

## **2000 Uniform Commercial Code Committee Report on Revised Article 9 (Secured Transactions)**

On the recommendation of the UCC Committee of the Business Law Section, WSBA sponsored the adoption of Revised Article 9, which the legislature enacted, with some local variations, as chapter 250, Laws of 2000, codified as Article 9A of RCW 62A. The Report of the UCC Committee dated September 1999 is attached.

The UCC Committee of the Business Law Section has now recommended technical amendments and corrections to UCC Article 9A and related statutes. These have been approved by the WSBA Board of Governors. Most of the changes reflect minor amendments and corrections to the official text of Revised Article 9. Attached are (1) the proposed bill, (2) a one-page explanation, and (3) a section-by-section analysis.

Also attached is an updated version, dated September 2000, of Washington Comments to Article 9A. These comments have been prepared by the UCC Committee. Additional comments may be needed in 2001 to reflect legislation enacted in that year.

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### ***A. Recommendations***

The Uniform Commercial Code Committee of the Business Law Section of the Washington State Bar Association (the "Committee") recommends:

1. Uniform Commercial Code Revised Article 9 (Secured Transactions) should be enacted in Washington State in the year 2000, except for proposed variations described in Part D of this report, and the Committee takes no position on certain policy issues described in Part E. Appendix III to this report sets forth the text of Revised Article 9 incorporating the proposed variations.
2. The Official Comments and Washington Comments to Revised Article 9 should be included in the official legislative history. The Official Comments have been prepared by the drafters of Revised Article 9 and are set forth as Appendix IV to this report.\* The Washington Comments have been written by this Committee and are set forth as Appendix I.
3. A computer system upgrade for the department of licensing UCC division should be funded in the year 2000 and paid for out of increased filing fees. The upgrade is needed to enable the department to accept electronic filings and to respond to information requests within two business days as specified by Revised Article 9.

### ***B. What is changed?***

Revised Article 9 represents a major overhaul and expansion. First, it reflects developments since 1972 in technology (such as electronic commerce) and in commercial finance (such as asset securitization). Second, the revised article fills in a number of gaps, addressing issues not resolved by the 1972 statute and on which courts have differed. Third, Revised Article 9 accomplishes a major simplification of the filing system. An excellent Comparison of the Current Article 9 and the New Article 9 is included (with permission) as Appendix II to this report. It was written by Steven O. Weise of the Los Angeles office of Heller Ehrman White & McAuliffe. Mr. Weise served as the American Bar Association's advisor to the Article 9 drafting committee. For an excellent, somewhat longer treatment, see Edwin Smith, "Overview of Revised Article 9," 73 Amer. Bankr. L. 1 (1999). Mr. Smith is chairman of the UCC Committee of the ABA and served on the Article 9 drafting committee. Given the length and complexity of the revised article, this Committee report can take note of only a few very important changes.

**Expanded Scope.** Revised Article 9 applies to security interests in deposit accounts, in health care insurance receivables, and in commercial tort claims. It applies to sales of payment intangibles and to most consignments. It covers the perfection and priority, though not the creation, of all nonpossessory agricultural liens.

**Simplified Filing System.** All filing under Revised Article 9 is at the location of the debtor except for fixtures, timber, minerals, oil, and gas. If the debtor is a corporation, it is located at the place of registration in the state of incorporation. (Similarly, for limited partnerships and limited liability companies.) So, when the collateral is inventory and equipment located in 20 states, it will no longer be necessary to file in more than one state.

A simplified national form of financing statement must be used. Except in consumer transactions, the collateral description in the financing statement can be "all property" of the debtor. (But the security agreement must identify the collateral by type and, in a consumer transaction, must describe the collateral). The financing statement need not be signed by the debtor. (The debtor must authorize the filing, but signing a security agreement constitutes authorization; in the event of an unauthorized filing, one may file a corrective notice.) Electronic filing is permitted.

**Free Assignability.** Freedom of contract is increased by generally invalidating restrictions on assignment of payment rights of any kind and by limiting restrictions on the granting of security interests in personal property. However, a "negative pledge" in a loan agreement remains enforceable.

