in individual cases certain interest groups may have been favored, in general Revised Article 9 does not produce a clear or consistent list of "winners" and "losers". Rather, Revised Article 9 represents a simpler yet more comprehensive statutory regime for governing secured transactions that should be adopted in Maine.

As noted above, in the course of our review individual committee members prepared analyses of the various sections of Revised Article 9. In these analyses, committee members attempted to identify those provisions that represent new developments in the law of secured transactions as well as, in appropriate cases, an identification of parties affected by such changes. Insofar as these summaries may be helpful to you or committee members, we have attached copies of such summaries as Exhibit B.

We believe that Revised Article 9 represents an appropriate expansion of the types of collateral and transactions covered by the Uniform Commercial Code and simplifies and clarifies a number of important rules relating to the creation, perfection, priority and enforcement of security interests in secured transactions. We have attached as Exhibit C a summary prepared by the National Conference of Commissioners on Uniform State Laws that succinctly identifies the key revisions to prior Article 9 and the principal advantages of Revised Article 9. We also recommend that you review this summary in your deliberations on the legislation.

We appreciate very much the assistance the members of the Secretary of State's committee has provided throughout this process and we stand ready to assist you in any way we can during the legislative process.

Maine State Bar Study Group

Revised Article 9 (UCC)

Analyses Prepared From Review of Article 9

EXHIBIT A

PROPOSED REVISIONS TO NEW ARTICLE 9 AND RELATED MAINE COMMENTARY

A. Modification to the Definition of Bank in Section 9-1102(8)

1. Proposed Non-Uniform Provision:

The definition of "Bank" in Section 9-1102(8) should be revised to add the following sentence: "Bank also includes any financial institution organized under Title 9-B of the Maine Revised Statutes Annotated, or any successor title."

2. Maine Comment:

"The definition of "Bank" was expanded to include all universal banks and limited purposes banks organized under Title 9-B. Several of these institutions have, or may have, limited powers that include maintaining deposit accounts but they are not engaged in the business of banking. This non-uniform provision ensures that deposit accounts with such institutions would be governed by this Article."

B. Maine Comment Relating to Aquatic Goods in Comments to Section 9-1102(34)

1. Proposed Non-Uniform Provision:

None.

2. Maine Comment:

The last paragraph of Official Comment 4(a) to this section, as well as Official Comment 11 to Section 9-1324, state that the courts are to determine on a case-by-case basis whether particular aquatic goods constitute "crops" or "livestock." If the item is determined to be a "crop," then it may be the subject of a production-money security interest; if it is "livestock," then it cannot. See Section 9-1324-A. Suppliers of feed and other items on credit for the growing of aquaculture goods (as well as lenders who finance purchases of these items) who take security interests in the goods will, therefore, be unable to determine with certainty the priority that they will have in the aquatic goods. This is an unacceptable level of uncertainty for, among others, Maine's growing aquaculture industry. Therefore, the above-referenced Official Comments should be disregarded to the extent that they leave the classification of aquatic goods as "crops" or "livestock" undetermined. Instead, it is intended that

aquatic goods that most closely approximate plants will be classified as "crops," while those that are animal in nature will be classified as "livestock."

C. **Maine Comment to Section 9-1102(44)(d)**

1. Proposed Non-Uniform Provision:

None.

2. Maine Comment:

Section 9-1102(44)(d) provides that "goods" include "crops" even if the crops are produced on trees, vines or bushes. "Crops" may also include certain aquatic goods. It is intended that the reference to "trees, vines or bushes" in Section 9-1102(44)(d) also includes aquatic goods that are crops, even if those aquatic goods are not produced on trees, vines and bushes, but are, instead, produced on some other item in a manner analogous to the way in which terrestrial crops are produced on trees, vines or bushes. The overall principle to be applied is that "aquatic goods" that are "crops" are, for the purposes of this Article 9, to be treated in the same manner as terrestrial "crops."

D. **Definitions Pertaining to Production Money Security Interests**

1. Proposed Non-Uniform Provision:

In view of our proposal to include Section 9-1324A, an optional provision in the Uniform Act that relates to the priority of production-money security interests and agricultural liens, Section 9-1102 needs to be amended to include the following definitions:

> "(65) Production money crops" means crops that secure a production-money obligation incurred with respect to the production of those crops.
>
> (66) "Production-money obligation" means an obligation of an obligor incurred for new value given to enable the debtor to produce crops if the value is in fact used for the production of the crops.
>
> (67) "Production of crops" includes tilling and otherwise preparing land or other growth medium for growing, planting, cultivating, fertilizing, irrigating, harvesting,

and gathering crops, and protecting them from damage or disease.

Please note that the numerical sequence in Section 9-1102 needs to be revised accordingly and all cross-references to the renumbered definitions adjusted accordingly.[1]

2. Maine Comment:

None required.

E. Maine Comment on Registered Organizations as Defined in Section 9-1102

1. Proposed Non-Uniform Provision:

None.

2. Maine Comment:

Although no modification to the Uniform Act is proposed, the following Maine Comment should be added to the second full paragraph of paragraph 11 of the comments to Section 9-1102:

"In addition, the Secretary of State is or may not be required to maintain a public record on all private and special act corporations organized under Maine law. Lenders and practitioners should pay particular care when dealing with such entities in secured transactions."

F. Proposed Modification to Section 9-1103(8)

1. Proposed Non-Uniform Provision:

None.

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[1] The renumbering in Section 9-1102 required by the addition of the definitions pertaining to production - money security interests raises the issue of identifying all cross-references affected by the renumbering. We did not have the NCCUSL Enactment Guide available to us, but we have been advised that the Enactment Guide contains recommendations on how to avoid a renumbering of the definitions in Section 9-1102. We certainly agree that renumbering should be avoided if possible and recommend that you consult the Enactment Code.

2. Maine Comment:

Section 9-1103(8) provides that the courts will determine the proper rules in consumer-goods transactions. Of course, pursuant to Section 9-1201(3), this provision is subject to other statutory mandates. See, e.g., 9-A M.R.S.A. Section 3-303.

G. Proposed Modification to Section 9-201(b)

1. Proposed Non-Uniform Provision:

Section 9-1201(b) provides that a transaction subject to Article 9 is also subject to relevant state consumer laws. The proposed amendment reinstates model act language making the list of applicable consumer laws nonexclusive and expands the list referenced in the legislation as follows:

"A transaction subject to this Article is subject to any applicable rule of law which establishes a different rule for consumers, including Title 9-A, Title 30-A sections 3960 to 3964-A and Title 32, sections 11001 to 110054."

2. Maine Comment:

With the exception of Section 9-1626, the Maine Act follows the uniform approach, leaving consumer protection rules found in other laws unchanged. As in the Uniform Act, the section provides a nonexclusive list of relevant consumer laws and indicates that they supersede Article 9 rules when applicable by their own terms.

H. Proposed Modification to Section 9-1208 and Section 9-1209 – Duties of a Secured Party Having Control of Collateral, Etc.

1. Proposed Non-Uniform Provision:

Section 9-1208 imposes duties on a secured party to release, within 10 days of receiving a request from a debtor, the secured party's rights in deposit accounts, electronic chattel paper, and investment property if there is no outstanding secured obligation or commitment to advance funds or give value. Section 9-1209 imposes duties on a secured party who has notified an account debtor of an assignment to inform the account debtor of the fulfillment or discharge of debtor's obligations to secured party. Failure to comply subjects the secured party to penalties under Section 9-1625. The Committee believed that the response time (10 days) is too short given the administrative burden on lenders and potential penalties for failure to comply. In view of these

factors, the Committee recommends deleting the references to 10 days in Sections 9-1208 and 9-1209, and substituting therefor 20 days.

2. Maine Comment:

None required.

I. Proposed Modification to Section 9-1210

1. Proposed Non-Uniform Provision:

Section 9-1210 requires secured lenders to respond to a request for an accounting, a list of collateral or a statement of accounts in 14 days. For the same reasons outlined above in Part H(1), the Committee recommends deleting all references to 14 days in Section 9-1210 and substituting therefor 20 days.

2. Maine Comment:

None required.

J. Proposed Revision to Automatic Perfection Rules

1. Proposed Non-Uniform Provision:

Section 9-1309 provides certain rules regarding the automatic perfection of a security interest in certain collateral, i.e., the security interest is perfected upon attachment. Under Revised Article 9, as under the prior Uniform Act, the automatic perfection rules extend to purchase money security interests in consumer goods. Existing Maine law contains a non-uniform provision that provides for automatic perfection of a security interest in consumer goods where the amount financed is less than $2,000.00. The Committee believes that the non-uniform provision should be retained but the cap increased to $10,000.00 and the language in existing Section 9-302(d) revised to clarify that the cap applies to the individual consumer good acquired, not multiple goods in a single transaction. We propose that Section 9-1309(1) be revised to read as follows:

Purchase-money security interest in a consumer good having a purchase price of $10,000 or less, except as otherwise provided in section 9-1311, subsection (2) with respect to consumer goods that are subject to a statute or treaty described in section 9-1311, subsection (1);

2. Maine Comment:

This provision continues Maine's non-uniform filing requirement for purchase money security interests in consumer goods. The new law changes the dollar minimum for filing requirements from $2,000.00 to $10,000.00 and clarifies that the limit applies to the price of individual items financed. Filing may also be advisable for goods costing less than $10,000.00 in view of the rule in subsection 9-1320(2), which permits a good faith purchaser from the consumer to defeat an unfiled security interest under most circumstances.

K. Correct Reference to Maine Title Law

1. Proposed Non-Uniform Provision:

Section 9-1311(1)(b) should be deleted and the following substituted therefor:

"(b) Title 29-A, Chapter 7."

2. Maine Comment:

Official Comment 4 to this section indicates that a filed financing statement would be sufficient to perfect a security interest in a titled good only if that good were inventory held for sale or lease. This is true only if the item remains covered by a titling act even when it is put to a particular use. For example, Maine's Certificate of Title Act provides that it does not apply to a motor vehicle held as a demonstrator or test vehicle by a dealer. See 29-A M.R.S.A. Section 652(2). This would be true even if that vehicle had previously been titled. In such an instance, the provisions of Section 9-1311(1)(b) would not apply (since the vehicle would not then be subject to the referenced statute) and the normal perfection provisions for non-titled goods would apply to the vehicle during the period in which it is used as a demonstrator or testing vehicle.

L. Buyer of Goods - Section 9-1320

1. Proposed Non-Uniform Provision:

None, but please note that in adopting the Uniform Act provision as presented we are deleting a non-uniform provision in former Section 9-307 that treated a purchaser of timber, logs or pulpwood from a person engaged in timbering operations, or from a person dealing such goods, the same as a purchaser of farm products from a person engaged in farming operations.

Thus, under the prior Section 9-307, buyers of timber, logs and pulpwood took such goods subject to a security interest created by the seller. No such protection to the secured lender financing timber operations is afforded by the uniform act.

2. Maine Comment:

"In a title theory state such as Maine, the mortgagee is deemed to be the legal owner of the real estate. In such cases, the ownership interest referenced in Official Comment No. 7 relates to the mortgagor, not to the mortgagee."

M. Maine Comment on Aquatic Goods

1. Proposed Non-Uniform Provision:

None.

2. Maine Comment:

Official Comment 11 to this section, as well as the last paragraph of Official Comment 4(a) to Section 9-1102, state that the courts are to determine on a case-by-case basis whether particular aquatic goods constitute "crops" or "livestock." If the item is determined to be a "crop," then it may be the subject of a production-money security interest; if it is "livestock," then it cannot. See Section 9-1324-A. Suppliers of feed and other items on credit for the growing of aquaculture goods (as well as lenders who finance purchases of these items) who take security interests in the goods will, therefore, be unable to determine with certainty the priority that they will have in the aquatic goods. This is an unacceptable level of uncertainty for, among others, Maine's growing aquaculture industry. Therefore, the above-referenced Official Comments should be disregarded to the extent that they leave the classification of aquatic goods as "crops" or "livestock" undetermined. Instead, it is intended that aquatic goods that most closely approximate plants will be classified as "crops," while those that are animal in nature will be classified as "livestock."

N. Reference Correction

1. Proposed Non-Uniform Provision:

The reference to "2-1508(5)" in Section 9-1325 should be deleted and 2-1508 substituted therefor.

2. Maine Comment:

None required.

O. Clarification of Limitation on Agreement not to Assert Defenses Against Assignees

1. Proposed Non-Uniform Provision:

None.

2. Maine Comment:

The Maine Consumer Credit Code requires in certain circumstances that an assignee of a consumer credit transaction is subject to certain claims and defenses. Paragraph 6 to the comments to Section 9-1403 should be modified to add the following:

As provided in Section 9-1201(3), the provisions of Title 9-A take priority over the provisions of this Article. This limitation is also suggested in a more limited form in Section 9-1403(5). Title 9-A provides that in certain instances, the assignee of a seller or lessor in a consumer sale or consumer lease is subject to defenses that might be raised against the original seller or lessor notwithstanding an agreement to the contrary. See 9-A M.R.S.A. Section 3-403. See also 9-A M.R.S.A. Sections 5-201(1) (providing for penalties or a damage award where the agreement limits rights of the consumer against assignee to less than what is provided in Section 3-403), 8-209 (making assignees liable for certain Truth-in-Lending violations). These provisions, as well as other provisions of Maine law, modify, limit, or void certain parts of Section 9-1403 of new Article 9.

P. Reference Correction

1. Proposed Non-Uniform Provision:

The reference to general intangibles in Section 9-1406(2)(c)(i) should be changed to payment intangibles.

2. Maine Comment:

None required.

Q. Effect of Change in Debtor's Name - Section 9-1507

1. Proposed Non-Uniform Provision:

Current Maine law contains a non-uniform provision in the cases when the debtor's name is changed by failing to incorporate the uniform four month rule. The Committee believes that the policy promoted by the non-uniform provision is sound and should be continued in Revised Article 9. A majority of the Committee believes that a secured party should be obligated to determine the debtor's true name at the time the secured party continues its financing statement and that, therefore, continuation statements should, in order to be effective, include any amendments to the prior financing statement that may be necessary to reflect the debtor's new name. A majority of the Committee believes that such a requirement is not unduly burdensome or costly for secured parties. A minority of the Committee believes that the first lender should not be so burdened at the time of filing a continuation statement but would shift the burden to the new secured lender to determine its debtor's prior names and search under those names as well as the debtor's current name in order to determine the priority of its new security interest. Consequently, a majority of the Committee believes that Section 9-1507(3) should be revised to read as follows:

> If a debtor changes its name, then a financing statement filed under the debtor's former name prior to the effective date of the name change remains effective to perfect a security interest to the same extent as if that financing statement was amended to provide the debtor's new name even if the previously filed financing statement would otherwise become seriously misleading under Section 9-1506. In such circumstances, the previously filed financing statement may be continued under the debtor's prior name, but such continuation is not effective to perfect a security interest in property acquired more than four (4) months after such continuation is filed, unless an amendment that renders the financing statement not seriously misleading is filed within the four (4) month period.

2. Maine Comment:

Maine has adopted a non-uniform provision stating that a change of a debtor's name does not affect the efficacy of a financing statement filed before the effective date of the name change under the debtor's prior name. When a name change becomes effective will be determined by law outside of this Article. This change was made because as a policy matter it is simpler and more convenient to have secured creditors who are making new filings

determine the former name of the debtor for purposes of performing a search of the records than it is to require a secured creditor to continuously monitor its debtor for any potential name changes. On the other hand, there appears to be little reason that a secured creditor should not be required to determine its debtor's actual name at the time its financing statement is continued and modify its financing statement accordingly, if necessary. This requirement also has the advantage of ensuring that the public records are kept at least somewhat up to date under debtors' current names. Given this non-uniform change, Official Comment 4 to this section does not apply under Maine's version of this Article.

R. Effect of Change in Debtor's Name - Continued - Section 9-1508:

1. Proposed Non-Uniform Provision:

For the policy rationale stated above, Section 9-1508(2) is amended to read as follows:

(2) If the new debtor is a registered organization and becomes subject to a security interest pursuant to Section 9-1203(4) by reason of a merger, consolidation or a change in the form of entity of the original debtor that is reflected in the public records relating to the new debtor's organization maintained by the governmental unit referenced in Section 9-1102(73), then a financing statement filed under the original debtor's former name before the effective date of the merger, consolidation or change in the form of entity remains effective to perfect a security interest in collateral acquired by the new debtor to the same extent as if that financing statement was amended to provide the new debtor's name even if the difference between the new debtor's name and that of the original debtor causes a filed financing statement that is effective under subsection (1) to become seriously misleading only if the place to file a financing statement against the new debtor for such collateral is, pursuant to Part 3 of this Article, the same jurisdiction in which the financing statement against the original debtor is filed. In all other instances, if the difference between the name of the original debtor and that of the new debtor causes a filed financing statement that is effective under subsection (1) to be seriously misleading under Section 9-1506:

(a) The financing statement is effective to perfect a security interest in collateral acquired by the new debtor before, and within 4 months after, the new debtor becomes bound under Section 9-1203, subsection (4); and

(b) The financing statement is not effective to perfect a security interest in collateral acquired by the new debtor more than 4 months after the new debtor becomes bound under Section 9-1203, subsection (4) unless an initial financing statement providing the name of the new debtor is filed before the expiration of that time.

2. Maine Comment.

As under Section 9-1507, Maine has adopted a non-uniform provision stating that perfection of a security interest against an original debtor is effective against the new debtor so long as the place for filing against the original debtor is the same as for filing against the new debtor, even if the difference in the names of the new debtor and the original debtor is great enough as to make the financing statement filed against the original debtor misleading pursuant to Section 9-1506. However, this provision is effective only if the relationship between the old debtor and the new debtor can be determined from an examination of the public records that relate to the organization of the new debtor. This change was made because as a policy matter it is simpler and more convenient to have secured creditors who are making new filings, and who can find the name of the old debtor through an examination of public records relating to the organization of the new debtor, search for financing statements under the name of both the original debtor and the new debtor, than it is to require a secured creditor to continuously monitor its original debtor in order to ensure that a new debtor has not emerged. Given this non-uniform change, Official Comment 4 to this section does not apply under Maine's version of this Article.

S. Correction to Reference in Official Comment

1. Proposed Non-Uniform Provision:

None.

2. Maine Comment:

In Paragraph 3 of the Official Comment to Section 9-1602, the reference to Section 9-207(c)(4)(C) should be changed to (b)(4)(C), and the corresponding reference to subsection (3) for the Maine cite should be changed to (2).

T. Correction to Statutory Reference

1. Proposed Non-Uniform Provision:

In Section 9-1603, subsection (b) should be changed to (2).

2. Maine Comment:

None.

U. Modification to Section 9-1608

1. Proposed Non-Uniform Provision:

The words "under this section" should be deleted from subsection 9-1608(a).

2. Maine Comment:

None required.

V. Modification to Section 9-1613

1. Proposed Non-Uniform Provision:

The reference to "public sale" in Section 9-1613(1)(3) should be deleted and "public disposition" substituted therefor.

2. Maine Comment:

None.

W. Revisions to Proposed Form of Notification Before Disposition of Consumer Goods

1. Proposed Non-Uniform Provision:

The safe harbor notice in Section 9-1614 is potentially confusing to those required to prepare the same. The Committee believes that the first line of the notice should be revised to read as follows:

[Name and address or addresses of intended recipient]

In addition, the bracketed sentence beginning on line 10 of page 405 should be deleted to conform to Maine law.

2. Maine Comment:

None.

X. Revisions to Conform to Maine UCCC

1. Proposed Non-Uniform Provision:

The last sentence of Section 9-1616(5) should be deleted so as to conform to the Maine UCCC.

2. Maine Comment:

None.

Y. Establishment of a Rebuttal Presumption Rule in Consumer Transactions

1. Proposed Non-Uniform Provision:

Revised Article 9 adopts the "rebuttable presumption" rule only for non-consumer transactions, leaving the courts to develop the proper rule for consumer transactions. The Official Comment explicitly prohibits a court from inferring the appropriate standard for consumer transactions from the Code rule for non-consumer transactions. The Maine courts have heretofore followed the rule adopted by a distinct minority of jurisdictions, imposing an "absolute bar" on deficiencies in all transactions (consumer and non-consumer) where the secured party has failed to adhere to the requirements of the default provisions of the Code, while the vast majority of other jurisdictions already follow the "rebuttable presumption" rule in both non-consumer and consumer transactions, allowing non-compliant secured parties the opportunity to rebut with appropriate evidence the presumption that there would not have been any deficiency had the secured party complied with the default provisions of the Code. The Committee recommends that Maine join the majority of jurisdictions by revising Section 9-1626 as follows:

"Section 9-1626(1) should be revised by deleting the words and symbols ", other than a consumer transaction,", and by deleting Section 9-1626(2) in its entirety.

2. Maine Comment:

The Maine Code deviates from the Uniform Code by adopting the "rebuttable presumption" rule for both non-consumer and consumer transactions, while the Uniform Code adopts the "rebuttable presumption" rule only for non-consumer transactions, leaving the courts to develop and apply the proper rule for consumer transactions. Indeed, the Uniform Code explicitly prohibits courts from inferring the appropriate standard for consumer transactions from the Code for non-consumer transactions. The Maine courts have heretofore followed the rule adopted by a minority of jurisdictions, imposing an "absolute bar" on deficiencies in all transactions (consumer and non-consumer) where the secured party has failed to adhere to the requirements of the default provisions of the Code, while the majority of other jurisdictions already follow the "rebuttable presumption" rule in both non-consumer and consumer transactions, allowing non-compliant secured parties the opportunity to rebut with appropriate evidence the presumption that there would not have been any deficiency had the secured party complied with the default provisions of the Code. Accordingly, the new Maine Code provision changes existing Maine law, and brings Maine law into conformity with the laws of a majority of other jurisdictions. Official Comment 4 to Section 9-1626 is not applicable in Maine.

Z. Cross-Reference Correction

1. Proposed Non-Uniform Provision:

None.

2. Maine Comment:

In the Official Comment on Section 2-326, the reference to Section 9-1103, subsection 2, should be changed to Section 9-1103, subsection 4.

AA. Missing Title

1. At the beginning of the Official Comment to Section 8-1102, the legislation omits the required introductory language.

BB. Reference Change

1. In the Official Comment to Section 8-1510, the reference to subsection (c) should be changed to (3) to conform to the proper Maine law references.

EXHIBIT B

DISCUSSION OUTLINE OF PROPOSED, REVISED ARTICLE 9
PART A

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DISCUSSION OUTLINE
FOR
PART A – REVISED ARTICLE 9

The drafters stated that Revised Article 9 would provide greater certainty in secured transactions by (a) expanding the scope of property and transactions covered by Article 9 and (b) simplifying the rules governing perfection, priority, enforcement, etc. The revisions in Part A focus primarily on the expanded scope of Article 9, while the practical effect or results of a number of these revisions will be illustrated in the discussions of Part C regarding perfection and priority.

A. Expanded Scope of Article 9 – Property and Transactions

1. Deposit Accounts. Now included as original collateral, not merely as proceeds of collateral, except in consumer transactions. Deposit accounts evidenced by an instrument are not considered deposit accounts. Maine law issue - - deposits must be maintained with a "bank". A bank must be in the business of banking, which will exclude Maine's speciality or limited purpose financial institutions. Should we revise definition of bank? Perfection, to be addressed later, is by control. In cases involving deposit accounts with non lender bank, we will need to use a control agreement.

2. Health Care Insurance Receivables. An interest in or claim under an insurance policy that is a right to payment of money for health-care goods or services. In effect, Article 9 now covers assignments by or to a health care provider. Existing law on security interests in insurance claims continues, as well rules on security interests in claims on insurance proceeds.

3. Consignments. In general, all true consignments are covered, with consignee treated as having a PMSI. Covered if goods are delivered to a merchant for sale and merchant is not an auctioneer, deals in goods of the kind delivered under a name different from that of the consignor and is not known to its creditors to be substantially engaged in selling the good to others. The definition excludes consumer goods and small consignments.

4. Commercial Tort Claims. Covers tort claims of a business or organization, or the claims of individuals if the claim arose out of debtor's business/profession and, if the claim does not arise from personal injury or death. Please note that non-business tort claims of a natural personal are excluded, as are tort claims for bodily injury. Finally, the secured party's lien cannot extend to after-

acquired commercial tort claims, i.e., it exists as of the date of the record, and it must be described with some particularity in the security agreement.

5. Non-possessory Statutory Agricultural Liens. Article 9 now applies to the perfection and priority of non-possessory agricultural liens, but not, it appears to the creation and attachment of those liens. Note that an agricultural lien is an interest, other than a security interest, in farm products. Consequently, in addition to a need to look outside of Article 9 for creation and attachment Article 9 applies to agricultural liens only where it so specifically provides. Please also note that it is tied to farm products and farm operations that would appear to exclude timber operations. We also should review how this change interacts with Title 10. It appears that the priority rule in 10 M.R.S.A. § 4012 still works, though we should review laws on potato liens, canned goods suppliers lien, and the colts/animals for pasturage lien.

6. Accounts. Note the expansion beyond rights to payment for goods sold or services rendered, which absorbs into accounts a number of payment rights that are general intangibles under existing Article 9. Accounts also now include credit card receivables and lottery winnings (Any Maine law issue?)

7. Authenticate. As an aside, review this definition with a view towards electronic filings.

8. Farm Products. Note the expansion to include aquatic goods as crops or livestock.

9. Letter of Credit Rights. These are now subject to Article 9, but note that only the right to payment or performance under the LC, and not the right to demand payment or performance (make a draw) under the LC (which continues to be governed by Article 5), is governed by Article 9. Perfection is by control or if secured party has perfected its security interest in the obligation supported by an LC. Nonetheless, always look to control, as the priority and enforcement discussions will highlight.

10. Registered Organization. A critical definition for determining the place of filing and thereby perfection, but note the requirement that a governmental authority under which a Registered Organization is organized must maintain a public record showing the organization to have been organized. Maine law issue - - what types of entities will not be Registered Organizations? Should they be?

11. Investment Property. Article 9 will govern security interests in all security entitlements, security accounts and securities. Three methods of perfection (filing, control or possession).

12. Payment Intangibles. A general intangible under which debtor's principal obligation is a monetary obligation. Sales of the same are now included, along with sales of promissory notes. When we discuss perfection, we will see that the interests of lenders that sell loan participations are protected by an automatic perfection rule.

13. Supporting Obligations. In effect, support obligations are guaranties, letter of credit and the like that support the payment/performance of another obligation. A security interest in a supported obligation automatically reaches the support obligation, though, as referenced above, you will want to perfect by control.

14. Consumer Definitions. The key element to each definition is the obligation secured and collateral at issue are used for personal, family or household purposes. Relatively straightforward. Any refinements in view of Maine law? Primarily used as a means of excluding transactions from certain provisions of Article 9.

B. Purchase Money Security Interests.

1. Really the same basic definitional structure for a PMSI in goods, with special rules for inventory – (review comment 4 which provides that a PMSI in inventory remains a PMSI if it secures advances for new inventory) and software.

2. Consignments are treated directly and clearly as PMSI and so no special priority rules for consignments in Part C.

3. Formal adoption of dual status rule, and rejection of transformation rule in refinancings. Allocation rules allow PMSI to remain in place but only to the amount of original purchase money obligation, and allows parties to agree how to apply payments.

C. Control.

1. In general, Article 9 makes clear that control agreements that condition control on, for example, a default, or that do not limit a debtor's access to the funds in the absence of a default, are satisfactory.

2. As to deposit accounts, either through being the depository bank (automatic perfection) or a control agreement.

3. Investment Property. No significant changes.

4. Letter of Credit Rights. Control defined as consent of issuer to assignment of right of payment or performance. Transferee's rights under Article 5 prime those of an assignee.

D. Collateral Description.

1. In general can use broader description (all goods, inventory, accounts, investment property, etc.) with the exception of commercial tort claims and in consumer transactions. So called super generic descriptions are satisfactory in financing statements but not in the security agreement.

2. Note – an after acquired collateral clause will not reach commercial tort claims. Therefore you can and need to be more specific.

