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COMMERCIAL TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE AND OTHER LAWS – 2014 Supplement

Donald B. King Sixth Edition

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Introduction

This 2014 Supplement to the Sixth Edition of Commercial Transactions Under the Uniform Commercial Code and Other Laws updates the text in three significant areas. First, this update includes a table of citations to replace the "Read" and "Read Also" cites found at the beginning of each section and subsection in Chapters 2-10. This updated list of citations reflects the May 2011 withdrawal of the 2003 Amendments to Articles 2 and 2A. All references to the 2003 Amendments have been eliminated.

Second, this update also includes an Addendum to Chapter 10 addressing the August 3, 2012 CISG Advisory Council Opinion No. 11, entitled, "Issues Raised by Documents under CISG focusing on the Buyer's Payment Duty."

Third, this update adds new material regarding the general scope of Article 9 and incorporates significant changes to Article 9 that became effective on July 1, 2013. The affected sections of the text include:

- Basic Scope of Article 9 — Adding new section § 16.02 [2] regarding the general scope of Article 9 under UCC § 9-109(a)(1) & cmt. 2.
- Perfection by Filing — Updating §§ 17.03[C] (Debtor's Name in Financing Statement) & [D] (Debtor's Location in Financing Statement) to reflect changes applicable under the 2010 Amendments to Article 9 effective July 1, 2013.
- Securitization — § 20.03

We hope that these additional materials will prove useful in your classes. We also welcome comments and suggestions—please feel free to email or phone Prof. Daniel Barnhizer at: 517-432-6901 or daniel.barnhizer@law.msu.edu.

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Chapters 2 – 10

Updated Citations for "Read" and "Read Also" materials for each section and subsection.

CITATIONS TO
COMMERCIAL TRANSACTIONS UNDER THE UCC
King, et al, 6th Edition (2011), Chapters 2-10

[Note: The following citations replace the "Read" and "Read also" cites found at the beginning of each section and subsection contained in Chapters 2-10 of King, et al, Cases and Materials. This is done for two reasons:

(i) In May 2011, the American Law Institute withdrew the 2003 Amendments to Articles 2 and 2A from the Official Text of the Uniform Commercial Code. Consequently, all references to the 2003 Amendments in "Read" and "Read also" have been eliminated. They will not be assigned in this course.

(ii) For ease of reference, "Read" and "Read also" are now entitled, "Sales", "Leases" and "CISG." This reflects that the "Sales and Leases" course covers Sales under UCC Article 2, Leases under UCC Article 2A, and International Sales under the United Nations Convention on Contracts for the International Sale of Goods (CISG).]

Chapter 2. SCOPE: SUBJECT MATTER OF THE CONTRACT FOR SALE [p. 11]

§2.01 § Applicability of U.C.C. Article 2 – Transactions Included and Excluded

Sales: UCC 2-102, 2-105, 2-106 (see 2-304), 2-107, 2-314(1)
Leases: UCC 2A-102; 2A-103(1)(j), (h), (e), (g); 1-201(b)(35), 1-203.
CISG: Arts. 1-6, 10, 95.

[A] Goods or Services

[B] Goods or Real Property

Sales: UCC 2-105(1), 2-107.
Leases: UCC 2A-103(1)(h).
CISG: No provision

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§2.02 Territorial Application of UCC Article 2

Sales: UCC 1-301.
Leases:UCC 1-301, 2A-105, 2A-106.
CISG: Art. 6.

Chapter 3. THE CONTRACT FOR SALE [p.31]

§3.01 Introduction

§3.02 Formation of the Contract for Sale

[A] Formation in General

Sales: UCC 2-204.
Leases:UCC 2A-204.
CISG: Arts. 14, 55.

[B] Form Contracts Generally

[C] Firm Offers

Sales: UCC 2-205
Leases:UCC 2A-205.
CISG: Arts. 15-17

[D] Construing the Offer: Bilateral or Unilateral Contract?

Sales: UCC 2-206.
Leases: UCC 2A-206(2).
CISG: Art. 18(3).

[E] Additional Terms in Acceptance or Confirmation

Sales: UCC 2-207.
Leases: No provision.
CISG: Art. 19.

[F] Sale by Auction

Sales: UCC 2-328.
Leases:No provision.
CISG: Art. 2(b).

[G] Home Solicitation Sale

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§3.03 Consideration

Sales: UCC 2-106(1), 2-304(1), 2-205, 2-209, see 2-203.
Leases: UCC 2A-103(1)(j), 2A-205, 2A-208, see 2A-203.
CISG: Arts. 1(1), 30, 53.

§3.04 Statute of Frauds

Sales: UCC 2-201, 2-209(3), 2-326(4), 8-113; see 9-203, 1-206.
Leases:UCC 2A-201.
CISG: Arts. 11-13; see Arts. 29, 96.

§3.05 Parol Evidence Rule

Sales: UCC 2-202.
Leases:UCC 2A-202, 1-303.
CISG: Arts. 1, 8-10.

§3.06 Terms, Construction and Interpretation of the Contract for Sale

Sales: UCC 1-201(b)(3), (12), (40); 2-202, 1-303.
Leases:UCC 2A-103(1)(k) & (l), 2A-202, 1-303.
CISG: Arts. 8, 9

Chapter 4. PROPERTY INTERESTS [p.77]

§4.01 Introduction

§4.02 Title

Sales: UCC 2-401, see 2-327(1)(a).
Leases:UCC 2A-302.
CISG: Arts. 4(b), 30.

§4.03 Special Property

Sales: UCC 2-401(1), 2-501(1).
Leases: UCC 2A-217 Comment.
CISG: No provision.

§4.04 Insurable Interest

Sales: UCC 2-501.
Leases:No provision.
CISG: No provision.

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§4.05 Security Interest

Sales: UCC 1-201(b)(35), 9-110 Comment 3.
Leases: UCC 2A-103(1)(j), 1-201(b)(35), 1-203.
CISG: No provision.

§4.06 Risk of Loss

Sales: UCC 2-509, 2-510, 2-237 (see 2-326(1)), 2-303, 2-319 through 2-322, 2-324;
see 2-501 Comment 4, 2-719(1)(a), 7-204, 7-309.
Leases: UCC 2A-219, 2A-220, 2A-221, 2A-529(1)(a).
CISG: Arts. 66-70; see Arts. 25, 36(1).

§4.08 Warranty of Title

Sales: UCC 2-312.
Leases: UCC 2A-211.
CISG: Arts. 41-44.

Chapter 5. WARRANTY/PRODUCTS LIABILITY [p. 99]

§5.01 Introduction

Sales: UCC 2-313 through 2-319, Restatement (Third) of Torts: Products Liability §§ 1-
4
(1998), Restatement (Second) of Torts § 402A (1965).
Leases: UCC 2A-210, 2A-212 through 2A-216.
CISG: Arts. 35-40; see Arts. 27, 44; see Arts. 2(a), 5.

§5.02 Historical Development

§5.03 Express Warranties

Sales: UCC 2-313.
Leases: UCC 2A-210.
CISG: Art. 35(1), (2)(c), (3); Arts. 36-40.

§5.04 Implied Warranties

[A] Merchantability

Sales: UCC 2-314, 1-303.
Leases: UCC 2A-212, 1-303.
CISG: Art. 35(1), (2)(a), (d) and (3), 36-40.

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[B] Fitness for a Particular Purpose

Sales: UCC 2-315, cf. 2-314(2)(c); see 2-317.
Leases:UCC 2A-213; cf. 2A-212(2)(c); 2A-215.
CISG: Art. 35(2)(b), (3); Arts. 36-40.

§5.05 Privity

Sales: UCC 2-318, 2-607(5); Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(7).
Leases:UCC § 2A-216, 2A-516(4), see 2A-209.
CISG: Arts. 1(1), 2(a), 4, 5.

§5.06 Disclaimer

Sales: UCC 2-316, 1-201(b)(10); see 2-719, 2-302.
Leases:UCC 2A-214, 1-201(b)(10); see 2A-503, 2A-108.
CISG: Arts. 4(a), 6, 7(1), 8(2), 35 (2) and (3).

§5.07 Interaction of Warranty and Products Liability in Tort

Sales: See UCC 2-314 Comment 7 (2003).
Leases:See UCC 2A-212 Comment 2 (2003).
CISG: Arts. 2(a), 5.

Chapter 6. PERFORMANCE [p. 141]

§6.01 Rights and Obligations of the Parties

Sales: UCC 2-301.
Leases: UCC 2A-103(1)(j).
CISG: Arts. 30, 53.

[A] In General

[B] Good Faith

Sales: UCC 1-304, 1-302(b), 2-311.
Leases: UCC 1-304, 1-302(b).
CISG: Arts. 7(1), 60(a), 65.

[C] Right to Unimpaired Expectation of Proper Performance

Sales: UCC 2-609, 2-610, 2-611.
Leases:UCC 2A-401, 2A-402, 2A-403.
CISG: Arts. 71, 72; see Arts. 25-27.

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§6.02 Seller's Obligation to Deliver

Sales: UCC 2-301, 2-503, 2-507(1), 2-307-2-309, 2-311.
Leases: UCC 2A-508(1), 2A-509(1).
CISG: Arts 30-34.

§6.03 Buyer's Right to Inspect and Obligation to Accept and Pay

Sales: UCC 2-301, 2-310, 2-507, 2-511-2-513, 2-606.
Leases: UCC 2A-515, 2A-516
CISG: Arts. 35(3), 38, 53-60.

§6.04 Buyer's Rights on Improper Delivery: Reject or Accept

Sales: UCC 2-601 through 2-607.
Leases: UCC 2A-509 through 2A-512, 2A-514 through 2A-516.
CISG: Arts. 45-52, 81-84 (see Arts. 49, 25-27), 86-88.

[A] Rejection or Acceptance

[B] Notice of Breach

Sales: UCC 2-607(3), (5), (6).
Leases: UCC 2A-516(3)-(5).
CISG: Arts. 27, 39. 40, 44, see 38.

[C] Revocation of Acceptance

Sales: UCC 2-608, see 2-607(2).
Leases: UCC 2A-517, see 2A-516(2).
CISG: Arts. 45, 49, 81-84 (see Arts. 25-27).

[D] Installment Contracts

Sales: UCC § 2-612.
Leases: UCC 2A-510.
CISG: Art. 73; see Arts. 25-27, 81-84.

§6.05 Seller's Right to Cure

Sales: UCC 2-508, 2-608(1)(a).
Leases: UCC 2A-513, 2A-517(1)(a).
CISG: Arts. 34, 37, 48, see Art. 46.

§6.06 Preserving Evidence of Goods in Dispute

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Sales: UCC 2-515.
Leases:No provision
CISG: No provision

§6.07 Excuse of Performance

Sales: UCC 2-613 (see 2-509), 2-614, 2-615, 2-616, see 2-311(3)(a).
Leases:UCC 2A-221, 2A-404, 2A-405, 2A-406.
CISG: Arts. 79, 80, see Art. 27.

Chapter 7. REMEDIES [p. 205]

§7.01 Remedies Generally

Sales: UCC 1-305.
Leases:UCC 1-305.
CISG: Art. 74.

§7.02 Seller's Remedies for Breach by Buyer

Sales: UCC 2-703, 2-709(1)(a).
Leases:UCC 2A-523, 2A-532.
CISG: Art. 61.