**Nonjudicial Foreclosure.** Ordinary warranties of title apply to a nonjudicial foreclosure sale unless disclaimed. Safe-harbor forms of notice of sale are provided (the form for consumers contains more information and is in plain English). Ten-days' notice of sale is sufficient (except in consumer transactions). If challenged, the secured party has the burden of proving that its sale was commercially reasonable. Before recovering a deficiency in a consumer transaction, the secured party must explain how the deficiency is calculated.

**Good Faith.** The definition of good faith requires, not just subjective honesty, but also the observance of reasonable commercial standards of fair dealing.

### *C. Why enact now?*

National uniformity is especially important for Revised Article 9 because (1) for interstate and international transactions, the filing system is so different, (2) a national form of financing statement is stipulated, and (3) the revised article makes many other significant changes that will complicate multi-state transactions in the absence of uniformity.

Revised Article 9 specifies an effective date of July 1, 2001. A grace period of one year afterward is generally provided for perfection of security interests under the new law. However, prior perfection by filing will generally remain effective until the original filing lapses. The transition rules are complicated in any event, but will become more so in a state that does not meet the target date. That will result in greater uncertainty and higher transaction costs for parties located in a nonadopting state.

Although enactment early in 2001 would achieve the target, there is no reason for delay, and the transition will be much smoother if Washington lawyers and businesses have a longer time to prepare.

#### ***D. Proposed variations***

The Committee's proposed Washington variations from the official text of Revised Article 9 fall into three categories. First, there are variations required by the official text itself. That occurs where the official text contains a blank or offers a choice between two options. Variations of these kinds appear in Sections 9-201, 9-311, 9-334, 9-501, 9-502, 9-512, 9-518, 9-519, 9-520, 9-522, 9-523, 9-526 and 9-617.

Second, some proposed variations are technical amendments to conform with existing Washington statutes on manufactured homes, motor vehicles, crop liens, recording of instruments, and foreclosure on real property. These changes appear in Sections 9-102, 9-322, 9-334, 9-515, 9-604 and 9-607 and in amendments to RCW chapters 46.12, 60.11, and 65.20. These variations are explained in the Washington comments.

Third, the UCC Committee recommends a few substantive deviations from the official text. Each of these substantive deviations from the official text is described below and in a Washington comment.

Section 9-102(47) clarifies the definition of "instrument" by providing that a writing is not an instrument if it does not contain an order or promise to pay or if it expressly states that it is nontransferable or nonassignable.

Section 9-108 specifies that the requirement of a reasonable description of collateral applies only to security agreements and not to financing statements.

Sections 9-109(d) excludes governmental transfers from Article 9, thus continuing the previous exclusion.

Section 9-309 provides for automatic perfection, without filing, of an account or payment intangible that does not exceed \$50,000, or 10% of the total amount, of the assignor's accounts and payment intangibles.

Section 9-333 continues the existing Washington variation in RCW 62A.9-310, so that a lien for materials or services is prior to a perfected security interest only if the lien is statutory and the statute expressly provides for such priority.

Section 9-406 preserves existing Washington statutes that expressly prohibit, or require governmental approval for, transfers of accounts or chattel paper.

Section 9-525 authorizes the department of licensing to offer expedited service for an additional charge and by giving the department rule-making authority similar to what it has now under RCW 62A.9-409.

Section 9-527 concerns reports by the department of licensing. The proposed Washington variation calls for these reports to be made annually to the governor and it deletes (as unnecessary) detail in the official text about what the report must cover.

Section 9-601 states that a secured party's rights after default do not override specific limitations on a secured party's use of certain kinds of intangible collateral.

Sections 9-602 and 9-624(a) preserves Washington case law that upholds waivers of suretyship defenses.

Section 9-607 conforms with Washington recording statutes and statutes providing for nonjudicial foreclosure on real property.

Section 9-610 provides explicitly that the safe harbor disclaimer of foreclosure sale warranties applies to all warranties.

Sections 9-611 and 9-621 continues the existing Washington variation by which secured parties are required to give notice of foreclosure sale and the like to other secured parties only if they have filed.

Section 2-210 provides that an unauthorized assignment of rights under a sales contract entitles the other party to demand adequate assurance of performance from the assignor.

Section 2A-310 treats security interests in accessions to leased vehicles the same as when the vehicle is not leased.

