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AN HISTORICAL OVERVIEW OF UCC ARTICLE 9

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If Article 9 of the Uniform Commercial Code were a computer code the present text of the article would be identified as version 3.1.¹ First adopted by its co-sponsors -- the National Conference of Commissioners on Uniform State Laws (NCCUSL)² and the American Law Institute (ALI)³ -- in 1951 (version 1.0) and modified significantly in 1972 (version 2.0), the official text was thoroughly overhauled in 1998 and promulgated in 1999 (version 3.0). Since 1999 there have been several patches, most importantly in 2010 (version 3.1). As of July 2015, all states⁴ have enacted the official text as modified in 2010, albeit with a number of relatively minor non-uniform amendments introduced by individual states.

This chapter adds flesh to this skeletal sketch of the evolution of UCC Article 9. The chapter first surveys the landscape of pre-Code secured transactions law as perceived by the drafters of Article 9 (A). It then describes the drafting of the first official text of Article 9 between 1947 and 1951 (B). The chapter goes on to identify developments between this first official text and the appointment in 1990 of a study committee to consider revision of Article 9 (C) and to report on the drafting of the 1999 official text and subsequent modifications (D). The chapter concludes with a summary of major themes running through the history traced in the preceding parts (E). Readers interested in finding original materials on which the chapter is based will find sources in the appendix to this chapter.

A PRE-ARTICLE 9 SECURITY LAW

Writing in 1947, Karl Llewellyn, the Chief Reporter of the Uniform Commercial Code project,

¹ The latest official edition of Article 9 was published in September 2014. *Uniform Commercial Code: Official Text and Comments* (2014-2015 edn) (Thomson Reuters, 2014).

² The National Conference of Commissioners on Uniform State Laws (now known unofficially as the Uniform Law Commission) is a body of commissioners appointed by states to draft and promote uniform state legislation. The Commission maintains a website (www.uniformlawcommission.com/) which includes a description of the organization, the texts of uniform laws, and information about current projects. For a history of the Commission, see R A Stein, *Forming a More Perfect Union: A History of the Uniform Law Commission* (Charlottesville, Virginia, Lexis/Nexis, 2013) (available in digital form on the Commission's website). Chapter 5 traces the evolution of the UCC.

³ The American Law Institute is a non-governmental body whose members are prominent lawyers, judges, and academics. The Institute, founded in 1923, is known principally for its Restatements of the Law. The Institute maintains a website (www.ali.org) which includes a description of its creation, the organization and current projects. Unlike NCCUSL, the ALI is tax-exempt and therefore prohibited from advocating adoption of legislation.

⁴ Article 9 is also the law in the District of Columbia and non-state territories, such as Puerto Rico and the Virgin Islands. Where applicable (eg, when determining the rights and remedies of federal lending agencies), federal common law adopts the text of Article 9 in the absence of special federal concerns. See eg *United States v Kimbell Foods, Inc.*, 440 US 715 (1979).

listed the complex array of security devices then recognized in the United States:

the chattel mortgage, the conditional sale, the pledge of documents of title with its now rather well developed "field warehouse" variant; there is the trust receipt; there are the two rather different types of assignment of contract rights: that of accounts receivable in bloc and that of a single executory production contract; there is the bailment variation of the sale on installments, familiar especially in railroad equipment financing as "the Pennsylvania plan"; there is the true factor's (ie, selling agent's) possessory lien, and the banker-"factor's" statutory lien on the New York model.⁵

Grant Gilmore, an associate reporter for the original Article 9 and later historian of pre-Code law and Article 9, described these devices collectively as resembling 'the obscure wood in which Dante once discovered the gates of hell.'⁶

Complexity, if not obscurity, was enhanced by the fact that the law governing these devices was non-uniform state law – state law because it was assumed that the federal constitution did not extend federal power to the law of property. This state law was judge-made law, statutory law or both, depending on the security device. Judges were often hostile to the claims of creditors alleging security. In those states that enacted legislation, the legislation addressed specific security devices, often requiring registration in separate public registries, and did not cover all possible issues even for a single device.

There were attempts to provide uniformity both by uniform laws and by non-binding restatements of the common law of security. NCCUSL had approved uniform statutes for several security devices – conditional sales (1918), chattel mortgages (1926), and trust receipts (1933) – but few of the 48 states and territories had enacted these statutes.⁷ Attempts at restating security law were no more successful. In 1941 the ALI published a Restatement of Security, the last component of its Restatement of the Law project. The Restatement, however, covered only the law of pledges, liens and suretyship. As the Introduction to the volume states, the Institute's object in preparing the restatement was 'to present an orderly statement of those basic or especially important subjects of the general common law which have not been reformulated and codified in uniform statutes or which for various reasons are probably not now susceptible of useful restatement.'⁸ In other words, the Restatement expressly excluded from its coverage chattel mortgages, conditional sales, trust receipts and security interests in land.⁹

⁵ K N Llewellyn, 'Problems of Codifying Security Law' (1948) 13 *Law & Contemporary Problems* 687, 687.

⁶ G Gilmore, *Secured Transactions* (Boston, Little Brown & Co., 1964) I, 27. The first eight chapters of Gilmore's two-volume treatise describe the pre-Code devices. Elsewhere in the treatise, Gilmore contrasted the complexity of US security law with the simpler legal solutions found in English law. The reasons for the divergent development, however, he left to 'the patient labors of the historians.' At I, 25-26.

⁷ Twelve states enacted the Uniform Conditional Sales Act, only one enacted the Uniform Chattel Mortgage Act and thirty-four ultimately enacted the Uniform Trust Receipts Act (1933). The Uniform Chattel Mortgage was withdrawn by NCCUSL just as the UCC project began, while the other two acts were withdrawn in 1952.

⁸ W D Lewis, 'Introduction' in American Law Institute, *Restatement of the Law of Security* vii (1941).

⁹ Note, "Restatement of Security" in *Restatement of the Law of Security* 1-2.

The US Supreme Court played only a peripheral role in providing some order because of limits on its jurisdiction over disputes governed by state law. Several of its decisions did, however, have an impact on practice. The most notorious of these was Justice Brandeis' opinion in *Benedict v Ratner*¹⁰ holding that the interest of a creditor to whom receivables had been assigned was a fraudulent transfer under New York law and therefore voidable by a bankruptcy trustee. The transfer was fraudulent because the creditor had not exercised sufficient control over the debtor's collection and subsequent use of the proceeds. Rather than discouraging receivables financing, however, the decision encouraged financiers to develop control techniques that would avoid the fraudulent transfer trap.

When reviewing this pre-Article 9 history Grant Gilmore concluded that judicial distrust of security interests had encouraged the development of many of these different security devices. Noting that a legal device is 'a gimmick for getting around some prohibition imposed by the substantive law,' Gilmore argued that the security devices were needed as face-saving ways to overcome judicial hostility to enforcing security rights of secured creditors.¹¹ As a consequence, despite judicial hostility, by 1940 creditors could obtain by means of one or another device a security interest in most of a debtor's present and future personal property.¹² 'In a sense,' Gilmore wrote, 'the unified structure of personal property security law had already been built: all that remained was to knock down the scaffolding which had been a temporary necessity during construction. Article 9 is not so much a new start or a fresh approach as it is a reflection of work long since accomplished.'¹³ The scaffolding, however, had led to a cadre of lawyers with specialized knowledge of the formalities required to create a valid interest, especially in inventory and receivables financing. The drafters of UCC Article 9 not only had to reveal the underlying structure but also overcome the resistance of a specialist bar.

B THE FIRST OFFICIAL TEXT

(i) The proposed Uniform Commercial Code

The idea of drafting a Uniform Commercial Code can be traced to 1940. At the end of his presidential address to the 1940 annual meeting of NCCUSL, William A Schnader¹⁴ proposed the drafting of such a Uniform Commercial Code. Although uniform commercial laws – negotiable instruments (1896), sales (1906), warehouse receipts (1906), bills of lading (1909), stock transfer (1909), conditional sales (1918), trust receipts (1933) – were the most successful of the NCCUSL's products, he argued that '[t]here does not seem to be the slightest excuse for the failure to have all of these acts universally adopted.'¹⁵ Perhaps, he suggested, if the prior uniform

¹⁰ *Benedict v Ratner*, 268 US 353 (1925).

¹¹ G Gilmore, 'Security Law, Formalism, and Article 9' (1968) 47 *Nebraska Law Review* 659, 660.

¹² G Gilmore, *Secured Transactions*, I, 288-290.

¹³ At I, 290.

¹⁴ Schnader ("General Schnader" because he had been Attorney General of Pennsylvania) was at the time an officer of both NCCUSL and the ALI. This proved to be extremely helpful when he sought co-sponsorship from the ALI. He remained active in the promotion of the UCC until his death in 1968. See W A Schnader, 'A Short History of the Preparation and Enactment of the Uniform Commercial Code' (1967) 22 *University of Miami Law Review* 1.