[A] Cancellation

Sales: UCC 2-703(f), 2-106(3) and (4); cf.2-711(l).
Leases:UCC 2A-523(1)(a), 2A-103(1)(b) and (z); 2A-508(1)(a).
CISG: Arts. 64, 25-27, 81-84, cf. 49.

[B] Take Action as to the Goods

[1] Withhold or Stop Delivery

Sales: UCC 2-702, 2-703(a)&(b), 2-705.
Leases:UCC 2A-523(1)(c)&(d), 2A-525(1), 2A-526.
CISG: Arts. 58(2), 64, 71, 72.

[2] Identify Goods to the Contract or Salvage Unfinished Goods

Sales: UCC 2-703(c), 2-704.
Leases:UCC 2A-523(1)(b), 2A-524.
CISG: Art. 77.

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[C] Recover Monies

[1] Resell and Recover Damages

Sales: UCC 2-703(d), 2-706, cf. 2-712.
Leases: UCC 2A-523(1)(e), 2A-527, cf. 2A-518.
CISG: Arts. 61(1)(b), 74, 75.

[2] Recover Damages for Non-Acceptance or Repudiation.

Sales: UCC 2-703(e), 2-708; see 2-723, 2-724, 2-503; cf. 2-713.
Leases: UCC 2A-523(1)(e), 2A-528, 2A-507, cf. 2A-519(1) & (2).
CISG: Arts. 61(1)(b), 74, 76.

[3] Recover the Price

Sales: UCC 2-703(e), 2-709, cf. 2-716(3).
Leases: UCC 2A-523(1)(e), 2A-529, cf. 2A-521(3).
CISG: Arts. 61(1)(a), 62; see Arts. 28, 78, cf. Art. 45(1).

[4] Incidental Damages

Sales: UCC 2-710.
Leases: UCC 2A-530.
CISG: Art. 74.

§7.03 Seller's Remedies on Discovery of Buyer's Insolvency

Sales: UCC 2-702; cf. 2-502; 2-507(2), 2-511(3).
Leases: UCC 2A-523(1)(c), 2A-525; cf. 2A-522.
CISG: Arts. 81(2), 84(2).

§7.04 Buyer's Remedies for Breach Where Goods Not Accepted or Acceptance Justifiably Revoked

Sales: UCC 2-711.
Leases: UCC 2A-508.
CISG: Art. 45.

[A] Cancellation

Sales: UCC 2-711(1), 2-106(3)&(4), cf. 2-703(f).
Leases: UCC 2A-508(1)(a), 2A-103(1)(b) & (z), 2A-505(1)-(3), cf. 2A-523(1)(a).
CISG: Arts. 49, 25-27, 81-84, cf. Art. 64.

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[B] Recover Price Paid; Security Interest in Rejected Goods

Sales: UCC 2-711(1)&(3); see 2-706, especially (6).
Leases: UCC 2A-508(1)(b) & (5).
CISG: Arts. 81, 84.

[C] Recover Money Damages

[1] Cover Money Damages

Sales: 2-711(1)(a), 2-712, cf. 2-706.
Leases: 2A-508(1)(c), 2A-518, 2A-520; cf. 2A-527.
CISG: Arts. 75, 77.

[2] Recover Damages for Non-Delivery or Repudiation

Sales: 2-610, 2-711(1)(b), 2-713; see 2-723, 2-724, 2-503, cf. 2-708.
Leases: 2A-402, 2A-519(1) & (2).
CISG: Arts. 25-27, 45(1)(b), 71, 72, 76, 77, 81-84.

[D] Reach the Goods Themselves

[1] Recover Identified Goods on Seller's Insolvency

Sales: UCC 2-711(2)(a), 2-502; see 2-501, cf. 2-702.
Leases: UCC 2A-508(2)(a), 2A-522, 2A-217, cf. 2A-525(2).
CISG: Arts. 45(1)(a), 46(1), 28; cf. Art. 62.

[2] Obtain Specific Performance or Replevy the Goods

Sales: UCC 2-711(2)(b), 2-716; see 2-306, 2-501, cf. 2-709(1)(b).
Leases: UCC 2A-508(2)(b), 2A-521, 2A-217, cf. 2A-529(1)(b).
CISG: Arts. 45(1)(a), 46(1), 28; cf. Art. 62.

§7.05 Buyer's Remedies Where Goods Finally Accepted

[A] Buyer's Damages for Breach

Sales: UCC 2-714, see 2-607(1).
Leases: UCC 2A-508(3) & (4), 2A-519(3) & (4), 2A-520, see 2A-516(1).
CISG: Arts. 50, 74.

[B] Deduction of Damages From Price

Sales: UCC 2-717.

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Leases:UCC 2A-508(6).
CISG: Arts. 45(1)(a), 50.

§7.06 Buyer's Incidental and Consequential Damages

Sales: UCC 2-715.
Leases:UCC 2A-520.
CISG: Arts. 45(1)(b), 74, 77, 78.

§7.07 Remedies Applicable to Sellers and Buyers

[A] Liquidated Damages

Sales: UCC 2-718, 2-719(1), 2-302; see 1-305.
Leases:UCC 2A-504, 2A-108.
CISG: Arts. 4(a), 6.

[B] Contractual Modification or Limitation of Remedy

Sales: UCC 2-719, 2-302; cf. 2-316, 7-204(2), 7-309(2).
Leases:UCC 2A-503, 2A-108, cf. 2A-214.
CISG: Arts. 6, 8(2).

[C] Remedies for Fraud

Sales: UCC 2-721.
Leases:UCC 2A-505(4) & (5).]
CISG: Art. 4(a).

[D] Who Can Sue Third Parties for Injury to Goods?

Sales: UCC 2-722.
Leases:UCC 2A-531.
CISG: Art. 4.

[E] Statute of Limitations

Sales: UCC 2-725, see 2-313, 2-314, 2-315, 2-503.
Leases:UCC 2A-506, see 2A-210, 2A-212, 2A-513.
CISG: No provision, see UN Convention on the Limitation Period in the International Sale
of Goods.

§7.08 Punitive Damages

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Sales: UCC 1-305.
Leases:UCC 1-305.
CISG: No provision.

Chapter 8. RIGHTS OF THIRD PARTIES: GOOD FAITH PURCHASE OF GOODS [p. 325]

§8.01 Introduction

Sales: UCC 2-403.

§8.02 Entrusting

Sales: UCC 2-403(2) & (3), see 2-702(3), 7-205, 9-320(a).
Leases:UCC 2A-304(2), 2A-305(2), 2A-103(3).
CISG: Arts. (1)(1), 4(b).

§8.03 Voidable Title

Sales: UCC 2-403(1), 2-702(3), cf. 3-404(a).
Leases:UCC 2A-304(1) & (3), 2A-305(1) & (3).
CISG: Arts. 1(1), 4(b).

§8.04 A Note on Bulk Transfers

Chapter 9. LEASES OF GOODS [p. 343]

§9.01 Introduction

§9.02 Warranties in Finance Leases

Leases:UCC 2A-103(1)(g), 2A-209, 2A-407, 9/403.

Chapter 10. THE DOCUMENTARY TRANSACTION: DOCUMENTS OF TITLE AND LETERS OF CREDIT [p. 357]

[Study “Read” and “Read also” cites as set forth in Chapter 10.]

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Chapter 10

[Insert following the end of Chapter 10 at page 400]

ADDENDUM

On August 3, 2012 the CISG Advisory Council adopted its Opinion No. 11, entitled, "Issues Raised by Documents under CISG Focusing on the Buyer's Payment Duty." The Opinion centers on CISG Articles 30, 34, and 58.

Opinion (black letter text) numbers 1-5, read as follows:

1. Under Articles 30 and 34 CISG, the seller must hand over any document relating to the goods. Examples of documents relating to the goods include [i] documents controlling their disposition and also [ii] other documents relating to the goods, such as commercial invoices, insurance policies or certificates, survey reports, packing lists, certificates of quality, and sanitary or phytosanitary certificates.

2. The parties may agree expressly or impliedly on the documents that must be handed over by the seller to the buyer before the buyer must pay the price.

3. If the parties have agreed that the buyer shall procure payment by letter of credit, the letter of credit identifies the documents that must be presented before payment is to be made.

4. If the parties have not agreed on the documents that must be presented before the buyer is required to pay the purchase price, Article 58 CISG applies. The buyer is then bound to pay the purchase price when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and the Convention.

5. The words "documents controlling their disposition" in Article 58 CISG should be interpreted as referring to any document (electronic or paper) that [i] entitles the buyer to take possession of the goods, or once in the hands of the buyer, [ii] establishes that the seller no longer has the right to control disposition of the goods.

Documents That Control the Disposition of the Goods For Purposes of CISG Article 58.

Comment 6 to Opinion No. 11 addresses this matter:

(a) Negotiable bills of lading (whether issued by (i) an ocean carrier, or (ii) an intermediary, such as a freight forwarder, etc.)

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"A negotiable bill of lading is undoubtedly a document controlling the disposition of the goods under Article 58 CISG. The carrier is entitled and obliged to deliver the goods to the holder of the original bill of lading without inquiring about whether it is the true owner of the goods."[1]

Negotiable bills of lading may be issued, not by an ocean carrier, but by an intermediary, e.g., a freight forwarder. Example: S delivers goods to F freight forwarder. (F takes goods from different sellers and consolidates them into carloads, etc., for lower transportation costs.) F issues a negotiable bill of lading to S. F, in turn, delivers the carload, etc., of goods (including S's goods) to C ocean carrier. C issues to F a negotiable bill of lading. Example: S delivers goods to F freight forwarder. (F's bill of lading does not of itself control disposition of the goods, in the narrow sense of giving the holder the right to possession of the goods.)[2]

(b) Straight (non-negotiable) bills of lading

"Straight" bills of lading name the consignee. They are not negotiable. But under Article 51.2(b) Rotterdam Rules "where a non-negotiable transport document contains a surrender clause, as straight bills of lading do, the consignee must present the original document(s) to the carrier in order to exercise its right to control the goods."[3] "Because the carrier is entitled to demand surrender of the original straight bill of lading before handing over the goods, a straight bill of lading is clearly 'a document controlling . . . disposition' for purposes of Article 58 CISG, as the buyer cannot take possession of the goods without the original document."[4]

(c) The consignor's copy of an air waybill

"Air waybills are non-negotiable transport documents for carriage by air. The intended consignee is named on the waybill."[5]

If the Montreal Convention applies,[6] it "requires an air carrier to deliver the cargo to the consignee on arrival at the place of destination, unless the consignor has exercised a right of disposal. The consignor may stop the cargo in transit or may require the carrier

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[1] Comment 6.1. Further note 37 to Comment 6.1 provides: "The UN Convention of Contracts for the International Carriage of Goods Wholley or Partly by Sea 2009 (The Rotterdam Rules), . . . adds the requirement that the holder of a 'negotiable transport document' must properly identify itself as well as surrendering the original document *if* it is the shipper, consignee or person to whom the document has been indorsed. The requirement that the holder identify itself does not apply when the document has been indorsed in blank, which is what is usually done in practice. Article 47(1)(b) Rotterdam Rules provides that the carrier shall refuse delivery if the original document is not surrendered or the holder does not properly identify itself (if required to do so)."