### ***E. Policy issues***

Current Article 9 contains only a few consumer protection provisions. For several reasons these protections were left to individual states rather than being included in the uniform national law. However, meetings of the drafting committee for Revised Article 9 were attended by several individuals who undertook to represent consumers and argued strongly for a number of provisions that would apply to consumers only. The general tendency of these provisions was to make it more difficult in a consumer transaction either to obtain a security interest or to foreclose on a security interest in the event of default. Eventually a compromise was struck by which these participants agreed not to oppose the revised article and in return for which a number of their proposals were included. The Committee regards some of the compromise provisions as uncontroversial (for example, consumer provisions mentioned in Part B of this report). On the other hand, some of the compromise provisions appear to involve important issues of public policy. Endeavoring to be impartial and nonpartisan, the UCC Committee will only attempt to identify, and will not take any position on, issues of that nature. Several provisions of Revised Article 9 relating to consumer transactions are believed to involve such issues of public policy:

Section 9-102(a) defines "consumer transaction" and related terms without any monetary limitation as there is under the federal Truth in Lending Law. The Committee takes no position on whether there should be such a limitation.

Section 9-109(d)(13) excludes consumer deposits from Article 9, thus letting the courts decide whether and how to obtain a security interest in this type of collateral. The Committee takes no position on this exclusion.

Section 9-513 in conjunction with Section 9-625 imposes an automatic \$500 penalty on a secured party who fails to file a timely termination statement of a financing statement covering consumer goods; for other collateral the penalty applies only if the secured party fails to act after receiving a request from the debtor. The Committee takes no position on the automatic penalty.

Article 9 has always allowed a secured party to retain collateral in full satisfaction of a secured obligation if after proper notice the debtor does not object. Revised Article 9 extends this procedure to allow retention of collateral in partial satisfaction of an obligation, but Section 9-620(g) prohibits this for consumer obligations. The Committee takes no position on the carve-out for consumers.

In addition, Section 9-615(f) contains an upset price procedure allowing any debtor (not just a consumer) to challenge the sufficiency of the purchase price obtained at a nonjudicial foreclosure sale at which the purchaser is the secured party or a guarantor. The Committee takes no position on whether such a procedure should be available. (If this subsection is omitted, then Section 9-626(a)(5) would also be omitted.)

Finally, the Committee has identified two significant policy issues relating to intangibles such as software.

First, Section 9-321 allows a licensee of intangibles in the ordinary course of business, when the license is nonexclusive, to take free of security interests created by its licensor. (The licensee must, of course, continue to perform all its obligations under the license.) Some think this change in law is inconsistent with current licensing law and practice and will have unintended adverse consequences. Other see no reason why a licensee should enjoy less protection than a buyer of goods.

The second issue concerns purchase money security interests (PMSIs) – security interests granted either to a seller to secure payment of the purchase price or to a third party who finances the purchase price. A PMSI in goods has generally enjoyed priority over competing security interests in the same goods. Revised Article 9 accords this priority to software only when it is financed with goods as part of an integrated transaction. Some see no reason why a seller or other financier of software or other general intangibles should receive lower priority than a seller or financier of goods, especially at a time when general intangibles may increasingly be the assets that debtors seek to finance. Others note that PMSI priority creates an exception to the general rule that first-in-time is first-in-right. If PMSI priority is extended to intangibles generally, would not the exception then swallow the rule? Would that necessarily be a bad result? In any event, to deviate from the official text on this subject would require technical amendments to several provisions, thus giving rise to potential errors and to the certainty that Washington law would differ considerably from that of other states.

In the evaluation of these and other policy issues, the Committee believes it essential to remember that Article 9 is a uniform law, the benefits of which are impaired by local variations that complicate interstate transactions. At the same time, not all local variations are likely to have that effect. For example, there is less need for uniformity in foreclosure procedures than in priority rules.

#### ***F. The UCC Committee and its work***

To review Revised Article 9, the Committee held eight half-day meetings beginning in March 1999. Each of the article's seven parts was assigned to a subcommittee, who discussed it among themselves before reporting to the full Committee. Difficult or controversial provisions were discussed at more than one meeting of the full Committee, as were provisions that needed revision in order to conform to other Washington laws. This report is the product of that study. Attached is a list of Committee members who participated in the study.