E. Basic Scope

1. Federal Preemption. Note the stricter rule - - Article 9 is preempted by federal law only when federal law specifically preempts. No deference to federal law when no preemption of Article 9 is intended and a rejection of those cases providing that Article 9 is supplanted if federal law provides any rule. This change allows lenders to perfect security interests in software and, for example, copyrightable materials, under Article 9.

F. General.

1. Maine Law Issues

   (a) Banks and Deposit Accounts
   (b) Agricultural liens and Title 10
   (c) Registered Organization Definition
   (d) Consumer Definitions

2. Winner and Losers?

=5230

DISCUSSION OF PROPOSED, REVISED ARTICLE 9

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Revised Article 9	Existing Article 9*	Proposed Maine Variations	Notes
§9-201 GENERAL EFFECTIVENESS OF SECURITY AGREEMENT			
9-201(a) tracks first sentence of 9-201 exactly.	9-201 [1st sentence] effectiveness of security interest against parties, purchasers and creditors.		Same.
9-201(b) A transaction subject to Article 9 is subject to any consumer law and [place for cross-reference to other applicable laws].	9-203(4) A transaction subject to Article 9 is also subject to Title 9-A and Title 30-A §§3961 and 3965.	Need to identify applicable Maine statutes and regulations 30-A §3961 [pawnbroker] 30-A §3965 [repealed]	Substantially similar to 9-203(4) which references Title 9-A or Title 30-A §§3961 and 3965. Are there regulations that should be referenced?
9-201(c). In case of a conflict between this Article and a law specified in § 201(b), the other law controls with effects specified therein.	9-203(4) Failure to comply with any applicable statute has only the effects specified therein.		Substantially similar to §203(4). [Anticipates that 201(b) will also reference any "Rule of law and regulation"]

* There are no Maine variations to Section 9-201 - 9-208 except for inclusion of statutory references in § 9-203(4).

Revised Article 9	Existing Article 9*	Proposed Maine Variations	Notes
9-201(d). Article doesn't validate any rate, charge, agreement or practice violating a law described in § 201(b) or extend application of such law to a transaction not otherwise subject to it.	9-201 [2nd sentence], Article 9 doesn't validate any practice illegal under usury, small loan, retail installment sales or like laws or extend application of such laws to transactions not otherwise subject to it.		Substantially similar.
§9-202 TITLE TO COLLATERAL IMMATERIAL			
§9-202. Article provisions with regard to rights and obligations apply whether title is the secured party or debtor, except as otherwise provided with respect to (1) consignments or (2) sales of accounts, chattel paper, payment intangibles or promissory notes.	9-202. Article provisions with respect to rights, obligations and remedies applies whether title is in secured party or debtor.		• Revised Article 9 deletes reference to remedies but comments suggest that substantive change may not have been intended (see comment 2.a). • New exceptions make clear that title is relevant in case of sale of accounts, chattel paper, payment intangibles and promissory notes [*e.g.* reasonable care in custody of chattel paper includes preserving rights against prior parties] and consignments and buyer of

Revised Article 9	Existing Article 9*	Proposed Maine Variations	Notes
			accounts, etc.
§9-203 ATTACHMENT AND ENFORCEMENT OF SECURITY INTEREST; PROCEEDS; SUPPORTING OBLIGATIONS; FORMAL REQUESTS			
9-203(a). Security interest attaches when it becomes enforceable against the debtor, unless an agreement expressly postpones attachment.	9-203(2). Security interest attaches when it becomes enforceable against debtor, attachment occurs when events described in 9-203(1) take place unless explicit agreement postpones.		Substantially similar.
9-203(b) Except as otherwise provided in clauses (c) through (i), security interest is enforceable only if • value given • debtor has rights in collateral or <u>power</u> to <u>transfer rights</u> to a secured party • any of -- debtor has authenticated a security agreement that describes collateral, and if collateral covers timber to be cut,	9-203(1) Subject to §4-208 [collecting bank], §9-113 [reference to Article 2] [sales article], §9-115 and 9-116 [investment property], a security interest is not enforceable and doesn't attach unless; • Secured party has possession pursuant to agreement; the collateral is investment property and secured party has control; or security agreement that contains description and, if <u>crops</u> or timber, a		• Expands to permit person who has power to transfer rights in collateral to do so • Appears to eliminate need for description of land in case of crops

Revised Article 9	Existing Article 9*	Proposed Maine Variations	Notes
description of land -- collateral is not a certified security and is in possession of secured party under 9-313 pursuant to security agreement --collateral in a certificated security in registered form and has been delivered under §8-301 pursuant to security agreement --the collateral is deposit account, electronic chattel paper, investment property or L/C Rights and secured party has control under 9-104, 105, 106 or 107 pursuant to security agreement	description of land • value given • debtor has rights in collateral See §9-115(6) (which eliminates requirement for written security agreement for enforceability)	We need to change reference to §8-301 to §8-1301	See 9-115(6) which eliminates requirement for written security agreement for enforceability Special rules for collateral newly covered by Article 9 and expressly references 8-301
(c) This subsection provides that 203(b) is subject to 4-210(collecting bank), 5-113 (letter of credit issuer), 9-110 [reference to Article 2] and 9-206 [investment property]	See 9-203(1) above.		From existing §9-203(1). Cross references vary (due to relocated provisions in revised article?) and new exceptions for letter of credit issues.

Revised Article 9	Existing Article 9*	Proposed Maine Variations	Notes
(d) Person becomes bound as a debtor by a security agreement entered into by another if, by operation of law or contract: -- the security agreement becomes effective to create a security interest in the person's property; or; -- the person becomes generally obligated for the obligations of the other (including secured obligation) and acquires or succeeds to substantially all assets.			NEW. Should eliminate doubt as to application of security interest to after acquired property post-merger or assumption.
(e) If a new debtor becomes bound by Security Agreement entered into another --the agreement satisfies §9-203(b)(3) with respect to after-acquired and existing property of new debtor to the extent property is described in agreement -- another agreement is not required for enforceability			NEW.

Revised Article 9	Existing Article 9*	Proposed Maine Variations	Notes
(f) Attachment of security interest gives secured party right to proceeds set forth in 9-315 and is also attachment of security interest in supporting obligations for the collateral	(3) Unless otherwise agreed, security agreement gives secured party rights to proceeds in 9-306		Substance of §306 moved to §315 --supporting obligation provision new (per comment, implied in old law)
(g) Attachment of security interest in a right to payment or performance secured by security interest or lien on property is attachment of security interest on that lien as well	–		NEW. Codifies common law rule
(h) Attachment of security interest in a securities account is also attachment of related securities entitlements	See §115(2)		Substantially similar to §115(2)
§9-204 AFTER ACQUIRED PROPERTY; FURTHER ADVANCES			
9-204(a) Except as otherwise provided in (b), a security interest may create or provide a security interest in after-acquired collateral	9-204(1) Except as provided in Section 2, a security agreement may provide that any or all obligations are to be secured by after acquired collateral		Substantially similar
9-204(b) Security interest doesn't attach to after-acquired property: --to consumer goods	9-204(2) No security agreement attaches under after-acquired property clause to consumer goods (other than accession)		--Substantially unchanged, except for reference to commercial torts

Revised Article 9	Existing Article 9*	Proposed Maine Variations	Notes
(other than accession given as additional security) unless debtor acquires right within ten days after secured party gives value --a commercial tort clause	unless debtor acquires right within ten days after secured party gives value		
9-204(c) Security agreement may provide that collateral secures, or that accounts, chattel paper, payment intangibles or promissory notes are sold in connection with, further advances or other value, whether or not given pursuant to commitment.	9-204(3) Obligations covered by a security agreement may include further advance or other value, whether or not given pursuant to commitment.		--Expressly validates future advance clause for sale of accounts, etc. Comment says this is implicit under existing Article 9. --Otherwise substantially similar to existing law
§9-205 USE OR DISPOSITION OF COLLATERAL PERMISSIBLE			
9-205(a) A security interest is not invalid or fraudulent solely because debtor has right or ability --to use, commingle or dispose of collateral --collect, compromise, enforce or otherwise deal with collateral --accept return of	A security interest is not invalid or fraudulent by reason of liberty in debtor to --use, commingle or dispose of collateral --collect or compromise accounts or chattel paper --accept return of goods or		-- "solely" is new --Existing reference to debtor's "liberty" to act replaced by "right or ability" --"enforce" is new --collateral substituted for

Revised Article 9	Existing Article 9*	Proposed Maine Variations	Notes
collateral or make repossessions --use, commingle or dispose of proceeds or if secured party fails to require an accounting for proceeds or to replace collateral	make repossessions --use, commingle or dispose of proceeds or by reason of secured party to require debtor to account for proceeds or replace collateral.		accounts or chattel paper --collateral substituted for goods Otherwise almost identical
9-205(b) Section doesn't relax requirement of possession if attachment, perfection or enforcement depend upon possession.	Section doesn't relax requirements of possession where perfection of security interest depends on possession.		--Reference to attachment and enforcement new. Otherwise almost identical.
§9-206 SECURITY INTEREST ARISING IN PERFECTION OR DELIVERY OF FINANCIAL ASSET			
9-206 Security interest arising in purchase of / delivery of a financial asset 9-206(a) & (b) A security interest in favor of a securities intermediary attaches to security entitlement if: --person buys a financial asset through the intermediary in which price is to be paid at time of purchase and --securities intermediary	See 9-116(1).		[uncertificated security] Substantially similar to 9-116(1) (but rewritten) Sentence making clear that no written security interest or perfection action is required as deleted but comment confirms that no substantive change is intended.

Revised Article 9	Existing Article 9*	Proposed Maine Variations	Notes
credits financial asset to buyer's security account before payment. Security interest secures obligation to pay for financial asset.			
9-206(c) & (d) A security interest in favor of a person that delivers a certificated security or other financial asset represented by a writing attaches to same if: --the security --in the ordinary course of business is transferred by delivery with any necessary endorsement --is delivered under agreement between persons in business of dealing with such assets and --agreement calls for delivery against payment. Security interest secures obligation to pay for financial asset.	See 9-116(2).		[certificated security] Substantially similar to 9-116(2) (but rewritten) Sentence making clear that no written security interest or perfection action is required as deleted, but comment confirms that no substantive change is intended.

Revised Article 9	Existing Article 9*	Proposed Maine Variations	Notes
Concept now addressed in §9-403.	9-202(2) When Seller retains a pmsi in goods, Article 2 governs sale and disclaimer limitation or modification of Seller's warranties.		Not reviewed.
§9-207 RIGHTS AND DUTIES OF SECURED PARTY HAVING POSSESSION OR CONTROL OF COLLATERAL			
9-207(a) Except as provided in subsection (d), a secured party shall use reasonable care in the custody and preservation of collateral in its possession. In the case of chattel paper or an instrument, reasonable care includes taking necessary steps to preserve rights against other persons unless otherwise agreed.	9-207(1) A secured party must use reasonable care in the custody and preservation of collateral in its possession. In the case of chattel paper or an instrument, reasonable care includes taking necessary steps to preserve rights against other persons unless otherwise agreed.		--Substantially similar to existing 9-207(1). --Due to revised definition, Section now applies to agricultural lien if collateral is in secured party's possession.
9-207(b) Except as provided in subsection (d), if a secured party has possession --reasonable expenses, including insurance costs and taxes or other charges, are chargeable to debtor and secured by collateral	9-207(2) Unless otherwise agreed, if a secured party has possession --reasonable expenses, including insurance costs and taxes or other charges, are chargeable to debtor and secured by collateral		Subsection 9-207(2)(c) stating that secured party may hold as additional collateral increase or profits (except money) is now addressed in Section 9-207(c).

Revised Article 9	Existing Article 9*	Proposed Maine Variations	Notes
--the risk of accidental loss or damage is on debtor to extent of deficiency. --The secured party must keep collateral (other than fungible collateral) identifiable.	--the risk of accidental loss or damage is on debtor to extent of deficiency. --The secured party must keep collateral (other than fungible collateral) identifiable.		
--The secured party may use or operate the collateral • to preserve collateral or its value • as permitted by a court • except in case of consumer goods, if agreed by debtor	9-207(4) A secured party may use or operate the collateral to preserve collateral or its value or pursuant to court order or, except in case of consumer goods, if provided in security agreement.		Substantially similar to 207(4)
9-207(c) Except as otherwise provided in subsection (d), secured party having possession or control of deposit accounts, electric chattel paper, investment property or letter-of-credit rights -- may hold as additional	See §(c) 9-207(2)(c) --The secured party may hold as additional security any increase or profits (except money) received from collateral, but money unless remitted shall be applied to obligation		--Reference to control of collateral is new --Reference to funds is new

Revised Article 9	Existing Article 9*	Proposed Maine Variations	Notes
security any proceeds, except money or funds, received from collateral --shall apply money or funds against collateral to reduce obligation unless remitted --may create a security interest in collateral	9-207(2)(e) The secured party may repledge the collateral upon terms which do not impair the debtor's right to redeem it		--Eliminates reference to not impairing debtor's right to redeem. Comment says this is primarily for clarification [but goes on to describe how rights to redeem could be ineffective as against new secured party] Comment says existing §207 could be read to limit repledge to transactions in which debt was equal to or less than debtor's debt. The revised Article limits the rights with respect to repledge and proceeds to certain types of collateral. Comment does <u>not</u> note this as a substantive change, however, but instead says that for the most part, this section does not change the law under existing §9-207. Otherwise substantially similar to 9-207(2).

Revised Article 9	Existing Article 9*	Proposed Maine Variations	Notes
9-207(d) If secured party is a buyer of accounts, chattel paper, payment intangibles or promissory note or a cosignor --subsection (a) concerning reasonable care doesn't apply unless the secured party is entitled under agreement to • charge back uncollected collateral or • otherwise to recourse against debtor or other obligor based on non-payment of account debtor, and --subsections (b) & (c) do not apply	–		NEW. Makes clear that section should not apply to true sales of accounts, chattel paper, payment intangibles or promissory notes.
	9-207(3) A secured party is liable for any loss due to breach of this section but doesn't lose his security interest.		No similar provision in Revised Act. Deletion not mentioned in comment.
§9-208 ADDITIONAL DUTIES OF SECURED PARTY HAVING CONTROL OF COLLATERAL			
9-208. In cases where there is no outstanding secured obligation or commitment to make advances or to otherwise			NEW. This section imposes duties on a secured party who has control of the deposit account,

Revised Article 9	Existing Article 9*	Proposed Maine Variations	Notes
give value, within 10 days after receiving request from the debtor --In case of deposit account collateral, notify the bank holding the deposit account of release from any further obligation to comply with the secured party's instructions, or pay over the balance to debtor or transfer the balance into a deposit account in the debtor's name, as applicable. --In the case of electronic chattel paper, provide the authoritative copy of the chattel paper to the debtor or custodian or, if applicable, communicate to the custodian releasing the custodian from any further obligation to comply with secured party's instructions, and enable the debtor or			electronic chattel paper, investment property or letter of credit right to cause the release of collateral after fulfillment or other discharge of debtor's obligations to secured party. These duties are analogous to the duties filed with a termination statement in cases where perfection is by filing.

Revised Article 9	Existing Article 9*	Proposed Maine Variations	Notes
custodian to make copies or revisions to the authoritative copy which add or change an identified assignee -- In the case of investment property under §8-106 (d)(2) or §9-106(b), send to the securities or commodity intermediary a record that releases it from a further obligation to comply with secured parties' instructions, and --With respect to letter of credit rights, send each person having an unfulfilled obligation to pay or deliver a release from any further obligation to pay or deliver to the secured party.			
§9-209 IF ACCOUNT DEBTOR HAS BEEN NOTIFIED			
9-209. In cases where there is			NEW.

Revised Article 9	Existing Article 9*	Proposed Maine Variations	Notes
no outstanding securd obligation or commitment to make advances or to otherwise give value, within 10 days after receiving a request form the debtor, a secured party shall send to an account debtor who has received notice of assignment a record releasing the account debtor form obligations to the secured party.	–		This section imposes duties on a secured party who has notified an account debtor of assignment to inform the account debtor of the fulfillment or after discharge of debtor's obligations to secured party. These duties are analogous to the duties filed with a termination statement
§9-210 REQUEST FOR ACCOUNTING; ETC.			
9-210(a). This new section adds definitions for "Request," "request for an accounting," "request regarding a list of collateral," and "request regarding a statement of account."	See §9-208.		-- Definitions are new -- Makes clear response must identify the transaction or relationship that is the subject of request.
(b) Subject to subsections (c)-(f), a secured party, other than a buyer of accounts, chattel paper, payment intangibles or promissory notes or a consignor, shall comply within 14 days after receipt: --in case of request of	9-208(1) A debtor may sign a statement indicating what he believes to be the aggregate remaining unpaid indebtedness and ask secured party to approve or correct. When security or other record kept by secured party identifies		--Authentication --Adds provision that debtor may simply request accounting, rather than seeking confirmation of debtor's own accounting

Revised Article 9	Existing Article 9*	Proposed Maine Variations	Notes
accounting, by authenticating and sending same to debtor --in case of request regarding list of collateral or a statement of accounts, by authenticating and sending approval or correction to debtor.	collateral, debtor may request approval or correction.		--Due to definition now applies to agricultural liens --Otherwise substantially similar.
§9-210 REQUEST FOR ACCOUNTING; ETC.			
9-210(a). This new section adds definitions for "Request," "request for an accounting," "request regarding a list of collateral," and "request regarding a statement of account."	See §9-208.		-- Definitions are new -- Makes clear response must identify the transaction or relationship that is the subject of request.
(b) Subject to subsections (c)-(f), a secured party, other than a buyer of accounts, chattel paper, payment intangibles or promissory notes or a consignor, shall comply within 14 days after receipt: --in case of request of accounting, by authenticating and sending same to debtor --in case of request regarding list of collateral or a statement of accounts, by authenticating	9-208(1) A debtor may sign a statement indicating what he believes to be the aggregate remaining unpaid indebtedness and ask secured party to approve or correct. When security or other record kept by secured party identifies collateral, debtor may request approval or correction.		--Authentication --Adds provision that debtor may simply request accounting, rather than seeking confirmation of debtor's own accounting --Due to definition now applies to agricultural liens --Otherwise substantially

Revised Article 9	Existing Article 9*	Proposed Maine Variations	Notes
and sending approval or correction to debtor.			similar.
(c) A secured party that claims a security interest in all of a type of collateral may comply with request by sending an authenticated list within 14 days by sending authenticated records so stating.	9-208(2) A secured party that claims a security interest in all of a type of collateral may indicate that in his reply and need not approve or correct an itemized list of collateral.		Substantially similar.
9-210(d) A person who receives a request regarding a list of collateral, claims no interest in collateral when receives a request and claimed an interest at an earlier time shall comply with request within 14 days by sending an authenticated record --disclosing any interest --if known, providing information on assignee or successor.	9-208(b) If secured party no longer has an interest, he must disclose successor known to him and is liable for loss caused to debtor by failure to do so. Successor in interest is not subject to section until request received by him.		--No reference in revision to liability of secured party who refused to disclose assignee. --Revision doesn't specify that assignee not bound until request received. --Otherwise substantially similar.
9-210(e) Similar provision to 9-210(d) except applied to statement of account.	See 9-208(b)		See Notes to 210(d) above.
9-210(f) A debtor is entitled without charge to a response to request under this section	9-208(3) A debtor is entitled without charge to the response to request under this section		Revision provides for $25 fee rather than $10.

Revised Article 9	Existing Article 9*	Proposed Maine Variations	Notes
during any 6-month period. Secured party may require fee of up to $25 for each additional response.	during any 6-month period. Secured party may require fee of up to $10 for each additional response.		Otherwise substantially similar.

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DISCUSSION OUTLINE OF PROPOSED, REVISED ARTICLE 9 PART 3, SUBPARTS 1, 2 AND 4

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October 14, 1999

Subpart 1. Choice of Law.

A. 9-301. General Rules of Perfection, Effect of Perfection and Priority ("PEP").
Source: 9-103

1. Basic rule: follow law of location of debtor to govern PEP.

2. For possessory security interests and for fixtures and timber, location of collateral governs PEP.

3. For tangible collateral (goods, negotiable documents, instruments, money, tangible chattel paper), effect and priority governed by law of location of collateral (the perfection governed by law of location of debtor). [Bifurcation of choice of law is a major new rule.]

NEW: Debtor location governs tangibles filing location; bifurcation of law choice.

B. 9-302. Agricultural Liens.

Source is new.

Jurisdiction of location of the farm products governs PEP.

C. 9-303. New Rules for Goods Covered by Certificate of Title.

Source: 9-103

New 9-303 reduces the "Liechtenstein problem" by rejecting any need for connection between location of the collateral and the issuing jurisdiction – 9-303(1) (but see, definition of "Certificate of Title" in 9-102(10).

A vehicle is "covered" when a valid application for title is filed. Note that both the comment to 9-303 and the definition of "Certificate of Title" in 9-102(10) require the issuing jurisdiction in fact call for the issuance of a certificate of title as to the vehicle in question as a "condition or result" of obtaining priority over a lien creditor. Thus, if the state does not purport to cover a vehicle located in another state, you can have an

ineffective certificate of title and not be "covered." This is a subset of the "Liechtenstein problem."

In a **NEW** rule, goods are covered by the certificate issued in a foreign jurisdiction until the certificate becomes invalid under the law of that foreign jurisdiction or a new certificate issued. 9-303(2). But old certificate remains valid against anyone except a BFP (9-316)(5).

Special Maine Statutory Note. 29-A M.R.S.A. § 702 needs to be fixed. It contains the old 9-103 rules. It needs to be conformed to 9-316.

In addition, Maine has a special nonuniform rule that maintains the validity of certificates of title issued to foreign over-the-road trailers until conditions arise that clearly indicate the owner and secured party no longer have an interest that needs to be protected by the certificate. This is in 29-A M.R.S.A. § 702(5). These provisions allow Maine to secure significant revenue as a "cheap harbor" for over-the-road trailer registrations.

NEW: Change of coverage rules including new rule that new certificate in new jurisdiction "uncovers" goods under old certificate [but see 9-316(4)&(5)]. Strong validation of title notwithstanding location of goods and debtor.

D. 9-304. Deposit Accounts.

Source: New

The law of the bank's jurisdiction governs, with a triage of rules ranging from a specific agreement specifying choice of jurisdiction for this purpose, general choice of law, location of the office stated in the agreement, office ID'd in the account documents, and the chief executive office [forms issues for bank lawyers].

NEW rule for new collateral type.

E. 9-305. Investment Property. (Remember, this means securities, securities accounts, securities entitlements and commodities accounts and commodities entitlements).

Source: 9-103(6)

- As to certificated security, location = PEP
- As to uncertificated security, issuer's location = PEP

- As to security entitlements/accounts, the law of the intermediary's jurisdiction applies (see new amended 8-110(5) on location of intermediary)

- A special rule refers to debtor location when the secured party perfects by filing (allowed as to securities entitlements and securities accounts, but trumped by control)

Old 9-115 rules appear in 9-328.

Not **NEW** material.

F. 9-306. Letter of Credit Rights.

Source: New

Issuer's jurisdiction under 5-116 governs PEP.

G. 9-307. **Location of Debtor**.

Source: 9-103 substantially revised.

This is a critical new provision because of the importance of debtor locations to perfection (where to file) in all cases and PEP in most.

Key Concepts:

- Individuals located at residence

- "Organizations" located at place of business or chief executive office (see 1-201(28) definition of "organization" for ambiguities re informal organizations)

- "Registered Organization" organized under the law of a state is located in that state (query results of research into drafter's meaning of term)

Foreign debtor deemed located in D.C. if actual location does not have a filing system that requires public notice of nonpossessory security interests.

Special rules provided for federal corporations and branches of foreign banks, foreign air carriers, USA.

NEW: Location of Registered Organizations

Subpart 2. Perfection.

A. 9-308. When Perfected.

Source: 9-303; 9-115(2)

Basically: Attachment plus compliance with applicable rules 9-309 to 9-316

Agricultural Liens: When "effective" plus filed.

New Rule. Perfection of security interest in rights to payment also perfects security interest in supporting obligations (lien on the note also provides a lien on the mortgage).

Perfection of security interest in securities or commodities account also gets all the securities or commodities entitlements therein. Concept formerly in 9-115.

NEW – automatic lien on supporting obligations.

B. 9-309. Automatic Perfection Rules.

Source: 9-302, 9-115, 9-116

- PMSI in consumer goods.

Special Maine note: We presently have a $2,000 cap on automatic perfection. Above that point, filing or other perfection is needed [Bruce: tell us about the ambiguities in the current law.] Query: Should we retain?

Other automatic perfections:

- Transfer of insignificant part of accounts or payment intangibles (old rule)
- Sale of payment intangibles (**new**)
- Sale of note (**new**)
- Health care receivables (**new**)
- Certain Article 2 security interests (old)
- Security interest of collecting bank (old)
- Issuer security interest under 5-118 (old)
- Security interest arising out of delivery of financial assets (old)

- Security interest created by broker in investment property and commodities (old)

- General assignment for benefit of creditors (old).

NEW: See above

C. 9-310. Perfection by Filing.

Source: 9-302

Filing is generally required, unless there is an exception.

Exceptions:

- Automatic perfection under 9-309.

- Automatic security interest in supporting obligations under 9-308 (4 & 5) and in securities and commodities accounts interest in underlying entitlements (6 & 7).

- Titled collateral

- Goods in possession of bailee (nonnegotiable document issuer receives notice)

- Temporary initial perfection 20 days from attachment for a signed security agreement covering certificated securities, negotiable documents and instruments, all where new value given (9-312)

- Temporary continued perfection 20 days where secured party had possession of the goods/negotiable documents and releases the same in connection with sale or shipping; similar rule for certificated securities (9-312)

- Collateral in possession of secured party

- Certificated security delivered to secured party

- Control over investment property and electronic chattel paper or letter of credit rights

- Proceeds under 9-315

- Continued perfection in other jurisdiction under 9-316 (property covered under law of another jurisdiction)

- Assignee of secured party need not file an amendment to keep the security interest perfected

NEW: None

D. 9-311. Perfection of Security Interest in Titled Collateral

Source: 9-302(4)

Filing not valid where:

(a) Federal statutory preemption of state filing.

(b) Cross-reference to Maine title law [**drafting note, citation should be to Maine Certificate of Title and Anti-Theft Act in Title 29-A Chapter 7**]

(c) Effective foreign titles. Foreign title will be valid in Maine as a perfection, except as provided in 9-316(4 & 5).

[Digression to 9-316(4) — a foreign certificate remains a valid perfection until the law of the issuing jurisdiction would cause such certificate to lapse absent Maine's issuance of a new certificate — subject to (5), under which BFP defeats the foreign certificate if either the certificate becomes invalid under foreign law or the four-month rule applies]

Maine legislative note, be sure that Title 29-A causes perfection upon filing of title application and remove any relation back provisions, see uniform comment 5

NEW: relationship to foreign titles (choice of law)

E. Section 9-312. Perfecting Security Interests in Chattel Paper, Deposit Accounts, Documents, Goods Covered by Documents, Instruments, Investment Property, Letter of Credit Rights and Money.

Source: 9-304 with additions

1. Filing will cover chattel paper, negotiable documents, investment property, instruments [the last is new, BFP/HDC still beats a filing. As always, control beats a filing].

2. Subject to proceeds rules, deposit accounts can only be perfected by control, letter of credit only by control, and money only by possession.

3. A security interest in negotiable documents is a security interest in the underlying goods. A security interest in the documents trumps a separate security interest in the goods.

4. 20-day temporary perfection rule governs a new security interest in instruments, certificated securities and negotiable documents (given for new value).

5. 20-day continued perfection where possession released by secured party to debtor for sale, shipping, processing of collateral. Applies to goods previously perfected under negotiable documents and goods in possession of bailee.

6. Similar 20-day continued perfection for surrender of certificated securities.

NEW: filing vs. instruments; control for deposit accounts and letter of credit rights.

F. 9-313. Perfection by Possession.

Source: 9-305; 9-115

1. Generally, effective as to goods, negotiable documents, instruments, tangible chattel paper, certificated securities [see how this parallels the choice of law rule that causes the location of the foregoing to govern the effect of perfection and priority ("EP") even if a different law governs perfection by filing].