[2] For discussion of this and similar transactions involving negotiable bills of lading issued by intermediaries, see Comment 6.2 of Opinion No. 11 and note 38 (Rotterdam Rules are drafted to make provision for this kind of arrangement). Cf. UCC § 7-503(c).

[3] Comment 6.3 of Opinion No. 11 and note 39.

[4] Id.

[5] Comment 6.4 of Opinion No. 11.

[6] See Comment 6.5 of Opinion No. 11.

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to deliver it to a consignee other than the one originally designated, but it can only do so upon presentation of the *consignor's copy of the air waybill*. . . . Although the buyer/consignee does not need to get the seller/consignor's copy of the waybill to take delivery from the carrier, the buyer/consignee cannot be sure that the seller/consignor will not exercise its right to redirect the cargo to another consignee unless and until it receives the consignor's copy. Thus, although the consignor's copy of the air waybill plays no part in establishing the consignee's right to delivery of the goods from the carrier, the consignor's copy should still be regarded as a 'document controlling. . . disposition' of the goods for purposes of Article 58 CISG because the buyer/consignee cannot be sure that it can take possession of the goods until it receives the document. As a result, the buyer is entitled to withhold payment until the document is produced."[7]

"The Uniform Customs and Practice for Documentary Credits, 2007 revision (UCP 600) makes provision for presentation of an air waybill for payment under a letter of credit, despite the fact that such a document is non-negotiable."[8]

(d) The consignor's copy of a road or rail consignment note.

"International *road* and *rail* carriage is usually done under non-negotiable transport documents known as consignment notes. Consignment notes do not control possession of the goods but merely provide evidence of the contract and the condition of the goods received for carriage. The consignee is entitled to demand delivery of both the *goods* and the *consignment note* after arrival of the goods at the place designated for delivery. This is the position under the international conventions governing international carriage of goods by *road* or rail.[9]

See the Convention Concerning International Carriage by Rail 1980 (COTIF) and the Convention on the Contract for the International Carriage of Goods by Road (CMR). "Under both conventions, the consignee is entitled to demand delivery of both the goods and the consignment note after arrival of the goods at the place designated for delivery."[10] "Because the consignee takes delivery of the goods and the consignment note from the road or rail carrier at the same time, the consignment note does not constitute a 'document controlling . . . disposition' of the goods under a literal interpretation of Article 58 CISG."[11]

Both the rail and road Conventions "give the consignor the right to modify the contract of carriage by giving subsequent orders to the carrier. . . the right to deliver the goods to a consignee different from the one entered on the consignment note. . . . In order

[7] Id. (Emphasis added.) The position is the same where the Warsaw Convention (or any of its Protocols) applies. Comment 6.6 of Opinion No. 11.

Where neither the Montreal Convention nor the Warsaw Convention (or any of its Protocol's) apply, "the consignor's right to stop the goods in transit or to redirect them depends upon the terms of the air waybill and the relevant national law." Comment 6.7 of Opinion No. 11. See e.g., UCC §§ 2-705, 7-303.

[8] Comment 6.8 of Opinion No. 11 (UCP 600, Article 23).

[9] Comment 6.9 of Opinion No. 11. (Emphasis added.)

[10] Comment 6.10 of Opinion No. 11.

[11] Comment 6.11 of Opinion No. 11.

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to exercise the right of disposal, the consignor. . . must produce to the carrier the duplicate consignment note (in the case of the [rail Convention]) or the first copy of the consignment note (in the case of the [road Convention]). Thus, the consignor is no longer entitled to redirect the goods if it has sent the duplicate or first copy to the consignee. . . . As a result, it has been suggested. . .that the provisions in [the rail and road Conventions] about the right of disposal have the effect that the duplicate consignment note (in the case of [rail Convention]) or the sender's copy of the consignment note (in the case of [road Convention]) is a document controlling the disposition of the goods for purposes of Article 58 CISG. Although the document itself does not control the right to possession of the goods, the duplicate or sender's copy does give the sender the right to redirect delivery. Thus, the sender/seller should not be entitled to payment under Article 58 CISG until it has presented the buyer with the document."[12]

The Uniform Customs and Practice for Documentary Credits 2007 revision (UCP 600) makes provision for presentation of road and rail consignment notes for payment under a letter of credit, despite the fact that such a document is non-negotiable."[13]

(e) Road and rail bills of lading in North America

"Because road and rail bills of lading issued in the United States are subject to the same provisions as those governing bills of lading for carriage of goods by sea, they are 'documents controlling [the] disposition' of the goods for purposes of Article 58 CISG. . . ."[14]

Comment 7 to Opinion No. 11 lists other documents giving the holder the right to possession:

> *(a) Warehouse receipts or warehouse warrants*
>
> "A negotiable warehouses receipt [is] the kind of document to which Article 58 CISG already applies."[15]
>
> *(b) Ship's delivery orders*
>
> Comment 7.3 and note 64 thereto, explain the transaction where goods are carried in bulk. "Standard form contracts for the sale of bulk cargoes often expressly exclude the CISG, so the question whether a ship's delivery order is a 'document [] controlling. . .disposition' for purposes of Article 58 CISG will seldom arise in practice."[16]

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[12] Comment 6.12 of Opinion No. 11. Where neither the rail or road Conventions apply, "the consignor's right to stop the goods in transit or to redirect them depends upon terms of the road or rail consignment note and the relevant national law." Comment 6.13 of Opinion No. 11. See, e.g., §§ 2-705, 7-303.

[13] Comment 6.14 of Opinion No. 11 (UCP 600, Article 24).

[14] Comment 6.15 of Opinion No. 11.

[15] Comments 7.1 and 7.2 of Opinion No. 11.

[16] Comment 7.4 of Opinion No. 11.

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Documents That Do Not Control Disposition of the Goods for Purposes of CISG Article 58

(a) Sea waybills

"Sea waybills are non-negotiable transport documents for carriage of goods by sea. The
intended consignee is named on the waybill. The carrier undertakes to delivery to the named consignee. There is no 'surrender clause' on a sea waybill as there typically is on bills of lading. . . . Thus, the named consignee does not have to present the original sea waybill to the carrier in order to take delivery. The named consignee simply identified himself to the carrier as the person to whom delivery must be made. Because there is no longer any need to present an original document to take delivery from the carrier, sea waybills are very often made in electronic form and are simply e-mailed from consignor to consignee. Given these qualities, a sea waybill is not a 'document [] controlling. . .disposition' of the goods for purposes of Article 58 CISG."[17]

"The Uniform Customs and Practice for Documentary Credits, 2007 revision (UCP 600) makes provision for presentation of a sea waybill for payment under a letter of credit, despite the fact that such a document is non-negotiable."[18]

(b) Dock receipts, quai receipts or mate's receipts

"Sometimes a sea-carrier or dock terminal operator issues a document known variously as a dock receipt, dock warrant or quai receipt, which acknowledges receipt of the goods for later shipment. Later, the carrier issues a bill of lading in return for the dock receipt based on the information contained in the dock receipt."[19]

After discussion and some disagreement among writers Comment 8.7 concludes:

> Because the dock receipt or mate's receipt is not enough in itself to give the holder the right to possession of the goods, it should not qualify as a "document [] controlling. . .disposition" of the goods for purposes of Article 58 CISG.

(c) Commercial invoices, survey reports, packing lists, certificates of origin or quality unless required by Customs or quarantine authorities.

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[17] Comments 8.1 and 8.2 of Opinion No. 11.
Some sea waybills reserve to the shipper the right to change the consignee after the goods have been shipped. . . . However, unlike the similar situation in relation to air waybills. . .and road and rail consignment notes. . ., the shipper may do this simply by giving written instructions to the carrier, without the need to present any copy of the sea waybill. . . . Thus, unlike the consignor's copy of an air waybill, or the duplicate copy of a rail consignment note, or the duplicate or first copy of a road consignment note, a sea waybill is never a 'document controlling the [] disposition' of the goods for purposes of Article 58 CISG." Comment 8.3 of Opinion No. 11.

[18] Comment 8.4 of Opinion No. 11 (UCP 600, Article 21).

[19] Comments 8.5 and 8.6 of Opinion No. 11.

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"Many other documents about the quality or condition of the goods may be generated before the goods leave the seller's country. They are all 'documents relating to the goods' for purposes of Articles 30 and 34 CISG, and so must be handed over from seller to buyer, but they are not 'documents controlling. . .disposition' of the goods for purposes of Article 58 CISG, with one possible exception.[20]

"When the buyer pays by letter of credit, it will often require, via stipulation in the letter of credit issued by its bank, that the seller (the beneficiary under the letter of credit) should present such documents as a pre-shipment survey report, a packing list (in the case of goods in containers), a certificate of origin showing in which country the goods were produced, sanitary or phytosanitary certificates (in the case of food or plant products), commercial invoices, etc. As noted above, Article 58(1) CISG has no practical application in such a case, because it is the letter of credit that governs which documents trigger the right to payment and when they must be presented."[21]

[20] Comment 8.8 of Opinion No. 11. See discussion at Comments 8.10-8.12.
[21] Comment 8.9 of Opinion No. 11.

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Chapter 16

AN INTRODUCTION TO SECURED TRANSACTIONS

Existing section § 16.01[C] should be designated § 16.01[C][1] History of Article 9:

[C][1] History of Article 9

The statutory provisions governing secured transactions represent the culmination of a half century of effort to provide a unitary approach to the variety of security devices used by creditors and debtors to create security interests. Exploration of these pre-Code security devices provides a better understanding of the full scope of Article 9's provisions. This historical overview also serves as an introduction to the basic terminology of the Code.

The *pledge* was the earliest form of the secured transaction for personal property. Under the concept, the debtor provided the creditor with physical possession of some piece of property, which the creditor kept until the debtor satisfied the obligation. The pledge, first formally recognized under Roman Law, was used by a number of early traders and societies. Medieval merchants and moneylenders also used the pledge. The creditor's physical possession of the collateral protected the lender against other parties who might claim an interest in the property. The pledge concept provided a lender with the maximum possible protection against a debtor's default. Unfortunately, pledging also meant that only tangible items of personal property (chattels) could be used as collateral to borrow money.

Another type of security device at early common law was the *real property mortgage.* With this type of land transaction the debtor offered the lender real estate as security for a loan. In most instances, the debtor continued in possession of the land. The creditor (mortgagee) recorded its interest in a specific location under the debtor's name. Potential creditors could check the record to determine if the land was already encumbered by another even though the debtor maintained possession. Although this idea was not extended to the concept of movable items (goods) for several centuries, the real property mortgage served as the basis for later developments in non-possessory secured transactions in goods.

The dawn of the industrial revolution led to the development of non-possessory secured interests in personal property. New methods of production, coupled with an increase in commercial activity, brought about a heightened demand for credit and for devices to secure such credit. In his landmark treatise on secured transactions, Professor Grant Gilmore noted this development:

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Until early in the nineteenth century the only security devices which were known in our legal system were the mortgage of real property and the pledge of chattels. Security interests in personal property which remained in the borrower's possession during the loan period were unknown. A transfer of an interest in personal property without delivery of possession was looked on as being, in essence, a fraudulent conveyance, invalid against creditors and purchasers. This principle, which was common to both sales law and to security law, dates from at least 1601 and the decision in *Twyne's Case.* Since the principle maintained itself for over two hundred years-few rules of law enjoy so long a run-we must conclude that it corresponded to the needs of its time.