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## 1999 UCC Committee Report on Uniform Commercial Code, Revised Article 9

### Appendix I

Uniform Commercial Code Revised Article 9 (Secured Transactions)  
Washington Comments

Prepared by  
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BUSINESS LAW SECTION  
WASHINGTON STATE BAR ASSOCIATION

SEPTEMBER 1999

#### **RCW 62A.9A-102. Definitions and Index of Definitions**

1. In general. Subsection (a) contains definitions for use "in this article." Being designed for financing transactions, these definitions do not necessarily apply by analogy in other contexts, especially when the same term is defined differently in other articles of the Uniform Commercial Code. For example, there is a different definition of "goods" in Article 2 (Sales), of "instrument" in Article 3 (Commercial Paper), and of "good faith" in Article 5 (Letters of Credit).
2. Manufactured Homes as Goods. For many years manufactured homes were treated as personalty and titled under the Washington motor vehicle statute, and a security interest in a manufactured home could be perfected only by notation on the certificate of title. See chapter 46.12 RCW. Chapter 65.20 RCW, enacted in 1989, provides a means for eliminating the title certificate and converting or merging a manufactured home into the real property on which it is installed. Once converted, the manufactured home is treated no differently than any other real property for title or security purposes. But until the title has been eliminated, the manufactured home is "not . . . real property in any form, including fixture law". RCW 65.20.030. (Emphasis added.) Consistently with this scheme, the last sentence of the definition of "goods" in subsection (44) has been revised to make clear that a manufactured home converted to real property under chapter 65.20 RCW cannot be "goods".
3. Instruments. In the second sentence of subsection (47), the definition of "instrument," clauses (iv) and (v) have been added to the official text to make clear that an instrument under Article 9 must contain a promise or order to pay and does not include a writing that is expressly nontransferable -- for example, a nontransferable "certificate of deposit."
4. Manufactured home. -- The definition of this term contained in Title 46 and chapter 65.20 RCW has been substituted for that of the official text.
5. Manufactured-home transaction. The definition of this term, found in subsection (54) of the official text, has been omitted as unnecessary under the Washington statutory scheme. See Washington Comment No. 2, supra.
6. Mortgage. Under Washington property law, the definition of "mortgage" in subsection (55) encompasses deeds of trust and real estate contracts as well as traditional mortgages, but does not include an ownership interest.

#### **RCW 62A.9A-108. Sufficiency of Description in Security Agreement.**



The official text is varied by adding a sentence to subsection (c) to make clear that the requirement of a reasonable identification of collateral, as distinguished from a supergeneric description (e.g., "all assets of debtor"), applies only to the security agreement and not to the financing statement. Likewise, the caption to this section is expanded to indicate that the section pertains to security agreements.

#### **RCW 62A.9A-109. Scope.**

Until now, the official text of Article 9 has excluded coverage of transfers by governments and governmental units. The official text of Revised Article 9 eliminates that exclusion. However, Washington's distinctive case law on municipal finance makes that elimination inappropriate in this state. Consequently, subsection (d)(14) has been added to continue the exclusion with respect to the State of Washington and its governmental units.

#### **RCW 62A.9A-201. General Effectiveness of Security Agreement.**

Subsection (b) is intended to make clear that transactions subject to the Uniform Commercial Code remain subject to other applicable laws relating to consumers, to the regulation of loans and the extension of credit, and to consumer protection, including, without limitation, chapter 19.52 RCW (Interest-Usury), chapter 19.86 RCW (Consumer Protection Act), chapter 31.04 RCW (Consumer Loan Act), and chapter 63.14 RCW (Retail Installment Sales).

#### **RCW 62A.9A-207. Rights and Duties of Secured Party Having Possession or Control of Collateral.**

Subsection (b) only applies to collateral in the possession of a secured party. Collateral must be capable of possession in order for subsection (b) to apply (See Official Comment 7 to this section, indicating that intangibles are not susceptible of "possession"). Therefore subsection (b) does not conflict with or limit the provisions of RCW 62A.9A-408(d), which restricts a secured party's use of certain intangible collateral.

#### **RCW 62A.9A-309. Security Interest Perfected Upon Attachment.**

Subsection (2) of the official text continues automatic perfection (without filing) for an assignment of accounts which does not transfer to the assignee a "significant" part of the assignor's outstanding accounts. Washington had eliminated automatic perfection in that situation in response to the decision in *Architectural Woods, Inc. v. State*, 88 Wn. 2d 406, 562 P. 2d 248 (1977), which held an assignment to be automatically perfected because it was casual and isolated, although it evidently constituted a large percentage of the assignor's total accounts. By specifying a quantitative test -- \$50,000, or 10% of the total amount, of the assignor's outstanding accounts and payment intangibles -- RCW 62A.9A-309(2) allows automatic perfection in accordance with the policy of the uniform act, while avoiding the uncertainty created by *Architectural Woods*.