¹⁵ *Handbook of the NCCUSL and Proceedings of the Fiftieth Annual Conference* (Philadelphia, 1940) 35, 42.

commercial laws were packaged together, states might buy the package in a single act without having to enact each law separately. Such a combined text would eliminate inconsistencies between prior uniform acts, delete obsolete provisions and bring the laws up to date.¹⁶ Among the reasons Schnader may have had for recommending a commercial code, however, there was no suggestion that banks, finance companies, sellers on credit, their legal advisers or lawyers generally demanded wholesale reform of the law governing security devices.

Schnader enlisted Karl Llewellyn as Chief Reporter.¹⁷ Llewellyn, then a law professor at Columbia Law School, had been a uniform law commissioner since 1926 and by 1940 was chair of the Commercial Law Section of the NCCUSL. Known in academic circles for his Realist jurisprudence and for his publications analyzing the law of sales, Llewellyn had accumulated experience drafting legislative texts and knowledge of security devices. He cut his teeth on a Uniform Chattel Mortgage Act, which was withdrawn after only one state had enacted it, but he went on to draft a Uniform Trust Receipts Act, which by 1940 was proving popular despite its complexity.

Llewellyn promptly began drafting a substantial revision of the 1906 Uniform Sales Act. Schnader in the meantime led a successful campaign to persuade the ALI to participate in the preparation of the revised sales law as a possible title in the proposed Code project. In 1944 NCCUSL and the ALI approved a proposed final draft of the Revised Uniform Sales Act and the ALI, having finished its Restatement project, debated whether to continue with the Commercial Code project or to dissolve. The ALI decided to continue.

(ii) The initial working plan

On 1 December 1944 the NCCUSL and the ALI concluded a formal co-operation agreement with a tentative table of contents, a five-year timetable and a statement about how the work was to be organized.¹⁸ An editorial board of five – two representatives from each body and the ALI Director as chair – was appointed to oversee the project. Llewellyn was appointed Chief Reporter and Soia Mentschikoff¹⁹ the Associate Chief Reporter. Llewellyn was given a free hand to pick associate reporters for each topic. In the case of the ‘chattel security’ chapter he selected two young professors, Alison Dunham²⁰ and Grant Gilmore.²¹ They brought research skills,

¹⁶ At 58.

¹⁷ On Llewellyn, see W Twining, *Karl Llewellyn and the Realist Movement* (1st edn 1973; Cambridge University Press, 2nd edn 2014). Chapters 11-12 set out an excellent history of the drafting of the first official text of the UCC.

¹⁸ For the text of the agreement between the ALI and NCCUSL, see ALI, ‘[Annual] Report of William Draper Lewis, Director’ (1946). For a fuller history leading up to the agreement, see ‘Report of the Committee on Cooperation with the American Law Institute in the Preparation of a Commercial Code’ *Handbook of the NCCUSL and Proceedings of the Fifty-fourth Annual Conference* (Chicago, 1944) 143-171.

¹⁹ Soia Mentschikoff had been Llewellyn’s research assistant at Columbia Law School and she later became his wife. For her reflections on drafting the UCC, see ‘Reflections of a Drafter: Soia Mentschikoff’ (1982) 43 *Ohio State Law Review* 537.

²⁰ ‘Reflections of a Drafter: Allison Dunham’ (1982) 43 *Ohio State Law Review* 569. Dunham later became the Executive Director of NCCUSL and was draftsman of the unsuccessful Uniform Land Transactions Act which attempted to extend Article 9 principles to real property transactions.

knowledge of case law and fresh eyes to the subject but neither had practical experience with secured financing. A small group of ‘advisors’ were appointed to advise the reporters as to the substance and the form of the draft.

Drafts were to go through four stages, the first three of which were set out in the ALI-NCCUSL agreement. Review by the small group of advisers was the first stage. The Council of the ALI and the relevant Section of NCCUSL would then examine the text. If they approved, the draft would be submitted to the entire membership of the two sponsors for adoption. There was, in addition, an implicit fourth stage: approval by the House of Delegates of the American Bar Association (ABA).²² By tradition,²³ the president of NCCUSL reported annually on the work of NCCUSL and uniform acts were submitted to the ABA House of Delegates for endorsement.

It was understood that Llewellyn and his associates turn to security devices only after completing work on the other parts of the Code. This sequence was deliberate. As Llewellyn wrote in a 1943 memorandum reviewing possible topics to be included in a commercial code:

no field of the commercial code will elicit as much battle or political objection as the chattel security field. This portion of the code, though materially simpler to do in adequate fashion, thus requires to be postponed until after the preceding chapters have been taken care of. It may then be hoped that the prestige derived from the earlier work will carry weight in regard to the more controversial.²⁴

A later memorandum identified as certain to cause political difficulty a single-type of purchase-money and book account financing, while auto title-certificate and certain chattel mortgages would probably cause political difficulty.²⁵ His experience as draftsman of the uniform chattel mortgage and trust receipts acts no doubt informed this assessment.

(iii) Drafting the Secured Transactions chapter

Unlike Schnader, who spoke as if it would be a simple task to collate the existing texts of the uniform commercial acts, Llewellyn returned again and again to the issue of what should go into a commercial code. With respect to a chapter on ‘chattel security’ he wrote at the end of 1943:

²¹ Descriptions of Gilmore’s reflections on his experience as a draftsman are scattered throughout his many publications. See eg G Gilmore, *Secured Transactions*, I, 290-294; G Gilmore, ‘[Tribute to] Homer Kripke’ (1981) 56 *New York University Law Review* 8; G Gilmore, ‘The Good Faith Purchase Idea and The Uniform Commercial Code: Confessions of a Repentant Draftsman’ (1981) 15 *Georgia Law Review* 605.

²² The American Bar Association is a national voluntary membership organization for lawyers. As of 2015 it has approximately 400,000 members. The ABA maintains a website (www.americanbar.org) with information about its history and goals. From its creation in 1878, the ABA has had as one of its goals the promotion of uniform law. NCCUSL was a spin off of the ABA. For many years the ABA provided funds to NCCUSL and meetings of NCCUSL were held in conjunction with the annual meeting of the ABA.

²³ K Patchel, ‘Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code’ (1993) 78 *Minnesota Law Review* 83, 88-91.

²⁴ K Llewellyn, ‘Commercial Code, Sketch of Prospective Subject Matter (Prepared for W.E. Stanley October 12th, 1943)’ *Llewellyn Papers* J.II.1.b at 5.

²⁵ K Llewellyn, ‘Needed to complete what can fairly be called A COMMERCIAL CODE, with parentheses indicating possible additional material’ (March 7, 1944) *Llewellyn Papers* J.VI.1.c at 1-2.

The Code plan, as thus far developed, looks to the production of a complete battery of security devices covering every needed aspect of finance; but in general the plan looks to providing only a single device to fill any particular type of need. For example, purchase-money security in sales of goods seems unwisely left open to such three alternative forms as conditional sale, bailment-lease, and purchase-money chattel mortgage. One basic form, left properly flexible, is enough; this also provides a much clearer and simpler body of law.²⁶

Under this plan each segment of the world of finance would be examined to determine what security device would be most appropriate.

Llewellyn's plan served as the starting point when work began on the 'chattel security' chapter at the end of 1947. Tentative Draft 1 consisted of a Part III devoted to inventory financing.²⁷ The text was promptly challenged. On reading this draft, Homer Kripke, who was then assistant to the general counsel of CIT Financial Corporation, thought the draft misguided. As he wrote later,

The draftsmen in the beginning were overly impressed with the economic fact that inventory flows naturally into receivables and that both inventory and receivables constitute the basic working capital of the merchant. By a series of definitions they, therefore, tried to assimilate receivables into inventory for legal purposes. The resulting drafts failed to take into account the fact that many of the problems of receivables relate to the *assignment* thereof, and that these assignment problems involve three parties: the merchant, the buyer of the goods, and the assignee of the buyer's obligation. Inventory financing, on the other hand, involves only a two-party relationship between the merchant and his creditor. Moreover, there is little homogeneity between the problems of the goods on the shelf, the 30-day unsecured receivable, and the long-term secured installment receivable. The drafts constructed on this basis were wholly unworkable and the draftsmen were commendably quick so to concede.²⁸

Kripke sought an interview with Llewellyn. They met. Llewellyn listened, conceded error and promptly took on Kripke to advise on commercial finance practices.²⁹

The inventory financing provisions were revised but work continued to focus on a functional approach. By May 1949 the text included eight 'parts': short title and general provisions; pledge; inventory and accounts receivable financing; equipment financing; agricultural financing; consumer's goods financing; bulk sales/bulk transfers; and vehicle liens.³⁰ When, however, the text was presented that May to a joint meeting of the ALI and NCCUSL, the members voted to

²⁶ K Llewellyn, 'Uniform Commercial Code Project: Scope and General Plan (11-22-43)' *Llewellyn Papers* J.V.1.e at 4. A subheading to this document says 'Statement prepared for those who ask for more detailed information.'