As the primary source of credit for early industrial companies, banks demanded assurances of repayment beyond the contractual promise and real estate collateral that had been utilized previously. As industrialization progressed, personal rather than real property became the principal repository of wealth. The mortgage on Blackacre could no longer support the merchant's insatiable demand for credit and the banker's demand for security. Even the medieval institution of the pledge proved insufficient in accommodating the need for collateral. Although stock certificates and bonds could be pledged, more obvious forms of value like the equipment of a factory, the rolling stock of a railroad, or the inventory stock of the merchant could not be used. Property that could not be pledged because it had not been used in the borrower's business represented a nearly inexhaustible source of prime collateral for loans. Developing some mechanism to unlock this store of value became a key goal for bankers and merchants alike.

Two of the earliest non-possessory security devices were the *chattel mortgage* and *conditional sale.* The chattel mortgage device evolved as a simple extension from real property mortgage law. Under the chattel mortgage, a seller of goods received a mortgage from the buyer who was allowed to possess the goods. To ensure against the debtor-buyer's misappropriation of the goods, the seller recorded its security interest to make the seller's claim valid against third parties. The seller held an equitable lien on the property until full payment occurred. The non-purchase money security interest in equipment and consumer goods represents the modern equivalent of the chattel mortgage.

The idea of a seller retaining title to goods was known as a *conditional sale.* Although the buyer had possession and the right to use the goods, the law recognized title as remaining with the seller until the buyer paid the debt in full; in effect, the seller conditioned the passing of title to the goods on the buyer's payment.

The drafters of the Code confronted the confusion of a multitude of security devices, judicial hostility, and an over-emphasis on technicalities, by examining the assumptions on which those old principles rested. The drafters made a major

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decision that there should be a single security interest encompassing the past forms of security such as the chattel mortgage.

In creating a single secured interest, the drafters eliminated the traditional distinctions of the past. The concept of title ceased to be the crucial determinant of whether one continued to hold a secured interest and what one's rights were as to third parties. This radical simplification treated the law of secured transactions in a more functional, rather than formal, manner.

In 1998, the American Law Institute and the National Conference of Commissioners on Uniform State Laws approved the Revised Article 9, the present version of Article 9 adopted in all 50 states and in effect as of July 1, 2001. Revised Article 9 is a major revision of its predecessor, the 1972 Code. Amendments to the official text of Revised Article 9 were approved in 2010, with a view to all states enacting the Amendments by their July 1, 2013, uniform effective date. Assigned Code sections throughout the chapters on secured transactions are from the Revised Article 9; however, some cases in the reading were decided under the 1972 Code.

New § 16.01[C][2]:

[2] Scope of Article 9 Read: U.C.C. § 9-109(a) & cmt. 2; § 9-109(c)

Section 9-109(a) lists the general types of transactions subject to Article 9. These include:

- Transactions that create security interests in personal property or fixtures, regardless of the form in which the parties structure the transaction;
- Agricultural liens;
- Sales of "accounts," "chattel paper," "payment intangibles," or "promissory notes;"
- Consignments; and
- Certain types of security interests arising under specific provisions of Articles 2, 2A, 4 and 5.

These transaction types are discussed in greater detail, *infra*. Importantly, the parties' choice of form for structuring a transaction is irrelevant to application of Article 9. As comment 2 notes:

> When a security interest is created, this Article applies regardless of the form of the transaction or the name that parties have given to it. Likewise, the subjective intention of the parties with respect to the legal characterization of their transaction is irrelevant to whether this Article applies, as it was to the application of former Article 9 under the proper interpretation of former Section 9-102. (U.C.C. § 9-109(1), cmt. 2).

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In addition to the transaction types specifically identified as being subject to Article 9, U.C.C. §§ 9-109(c) & (d) circumscribe the boundaries of Article 9's jurisdiction. Subsection (c) limits the "extent" of Article 9, clarifying that even if a transaction would appear to satisfy the criteria for secured transactions Article 9 does not apply "to the extent that" the transaction falls within one of the listed limitations. Thus, for example, a transaction that creates a security interest in personal property or fixtures (*see* U.C.C. § 9-109(a)(1)) nonetheless is not subject to Article 9 if "another statute of [the state in which the security interest was created] expressly governs the creation, perfection, priority, or enforcement of a security interest created by this State or a governmental unit of this State." U.C.C. § 9-109(c)(2). Other subsection 9-109(c) limitations on the extent of Article 9 include preemption by federal law (U.C.C. § 9-109(c)(1)); application of statutes of other states or foreign countries, other than statutes generally applicable to security interests, that govern the "creation, perfection, priority, or enforcement of a security interest created by the State, country, or governmental unit" (U.C.C. § 9-109(c)(3)); and the independent and superior rights of a transferee beneficiary or nominated person under a letter of credit (U.C.C. §§ 9-109(c)(4), 5-114).

Where subsection 109(c) limits the extent of application of Article 9 to transactions that would otherwise be within its scope, §9-109(d) specifically exempts certain transaction types altogether. Exempted transactions under U.C.C. § 9-109(d) include:

- Landlords' liens,
- Liens, other than agricultural liens, given by statute for services or materials such as mechanics' or artisans' liens (although § 9-333 controls the priority of such liens),
- Assignments of claims for wages, salary, or compensation of an employee,
- Sales of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose, or assignments of those interests for collection purposes, and
- Certain assignments.

A related set of issues raised by the scope and extent provisions of § 9-109(c) & (d) is the applicability of Article 9 to subordination agreements, covenants by debtors not to transfer or encumber property, and sureties who are assigned accounts by contract. With respect to subordination agreements, a security interest is created only when the parties intend the subordination to be considered a security interest. If the parties are silent, no security interest is created. Similarly, unless the parties explicitly indicate an intent to create a security interest, a covenant not to transfer or encumber property will likewise fail to create a security interest in that property.

Sureties' rights of subrogation raise somewhat more complicated problems with respect to the creation of a security interest. If the assignor is unable to complete the assured obligation, the surety subrogates to the assignor's duties regarding the obligation and must complete that obligation while also assuming to the assignor's right to

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payments relating to the obligation.

For example, in Canter v. Schlager, 358 Mass. 789, N.E.2d 492, 499 (1971), a general contractor entered a written contract to construct a building for a group of owners. As part of the construction contract, the general contractor provided a performance bond under which a surety assumed responsibility for completion of the construction contract in the event of default by the general contractor. Further, the application for the performance bond assigned to the surety all payments due to the general contractor by the owners in performing the construction contract. No financing statement was filed regarding the assignment.

The general contractor defaulted on the construction contract, and the surety took over the work, ultimately paying more than $60,000 to subcontractors for labor and materials. The owners refused to pay the full balance to the surety, arguing that the surety was asserting an unsecured contract right to the payment that was superseded by the trustee in bankruptcy as a lien creditor of the contractor.

The court acknowledged that the surety's contract claim by virtue of the assignment represented a security interest in a contract right. Such a claim "would be subordinate to the rights of a person who became a lien creditor without knowledge of the security interest and before it was perfected" – e.g., a trustee in bankruptcy.

But the court further held that the surety's second claim for equitable subordination to the rights of the contractor to the correct balance due under the contract was not subordinated to the trustee's interests as lien creditor. As the court noted, U.C.C. § 1-103 provides that "unless displaced by the particular provisions of this chapter, the principles of law and equity … shall supplement its provisions." The court further observed that subordination is an equitable doctrine, not a contract doctrine. "Of basic importance is the general rule of Section 9-102(2) that Article 9 applies to security interests created by contract. Rights of subrogation, although growing out of a contractual setting and oftimes articulated by the contract, do not depend for their existence on a grant in the contract, but are created by law to avoid injustice. Therefore, subrogation rights are not 'security interests' within the meaning of Article 9." [internal citations and quotation marks omitted].

Similarly, the Florida Supreme Court in Transamerica Ins. Co. v. Barnett Bank of Marion Cnty., N.A., 540 So. 2d 113, 114-17 (Fla. 1989), likewise held that sureties' subrogation rights after payment of the underlying obligations are not subordinated to security interests perfected under the Code. Importantly, the court observed that "[t]he interests of all concerned parties, whether they be contractors in default, nonsurety assignees, owners, or other obligees, are best served by prompt performance by the surety. Under these circumstances, it is appropriate to give priority to the claims of the surety, up to the limits of its performance."

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Chapter 17

New § 17.03[C] & § 17.03[D] – These new sections should replace existing sections 17.03[C] and [D] located at pages 752-757.

[C] Debtor's Name Read: U.C.C. § 9-503.

The importance of making sure that debtor's name is correct on a financing statement cannot be over emphasized. If the debtor is an individual, the last name of the debtor must be identified. While minor errors or omissions may be overlooked in a financing statement, a financing statement which fails to sufficiently provide the name of the debtor is seriously misleading. Rev. § 9-506. A financing statement which is seriously misleading is ineffective to perfect a security interest, accordingly, it is essential to make sure that the debtor's name is correctly stated on the form. Third parties must be able to search the records to discover whether or not a debtor's assets are encumbered. A record search is conducted by looking under the debtor's correct name. If a record search using the filing office's standard search logic discloses a filed financing statement, then it is not seriously misleading if it fails to satisfy the Code requirements for debtor's name. Rev. § 9- 506, cmt. 2.

CORONA FRUITS & VEGIES, INC. v. FROZSUN FOODS, INC.

California Court of Appeal 143 Cal. App. 4th 319 (2006)

YEGAN, ACTING P.J.

In 2001, appellants subleased farm land to a strawberry farmer (debtor) who went by the last name of "Munoz." The sublease, as well as other documents given to appellants, stated that debtor's name was "Armando Munoz Juarez." That was and is his full true name. But he signed the sublease "Armando Munoz."

Appellants advanced money for payroll and farm production expenses. On July 2, 2001, appellants filed a UCC-1 financing statement listing debtor's name as "Armando Munoz" and a second UCC-1 financing statement on January 17, 2002, listing the same name.

In December 2001, debtor contracted with respondent Frozsun Foods, Inc. (Frozsun Foods) to sell processed strawberries. Frozsun Foods advanced money which was secured by a January 17, 2002 UCC-1 financing statement listing debtor's last name as "Armando Juarez."

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As of July 26, 2002, debtor owed appellants $230,482.52 and owed Frozsun Foods $19,648.52. When debtor was unable to meet his loan obligations, appellants took back the farm land, harvested the strawberry crop, and kept the crop proceeds.

In California, the filing of a UCC-1 financing statement is generally required to perfect a security interest or agricultural lien. (§9310, subd. (a): 4 Witkin, Summary of Cal. Law (10th ed. 2005) Secured Transactions In Personal Property § 76, p. 634.) "The requirement that a financing statement provide the debtor's name is particularly important. Financing statements are indexed under the name of the debtor, and those who wish to find finance statements search for them under the debtor's name. [Citations.]" (*Id.*, at pp. 639-640, § 80.)