2. Once a Maine certificate of title covers a vehicle, secured party may perfect by possession only in the circumstances described in 9-316(4) [a validly-perfected security interest perfected under the law of another jurisdiction when the goods were brought into this State remains perfected for so long as the original state allowed the perfection to continue had not a Maine certificate issued. For example, this law allows a secured party with New Jersey certificate, to follow a vehicle brought to Maine and repossess it for default, even though New Jersey law might have honored the Maine certificate after four months for all other purposes.]

3. Providing new rules for identifying when the secured party has taken possession through a third party. Note that possession by the debtor or the debtor's lessee in the ordinary course of business can never perfect a security interest by possession. New rule is authenticated record of acknowledgment by third party that it holds f/b/o secured party.

4. Provides special new rules dealing with the duties of a third party (none) to acknowledge.

5. Provides new rules governing mortgage warehouse lenders and delivery of notes to prospective purchasers under agreement to hold f/b/o secured party or return.

NEW: Rule for relocated certificated vehicles; possession through third parties clarified; third party duties clarified.

G. 9-314. Perfection by Control.

Source: 9-115 and much new

1. Effective for investment property, deposit accounts, letter of credit rights and electronic chattel paper.

2. Perfection lapses immediately when a secured party loses control of deposit accounts, electronic chattel paper or letter of credit rights (which can only be perfected by "control").

3. Perfection continues in investment property after loss of control until

- The debtor acquires possession of a certificated security
- The issuer registers an uncertificated security in the name of the debtor
- The debtor becomes the entitlement holder of a security entitlement

NEW: Extends control/lapse rules to deposit accounts and clarifies investment property

H. 9-315. Security Interest in Proceeds.

Source: 9-306

1. Security interest continues in original collateral unless secured party authorized the disposition free of the security interest.

2. Security interest continues in identifiable proceeds.

3. New tracing rule expressly allowed under subsection 2(b) for commingled cash proceeds.

4. 20-day rule applies for continued perfection of security interest in proceeds (was ten days).

5. During the 20 days, continuation of perfection allowed by

- Filing, if a filed financing statement covers the original collateral and the proceeds are the type of collateral in which a security interest may be perfected by filing in the office where the original

filing was made, or

- If the proceeds are identifiable cash proceeds.

NEW:

- Authorized sale of collateral is not free and clear of security interests unless it was authorized to be sold free and clear.

- Clarification of rights to commingled proceeds.

- Repeal of special rule for debtor insolvency.

I. 9-316. Change of Governing (Choice of) Law.

Source: 9-103 four-month rule.

1. Change of location of the debtor = unperfected after four months as to the same debtor or after a year, if the change of location resulted from the change of debtor identity.

2. If you fail to perfect in the four-month period, the lapse relates back as against a BFP who bought during the four months.

3. Special rule for possessory security interest — you don't get four months. You must be perfected under new law immediately or lapse occurs.

4. Special rule for certificated collateral. Once covered by a certificate of this State and still covered by a certificate of an old state, the old state certificate continues to be valid until the old state would have lapsed if this State had not issued a new certificate (this trumps 9-303(2)) rule re choice of law — meaning you can have two valid certificates).

5. Resolves a conflict under the foregoing rule if two valid certificates are outstanding; a BFP under the new certificate (including a secured party) wins.

6. The four-month rule applies to relocation of the bank of deposit, securities intermediary, letter of credit issuer whose location governed perfection.

NEW: elaborate bifurcated rules for certificated collateral; treatment of new collateral types (deposits) and choice of law benchmarks (location of bank, securities intermediary, LOC issues).

Subpart 4

A. 9-340. Bank of Deposit v. Secured Party.

Source: New

Bank of deposit can always exercise right of set-off unless the secured party has obtained control under 9-104(1)(c) [the account has been changed and reopened in the name of the secured party as the bank's customer]. [Note the effect of this is to allow bank of deposit to trump even a perfected security interest and to set off in breach of a control agreement but the breach would be actionable under 9-341.]

NEW: Resolution to longstanding conflict.

B. 9-341. Bank's Rights and Duties with Respect to Deposit Account.

Source: new

Basically are unaffected by the creation or perfection of a security interest, unless the bank agrees otherwise in writing (this would be your control agreement). In other words, unless the bank has agreed in writing to honor the instructions of the secured party, the "free flow of funds rule" wins.

NEW: entirely

C. 9-342. Bank's Right to Refuse to Enter into a Control Agreement.

Source: new

Even if the customer requests, the bank is not obligated to enter into a control agreement or, if it has entered into one, to confirm it to another person (unless requested by the customer).

NEW: entirely

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SUMMARY:
UNIFORM COMMERCIAL CODE
Proposed Article 9
Part 3. Perfection and Priority
Subpart 3. Priority

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Section 9-1317. Interests that take priority over or take free of unperfected security interest or agricultural lien

Source:

11 M.R.S.A. §§ 2-1307(2), 9-301

Summary:

As under current law, this section provides that a perfected interest takes priority over an unperfected interest, that a buyer (other than a secured party) of goods, instruments, documents and chattel paper in bulk or outside of the ordinary course of business, as well as a lessee of goods, take free of an unperfected security interest if that buyer gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected, and that a lien creditor takes priority over an unperfected interest. As under current law, the new section provides that a buyer (other than a secured party) of accounts and general intangibles tales priority so long as the buyer gives value without knowledge of the security interest and before it is perfected.

Changes in law:

1. Since agricultural liens will have to be perfected under new Article 9, an unperfected agricultural lien is treated in the same manner as an unperfected security interest for priority purposes.

2. The new section provides that the lien creditor will have priority if that person becomes a lien creditor before the security interest or agricultural lien is perfected or before "a financing statement covering the collateral is filed". Current law does not include this quoted language. Thus, the new section, but not current law, permits a secured party to take priority over a lien creditor so long as the secured party files a prior financing statement even if the secured party has not yet given value to support the security interest. See § 9-1317, Official Comment 4. This provision, of course, applies only with respect to collateral for which perfection by filing is permitted.

3. The new section provides the current rule applicable to a buyer of goods, documents and chattel paper in bulk applies to all buyers and not just those who purchase in bulk or not in the ordinary course of business. That same rule will apply to a buyer of tangible chattel paper, instruments or a security certificate. See § 9-1317(2).

4. The new section treats a licensee of a general intangible or a buyer (other than a secured party) of accounts, electronic chattel paper, general

intangibles or investment property (other than a certificated security) in the same manner as current law treats a transferee of accounts and general intangibles.

5. Current law provides that the holder of a purchase money security interest ("PMSI") will take priority over an intervening transferee in bulk or of a lien creditor if the holder of the PMSI files with respect to that security interest within 20 days after the debtor receives possession of the collateral. See § 9-301(2). The new section continues the protection against lien creditors and also provides this protection as against all buyers and lessees, not just transferees in bulk. See § 9-1317(5), Official Comment 8. As under prior law, it would appear that this applies to a PMSI in any type of collateral.

Winners and Losers:

For the most part, the new section does not change current law other than to expand the scope of the section to include, as appropriate, the additional types of collateral that will be covered in new Article 9. Thus, for example, unperfected agricultural liens will be subject to this section. In addition, secured creditors and holders of agricultural liens will be protected against lien creditors if they file a financing statement with respect to appropriate collateral even before any advances are made. This will adversely affect lien creditors in only a minor way. The holder of a PMSI will have additional protection during the 20-day perfection period at the expense of certain lessees and of buyers.

Proposed Maine Comment:

None.

Section 9-1318. No interest retained in right to payment that is sold; rights and title of seller of account or chattel paper with respect to creditors and purchasers

Source:

New

Summary:

This section provides that a debtor who has sold an account, chattel paper, payment intangible or promissory note does not retain an interest in the collateral that has been sold, but, until the sale is perfected, is deemed to hold the rights that were sold for purposes of determining the rights of third party creditors and purchasers for value of an account or chattel paper.

Changes in law:

As indicated, this section is new and has no counterpart in current Article 9. It is intended to make explicit what has always been assumed; that a seller of such collateral does not retain an interest therein even though such a sale is considered to give rise to a "security interest". See § 9-1318, Official Comment 2. The second part of the new section is intended to make clear what the effect of that security interest is really intended to be – that is, that failure to perfect the sale transaction allows third parties to acquire superior rights in these types of collateral from the seller even though for all other purposes the seller no longer has any rights in that property.

Winners and Losers

This section merely makes explicit what was always implied in current law.

Suggested Maine Comment:

None.

Section 9-1319. Rights and title of consignee with respect to creditors and purchasers

Source:

New, but see §§ 1-201(37), 2-326 (3), 9-114

Summary:

This section provides that the rights of creditors of, and purchasers for value from, a consignee of goods while the goods are in the consignee's possession are to be determined as though the consignee has the same rights and title to the goods as the consignor had or had power to transfer. If, however, the consignor perfects its security interest in the goods, then the law outside of Article 9 determines the rights of the consignor and any creditors of the consignee. While the section is far less than a paradigm of lucidity, it appears that the drafters intend to provide the creditor of a consignee with an interest in whatever rights the consignee holds in the goods as provided by other law and as modified by this section.

Changes in law:

Current law provides that a consignment will constitute a security interest subject to Article 9 only if that consignment is intended as security. See § 1-201(37). In addition, Article 2 provides a consignor with a safe harbor by permitting an Article 9 filing to protect the consignor's rights n the consigned goods. See § 2-326(3)(c). Under new Article 9, consignors will always be considered "secured parties" and the consignment will always constitute a "security interest". See §§ 1-201(37) (amended by L.D. 2245, § B-3), 9-1102(72)(c). See also § 9-1103(4) (consignment constitutes PMSI in inventory). Therefore, once again the scope of Article 9 has been expanded. Additionally, the new provision provides that a buyer not in the ordinary course of business will be treated like any other buyer of the consigned goods. Current law provides almost no protection for such a buyer in a consignment context. See § 9-307(3)

Winners and Losers:

Consignors could lose in a big way if they do not file financing statements to protect their interests in consigned goods. Thus, they will have to pay attention to filing. In addition, since a consignment is treated as a PMSI in inventory, a consignor will have to provide notices to other creditors of record in order to ensure that its rights are protected. See §9-1324(2). Thus, consignors, and particularly consumer consignors who may not know the legal complexities involved, could be losers. Creditors of

consignees, as well as buyers outside of the ordinary course of business from consignees, could gain what the consignors lose.

Proposed Maine Comment:

None.

Section 9-1320. Buyer of goods

Source:

11 M.R.S.A. § 9-307

Summary:

This section provides that, even without the consent of the secured party, a buyer of goods in the ordinary course of business (other than a buyer of farm products from a person engaged in farming operations) takes free of a security interest created by the seller, even if that security interest is perfected and the buyer knows of it, unless the goods are in the secured creditor's possession. This section also provides that, even without the consent of the secured party, a consumer purchaser of consumer goods from another consumer takes free of a security interest, even if perfected, so long as the buyer buys without knowledge of the security interest, for value and before the filing of a financing statement that continues to be effective at the time of the sale and the goods are not in the secured creditor's possession. Finally, the section provides that, even without the consent of the secured party, a buyer in the ordinary course of business buying oil, gas or minerals at the wellhead or the minehead or after extraction takes free of an interest arising out of an encumbrance on the land.

Changes in law:

Maine's version of current § 9-307 contains a non-uniform provision treating a buyer of timber, logs or pulpwood from a person engaged in timbering operations, or from a person dealing in such goods, the same rights as a purchaser of farm products from a person engaged in farming operations. See § 9-307(1) (providing that such buyers take subject to security interest created by seller). No such protection is afforded under the new section. The provision that a buyer does not defeat the rights of a secured party in possession of the collateral is, at best, only implied under current law. The provisions for oil, gas and other minerals are new.

Winners and Losers:

Parties who hold security interests in timber, pulp and related materials will no longer have the protected position that they now occupy under Maine's current version of Article 9. Buyers of such property in such collateral will gain accordingly. Certain parties purchasing oil, gas and other minerals will not only receive the protection normally offered to buyers under this section, but will also receive priority over encumbrances

in the real estate. Such encumbrancers will, therefore, have their rights diminished.

Proposed Maine Comment:

The Official Comment to this section provides that purchasers of gas, oil and other minerals will take free of encumbrances (including mortgages) upon real estate, but not from an ownership interest in that real estate. See § 9-1320, Official Comment 7. Since Maine is a title theory state in which a mortgagee is deemed to be the legal owner of the real estate, a comment should be inserted to clarify the intent of the Uniform Comment and the Section as a whole. Additionally, consideration should be given to whether the non-uniform portion of current § 9-307(1) should be repeated here.

Section 9-1321. Licensee of general intangible and lessee of goods in ordinary course of business

Source:

11 M.R.S.A. §§ 2-1103(1)(o), 2-1307(3)

Summary:

This section defines a "licensee in ordinary course of business" to mean a party who becomes a licensee of a general intangible in good faith, without knowledge that the license violates the rights of another persons in the collateral, and in the ordinary course form the person in the business of licensing general intangibles of that kind. A party can also become such a licensee only if the license comports with the normal practices in the kind of business in which the licensor is engaged of with the licensor's own normal practices.

Such a licensee takes its rights under a non-exclusive license free of a security interest in the general intangible created by the licensor, even if the security interest is perfected and the licensee knows of the existence of that security interest. By negative implication, a sub-licensee does not take free of a security interest if the original license is exclusive. Additionally, an ordinary course lessee of goods takes its leasehold interest free of a security interest in the goods created by the lessor even if the security interest is perfected and the lessee knows of its existence.

Changes in law:

No change is made to the rights of a lessee. Current law does not contain a similar provision for a non-exclusive licensee of a general intangible.

Proposed Maine Comment:

None.

Section 9-1322. Priorities among conflicting security interests in and agricultural liens on same collateral

Source:

§§ 9-312(5), 9-312(6)

Summary:

Just as under current law, the general rule is that conflicting perfected security interests rank according to priority in time of filing or perfection. The new provision section expands this to include ranking of agricultural liens as well. The states this rule in more direct language than is the case under current law to make clear that the filing of a financing statement may of itself establish priority even if the security interest or lien has not yet otherwise attached. The section also explicitly states that a perfected interest has priority over an unperfected interest, something that is clearly implied but not directly stated in current law. As under current law, the first unperfected security interest to attach has priority over any unperfected security interest that attaches or becomes effective on a later date. See § 9-312(5)(b). The new provision goes on to state that the "effective" date of an unperfected security interest security interest has the same effect as its attachment for priority purposes as its attachment. It does not appear that this is intended to be a change from current law. See § 9-1322, Official Comments 3, 11.

The new section also provides that priority of an interest in proceeds and in a supporting obligation is determined in the same manner as an interest in the underlying collateral. See § 9-1322(2).

The general rule enunciated in this section is subject to many exceptions, several of which are set forth in other sections of new Article 9. Security interests entitled to priority under the sections dealing with priority of security interests in deposit accounts, investment property and letter of credit rights, as well as the priority afforded a purchaser of chattel paper and instruments and the rights of purchasers of instruments, documents and securities under other Articles of the UCC (new §§ 9-1327, 9-1328, 9-1329, 9-13330 and 9-1331) also have priority over any security interests in supporting obligations for the collateral. Security interests covered by these other sections also have priority over other security interests in proceeds of that collateral if the security interest in proceeds is perfected, the proceeds are cash proceeds or proceeds that are the same type of property as the collateral, and, in the case of proceeds of proceeds, all intervening proceeds are cash proceeds, proceeds of the same type of property as the collateral or are an account relating to the collateral. See § 9-1322(3).

This section also provides that if a security interest in chattel paper, deposit accounts, negotiable instruments, instruments, investment property of letter of

credit rights is perfected by a method other than filing, then conflicting security interests in proceeds of such collateral rank according to time of filing rather than by the date of perfection of the security interest in the underlying collateral by another means. However, this special rule applies only if the proceeds are not cash proceeds, chattel paper, negotiable instruments, instruments, investment property or letter of credit rights. See §§ 9-1322(4), 9-1322(5).

The priorities set forth in this section are explicitly made subject to various other exceptions set forth elsewhere in Article 9. See § 9-1322(6)(a). They are also subject to the security interest of a collecting bank provided for in § 4-210 of the UCC and the security interest of an issuer or nominated person as provided in § 5-1118 of the UCC with respect to letters of credit. See §§ 9-1322(6)(b), 9-1322(6)(c). Security interests provided for under Article 2 and Article 2A of the UCC also have priority despite any contrary provisions of § 9-1322. See §§ 9-1110(4), 9-1322(6)(d). Furthermore, a perfected agricultural lien on collateral has priority over a conflicting security interest or agricultural lien in the collateral if the statute creating the lien so provides. See 9-1322(7).

Changes in law:

The basic rule of first in time, first in right remains the same as under current law. See § 9-312(5). The section expands this general rule to cover priority of agricultural liens as well as security interests. The general rule as to a security interest or agricultural lien in a supporting obligation is an expansion of the current rule with respect to proceeds of collateral, but presumably does not represent much of a change in the law as currently applied. The priority of a security interest in deposit accounts, investment property and letter of credit rights, and of the rights of a purchaser of chattel paper and instruments and the rights of purchasers of instruments, documents and securities under other Articles of the UCC (new §§ 9-1327, 9-1328, 9-1329, 9-13330 and 9-1331) over a security interest in proceeds of, and supporting obligations for, other types of collateral is new given the newly expanded coverage of proposed Article 9. See §§ 9-1322(3), 9-1322(4).

Winners and Losers:

This is the basic priority section of new Article 9. The most important changes here are the increase in the scope of Article 9 and are dealt with more specifically in other sections of the new law.

Proposed Maine Comment:

None.

Section 9-1323. Future advances

Source:

11 M.R.S.A. §§ 2-1307(4), 9-301(4), 9-307(3), 9-312(7)

Summary:

Under § 9-1322, as under current law, ordinarily the priority of a security interest in collateral is based upon the date of filing or perfection and not the date that an advance is made which is secured by the collateral. However, perfection of a security interest dates from the time that an advance is made where the security interest secures an advance that is made while the security interest is perfected only under § 9-1309 (providing for automatic perfection of certain security interests upon attachment), or §§ 9-1312(5), 9-1312(6) or 9-1312(7) (providing for 20-day temporary perfection of security interest in certain types of collateral without filing or taking possession of the collateral), or where the advance is not made pursuant to a commitment entered into before or while the security interest is perfected by a method other than the temporary perfection permitted by §§ 9-1312(5), 9-1312(6) or 9-1312(7). See § 9-1323(1).

The foregoing rules do not apply where the security interest is held by a buyer of accounts, chattel paper, payment intangibles or promissory notes (but would not apply where a security interest is held in these items merely to secure an obligation), or by a consignor. See § 9-1323(3).

Section § 9-1323 provides that, as under current law, a security interest is subordinate to the rights of a party who becomes a lien creditor while the security interest is perfected to the extent that it secures advances made more than 45 days after the person becomes a lien creditor, or pursuant to a commitment entered into prior to the end of the 45-day period. Compare § 9-301(4) with § 9-1323(2). This rule applies only where the future advance is made without knowledge of the lien by the secured creditor or is made pursuant to a commitment entered into without knowledge of the lien. In addition, as under current law, a buyer other than in the ordinary course of business takes free of a security interest to the extent it secures advances made after the earlier of the time that the secured party acquires knowledge of the purchase or 45 days after the purchase, unless the advance is made pursuant to a commitment entered into without knowledge of the purchase and before the end of the 45 day period. Compare § 9-307(3) with §§ 9-1323(4), 9-1323(5). A lessee of goods other than in the ordinary course of business is treated in the same manner as such a buyer. See §§ 9-1323(6), 9-1323(7). This is the same result reached under current law. See § 2-1307(4).

Changes in law:

No significant changes.

Winners and losers:

Since there are no significant changes in the law, the positions of the relevant parties should not shift.

Proposed Maine Comment:

None

Section 9-1324. Priority of purchase-money security interests

Source:

11 M.R.S.A. §§ 9-312(3), 9-312(4)

Summary:

As under current law, a PMSI in goods other than inventory has priority over a competing non-purchase money security interest in the collateral so long as the PMSI is perfected when the debtor receives possession of the collateral or within 20 days thereafter. Compare § 9-312(3) with § 9-1324(1). New § 9-1324(1) expands this rule to a PMSI in livestock. The new section provides that a PMSI in collateral also has priority over a non-PMSI security interest in identifiable cash proceeds, except to the extent that the proceeds are placed in a deposit account over which another secured creditor has control or in which the depository institution holds a security interest. See §§ 9-1324(1), 9-1327(1).

A PMSI in inventory will have priority over a conflicting non-PMSI in the same property if the PMSI is perfected when the debtor receives possession of the inventory, the creditor holding the PMSI notifies the holder of the competing interest, the holder of the competing interest receives the notice within 5 years before the debtor receives possession of the inventory, and the notice states that the sender has or expects to acquire a PMSI in inventory of the debtor and describes that inventory. See § 9-1324(2). The notice need only be sent to the holder of a competing interest who files a financing statement covering the relevant type of collateral prior to the date that the PMSI is perfected by filing or if the PMSI is temporarily perfected without filing, before the beginning of the 20-day period of temporary perfection. See § 9-1324(3). If all of these requirements are met, then the PMSI has priority over a competing non-PMSI security interest in the inventory collateral, as well as over a conflicting security interest in chattel paper or an instrument that constitutes proceeds of the inventory, in proceeds of that chattel paper (except as otherwise provided in § 9-1330 dealing with security interests in chattel paper or instruments), and (except as otherwise provided in § 9-1327 dealing with security interests in deposit accounts) also has priority in identifiable cash proceeds of the inventory to the extent that those cash proceeds are received on or before the delivery of the inventory to the buyer.

The is same priority is granted to a PMSI in livestock that is a farm product if the holder of the PMSI takes the same steps as would be required where the collateral was inventory (except that the notice must have been received within 6 months before the debtor receives possession of the livestock). See §§ 9-1324(4), 9-1324(5). This priority extends to identifiable cash proceeds of the livestock (except as otherwise provided in § 9-1327) and to identifiable products of their unmanufactured states.

A PMSI in software has priority over non-PMSI security interests in that software to the extent that the PMSI interest in the goods for which the software was acquired for use has priority in the goods. See § 9-1324(6). Except as otherwise provided in § 9-1327, the PMSI in the software has priority over a conflicting interest in identifiable proceeds of the software to the extent that the PMSI in the goods for which the software was acquired has such a priority.

Where there are multiple PMSI's in the same collateral, then a perfected PMSI retained by the seller of the collateral has priority over a PMSI held by a party who advanced funds to enable the debtor to acquire rights in or the use of the collateral. See § 9-1324(7)(a). In all other instances, priority is given to the PMSI that is first filed or perfected. See § 9-1324(7)(b).

Changes in law:

The new statute contains numerous changes from current law. First, a PMSI in livestock that are farm products is treated in virtually the same manner as a PMSI in inventory. Under current law, a PMSI in livestock is treated like a PMSI in non-inventory collateral. Thus, the holder of a PMSI in livestock will be required to provide notice to other creditors of record and will have to perfect the PMSI before the debtor receives the livestock, rather than before the period ending 20 days after possession of the livestock is acquired by the debtor.

Second, the priority of a PMSI in proceeds is in all cases subject to the rights of a secured creditor who controls the deposit account in which cash proceeds are placed. It will also be subject to the security interest of the depository institution in that account, unless the holder of the PMSI has control of the account. See § 9-1327.

Third, current law does not deal with the relative priorities of parties that each hold a PMSI in the same collateral. Under the new section, a PMSI retained by a seller has priority over another PMSI in the same collateral held by a party who advanced funds to enable the debtor to acquire rights in the collateral or the use of the collateral. In all other instances, priority is given to the holder who first filed or perfected. This may require a later secured party to make inquiry of all prior filed or perfected secured creditors in the same type of collateral as to whether their security interests are PMSI's. In the absence of such an inquiry, the later filed or perfected PMSI could have a position subordinate to the previously filed or perfected PMSI.

Fourth, the PMSI has priority over a non-PMSI in chattel paper proceeds if the holder of the PMSI subsequently purchases that paper. This resolves an issue under current law by deeming the purchase to be for "new value".

Winners and losers:

Holders of a PMSI in livestock could lose their priority unless they follow the new notice and perfection rules. This cold hurt such holders and help competing creditors.

The rights of a holder of a PMSI in proceeds put into a deposit account may be substantially destroyed if there is a competing interest in the account held by the depository institution or by a third party with control over the account. Lenders other than the depository institution will be required to obtain control of the account and a subordination agreement from the depository institution in order to protect their priority in proceeds. The winner is the depository institution; the loser is the PMSI lender who is not that institution.

Sellers who retain a PMSI, as well as the first PMSI holder to file or otherwise perfect are the winners under the new priority rules, whereas a non-seller holder of a PMSI, or a later filing holder of a PMSI are the potential losers. This should result in more inter-creditor agreements and more creditor inquiries made of prior secured creditors.

Proposed Maine Comment:

The Official Comment states that whether particular aquatic farm products are treated as livestock under this section or as crops under § 9-1324-A is to be left to the courts. See § 9-1324, Official Comment 11. If the products are treated as livestock, then a supplier of feed for such animals will not hold a PMSI with its relatively high priority position. If, on the other hand, aquatic farm products are treated as crops, then the supplier could come to hold a production money security interest in the products with a greater priority position. This leaves a substantial amount of uncertainty for Maine's growing aquaculture industries. A Maine comment (or perhaps a non-uniform provision) should be inserted to clarify what is an unacceptable level of uncertainty in this area.

Section 9-1324-A. Priority of production-money security interests and agricultural liens

Source:

11 M.R.S.A. § 9-312(2)

Summary:

This section grants a perfected production-money security interest priority over a conflicting security interest in the same crops. This priority arises only if the production-money security interest is perfected by filing when the holder of that interest first gives new value to enable the debtor to produce crops and sends a PMSI type notice to the holder of the conflicting security interest not less than 10 nor more than 30 days before the holder first gives new value to enable the debtor to produce the crops. The notice need be sent only to creditors who file financing statements covering the crops before the date of the holder's filing. If the secured party holding the conflicting interest then itself advances funds that are intended to and are used to produce the crops, then the priorities between the two creditors will be determined by which of them first filed, even though the creditor who received the notice did not itself send out a notice. Priority between any other perfected production-money security interests in the same crops is determined by the general first to file rule so long as the notice requirement is met. The production-money security interest priority also applies to proceeds of the crops, except as otherwise provided in § 9-1327. Where a party holds both a production-money security interest and an agricultural lien in the same crops, the rules of priority applicable to agricultural liens will govern the priority of both the lien and the production-money security interest unless the creditor waives the agricultural lien rights.

Changes in law:

This section is substantially more detailed and expansive than current § 9-312(2). The notice provision is completely new, as is the provision concerning the effect of an agricultural lien. The opportunity given to the holder of a previously filed security interest to advance funds and acquire the status of the holder of a production-money security interest is also new, as is the provision concerning the relative priority of competing production-money security interests.

Winners and losers:

Holders of previously filed security interests in crops are the winners here, since they can preempt making advances to the debtor and acquire a priority position with respect to the same. Later lenders are the big losers.

Proposed Maine comment:

There are at least two problems with this section. First, the term "production-money crops" is not defined. Second, whether this section covers particular types of aquatic farm products is, as noted above, not resolved by the new Article 9. These items could be dealt with in a Maine comment to this section.

Section 9-1325. Priority of security interests in transferred collateral

Source:

New.

Summary:

A security interest created by a debtor is subordinate to a security interest in the same collateral created by another person if the debtor acquired the collateral subject to that security interest, the prior interest was perfected when the debtor acquired the collateral, and there is no period thereafter when the prior interest was unperfected. These provisions apply only where the interest to be subordinated would otherwise have priority under the general rules set forth in § 9-1322(a) (first to file or perfect for perfected interests, first to attach for unperfected interests, perfected interest has priority over unperfected interest) or under the PMSI rules contained in § 9-1324. These provisions also apply where the subordinated security interest arose under § 2-711(3) of Article 2 (granting a security interest to a buyer who has rightfully rejected or for which it has justifiably revoked acceptance) or under § 2-1508(5) of Article 2A (granting a lessee a security interest in leased goods that the lessee has rightfully rejected or for which it has justifiably revoked acceptance).