²⁷ Article 7, group 3, *Tentative Draft 1* (February 24, 1948) (Confidential). The numbering of the Article was subsequently changed to Article 9 before the co-sponsors finally approved the Code.

²⁸ H Kripke, 'The Modernization of Commercial Security under the Uniform Commercial Code' (1951) 16 *Law & Contemporary Problems* 183, 184-185.

²⁹ 'Reflections of a Drafter: Homer Kripke' (1982) 43 *Ohio State Law Review* 577, 578.

³⁰ American Law Institute & National Conference of Commissioners on Uniform State Laws, *Uniform Commercial Code: May 1949 draft*.

remit this text to the reporters for further work.³¹

At the May 1949 meeting Dunham suggested the reporters might abandon the ‘functional’ approach.

During the drafting it is becoming clearer to us that we have more and more sections in common that run across all of the transactions than we thought we originally would have, and over the summer we propose, if we can do so, to consider the possibility of instead of having six separate types of security interest based on function, to see whether we cannot put it together and have one set of rules that govern all security transactions with only limited numbers of sections defining special rules for a mortgage on stock in trade, for example, or a special rule for a consumer borrowing money to buy furniture.’³²

Over the summer of 1949 Dunham and Gilmore proceeded to reorganize the text so that the draft approved by the next joint meeting of the sponsors closely resembles the organisation of latest official text.³³

Organisation of Article 9 may have been resolved satisfactorily, but agreement on substance continued to elude the reporters. The secured transactions provisions faced two principal objections: they were too ‘leftist’ and they needed technical revision.³⁴ Critics cited the regulatory provisions in the part on financing consumer goods as the principal example of the reporters’ attempt to introduce social engineering. These provisions were designed to protect consumer debtors from abuse. Creditors would be required, for example, to disclose terms in a way that consumer debtors could make comparisons between creditors. Controversy over these provisions was, reports Gilmore, “one of the most violent in the history of the Code’s drafting.”³⁵ The objection that such controversial provisions would delay adoption of the Code, if not kill the project altogether, ultimately won the day and these provisions were withdrawn.³⁶

As for technical deficiencies, Llewellyn and the reporters met the criticism by listening to practitioners and by being willing to modify the text. A 1951 ABA Section of Corporation, Banking and Mercantile Law report noted ‘some tendency of the reporters (drawn exclusively from law school faculties) to adhere to the side of theory as distinguished from the hard realities of actual practice’ but added that this tendency was offset by the willingness of the reporters ‘to

³¹ A transcript of the meeting may be found in the three volumes of the *Proceedings of the twenty-sixth annual meeting of the American Law Institute in joint session with the National Conference of Commissioners on Uniform State Laws* (1949).

³² *Proceedings of the twenty-sixth annual meeting* I, 93.

³³ Years later Dunham wrote that Gilmore and he were teaching summer school in Chicago. ‘Neither of our families were present and we agreed that over the weekend we would come up with a draft. This was the 4th of July holiday weekend and it was the hottest weekend in the Chicago area in 1948 or ‘49 – I’ve forgotten the year – that was then imaginable. And we assembled in the Northwestern Law School all closed up for the holiday and went up on the third floor, took all of our clothes off, except our underwear, and produced a hot weather draft that survived thereafter.’ ‘Reflections of a Drafter: Allison Dunham’ (1982) 43 *Ohio State Law Review* 569, 569.

³⁴ A R Kamp, ‘Downtown Code: A History of the Uniform Commercial Code: 1949-1954’ (2001) 49 *Buffalo Law Review* 359, 435-448 (reporting criticism of secured transactions provisions).

³⁵ G Gilmore, *Secured Transactions*, I, 293.

³⁶ ‘Reflections of a Drafter: Homer Kripke’ (1982) 43 *Ohio State Law Review* 577, 582-583.

seek and listen to outside trade, industry and legal specialists in various fields (many of whom were furnished by this Section) and to adopt many of the suggestions offered by these specialists.’³⁷ A year earlier, however, the ABA Committee on the Proposed Commercial Code, while approving the attempt of the secured transaction chapter to rationalize the patchwork of existing security devices, concluded that the text ‘needs a great deal of technical revision as well as further consideration of some of the underlying concepts.’³⁸

Continuous technical revision and rethinking delayed presentation of a final text. Schnader was dismayed, complaining in 1950 to the Director of the ALI that Dunham and Gilmore were amateurs with no facility for the work. ‘It seems to me to be just inexcusable for so many different drafts to have gone out on that article. It seems that nothing that is done is given enough thought to give it a semblance of finality.’³⁹ Schnader’s frustration was no doubt related to the fact that the ALI and NCCUSL had planned to adopt the final text of the Code in 1950 and that money raised to support work on the Code was running out. When asked in 1950 by the Council of the ABA Section of Corporation, Banking and Mercantile Law to delay adoption for two years to allow further study, the co-sponsors pleaded the lack of funds but agreed to postpone adoption for one year. They also agreed to enlarge the size of the editorial board from 5 to 15 members and charged it with gathering input. The Enlarged Editorial Board itself convened a public meeting in New York City in January 1951 to listen to comments on the draft Code. In the light of these comments the Board approved changes to the text and the co-sponsors approved the amended text without ‘official comments’ in May 1951. NCCUSL and the ALI reaffirmed their approval in September. Less than a week later the ABA House of Delegates voted to approve the Uniform Commercial Code, including Article 9. ‘Official Comments’ which accompany the text of each code section were not ready so that it was not until 1952 that the first official text and comments edition was published.⁴⁰

(iii) Contributions of the original text of Article 9

When the ABA House of Delegates voted to approve the Code in September 1951 it had before it a favorable report from the Council of the Section of Corporation, Banking and Mercantile Law. The report stated that Article 9 integrated prior statutes, filled gaps in the law, stated new principles and codified common law and commercial practices. This, the report concluded, was ‘badly needed.’⁴¹ This judgment is echoed in the Official Comment to s 9-101.

Several contributions stand out. The integration of the multiple security devices into a unitary ‘security interest’ with common rules on creation, validity, perfection, priority, and enforcement was a major achievement. Prior security devices, such as chattel mortgages and conditional sales, ceased to be treated separately. Terminology drawn from these devices could continue to be used but terms were to be characterized using Code concepts and terms (s 9-102 (1)(a) & (2)).

³⁷ ‘Report of the Council to the House of Delegates on the Proposed Uniform Commercial Code’ (1951-1952) 7 *Business Lawyer* 2, 5.

³⁸ ‘Report of the Committee on the Proposed Commercial Code’ (1949-1950) 5 *Business Lawyer* 142, 149.

³⁹ Letter of 25 August 1950 from Schnader to Goodrich quoted in Kamp (n 34) at 344 n 144.

⁴⁰ *Uniform Commercial Code: Official Draft* (Text and Comments edn) (ALI & NCCUSL, 1952).

⁴¹ ‘Report of the Council to the House of Delegates on the Proposed Uniform Commercial Code’ (1951-1952) 7 *Business Lawyer* 2, 5.

Separate filing offices for the different devices were no longer necessary. Filing a short notice (a ‘financing statement’) of a security interest was the principal means of giving public notice of a security interest in most types of collateral. Individual states retained flexibility when organizing filing offices and filling in details on the their operation.

The text also validates the ‘floating lien.’⁴² It does so by a variety of separate provisions that together permit a secured creditor to take a perfected⁴³ security interest in all a debtor’s present and future assets to secure the debtor’s present obligations to the creditor as well as future advances made by the creditor. Thus, a security agreement may provide that a security interest attaches to personal property when the property is acquired and that the obligation secured includes the creditor’s future advances. Article 9 itself provides that the security interest automatically attaches to proceeds received on disposition of collateral. The Article also authorizes a debtor to use or dispose of collateral, such as accounts and inventory, without having to account to its secured creditor, thus rejecting the rule in *Benedict v Ratner*. Notice filing allows a single filed financing statement to be effective as to subsequent transactions. Rules on the priorities of competing claimants to collateral are clarified by making the first to file or perfect priority; buyers of collateral in the ordinary course of business take free of security interests.

An Official Comment⁴⁴ explained that by recognizing a floating lien Article 9 was merely recognizing ‘an existing state of things.’ By 1950 it was possible in most states for a borrower to give a lien on all its present and future assets by the use of various security devices.⁴⁵ Although noting that there ‘have no doubt been sufficient economic reasons’ to reject hostility to the floating lien, the comment expressed regret. Earlier judicial prejudice against floating liens protected borrowers and provided unsecured creditors a cushion of assets free from secured claims – protection, the comment says, that has much to recommend itself. Article 9 ‘decisively’ rejected the premise underlying this prejudice ‘not on the ground that it was wrong in policy but on the ground that it has not been effective.’

C THE INTERIM PERIOD (1952-1990)

(i) Further study and amendment of the ‘final’ text⁴⁶

The decade following approval of the 1952 official text saw the ‘political arm’ of the UCC

⁴² Although both the UCC lien and the English charge ‘float’ the two devices are conceptually distinct. The UCC floating lien attaches to collateral existing at the time the security interest is created and to after-acquired property when the debtor has rights in that property. The drafters were aware of the difference between the devices. P F Coogan, ‘Article 9 of the Uniform Commercial Code: Priorities among Secured Creditors and the “Floating Lien”’ (1959) 72 *Harvard Law Review* 838, 839 n 2.