Substantial evidence supports the finding that debtor's true last name was "Juarez" and not "Munoz." The pleadings state that debtor's last name is "Juarez," as do many of appellants' business records. Debtor provided appellants with a photo I.D. and Green Card bearing the name "Armando Munoz Juarez." The name appears on the sublease and other documents including the Farmer Agreement, a Crop Exhibit, a second sublease agreement (identifying debtor as "Juarez Farms, Armando Munoz Juarez"), a crop assignment, appellants' accounting records, receipts for advances, appellants' letters to debtor, and checks issued by appellants. Debtor identified himself by the last name "Juarez" on two tax returns, in tax documents issued by appellants, in debtor's dealings with the U.S. Department of Agriculture, in debtor's bankruptcy petition, and in debtor's business dealings with Frozsun Foods.

As a general rule, minor errors in a UCC financing statement do not affect the effectiveness of the financing statement unless the errors render the document seriously misleading to other creditors.

Section 9506, subdivision (b), however, provides: "[A] financing statement that fails sufficiently to provide the name of the debtor in accordance with subdivision (a) of Section 9503 is seriously misleading." There is a safe harbor. "[I]f a search of the filing office's records under the debtor's correct name, using the filing office's standard search logic, if any, would nevertheless disclose that financing statement, the name provided does not make the financing statement seriously misleading. (U.C.C. 9506(c).)" (4 Witkin, Summary of Cal. Law, Secured Transactions in Personal Property, *supra*, § 83, at p. 642.)

The record indicates that Frozsun's agent conducted a "Juarez" debtor name search and did not discover appellants' UCC-1 financing statement. No evidence was presented that the financing statement would have been discovered under debtor's true legal name, using the filing office's standard search logic. Absent such a showing, the trial court reasonably concluded that the "Armando Munoz" debtor name in appellants' financing statement was seriously misleading.

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Appellants contend that the debtor name requirement is governed by the naming convention of Latin American countries because debtor is from Mexico. We reject the argument because the strawberries were planted in and the debt obligation arose in Santa Barbara County, not Mexico. "In most Latin American countries, the surname is formed by listing first the father's name, then the mother's name. . . . [T]his is exactly opposite Anglo-American tradition. . . ." Debtor's last name did not change when he crossed the border into the United States. The "naming convention" is legally irrelevant for UCC-1 purposes and, if accepted, would seriously undermine the concept of lien perfection.

Appellants knew that debtor's legal name was "Armando Juarez" or "Armando Munoz Juarez." Elodia Corona, appellants' account manager, prepared the UCC Financing Statements and testified: "I don't know why I didn't put his [i.e., debtor's] last name [on the UCC-1 financing statement]. I could have made a mistake. . . ." Ms. Corona was asked: "So the last name on all the Agreements is Juarez, but on the U.C.C. 1 Forms, you filed them as Munoz?" Ms. Corona answered, "Yes."

Appellants are estopped by their pleadings, the contracts, business records, the checks for the cash advances, debtor's identification papers and tax papers, and the testimony of appellants' account manager. Appellants could have protected themselves by using both names on their financing statements. The trial court did not err in finding that the UCC-1 financing statement filed by Frozsun Foods perfected a security interest superior to appellants' liens.

The judgment is affirmed. Frozsun Foods is awarded costs on appeal.

NOTE

Aside from spelling errors which render a financing statement seriously misleading, failure to properly identify the organizational format of the debtor is the most common error resulting in unperfected status for the secured party. While the secured party may misspell the individual debtor's name, the secured party may fail to differentiate between corporate status and that of a sole proprietorship. From a practical standpoint, the secured party should always examine the debtor's organizational papers to insure that the correct name is being used for filing purposes. If the debtor is a "registered organization," such as a corporation or limited liability company, the financing statement is sufficient only if it provides the debtor's name indicated on the public record of the debtor's jurisdiction of organization. Rev. § 9-503(a). The section further provides that if the debtor is an organization and the organization has a name, then that is the name which should appear on the financing statement. This should not be confused with trade or d/b/a (doing business as) names. The Revised Code states a financing statement that provides only the debtor's trade name does not sufficiently name the debtor. A

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sole proprietorship debtor must be filed under the individual name and not the d/b/a name.

THE 2010 AMENDMENTS TO ARTICLE 9 RELATING TO DEBTOR'S NAME

The 2010 Amendments to Article 9 introduced a number of important changes and clarifications to identifying the debtor's name in the financing statements. Broadly, these changes break down into two categories: (1) names of individual debtors, and (2) names of organizational debtors.

The 2010 Amendments attempt to resolve the difficulty of identifying the name of a debtor on the financing statement. Organizational debtors typically register their names with the state in some form. Unlike organizational debtors, however, individuals have no such registration requirement. One of your casebook authors, for instance, is "Dan Barnhizer" to family and friends, "Professor Daniel Barnhizer" at academic conferences, and "Daniel D. Barnhizer" when writing. If this author also did business as a sole proprietorship, that name too might be seen as a legitimate mechanism for identification. All, along with the author's full name spelled out on the driver's license, are acceptable ways of referencing this author in various contexts. But the financing statement must correctly and sufficiently identify the debtor by the version of his or her individual name or risk failing to perfect the security interest.

With respect to individual debtors, the 2010 Amendments provide states with two alternatives for identifying the debtor's name. Under "Alternative A," the creditor must first determine whether the debtor holds an "unexpired driver's license issued by the State where the financing statement is filed." If so, the financing statement must provide the debtor's name as indicated on the driver's license. If the debtor does not hold such a driver's license, the financing statement is sufficient if it provides either the "individual name" of the debtor or if it "provides the debtor's surname (i.e., family name) and first personal name (i.e., first name other than surname)." Alternative A has been described as the "only if" approach to identifying an individual debtor's name – a financing statement properly identifies the debtor "only if" the name in the financing statement matches the name on the debtor's unexpired state-issued driver's license.

Under "Alternative B," a financing statement relating to an individual debtor is sufficient if it lists the "individual name" of the debtor, the debtor's surname and first personal name, and/or the name indicated on the debtor's driver's license. Because any of these alternatives will satisfy § 9-503(d), Alternative B has been referred to as the "safe harbor" approach.

The 2010 Amendments also clarify how the financing statement must identify organizational debtors. Under § 9-503(a) (2010), a debtor that is a "registered organization" should be identified by the "name shown on the 'public organic record' of the debtor's 'jurisdiction of organization'…." A registered organization is "an organization formed or organized solely under the law of a single State or the United

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States by the filing of a public organic record with, the issuance of a public organic record by, or the enactment of legislation by the State or the United States." See U.C.C. § 9-102(a)(71) (2010). A "public organic record" generally refers to the record initially required to be filed with or issued by a state in order to create or organize an organization or business trust. It may also refer to state or federal legislation that forms or organizes an organization, as well as any amendments to these documents. *See* U.C.C. § 9-102(a)(68) (2010).

[D] Debtor's Location **Read: U.C.C. § 9-307.**

IN RE AURA SYSTEMS, INC.

United States Bankruptcy Court, Central District of California 347 B.R. 720 (2006)

SAMUEL L. BUFFORD, BANKRUPTCY JUDGE

Debtor Aura Systems, Inc. ("Aura"), a Delaware corporation, filed a voluntary petition under chapter 11 of the bankruptcy code in 2005. In 1995, some ten years earlier, claimants filed a district court action for alleged violations of federal securities laws in connection with their purchase of Aura common stock. In 1999, the parties reached a global settlement, which provided for Aura to pay claimants a total of $4 million in installments.

In late 2002, Aura defaulted on the monthly payment due under the settlement. As a result, the district court entered a final judgment in favor of claimants for the sum of $923,250, the unpaid remainder of the settlement sum. The claimants filed a "Notice of Judgment Lien," using a "Form Jl-1," with the California Secretary of State on April 10, 2003. Claimants' proof of claim states that the claim is secured by accounts receivable, equipment and inventory pursuant to a lien arising from this judgment.

In its motion for summary judgment on its claim objection, Aura contends that a judicial lien cannot be created against a non-California corporate debtor through the filing of a notice of judgment lien with the California Secretary of State. Thus, Aura argues, the claimants' claims are unsecured. The question for this court is whether a judicial lien can be created, after the UCC Article 9 amendments adopted in 2001, by filing a notice of judgment lien with the California Secretary of State against a non-California corporate debtor with property in California.

California Commercial Code § 9307 (the California version of UCC § 9-307), effective July 1, 2001, determines the location of a debtor for the purposes of personal property security interests. Section 9307(e) specifies: "A registered organization that is organized under the law of a state [such as a corporation] is

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located in that state.” Identical provisions were adopted in 2001 in every other state. Thus, for the perfection of a security interest in personal property, Aura is located in Delaware, because it is a Delaware corporation.

The consequence of Aura’s location in Delaware is specified in California Commercial Code § 9301(1), also adopted in 2001, which provides in relevant part: “while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection . . . of a security interest in collateral.” Again, the law of every other state is similar. Thus, California law dictates that the perfection of a security interest in Aura’s California collateral is governed by the internal law of Delaware.

UCC § 9-310, adopted in Delaware as 6 Del. C. 9-310, provides the applicable Delaware law for perfecting a security interest in collateral. This provision states (with certain exceptions not relevant in this case): “a financing statement must be filed to perfect all security interests. . . .” Section 9-501(a) of the UCC, codified in Delaware as 6 Del. C. 9-501(a), provides the proper location for such a filing: “if the local law of this State governs perfection of a security interest . . . , the office in which to file a financing statement to perfect the security interest . . . is . . . the office of the [Delaware] Secretary of State. . . .”

From these statutory provisions, it follows that, under both California and Delaware law, there is a single place to perfect a security interest in collateral owned by a Delaware corporation, wherever the collateral may be located. That location is the office of the Delaware Secretary of State. It also follows that there is no place in California to file a financing statement that would accomplish such perfection of a security interest in such collateral, including California collateral, belonging to a Delaware corporation.

There are strong policy considerations behind this result. One of the principal purposes of the 2001 changes in Article 9 of the UCC was to require that all UCC security interest filings for a given corporation be made in the corporation’s state of incorporation.

Previous law provided that the state where the property was located was usually the proper location for perfecting a security interest. *See* Former U.C.C. § 9-103(1)(b). This law was unsatisfactory, for two reasons. First, a lender seeking a security interest in a corporation’s collateral would have to examine the filings in all states where the corporation had collateral to make sure that there was no outstanding encumbrance in such collateral. In addition, such a lender was required to file its financing statement in every state where such collateral was located. This was a burdensome and duplicative process if the borrower was a large corporation.

Second, personal property is frequently moved from state to state. In consequence,

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a secured creditor could lose its security interest if it did not adequately keep track of the location of its collateral and take appropriate subsequent steps, within an appropriate time frame, to maintain its secured status by filing in the new state or states where the collateral came to rest. *See* UCC § 9- 103 (1972) (amended effective July 1, 2001). In addition, a secured creditor would have to investigate the provenance of collateral to find out if it was subject to a prior perfected security interest in another state.

The goal of the 2001 amendments here at issue was to make a UCC security interest filing permanent and easy to find. For a Delaware corporation, it is now necessary to examine only the UCC filings in Delaware to determine whether there is a perfected security interest for any collateral belonging to the corporation anywhere in the United States. This is far more efficient and less prone to error than the previous system.