Changes in law:

The purpose of this section is to deal with the "double debtor" problem that arises where a debtor acquires collateral subject to a prior security interest. It is equitable in nature and permits the holder of the original security interest to prevail even if perfects against the original debtor after the later secured creditor perfects against its debtor. If the prior interest is never perfected, then this section does not apply. See § 9-1325, Official Comment 4. The Official comment indicates that the equitable principals underlying this section can make it applicable to situations outside of its stated scope. See § 9-1325, Official comment 6.

Winners and losers:

Secured creditors whose collateral is transferred to third parties are the winners. Secured creditors of the transferees are the losers.

Proposed Maine Comment:

None. However, the reference to both "2-1508(5)" and "subsection (5)" in § 9-1325(2)(b) is redundant.

Section 9-1326. Priority of security interests created by new debtor

Source:

New.

Summary:

A security interest that is perfected by a filing against the old debtor and that is effective against the new debtor under § 9-1508 is subordinated to a security interest in that same collateral perfected by any other method even if the latter is perfected after the former. Where a new debtor is bound under § 9-1508 by more than one security interest created by the a particular predecessor debtor, then their relative priorities are determined by the other provisions of Article 9. However, if the security interests by which the new debtor is bound were not entered into by the same original debtor, then the conflicting security interests rank according to priority in time of the new debtor's having become bound by that particular security interest.

Changes in law:

This section is new to Article 9. Previously, the effect of a security interest upon a successor was dealt with by corporate and successorship law generally, as well as by the Article 9 concept that a transfer of collateral outside of the ordinary course of business did not always void a security interest therein.

Winners and losers:

Under this section secured creditors of predecessor debtors could lose their priority in collateral. Secured creditors of successor debtors could, on the other, see their priority advanced over that of the secured creditors of the predecessor debtor.

Proposed Maine Comment:

None. However, the Corporation Codes should be reviewed to ensure that they are consistent with this provision in the case of mergers and acquisitions.

Section 9-1327. Priority of security interests in deposit account

Source:

New. Derived from current 11 M.R.S.A. § 9-115(5) which now deals with investment property.

Summary:

A secured party who obtains control over a deposit account will have priority over a security interest in that account that is held by a party that does not have control. A secured party in control will also have priority over the security interest of the institution in which the deposit account is held. The security interest of that institution will, however, have priority over any other security interest in that account.

Changes in law:

Maine's Banking Code provides that a security interest in a deposit account is perfected as against the institution in which the account is held and against third parties by providing the institution with notice of the security interest and by the secured party's acquisition of the documents evidencing the account. See 9-B M.R.S.A. § 427(7). New Article 9 rather than the Banking Code would cover perfection of a security interest in a deposit account.

Current law provides that in many instances a secured party holding an interest in a deposit account as proceeds of its collateral will hold a priority in that account to the extent of those proceeds. See §§ 9-306(3)(b), 9-306(4). New § 9-1327 provides that the depository institution may acquire a priority position simply by taking a security interest in the account (whether or not that interest is otherwise perfected). Third parties can also obtain priority over a security interest in proceeds by taking control of the account. Parties who wish to establish their priority in proceeds in such an account should, therefore, take control of the account and/or obtain a subordination agreement from the depository institution.

Winners and losers:

Depository institutions are the big winners here. Secured parties who obtain control of a deposit account as collateral are also winners. Secured parties whose proceeds appear in a deposit account are the big losers unless they control that account and/or have a subordination agreement with the depository institution.

Proposed Maine Comment:

None. However, those provisions of title 9-B dealing with perfection of a security interest in a deposit account must be modified.

Section 9-1328. **Priority of security interests in investment property**

Source:

11 M.R.S.A. § 9-115(5).

Summary:

As under current law, the new section provides that a security interest in investment property perfected by filing will be subordinate to a security interest in that same property perfected by control. Compare § 9-1328 with § 9-115(5). Under current law, in many instances the security interests of secured parties that have both perfected by control of the same investment property rank equally. See § 9-115(5)(b). The new section provides that if the investment property is a security, priority will be determined by which party first obtained control of the security. If the property is a security entitlement carried in a securities account, then generally priority is determined by the order in which, as between the competing secured parties, the following occur: (1) if control is obtained by a secured party becoming the person for whom the securities account is maintained, then the time that party becomes the person for which the securities account is maintained; (2) if control is obtained because the securities intermediary has agreed that it will comply with entitlement orders originated by the secured party without further consent by the entitlement holder, then the time of that agreement; and (3) if control is obtained because another person obtains control or agrees that its control of the securities entitlement is on behalf of the secured party, then the time on which priority would be based if that third party in control were the secured party. If the collateral is a commodity contract carried with a commodity intermediary, then generally priority will be determined by the time that the commodity customer, the secured party and the commodity intermediary agree that the commodity intermediary will apply any value distributed on account of the commodity contract as directed by the secured party without further consent by the commodity customer. See § 9-1328(2).

Notwithstanding the above, a security interest held by the securities intermediary will have priority over all other security interests held in the security by any other party. See § 9-1328(3). Similarly, a security interest held by a commodities intermediary will have priority over all other security interests held in a commodities contract or commodities account. See § 9-1328(4). Conflicting security interests perfected by a broker, securities intermediary or commodities intermediary by methods other than control rank equally among themselves. See § 9-1328(6).

In addition, a security interest perfected by delivery but not control of a certificated security that is in registered form will have priority over a security interest in that security perfected by any method (such as filing) other than control. See § 9-1328(5). Finally, in all other instances, priority is determined by

looking to § 9-1322 and § 9-1323, which in most instances means that first in time will be first in right. See § 9-1328(6).

Changes in law:

Control of a securities entitlement by a third party becomes a new method of perfection of a security interest in a securities entitlement and § 9-1328(2)(b)(iii) is added to accommodate this. See L.D. 2245, § B-21 (amending 11 M.R.S.A. § 8-1106). More importantly, current law provides that (except for the super-priorities granted securities and commodities intermediaries) all security interests in the same investment property that are perfected by control have equal priority. See § 9-115(b). Under the new provision, the conflict is resolved by the temporal rules set forth in § 9-1328(2), which essentially results in priority for the party that first perfects by control.

Winners and Losers:

Secured parties now have an additional method of obtaining control over a securities entitlement which is a minor win for them with no corresponding loser. The imposition of the first in time, first in right rules to situations in which perfection is obtained by control makes winners of those who win the race to control first and losers of those whose control is obtained thereafter.

Proposed Maine Comment:

None.

Section 9-1329. Priority of security interests in letter-of-credit right

Source:

New.

Summary:

A security interest in a letter-of-credit right perfected by control has priority over a security interest in that right perfected by any other method. See §§ 9-1312(2)(b) (security interest in letter of credit may be perfected only by control or as a supporting obligation). Conflicting security interests perfected by control rank according to the time at which control was obtained.

Although not dealt with specifically in this section, the comments make clear that rights of a transferee of a letter of credit arising under Article 5 take priority over the rights of a secured party under Article 9. See § 9-1329, Official Comments 3, 4. See also § 9-1102(51) (defining letter-of-credit right under Article 9 to exclude the right of a beneficiary to demand payment or performance under a letter of credit). This would include rights arising from a separate security interest granted in letter-of credit rights, as well as rights arising out of a secured party's rights in a letter-of-credit right that is a supporting obligation of other collateral. The relative rights of a secured party who also becomes a transferee under Article 5 are also not dealt with here, which may lead to substantial uncertainty in the priority of rights in such a situation. See § 9-1329, Official Comment 4.

Changes in law:

Under current law, letter-of-credit rights could constitute general intangibles, accounts or instruments. See §§ 9-105(1)(i), 9-106. This section somewhat clarifies and regularizes security interests in such rights by making it a separate category of property in which a security interest can be taken with its own separate perfection method.

Winners and Losers:

Any party who obtains control of a letter of credit right will be a winner under this section, particularly if that party also becomes an assignee of those rights under Article 5. Secured parties who do not take such actions will be the losers, including those parties who merely depend upon their rights in collateral for which the letter of credit is a supporting obligation.

Proposed Maine Comment:

None.

Section 9-1330. **Priority of purchaser of chattel paper or instrument**

Source:

11 M.R.S.A. § 9-308

Summary:

A purchaser of chattel paper has priority over a secured party who claims a right in that paper as proceeds of its security interest in inventory so long as the purchaser gives new value and takes possession of the chattel paper, or otherwise obtains control of it, in good faith and in the ordinary course of the purchaser's business, and the chattel paper does not indicate that it has been assigned to any other identified assignee. See § 9-1330(1). The purchaser will also have priority over a secured party who claims a right in the chattel paper other than as proceeds of inventory if that purchaser gives new value and takes possession, or obtains control, of the chattel paper in good faith, in the ordinary course of the purchaser's business and without knowledge that the purchase violates the rights of the other secured party. See § 9-1330(2). For purposes of these subsections, the holder of a PMSI in inventory is deemed to give new value for chattel paper constituting proceeds of that inventory. See § 9-1330(5). For purposes of § 9-1330(2), if the chattel paper indicates that it is subject to the rights of an identified secured party, then the purchaser is deemed to have knowledge that the purchase violates the rights of the secured party. See § 9-1330(6).

The above priorities also extend to proceeds of the chattel paper to the extent provided in § 9-1322 or to the extent that the proceeds consist of specific goods covered by the chattel paper or proceeds of those goods, even if the purchaser's security interest in the proceeds is unperfected. See § 9-1330(3). However, this priority in proceeds is subject to the rights of a holder of a security interest in a deposit account as set forth in § 9-1327.

A purchaser of an instrument has priority over a security interest in the instrument perfected by a method other than possession so long as the purchaser gives value and takes possession in good faith and without knowledge that the purchase violates the rights of the secured party. See § 9-1330(4). If the instrument indicates that it has been assigned to an identified third party, then the purchaser is deemed to have knowledge that the purchase violates the secured party's rights. See § 9-1330(6).

Changes in law:

The basic priority rules remain substantially the same as under current law. The "good faith" requirement is explicit in this section, whereas it is, at best, only implicit in current law. The rules deeming the holder of a PMSI in inventory to have given new value, and deeming a purchaser to have knowledge of a secured

party's rights where the security interest is noted on the instrument or chattel paper, is new as well.

Winners and Losers:

Because the priority rules remain substantially the same, there are no big winners of losers here. The priority of a security interest in a deposit account over an interest in proceeds will, of course benefit those holding deposit account security interests (and particularly depository institutions) at the expense of other secured creditors.

Proposed Maine Comment:

None.

Section 9-1331. **Priority of rights of purchaser of instruments, documents and securities under other Articles; priority of interests in financial assets and security entitlements under Article 8**

Source:

11 M.R.S.A. § 9-309

Summary:

This section provides that it does not limit the rights of a holder in due course of a negotiable instrument, a holder to which a negotiable document of title has been duly negotiated, or a protected purchaser of a security, and provides that the rights of such parties take priority over an earlier security interest to the extent provided in Articles 3, 7 and 8. See § 9-1331(1). In addition, the section provides that Article 9 does not limit the rights or impose liability upon any person to the extent that that person is protected against the assertion of an adverse claim under Article 8. See § 9-1331(2). Finally, the filing of a financing statement under Article 9 does not constitute notice of a claim or defense to these parties. See 9-1331(3).

Changes in law:

This section further explicates the priorities and rights of parties under Articles 3, 7 and 8, but does not change them to any substantial extent from current law.

Winners and losers:

None.

Proposed Maine Comment:

None.

Section 9-1332. Transfer of money; transfer of funds from deposit account

Source:

New.

Summary:

A transferee of money, or of funds from a deposit account, takes free of a security interest in that money or in those funds unless the transferee acts in collusion with the debtor in violating the rights of the secured party.

Changes in law:

This is a new provision of Article 9. It is consistent with the results achieved under current law. See generally § 9-306, Uniform Commercial Code Comment 2(c) (cash proceeds paid by debtor in the ordinary course of its business are received free of any claim which the secured party may have to them as proceeds, but other law of fraudulent conveyances should be sufficient to permit secured creditor to recover payments made out of the ordinary course or in collusion with the debtor to defraud the secured party). However, it appears to permit a recipient of payments to take free of the secured party's interest even if the payment is not made in the ordinary course of business, so long as the recipient does not act in collusion with the debtor.

Winners and Losers

Transferees of cash, or of funds from a deposit account, will now have an explicit statutory provision supporting their rights at the expense of secured creditors, which appear to make these transferees, and particularly transferees who receive payment outside of the ordinary course of business, the winners at the expense of secured creditors. The new rules also applies where funds are paid out of a deposit account in which the secured party holds a security interest directly and not merely as proceeds of its initial collateral.

Proposed Maine Comment:

None.

Secant 9-1333. Priority of certain liens arising by operation of law

Source:

11 M.R.S.A. § 9-310

Summary:

This section provides that a "possessory lien" on goods will have priority over a security interest in the goods unless a statute that expressly provides otherwise creates the lien. See § 9-1333(2). The section defines a "possessory lien" to mean an interest, other than a security interest or agricultural lien: (1) that secures payment of performance of an obligation for services or materials furnished with respect to goods in the ordinary course of the person's business; (2) that is created by statute or rule of law; and (3) whose effectiveness depends on the person's possession of the goods. See § 9-1333(1).

Changes in law:

This section no longer applies to "agricultural liens" which are ordinarily treated in the same manner as other security interests, rather than as possessory liens under the new Article 9. In all other respects, the new section is merely a rewording of current law.

Proposed Maine Comments:

None.

Section 9-1334. **Priority of security interests in fixtures and crops**

Source:

11 M.R.S.A. § 9-313

Summary:

This section states that, as under current law, although a security interest in fixtures may be created under Article 9, a security interest does not exist under this Article in ordinary building materials that are incorporated into an improvement on land. See § 9-313, Uniform Code Comment 3, § 9-1334(1). Essentially, such building materials are treated as "pure" real estate, rather than as fixtures under the new Article 9. In addition, new Article 9 does not prevent the creation of an encumbrance on fixtures under real estate law. See 9-1334(2).

Except as otherwise provided with respect to "construction mortgages", a perfected security interest in a fixture has priority over the interest of a real estate encumbrancer and the owner of the real estate if the security interest is a PMSI, the interest of the encumbrancer or owner arose before the goods became fixtures and the security interest is perfected by a fixture filing before twenty days after the goods become fixtures. See § 9-1334(4).

A perfected security interest in fixtures also has priority over a conflicting interest of an encumbrancer or owner if: (a) the debtor has a record interest in the property or is in possession of the property, and the security interest is perfected by a fixture filing before the real estate interest is of record and that security interest has priority over the interest of a predecessor in title of the encumbrancer or owner; (2) before the goods become fixtures the security interest is perfected, and the fixtures are readily removable factory or office machines, are equipment that is not primarily used or leased for use in the operation of the real estate, or are replacements of domestic appliances that are consumer goods; (3) the conflicting interest is a lien obtained be legal or equitable proceedings after the security interest was perfected; or (4) the security interest is created in a manufactured home in a transaction in which a PMSI is taken in a manufactured home, or a manufactured home is the primary collateral, and the manufactured home is not inventory, and the security interest is perfected by a certificate of title statue. See § 9-1334(5).

A security interest in fixtures has priority over the rights of an encumbrancer or owner, even if the security interest is not perfected, if the debtor has a right to remove the fixture as against the owner or encumbrancer. See § 9-1334(6)(b). This priority continues for a reasonable time if the debtor's right to remove the goods terminates. See § 9-1334(7). A security interest in fixtures also has priority over the rights of an encumbrancer or owner, even if the security interest

is not perfected, if the encumbrancer or owner has consented to the security interest or disclaimed an interest in the goods as fixtures. See § 9-1334(6).

A mortgage is considered to be a "construction mortgage" to the extent that it secures an obligation for the construction of an improvement upon land, including the acquisition cost of the land, if the recorded mortgage so indicates. See § 9-1334(8). Except as provided in subsections 5 and 6, a construction mortgage has priority over a security interest in fixtures if the mortgage is recorded before the goods Become fixtures and the goods become fixtures before the completion of the construction to which the mortgage relates. To the extent that a mortgage secures a refinancing of an obligation secured by a construction loan mortgage, the new mortgage has the same priority in fixtures as the construction mortgage.

Finally, this section provides that a perfected security interest in crops growing on real estate has priority over the interest of an encumbrancer or owner of the property if the debtor has an interest of record in or is in possession of the land. See § 9-1334(9).

Changes in law:

Under new § 9-1334(4)(c), the secured party may obtain priority be making a fixture filing before the end of 20 days after the goods become fixtures. Current law provides for a fixture filing before 10 days after the goods become fixtures. See § 9-313(4)(a). The special provision for a manufactured home transaction is new, but should have little effect in Maine since manufactured homes are not subject to Maine's certificate of title statutes. Current law provides that when a secured party has priority over all owners and encumbrancers, then that party may, after default and subject to Part 5 of Article 9, remove the collateral from the real estate, but must reimburse any encumbrancer or owner other than the debtor for any cost of repair of any physical injury caused by that removal. See § 9-313(8). This provision has been moved to Part 6 of the new Article 9. See §§ 9-1604(3), 9-1604(4).

Winners and Losers:

The extension of the filing period to 20 days after the goods become fixtures benefits secured parties at the expense of real estate encumbrancers and owners.

Proposed Maine Comment:

None.

Section 9-1335. Accessions

Source:

11 M.R.S.A. § 9-314

Summary:

A security interest in an item continues in that collateral when the item becomes an accession. In addition, a security interest may be taken in an item that is an accession. See § 9-1335(1). If the security interest is perfected when the collateral becomes an accession, it remains perfected thereafter. See § 9-1335(2).

A security interest in an accession is subordinate to a security interest in the whole that is perfected by compliance with a title certificate statute. See § 9-1335(4). In all other instances, a security interest in the accession has the priority provided by other sections of new Article 9. See § 9-1335(3).

If the security interest in the accession has priority over the claims of every person having a right in the whole, then after default the holder of the security interest in the accession may remove the accession from the other goods. See § 9-1335(5). A party so removing the accession must reimburse parties having rights in the whole or of any other goods (other than the debtor) for any physical injury caused to the collateral of such other parties resulting form the removal, but not for any diminution in value caused by the removal or by any necessity for replacing the removed item. A person entitled to reimbursement may refuse permission to remove the accession until the secured party gives adequate assurance for performance of this reimbursement obligation. See § 9-1335(6).

Changes in law:

Current law provides that an interest in the whole that exists at the time an item becomes an accession takes priority over a security interest in an accession that is perfected after the accession is attached to the whole, unless the party holding the priority interest consents in writing to the security interest in the accession or has disclaimed an interest in the accession. See § 9-314(2). It also provides that a security interest that attaches before the goods are installed has priority over the claims of all persons to the whole, other than the interest of: (1) a subsequent purchaser for value of any interest in the whole; (2) a creditor with a lien on the whole subsequently obtained by legal proceedings; and (3) a creditor with a prior perfected security interest on the whole to the extent that the creditor makes subsequent advances; to the extent that the purchase is made, lien is obtained, or the subsequent advance is made or contracted for, without knowledge of the security interest in the accession and before it is perfected. See § 9-314(3). The new section merely provides that a security interest in an item that is or becomes an accession will be treated in the same manner as any other security interest

taken in a good. See § 9-1335, Official Comment 6. Thus, priority will (with the exception of a situation where the whole is subject to a title certificate statute) turn on time of perfection, and concerns such as whether the secured party took a purchase money security interest in the accession. Where the whole is subject to a title certificate statute, then the security interest in the accession will be subordinated to perfected security interests in the whole. This distinction between titled items and those that are not subject to title certificate statutes is not made under current law.

Changes in law:

Holders of security interests in items that become accessions to motor vehicles are losers, to the benefit of holders of security interests in the vehicles themselves. Holders of purchase money security interests in items that are accessions may now obtain priority in some situations where they would not have done so under current law to the detriment of holders of security interests in the whole.

Proposed Maine Comment:

None.

Section 9-1336. Commingled goods

Source:

11 M.R.S.A. § 9-315

Summary:

No security interest exists in commingled goods since they have lost their identity in a product or mass. See §§ 9-1336(1), 9-1336(2). However, a security interest may attach to the resulting mass or product. See § 9-1336(2). A security interest in collateral attaches to the product or mass when the original collateral becomes commingled goods. See § 9-1336(3). If the security interest is perfected before the collateral becomes commingled goods then the resulting security interest in the mass or product is also perfected. See § 9-1336(4). If more than one security interest in the mass is created by reason of the commingling of collateral, then a security interest in collateral existing prior to its commingling that remains perfected under § 9-1336(4) has priority over a security interest that is unperfected at the time that the collateral becomes commingled goods. If more than one security interest in the product or mass is perfected as a result of § 9-1336(4), then the resulting security interests rank equally in proportion to the value of the collateral at the time it became commingled goods. See § 9-1336(6). In all other instances, other provisions of Article 9 determine the relative priorities in the whole or the mass. See § 9-1336(5).

Changes in law:

Current law does not explicitly state how priorities are to be determined between security interests taken in goods that are later commingled and security interests taken initially in the whole mass. The new section provides that in such an instance the normal priority rules would apply. Priority could then be determined by which party was the first to perfect, or by whether a security interest was a PMSI. It is not certain what result would be reached under current law in these circumstances.

Winners and Losers:

The new provision does not substantially change the results achieved under current law, but does make the rule for those results more explicit. The interposition of this element of certainty probably aids all parties.

Proposed Maine Comment:

None.

Section 9-1338. **Priority of security interest or agricultural lien perfected by filed financing statement providing certain incorrect information**

Source:

New.

Summary:

This section applies to situations where a security interest or agricultural lien is perfected by the filing of a financing statement that does not provide a correct mailing address for the debtor or correctly indicates whether the debtor is an individual or an organization. See §§ 9-1338, 9-1516(2)(e)(i), 9-1516(2)(e)(ii). It also applies where the debtor is an organization and the financing statement does not indicate the correct type of organization, provide the correct jurisdiction of organization for the debtor, or provide a correct organizational identification number for the debtor or correctly indicate that it has none. See §§ 9-1338, 9-1516(2)(e)(ii). In such an instance the security interest or agricultural lien is subordinate to a conflicting perfected security interest to the extent that the holder of the conflicting interest gives value in reasonable reliance on the incorrect information. See § 9-1338(10. A purchaser other than a secured party takes free of the security interest or agricultural lien to the extent that in reasonable reliance upon the incorrect information the purchaser gives value and, in the case of chattel paper, documents, goods, instruments or a security certificate, receives delivery of the collateral. See § 9-1338(2). This section applies only where incorrect information is included on the financing statement and does not apply where some required information is not provided at all. See § 9-1520 (requiring filing office to reject statements that do not include certain required information).

Change in law:

Under current law, many of the items referenced above are not required to be included on a financing statement. This provision permits the perfection of a security interest by the filing of a financing statement that contains certain incorrect information, but provides for the subordination of the perfected interest in certain situations where this is an equitable result.

Winners and Losers:

This section provides secured parties with certainty that certain incorrect information on a financing statement will not of itself affect perfection and will subordinate that security interest to security interests held by certain parties who have relied upon the incorrect statement to their detriment. The secured party who files the incorrect statement is a winner at the expense of other parties who

may have correctly filed their own financing statements in the same collateral, but did not rely upon the incorrect filing to their detriment.

Proposed Maine Comment:

None.

Section 9-1339. Priority subject to subordination

Source:

11 M.R.S.A. § 9-316

Summary:

This section provides that Article 9 does not preclude subordination by agreement.

Changes in law:

None.

Proposed Maine Comment:

None.

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SUMMARY:
UNIFORM COMMERCIAL CODE
Proposed Article 9
Part 3. Perfection and Priority
Subpart 5. Rights of 3rd Parties

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Section 9-1401. Alienability of debtor's rights

Source:

11 M.R.S.A. § 9-311

Summary:

This section sets forth the general rule (subject to §§ 9-1406, 9-1407, 9-1408 and 9-1409) that whether a debtor's rights in collateral are subject to voluntary or involuntary transfer is governed by law other than that set forth in Article 9. See § 9-1401(1). The section also provides that an agreement between the debtor and a secured party prohibiting a transfer of collateral or which makes the transfer a default does not prevent the transfer from taking effect.

Changes in law:

It is implicit under current law that law other than that contained in Article 9 determines the transferability of collateral. See § 9-1401, Official Comment 4. New § 9-1401(1) makes this explicit, subject to specific limitations contained in other provisions of this Part of Article 9. Current law concerning the effect of an agreement prohibiting transfer or making transfer of collateral a default is the same as § 9-1401(2).

Winners and Losers:

None.

Proposed Maine Comment:

None.

Section 9-1402. Secured party not obligated on contract of debtor or in tort

Source:

11 M.R.S.A. § 9-317

Summary:

The existence of a security interest, agricultural lien or authority given to a debtor to dispose of collateral or use collateral does not itself subject the secured party to liability in contract of tort for the debtor's actions.

Changes in law:

This is identical to current law, expanded only to include agricultural liens.

Winners and Losers:

None.

Proposed Maine Comment:

None.

Section 9-1403. Agreement not to assert defenses against assignee

Source:

11 M.R.S.A. § 9-206

Summary:

This section sets forth the general rule that an agreement between an account debtor and an assignor not to assert defenses of claims against an assignee is enforceable by the assignee to the extent that the assignee takes an assignment: (1) for value (as value is defined in § 3-303(1)); (2) in good faith; (3) without notice of a claim of a property or possessory right to the assigned property; and (4) without notice of a defense or claim in recoupment of a type that could be asserted against a holder in due course of a negotiable instrument under § 3-305(1). See § 9-1403(2). However, despite such an agreement, the assignee will remain subject to defenses or claims that could be asserted against a holder in due course of a negotiable instrument under § 3-305(2). See § 9-1403(3). In addition, if in a consumer transaction law outside of Article 9 requires the record of the transaction to include a statement that the assignee is subject to claims and defenses that could be asserted against the original obligee, then the record of the transaction will be deemed to include the notice and the account debtor can assert the defenses against the assignee as though the notice had been included in the record of the transaction. See § 9-1403(4). In addition, this section is subject to law outside of Article 9 governing consumer transactions that establishes a different rule. See § 9-1403(5). Finally, except as set forth in § 9-1403(4) relating to consumer transactions, this section does not displace law outside of Article 9 that gives effect to an agreement by an account debtor not to assert a claim or defense against an assignee. See § 9-1403(6).

Changes in law:

The general rules set forth in § 9-1403(2) and § 9-1403(3) are the same as current law, but have here been expanded to apply to all account debtors and not just account debtors who have bought or leased goods. See §§ 9-206(1); 9-1403, Official Comment 2. The new section also clarifies that "value" has the meaning set forth in Article 3 for a holder in due course, rather than the general definition of that term set forth in § 1-201. See § 9-1403, Official Comment 3. The specific references to other law for the efficacy of an agreement to not assert defenses or claims in consumer transactions is more explicit than the wording under current law, but probably does not change the intended or actual result that would be reached by the courts. The provision that the section does not (except in certain consumer transactions) displace other law that gives effect to an agreement not to asserts claims or defenses against an assignee is new. Therefore, if other law permits such an agreement in a non-consumer transaction, then the provisions of

the new section would not invalidate the provision to the extent made efficacious by that other law. See § 9-1403, Official Comment 6.

Winners and Losers:

The more explicit description of the rights of consumers makes them winners at the expense of the assignees of consumer transactions. The new deference to other law making agreements to not assert defenses or claims in non-consumer transactions could have the effect of broadening the range of transactions, defenses and claims for which such agreements would be upheld.

Proposed Maine Comment:

A reference to those sections of Maine's Consumer Credit Code making an assignee of a consumer credit transaction subject to certain claims and defenses should be put into a Maine comment. In addition, if any Maine law exists upholding agreements to not assert claims or defenses in non-consumer situations other than what is set forth in this section, then this should be referenced as well.