⁴³ A security interest is ‘perfected’ when public notice of the interest is given, usually by filing a short notice in a public file. In most cases a perfected interest will prevail over subsequent unsecured creditors, the trustee in bankruptcy, and later security interests. A subsequent buyer of the

⁴⁴ Official Comment 2 to s 9-204 (UCC 1952).

⁴⁵ See Coogan (n 42) 850 (illustrating how a borrower could do so under pre-Code Massachusetts law).

⁴⁶ For the history of this early period, see R Braucher, ‘The Legislative History of the Uniform Commercial Code’ (1958) 58 *Columbia Law Review* 798.

sponsors⁴⁷ promote the code in key state legislatures and the reactivation of an enlarged Editorial Board to review objections to various provisions of the code. Critiques of the text came from all sides as it came under intense scrutiny by state legislative bodies, state bar associations, lawyers, and academics. The ABA continued to suggest modifications and to monitor the progress of the Code in state legislatures.⁴⁸

Schnader, as chair of NCCUSL's Commercial Code committee, led the campaign for enactment. He submitted the code to the Pennsylvania legislature, which in 1953 became the first state to enact the UCC. Other states, however, balked. To Schnader's disappointment, Governor Dewey of New York decided to refer the code to the New York Law Revision Commission for review. The New York Commission began a three-year review. It solicited comments, held public hearings, and commissioned studies on each code Article. The Commission's final report in February 1956 concluded that the UCC was 'not satisfactory without comprehensive re-examination and revision in the light of all critical comment obtainable.'⁴⁹ Article 9, however, was recognized as 'a significant reform of the law of personal property security.' The Commission believed that the Article's approach 'is sound in theory and satisfactorily developed in most of its elements.'⁵⁰

While the New York Commission conducted its review, the Enlarged Editorial Board itself began responding to objections by proposing modifications of its own. The Board appointed subcommittees for each Article of the Code to analyze these objections. Changes and modifications recommended by the Editorial Board were approved by the ALI and NCCUSL in 1953 and a Supplement to the UCC was published in 1955. When the New York Commission's report appeared in early 1956 the Enlarged Editorial Board responded promptly, approving many but not all that report's criticisms. There followed the publication in quick succession of almost annual UCC official texts, culminating in the 1962 edition.⁵¹

Much of this activity was in response to increasing interest in the UCC in state legislatures. For despite the negative response in New York, other states began to adopt the code. Massachusetts acted in 1957, followed by a growing trickle of states, until in 1962 the UCC was the law in eighteen states. These states, however, adopted the code with numerous non-uniform amendments, many of them to Article 9.

(ii) Non-uniform amendments and the Permanent Editorial Board

Concerned with proliferating non-uniform amendments, NCCUSL and the ALI decided to make

⁴⁷ Because the ALI could not engage in political activity, NCCUSL's Commercial Code committee organized the approach to state legislatures.

⁴⁸ Walter Malcolm, who had been chair since 1946 of the Committee on Commercial Code in the Section of Corporation, Banking and Mercantile Law, was appointed to the Enlarged Editorial Board in 1954. W D Malcolm, 'The Uniform Commercial Code: Current Status and Future Prospects' (1955) 10 *Business Lawyer* 3

⁴⁹ 'Report relating to the Uniform Commercial Code' 1956 *Report of the New York Law Revision Commission* 68.

⁵⁰ At 60.

⁵¹ For 1952-1962 texts see *Uniform Commercial Code Drafts* vols XV-XXIII (E S Kelly compiler) (Littleton, Colorado, Fred B Rothman & Co, 1984).

the Editorial Board permanent. They succeeded in their solicitation of funds to endow a Permanent Editorial Board for the Uniform Commercial Code. A formal agreement was drawn up in 1961 between the co-sponsors.⁵² The PEB was 'to assist in attaining and maintaining uniformity ... and to this end to approve a minimum number of amendments to the Code.' The Board was to propose amendments when Code sections proved unworkable, court decisions raised doubts about their correct interpretation, or new commercial practices made sections obsolete or required new provisions.⁵³ The ALI Director was to serve as chair and each co-sponsor was to select five members, with a majority of selected members to come from states that had enacted the code.

In several subsequent reports, the Permanent Editorial Board proceeded to analyze each unofficial amendment to the code, adopting some as uniform sections and rejecting others with explanations for doing so.⁵⁴ At its meeting in November 1966 the PEB noted that states had enacted 337 non-uniform, non-official amendments to Article 9, with 47 of its 54 sections amended.⁵⁵ By 1966 virtually all the states had enacted the UCC. Without the fear of inhibiting states from adopting the code, the PEB concluded that it would be appropriate to restudy Article 9 'in depth.'

(iii) Substantial review of Article 9 (1966-1972)

To carry out its 'in depth' restudy of Article 9 the Permanent Editorial Board appointed an Article 9 Review Committee in late 1966. Herbert Wechsler, then chairman of the Board, chaired the study committee. The ten other committee members were a mixture of judges, practicing lawyers and academics; all had extensive experience with Article 9 in one capacity or another. There were also familiar faces. Homer Kripke was named Associate Reporter and effectively became the principal draftsman when the Reporter, Robert Braucher, was appointed to the bench in Massachusetts. Grant Gilmore and Peter Coogan served as the two consultants.⁵⁶ For those who participated in drafting the original official text, this chance to revisit Article 9 was welcome. When they had published law review articles pointing out defects in the text Schnader had chastised them, saying that they should wait until all states had adopted the UCC.⁵⁷

Between 1967 and 1970 the review committee studied an array of troublesome topics: fixtures; crops and farm products; timber; oil, gas and minerals; intangibles, proceeds and priorities; conflict of laws; motor vehicles and related problems of perfection; matters of scope; filing; and default.⁵⁸ When evaluating whether modifications to the existing texts were necessary, the committee followed the cautious policies of the PEB itself. As the 'general comment' in the committee's final report explained:

⁵² Agreement dated August 5, 1961 between the ALI and NCCUSL, *Handbook of the NCCUSL and Proceedings of the Annual Conference Meeting in Its Seventieth Year* (Saint Louis, 1961) 168.

⁵³ At 169 ('Seventh' clause)

⁵⁴ PEB, *Report No. 1* (1962); *Report No. 2* (1964).

⁵⁵ PEB, *Report No. 3* (1966).

⁵⁶ 'Foreword' *Uniform Commercial Code: 1972 Official Text with Comments and Appendix showing 1972 Changes* (ALI & NCCUSL, 1972) xxxi-xxxiii.

⁵⁷ Kripke (n 29) at 581-582.

⁵⁸ The review committee's final report summarizes its recommendations with respect to these topics. PEB Review Committee for Article 9 of the Uniform Commercial Code, *Final Report* (April 25, 1971) 197-248.

The Reporters have reported to the Committee many instances in which the drafting could be improved for clarity or to answer questions that can be posed that are not now clearly answered. Yet the outstanding result of Article 9 in practice has been that it has been gratifyingly successful; that no errors with serious consequences have been disclosed; and that the demands for change have been in relatively narrow areas. The Committee has therefore felt that it is not its responsibility, consistent with the terms of creation of the Permanent Editorial Board, to seek perfection where the Code appears to be working satisfactorily without significant problems in practice, for to do so would run the risk of opening up still further problems.⁵⁹

Although it reviewed confidential drafts behind closed doors, the review committee published several draft reports⁶⁰ and participated in several public panel discussions⁶¹ before submitting its final report to the PEB. The Board in turn made recommendations to the ALI and NCCUSL, which approved the text published as the 1972 official text of the UCC. Of the amendments adopted, the most significant were the revised treatment of fixtures and the clarification of priority with respect to future advances and proceeds.⁶²

From the beginning, Article 9 covered security interests not only in personal property but also in goods attached to real property (described, as of 1956, as “fixtures”). Financiers of real estate transactions typically claim a mortgage interest not only in the real property but also in fixtures. Financiers of goods that become fixtures, on the other hand, want to enforce a security interest in these fixtures by removing them from the real property when a debtor defaults. Balancing these interests – and the interests of other claimants – proved difficult. The drafters’ very attempt to define what a ‘fixture’ is failed and the drafters ultimately incorporated the definition found in the real property law of the state in which that property is located. Real property law not being uniform among the different states, Article 9’s incorporation of state definitions of fixtures necessarily is not uniform.