We come now to consider the application of the foregoing law to obtaining a judgment lien on California collateral. Under CCP § 697.530, a judgment lien on such property can be created only by filing the requisite notice in the office of the Secretary of State. However, the statute provides that this procedure is effective to create a judgment lien only if the Commercial Code permits the perfection of a security interest in such collateral by a filing in the same office.

The parties devote much space to discussing which state's Secretary of State's office is specified by the statute. The court need not resolve this dispute. If the statute is interpreted to apply only to the California Secretary of State, the statute does not apply in this case, because the California Commercial Code does not permit the perfection of a security interest in collateral belonging to a Delaware corporation by filing a notice of judgment in California. On the other hand, if we take the California statute to create a judgment lien upon the filing of a notice of judgment lien in the Secretary of State's office in the appropriate state, claimants must lose because they filed their notice of judgment in the wrong state. They should have filed their notice in Delaware instead of in California.

Therefore, claimants' judgment against Aura only supports an unsecured claim in this case.

Summary judgment is granted to Aura.

THE 2010 AMENDMENTS TO ARTICLE 9 RELATING TO DEBTOR'S LOCATION

As the *In re Aura Systems, Inc.* opinion above makes clear, the 2001 amendments to Article 9 simplified the identification of a debtor's location on a financing

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statement. Before 2001, financing statements had to be filed in any jurisdiction in which collateral was located. This burden might be *de minimis* in terms of perfecting a security interest, but it required later creditors to search records in multiple jurisdictions to determine whether the property was encumbered with a prior interest. Additionally, personal property is often moveable, and a creditor that failed to protect its security interest as the collateral changed jurisdictions could lose that security interest. The 2001 amendments eliminated much of this uncertainty by providing instead that the debtor's location – usually the state of incorporation or organization in the case of a business – was the proper jurisdiction for filing the financing statement.

The 2001 amendments did not fully resolve the problem, however. While movement of the collateral was no longer an issue, both individual and organizational debtors can and do change their locations. The 2001 amendments provided that with respect to property acquired and subject to a security interest before the change of location, the secured creditor would have an additional four month grace period in which to perfect the security interest in the new location. This grace period did not apply, however, to collateral acquired after a change in location. The 2010 amendments extended the four-month grace period to this after-acquired property. *See* U.C.C. § 9-316(h) (2010). Under the amendments, a creditor seeking a security interest in property acquired in the four months after a debtor has changed its location (or a purchaser of that property) must search the financing statements of both the new location and the debtor's old location or risk their collateral being subject to a prior security interest.

Similar rules apply upon a change in the debtor itself, such as when a representative organization debtor is acquired by a new entity. In such situations, secured creditors of the original debtor would have a four-month grace period to file a new financing statement covering property acquired before and within four months after the acquisition. *See* U.C.C. § 9-316(i) (2010).

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Chapter 20

[Insert in § 20.03 at page 938 following the reference to *In re JLL Liquidating, Inc.* and before Problem 20.1]

"Securitization" describes the process whereby a trustee retains a security interest in the value of goods or other property, giving the trustee rights in bankruptcy that supersede the rights of other perfected creditors. In a typical example, an individual will provide a third-party trustee, usually a bank or other similar institution, with a security interest to the right of property of the individual, in order to attain a loan. When the individual defaults on the loan, the third-party trustee recovers the value of the loan through the security interest and stands before any creditor, even perfect creditors.

In order for the third-party trustee to recover assets from the bankruptcy estate, however, the third-party trustee must show that the transaction was a bona fide sale and not merely a secured financing.

Due to the expense of this type of transaction, securitization is generally only seen in situations involving large amounts of money (more than $15,000,000) or where the individual does not otherwise qualify for a loan. Much of the cost of creating a securitization is incurred in balancing the requirements of a bona fide sale and a secured financing in such a way that a court would determine that the transfer was indeed a bona fide sale.

As an example of securitization and its impact, consider *Octagon Gas Systems, Inc. v. Rimmer*, 995 F.2d 948 (10th Cir. 1993).

BALDOCK, Circuit Judge.

Octagon Gas Systems, Inc. ("Octagon") appeals from the decision of the United States District Court for the Western District of Oklahoma affirming the bankruptcy court's order granting Appellee Roy T. Rimmer's motion for summary judgment. We have jurisdiction under 28 U.S.C. 158(d).

Poll Gas, Inc. ("Poll") was in the business of gathering and selling natural gas in Oklahoma. As part of its business, Poll owned and operated a gas gathering system ("the System"). Prior to 1976, Amcole Energy Corporation ("Amcole") owned ten percent of the Poll stock and four other shareholders owned the remainder of the stock. In May 1976, Amcole entered into an agreement with Poll's remaining four shareholders to purchase all of their shares. Pursuant to the terms of the purchase agreement ("the 1976 Agreement") between Amcole and the other shareholders, the selling shareholders agreed to sell Amcole their 90% of the Poll stock and certain other assets. In exchange, Amcole transferred to each shareholder a proportionate "overriding royalty interest" in the gross proceeds received by Amcole from gas sold through the Poll System. As a result of the 1976 Agreement, Amcole became Poll's sole remaining shareholder. Approximately one-half of Rimmer's "overriding royalty interest" originates from the 1976 Agreement.

On May 31, 1982, Poll, assigned to SINA 79/80 Limited ("SINA") an "overriding royalty interest" in the gross proceeds derived from the Poll System. The remaining half of Rimmer's "overriding royalty interest" arises from the 1982 Assignment.

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In 1983 and 1984, Rimmer purchased, from the original assignees, a portion of the "overriding royalty interests" created by the 1976 Agreement and the 1982 Assignment. Subsequently, on January 28, 1987, Amcole, Poll, and Rimmer executed an agreement entitled Assignment of Overriding Royalty Interest ("1987 Assignment"). *See supra* note 3. Pursuant to the parties' various cross-transfers, the 1987 Assignment provided that "…Rimmer will own from this date forward a full Five Percent (5%) perpetual overriding royalty interest on all proceeds payable to [Poll] under the [System]…." Appellant's App. at 83-86.

In 1988, Poll commenced this Chapter 11 bankruptcy case. Prior to filing the petition in bankruptcy, Poll, pursuant to the 1987 Assignment, paid Rimmer five percent of its proceeds from the sale of gas through the System. During the pendency of the bankruptcy estate, the bankruptcy trustee continued to pay this five percent interest to Rimmer.

In January 1990, the bankruptcy court confirmed the trustee's reorganization plan. Under the plan, the Poll System was conveyed to Norwest Bank Minnesota ("Norwest") or its designee, in satisfaction of Norwest's secured claim. The Plan provided that the Poll System would be transferred to Norwest "free and clear of liens, claims, interests, and encumbrances." Appellant's App. at 130. Thereafter, Norwest conveyed the System to Octagon. After assuming control of the System, Octagon refused to recognize any interest held by Rimmer in the System gas sale proceeds and failed to make any payments to Rimmer. Consequently, this action was commenced by a creditor of Rimmer, Bonnet Resources Corporation, alleging it is secured by Rimmer's interest in the System's gas sale proceeds. Rimmer subsequently brought a motion for intervention. The bankruptcy court granted Rimmer's motion and exercised jurisdiction to determine whether the Plan effectuated a transfer of Rimmer's five percent interest to Octagon, or whether Rimmer's interest survives as personal property owned by Rimmer.

On cross motions for summary judgment, the bankruptcy court held that Rimmer owned a five percent interest in the proceeds of gas sold through the Poll System which was not affected by the Plan or the transfer of the Poll System to Octagon. The court, rejecting Octagon's argument that Article 9 of the Uniform Commercial Code ("U.C.C.") applied, reasoned that Rimmer's partial interest in the proceeds from the sale of gas was a "good" and amounted to a proportionate ownership right. The court found that Rimmer's interest was not property of Poll's bankruptcy estate and therefore could not be transferred by the estate to Octagon. The bankruptcy court granted summary judgment in favor of Rimmer, and the district court summarily affirmed.

On appeal Octagon raises numerous issues, among them: (1) whether the bankruptcy court erred in finding that Rimmer had an interest in the Poll System gas sale proceeds, and (2) whether the bankruptcy court erred in determining that Article 9 of the U.C.C. was inapplicable to Rimmer's interest. Because we remand in order for the court to apply Article 9, we do not address Octagon's remaining issues.

We review a court's order granting summary judgment de novo. *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.* 912 F.2d 1238, 1241 (10th Cir. 1990). We examine the record to determine whether any genuine issue of material fact exists, and, if not, whether the substantive law was applied correctly. <u>*Hokansen v. United States*</u>, 868 F.2d 372, 374 (10th Cir. 1989) (citation omitted).

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I.

Octagon argues that Rimmer had no enforceable interest in the Poll System gas sales proceeds. Octagon's only argument concerning this issue that merits extensive discussion pertains to the 1976 Agreement. Octagon contends that because Poll was not a party to the 1976 Agreement, the portion of Rimmer's interest that derives from the 1976 Agreement is not an enforceable interest in the Poll System gas sale proceeds; rather it is only an enforceable interest against Amcole in the amount Amcole received from Poll.

Whether or not Rimmer has an enforceable interest in the Poll System proceeds and the characterization of that claimed interest are matters of state law. *See* Paul v. Monts, 906 F.2d 1468, 1475 (10th Cir. 1990). In construing the meaning of a written contract, the intent of the parties controls. *Founders Bank & Trust Co. v. Upsher*, 830 P.2d 1355, 1361 (Okla. 1992) (citing Okla. Stat. Ann. tit. 15, 151-153 (West 1981)). Where the language of the contract alone does not clearly set forth the intent of the parties, the court may look to extrinsic evidence. *See* Panhandle Coop. Royalty Co. v. Cunningham, 495 P.2d 108, 112-113 (Okla. 1971); Pollock Stores Co. v. Draper, 202 Okla. 546, 215 P.2d 843 (Okla. 1950).

Although Poll was not a party to the 1976 Agreement, the portion of Rimmer's interest that derives from the 1976 Agreement is an enforceable interest in the Poll System's gas sale proceeds. First, we hold that the intention of the parties is not clearly ascertainable from the writing alone. As a result, we look to the parties' course of dealing and the undisputed affidavit of one of the parties--Frank Cole, president of Amcole in 1976--which clearly indicate that the intent of the parties was to create enforceable interests in the Poll System's gas sale proceeds, not interests in proceeds Amcole received from Poll. Throughout the nearly fourteen years following the execution of the 1976 Agreement, Poll itself, not Amcole, paid the owners of the interests conveyed in the 1976 Agreement their proportionate share of Poll's proceeds. According to Cole, the parties' intent was that Amcole's sole obligation with respect to the payment of the created interests arose from its status, following the 1976 Agreement, as Poll's sole shareholder. The parties intended that the created interests were in Poll's proceeds, not in Poll proceeds received by Amcole.

Of course, the 1976 Agreement could not have created interests in the Poll System gas sale proceeds unless the parties to the 1976 Agreement had the capacity to bind Poll to the Agreement and sell interests in Poll's proceeds, or unless Poll subsequently ratified the Agreement. Contracts involving all of a corporation's shareholders are binding on the corporation, 12B William M. Fletcher, *Fletcher's Cyclopedia of the Law of Private Corporations*, 5743 (perm. ed. rev. vol. 1984), and under Oklahoma law in effect in 1976, shareholders had the right to authorize the disposition of corporate assets, Okla. Stat. Ann. tit. 18, 1.164(b) (West 1971) (repealed 1986). Additionally, a corporation, by subsequent action, may ratify a contract entered in its behalf. *East Ctr. Okla. Elec. Coop., Inc. v. Oklahoma Gas & Electric Co.*, 505 P.2d 1324, 1329 (Okla. 1973). We hold that under either theory, the 1976 Agreement created an enforceable interest in Poll's proceeds.