#### **RCW 62A.9A-311. Perfection of Security Interests in Property Subject to Certain Statutes, Regulations, and Treaties.**

Subsection (b) provides that the filing of a financing statement does not perfect a security interest in (1) motor vehicles, (2) boats, or (3) fixtures, timber or minerals on property registered under the Torrens system.

#### **RCW 62A.9A-322. Priorities Among Conflicting Security Interests in and Agricultural Liens on Same Collateral.**

Subsection (g) expands the official text to provide that the crop lien statute, chapter 60.11 RCW, governs priority conflicts between secured parties and holders of agricultural liens subject to that statute.

**RCW 62A.9A-333. Priority of Certain Liens Arising by Operation of Law.**

Subsection (b) continues the Washington variation in RCW 62A.9-310 by which a possessory lien has priority over a security interest only if the lien is statutory and the statute expressly confers priority.

**RCW 62A.9A-334. Priority of Security Interests in Fixtures and Crops.**

1. Manufactured homes. Subsection (e)(4) of the official text provides a special priority rule for security interest in manufactured homes that become fixtures. This rule has been deleted as irrelevant under the Washington statutory scheme. See Washington Comment No. 2 to RCW 62A.9A-102.

2. Crop liens. The Washington variation of subsection (j), in conjunction with subsection (i) and Washington's crop lien statute, chapter 60.11 RCW, gives a security interest in growing crops priority over real property interests except as otherwise provided in RCW 60.11.050. The real property interests thus subordinated include all liens arising under Titles 60 and 61 of RCW except those expressly given priority by RCW 60.11.050.

**RCW 62A.9A-406. Discharge of Account Debtor; Notification of Assignment; Identification and Proof of Assignment; Restrictions on Assignment of Accounts, Chattel Paper, Payment Intangibles, and Promissory Notes Ineffective.**

Subsection (f) of the official text has been omitted so as to preserve existing Washington statutes that expressly prohibit, or require governmental approval for, transfers of accounts or chattel paper; e.g., RCW 67.70.100, which requires court approval to assign lottery winnings.

**RCW 62A.9A-515. Duration and Effectiveness of Financing Statement; Effect of Lapsed Financing Statement.**

Subsection (b) of the official text provides an extended period for the effectiveness of a financing statement relating to a public-finance transaction or a manufactured home transaction. This subsection has been omitted as unnecessary in Washington because of the exclusion for Washington State public-finance transactions and the treatment of manufactured homes under chapter 65.20 RCW. See, respectively, Washington Comment to RCW 62A.9A-109 and Washington Comment No. 2 to RCW 62A.9A-102.

**RCW 62A.9A-525. Fees.**

Instead of fixing filing fees by statute, the Washington variation gives the department of licensing rule-making authority similar to that previously conferred by RCW 62A.9-409. The statute specifies those services for which fees are allowed and expressly allows an additional fee for expedited service.

**RCW 62A.9A-527. Duty to Report.**

RCW 62A.9A-527 omits as unnecessary the official text provision detailing what subjects must be covered in the annual reports submitted by the department of licensing.

**RCW 62A.9A-601. Rights After Default; Judicial Enforcement; Consignor or Buyer of Accounts, Chattel Paper, Payment Intangibles, or Promissory Notes.**

To avoid doubt, subsection (h) states that rights and remedies under Part 6 of Revised Article 9 do not override applicable provisions of RCW 62A.9A-408, which restricts a secured party's use of certain types of intangible collateral.

**RCW 62A.9A-602. Waiver and Variance of Rights and Duties.**

Consistently with Washington case law (e.g., *Freuhauf Trailer Co. of Canada Ltd. v. Chandler*, 67 Wn. 2d 704, 409 P. 2d 651 (1966)), Washington variations of this section and RCW 62A.9A-624(a) preserve the ability of a guarantor to waive suretyship defenses prior to default.