Section 9-1404. Rights acquired by assignee; claims and defenses against assignee

Source:

11 M.R.S.A. § 9-318(1)

Summary:

This section sets forth the general rule that unless an account debtor has made an enforceable agreement not to assert claims and defenses against an assignee, the rights of the assignee are subject to: (1) all of the original contract terms and any defenses or recoupment rights that the account debtor might have; and (2) any other defense or claim of the account debtor against the assignor that accrues before the account debtor receives a properly authenticated notice of the assignment. See § 9-1404(1). Generally, however, any claims of the account debtor against the assignor may be asserted only to reduce the amount that the account debtor owes and not to obtain an affirmative recovery against the assignee. See § 9-1404(2). However, both of these general rules are subject to any law outside of Article 9 that establishes a different rule for consumer transactions. See § 9-1404(3). Similarly, if in a consumer transaction law outside of Article 9 requires the record of the transaction to indicate that an assignee will be subject to certain claims and defenses assertable against the assignor, then the record will be deemed to include such a statement, whether or not it actually appears there. See § 9-1404(4). Finally, the section provides that it does not apply to an assignment of a health-care-insurance receivable. See § 9-1404(5).

Changes in law:

The general rule of the applicability of defenses and claims assertable against an assignor in the absence of an agreement to the contrary is the same as under current law. See § 9-318(1). The elimination of the ability to use such a claim or defense to obtain an affirmative recovery against the assignee in a non-consumer transaction is new, but is consistent with the cases decided under current law. See § 9-1404, Official Comment 3. The explicit language concerning consumer rights is also new in this portion of Article 9, but probably represents little, if any, change in prior law. See § 9-203(4) (making Article 9 subject to applicable provisions of Title 9-A).

Winners and Losers:

Since this section appears to restate prior law, it does not appear that there are any winners or losers here.

Proposed Maine Comment:

None.

Section 9-1405. Modification of assigned contract

Source:

11 M.R.S.A. § 9-318(2)

Summary:

This section provides a general rule that a modification of or substitution for an assigned contract is effective against the assignee if made in good faith and the assignee acquires the new rights under the modified or substituted contract. The assignment may provide that the modification or breach of contract by the assignor. See § 9-1405(1). This general rule applies to the extent that a right to payment under the assigned contract has not been fully or partially earned by performance. See § 9-1405(2)(a). The general rule also applies even to the extent that a right to payment or to a part payment has been fully earned where the account debtor has not received a notice of assignment under § 9-1406(1). See § 9-1405(2)(b). The section also does not apply to an assignment of a health-care-insurance receivable or the extent that law outside of Article 9 provides for a different rule in consumer transactions. See §§ 9-1405(3), 9-1405(4).

Changes in law:

Under current law, an assigned contract could not be modified or substituted for where payment had been fully earned. See § 9-318(2). The new provision would permit modification or substitution even where payment had been fully earned, so long as the account debtor had not received notice of the assignment. See § 9-1405(2)(b). The provision for consumer transaction is new to this part of Article 9, but probably represents little, if any, change in prior law. See § 9-203(4).

Winners and Losers:

Account debtors who have not received notice of an assignment can now modify or substitute for an assigned contract, even to the extent that payment under that contract has been earned. Assignees who have not ensured that notice of assignment has been provided are the corresponding losers.

Proposed Maine Comment:

None.

Section 9-1406. **Discharge of account debtor; notification of assignment; identification and proof of assignment; restrictions on assignment of accounts, chattel paper, payment intangibles, and promissory notes ineffective**

Source:

11 M.R.S.A. §§ 9-318(3), 9-318(4)

Summary:

As indicated by its title, this section deals with several issues. First, it provides that an account debtor on an account, chattel paper or payment intangible may continue to effectively pay the assignor until, but not after, the account debtor receives an effective notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. Either the assignor or the assignee must authenticate the notice. After receipt of the notification, the account debtor must pay the assignee and not the assignor. See § 9-1406(1). A notification is ineffective if it does not reasonably identify the rights assigned. See § 9-1406(2)(a). It is also ineffective if law other than Article 9 permits an agreement between an account debtor and a seller of a payment intangible to effectively limit the account debtor's duty to pay another person. See § 9-1406(2)(b). Finally, the account debtor has the option to consider the notice ineffective if it notifies the account debtor to make less than the full amount of any installment or other periodic payment to the assignee. See § 9-1406(2)(c). This last applies even if only a portion of the account, chattel paper or general intangible has been assigned, a portion has been assigned to another assignee, or the account debtor knows that the assignment to the assignee is limited. Id. In addition, the option rights provided for in § 9-1406(2)(c) may not be waived or varied by the account debtor. See 9-1406(7).

Second, if requested by an account debtor, an assignee must seasonably furnish reasonable proof that an assignment has occurred. Unless the assignee complies, the account debtor may continue to make payments to the assignor, even if the account debtor has otherwise received an effective notification of the assignment. See § 9-1406(3).

Third, a term in an agreement between an account debtor and an assignor, or in a promissory note is ineffective to the extent that it prohibits, restricts or requires the consent of the account debtor or person obligated on the note to, the assignment or transfer of, or the creation, attachment, perfection or enforcement of, a security interest in the account chattel paper, payment intangible or note. See § 9-1406(4)(a). Such an agreement is also ineffective to the extent that it provides that the creation, attachment, perfection or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination or remedy under the account, chattel paper,

payment intangible or note. See § 9-1406(4)(b). However, these limitations on such agreements do not apply to the extent that they are otherwise permitted in leases under § 2-1303 or § 9-1407 of the UCC. See § 9-1406(4). In addition, these limitations do not apply to the sale of a payment intangible or promissory note. See § 9-1406(5).

Fourth, a rule of law, statute or regulation that prohibits, restricts or requires governmental consent or the consent of the account debtor to the assignment of, transfer of, or creation of a security interest in an account or chattel paper is ineffective to the extent that it prohibits or requires such consent to the assignment or transfer of, or the creation, attachment, perfection or enforcement of a security interest in the account or chattel paper. See § 9-1406(6)(a). It is also ineffective to the extent that it provides that the creation, attachment, perfection or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination or remedy under the account or chattel paper. See § 9-1406(6)(b). However, these limitations do not apply to the extent that they are otherwise permitted in leases under § 2-1303 or § 9-1407 of the UCC. See § 9-1406(6).

Sixth, none of the provisions of this section apply to an assignment of a health-care-insurance receivable. See § 9-1406(9).

Finally, this section is subject to law outside of Article 9 that establishes a different rule for an account debtor who is a consumer in a consumer transaction. See § 9-1406(8).

Changes in law:

The general principles set forth in this section (freedom to pay assignor until notified of assignment and freedom to assign despite limitations to the contrary) are foreshadowed in current law, but are expanded upon in this section. The explicit preemption of the obligation to pay an assignee after receipt by the account debtor of an otherwise effective notice of assignment to the extent provided for in other law is new and resolves possible conflict on this point. The right of the account debtor to optionally disregard a notice that requires payment of less than the full amount of a periodic payment to the assignee is new and is inserted in recognition that even in these days of partial assignments of rights, requiring payment to multiple parties is an imposition upon an account debtor. See § 9-1406, Official Comment 3.

This section is new to the extent that its provisions concerning the ineffectiveness of restrictions on transfers and related rights apply to promissory notes and chattel paper. See §§ 9-1406(4), 9-1406(6). In addition, current law on this subject only applies to agreements to impose such restrictions, and not provisions of law that might otherwise do the same. See § 9-1406(6).[1] The provision relating to rights

[1] Although clearly this limitation would not apply to any restrictions imposed by federal law.

in consumer transactions is new, but probably reflects the result that would have arisen under current law. See § 9-203(4).

Winners and Losers:

The most significant change here is the expansion of the limitations under current law on assignment restrictions to notes and chattel paper and to restrictions created by law, as well as by agreement. Account debtors on such obligations who thought that they would never have to make payment to a anyone other than a particular payee will be losers here. This impact should, however, be minimal in these days of debt securitization. Winners will include secured parties who wish to assign or securitize these debts.

Proposed Maine Comment:

None. However, the reference in proposed § 9-1406(c)(i) to a "general intangible" should be to a "payment intangible".

Section 9-1407. Restrictions on creation or enforcement of security interest in leasehold interest or in lessor's residual interest

Source:

11 M.R.S.A. § 2-1303

Summary:

The general rule enunciated in this section applies virtually the same rule as is imposed in § 9-1406(4) upon restrictions to assignability of rights in leases. The general rule is that a provision of a lease agreement is ineffective to the extent that it prohibits, restricts or requires the consent of a party to the lease to the creation, attachment, perfection or enforcement of a security interest in an interest of a party under the lease or in the lessor's residual interest in the leased goods. See § 9-1407(1)(a).

Such a lease provision is also ineffective to the extent that it provides that the creation, attachment, perfection or enforcement of a security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination or remedy under the lease. See § 9-1407(1)(b). However, except as otherwise provided in § 2-1303(7), these latter types of restrictions are effective to the extent that a transfer by the lessee of the lessee's right of possession or use of the goods is a violation of the term, or a delegation of material performance of either party to the lease is a violation of that term. See § 9-1407(2).

Finally, § 2-1303(5) provides that a transfer of a party's interest in a lease or of the residual interest of the lessor in the leased goods which "materially impairs the prospect of obtaining return performance or materially changes the duty or materially increases the burden or risk on a lessee gives rise to certain remedies that may be exercised by the other party to the lease. Section 9-1407(3) provides that the creation, attachment, perfection or enforcement of a security interest in the lessor's interest under the lease or in the lessor's residual interest in the leased goods does not constitute a situation except to the extent that enforcement actually results in a delegation of material performance of the lessor.

Changes in law:

For the most part, this section merely repeats what was explicit or implicit in § 2-1303. Section 9-1407(3) is new to the extent that it permits restrictions on security interests where enforcement of the same actually results in delegation of material performance of the lessor.

Winners and Losers:

The section provides some minimal extra protection to lessees at the expense of lessors by permitting restrictions on security interests where enforcement of the same actually results in delegation of material performance of the lessor.

Proposed Maine Comment:

None.

Section 9-1408. **Restrictions on assignment of promissory notes, health-care-insurance receivables and certain general intangibles ineffective**

Source:

New

Summary:

The general rule is that restrictions in a promissory note or in an agreement between an account debtor and a debtor relating to a health-care-receivable, or a general intangible, that prohibits, restricts or requires the consent of the person obligated on the note or the account debtor to, the assignment or transfer of, or creation, attachment of perfection of a security interest in, the note, receivable or intangible, is ineffective to the extent that it would: (1) impair the creation, attachment or perfection of a security interest arising out of a sale of the note, receivable or intangible; or (2) provides that the creation, attachment or perfection of a security interest arising out of such a sale may give rise to a default, breach, right or recoupment, claim, defense, termination, right of termination or remedy under the note, receivable or intangible. See §§ 9-1408(1), (2). The same rule applies to the effect of a law, statute or regulation that prohibits, restricts or requires governmental consent or the consent of the account debtor to the assignment or transfer of, or to the creation of any type of security interest in, such promissory notes, health-care-insurance receivables, or general intangibles. See § 9-1408(3).

To the extent that any such agreement, law, statute or regulation would be effective under law other than Article 9, but is ineffective under the foregoing, then the creation, attachment, or perfection of the security interest: (1) is not enforceable against the person obligated on the note or the account debtor; (2) does not impose a duty or obligation upon such a person; (3) does not require such a person to recognize the security interest or render performance (including payment) to the secured party or accept performance from the secured party; (4) does not entitle the secured party to use or assign the debtor's rights under the note, receivable, or intangible (including any related information or materials provided to the debtor in the transaction that gave rise to the note, receivable or intangible); (5) does not entitle the secured party to use, assign, possess or have access to any trade secrets or confidential information of the person obligated on the note or the account debtor; and (6) does not entitle the secured party to enforce the security interest in the note, receivable or intangible. See § 9-1408(4).

Changes in law:

This section is new. It basically permits the creation of a security interest in a promissory note, health-care-insurance receivable or a general intangible despite

the existence of an agreement or state law to the contrary. However, in such an instance, the security interest will only be effective between the debtor and the secured party and not against the party with obligations to the debtor under the note, receivable or intangible. A health-care-insurance receivable would not be covered under current Article 9. See § 9-104(7). A promissory note as an instrument would be covered by current Article, but no provision of that Article prohibits or limits the ability of the parties to limit the creation of a security interest in the note either by agreement or by law existing outside of the Article. Under current law, an agreement that prohibited the creation of a security interest in a general intangible is ineffective, whereas a prohibition or limitation contained in other law is effective. See § 9-318(4). The new provisions would make such agreements effective with respect to the account debtor, but not with respect to the debtor and the assignee.

Winners and Losers:

Winners are parties taking security interests in notes, health-care-insurance receivables and general intangibles. Also winning are debtors who may be able to better obtain credit using such collateral. There are no real losers, since other parties would not be affected.

Proposed Maine Comment:

None.

Section 9-1409. **Restrictions on assignment of letter-of-credit rights ineffective**

Source:

New

Summary:

A term in a letter of credit or in a rule of law, statute, regulation, custom or practice applicable to a letter of credit that prohibits, restricts or requires the consent of an applicant, issuer or nominated person to a beneficiary's assignment of or the creation of a security interest in a letter-of-credit right is ineffective, to the extent that such: (1) would impair the creation, attachment, or perfection of a security interest in that right; or (2) provides that the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination or remedy under the letter-of-credit right. See § 9-1409(1). However, to the extent that a term ineffective under the foregoing is effective under non-Article 9 or a custom or practice applicable to the letter of credit, to the transfer of a right to draw or otherwise demand performance under the letter of credit or to the assignment of a right to proceeds in the letter of credit, or to the creation, attachment, or perfection of a security interest in the letter of credit right: (1) the term is not enforceable against the applicant, issuer, nominated person or transferee beneficiary; (2) imposes no duties or obligations the applicant, issuer, nominated person or transferee beneficiary; and does not require the applicant, issuer, nominated person or transferee beneficiary to recognize the security interest, pay or render performance to the secured party, or accept payment or other performance from the secured party.

Changes in Law:

This section is new. It is patterned on § 9-1408 and limits the effectiveness of attempts to restrict security interests in letter-of-credit rights by providing that limitations created by agreement, law, custom or practice are ineffective to restrict the creation, attachment, and perfection of such security interests. See § 9-1409(1). On the other hand, the section provides that such a security interest is essentially only enforceable between the beneficiary debtor and the secured party. Thus, as is the case under § 9-1329, the rights and obligations of these other parties continue to be governed by letter of credit law and not by Article 9. The result under current law is not clear.

Winners and Losers:

All parties to a letter of credit other than the beneficiary who has granted a security interest in letter-of-credit rights will be benefited in that the provision of a security interest in letter-of-credit rights will not alter their rights and

obligations thereunder. The provision will make it clearer that secured parties who have not taken an actual assignment of the letter of credit will not have rights against those other parties. Secured parties should, therefore, take an actual assignment of the letter of credit whenever possible.

Proposed Maine Comment:

None.

DISCUSSION OUTLINE OF PROPOSED, REVISED ARTICLE 9 SUBPART 1 OF PART 5 OF SECTIONS 9-1501 - 9-1509

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DISCUSSION OUTLINE
SUBPART 1
OF
PART 5
OF
SECTIONS 9-1501-9-1509

A. Where to File

1. **§ 9-1501** provides that all filings are with the Secretary of State (assuming perfection is governed by the laws of the State - see RPH outline), **unless** the collateral is as - extracted collateral (namely, oil, gas and other minerals subject to a security interest created by debtor before extraction and that attaches as the minerals are extracted, and accounts arising from sales of the same at the wellhead or minehead), or timber to be cut, or the filing is intended to be a fixture filing and the goods are or may become fixtures, in which you file with the registry where you would record a mortgage on the related real property. As previously noted, the place of filing for registered organizations is the jurisdiction of organization or formation.

2. For transmitting utilities, including fixture filings, you file with the Secretary of State.

3. Please note that for timber to be cut, the registry filing is necessary, but once cut, it becomes ordinary goods and a filing with the Secretary of State is necessary.

4. **Principal change – no local filing option.**

B. The Contents of a Financing Statement (§ 9-1052)

1. You need the name of the debtor, the secured party (or the representative of a secured party) and a description of the collateral.

2. If the filing covers as-extracted collateral, timber to be cut, or is intended as a fixture filing for fixtures, the filing should specify the type of collateral covered (e.g., as extracted collateral), that it is to be filed in the real property records; provide a description of the real property; and provide the name of the record owner if the debtor does not have an interest of record.

3. As in the past, a mortgage or record of a mortgage can serve as a financing statement filed for a fixture filing, timber to be cut, and/or as-extracted collateral so long as the mortgage of record identifies the collateral covered; the goods become affixed, or the as-extracted collateral, or timber to be cut

relate to the real property referenced in the mortgage; the other requirements for a filing are satisfied; and you record the mortgage.

4. The usual five year term is not applicable to mortgages that function as fixture filings.

5. Principal Changes:

(a) There is no requirement that the debtor sign the financing statement but the filing must be authorized. The authorization rules are summarized elsewhere (including in § 9-1509) and a filing has legal effect only if it is authorized. Our security agreements should be modified accordingly.

(b) The risk of bogus and/or unauthorized filings is addressed below (§§ 9-1509 and 9-1518) and by the remedies identified in §9-1625.

(c) For registry filings, please note that a metes and bounds description is not required so long as the description "fits into" the real estate search system and would be found by a title examiner conducting a search.

C. Identifying Parties and the Collateral (§§ 9-1503 and 9-1504)

1. § 9-1503 outlines the rules regarding the name of the debtor and secured party on the financing statement. In general, if the debtor is a registered organization, you need to confirm the name with reference to the name appearing in the public record of the jurisdiction of organization.

2. Special rules for trusts, estates and "all other cases."

3. Please note that the commentary specifies that the use of a trade names is neither necessary nor sufficient.

4. Financing statements may provide for multiple debtors and/or secured parties. Moreover, the financing statement need not identify that the secured party is a representation for a group of lenders or that the secured party is, for example, serving as collateral agent or representation for the secured parties when it is not a secured party. These rules clarify the requirements in multiple lender/syndication deals.

5. In describing the collateral, a reference to "all assets" or "all personal property" now suffices, although you need to identify by item or type the collateral in the security agreement. *See* §9-1504.

D. Precautionary Filings (§9-1505)

1. Same basic rule as former section 9-408, where doubts exist as to whether a transaction is an Article 9 transaction you have the option of filing. Please note that the scope of former §9-408 has been expanded to include bailments, licensing and certain sales.

2. Issue in comment 3 to §9-1505. RPH.

E. Errors (§ 9-1505)

1. In general, a filing that substantially satisfies the above-referenced rules is effective unless it is seriously misleading.

2. **Please note that a failure to get the debtor's name correct is presumptively "seriously misleading," unless a search of debtor's correct name, using standard logic in the filing option, would disclose the erroneous filing.**

F. Effect of Subsequent Events (§9-1507)

1. In the event of a name change, that is seriously misleading in accordance with the foregoing standards, the filing covers only collateral acquired before the name change, or within four (4) months after the name change.

2. The security interest runs with the collateral as per former Section 9-402(7). Consequently, to determine whether the debtor owns free and clear, you need to determine debtor's source of title and search under the name of the former owner. See example in comment 3.

3. § 9-1508 clarifies the rules in the event that a new debtor becomes bound by the terms of a security agreement signed by a former debtor that included an after-acquired property clause. Does the security interest attach to after-acquired property of new debtor?

4. The new debtor is bound by the old debtor's security agreement in the event of a merger, when all obligations of the old debtor are assumed, or if new debtor acquires substantially all of the assets of the old debtor. In each such case the security interest attaches to collateral which the new debtor has at the time it becomes bound by old debtor's security agreement and collateral acquired four (4) months thereafter.

G. Authorized Filings (§ 9-1509)

1. Initial financing statements and amendments adding collateral or debtors may be filed only if authorized by the debtor. Signing a security agreement authorizes such filings for the collateral described in the security agreement.

2. Amendments other than those referenced above may be filed only if authorized by the secured party of record or by the debtor if the filing is a termination statement and the secured party has failed to file the termination and the filing by debtor indicates that it is authorized to do so.

3. Please note that the identity of the filer will not be part of the searchable records.

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SUMMARY
UNIFORM COMMERCIAL CODE
REVISED (1999) ARTICLE 9 SECURED TRANSACTIONS
PART 5. FILING
SUBPART 1. FILING OFFICE; CONTENTS AND EFFECTIVENESS OF FINANCING STATEMENT

§§ 9-510 - 9-518
(§§ 9-1510 - 9-1518)

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§ 9-510. Effectiveness of Filed Record.

Source: New.

Summary:

Ineffectiveness of Unauthorized or Overbroad Filings. Subsection (a) provides that a filed financing statement is effective only to the extent it was filed by a person entitled to file it. For example, a secured party authorized by the debtor to file a financing statement covering only inventory may not file one covering other collateral.

Multiple Secured Parties of Record. Section 9-509(e) permits any secured party of record to authorize the filing of most amendments. Subsection (b) of this section prevents a filing authorized by one secured party of record from affecting the rights and powers of another secured party of record without the latter's consent. So if two secured parties hold a security interest, the acts of one cannot affect the interest of another.

Continuation Statements. A continuation statement may be filed only within the six months immediately before lapse and if the filing office fails to reject an untimely continuation statement it is nonetheless ineffective.

The changes in Subsections (a) and (b) follow from the changes made in Section 9-509. Subsection (c) is similar to current Sections 9-403(2) and (3) except that the provision regarding the effect of a bankruptcy during the 6-month continuation period has been moved to Section 9-515.

§ 9-511. Secured Party of Record.

Source. New.

Summary:

Secured Party of Record. The "secured party of record" is the person named in the initial financing statement as the secured party or secured party's representative. Similarly, the assignee shown on the initial financing statement or an amendment would be the secured party of record. At any point in time, all effective records that comprise a financing statement must be examined to determine the person or persons that have the status of secured party of record.

Successor to Secured Party of Record. Application of other law may result in a person succeeding to the powers of a secured party of record (e.g., mergers).

These are the basic rules about who can file amendments, terminations, etc., and does not constitute a change in the law (see current § 9-405 Assignment of Security Interest, etc.)

§ 9-512. Amendment of Financing Statement.

Source. Former 9-402(4).

Summary:

Changes to Financing Statements. This section addresses changes to financing statements, including addition and deletion of collateral. A single amendment is legally sufficient effect more than one type of amendment (e.g., to add collateral and continue the effectiveness of the financing statement).

This section revises current Section 9-402(4) (which requires "a writing signed by both the debtor and the secured party") to permit secured parties of record to make changes without the need to obtain the debtor's signature unless the change adds collateral or adds a debtor, in which case it must be authorized by the debtor or it will not be effective. See Sections 9-509(a), 9-510(a).

Amendment Adding Debtor. With respect to an added debtor, the time of filing is the time of the filing of the amendment, not the time of the filing of the initial financing statement, for purposes of determining the priority of the security interest. The effectiveness of the financing statement lapses with respect to an added debtor at the time it lapses with respect to the *original* debtor.

This section appears to be new but it is consistent with the "added collateral" rule set forth in current § 9-402(4).

Deletion of All Debtors or Secured Parties of Record. Subsection (e) assures that there will be a debtor and secured party of record for every financing statement. For example, an amendment is ineffective to the extent it purports to delete the secured party of record without naming a new one.

§ 9-513. Termination Statement.

Source. Former Section 9-404.

Summary:

Duty to File or Send. No requirement is placed on the secured party to file a termination statement unless demanded by the debtor, except in the case of consumer goods, in which case, an affirmative duty is put on the secured party.

Current § 9-404(1)(b) requires the secured party to terminate its financing statement within 30 days of satisfaction. This was a change brought about by Laws 1969, c. 582, § 3, when the prior law required a written demand by the debtor.

This section applies to a certificate of title of a motor vehicle unless the section is superseded by a certificate-of-title statute that contains a specific rule addressing a secured party's duty to cause a notation of a security interest to be removed from a certificate of title. See Section 9-309(1). Under Section 9-311(b), compliance with a certificate-of-title statute is "equivalent to the filing of a financing statement under this article." Under 29-A M.R.S.A. § 705 (Maine's certificate-of-title statute), a lienholder is required, within 14 days after demand, to execute a release of the security interest.

"Bogus" Filings. A secured party's duty to send a termination statement arises when the secured party "receives" an authenticated demand from the debtor. In the case of an unauthorized financing statement, the person named as debtor in the financing statement may have no relationship with the named secured party and no reason to know the secured party's address. Inasmuch as the address in the financing statement is "held out by [the person named as secured party in the financing statement] as the place for receipt of such communications [i.e., communications relating to security interests]," the putative secured party is deemed to have "received" a notification delivered to that address. See Section 1-201(26). If a termination statement is not forthcoming, the person named as debtor himself may authorize the filing of a termination statement, which will be effective if it indicates that the person authorized it to be filed. See Sections 9-509(d)(2), 9-510(c).

Buyers of Receivables. Applied literally, current Section 9-404(1) would require many buyers of receivables to file a termination statement immediately upon filing a financing statement because "there is no outstanding secured obligation and no commitment to make advances, incur obligations, or otherwise give value." Subsections (c)(1) and (2) remedy this problem by not requiring the delivery of a termination statement in the case of sold accounts or chattel paper or consigned goods.

Effect of Filing a Termination Statement. Subsection (d) states that the effect of filing a termination statement is that the related financing statement ceases to be effective. The financing statement, including the termination statement, will remain of record until at least one year after it lapses with respect to all secured parties of record. See Section 9-519(g).

Current §§ 9-403(3) (lapse) and 9-404(2) (termination) provides that the filing officer may destroy a lapsed financing statement immediately if he has a microfilm or photostatic record, or other case after one year.

§ 9-514. Assignment of Powers of Secured Party of Record.

Source. Former Section 9-405.

Summary:

Assignments. This section provides a device whereby a secured party of record may assign its power to affect a financing statement. Upon the filing of an assignment, the

assignee becomes the "secured party of record" and may authorize the filing of a continuation statement, termination statement, or other amendment. Where a record of a mortgage is effective as a financing statement filed as a fixture filing (Section 9-502(c)), then an assignment of record of the security interest may be made only in the manner in which an assignment of record of the mortgage may be made under local real-property law.

As a general matter, this section preserves the opportunity given by current Section 9-405 to assign a security interest of record in one of two different ways, either by naming an assignee in the initial financing statement, or by making a subsequent filing. As under current law, an initial financing statement may not be used to change the secured party of record.

§ 9-515. Duration and Effectiveness of Financing Statement; Effect of Lapsed Financing Statement.

Source. Former Section 9-403(2), (3), (6).

Summary:

Period of Financing Statement's Effectiveness. Subsection (a) states the general rule that a financing statement is effective for a five-year period unless it is continued or terminated under Section 9-513.

Subsection (b) is a new provision that provides that if the financing statement relates to a public-finance transaction or a manufactured-home transaction and so indicates, the financing statement is effective for 30 years.

Lapse. When the period of effectiveness under subsection (a) or (b) expires, the effectiveness of the financing statement lapses. The last sentence of subsection (c) addresses the effect of lapse. The deemed retroactive unperfection applies only with respect to purchasers for value; unlike current Section 9-403(2), it does not apply with respect to lien creditors.

A security interest that becomes unperfected upon lapse, but that was perfected by filing when a lien creditor acquired its lien will, notwithstanding the lapse, have priority over the rights of the lien creditor, who is not a purchaser. Current § 9-403(2) protects both purchasers and lien creditors.

Effect of Debtor's Bankruptcy. Under current Section 9-403(2), lapse is tolled if the debtor entered bankruptcy or another insolvency proceeding. Filing offices, being unaware that insolvency proceedings had been commenced, routinely removed records from the files as if lapse had not been tolled.

Subsection (c) deletes the current tolling provision and imposes the burden on the secured party to be sure that a financing statement does not lapse during the debtor's bankruptcy. In order to prevent lapse, the secured party must file a continuation statement, even without first obtaining relief from the automatic stay. See Bankruptcy Code Section 362(b)(3).

Continuation Statements. A continuation statement filed at a time other than that prescribed by subsection (d) is ineffective, and the filing office may not accept it. Subsection (e) specifies the effect of a continuation statement and provides for successive continuation statements.

This is similar to current § 9-403(3).

§ 9-516. What Constitutes Filing; Effectiveness of Filing.

Source. Subsection (a): former Section 9-403(1); the remainder is new.