The 1972 amendments⁶³ recognize the right of an Article 9 secured creditor to remove fixtures on compensating other creditors for any damage caused by the removal. At the same time mortgagees and other encumbrancers of the real estate were presumed to have priority in the absence of an Article 9 rule to the contrary. The amendments clarified priority among the different interests. An Article 9 creditor that filed a ‘fixture filing’ – notice of an Article 9 security interest in fixtures filed in the real estate records – was given priority over mortgagees and encumbrancers in specified circumstances. Other competing claimants, such as a creditor with a judicial lien and a bankruptcy trustee, were subordinate to an Article 9 secured creditor that had either made a fixture filing or had filed notice (a ‘financing statement’) in the personal property office designated by Article 9. To meet objections from mortgagees financing construction, the drafters crafted special rules giving them priority over all fixtures affixed during

⁵⁹ ‘General Comment on the Approach of the Review Committee for Article 9’ in PEB Review Committee, *Final Report* (April 25, 1971) 195.

⁶⁰ The committee’s confidential documents and reports may be found in digital form on the HeinOnline American Law Institute Library/Uniform Commercial Code database.

⁶¹ See eg ‘A Look at the Work of the Article 9 Review Committee: A Panel Discussion’ (1970) 26 *Business Lawyer* 307.

⁶² See generally P F Coogan, ‘The New Article 9’ (1973) 86 *Harvard Law Review* 477.

⁶³ Amendments were incorporated in UCC § 9-313 (1972 edn); see § 9-335 (2014-2015 edn).

construction. The resulting text of the amended Article 9 provision was necessarily complex and, if the transcript of a panel discussion is to be trusted, even the drafters were not fully satisfied with the final proposed amendments.⁶⁴

Experience with priority issues related to future advances and proceeds revealed gaps and ambiguities in the pre-1972 official text.⁶⁵ For example, there was no answer to the question whether a creditor with a security interest in a debtor's receivables would have priority over a later creditor that took a security interest in the debtor's inventory (i.e., collateral earlier in the business cycle). The 1972 amendments provided an answer: if the receivables financier duly filed a financing statement the financier would have priority over any subsequent creditor financing inventory. When addressing this and other ambiguities, the drafters drew upon business needs and practices.

(iv) Settling in (1972-1988)

The decade and a half that followed publication of the 1972 text was a period of settling in. No longer were the Article 9 provisions a novelty. Asset-based financing became commonplace for both financial institutions and borrowers. The 1972 amendments had addressed the most pressing issues that had led to non-uniform amendments, dubious judicial decisions, and uncertainties in practice. Although this period saw the beginnings of more sophisticated forms of financing, such as securitization, the text of Article 9 remained relatively stable between 1972 and 1988. Four developments, however, were significant.

(a) Security interests in investment securities

Although often studied in isolation, Article 9 is a part of a Commercial Code. This means not only that the general provisions of Article 1 apply to secured transactions but also that changes to other parts of the UCC may require amendments to Article 9. This was the case in 1977 when the ALI and NCCUSL amended Article 8 (Investment Securities). As the Article 9 Review Committee was meeting at the end of the 1960s, the share markets suffered from a 'paperwork crunch' because the physical transfer of share certificates could not keep up with the sale and purchase of shares. An ABA Committee on Stock Certificates and a PEB committee considering the implications of electronic data processing had separately studied the problem and recommended recognition of 'uncertificated securities'. After reviewing the reports of these committees, the PEB approved a draft text spelling out the legal rights and obligations of parties to dealings in such securities. The 1977 text amended Article 8, but recognizing that investment securities were often pledged the PEB also amended Article 9 to cross-reference relevant Article 8 provisions.⁶⁶

Market practice, however, took a different turn. Instead of becoming uncertificated, the vast majority of publicly traded certificated securities were immobilized by depositing certificates with 'warehouses'. Owners of these securities held securities entitlements against securities

⁶⁴ Panel discussion (n 61) at 312-320; see Coogan (n 62) at 483-505.

⁶⁵ See Coogan (n 62) at 505-518.

⁶⁶ For a brief history of the 1977 amendments, see 'Foreword' to *Uniform Commercial Code Official Text and Comments* (1978 edn).

intermediaries, such as clearing houses and brokers, which record these holdings in the owners' investment accounts on the intermediaries' books. To take into account this indirect holding system, the ALI and NCCUSL adopted a revised Article 8 in 1994 with consequential amendments to Article 9.⁶⁷ The subsequent revision of Article 9 itself completed the absorption into Article 9 of the rules governing security interests in investment property with appropriate cross-references to Article 8. The 1977 revision of Article 8 became, in other words, an example of premature codification.

(b) Bankruptcy Code

Just as one must read Article 9 in the context of the full text of the Uniform Commercial Code so one must consider Article 9 in the context of other laws that impinge on secured transactions.⁶⁸ By far the most important of these laws is the federal Bankruptcy Code. Under the federal constitution the U.S. Congress has the power to enact bankruptcy legislation and if it does so the bankruptcy law is the 'supreme law of the land,' thus overriding contrary state law.⁶⁹ At the time Article 9 was first drafted, the relevant bankruptcy law was the Bankruptcy Act of 1898. Given its age and despite numerous amendments, the Act included concepts and terminology that differed from Article 9. These differences raised concerns that Article 9 security interests might be voidable in a bankruptcy proceeding. Recodification of bankruptcy law in the 1978 Bankruptcy Code, resolved some but not all of these concerns.⁷⁰

Prior to 1978 doubts had been raised about whether a 'floating lien' could withstand challenge.⁷¹ A creditor's security interest attaches – ie, there is a transfer of a property interest – when, inter alia, the debtor acquires rights in collateral. Because inventory and receivables turn over in the ordinary course of business, the debtor transfers a property interest to the creditor as the debtor acquires new inventory items or receivables arise. Under the 1898 Act, transfers during a 'suspect' period (the four months immediately before commencement of bankruptcy proceedings) were void as preferential transfers. Were such transfers to a creditor with a floating lien over inventory or receivables therefore void? Although the floating lien survived several judicial challenges,⁷² it was thought desirable to amend the Bankruptcy Act. The National Bankruptcy

⁶⁷ *Uniform Commercial Code: Official Text with Comments* (1994 edn.). For a brief history of the evolution of Article 8, see 'Prefatory Note' to Article 8 in *Uniform Commercial Code: Official Text and Comments* (2014-2015 edn) (n 1) 672-675. Notwithstanding the focus of these amendments on the public market for investment property, a secured party may still perfect a security interest in an investment security by taking possession of a certificate. UCC §§ 9-313(a), 8-301.

⁶⁸ *United States Code*, Title 11. The relative priority of federal tax liens has also been of concern. *United States Code*, Title 26, § 6321. Until the lien is duly recorded in an office designated by the relevant state, the lien is subordinate to an Article 9 perfected security interest. Id § 6323(f). In 1978 NCCUSL adopted a Uniform Federal Lien Registration Act with registration provisions similar to those in real estate records and in UCC Article 9. Thirty-eight states have enacted the uniform act.

⁶⁹ *Constitution of the United States of America*, Art I, s 8, cl 4 (bankruptcy) and Art VI, cl 2 (federal legislation supreme law).

⁷⁰ Pub. L. No. 95-598, 92 Stat. 2549 (November 6, 1978). The Bankruptcy Code was modified significantly in 2005. Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005).

⁷¹ See generally P F Coogan, 'Article 9-An Agenda for the Next Decade' (1978) 87 *Yale Law Journal* 1012, 1019-125.

⁷² *DuBay v Williams*, 491 F.2d 1277 (9th Cir. 1969); *Grain Merchants v United Bank & Savings Co.* (7th Cir. 1969).

Conference⁷³ appointed Grant Gilmore as chair of a committee charged with rewriting the preferential transfer section. The committee recommended comparing the secured creditor's position at the start of the suspect period with its position at the commencement of bankruptcy proceedings: the creditor's interest would be void only to the extent its position had improved. This recommendation was subsequently incorporated into the 1978 Bankruptcy Code.⁷⁴

Other changes made by the 1978 Bankruptcy Code affected security interests – a stay of actions by a secured party to create or enforce a security interest became automatic on the commencement of a case under the Bankruptcy Code; the right to use collateral in a reorganization proceeding was enhanced – but in general bankruptcy law recognized property rights created under state law and protected the value of these rights. Just as important as these substantive changes, however, was the increased publication of bankruptcy court opinions, a development encouraged by rules regularizing the status and power of these courts. The number of opinions construing (and misconstruing) Article 9 increased significantly and ultimately led to calls for revision of Article 9.

(c) Academic analysis of secured credit and insolvency

Stimulated by the new Bankruptcy Code and by academic interest in the economic analysis of law in the late 1970s, a growing body of law review articles in this period examined the justification for secured transactions and priorities among creditors.⁷⁵ Most of the authors of these articles had little practical experience. Homer Kripke, who did have considerable experience, questioned the value of this theoretical literature.⁷⁶ The literature did, however, support calls at the end of the 1980s for a thorough review of Article 9.

(d) Revamping the Permanent Editorial Board

In 1986 NCCUSL and the ALI replaced their earlier agreement creating the Permanent Editorial Board with a more detailed agreement.⁷⁷ Recognizing the continuing contribution of the American Bar Association, the agreement expanded membership of the Board to include a non-voting representative of the ABA as an adviser and the possibility of inviting other interested groups to appoint non-voting representatives (para B.2).