**RCW 62A.9A-604. Procedure if Security Agreement Covers Real Property or Fixtures.**

The rules in subsection (c) and (d) on removal of fixtures are made expressly applicable to manufactured homes. Otherwise, under chapter 65.20 RCW, those rules would not apply to manufactured homes. See Washington Comment No. 2 to RCW 62A.9A-102.

**RCW 62A.9A-607. Collection and Enforcement by Secured Party.**

When a promissory note secured by a mortgage of real property has been sold or pledged, subsection (b) gives the transferee the same right that the transferor had to foreclose the mortgage nonjudicially. In Washington, of course, the only kinds of "mortgage" that can be foreclosed nonjudicially are real estate contracts and deeds of trust satisfying the requirements of chapter 61.24 RCW. To exercise a right of nonjudicial foreclosure, the transferee of the secured note must record an affidavit setting forth specified facts concerning his right to foreclose.

**RCW 62A.9A-610. Disposition of Collateral After Default.**

Subsection (f) varies the official text by stating explicitly that the safe harbor form of disclaimer disclaims all warranties by a secured party making a nonjudicial disposition of collateral.

**RCW 62A.9A-611. Notification Before Disposition of Collateral.**

Subsection (c) continues the policy of the existing Washington variation in RCW 62A.9-504(c)(3) by requiring a secured party to give notice of nonjudicial disposition of collateral to other secured parties only if they have filed financing statements or have perfected by title certificate notation or under federal law.

**RCW 62A.9A-620. Acceptance of Collateral in Full or Partial Satisfaction of Obligation; Compulsory Disposition of Collateral.**

In conformity with the official text, subsection (b) eliminates "constructive" strict foreclosure by which a secured party who delays too long to dispose of collateral is deemed to have elected to retain the collateral in full satisfaction of the secured obligations. Revised Article 9 thus overrules *Service Chevrolet, Inc. v. Sparks*, 99 Wn. 2d 199, 660 P. 2d 760 (1983). However, as noted in Official Comment No. 5, excessive delay in disposing of repossessed collateral is a factor in determining whether the eventual disposition is commercially reasonable.

**RCW 62A.9A-621. Notification of Proposal to Accept Collateral.**

RCW 62A.9A-621(a) continues the policy of the existing Washington variation in RCW 62A.9-505(2) by requiring a secured party to give notice to another secured party of its intention to retain collateral in satisfaction of secured obligations only if the other secured party has filed a financing statement or has perfected by title certificate notation or under federal law.

**RCW 62A.9A-624. Waiver.**

See Washington Comment to RCW 62A.9A-602.

**RCW 62A.9A-626. Action in Which Deficiency or Surplus Is in Issue.**

When a secured party seeks to collect a deficiency judgment after disposing of collateral in a manner that is not commercially reasonable, subsection (a) follows the official text by adopting the rebuttable presumption rule for commercial transactions; i.e., the value of the collateral is rebuttably presumed to have been equal to the amount of the secured obligations. RCW 62A.9A-626(b) also follows the official text by adopting no rule for consumer transactions and providing instead that the courts shall decide what rule to apply to those transactions. Although the Washington Supreme Court has not yet addressed the issue, Division II of the Court of Appeals has applied the rebuttable presumption rule in a consumer transaction, *McChord Credit Union v. Parrish*, 61 Wn. App. 8, 809 P. 2d 759 (1991), while Divisions I and III have applied the rebuttable presumption rule in commercial transactions based on reasoning that would apply equally to consumer transactions. *Empire South, Inc. v. Repp*, 51 Wn. App. 868, 756 P. 2d 745 (1988); *Rotta v. Early Indus. Corp.*, 47 Wn. App. 21, 733 P. 2d 576 (1987). It is therefore expected that under Revised Article 9, unless the supreme court should decide otherwise, Washington courts will apply the rebuttable presumption rule in consumer transactions as well as commercial transactions.

**RCW 62A.2-210. Delegation of Performance; Assignment of Rights.**

Subsections (2) and (3) reflect the policy of RCW 62A.9A-406, which generally invalidates anti-assignment provisions in a contract between an account debtor and the obligee. Subsection (7) has been added to enable a party to a sales contract to demand adequate assurances of performance when an assignment by the other party provides reasonable grounds for insecurity. If the assignment is merely for security, it is not likely to impair the other party's ability to obtain future performance due from the assignor. But even then, if under the circumstances the non-assigning party has reasonable grounds for insecurity, subsection (7) makes available the remedy afforded by RCW 62A.2-609.