Summary:

What Constitutes Filing. Subsection (a) follows current Section 9-403(1), under which either acceptance of a record by the filing office or presentation of the record and tender of the filing fee constitutes filing.

Effectiveness of Rejected Record. Subsection (b) provides an exclusive list of grounds upon which the filing office may reject a record, failure to indicate whether the debtor is an individual or organization, and if an organization, the type, its jurisdiction and the organizational ID number, if any. Neither this section nor Section 9-520 requires or authorizes the filing office to determine, or even consider, the accuracy of information provided in a record.

Subsection (d) deals with the filing office's unjustified refusal to accept a record. Although wrongfully rejected records generally are effective, subsection (d) contains a special rule to protect a third-party purchaser/creditor of the collateral who gives value

in reliance upon the apparent absence of the record from the files. As against such a person, subsection (d) imposes upon the filer the risk that a record failed to make its way into the filing system because of the filing office's wrongful rejection of it. (Cf. Section 9- 517, under which a mis-indexed financing statement is fully effective.) Section 9-520(b) requires the filing office to give prompt notice of its refusal to accept a record for filing.

§ 9-517. Effect of Indexing Errors.

Source. New.

Summary:

Effectiveness of Mis-Indexed Records. This section provides that the filing office's error in mis-indexing a record does not render ineffective an otherwise effective record. As does current Section 9-401, this section imposes the risk of filing-office error on those who search the files rather than on those who file.

§ 9-518. Claim Concerning Inaccurate or Wrongfully Filed Record.

Source. New.

Summary:

Correction Statements. Current Article 9 does not provide a nonjudicial means for a debtor to correct a financing statement or other record that was inaccurate or wrongfully filed. Subsections (a)and (b) afford an aggrieved person the opportunity to state his position on the public record but do not permit an aggrieved person to change the legal effect of the record. So, although a filed correction statement becomes part of the "financing statement," (Section 9-102), the filing does not affect the effectiveness of the initial financing statement or any other filed record. See subsection (c).

This section does not displace any available judicial remedies or other provisions of Article 9 that impose liability for making unauthorized filings or failing to file or send a termination statement. See Section 9-625(e).

Discussion Outline of Article 9, Part 5, Subpart 2
"Duties and Operation of Filing Office"

9-1519. Numbering, maintaining and indexing records; communicating information provided in records

- Source: 9-403(4), 9-403(7), 9-405(2)

- For each record, the filing office must:

- Assign a unique number for the initial financing statement;
  - (after January 1, 2002, the file number must include a "check-digit");
- Index the initial financing statement by file number, date and time;
- Index fixture filings and as-extracted collateral or timber under each owner of record or secured party;
- Create and maintain a file for public inspection;
- Connect all associated records to the initial financing statement;
- Not remove a filing from the index until 1 year after lapse of the financing statement;
- File records within 2 business days of receipt;
  - (this provision does not apply to filings by the Registry of Deeds).

9-1520. Acceptance and refusal to accept record

- Source: new

- A filing office may only refuse to accept a record for filing for a reason set forth in 9-1516 (not communicated properly; filing fee incorrect or not included; unable to index; name or address of debtor, secured party or assignee not provided; continuation not filed within 6 months of lapse; information not readable; amendment not indicated).
- Filing office must communicate to the filer that the filing was rejected; the reason for the refusal and the date and time the record would have been filed if the filing office had accepted it.

9-1521. Uniform form of written financing statement and amendment

- Source: 9-402(3)

- Provides uniform form for initial financing statement and amendments that must be accepted by every filing office; other forms may also be accepted.

9-1522. Maintenance and destruction of records

- Source: 9-403(3)

- Allows the destruction of all records one (1) year after the lapse of record's effectiveness;
- Written copies may be destroyed immediately if another copy exists in a different medium;
- Records filed in the Registry of Deeds must be retrievable by the name of the debtor and the file number of the initial financing statement and the book and page number;
- Records filed in the Office of the Secretary of State must be retrievable by the name of the debtor and the file number of the initial financing statement.

9-1523. Information from filing office; sale or license of records

- Source: 9-407

- If a filer requests an acknowledgment of a written record, the filing office must provide such acknowledgment by an image of the filing showing the file number and date and time of the record, or by indicating this information on a duplicate copy of the filing provided by the filer.
- If the filing was made other than by written record, the filing office must provide an acknowledgment for every filing.
- Must provide upon request all lapsed records.
- Must provide a through date not earlier than 3 business days.
- Must, on a weekly basis, offer to sell bulk records.
- Must process requests for information within 2 business days.

9-1524. Delay by filing office

- Source: new

- A delay in filing is excused if it is caused by circumstances beyond the control of the filing office and it the filing office exercised reasonable diligence under the circumstances.

9-1525. Fees

- Source: 9-403(5), 9-404(3), 9-407(2)

- Fees will be set after negotiation with InforME. Current fees are: $20 for initial financing statement; $10 for continuations and amendments; $0 to $15 for terminations depending on filing date of original financing statement. Current search fees are: $5 per debtor name plus $.50 for each report page; $2 for first page and $.50 for each additional page of copies; $5 for certification.

9-1526. Filing Office Rules

- Source: 9-413

- Adopt Model Rules and maintain most recent version;
- Take into consideration the rules, practices and technology used by filing offices in other jurisdictions.

REVISED ARTICLE 9 OF THE U.C.C.

Part 6: Default
Sections 9-601 through 9-614

NOVEMBER 4, 1999

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Section 9-601	**Rights After Default; Judicial Enforcement; Consignor or Buyer of Accounts, Chattel Paper, Payment Intangibles, or Promissory Notes**
Source:	11 M.R.S.A. § 9-501
Summary:	This section supplies the general rule that, after default, secured parties (including holders of agricultural liens), debtors, and obligors enjoy the rights and remedies provided by Article 9 and the parties' agreements. Like current Article 9, Revised 9-601 allows the parties to determine when a default has occurred. (Note, however, that the Maine Consumer Credit Code contains a specific section dealing with the existence of a default. *See* 9-A M.R.S.A. § 5-109(a)). Where the secured party exercises its right to take possession or control of the collateral after default, the secured party will be subject to the requirements of Revised 9-207 (including the right to operate the collateral and the duty to take reasonable care in the custody of the collateral). This section also permits a secured party to purchase its collateral at an execution sale, and thereafter hold its collateral, free from the requirements of Article 9. It also provides rules for the relation back of a secured party's judicial lien against the collateral to the earlier of the date of filing or perfection (or, for agricultural liens, to any date specified in the statute creating the lien). Revised 9-601 also contains a carve-out from Part 6 of Revised 9 (with one exception) for buyers of accounts, chattel paper, payment intangibles and promissory notes. The exception is found in Revised 9-607(c), which generally obligates a secured party to proceed in a commercially reasonable manner.
Changes to Prior Law:	This section makes explicit that a secured party's remedies may be exercised simultaneously. It also extends the duties of a secured party in possession of collateral to a secured party in control of collateral. Further, Revised 9-601 provides that a judicial lien obtained by a secured party relate back to the earlier of the filing or perfection, in order to conform to the "first to file or perfect" rule of Revised 9-322(a)(1). *Cf.* 9-501(5) (judicial lien relates back to date of perfection). Finally, Revised 9-601 aligns the holder of an agricultural lien with the holder of a consensual security interest (except that Revised 9-606 defines a "default" under an agricultural lien).
Notes:	The relation back of judicial liens to the earlier of filing or perfection provides added benefit to the secured party in two contexts. First, the secured party does not lose the priority established by the filing to another creditor with a security interest perfected after the filing but before the judicial lien. Second, in the event of a preference attack by the debtor or a bankruptcy trustee, the transfer will have occurred on the earlier of filing or perfection, not on the date that the judicial lien is created.
Proposed Revisions/ Maine Comment:	None.

Section 9-602	**Waiver and Variance of Rights and Duties**
Source:	11 M.R.S.A. § 9-501(3)
Summary:	This section enumerates those rights of debtors and obligors and duties of secured parties that cannot be waived or varied. This list has expanded considerably from the list of non-waivable rights found in 9-501(3). The additional rights and duties include: use and operation of the collateral by the secured party; requests for an accounting and list of the collateral; collection and enforcement of the collateral; application of noncash proceeds from collection or enforcement; the duty to refrain from breaching the peace when repossessing collateral; calculation of a deficiency when a disposition of the collateral is made to the secured party or a related party; the explanation of the calculation of a surplus or deficiency; and permissible waivers. The Official Comment makes clear, however, that the prohibition on waiver or variance does not prevent the parties from settling claims arising out of a violation or breach of those rights and duties. Further, this section is subject to Revised 9-624 which addresses the validity of certain post-default waivers.
Changes to Prior Law:	Revised 9-602 contains an expanded list of rights and duties that cannot be waived, including a secured party's duty to refrain from breaching the peace. This section also extends the anti-waiver protection to obligors (which includes guarantors), to the same extent that debtors enjoy that protection, an extension that is generally consistent with most current law. Revised 9-602 also adopts the phrase "waive or vary," in place of "renounc[e] or modify" used in 9-504(3).
Notes:	By expanding the list of rights that cannot be waived and by granting the anti-waiver protection to guarantors, this section provides an added measure of protection for borrowers and guarantors. Although post-default waivers can be effective, the Official Comment to Revised 9-602 urges courts to scrutinize carefully any record containing a purported post-default waiver. For example, if the waiver is contained in an onerous forbearance agreement, a court may conclude that it was not part of the parties' agreement, which is defined in Revised 1-201 as the "bargain of the parties in fact."
Proposed Revisions/ Maine Comment:	Comment 3 refers to "duties under Section 9-207(c)(4)(C), which deals with the use and operation of consumer goods." This citation should be changed to Revised 9-207(b)(4)(C). Moreover, Revised 9-207(b)(4)(C) deals with collateral other than "consumer goods."

Section 9-603	**Agreement on Standards Concerning Rights and Duties**
Source:	11 M.R.S.A. § 9-504(3)
Summary:	Like its predecessor, this section generally allows the parties to determine the standards for compliance with the rights and duties imposed by Part 6, as long as those standards are not "manifestly unreasonable." The parties may not, however, set the standards for determining whether a secured party has breached the peace in violation of Revised 9-609.
Changes to Prior Law:	Although current Article 9 does not expressly reserve the issue of when a breach of the peace occurs to the court, most courts have rejected secured creditors' arguments that they did not breach the peace, based on the standard set in the security agreement or other loan documents. Revised 9-603 prevents the parties from determining *inter sese* the standards for determining whether a secured party has breached the peace.
Notes:	Like current Article 9, Revised Article 9 does not provide any guidance for determining what is "manifestly unreasonable." One commentator has suggested that the appropriate standard should be between "unreasonable" and "unconscionable."
Proposed Revisions/ Maine Comment:	Although the intendment of the drafters is clear, it may be beneficial to include "Except as otherwise provided in subsection (b)" at the beginning of Revised 9-603(a).

Section 9-604	**Procedure if Security Agreement Covers Real Property or Fixtures**
Source:	11 M.R.S.A. § 9-501(4); 11 M.R.S.A. § 9-313(8)
Summary:	If a security agreement covers both personal property and real property (including fixtures), then the secured party has two options. First, it may proceed against the personal property under Article 9 without prejudicing its applicable rights as to the real property. Second, it may circumvent Part 6 of Article 9 by proceeding against both types of property "in accordance with the rights with respect to the real property[.]" A secured party with a first position lien against fixtures may remove the fixtures, but the secured party must reimburse any owner or encumbrancer for the cost of repairing physical damage caused by the removal (but not for mere diminution in value caused by the removal of the fixture).
Changes to Prior Law:	This section clarifies that secured parties have the same option with respect to fixtures as they do for other types of real property, *viz.* proceeding under Art. 9 or under applicable real property law. Under current Article 9, an owner or encumbrancer that may be entitled to reimbursement for damage caused by the removal of fixtures could prevent the secured party from removing the fixture until the secured party gave "adequate security for the performance of this obligation." 11 M.R.S.A. § 313(8) (emphasis added). Under Revised 9-604, the owner or encumbrancer may refuse permission until the secured party gives "adequate assurance for the performance of the obligation to reimburse." Revised 9-602(d) (emphasis added). The Official Comment does not address this distinction, although it seems likely that no substantive change was intended.
Notes:	None.
Proposed Revisions/ Maine Comment:	None.

Section 9-605	**Unknown Debtor or Secondary Obligor**
Source:	New
Summary:	This section absolves a secured party of any duty, based on its status as a secured party, to certain "unknown" debtors, obligors, and other secured parties. Before a secured party has a duty to a person that is a debtor or obligor, the secured party must know (a) that the person is a debtor or obligor; (b) the identity of the person; and (c) how to communicate with the person. Before a secured party has a duty to another secured party or lienholder that has a filed a financing statement against a person, the secured party must know (a) that the person is a debtor or obligor and (b) the identity of the person. By way of example, this section will protect the secured party from its failure to fulfill the duties imposed by Article, when the debtor has sold the collateral to a new owner that has become a new debtor under Revised 9-102(a)(56). *See* Official Comment 2 to Revised 9-605.
Changes to Prior Law:	Current Article 9 does not address the situation where the secured party is unaware of the debtor or other secured party's.
Notes:	This section is designed to protect secured creditors by relieving them of any duty to unknown parties. Nevertheless, the actual scope of the benefit seems questionable. Although Revised 9-605 applies where a secured party lacks certain information necessary for the performance of its duties under Article 9, Revised 9-506 does not describe what, if any, affirmative steps the less-than-fully-informed secured creditor must take before becoming entitled to this protection. Presumably, the non-waivable duty of good faith will provide an incentive for the secured party to take action to determine the identity and location of its debtors and other secured parties have an interest in the collateral.
Proposed Revisions/ Maine Comment:	None.

Section 9-606	**Time of Default for Agricultural Lien**
Source:	New
Summary:	The holder of an agricultural lien becomes entitled to enforce the rights and remedies created by Part 6 of Article 9, when the lienholder becomes entitled to enforce the lien under the statute creating the lien.
Changes to Prior Law:	This new statute was necessitated by (i) the inclusion of agricultural liens within the scope of Revised Article 9 and (ii) the deference of Revised Article 9 to the parties' ability to define when a default occurs.
Notes:	None.
Proposed Revisions/ Maine Comment:	None.

Section 9-607 **Collection and Enforcement by Secured Party**

Source: Revised 9-607(a) derives from 11 M.R.S.A. § 9-502(1); the remainder of this section is new.

Summary: This section allows a secured creditor, after default, to (a) notify an account debtor to make payments or render performance of non-payment obligations directly to the secured party and (b) enforce the debtor's rights against either the account debtor or the collateral securing the account debtor's obligations to the debtor (including supporting obligations). It further extends this right to "other persons obligated on the collateral[.]" The secured party must exercise these rights in a commercially reasonably manner *if the secured party has chargeback or recourse rights.*[1] The duty to proceed in a commercially reasonable manner is non-waivable, *see* Revised 9-602(3), although the parties can agree on standards for determining whether the secured party has satisfied that duty, provided such standards are not manifestly unreasonable. Although Revised 9-607 gives the secured party certain rights, it also makes clear that the obligations of the account debtor or a party obligated on the collateral are not determined by Revised 9-607. Thus, if the account debtor has defenses against the debtor, then those defenses may be asserted against the secured party exercising enforcement rights under Revised 9-607.

If the secured party's collateral consists of a note or other obligation secured by an interest in real property, then, after default, the secured party may record the security agreement and an affidavit stating that a default has occurred. Essentially, this permits the secured party to become the record-holder of mortgagee/assignee's interest in the mortgage. Therefore, the secured party may proceed with a nonjudicial foreclosure of the mortgage.

If a secured party has a perfected security interest in a deposit account (which may be taken as original collateral under Revised Article 9), then secured party may, after default, apply the balance of the account to the obligation secured by the deposit account or instruct the bank to pay the balance of the account to or for the secured party.

A junior secured creditor may exercise the collection rights granted by Revised 9-607, but may lack priority in the cash proceeds of the accounts. *See* Official Comment 5 to Revised 9-607. Revised 9-607 permits the secured party to deduct reasonable expenses of collection and enforcement (including reasonable attorney fees and legal expenses) from its collections on the collateral under Revised 9-607, even if the parties agreement does not so provide. *See* Official Comment 10 to Revised 9-607; *cf.* 11 M.R.S.A. § 9-502(2) (secured party . . . may deduct his reasonable expenses of realization from the collections.")

Changes to Prior Law: The expansion of this section to include enforcement rights (as opposed to simply collection rights) against account debtors and other persons obligated on collateral works a significant change in favor of secured parties. There may be circumstances, however, where non-UCC law limits the secured party's ability to gain the benefit of the account debtor's obligations. *See, e.g.*, Restatement of Contracts (Second) § 317(2) (limiting an assignee's ability to enforce obligor's performance if the enforcement would materially change the performance or would materially impair the obligor's chances of obtaining return performance). The account debtor may be able to raise other non-Part 6 defenses to collection or enforcement efforts by the secured party; for example, the secured party may not be able to draw on a nontransferable letter of credit right.

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[1] If the buyer/secured party has no recourse rights against the seller/debtor, then the commercial reasonableness of the disposition of the collateral does not effect the seller/debtor's liability to the buyer/secured party. *See* Official Comment 9 to Revised 9-607.

Revised 9-607 creates an automatic entitlement to "reasonable expenses of collection and enforcement" in favor of a secured party proceeding against accounts debtors and other third parties obligated on the collateral under Revised 9-607(c). The secured party's ability to recover such expenses when the secured party proceeds against the debtor depends on the parties' agreement. *See* Revised 9-608(a)(1)(A).

Notes: Given the increased flexibility in the collection and enforcement of collateral provided by Revised 9-607, secured creditors are the clear winners here.

Proposed Revisions/
Maine Comment: None.

Section 9-608	**Application of Proceeds of Collection or Enforcement; Liability for Deficiency and Right to Surplus**
Source:	Part of Revised 9-608 derives from 11 M.R.S.A. § 9-502(2); the rest is new.
Summary:	This section prescribes the order in which the secured party must apply the proceeds. First, as to cash proceeds of collection or enforcement, the secured party is entitled to pay its expenses and, if provided in the agreement and not prohibited by law, its reasonable attorney fees and legal expenses. The proceeds are next applied to the secured debt, and then to subordinate interests if the secured party has received an authenticated demand before the distribution of proceeds is completed. Finally, the secured party must pay any surplus to the debtor, a duty that is non-waivable under Revised 9-602(5). Second, as to noncash proceeds, the secured party is required to account for noncash proceeds only if failure to do so would be commercially unreasonable. If the secured creditor elects to apply noncash proceeds, then it must do so in a commercially reasonable manner. Generally, the debtor or obligor remains liable for a deficiency and is entitled to a surplus (except in the case of the sale of accounts, chattel paper, promissory notes and payment intangibles). The payment scheme created by Revised 9-608 for realization on collection or enforcement rights is substantially similar to the scheme created by Revised 9-615 for dispositions of collateral.
Changes to Prior Law:	This section expands on existing law by providing secured creditors with guidance on how to apply amounts realized from the collection or enforcement of collateral.
Notes:	None.
Proposed Revisions/ Maine Comment:	Revised 9-608(a)(1) probably should read "cash proceeds of collection or enforcement under 9-607" rather than "cash proceeds of collection or enforcement under this section." The reference to "this section" must be read to mean Revised 9-608, which does not give the secured party any collection or enforcement rights, but simply instructs the secured party about how to apply any proceeds derived from the exercise of those rights. The right to collect or enforce is created by Revised 9-607.

Section 9-609	**Secured Party's Right to Take Possession After Default**
Source:	11 M.R.S.A. § 9-503.
Summary:	In many cases, the right to physically control the collateral is among the secured party's most important rights. Section 9-609 preserves this right by allowing the secured party (a) take possession of or (b) disassemble the collateral by either judicial or nonjudicial process. However, the parties' agreement may limit the secured party's ability to resort to self-help. Of course, the right to proceed nonjudicially may only be exercised without a breach of the peace. This is one of the non-waivable duties, and is one for which the parties cannot set the standards for evaluation. *See* 9-602(6) and 9-603(b). Like current Article 9, Revised Article 9 does not contain a definition of the term "breach of the peace."
Changes to Prior Law:	Under current Article 9, the right to require the debtor to assemble and make available the collateral exists only if created contractually. Under Revised Article 9, the right exists if created contractually and, in event any, after default (although 9-609(c) is not among the non-waivable duties and therefore could be modified or eliminated by the parties).
Notes:	
Proposed Revisions/ Maine Comment:	None.

Section 9-610 **Disposition of Collateral After Default**

Source: 11 M.R.S.A. § 9-504(1), (3)

Summary: After default, a secured party may dispose of the collateral in a commercially reasonable manner. Each aspect of the disposition must be commercially reasonable, but the fact that a higher price could have been obtained at a different time or through a different manner of disposition does not, in and of itself, render a disposition commercially unreasonable. *See* Revised 9-627(a). Revised 9-610 does not impose an independent obligation on the secured party to prepare or process the collateral prior to the sale (although failure to do so, in some circumstances, could effect the commercial reasonableness of the sale, thereby impairing the secured party's right to a deficiency claim).

The secured party may purchase any type of collateral at a public disposition.[2] The secured party may purchase the collateral at a private disposition only if the type of collateral is "customarily sold on a recognized market" or is the subject of "widely distributed standard price quotations." A recognized market exists where items are fungible and prices are not subject to individual negotiation.

The official comment to Revised 9-610 explains that a "public" disposition is one in which the price is determined by a meaningful opportunity for competitive bidding. The keys to a finding that there has been the requisite "meaningful opportunity" are notice or advertisement and access to the sale.

Changes: Absent an effective disclaimer or modification, the transferee in a disposition under Revised 9-610 receives the warranties described in Revised 9-610(d) (including warranties of title, possession, and quiet enjoyment). Although this change appears to benefit purchasers at foreclosure sales, as a practical matter, well-advised secured parties will simply include the disclaimer described in Revised 9-610(e)(2) and (f). The most obvious question about a secured party's ability to disclaim warranties is whether such a disclaimer would depress the purchase price for the collateral, thereby rendering the sale commercially unreasonable. Further, many of the warranties created by Article 2 will not be a concern for most secured parties, since they are not merchants.

Revised Article 9 eliminates the distinction between public and private sales of collateral, under which a transferee at a public sale could lose its protections more easily than transferees in other nonconforming dispositions. *See* Revised 9-617(b) (adopting the "good faith" standard for determining whether any transferee takes free and clear of certain interests).

Comments: The official comments to Revised 9-610 state that Revised Article 9is intended to encourage private dispositions of collateral, on the assumption that they produce a higher return on the collateral. Given this preference, it seems questionable that Revised 9-610 adopts a restrictive interpretation of the term "recognized market" and does not define or otherwise explain the phrase "widely distributed standard price quotations," each of which describes when a secured party may purchase the collateral at a private disposition. The debtor's ability to challenge a secured party's entitlement to a deficiency claim should deter the secured party from "selling" itself the collateral in a private disposition for an unduly low price. *See* Revised 9-615(f).

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[2] Revised Article 9 uses the terms "public disposition" and "private disposition," in place of "public sale" and "private sale" found in current Article 9.

Proposed Changes/
Maine Comments: A comment indicating that a secured party's disclaimer of warranties does not, in and of itself, render a sale commercially unreasonable, would be useful.

Section 9-611	**Notification Before Disposition of Collateral**
Source:	11 M.R.S.A. § 9-504(3)
Summary:	This section determines when a secured party must given notice of a disposition of collateral under Revised 9-610, and, when notice is required, to whom notice must be sent. First, the secured party need not send notice of a 9-610 disposition if the collateral (i) is perishable; (ii) threatens to decline speedily in value; or (iii) is of a type customarily sold on a recognized market. If notice is required, the secured party must send "reasonable authenticated notification of disposition." The modified "reasonable" applies to the timeliness of the notice and the manner in which it is provided, *see* Comment 2 to Revised 9-611 and 9-612, and "authenticated" requires that the notice be in writing. *See* Revised 9-102(7), (69). Revised 9-613 and 9-614 provide greater guidance for determining the content of the notice. If the collateral consists of consumer goods, then the secured party must give notice to the debtor and any secondary obligor. If the collateral is other than consumer goods, then the secured party must give notice to (i) the debtor; (ii) any secondary obligor; (iii) any person who sends notice of its interest in the collateral to the secured party prior to the notification date; and (iv) certain other secured parties or lienors having, as of 10 days before the notification date, an interest in the collateral that is perfected through filing of a financing statement *or* compliance with a statute, treaty or regulation described in Revised 9-311 (which is the equivalent of filing a financing statement).
Changes:	Revised 9-611 clarifies existing law, by providing that a secured party must give notice of the disposition of collateral (including consumer goods collateral) to the debtor and any secondary obligor, which includes guarantors. Revised 9-611 also imposes an affirmative burden on the secured creditor to identify other secured parties or lienholders having an interest in the collateral, whereas under 9-504(3) the secured party could remain passive and send notice only to those parties who had sent written notice of their claim.
Comments:	Revised 9-611(d) eliminates the requirement of notice when the collateral is sold on a recognized market. One commentator has pointed out that the sale of the collateral on a recognized market permits the secured party to purchase the collateral at a private disposition. Article 9 (both current and Revised) permit this result, since independent market forces can easily determine the reasonableness of the price obtained by the selling secured party. The same reasoning permits a secured party to purchase the collateral at a private disposition if the collateral is of the type "subject to widely distributed standard price quotations." There is no apparent justification for failing to include this as an excuse for notice of the disposition.
Winners/Losers:	Secured parties now have an affirmative obligation to search the public records in determining who is entitled to receive notice. However, Revised 9-611(e) provides a safe-harbor provision that recognizes the practical reality of delays in receiving information from the public filing office and, if another secured party is erroneously omitted from that report, the risk of non-notification falls on the omitted secured party, not on the foreclosing secured party. *See* Revised 9-611(e)(2)(B).[3]
Proposed Changes/ Maine Comments:	None.

[3] The "safe harbor" provision does not absolve the secured party to send notice to those persons who gave timely notice of their interest in the collateral under Revised 9-611(c)(3)(A).

Section 9-612	**Timeliness of Notification Before Disposition of Collateral**
Source:	New
Summary:	Generally, the question of whether notice was sent within a reasonable time prior to the disposition is a question of fact. However, in non-consumer transactions, post-default notice sent 10 or more days before the earliest time of disposition set forth in the notice is presumed to be sent within a reasonable time. Note that the safe-harbor does not obviate the need to send the notice in a commercially reasonable manner.
Changes:	None.
Comments:	The safe-harbor provision provides some protection against a challenge to the reasonableness of the foreclosing creditor's notice. A shorter notice period may satisfy the requirement of Revised 9-611 if the parties have agreed on such period, provided it is not manifestly unreasonable.
Proposed Changes/ Maine Comments:	None.

Section 9-613	**Contents and Form of Notification Before Disposition of Collateral: General**
Source:	New.
Summary:	This section prescribes the information that, if included in a notification of disposition in a non-consumer goods transaction, will satisfy the requirement of a "reasonable" notification. Generally, the notice must describe (i) the debtor and the secured party [but not any secondary obligor?]; (ii) the collateral subject to the proposed disposition; (iii) the method of the disposition; (iv) the debtor's entitlement to an accounting; and (v) the time and place of a public sale or the time after which any other disposition is to be made. Whether a notice is reasonable, notwithstanding the failure to include all of the information required by Revised 9-613(1), is a question of fact, which means that the secured party generally will not be able to obtain a summary judgment. However, if substantially all of the information required by Revised 9-613(1) is contained in a notice, then the existence of either (i) additional information or (ii) minor errors not seriously misleading will not render the notice insufficient. *See* Revised 9-613(3).[4] Although no particular phrasing is required, Revised 9-613 contains a model notice.
Changes:	Current Article 9 provides little guidance on the contents of a "reasonable notice." With respect to private sales, the notice need to include the date after which the sale could take place; with respect to public sales, the notice needed to include the time (and date) and the place of the sale. This section eliminates any doubt about the nature and quantum of information that must be included in the "reasonable authenticated" notice required by Revised 9-611(b).
Comments:	The sample notice of disposition creates some confusion. The bracketed language next to the "Name of Debtor(s)" states "include only if the debtors are not an addressee." *See* Revised 9-613(5). Because the Debtor will always be an addressee, *see* Revised 9-611(c)(1), the sample notice suggests that it is not necessary to include the name of the debtor, a conclusion that is at odds with Revised 9-613(1)(A).
Proposed Changes/ Maine Comments:	In the interest of consistency, the phrase "public sale" in Revised 9-613(1)(E) should be changed to "public disposition." *See* Revised 9-610(c)(1) ("public disposition"). Query whether, from a stylistic and/or grammatical perspective, the words "all of" should be inserted immediately after "substantially" in Revised 9-613(3), so that it would read "The contents of a notification providing substantially all of the information specified in paragraph (1) are sufficient even if the notification . . . ."