⁷³ The National Bankruptcy Conference is a body of 60 leading U.S. bankruptcy judges, practitioners and scholars. Membership is by invitation only. Since the 1930s the NBC has assisted Congress with the drafting of bankruptcy legislation and the development of relevant bankruptcy policies.

⁷⁴ 11 *United States Code* § 547(c)(5).

⁷⁵ A small sampling of this literature includes T H Jackson & A T Kronman, 'Secured Financing and Priorities Among Creditors' (1979) 88 *Yale Law Journal* 1143; A Schwartz, 'Security Interests and Bankruptcy Priorities: A Review of Current Theories' (1981) 10 *Journal of Legal Studies* 1; J J White, 'Efficiency Justifications for Personal Property Security' (1984) 37 *Vanderbilt Law Review* 473; and R E Scott, 'A Relational Theory of Secured Financing,' (1986) 86 *Columbia Law Review* 901. These authors and others continued to refine analysis of secured transactions in the 1990s.

⁷⁶ H Kripke, 'Law and Economics: Measuring the Economic Effect of Commercial Law in a Vacuum of Fact' (1985) 133 *University of Pennsylvania Law Review* 929. Professors Jackson and Schwartz responded: T H Jackson & A Schwartz, 'Vacuum of Fact or Vacuum Theory: A Reply to Professor Kripke' (1985) 133 *University of Pennsylvania Law Review* 987.

⁷⁷ ALI, 64th *Annual Meeting Reports* (1987) 119. The 1986 agreement was revised in 1998. ALI, 79th *Annual Meeting Reports* (1988) 189.

The function of the PEB continued to be ‘to discourage amendments or additions to the Uniform Commercial Code not authorized pursuant to this agreement, to assist in attaining and maintaining uniformity in state statutes governing commercial transactions, and to monitor the law of commercial transactions for needed modernization or other improvement’ (para B.5). To carry out its function, the Board was given considerable leeway. A non-exhaustive list of steps it might take include (para B.5a-5e):

- a. making recommendations to the Institute and Conference for amendments, revisions or additions to the Uniform Commercial Code after studies conducted by the PEB upon its own motion or as suggestions by the American Bar Association or other groups indicate action is needed to correct unworkable provisions, to resolve divided interpretation of the law, to accommodate new or developing commercial practices, or to advance acceptance of a uniform commercial law, and thereafter commenting upon any drafting product;
- b. preparing and publishing supplemental Comments or Annotations to the Uniform Commercial Code and other articulations as appropriate to reflect the correct interpretation of the Code and issuing the same in a manner and at times best calculated to advance the uniformity and orderly development of commercial law; provided, however, that Annotations or Comments which suggest a substantial departure from an accepted interpretation of the Code shall first also be approved by the Executive Committees of the Conference and the Institute and if those bodies direct shall be circulated for suggestions by interested groups prior to their becoming final;⁷⁸
- c. monitoring significant case law and statutory developments and the course of commercial practices either itself or in cooperation with the American Bar Association or other groups to detect significant divisions of authority, problem areas of commercial law and practice, and non-uniform amendments, and devising recommendations or other methods to deal with these matters including the publication of reports commenting on one or more developments;
- d. monitoring developments in federal law preempting or otherwise affecting the state commercial law and devising recommendations or other methods to deal with the issues raised; and
- e. coordinating the proper relationship between statutory commercial law and case law developments impacting upon it in the area of products liability and elsewhere and taking appropriate actions to reconcile the issues.⁷⁹

⁷⁸ In March 1987 the PEB adopted a resolution to implement this paragraph. PEB Resolution on Purposes, Standards and Procedures for the Adoption of PEB Commentaries, *Uniform Commercial Code: Official Text and Comments* (2014-2015 edn) (n 1) 1115-16.

⁷⁹ The agreement was amended in 1998 to provide, *inter alia*, for the appointment of a research director whose duties include:

- (1) monitoring outside developments in technology, business practices, federal and state legislation that in any way may impact on or relate to the Code, international developments, and other matters considered relevant by the research director;
- (2) summarizing the same for the PEB at each meeting, along with (as required) recommendations to address the matters presented;
- (3) meeting with appropriate American Bar Association Committees, and other groups involved in matters concerning the Code at the direction of the PEB;
- (4) preparing drafts of and seeing through to completion PEB Commentaries, annual reports of the PEB, and such other matters as directed by the PEB;
- (5) receiving and, as directed by the chair of the PEB, acting on communications or requests to the PEB; and

The revamped Board promptly began to consider revising the Uniform Commercial Code as a whole. Work began on other parts of the Code⁸⁰ but ample reasons were cited for also considering revision of Article 9.

During the two decades since the [1967-1971] Review Committee's final report, the secured credit markets have seen continued growth and unprecedented innovation. In addition, many hundreds of judicial decisions applying Article 9 have been reported and a large volume of commentary on Article 9, both scholarly and practice-oriented, has emerged. Moreover, the enactment by Congress of the Bankruptcy Reform Act of 1978, which includes a new codification of bankruptcy law, has had a profound effect on secured transactions.⁸¹

The Board began revision on several fronts. It prepared 'Commentaries' analyzing the interpretation of specific legal issues, many of which arose under Article 9. Five of the first seven Commentaries, for example, addressed Article 9 issues.⁸² Typical is the issue analyzed by Commentary No. 7:

Secured party A and secured party B each has a perfected security interest in the same account, chattel paper, or general intangible, with A having priority over B. If the account debtor makes payment to secured party B, directly or through the debtor, may A recover the payment from B?

The Commentary discusses the issue and then sets out a conclusion, which it implements by amending the Official Comments published with the UCC black-letter text.⁸³

By late 1989, however, the Board concluded that a more thorough revision might be desirable and it appointed a study group to examine the matter.

D THE 1999 OFFICIAL TEXT

(i) The study group (1990-1992)

The Permanent Editorial Board appointed a study group in early 1990 to consider whether Article 9 should be amended.⁸⁴ William Burke, a prominent lawyer and ALI-appointed member of the PEB, chaired the 16-member group. To provide continuity with previous revision of Article 9,

(6) reporting to the PEB or a designated subcommittee of the PEB at such times and in such manner as specified by the PEB as to the above matters.

ALI, *79th Annual Meeting Reports* (1988) 189, 192.

⁸⁰ 'Foreword' *Uniform Commercial Code: Official Text – 1999* (ALI & NCCUSL, 1999) xiii.

⁸¹ 'Report of the Article 9 Study Committee of the Permanent Editorial Board for the Uniform Commercial Code' (Dec 1992) I, 2.

⁸² PEB Commentaries 1-7 (March 10, 1990), *Uniform Commercial Code: Official Text and Comments* (2014-2015 edn) 1114. Many of the Commentaries have been absorbed into subsequent revisions of the UCC Articles or amended to reflect these revised Articles. The texts of these Commentaries are reproduced in Appendix A of the 2014-2015 edition.

⁸³ PEB Commentary 7, *Uniform Commercial Code: Official Text and Comments* (2014-2015 edn) 1139-41. The 1999 revision supersedes the commentary by answering the scenario directly with specific priority rules. UCC §§ 9-330, 9-331 & 9-332.

⁸⁴ PEB Study Group UCC Article 9, *Report* (December 1, 1992) I, 3.

Homer Kripke was one of four advisers to the group. Professors Steve Harris and Charles Mooney, Jr, served as reporters.

The study group's primary task was to identify 'drafting imprecision, misinterpretations by the courts, gaps in scope and coverage, and the interaction of Article 9 with other articles of the UCC, with non-UCC state laws, and with an increasing number of federal laws and regulations.'⁸⁵ The review, however, was to be thorough, including both examination of Article 9 section by section and analysis of broad policy issues.

As a signal of how thorough the study was to be, the reporters circulated a 53-page list of preliminary issues at the beginning of the group's work in early 1990.⁸⁶ When listing questions that raised more basic questions of policy, the reporters suggested that explicitly asking and answering these questions would be useful because to do so would identify the group members' perspectives on policies and the role of the group. Even if the group spent little time discussing the questions in the abstract, they wrote, the questions might provide a useful backdrop for analysis of specific issues. The broad issues identified included such questions as whether the group should seriously consider the literature questioning the economic and social benefits of security interests, whether the group should seek consensus on the purpose of the 'public notice' rules, and how the group should address consumer transactions.⁸⁷

Over a three-year period the study group met seven times to discuss working papers analyzing a wide variety of issues.⁸⁸ The group commissioned some of the working papers; task forces established by groups of several ABA Sections also contributed studies on particular topics.⁸⁹ A total of 83 separate documents appear in the files of the study group and several additional reports appear in the volume of appendices submitted with the group's final report.⁹⁰

Robert Scott, an academic member of the study group, later provided insight into the dynamics of the study group's deliberations. In a 1994 law review article Scott analyzes the ALI and NCCUSL as 'private legislatures.'⁹¹ These institutions, he argues, value expertise but not all expertise is equally valued. They value academic insights into the structure and social effects of secured transactions, but they value more highly knowledge of case law and

⁸⁵ At I, 2.