All of Poll's shareholders and directors were parties to the 1976 Agreement. This being the case, the shareholders had the capacity to dispose of Poll's assets and bind Poll to the Agreement. Because this was the intent of the parties, the effect of the 1976

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Agreement was to create enforceable interests in Poll's proceeds. Alternatively, Poll's continuous payment of the interests over nearly fourteen years evidences its ratification of the 1976 Agreement. *See* Blunt v. Blunt, 198 Okla. 138, 176 P.2d 471, 472 (Okla. 1947). Because we hold that the 1976 Agreement, in addition to the 1982 Assignment and the 1987 Assignment, created an enforceable interest in the Poll System gas sale proceeds, we uphold the bankruptcy court's determination that Rimmer had an interest in the Poll System's gas sale proceeds.

II.

Throughout this litigation, Octagon has maintained that Rimmer's interest is an "account" governed by Article 9 of the U.C.C. as adopted by Oklahoma. Rimmer has conceded that his interest is an "account," but argues that regardless of Article 9, he "owns" the interest, not Poll, and therefore his interest has never been property of Poll's bankruptcy estate. The bankruptcy court held that Article 9 was inapplicable because Article 9 provides a classification of interests for the purpose of determining competing secured interests, "not a classification for the creation of an ownership right in personal property." Order of July 26, 1991 at 6-7, *In Re Meridian Reserve, Inc.*, No. BK-88-06519-BH, (Bankr. W.D. Okla. July 29, 1990).

"Article [9 of the U.C.C.] sets out a comprehensive scheme for the regulation of security interests in personal property and fixtures." Okla. Stat. Ann. tit. 12A, 9-101 (West 1963) (Official Comment). The aim of Article 9 is "to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty." *Id*. As a means towards achieving this end, Article 9 lays out the steps a party must take to create a valid security interest. *See* Okla. Stat. Ann. tit. 12A, art. 9 pt. 2 (West 1963 & Supp. 1993). These steps include "attachment" of a security interest, and "perfection" of the interest. *See* Okla. Stat. Ann. tit. 12A, 9-204, 9-302 to 9-305 (West Supp. 1993). Article 9 also provides for priority among competing claims of purchasers and creditors of the debtor. *See* Okla. Stat. Ann. tit. 12A, art. 9 pt. 3 (West 1963 & Supp. 1993). Although Article 9 applies mainly to transactions intended to create security interests, it also applies to sales of accounts, Okla. Stat. Ann. tit. 12A, 9-102(1)(b) (West Supp. 1993), because sales of wholly intangible interests in accounts create the same risks of secret liens inherent in secured transactions. *See* Dan T. Coenen, *Priorities in Accounts: The Crazy Quilt of Current Law and a Proposal for Reform*, 45 Vand. L. Rev. 1061, 1073-74 (1992).

As a starting point in our analysis, we must determine whether Rimmer's interest in the Poll System's gas sale proceeds is an "account" as defined by Article 9 of the U.C.C. as adopted by Oklahoma. *See* Okla. Stat. Ann. tit. 12A, 9-101 to 9-507 (West 1963 & Supp. 1993). Article 9 applies to transactions involving personal property. Okla. Stat. Ann. tit. 12A, 9-102(1) (West 1963). One form of personal property to which Article 9 applies is an "account" which is defined as "any right to payment for goods sold . . . which is not evidenced by an instrument or chattel paper." Okla. Stat. Ann. tit. 12A, 9-106 (West Supp. 1993). Section 9-105(1)(h) states that "goods" includes "all things which are movable at the time the security interest attaches…but does not

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include…minerals or the like, including oil and gas, *before extraction*." *Id*. 9-105(1)(h) (emphasis added).

Natural gas, once extracted, becomes personal property in Oklahoma, Continental Supply Co. v. Marshall, 152 F.2d 300, 305 (10th Cir. 1945), *cert. denied*, 327 U.S. 803, 90 L. Ed. 1028, 66 S. Ct. 962 (1946), and as such, is subject to Article 9. Also, by negative implication, section 9-105(1)(h) indicates that minerals, including gas, *following extraction*, come within Article 9's definition of a "good." *See In* Re Fullop, 125 Bankr. 536, 539-40 (Bankr. S.D. Ill. 1990), *aff'd*, 133 Bankr. 627 (S.D. Ill. 1991); Barkley Clark, *The Law of Secured Transactions Under the Uniform Commercial Code*, P13.3[1] (1980). Here, the gas sold is extracted. Because extracted gas is a "good," Poll's right to payment for gas sold, as well as Rimmer's five percent interest in Poll's right to payment, is an account.

Having determined that the interest acquired by Rimmer is an account under Article 9, it follows that Article 9 applies to Rimmer's five percent interest in the Poll System's gas sale proceeds (hereinafter referred to as "Rimmer's account"), even though the transactions giving rise to Rimmer's account were not intended to secure a debt. The U.C.C. Official Comment 2 to Okla. Stat. Ann. tit. 12A, 9-102 (West Supp. 1993), explains that in the case of commercial financing on the basis of accounts, "the distinction between a security transfer and a sale is blurred, and a sale of such property is therefore covered by [9-102(1)(b)] *whether intended for security or not*. The buyer is then treated as a secured party and his interest as a security interest." (emphasis added). Section 9-102(1)(b) states that Article 9 applies "to any outright sale of accounts." Further, the term "security interest" as defined by Article 9, expressly includes "any interest of a buyer of accounts," Okla. Stat. Ann. tit. 12A, 1-201(37)(West Supp. 1993), and "secured party" includes "a person to whom accounts…have been sold." *Id*. 9-105(1)(m). Additionally, section 9-105(1)(d) defines "debtor" as including "the seller of accounts," and, under section 9-105(1)(c), "collateral" includes "accounts…which have been sold." These provisions clearly indicate that the buyer of an account is treated as a secured party, his interest in the account is treated as a security interest, the seller of the account is a debtor, and the account sold is treated as collateral.

We must now determine whether the fact of Poll's bankruptcy alters the application of Article 9 to Rimmer's account. Under § 541 of the Bankruptcy Code, the property of the bankrupt's estate includes, "all legal or equitable interests of the debtor in property as of the commencement of the case." In United States v. Whiting Pools, Inc., 462 U.S. 198, 76 L. Ed. 2d 515, 103 S. Ct. 2309 (1983), the Supreme Court, noting that 541 has an expansive scope, determined that 541 merely defines what is included in the bankrupt's estate rather than placing a limit on the scope of the estate. *Id*. at 203. The Court also pointed out that, under 541, property of the bankrupt's estate includes any property subject to a security interest. *Id*. at 203-04. The impact of applying Article 9 to Rimmer's account is that Article 9's treatment of accounts sold as collateral would place Rimmer's account within the property of Poll's bankruptcy estate. Further, if it is determined that Rimmer's account was not properly perfected, then, upon Poll's filing of bankruptcy, the bankruptcy trustee as a lien creditor would have a security interest superior to that of Rimmer. *See In* Re Reliance Equities, Inc., 966 F.2d 1338, 1344 (10th

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Cir. 1992); United States v. Trigg, 465 F.2d 1264, 1269 (8th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973); *In* Re Cripps, 31 Bankr. 541, 543 (Bankr. W.D. Okla. 1983).

Rimmer contends, and the bankruptcy court held, that because Rimmer "bought" the account, he had title to the account and "owned" the account, and Poll no longer had any ownership interest in the account. Therefore, Rimmer argues, when Poll filed for bankruptcy, Poll's bankruptcy estate did not include Rimmer's account. Although acknowledging that Article 9 applies to sales of accounts, Rimmer argues that when deciding whether the account is property of the bankrupt's estate, the sale of an account must be distinguished from the transfer of an account for security. Simply put, Rimmer's argument rests on the principle that he, not Poll, owned the account as of the date of the sale.

We do not agree that the assignment of the account to Rimmer effectuated a transfer to Rimmer of all property interests in the account, leaving Poll with no property interest in Rimmer's account which the bankruptcy trustee could reach under 11 U.S.C. 541. Rimmer has advanced no sound argument, based either on post-U.C.C. case law or policy, as to why Article 9 should not be applied here. In fact, our review of the structure of Article 9, the available case law, and the policies underlying Article 9 and the Bankruptcy Code convinces us that a debtor's sale of an account, prior to filing for bankruptcy, does not necessarily place that account beyond the reach of the bankruptcy trustee.

As the Eighth Circuit explained in United States v. Trigg, 465 F.2d at 1268, Article 9 does not attempt to classify a debtor's interest in the collateral as a property right or a specific legal interest. Article 9 also does not speak in terms of who has title to collateral among competing parties. *Id.*; Okla. Stat. Ann. tit. 12A, 9-101 (West 1963) (Official Comment). Rather, Article 9 " focuses on the rights and duties of the secured party, the debtor, and third parties."Okla. Stat. Ann. tit. 12A, 9-101 (West 1963) (Official Comment); *see also* Trigg, 465 F.2d at 1268. Article 9 grants rights in the collateral to creditors in the event a secured party fails to perfect his interest, Okla. Stat. Ann. tit. 12A, 9-301 (West Supp. 1993), regardless of the location of title and regardless of the debtor's or secured party's legal interest in the collateral. *Id.*; *see also* Trigg, 465 F.2d at 1268. This Article 9 scheme applies with equal force to the sale of accounts. Article 9 treats the interest acquired by a buyer of accounts as a security interest and treats the buyer as a secured party. *See supra*. Accordingly, the seller or assignor of the account "does not part with all transferable rights in [the] account[] even following an absolute assignment." Coenen, *supra*, at 1079.

In Trigg, 465 F.2d 1264, the Eighth Circuit addressed a transfer of ownership argument as it applied to a tax lien. In that case, an account assignee argued that the assignment of accounts was a transfer of property rights in the accounts leaving no property rights in the debtor which the United States could attach via a tax lien. *Id*. The court rejected the assignee's argument based on the applicability of Article 9 to the assignment of accounts. *Id*. Without defining what property rights the debtor retained after assigning the accounts, the court concluded that the assignment, "did not place the progress payments beyond the reach of the federal tax lien." *Id*. at 1269; *accord* Southern Rock, Inc. v. B & B Auto Supply, 711 F.2d 683, 685 (5th Cir. 1983); *see also* Nevada Rock & Sand Co. v. United States Dept. of Treasury, 376 F. Supp. 161, 170-72 (D. Nev. 1974).

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Although the Bankruptcy Code defines property of a bankrupt's estate in terms of "legal or equitable interests of the debtor in property," 11 U.S.C. 541(a)(1), rather than in terms of "property rights," we find *Trigg* and its progeny instructive and hold that because the transfer of ownership argument fails as to whether the debtor retains "property rights" that can be attached by a tax lien in accounts he has sold, the same argument must also fail in terms of whether the debtor retains "legal or equitable interest" in the accounts sold for purposes of the Bankruptcy Code.