[4] The "minor errors not seriously misleading" test exists in current Article 9 in 11 M.R.S.A. § 9-402, which governs the effectiveness of financing statements.

Section 9-614	**Contents and Form of Notification Before Disposition of Collateral: Consumer-Goods Transaction**
Source:	New.
Summary:	In a consumer-goods transaction, *see* Revised 9-102(a)(24), a secured party intending to dispose of the collateral under Revised 9-610 must provide the debtor and any secondary obligor with a "reasonable authenticated notification" of the disposition. *See* Revised 9-611(b), (c)(1),(2). Revised 9-614 describes the contents of a "reasonable" notice, primarily by incorporating the requirements of Revised 9-613, which applies in non-consumer transactions. There are, however, three additional pieces of information that must be included under Revised 9-614. First, the notice must include a description of any liability for a deficiency. Next, the notice must state a telephone number to obtain the amount necessary to redeem the collateral. Finally, the notice must include a telephone number or mailing address for obtaining additional information concerning the disposition and the secured obligation. Like its counterpart for non-consumer transactions, Revised 9-614 contains a sample notice, which if completed, provides "sufficient information." *See* Revised 9-614(3). Unlike Revised 9-614, the failure to include any of the required information renders a notice insufficient as a matter of law. *See* Official Comment 1 to Revised 9-614.
Changes:	11 M.R.S.A. § 9-504 states that a notice is sufficient if certain information is included; Revised 9-614 provides that a notice of disposition in a consumer-goods transaction "must" include specified information. As a practical matter, this change is insignificant.
Comments:	None.
Proposed Changes/ Maine Comments:	The bracketed language under the heading "Notice of Our Plan to Sell Property" suggest that the notice should be sent to "any obligor who is also a debtor." This implies that notice need not be sent to a guarantor who does not have an interest in the collateral. *See* Revised 9-102(a)(28), (59), (71) (definitions of 'debtor,' 'obligor,' and 'secondary obligor') and Official Comment 2 to Revised 9-102. In order to eliminate any possible confusion about the persons who are entitled to receive the notice, this language should be amended to conform to Revised 9-611(c)(1), (2) (requiring notice to any debtor and any secondary obligor). Also, the paragraph addressing a consumer's ability to redeem the collateral should read "You can get the property back at any time before we sell it *or enter into a contract to sell it* by paying us the full amount . . ." *See* Revised 9-623(c).

SUMMARY OF REVISED ARTICLE IX

9-1615 – 9-1628

By: Christopher H. Roney

Section 9-1615	**Application of Proceeds of Disposition; Liability for Deficiency & Right to Surplus**
Source:	9-504 (1), (2)
Summary:	Provides framework for distributing proceeds of foreclosure sale.
What Changed:	Inserts provisions dealing with rights of subordinate secured parties, lienholders (who are excluded entirely in existing law payment framework) and debtor vis a vis consignor as to proceeds of sale. Adds concept of non-cash proceeds, does not require application or payment of non-cash proceeds except where commercially unreasonable not to. On sales of accounts, deletes reference to ability of agreement to create individualized surplus/ deficiency rules. Note: this section is not subject of anti waiver provisions of 9-1602; thus likely still possible to vary by agreement. Creates real estate foreclosure - like limitation on deficiency if sale is to secured party, related party, secondary obligor [ie guarantor], and price is significantly below range which sale to 3rd party would have brought. Requires use of fictional "amount which would have been realized" if sale was to 3rd party to calculate deficiency. Also seems to require payment of fictional surplus if "amount that would have been realized" exceeds secured party debt. Adds provisions dealing with senior security party's rights in foreclosure proceeds of junior secured party – although unclear exactly what is intended by "disposition in good faith without knowledge that receipt violates rights of [senior party]".
Who Impacted:	Secured parties have seemingly higher level of duties & responsibilities than under existing law.
Maine Comment:	None required.

####

Section 9-1616	**Explanation of Calculation of Surplus or Deficiency**
Source:	New
Summary:	Requires report of sale after disposition in a consumer transaction (called "explanation"). Creditor must send when first demanding deficiency or remitting surplus, or (if earlier) within 14 days of written demand. Information required: Amount of debt,

	Amount of sale proceeds; accounting of expenses & credits; net surplus/deficiency.
What Changed:	Whole Section
Who Impacted:	Secured parties now have additional report of sale requirement in consumer transactions.
Maine Comment:	None required {cross references to MCCC?}.

####

Section 9-1617	**Rights of Transferee of Collateral**
Source:	9-504(4)
Summary:	Outlines practical effect of foreclosure on title transferred to transferee in a foreclosure sale.
What Changed:	Makes distinction between "purchaser" and "transferee' for value. Standardizes requirements for transferees to take free & clear of foreclosed security interests & subordinate interest holders – requires only good faith in public or private sales (as opposed to existing law requirements of lack of collusion, etc., in public sales). Increases insulation for transferee for errors by secured party. Existing law insulates only from post-default errors. New provision insulates from any Article IX errors. Outlines formerly implicit negative result of lack of good faith in transfer.
Who Impacted:	Transferee better insulated & obtains better title; indirectly secured parties & debtor's better off by cleaner sale terms, and resulting betterment in price.

####

Section 9-1618	**Rights & Duties of Certain Secondary Obligors:**
Source:	9-504(5)
Summary:	Transfer of obligation from original secured party to "secondary obligor" turns secondary obligor into a secured party: -by assignment of obligation -by receipt of collateral & agreement to assume secured party's duties -by subrogation [in collateral]. Such a transfer is not a true disposition of collateral under 9-610.
What Changed:	Requires agreement of "assignee" before imposing duties of secured party when collateral transfer is effected. Clarifies that there is only one secured party at a time (assignor released from liability for FUTURE acts of secured party, and vise versa).
Who Impacted:	Rights of secured parties & their sureties somewhat clarified.
Maine Comment:	Not required.

####

Section 9-1619	**Transfer of Record or Legal Title**
Source:	New
Summary:	Creates concept of "transfer statement" which is essentially a signed "affidavit of repossession" type instrument outlining chain of events leading to foreclosure sale to new transferee. Entitles transferee to new ownership documentation - can be done by secured party (to itself) before foreclosure sale.
What Changed:	Whole section
Who Impacted:	Transferees assisted – indirect benefit on secured party & debtors through possible increase in prices paid by transferees.
Maine Comment:	Not required.

####

Section 9-1620	**Acceptance of Collateral in Full or Partial Satisfaction of Obligation; Compulsory Disposition of Collateral.**
Source:	9-505
Summary:	Provides procedure by which creditor can keep collateral as opposed to holding foreclosure sale and treat debt as fully or partially satisfied. [Strict Foreclosure}
What Changed:	Adds concept of partial satisfaction (non-consumers only) where prior law recognized only full satisfaction transactions. Partial allowed only on express agreement by debtor. Full allowed by express agreement or by implicit agreement through absence of objection post notice. Requires notice to debtor & junior parties in interest. Requires non-possession by debtor (except for consumer goods). Adds protections for secured parties who obtain possession of collateral from being "deemed" to have accepted it in satisfaction of debt. Retains limit on procedure when consumer goods have been paid for by more than 60%-forcing sale with in 90 days of repossession.
Who Impacted:	Secured party generally aided by adding partial satisfaction concept & protections against implied acceptance; Debtors also may be benefited.
Maine Comment:	None required.

####

Section 9-1621	**Notification of Proposal to Accept Collateral**
Source:	9-505
Summary:	Compiles list of who must receive notice of proposed full/partial acceptance of collateral in satisfaction of debt.
What Changed:	Adds parties of record 10 days prior to debtor's express or implied consent to transaction as entitled to receive notice of the proposed transaction. Existing law only requires notice to those who demand it in writing. Adds notice requirement to secondary obligor in the case of partial satisfaction transactions.

	Comments of 9-1620 & 9-1621 add "good faith requirement" to transactions in satisfaction of debt.
Who Impacted:	Secured parties have additional parties to notify now.
Maine Comment:	None required.

####

Section 9-1622	**Effect of Acceptance of Collateral**
Source:	New
Summary:	Provides same title clearing benefit to the full/partial acceptance in satisfaction of debt transactions as those obtained in a foreclosure sale, including in situations where there are errors in compliance with any provision of Article 9 by secured party.
What Changed:	Whole Section
Who Impacted:	Secured parties benefit from express statement of effects of acceptance.
Maine Comment:	None required.

####

Section 9-1623	**Right to Redeem Collateral**
Source:	9-506
Summary:	Provisions provide debtor & others rights to redeem collateral by paying debt secured thereby in full.
What Changed:	Added junior lienholders & secondary obligors to junior (consensual) secured parties on the list of those persons who are entitled to redeem. Clarifies deadline for redemption of accounts receivable or deposit accounts is collection thereof by secured party.
Who Impacted:	Junior lienholders – gain right to redeem.
Maine Comment:	None required.

####

Section 9-1624	**Waiver**
Source:	9-504(3), 9-505, 9-506
Summary:	Allows debtor to waive rights to certain notices after default.
What Changed:	Little: Consumer debtors no longer can waive right to redeem.
Who Impacted:	Debtors benefited to a limited degree.
Maine Comment:	None required

####

Section 9-1625	**Remedies for Secured Party's Failure to Comply with Article.**
Source:	9-507
Summary:	Provides remedies for secured party's noncompliance with Article IX as a whole, including injunctive relief and damages.
What Changed:	Enlarges liability to include noncompliance with any part of Article IX as opposed to merely default provisions. Expands (or at least clarifies) who can obtain relief (including debtor, other obligors, holders of subordinate security interests and lienholders). Provides for elimination of deficiency and recovery of lost surplus as remedies. Adds fixed penalty ($500) for certain non-compliant actions (eg. failure to file termination statement or release control when debt paid, or failure to provide accounting upon request). Adds potential loss of collateral & value if secured party fails to comply with request for list of collateral if requestor thereby reasonably misled.
Who Impacted:	Secured parties – more express liability.
Maine Comments:	None required – maybe cross reference various limitations/damages provisions of MCCC.

####

Section 9-1626	**Action in Which Deficiency or Surplus is in Issue.**
Source:	New
Summary:	Provides basic rules of pleadings & proof in disputes where surplus or deficiency is at issue.
What Changed:	"Rebuttable Presumption Rule" adopted – secured party need not prove compliance with default provisions unless "placed in issue" by others. If secured party unable to establish it was compliant – deficiency limited to amount received or amount which would have been received if compliant (whichever greater) with a presumption that proceeds that would have been received = amount of debt unless secured party proves otherwise. Debtor has burden of proving an otherwise compliant sale to secured party or related party or secondary obligor is significantly below range that would have otherwise been received in sale to 3rd party. Remedies in consumer transactions left to Courts
Who Impacted:	Secured parties in a way better off – Maine appears to follow the absolute bar rule – although burden may be shifted to a degree.

####

Section 9-1627	**Determination of Whether Conduct was Commercially Reasonable.**
Source:	9-507(2)
Summary:	Sales in usual manner in recognized market or at market recognized price, or otherwise in conformity with practices amongst dealers, or as approved by court, are commercially reasonable.
What Changed:	Nothing really changed.
Who Impacted:	No one
Maine Comment:	None required

####

Section 9-1628	**Non-liability and Limitation on Liability of Secured Party; Liability of Secondary Obligor.**
Source:	New
Summary:	Limits secured party liability to those whom it does no know are debtors (ie: owner of collateral at any given time, as opposed to original obligor) or obligors, and limits liability of the secured party to such unknown parties' own secured parties. Also provides deficiency not limited in these situations. Allows secured party to reasonably rely on representations RE: Non-consumer status of transactions. Absolves secured party from liability for credit service charges plus 10% penalty for failure to send report of sale in consumer transactions – also provides that this penalty may only be imposed once per transaction.
What Changed:	All new
Who Impacted:	Secured party offered some protections.
Maine Comment:	None required

####

DISCUSSION OUTLINE OF PROPOSED, REVISED ARTICLE 9, PART 7
THE TRANSITION RULES

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DISCUSSION OUTLINE
ARTICLE 9
PART 7
THE TRANSITION RULES

A. Effective Date (§9-1701)

1. July 1, 2001.

2. The difficulties associated with the implementation of the new regime occur because certain transactions will straddle the effective date. New Article 9 also covers additional collateral and transactions, and provides new rules on perfection, priority and choice of law. Part 7 attempts to address these issues.

B. Pre-Effective Date Transactions and Liens -- General Rule (§9-1702)

1. The general rule (§9-1702) is that transactions and liens entered into before July 1, 2001 must be terminated, completed and enforced in accordance with the terms of new Article 9, i.e., new Article 9 is generally applicable unless Part 7 provides a special rule. Please note, however, that Part 7 provides several significant exceptions to this general rule.

2. Exception. If a transaction or lien was not covered by old Article 9 but is now covered by Article 9, secured party may proceed to enforce, terminate, etc. (e.g., a commercial tort claim) under either new Article 9 or non-Article 9 law. New Article 9 also does not affect litigation pending as of the effective date.

C. Previously Perfected Security Interests (§9-1703; §9-1704)

1. If you were perfected under prior law and had priority over a lien creditor under the former regime, and the requirements for perfection are satisfied under new Article 9, no action is required and you remain perfected.

2. **If you were perfected under old Article 9, but you do not satisfy the requirements for attachment or perfection under new Article 9, you remain perfected only until July 1, 2002 (one year). If you correct the deficiency within the one year period, you remain continuously perfected. For example, assume a security interest is in goods, now existing or hereafter acquired, a portion of your collateral is stored with a bailee and you previously notified the bailee but did not receive the bailee's acknowledgment. You remain perfected for one year but must obtain the bailee's acknowledgment within a year to be continuously perfected until the normal lapse. See comment 2 to § 9-1703 for additional examples.**

3. **The terms and provisions of a pre-effective date security agreement will be construed under old Article 9 unless the agreement contains a saving clause. Drafting point for our loan documents -- " . . . as presently or hereafter defined in the Maine UCC."**

4. Deficient filings (e.g., a collateral description of "all assets") will be corrected (with the attendant perfection) as of the effective date, assuming you have filed in the proper office.

D. **Prior Filings -- The Continuation of Perfection (§9-1705)**

1. Filings prior to the effective date that satisfy the requirements of new Article 9 continue perfected.

2. **The general rule on security interests properly perfected by filing under old Article 9 is that those filings continue as effective for collateral acquired before and after the effective date until the earlier of the normal lapse date of the financing statement or 6/30/06.**

3. Please note the need for dual searches.

E. **The Continuation of Previously Projected Financing Statements (§9-1706).**

1. The issue confronting the secured party is that it is perfected under old Article 9 with a filing in an office other than the jurisdiction of organization of the debtor. How do you continue the effectiveness of your perfection by filing?

2. §9-1705(d) allows you to continue the old financing statement through the use of a continuation statement if new Article 9 and old Article 9 present the same jurisdiction and filing office.

3. Under §9-1706, the filing of an initial financing statement (not a continuation statement) in the proper form and in the proper office continues the effectiveness of a financing statement filed before new Article 9 takes effect.

4. To effectuate such a filing, your initial financing statement must identify the office where the prior filing was filed, the file number and date of filing, the most recent continuation (if any) and contain a statement that the prior filing remains effective. **Please note -- these filings may be made at any time, and the lapse date thereafter is calculated off the initial financing statement filing date, not the original filing.**

5. The secured party may make these filings and may do so at any time after the effective date (not just within the six months immediately prior to lapse).

F. Law Governing Priority (§9-1708)

1. The rules regarding priority under prior Article 9 will govern if the competing security interests were established before Article 9 came into effect. Example of pre-Article 9 filing on license fees (a general intangible under old Article 9 and an account under new Article 9) that incorrectly used accounts to describe license fees. A second secured party files on that debtor's general intangibles before the effective date. The first filing becomes perfected on the effective date but loses to the second filing. If both used the "account" description, the first to file wins.

2. In all other cases, new Article priority rules discussed by Bruce govern.

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DISCUSSION OF PROPOSED, REVISED ARTICLE 9 CONFORMING AMENDMENTS TO OTHER ARTICLES

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CONFORMING AMENDMENTS TO OTHER ARTICLES

SECTION	TITLE	AMENDMENT	COMMENTS
1-105	Territorial application of the Act; parties' power to choose applicable law	Subsection 2 amended to reflect that "applicable law" under revised Article 9 includes Sections 9-1301 - 9-1307. "Law governing perfection, the effect of perfection or nonperfection, and the priority of security interests and agricultural liens." §§ 9-1301 - 9-1307.	None
1-201	General Definitions	Definitions of the following amended: (9) "Buyer in the ordinary course of business" Definition clarifies that a person buying from a pawnbroker is not a buyer in the ordinary course of business. Also clarifies that a person who acquires goods as security for or in satisfaction of debt is not a buyer in ordinary course of business. (32) "Purchase" Clarifies that a purchase includes taking by security interest as well as taking by mortgage, pledge, lien. (37) "Security Interest" Definition expanded to coincide with the expanded scope of Article 9, (now includes interest of a consignor, the interest of a buyer of accounts, chattel paper, payment intangibles, or promissory	 Note: Second sentence which is struck out by amendment, omits part of sentence i.e. "in the business of selling goods of that kind". Numerous sections of Article 8 refer to a "purchaser". This clarifies that a purchaser is a secured party. None

SECTION	TITLE	AMENDMENT	COMMENTS
		notes). Also, the amendment clarifies when a seller of goods retains a "security interest" in the collateral and specifically states, in the comment, the sections addressing seller's remedies (2-702(1), 2-703(a)), lessor's rights to goods under a lease, (2-1525) the right to stop delivery under Section 2-705 or 2-1526 and the seller's right to reclaim goods under Sections 2-507(2) or 2-702(2).	
2-103	Definitions and index of definitions	Cross reference on two definitions revised: "consumer goods": 9-1102 instead of 9-109 "Dishonor": 3-1502 instead of Section 3-507.	None
2-210	Delegation of Performance; assignment of rights	"Except as otherwise provided in subsection 9-1406, unless otherwise agreed, all rights of either seller or buyer can be assigned except where the assignment would materially change the duty on the other party. . . Subsection (2)A added	The added section clarifies that the creation, attachment, perfection or enforcement of a security interest does not materially change the duty or risk imposed on the buyer and therefore the rights of seller are freely assignable regardless of a contrary agreement. In cases where the seller's lender enforces a security interest resulting in a delegation of a material duty, the buyer can sue for damages or seek to enjoin enforcement of the security interest.

SECTION	TITLE	AMENDMENT	COMMENTS
2-312	Warranty of title and against infringement, buyer, buyer's obligation against infringement	Amendment to comment only. The existing comment #5 implies that all sales by creditors are without or contain limited warranties. The comment distinguishes foreclosures under revised Article 9 from sales by sheriffs, executors, and certain foreclosing lienors. Unless warranties of title are excluded under 2-312(2) or under 9-1610, a disposition under 9-1610 includes the warranty of title and, if applicable, warranty against infringement.	None
2-326	Sale on approval and sale or return; consignment sales and rights of creditors	Subsection 3 deleted in its entirety. The section addressed consignment sales which are now, under Revised Article 9. The comments further seek to clarify when a sale is a "sale or return" and therefore subject to the claims of creditors of the buyer.	The official comment cross references sections under which consignments are dealt with under Revised Article 9. The cross reference to Section 9-1103, subsection 2 should be 9-1103, subsection 4 (9-1103 is the section on purchase money security interests).
2-502	Buyer's right to goods on seller's insolvency.	This section was repealed and replaced.	The substantive change was to give the buyer of consumer goods the right to recover the goods where a portion of the purchase price was paid. The new section retains the

SECTION	TITLE	AMENDMENT	COMMENTS
			provision which allows a buyer to reclaim goods upon a seller's insolvency within 10 days after receipt of the first installment payment by the seller. The buyer's right to recover the goods, as opposed to damages against the seller, is conditioned upon payment of the unpaid portion of the purchase price.
2-716	Buyer's right to specific performance or replevin.	Subsection 3 adds the right of a buyer to replevy consumer goods upon the buyer's acquisition of a special property on which occurs when the goods have been identified to the contract. A buyer who has the right to replevy goods, takes the goods free of the security interest created by the seller.	
2-1103	Definitions and index of definitions	Cross references to the following definitional section made: "Account" - ~~9-106~~ Section 9-1102, Subsection (2). "Chattel Paper" - ~~9-105(1)~~ Section 9-1102, Subsection 11. "Consumer Goods" - ~~9-109(1)~~ 9-1102, Subsection (30).	None

SECTION	TITLE	AMENDMENT	COMMENTS
		"General Intangible" - ~~9-106~~ 9-1102, Subsection 42. "Instrument" - ~~9-105(1)(i)~~ 9-1102, Subsection (47). "Mortgage" - ~~9-105(i)(j)~~ 9-1102, Subsection (55). "Pursuant to Commitment" - ~~9-105~~ 9-1102, Subsection (60)	
2-1303	Alienability of parties' interests under lease contract or of lessor's residual interest in goods; delegation of performance; assignment of rights	Section 1 amended to provide appropriate cross references to revised Article 9. Subsection 3 was repealed in its entirety	Section 3 stated that a provision in a lease agreement prohibiting creation or enforcement of a security interest making a transfer an event of default is unenforceable and is generally dealt with under Section 9-1407.

SECTION	TITLE	AMENDMENT	COMMENTS
2-1307	Priority of liens arising by attachment or levy on, security interest in and other claims to goods	Previous section replaced.	The revision essentially clarifies the circumstances under which a lessee takes a leasehold interest free of the security interests created by the lessor. It does this by cross referencing Sections 9-1317, [interest that take priority over or take free of unperfected security interest or agricultural lien], 9-1321 [licensee of general intangible and lessee of goods in ordinary course of business] and 9-1323 [future advances].
2-1309	Lessor's and lessee's rights when goods become fixtures.	Cross references to the appropriate sections of Revised Article 9 are made.	None
4-208	Security interest of collecting bank in items, accompanying documents and proceeds	Subsection 3(a) amended to make appropriate cross references to revised Article 9, 9-1203(2) instead of 9-203(1).	None

SECTION	TITLE	AMENDMENT	COMMENTS
5-1118	Security interests of issuer or nominated person	New. This is a further change to the section on letters of credit revised in 1997. This section gives the issuer or nominated person an automatic security interest in the document presented under the letter of credit and to the extent that value is given. Security interest granted under this section is subject to Article 9, [9-1109].	None
7-503	Document of title to goods defeated in certain cases	Appropriate cross references to revised Article 9 9-1320 instead of 9-307	None
8-1102	Definitions	An amendment to the comment regarding the definition of "entitlement holder" and "entitlement order."	None
8-1103	Rules for determining whether certain obligations and interests are securities or financial assets	Amendment made to subsection 6 regarding the definition of a "Commodity Contract." The amendment appropriately cross references Article 9 in accordance with the revisions, i.e., 9-1102(15) instead of 9-115.	None

SECTION	TITLE	AMENDMENT	COMMENTS
8-1106	Control	Subsection d(3) added. Section d describes circumstances under which a purchaser of a security entitlement has control: "3. Another person has control of the security entitlement on behalf of the purchaser or having previously acquired control of the security entitlement, acknowledges that it has control on behalf of the purchaser." An example 9 illustrating the operation of d(3) was added to the official comment.	None
8-1110	Applicability; Choice of Law	Amendments clarify the choice of law rules for securities intermediaries: (summarized) (a) if there is an agreement between the entitlement holder and the securities intermediary, and it states the jurisdiction of the securities intermediary, that jurisdiction applies; (b) if there is no such agreement, but there is an agreement specifying that the law of a particular jurisdiction should apply, that law applies; (c) if none of the above apply, the jurisdiction is the location of the office serving the entitlement holder's account identified in an account statement; (d) if none of the above, it is the location of the securities intermediary's chief executive office .	For securities entitlements and security's accounts, the law of the securities intermediary's jurisdiction governs under Article 9-1305.

SECTION	TITLE	AMENDMENT	COMMENTS
8-1301	Delivery	The amendment to subsection 1(c) clarifies that a securities intermediary acquires possession of a certificated security, if: 1. Registered in the name of the purchaser; 2. Payable to the order of the purchaser; or 3. Specially indorsed to the purchaser by an effective indorsement and has not been indorsed to the securities' intermediary or in blank.	The existing section states that possession occurs if "the certificate is in registered form and has been specially indorsed to the purchaser by an effective indorsement."
8-1302	Rights of Purchaser	"(1)" except as otherwise provided in subsections 2 and 3, a purchaser ~~upon delivery~~ of a certificated or uncertificated security ~~to a purchaser, the purchaser~~ acquires all rights in the security that the transferor had or had power to transfer."	None
8-1502	Assertion of adverse claim against entitlement holder	An additional example to the official comment added to illustrate operation of 8-1502 Also, the correction of a cross reference from 9-115 to 9-1312 made to example 4 in the official comment.	None

SECTION	TITLE	AMENDMENT	COMMENTS
8-1510	Rights of purchaser of security entitlement from entitlement holder	The purchaser priority rules in 8-1510(3) are intended to track priority rules in Article 9 [9-1328(2)]	8-1510 has three numerical subsections, as opposed to the Uniform version which had 3 alphabetical subsections. The comments to 8-1510 refer to 8-1510(3) as subsection (c). As a subsection (c) is being added under paragraph 3, this misreference existing throughout the comment will be confusing.

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EXHIBIT C

4. **Summary of Revisions.** Following is a brief summary of some of the more significant revisions of Article 9 that are included in this Article.

a. **Scope of Article 9.** This Article expands the scope of Article 9 in several respects.

Deposit accounts. Section 9-109 includes within this Article's scope deposit accounts as original collateral, except in consumer transactions. Former Article 9 dealt with deposit accounts only as proceeds of other collateral.

Sales of payment intangibles and promissory notes. Section 9-109 also includes within the scope of this Article most sales of "payment intangibles" (defined in Section 9-102 as general intangibles under which an account debtor's principal obligation is monetary) and "promissory notes" (also defined in Section 9-102). Former Article 9 included sales of accounts and chattel paper, but not sales of payment intangibles or promissory notes. In its inclusion of sales of payment intangibles and promissory notes, this Article continues the drafting convention found in former Article 9; it provides that the sale of accounts, chattel paper, payment intangibles, or promissory notes creates a "security interest." The definition of "account" in Section 9-102 also has been expanded to include various rights to payment that were general intangibles under former Article 9.

Health-care-insurance receivables. Section 9-109 narrows Article 9's exclusion of transfers of interests in insurance policies by carving out of the exclusion "health-care-insurance receivables" (defined in Section 9-102). A health-care-insurance receivable is included within the definition of "account" in Section 9-102.

Nonpossessory statutory agricultural liens. Section 9-109 also brings nonpossessory statutory agricultural liens within the scope of Article 9.

Consignments. Section 9-109 provides that "true" consignments–bailments for the purpose of sale by the bailee–are security interests covered by Article 9, with certain exceptions. See Section 9-102 (defining "consignment"). Currently, many consignments are subject to Article 9's filing requirements by operation of former Section 2-326.

Supporting obligations and property securing rights to payment. This Article also addresses explicitly (i) obligations, such as guaranties and letters of credit, that support payment or performance of collateral such as accounts, chattel paper, and payment intangibles, and (ii) any property (including real property) that secures a right to payment or performance that is subject to an Article 9 security interest. See Sections 9-203, 9-308.