⁸⁶ S L Harris & C W Mooney, Jr, 'Preliminary List of Issues for Discussion and Study Concerning UCC Article 9' (April 18, 1990).

⁸⁷ At 47-53.

⁸⁸ An interim report published in the ABA Section of Business Law's widely-circulated journal solicited comments from readers. W M Burke, S L Harris & C W Mooney, Jr, 'Interim Report on the Activities of the Article 9 Study Committee' (1991) 46 *Business Lawyer* 1883.

⁸⁹ PEB Study Group, *Report* (n 85) 4, n 12 (listing special advisors and advisory groups).

⁹⁰ All of the documents before the study committee are preserved in the HeinOnline ALI Library/Uniform Commercial Code database. See Appendix to this chapter.

⁹¹ R E Scott, 'The Politics of Article 9' (1994) 80 *Virginia Law Review* 1783. See also A Schwartz & R E Scott, 'The Political Economy of Private Legislatures' (1995) 143 *University of Pennsylvania Law Review* 595. See A Schwartz, 'The Still Questionable Role of Private Legislatures' (2002) 62 *Louisiana Law Review* 1147. One of the reporters later took issue with the Scott-Schwartz analysis. C W Mooney, Jr, 'Modeling the Uniform Law 'Process': A Comment on Scott's Rise and Fall of Article 2' (2002) 62 *Louisiana Law Review* 1081.

they value most highly experience with how secured transactions work in the real world.

Because operational expertise is the relevant criterion, it is unsurprising that eight members of the Study Group (including the chair) were commercial lawyers and house counsel whose practice specialty was the representation of secured creditors. These lawyers are the most knowledgeable concerning the questions the Study Group is asked to resolve, and they properly emerge as the most influential members of the group (other than the academic reporters). Their influence is further elevated because key members of this group also occupy prominent roles on the UCC Permanent Editorial Board.⁹²

The dominance of these ‘real-work’ lawyers minimizes the contributions of other members in the group’s deliberations.

Efforts by the [four] academic members to place on the agenda a discussion of the broader implications of the proposed changes in Article 9, including their cumulative effects on other societal interests, were uniformly unsuccessful. The several practicing lawyers who were seen as representatives of other interests were similarly marginalized by the focus on the technical task of ‘fixing’ Article 9. Ultimately, these members participated only sporadically in the discussions that led to the final report.⁹³

Despite this dynamic, Scott points out that the result is not necessarily evidence that the recommendations have a special interest bias or that the recommendations will ultimately become law. In any event, no matter what the dynamics of its deliberations the group’s final report records no dissents.

The study group submitted this final report in December 1992.⁹⁴ The report made 33 specific recommendations. These fall into three main categories: expanding the scope of Article 9, modifying and simplifying filing provisions, and introducing more detailed rules on enforcement with special attention to the obligations of account debtors on intangibles. The report does not have separate analysis of the broad questions asked initially but it is clear from the report that the group resolved any doubts about the utility of secured transactions in their favour. The report pays considerable attention to the appropriate use of filing in public records, but there is less concern about consumer debtors. Stressing that the group found the concepts in existing Article 9 to be fundamentally sound, the group nevertheless concluded that the benefits from proposed modifications outweighed the costs of re-education, unintended consequences, and temporary non-uniformity. To no one’s surprise, the study group recommended the appointment of a drafting committee.

(ii) The drafting committee (1993-1998)

The co-sponsors accepted the recommendation and in 1993 the PEB appointed a drafting committee. William Burke was named chair of the drafting committee but the other members of

⁹² At 1808-1809.

⁹³ At 1809.

⁹⁴ PEB Study Group, *Report* (n 85) 2 vols.

the twelve-person committee had not served on the study group. As with the 1967-1972 committee, membership included practitioners, judges, and several academics. Steve Harris and Charles Mooney were asked to serve as reporters.

Work began promptly. Between November 1993 and March 1998 the drafting committee met 14 times. The annual meetings of NCCUSL reviewed drafts in 1995, 1996 and 1997. The Council of the ALI reviewed drafts in those same years, while the reporters made informational reports to the general ALI membership at the annual meetings in this same period. ALI members with a particular interest in the project constituted a Members Consultative Group and the reporters, the chair and some members of the drafting committee met with the Group three times between 1994 and 1996. At the same time ABA committees, especially the Uniform Commercial Code committee of the Section of Business Law, prepared reports and monitored the progress of the drafting committee. In comparison with the 1968-1972 revision, the process was more transparent and open.

(a) Reconciling consumer interests

Notwithstanding this transparency and openness, the drafting committee's procedures were criticized for inadequate representation of consumer interests – a criticism already raised in connection with revision of other Code articles.⁹⁵ The Code sponsors responded by taking steps to support participation of representatives of consumer groups. In the case of the Article 9, the drafting committee appointed in 1995 a special subcommittee to consider 'whether and to what extent [the] Article 9 draft should contain consumer-protection provisions.'⁹⁶ As the drafters of the original Article 9 would have warned the committee, attempts to provide such protections proved to be controversial. Consumer representatives and consumer-finance creditors reached an impasse. As reported to the ALI membership in 1998, a compromise was brokered at the last minute by the chair of the drafting committee and presented to the committee as the only way to avoid 'widespread opposition, with pitched battles in the various legislatures during the enactment process' – delaying or inhibiting enactment.⁹⁷ Most of the compromises involved enforcement procedures. In several instances, the compromises left the resolution to judicial decisions without guidance.⁹⁸ The drafting committee approved the compromise but the drafters, who had not participated in the compromise negotiations, were not pleased.⁹⁹ Nor, more generally, was a principal representative of consumer interests.¹⁰⁰

(b) Academic debates

The openness and transparency of the UCC revision process encouraged the outpouring of academic analysis in the law reviews. The 1990s were halcyon days for commercial law

⁹⁵ See eg comments on the revision of Articles 3 and 4 (Negotiable Instruments; Bank Deposits and Collections) in E L Rubin, 'Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4,' (1993) 26 *Loyola Los Angeles Law Review* 743; also K Patchel (n 23).

⁹⁶ *UCC Article 9: Proposed Final Draft* (April 15, 1998) xliv.

⁹⁷ *Id.*

⁹⁸ See eg UCC § 9-626(b); see also § 9-103(h).

⁹⁹ C W Mooney, Jr, 'The Consumer Compromise in Revised UCC Article 9: The Shame of it All' (2007) 68 *Ohio State Law Journal* 215.

¹⁰⁰ G Hillebrand, 'What's Wrong with the Uniform Law Process?' (2001) 52 *Hastings Law Journal* 631.

academics. Distinguished reviews published articles and symposia issues exploring such topics as the justification (economic or otherwise) for secured transactions, the implications of the ALI and NCCUSL acting as private legislatures, whether unsecured creditors need protection from secured creditors, the value (or lack of value) of public filing systems, and whether the absence of empirical support for particular arguments was relevant. The Article 9 reporters -- Professors Harris and Mooney -- did not hesitate to contribute their analysis of these issues.¹⁰¹

The sometimes heated interchanges among academics, however, had little impact on the revised text of Article 9. Whether or not justified by empirical data, security interests continue to be recognized; the drafting process has not changed significantly; unsecured creditors may (or may not) be worse off by making it easier to perfect security interests in a common debtor's property; public filing remains the centerpiece of the system for determining priority; and empirical studies remain scarce. One example illustrates the point. Two Harvard scholars published an article in the *Yale Law Journal* questioning the priority of secured claims in bankruptcy.¹⁰² Professor Elizabeth Warren followed up with a draft amendment to section 9-301 to allow an unsecured creditor to levy on 20% of the value of collateral covered by a secured party with a perfected security interest.¹⁰³ Although her amendment interested some fellow academics, it had no support on the drafting committee and the proposal disappeared without trace. Members of the committee showed little interest in the claims of unsecured creditors; they had their eyes focused primarily on responding to the recommendations of the earlier study group.

(c) The final text

From 1993 to 1998 the Article 9 drafting committee reviewed scrupulously the study group's recommendation and the draft texts prepared by the two reporters. The committee accepted most recommendations. As a result, the principal features of the final text submitted to the ALI and NCCUSL in 1998 are similar to those identified in the study group's report.¹⁰⁴ The scope of Article 9 is expanded to cover, *inter alia*, security interests in deposit accounts as original collateral, the sale of promissory notes and payment intangibles, and assignment of commercial tort claims. Agricultural liens are dealt with the first time. The filing provisions are extensively revised to encourage uniformity, reduce the cost of filing and address numerous details not previously covered. Details on enforcement of security interests fill broad and open-ended

¹⁰¹ See eg S L Harris & C W Mooney, Jr, 'A property-based theory of security interests: taking debtors' choices seriously' (1994) 80 *Virginia Law Review* 2021; ---, 'Choosing the law governing perfection: the data and politics of Article 9 filing' (1995) 79 *Minnesota Law Review* 663; ---, 'Negotiability, electronic commercial practices, and a new structure for the UCC Article 9 filing system: tapping the private market for information technology' (1995) 31 *Idaho Law Review* 835; ---, 'Measuring the social costs and benefits and identifying the victims of subordinating security interests in bankruptcy' (1997) 82 *Cornell Law Review* 1349.