In the context of bankruptcy cases, courts have dismissed arguments identical to the transfer of ownership argument Rimmer advances here. *See e.g.*, *In Re Flowers*, 78 Bankr. 774 (Bankr. D.S.C. 1986); *In Re Cawthorn*, 33 Bankr. 119 (M.D. Tenn. 1983); *In Re Cripps*, 31 Bankr. 541. In *In Re Cripps*, which involved the application of Article 9 under Oklahoma law, the petitioner, a buyer of accounts, argued that because the true nature of the transaction between herself and the debtor was a sale, she gained title to the accounts following the sale, and the accounts were her property, not property of the debtor's bankruptcy estate. *Id*. at 544. The court dismissed the petitioner's argument, stating that "title, for purposes of defining rights of parties, is of little relative consequence under [Article 9]." *Id*. (citing *Morton Booth Co. v. Tiara Furniture, Inc.*, 564 P.2d 210 (Okla. 1977).The court went on to conclude that because Article 9 applies to sales of accounts as well as assignments of accounts for security, the account was property of the debtor's estate regardless of the nature of the underlying transaction. *Id*. We find the *In Re Cripps* court's reasoning to be sound.

Finally, acceptance of Rimmer's transfer of ownership or title argument would allow an account buyer to benefit unfairly, at the expense of the bankrupt debtor's other creditors, from the debtor's filing for bankruptcy. For example, it is beyond dispute that, outside the realm of bankruptcy, a lien creditor would have rights in the accounts superior to the rights of the unperfected buyer of the accounts. *See* Okla. Stat. Ann. tit. 12A, 9-301 & 9-312 (West Supp. 1993). However, under Rimmer's theory, once the debtor declares bankruptcy, *the fact of bankruptcy alone* places the accounts sold to the unperfected account buyer beyond the reach of the bankruptcy trustee and all of the bankrupt's creditors. This result is contrary to the similar aims of Article 9 and the Bankruptcy Code. The current Bankruptcy Code was designed, in part, to make bankruptcy law more congruent with the U.C.C. *In Re Antweil*, 931 F.2d 689, 693 (10th Cir. 1991), *aff'd sub nom*. *Barnhill v. Johnson*, 118 L. Ed. 2d 39, 112 S. Ct. 1386 (1992). The policy behind Article 9 is to ensure certainty for creditors and provide notice of security interests to third parties. *See* Okla. Stat. Ann. tit. 12A, 9-101 (West 1963) (Official Comment). Likewise, certain provisions of the Bankruptcy Code "are designed to protect creditors by eliminating secret liens." *In Re Reliance*, 966 F.2d at 1344 (citing 11 U.S.C. 544, 546). In keeping with these policies, we hold that because, under Article 9, a sale of accounts is treated as if it creates a security interest in the accounts, accounts sold by a debtor prior to filing for bankruptcy remain property of the debtor's bankruptcy estate.

Accordingly, we hold that the bankruptcy court erred in concluding that Article 9 was inapplicable to Rimmer's interest. The bankruptcy court must therefore readdress, in light of Article 9, the central issue of whether the reorganization plan effectuated a transfer of Rimmer's interest to Octagon, or whether Rimmer's interest survives the Plan.

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The court must make findings regarding whether Rimmer's account was a perfected security interest--i.e., whether U.C.C. filings were required or made. The court must also determine the effect, if any, of the trustee's actions concerning Rimmer's account, and the effect, if any, of Rimmer's actions. For these reasons, we REVERSE the entry of summary judgment in favor of Rimmer and REMAND to the district court with instructions to vacate its judgment and remand the case to the bankruptcy court for further proceedings consistent with this opinion.

SETH, Circuit Judge, dissenting:

I must respectfully dissent from the majority opinion as I agree with the determinations made by the United States District Court for the Western District of Oklahoma and by the United States Bankruptcy Judge. Briefly, these were that the "interest" in issue was never part of the Poll, Inc. bankruptcy estate. The "interest" owned by Mr. Rimmer was in the proceeds of the sale of natural gas collected from producing wells and sold to distributors, especially to Oklahoma Natural Gas Company. It apparently was secured from Amcole.

The Bankruptcy Court, in substance, held that Appellee Rimmer owns a separate and distinct interest in 5% of the proceeds of gas and liquids sold through the Poll Gas System, and that this interest was not in Poll's bankruptcy estate nor impacted by the Trustee's conveyance of the system.

The "interest" of Rimmer which I consider is only that portion derived from what is referred to as the 1976 Agreement or the Agreement, which is herein described. By the Agreement undivided interests were sold by Amcole outright to "Sellers" who were Rimmer's predecessors.

The Agreement was an outright sales agreement signed by all the stockholders and directors who thereby sold all their stock in Poll, Inc. (and two gas wells) to Amcole as Buyer. Amcole was also a stockholder in Poll. As consideration for the purchase of the stock in Poll, Inc., Amcole agreed to pay the purchase price in full, and did so. This purchase price, as stated in the Agreement (including some cash also from Poll, Inc.), was:

> "an Override of the gross proceeds received by BUYER through Poll Gas Inc. from Oklahoma Natural Gas Company under their existing contract and any and all amendments thereto, and all other gas, and liquids purchased and sold, and all additional connections, gas processing and gathering facilities and systems, through the Poll Gas System? [in three named counties in Oklahoma]."

The "override" was to total 9% of the proceeds of gas sales and 5% of proceeds from sales of liquids. The Agreement said these were "to be owned" as therein divided among

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the three named individuals and two corporations. These were the former Poll, Inc. stockholders except for Amcole.

The Agreement was to apply to any purchases of gas or liquids as well by the Oklahoma Natural Gas Company. The Agreement was filed in the county records. Appellee Rimmer was not one of these original sellers of stock, as mentioned, but bought interests from them.

The rest of Rimmer's interest originated in later agreements with other parties. The interests there concerned were also called overriding royalties.

We are concerned with Poll, Inc. as the Debtor, and its bankruptcy estate, not with Amcole. There remained nothing relating to the interests to go into the Poll bankruptcy estate. The ownership had passed by the 1976 Agreement to Amcole, and it as consideration agreed to and did create the "interests," as above described, out of what it bought--Poll Gas, Inc. I agree with the majority that enforceable interests were created by the 1976 Agreement including that owned by Rimmer, but I must disagree that they were part of the Poll bankruptcy estate.

I.

There is a significant aspect of the appeal which relates to the decision of the District Court, and of the Bankruptcy Court, that the "interests" of Rimmer were not part of the Debtor Poll, Inc. bankruptcy estate.

The relationship of the parties and the early transactions, particularly the changes brought about by the 1976 Agreement, must be examined. The Agreement is the source of the particular interests here considered. Before the 1976 Agreement the Poll corporation gathered gas in the field, transported it, and sold much of it to Oklahoma Natural Gas Company under contracts. Amcole decided to acquire Poll, Inc. by the 1976 Agreement. Under the Agreement *all stock* of Poll which Amcole did not already own vested in Amcole as "Buyer." All stockholders and directors of Poll signed the 1976 Agreement. The majority holds that Poll, Inc. was bound by the Agreement, and I agree.

The unusual part of the Agreement was that Amcole, as Buyer (of the stock), was obligated to use assets of Poll, that is, the gas sales contracts with Oklahoma Gas Company or the proceeds therefrom to pay the former Poll stockholders--the Sellers. To do this, and it was done, Amcole necessarily had to exercise ownership of these interests formerly of Poll, Inc. The actions of Amcole, and its performance as Buyer for its own benefit, demonstrated this ownership. It was the only way it could perform its obligation. "Control" of Poll could not do this. There would be no ownership of the interests in question after the 1976 Agreement remaining in Poll. Poll obtained no benefits under the Agreement and it lost assets. It undertook the duty to remit sales proceeds formerly its own. This was done in the capacity of a *cestui que* trust as would arise under an oil payment or similar interest. It had a duty to remit and nothing more. See Corbin on Contracts, 873 at 823 and 902 at 853.

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Thus the "interests," which the majority defines as "accounts" *under the 1976 Agreement*, passed to Amcole as part of the sale of Poll, Inc. U.C.C. 9-104(e) Supp. They could not then be part of the Poll, Inc. estate. Whether they were part of the Amcole estate the record does not reveal. This is one of the elements supporting the District Court's holding that the interests were not part of the Poll estate.

II.

There is another reason why the Rimmer interest did not become part of the Poll estate.

The use by the original parties to the 1976 Agreement, and the continued use of the term "override" in later agreements between successors to the interests as a description of the interests created, is significant and cannot be ignored. It was obvious that the parties adopted the accepted characteristics and consequences of "overrides" as applicable and descriptive of the interests created. This was a clear and obvious description for them to apply to the "interests." It was in commonly used terms in the business. They adopted and applied the consequences and characteristics of such an interest in their agreements. This was clearly expressed, the intent was clear, and it can make no difference that the term is not applied to an interest of the type here concerned if its meaning they adopted and applied. We are not concerned with how the term may have been used by others. Certainly the 17+ years of "continued course of dealing" shows what the parties meant. *See* U.C.C. (with comments) 1-102 and 1-105.

It is apparent that the consequences, nature and scope of an "override" were adopted as descriptive as there were no time limits or period to restrict the perpetual term of such an interest and there was also *no dollar limit*. With such a permanent interest and without limits of time and money, the use or misuse of the term "override" was a clear expression or description. The nature and scope were well known and accepted.

The years of "continued course of dealing" by the parties and successors adopted its meaning and this should be sufficient under the U.C.C. An "agreement" under the U.C.C. as to consequences which would otherwise flow from the provisions of the U.C.C. includes the effect of a course of dealing (1-102, 105).

The intent of the parties must be applied. There is no indication whatever that the Agreement or the interests were in any way intended to be a security agreement. The course of dealing was the equivalent to an "agreement" of the parties as described in the U.C.C., which modifies the U.C.C. terms, and determines the real nature of the interests.

III.

The position taken by the majority is that the interest of Mr. Rimmer was put in the Poll bankruptcy estate by Article 9 of the U.C.C. This position is based only on the theory that the interest fell within the Article 9 definition of an "account," and if it was an "account" it automatically was included in the Debtor's estate. This was, according to the

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majority, to follow regardless of the intention of the parties to the Agreement and the years of "course of dealing." When the definition was applied it was automatically something none of the parties intended, nor what it actually was as demonstrated over the 17 years. The record shows there was no debt, the interest was paid for in full, the intent was perpetual, and the interest had no dollar limit. There was no hint of commercial financing.

To apply the "account" definition is to reverse the completed 1976 sale and revest the interest in Poll. Rimmer apparently paid several hundred thousand dollars to buy the interest and the application of Article 9 would divest him of the interest. By all indications in the majority opinion he would become at most an unsecured creditor in the estate of the corporation which probably was never the source of interest to permit the application of Article 9.

The consequences of the application of Article 9 demonstrates that it is not applicable. The U.C.C. by fiat cannot change the consequences and legal nature of a transaction contrary to the intent of the parties.

The most that the statute could do, in Article 9, and this may be what it does, is to require the consequences therein provided, that is, to require this to be a security transaction, *unless a contrary intention and purpose of the parties can be shown*.
I would affirm the trial court.