Commercial tort claims. Section 9-109 expands the scope of Article 9 to include the assignment of commercial tort claims by narrowing the exclusion of tort claims generally. However, this Article continues to exclude tort claims for bodily injury and other non-business tort claims of a natural person. See Section 9-102 (defining "commercial tort claim").

Transfers by States and governmental units of States. Section 9-109 narrows the exclusion of transfers by States and their governmental units. It excludes only transfers covered by another statute (other than a statute generally applicable to security interests) to the extent the statute governs the creation, perfection, priority, or enforcement of security interests.

Nonassignable general intangibles, promissory notes, health-care-insurance receivables, and letter-of-credit rights. This Article enables a security interest to attach to letter-of-credit rights, health-care-insurance receivables, promissory notes, and general intangibles, including contracts, permits, licenses, and franchises, notwithstanding a contractual or statutory prohibition against or limitation on assignment. This Article explicitly protects third parties against any adverse effect of the creation or attempted enforcement of the security interest. See Sections 9-408, 9-409.

Subject to Sections 9-408 and 9-409 and two other exceptions (Sections 9-406, concerning accounts, chattel paper, and payment intangibles, and 9-407, concerning interests in leased goods), Section 9-401 establishes a baseline rule that the inclusion of transactions and collateral within the scope of Article 9 has no effect on non-Article 9 law dealing with the alienability or inalienability of property. For example, if a commercial tort claim is nonassignable under other applicable law, the fact that a security interest in the claim is within the scope of Article 9 does not override the other applicable law's effective prohibition of assignment.

b. **Duties of Secured Party.** This Article provides for expanded duties of secured parties.

Release of control. Section 9-208 imposes upon a secured party having control of a deposit account, investment property, or a letter-of-credit right the duty to release control when there is no secured obligation and no commitment to give value. Section 9-209 contains analogous provisions when an account debtor has been notified to pay a secured party.

Information. Section 9-210 expands a secured party's duties to provide the debtor with information concerning collateral and the obligations that it secures.

Default and enforcement. Part 6 also includes some additional duties of secured parties in connection with default and enforcement. See, e.g., Section 9-616 (duty to explain calculation of deficiency or surplus in a consumer-goods transaction).

c. **Choice of Law.** The choice-of-law rules for the law governing perfection, the effect of perfection or nonperfection, and priority are found in Part 3, Subpart 1 (Sections 9-301 through 9-307). See also Section 9-316.

Where to file: Location of debtor. This Article changes the choice-of-law rule governing perfection (i.e., where to file) for most collateral to the law of the jurisdiction where the debtor is located. See Section 9-301. Under former Article 9, the jurisdiction of the debtor's location governed only perfection and priority of a security interest in accounts, general intangibles, mobile goods, and, for purposes of perfection by filing, chattel paper and investment property.

Determining debtor's location. As a baseline rule, Section 9-307 follows former Section 9-103, under which the location of the debtor is the debtor's place of business (or chief executive office, if the debtor has more than one place of business). Section 9-307 contains three major exceptions. First, a "registered organization," such as a corporation or limited liability company, is located in the State under whose law the debtor is organized, e.g., a corporate debtor's State of incorporation. Second, an individual debtor is located at his or her principal residence. Third, there are special rules for determining the location of the United States and registered organizations organized under the law of the United States.

Location of non-U.S. debtors. If, applying the foregoing rules, a debtor is located in a jurisdiction whose law does not require public notice as a condition of perfection of a nonpossessory security interest, the entity is deemed located in the District of Columbia. See Section 9-307. Thus, to the extent that this Article applies to non-U.S. debtors, perfection could be accomplished in many cases by a domestic filing.

Priority. For tangible collateral such as goods and instruments, Section 9-301 provides that the law applicable to priority and the effect of perfection or nonperfection will remain the law of the jurisdiction where the collateral is located, as under former Section 9-103 (but without the confusing "last event" test). For intangible collateral, such as accounts, the applicable law for priority will be that of the jurisdiction in which the debtor is located.

Possessory security interests; agricultural liens. Perfection, the effect of perfection or nonperfection, and priority of a possessory security interest or an agricultural lien are governed by the law of the jurisdiction where the collateral subject to the security interest or lien is located. See Sections 9-301, 9-302.

Goods covered by certificates of title; deposit accounts; letter-of-credit rights; investment property. This Article includes several refinements to the treatment of choice-of-law matters for goods covered by certificates of title. See Section 9-303. It also provides special choice-of-law rules, similar to those for investment property under current Articles 8 and 9, for deposit accounts (Section 9-304), investment property (Section 9-305), and letter-of-credit rights (Section 9-306).

Change in applicable law. Section 9-316 addresses perfection following a change in applicable law.

d. **Perfection.** The rules governing perfection of security interests and agricultural liens are found in Part 3, Subpart 2 (Sections 9-308 through 9-316).

Deposit accounts; letter-of-credit rights. With certain exceptions, this Article provides that a security interest in a deposit account or a letter-of-credit right may be perfected *only* by the secured party's acquiring "control" of the deposit account or letter-of-credit right. See Sections 9-312, 9-314. Under Section 9-104, a secured party has "control" of a deposit account when, with the consent of the debtor, the secured party obtains the depositary bank's agreement to act on the secured party's instructions (including when the secured party becomes the account holder) or when the secured party is itself the depositary bank. The control requirements are patterned on Section 8-106, which specifies the requirements for control of investment property. Under Section 9-107, "control" of a letter-of-credit right occurs when the issuer or nominated person consents to an assignment of proceeds under Section 5-114.

Electronic chattel paper. Section 9-102 includes a new defined term: "electronic chattel paper." Electronic chattel paper is a record or records consisting of information stored in an electronic medium (i.e., it is not written). Perfection of a security interest in electronic chattel paper may be by control or filing. See Sections 9-105 (*sui generis* definition of control of electronic chattel paper), 9-312 (perfection by filing), 9-314 (perfection by control).

Investment property. The perfection requirements for "investment property" (defined in Section 9-102), including perfection by control under Section 9-106, remain substantially unchanged. However, a new provision in Section 9-314 is designed to ensure that a secured party retains control in "repledge" transactions that are typical in the securities markets.

Instruments, agricultural liens, and commercial tort claims. This Article expands the types of collateral in which a security interest may be perfected by filing to include instruments. See Section 9-312. Agricultural liens and security interests in commercial tort claims also are perfected by filing, under this Article. See Sections 9-308, 9-310.

Sales of payment intangibles and promissory notes. Although former Article 9 covered the outright sale of accounts and chattel paper, sales of most other types of receivables also are financing transactions to which Article 9 should apply. Accordingly, Section 9-102 expands the definition of "account" to include many types of receivables (including "health-care-insurance receivables," defined in Section 9-102) that former Article 9 classified as "general intangibles." It thereby subjects to Article 9's filing system sales of more types of receivables than did former Article 9. Certain sales of payment intangibles–primarily bank loan participation transactions–should not be subject to the Article 9 filing rules. These transactions fall in a residual category of collateral, "payment intangibles" (general intangibles under which the account debtor's principal obligation is monetary), the sale of which is exempt from the filing requirements of Article 9. See Sections 9-102, 9-109, 9-309 (perfection upon attachment). The perfection rules for sales of promissory notes are the same as those for sales of payment intangibles.

Possessory security interests. Several provisions of this Article address aspects of security interests involving a secured party or a third party who is in possession of the collateral. In particular, Section 9-313 resolves a number of uncertainties under former Section 9-305. It provides that a security interest in collateral in the possession of a third party is perfected when the third party acknowledges in an authenticated record that it holds for the secured party's benefit. Section 9-313 also provides that a third party need not so acknowledge and that its acknowledgment does not impose any duties on it, unless it otherwise agrees. A special rule in Section 9-313 provides that if a secured party already is in possession of collateral, its security interest remains perfected by possession if it delivers the collateral to a third party and the collateral is accompanied by instructions to hold it for the secured party or to redeliver it to the secured party. Section 9-313 also clarifies the limited circumstances under which a security interest in goods covered by a certificate of title may be perfected by the secured party's taking possession.

Automatic perfection. Section 9-309 lists various types of security interests as to which no public-notice step is required for perfection (e.g., purchase-money

security interests in consumer goods other than automobiles). This automatic perfection also extends to a transfer of a health-care-insurance receivable *to* a health-care provider. Those transfers normally will be made by natural persons who receive health-care services; there is little value in requiring filing for perfection in that context. Automatic perfection also applies to security interests created by sales of payment intangibles and promissory notes. Section 9-308 provides that a perfected security interest in collateral supported by a "supporting obligation" (such as an account supported by a guaranty) also is a perfected security interest in the supporting obligation, and that a perfected security interest in an obligation secured by a security interest or lien on property (e.g., a real-property mortgage) also is a perfected security interest in the security interest or lien.

e. **Priority; Special Rules for Banks and Deposit Accounts.** The rules governing priority of security interests and agricultural liens are found in Part 3, Subpart 3 (Sections 9-317 through 9-342). This Article includes several new priority rules and some special rules relating to banks and deposit accounts (Sections 9-340 through 9-342).

Purchase-money security interests: General; consumer-goods transactions; inventory. Section 9-103 substantially rewrites the definition of purchase-money security interest (PMSI) (although the term is not formally "defined"). The substantive changes, however, apply only to non-consumer-goods transactions. (Consumer transactions and consumer-goods transactions are discussed below in Comment 4.j.) For non-consumer-goods transactions, Section 9-103 makes clear that a security interest in collateral may be (to some extent) both a PMSI as well as a non-PMSI, in accord with the "dual status" rule applied by some courts under former Article 9 (thereby rejecting the "transformation" rule). The definition provides an even broader conception of a PMSI in inventory, yielding a result that accords with private agreements entered into in response to the uncertainty under former Article 9. It also treats consignments as purchase-money security interests in inventory. Section 9-324 revises the PMSI priority rules, but for the most part without material change in substance. Section 9-324 also clarifies the priority rules for competing PMSIs in the same collateral.

Purchase-money security interests in livestock; agricultural liens. Section 9-324 provides a special PMSI priority, similar to the inventory PMSI priority rule, for livestock. Section 9-322 (which contains the baseline first-to-file-or-perfect priority rule) also recognizes special non-Article 9 priority rules for agricultural liens, which can override the baseline first-in-time rule.

Purchase-money security interests in software. Section 9-324 contains a new priority rule for a software purchase-money security interest. (Section 9-102 includes a definition of "software.") Under Section 9-103, a software PMSI includes a PMSI in software that is used in goods that are also subject to a PMSI. (Note also that the definition of "chattel paper" has been expanded to include

records that evidence a monetary obligation and a security interest in specific goods and software used in the goods.)

Investment property. The priority rules for investment property are substantially similar to the priority rules found in former Section 9-115, which was added in conjunction with the 1994 revisions to UCC Article 8. Under Section 9-328, if a secured party has control of investment property (Sections 8-106, 9-106), its security interest is senior to a security interest perfected in another manner (e.g., by filing). Also under Section 9-328, security interests perfected by control generally rank according to the time that control is obtained or, in the case of a security entitlement or a commodity contract carried in a commodity account, the time when the control arrangement is entered into. This is a change from former Section 9-115, under which the security interests ranked equally. However, as between a securities intermediary's security interest in a security entitlement that it maintains for the debtor and a security interest held by another secured party, the securities intermediary's security interest is senior.

Deposit accounts. This Article's priority rules applicable to deposit accounts are found in Section 9-327. They are patterned on and are similar to those for investment property in former Section 9-115 and Section 9-328 of this Article. Under Section 9-327, if a secured party has control of a deposit account, its security interest is senior to a security interest perfected in another manner (i.e., as cash proceeds). Also under Section 9-327, security interests perfected by control rank according to the time that control is obtained, but as between a depositary bank's security interest and one held by another secured party, the depositary bank's security interest is senior. A corresponding rule in Section 9-340 makes a depositary bank's right of set-off generally senior to a security interest held by another secured party. However, if the other secured party becomes the depositary bank's customer with respect to the deposit account, then its security interest is senior to the depositary bank's security interest and right of set-off. Sections 9-327, 9-340.

Letter-of-credit rights. The priority rules for security interests in letter-of-credit rights are found in Section 9-329. They are somewhat analogous to those for deposit accounts. A security interest perfected by control has priority over one perfected in another manner (i.e., as a supporting obligation for the collateral in which a security interest is perfected). Security interests in a letter-of-credit right perfected by control rank according to the time that control is obtained. However, the rights of a transferee beneficiary or a nominated person are independent and superior to the extent provided in Section 5-114. See Section 9-109(c)(4).

Chattel paper and instruments. Section 9-330 is the successor to former Section 9-308. As under former Section 9-308, differing priority rules apply to purchasers of chattel paper who give new value and take possession (or, in the case of electronic chattel paper, obtain control) of the collateral depending on whether a

conflicting security interest in the collateral is claimed merely as proceeds. The principal change relates to the role of knowledge and the effect of an indication of a previous assignment of the collateral. Section 9-330 also affords priority to purchasers of instruments who take possession in good faith and without knowledge that the purchase violates the rights of the competing secured party. In addition, to qualify for priority, purchasers of chattel paper, but not of instruments, must purchase in the ordinary course of business.

Proceeds. Section 9-322 contains new priority rules that clarify when a special priority of a security interest in collateral continues or does not continue with respect to proceeds of the collateral. Other refinements to the priority rules for proceeds are included in Sections 9-324 (purchase-money security interest priority) and 9-330 (priority of certain purchasers of chattel paper and instruments).

Miscellaneous priority provisions. This Article also includes (i) clarifications of selected good-faith-purchase and similar issues (Sections 9-317, 9-331); (ii) new priority rules to deal with the "double debtor" problem arising when a debtor creates a security interest in collateral acquired by the debtor subject to a security interest created by another person (Section 9-325); (iii) new priority rules to deal with the problems created when a change in corporate structure or the like results in a new entity that has become bound by the original debtor's after-acquired property agreement (Section 9-326); (iv) a provision enabling most transferees of funds from a deposit account or money to take free of a security interest (Section 9-332); (v) substantially rewritten and refined priority rules dealing with accessions and commingled goods (Sections 9-335, 9-336); (vi) revised priority rules for security interests in goods covered by a certificate of title (Section 9-337); and (vii) provisions designed to ensure that security interests in deposit accounts will not extend to most transferees of funds on deposit or payees from deposit accounts and will not otherwise "clog" the payments system (Sections 9-341, 9-342).

Model provisions relating to production-money security interests. Appendix II to this Article contains model definitions and priority rules relating to "production-money security interests" held by secured parties who give new value used in the production of crops. Because no consensus emerged on the wisdom of these provisions during the drafting process, the sponsors make no recommendation on whether these model provisions should be enacted.

f. **Proceeds.** Section 9-102 contains an expanded definition of "proceeds" of collateral which includes additional rights and property that arise out of collateral, such as distributions on account of collateral and claims arising out of the loss or nonconformity of, defects in, or damage to collateral. The term also includes collections on account of "supporting obligations," such as guarantees.

g. **Part 4: Additional Provisions Relating to Third-Party Rights.** New Part 4 contains several provisions relating to the relationships between certain third parties and the parties to secured transactions. It contains new Sections 9-401 (replacing former Section 9-311) (alienability of debtor's rights), 9-402 (replacing former Section 9-317) (secured party not obligated on debtor's contracts), 9-403 (replacing former Section 9-206) (agreement not to assert defenses against assignee), 9-404, 9-405, and 9-406 (replacing former Section 9-318) (rights acquired by assignee, modification of assigned contract, discharge of account debtor, restrictions on assignment of account, chattel paper, promissory note, or payment intangible ineffective), 9-407 (replacing some provisions of former Section 2A-303) (restrictions on creation or enforcement of security interest in leasehold interest or lessor's residual interest ineffective). It also contains new Sections 9-408 (restrictions on assignment of promissory notes, health-care-insurance receivables ineffective, and certain general intangibles ineffective) and 9-409 (restrictions on assignment of letter-of-credit rights ineffective), which are discussed above.

h. **Filing.** Part 5 (formerly Part 4) of Article 9 has been substantially rewritten to simplify the statutory text and to deal with numerous problems of interpretation and implementation that have arisen over the years.

Medium-neutrality. This Article is "medium-neutral"; that is, it makes clear that parties may file and otherwise communicate with a filing office by means of records communicated and stored in media other than on paper.

Identity of person who files a record; authorization. Part 5 is largely indifferent as to the person who effects a filing. Instead, it addresses whose authorization is necessary for a person to file a record with a filing office. The filing scheme does not contemplate that the identity of a "filer" will be a part of the searchable records. This approach is consistent with, and a necessary aspect of, eliminating signatures or other evidence of authorization from the system (except to the extent that filing offices may choose to employ authentication procedures in connection with electronic communications). As long as the appropriate person authorizes the filing, or, in the case of a termination statement, the debtor is entitled to the termination, it is largely insignificant whether the secured party or another person files any given record.

Section 9-509 collects in one place most of the rules that determine when a record may be filed. In general, the debtor's authorization is required for the filing of an initial financing statement or an amendment that adds collateral. With one further exception, a secured party of record's authorization is required for the filing of other amendments. The exception arises if a secured party has failed to provide a termination statement that is required because there is no outstanding secured obligation or commitment to give value. In that situation, a debtor is authorized to file a termination statement indicating that it has been filed by the debtor.

Financing statement formal requisites. The formal requisites for a financing statement are set out in Section 9-502. A financing statement must provide the name of the debtor and the secured party and an indication of the collateral that it covers. Sections 9-503 and 9-506 address the sufficiency of a name provided on a financing statement and clarify when a debtor's name is correct and when an incorrect name is insufficient. Section 9-504 addresses the indication of collateral covered. Under Section 9-504, a super-generic description (e.g.,"all assets" or "all personal property") in a financing statement is a sufficient indication of the collateral. (Note, however, that a super-generic description is inadequate for purposes of a security agreement. See Sections 9-108, 9-203.) To facilitate electronic filing, this Article does not require that the debtor's signature or other authorization appear on a financing statement. Instead, it prohibits the filing of unauthorized financing statements and imposes liability upon those who violate the prohibition. See Sections 9-509, 9-626.

Filing-office operations. Part 5 contains several provisions governing filing operations. First, it prohibits the filing office from rejecting an initial financing statement or other record for a reason other than one of the few that are specified. See Sections 9-520, 9-516. Second, the filing office is obliged to link all subsequent records (e.g., assignments, continuation statements, etc.) to the initial financing statement to which they relate. See Section 9-519. Third, the filing office may delete a financing statement and related records from the files no earlier than one year after lapse (lapse normally is five years after the filing date), and then only if a continuation statement has not been filed. See Sections 9-515, 9-519, 9-522. Thus, a financing statement and related records would be discovered by a search of the files even after the filing of a termination statement. This approach helps eliminate filing-office discretion and also eases problems associated with multiple secured parties and multiple partial assignments. Fourth, Part 5 mandates performance standards for filing offices. See Sections 9-519, 9-520, 9-523. Fifth, it provides for the promulgation of filing-office rules to deal with details best left out of the statute and requires the filing office to submit periodic reports. See Sections 9-526, 9-527.

Correction of records: Defaulting or missing secured parties and fraudulent filings. In some areas of the country, serious problems have arisen from fraudulent financing statements that are filed against public officials and other persons. This Article addresses the fraud problem by providing the opportunity for a debtor to file a termination statement when a secured party wrongfully refuses or fails to provide a termination statement. See Section 9-509. This opportunity also addresses the problem of secured parties that simply disappear through mergers or liquidations. In addition, Section 9-518 affords a statutory method by which a debtor who believes that a filed record is inaccurate or was wrongfully filed may indicate that fact in the files by filing a correction statement, albeit without affecting the efficacy, if any, of the challenged record.

Extended period of effectiveness for certain financing statements. Section 9-515 contains an exception to the usual rule that financing statements are effective for five years unless a continuation statement is filed to continue the effectiveness for another five years. Under that section, an initial financing statement filed in connection with a "public-finance transaction" or a "manufactured-home transaction" (terms defined in Section 9-102) is effective for 30 years.

National form of financing statement and related forms. Section 9-521 provides for uniform, national written forms of financing statements and related written records that must be accepted by a filing office that accepts written records.

i. **Default and Enforcement.** Part 6 of Article 9 extensively revises former Part 5. Provisions relating to enforcement of consumer-goods transactions and consumer transactions are discussed in Comment 4.j.

Debtor, secondary obligor; waiver. Section 9-602 clarifies the identity of persons who have rights and persons to whom a secured party owes specified duties under Part 6. Under that section, the rights and duties are enjoyed by and run to the "debtor," defined in Section 9-102 to mean any person with a non-lien property interest in collateral, and to any "obligor." However, with one exception (Section 9-616, as it relates to a consumer obligor), the rights and duties concerned affect non-debtor obligors only if they are "secondary obligors." "Secondary obligor" is defined in Section 9-102 to include one who is secondarily obligated on the secured obligation, e.g., a guarantor, or one who has a right of recourse against the debtor or another obligor with respect to an obligation secured by collateral. However, under Section 9-628, the secured party is relieved from any duty or liability to any person unless the secured party knows that the person is a debtor or obligor. Resolving an issue on which courts disagreed under former Article 9, this Article generally prohibits waiver by a secondary obligor of its rights and a secured party's duties under Part 6. See Section 9-602. However, Section 9-624 permits a secondary obligor or debtor to waive the right to notification of disposition of collateral and, in a non-consumer transaction, the right to redeem collateral, if the secondary obligor or debtor agrees to do so after default.

Rights of collection and enforcement of collateral. Section 9-607 explains in greater detail than former 9-502 the rights of a secured party who seeks to collect or enforce collateral, including accounts, chattel paper, and payment intangibles. It also sets forth the enforcement rights of a depositary bank holding a security interest in a deposit account maintained with the depositary bank. Section 9-607 relates solely to the rights of a secured party vis-a-vis a debtor with respect to collections and enforcement. It does not affect the rights or duties of third parties, such as account debtors on collateral, which are addressed elsewhere (e.g., Section 9-406). Section 9-608 clarifies the manner in which proceeds of collection or enforcement are to be applied.

Disposition of collateral: Warranties of title. Section 9-610 imposes on a secured party who disposes of collateral the warranties of title, quiet possession, and the like that are otherwise applicable under other law. It also provides rules for the exclusion or modification of those warranties.

Disposition of collateral: Notification, application of proceeds, surplus and deficiency, other effects. Section 9-611 requires a secured party to give notification of a disposition of collateral to other secured parties and lienholders who have filed financing statements against the debtor covering the collateral. (That duty was eliminated by the 1972 revisions to Article 9.) However, that section relieves the secured party from that duty when the secured party undertakes a search of the records and a report of the results is unreasonably delayed. Section 9-613, which applies only to non-consumer transactions, specifies the contents of a sufficient notification of disposition and provides that a notification sent 10 days or more before the earliest time for disposition is sent within a reasonable time. Section 9-615 addresses the application of proceeds of disposition, the entitlement of a debtor to any surplus, and the liability of an obligor for any deficiency. Section 9-619 clarifies the effects of a disposition by a secured party, including the rights of transferees of the collateral.

Rights and duties of secondary obligor. Section 9-618 provides that a secondary obligor obtains the rights and assumes the duties of a secured party if the secondary obligor receives an assignment of a secured obligation, agrees to assume the secured party's rights and duties upon a transfer to it of collateral, or becomes subrogated to the rights of the secured party with respect to the collateral. The assumption, transfer, or subrogation is not a disposition of collateral under Section 9-610, but it does relieves the former secured party of further duties. Former Section 9-504(5) did not address whether a secured party was relieved of its duties in this situation.

Transfer of record or legal title. Section 9-619 contains a new provision making clear that a transfer of record or legal title to a secured party is not of itself a disposition under Part 6. This rule applies regardless of the circumstances under which the transfer of title occurs.

Strict foreclosure. Section 9-620, unlike former Section 9-505, permits a secured party to accept collateral in partial satisfaction, as well as full satisfaction, of the obligations secured. This right of strict foreclosure extends to intangible as well as tangible property. Section 9-622 clarifies the effects of an acceptance of collateral on the rights of junior claimants. It rejects the approach taken by some courts–deeming a secured party to have constructively retained collateral in satisfaction of the secured obligations–in the case of a secured party's unreasonable delay in the disposition of collateral. Instead, unreasonable delay is relevant when determining whether a disposition under Section 9-610 is commercially reasonable.

Effect of noncompliance: "Rebuttable presumption" test. Section 9-626 adopts the "rebuttable presumption" test for the failure of a secured party to proceed in accordance with certain provisions of Part 6. (As discussed in Comment 4.j., the test does not necessarily apply to consumer transactions.) Under this approach, the deficiency claim of a noncomplying secured party is calculated by crediting the obligor with the greater of the actual net proceeds of a disposition and the amount of net proceeds that would have been realized if the disposition had been conducted in accordance with Part 6 (e.g., in a commercially reasonable manner). For non-consumer transactions, Section 9-626 rejects the "absolute bar" test that some courts have imposed; that approach bars a noncomplying secured party from recovering any deficiency, regardless of the loss (if any) the debtor suffered as a consequence of the noncompliance.

"Low-price" dispositions: Calculation of deficiency and surplus. Section 9-615(f) addresses the problem of procedurally regular dispositions that fetch a low price. Subsection (f) provides a special method for calculating a deficiency if the proceeds of a disposition of collateral to a secured party, a person related to the secured party, or a secondary obligor are "significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought." ("Person related to" is defined in Section 9-102.) In these situations there is reason to suspect that there may be inadequate incentives to obtain a better price. Consequently, instead of calculating a deficiency (or surplus) based on the actual net proceeds, the deficiency (or surplus) would be calculated based on the proceeds that would have been received in a disposition to person other than the secured party, a person related to the secured party, or a secondary obligor.

j. **Consumer Goods, Consumer-Goods Transactions, and Consumer Transactions.** This Article (including the accompanying conforming revisions (see Appendix I)) includes several special rules for "consumer goods," "consumer transactions," and "consumer-goods transactions." Each term is defined in Section 9-102.

(i) Revised Sections 2-502 and 2-716 provide a buyer of consumer goods with enhanced rights to possession of the goods, thereby accelerating the opportunity to achieve "buyer in ordinary course of business" status under Section 1-201.

(ii) Section 9-103(e) (allocation of payments for determining extent of purchase-money status), (f) (purchase-money status not affected by cross-collateralization, refinancing, restructuring, or the like), and (g) (secured party has burden of establishing extent of purchase-money status) do not apply to consumer-goods transactions. Sections 9-103 also provides that the limitation of those provisions to transactions other than consumer-goods transactions leaves to the

courts the proper rules for consumer-goods transactions and prohibits the courts from drawing inferences from that limitation.

(iii) Section 9-108 provides that in a consumer transaction a description of consumer goods, a security entitlement, securities account, or commodity account "only by [UCC-defined] type of collateral" is not a sufficient collateral description in a security agreement.

(iv) Sections 9-403 and 9-404 make effective the Federal Trade Commission's anti-holder-in-due-course rule (when applicable), 16 C.F.R. Part 433, even in the absence of the required legend.

(v) The 10-day safe-harbor for notification of a disposition provided by Section 9-612 does not apply in a consumer transaction.

(vi) Section 9-613 (contents and form of notice of disposition) does not apply to a consumer-goods transaction.

(vii) Section 9-614 contains special requirements for the contents of a notification of disposition and a safe-harbor, "plain English" form of notification, for consumer-goods transactions.

(viii) Section 9-616 requires a secured party in a consumer-goods transaction to provide a debtor with a notification of how it calculated a deficiency at the time it first undertakes to collect a deficiency.

(ix) Section 9-620 prohibits partial strict foreclosure with respect to consumer goods collateral and, unless the debtor agrees to waive the requirement in an authenticated record after default, in certain cases requires the secured party to dispose of consumer goods collateral which has been repossessed.

(x) Section 9-626 ("rebuttable presumption" rule) does not apply to a consumer transaction. Section 9-626 also provides that its limitation to transactions other than consumer transactions leaves to the courts the proper rules for consumer transactions and prohibits the courts from drawing inferences from that limitation.

k. **Good Faith.** Section 9-102 contains a new definition of "good faith" that includes not only "honesty in fact" but also "the observance of reasonable commercial standards of fair dealing." The definition is similar to the ones adopted in connection with other, recently completed revisions of the UCC.