¹⁰² L A Bebhuk & J M Fried, 'The Uneasy Case for the Priority of Secured Claims in Bankruptcy' (1996) 105 *Yale Law Journal* 857; ---, 'The Uneasy Case for the Priority of Secured Claims in Bankruptcy: Further Thoughts and Replies to Critics' (1997) 82 *Cornell Law Review* 1279.

¹⁰³ E Warren, 'Article 9 Set-Aside for Unsecured Creditors' (1997) 51 *Consumer Finance Law Quarterly Report* 323; ---, E Warren, 'Making Policy with Imperfect Information: The Article 9 Full Priority Debates' (1997) 82 *Cornell Law Review* 1373.

¹⁰⁴ A useful summary of the revisions is found in Official Comment 4 to UCC § 9-101. An overview of the text as revised is set out in the Official Comments to UCC § 9-102

provisions, with particular attention to enforcing security interests in intangible property and to protecting consumer debtors. Numerous definitions are added and the text reorganized. To help readers navigate what has become an extremely complex text bracketed captions are inserted at the beginning of subsections.¹⁰⁵

The ALI and NCCUSL approved the official text in 1998 and the official text with comments in 1999.¹⁰⁶ The text was tweaked with the publication of errata, technical amendments and modifications in 1999 and 2000. To allow the text to come into force at the same time in all states, section 9-701 provided that it would take effect on July 1, 2001.

(iii) The 2010 amendments

By the end of 2001 Revised Article 9 had come into force in all states. Some states, however, had enacted non-uniform amendments, many of which modified the public filing provisions. Filing officers and International Association of Commercial Administrators (IACA)¹⁰⁷ proposed numerous changes to forms and procedures. Non-uniform treatment of the names of debtors, especially individuals, was particularly troublesome because financing statements are indexed under the names of debtors. Practice had also identified several other problems with the revised Article and several problematic court opinions were handed down.¹⁰⁸

In January 2008 NCCUSL's executive committee approved the creation of a study committee to determine whether there were issues sufficiently significant that amendments were necessary. On the recommendation of the study committee, the Code sponsors appointed a Joint Review Committee chaired by Ed Smith, a member of the Permanent Editorial Board and a prominent member of the ABA Business Law Section. Steve Harris agreed to be the reporter. There was to be no change to policies adopted during the 1998 revision in the absence of significant problems in practice. The review committee was to recommend amendments to the statutory text only if these problems were substantial; otherwise other techniques, such as clarifying or amending the official comments, should be considered.

The ALI and NCCUSL adopted the final text in 2010, drafts of proposed amendments circulated in 2009.¹⁰⁹ The principal changes to the 1998 text relate to filing, although both text and comments were changed to address several other issues and the PEB issued a Commentary to

¹⁰⁵ L F Del Duca et al, 'Simplification in Drafting-The UCC Article 9 Experience' (1999) 74 *Chicago-Kent Law Review* 1309.

¹⁰⁶ *Uniform Commercial Code: Official Text—1999* Appendix XVI.

¹⁰⁷ IACA is an association of administrators of official business organization and secured transaction record systems. Originally established in the United States in 1978, IACA expanded its membership internationally in the 1990s. Although primarily an association of individual professionals, IACA amended its bylaws in 2013 to permit jurisdictions outside the United States and Canada to become members. See <http://www.iaca.org>.

¹⁰⁸ For the history of the 2010 amendments see E E Smith, 'An Updated Summary of the 2010 Amendments to Article 9 of the Uniform Commercial Code' (2013) 45 *Uniform Commercial Code Law Journal* 131.

¹⁰⁹ *Uniform Commercial Code: Official Text and Comments* (2014-2015 edn), Appendix AA.

clarify the issues in a troublesome 2007 case.¹¹⁰ On the most problematic issue – the ‘correct’ name of an individual debtor – agreement could not be reached on a uniform solution so the official text sets out three alternative solutions, leaving it to each state to choose an alternative.¹¹¹

E. THEMES

The present Article 9 is complex. Much of its complexity can be attributed to changing financial practices, to expansion of the Article’s coverage, and to the increasing demand for predictable answers. Financial practices have become more sophisticated. More intense competition among financial institutions has led to the search for new forms of potential collateral. A debtor’s intangible property has become a far more significant part of its assets. At the same time, legal advisers have responded with demands for answers that provide certainty without the need to rely on litigation. Yet, notwithstanding this complexity, the basic concepts of the 1952 text – eg, the distinction between attachment and perfection, the importance of filing financing statements – remain the foundation on which the complexity is built.

Article 9’s success in responding to changes in the financial practice can be traced to the Permanent Editorial Board. The PEB has monitored developments and responded in a timely and measured way with a variety of measures ranging from proposed changes to the Article 9 text and separate commentaries. Its work has increasingly been aided by task forces and committees of the American Bar Association. It has found it more difficult, however, to obtain input from representatives of consumers continues.

APPENDIX

Sources

The historian of UCC Article 9 can draw upon a wealth of source material. Digital databases and paper-depositaries include official drafts, confidential drafts, explanatory introductions and comments to these texts, transcripts of meetings, committee reports, publications of drafters and other participants, reports and communications from other interested persons, and even anecdotal reminiscences of those intimately involved.

(i) Drafts of UCC Article 9 texts and reports

Paper copies kept in the Uniform Law Commission Archives at the University of Texas Law School (in process of being digitized) and in the American Law Institute Archives at the University of Pennsylvania Law School. A finding aid for the Uniform Commercial Code Records at the University of Pennsylvania may be found in ALI.04.004 (prepared by Jordon Steele) (last updated on 28 April 2011).

Uniform Commercial Code Drafts: Issued by the American Law Institute and the National Commissioners on Uniform State Laws through the 1962 Official Text with Comments (E S Kelly ed) (Littleton, Colorado, Fred B Rothman & Co, 1984) 23 vols [also available on HeinOnline: American Law Institute database]

¹¹⁰ ‘PEB Commentary No 18: The *Highland Capital* case’ (July 2014), *Uniform Commercial Code: Official Text and Comments* (2014-2015 edn)1221.

¹¹¹ UCC § 9-503.

Uniform Commercial Code Confidential Drafts: Issued by the American Law Institute and the National Conference of Commissioners on Uniform State Laws through the 1977 Revisions of Article 8 (E S Kelly & A Puckett compilers, 1955) (Littleton, Colorado, Fred B Rothman & Co, 1984) 10 vols [also available on HeinOnline: American Law Institute database]

HeinOnline: American Law Institute Library/Uniform Commercial Code

HeinOnline: National Conference of Commissioners on Uniform State Laws/Archive Publications/Commercial Code database

Uniform Law Commission (NCCUSL) website: www.uniformlaws.org

(ii) Transcripts of debates

Transcripts available in the archives mentioned above

HeinOnline: American Law Institute Proceedings of Annual Meetings

W S Hein & Co: Proceedings of ALI Annual Meetings [microfiches]

W S Hein & Co: Proceedings of the NCCUSL Annual Conference [microfiches]

(iii) Collected Papers

The papers of K N Llewellyn and the UCC papers of S Mentschikoff have been deposited at the University of Chicago in the Special Collections Department of the University Library. The Llewellyn UCC papers (Category J) were published on microfilm by W S Hein & Co.

Karl Llewellyn papers: A guide to the collection (R M Ellinwood & W L Twining compilers, 1970) updated by *Karl N. Llewellyn Papers: A Supplemental Guide to the Collection* (S H Lewis compiler, 1994)

(iv) Reminiscences of the drafters

(a) Original Official Text

‘Symposium: Origins and Evolution: Drafters Reflect Upon the Uniform Commercial Code’ (1982) 43 *Ohio State Law Journal* 535-642 (Mentschikoff, Coogan, Leary, Dunham, Kripke, Henson) [the publications of most of these authors often include comments on the drafting of the original official text and later amendments]

G Gilmore, ‘[Tribute to] Homer Kripke’ (1981) 56 *New York University Law Review* 8.

G Gilmore, ‘The Good Faith Purchase Idea and The Uniform Commercial Code: Confessions of a Repentant Draftsman’ (1981) 15 *Georgia Law Review* 605

(b) 1972 Amendments

H Kripke, ‘A draftsman’s wishes he could do things over again – UCC Article 9’ (1989) 26 *San Diego Law Review* 1

(c) 1998 Amendments

S L Harris & C W Mooney, Jr, ‘How successful was the revision of UCC Article 9? Reflections of the drafters’ (1999) 74 *Chicago-Kent Law Review* 1357

C W Mooney, Jr, 'The consumer compromise in UCC Article 9: the shame of it all' (2007) 68
Ohio State Law Journal 215