**RCW 62A.2A-310. Lessor's and Lessee's Rights When Goods Become Accessions.**

Subsection (4)(c) has been added to conform to RCW 62A.9A-335(d).

## **UCC Article 9A**

### **Technical amendments and corrections**

Bill draft Z-0048.2/01 was prepared by the Office of the Code Reviser at the request of the Uniform Commercial Code Committee of the Business Law Section of the Washington State Bar Association. The bill, which has now been approved by the Executive Committee of the Business Law Section and by the WSBA Legislative Committee makes technical amendments and corrections to Article 9A of the Uniform Code and related statutes. Article 9A was enacted, and related statutes were amended, by chapter 250, Washington Session Laws of 2000. Enactment in the year 2000 was important to enable our state to prepare for the national effective date of July 1, 2001. The need to make technical amendments and corrections in 2001 is not unexpected considering the length of Chapter 250 (174 pages) and the fact that Revised Article 9 had been promulgated by the Conference of Commissioners on Uniform State Laws ("NCCUSL") only in August of 1998.

Most of this bill consists of official text changes promulgated by NCCUSL. The changes peculiar to Washington affect the wording of Washington variations to the official text or the integration of Article 9A with existing Washington lien laws.

The bill contains one substantive innovation. At the suggestion of Professor Sepinuck of Gonzaga University Law School the bill clarifies RCW 62A.9A-625(d) to make explicit that, to the extent a secured party's deficiency claim is reduced or eliminated under the rebuttable presumption rule for failure to conduct a commercially reasonable sale, the debtor cannot "double dip" by collecting statutory damages as well.

The proposed changes run the gamut from 62A.9A-625(d), discussed in the preceding paragraph, to RCW 62A.9A-407(a), which adds a missing comma. Most of the changes are at the latter end of the spectrum. This is evident from the detailed analysis that accompanies this memo and describes the effect of each section of the bill. The length of the bill results, of course, from Washington Constitution Article II, Section 3, which requires every amended section of a statute to be set forth in full.

Daniel B. Ritter for the

Uniform Commercial Code Committee

October 4, 2000

**DETAILED ANALYSIS OF PROPOSED BILL (Z-0048.2/01, 2<sup>ND</sup> DRAFT)  
MAKING TECHNICAL AMENDMENTS AND CORRECTIONS  
TO UCC ARTICLE 9A AND RELATED STATUTES**

This memo first describes bill sections that implement technical amendments to the official text of UCC Revised Article 9 (RCW 62A.9A). Second, the memo describes sections that implement changes proposed by the state bar UCC Committee. Unless otherwise indicated, section references in this analysis are to sections of the proposed bill. Sometimes a section of the proposed bill would effect more than one change in the statute being amended; in that case, the bill section will be mentioned more than once in this memo. However, each section of the proposed bill is mentioned at least once.

**Official Text Amendments**

Sec. 6 adds a reference to “agricultural liens.”

Sec. 13 clarifies the definitions of “chattel paper,” “original debtor,” and “proceeds” and corrects cross-references contained in the definition of “person related to.”

Sec. 14 clarifies that a reference to “account” is to “deposit account.”

Sec. 15, 19, and 36 each clarifies a cross-reference by adding the word “subsection.”

Sec. 17 changes roman numerals to arabic.

Sec. 21 adds a missing apostrophe.

Sec. 22 clarifies the inventory exception to the general rule requiring security interests in vehicles to be perfected by title certificate notation.

Sec. 24 clarifies when a lien creditor is prior to an unperfected security interest.

Sec. 25 adds a missing preposition.

Sec. 27 clarifies that a reference to “claim” is to “adverse claim.”

Sec. 29 clarifies that a cross-reference to subsection “(f)” is to subsection “(f)(2).”

Sec. 30 adds a missing article.

Sec. 31 clarifies that a reference to “general intangibles” refers only to those that are “payment intangibles.”

Sec. 32 adds a missing comma.

Sec. 33 clarifies when a secured party may add collateral to a financing statement.

Sec. 34 clarifies when the filing of a termination statement applies to a transmitting utility.

Sec. 35 and 37 correct erroneous cross-references.

Sec. 36 clarifies that notice requirements for disposition of collateral apply to all methods of disposition.

Sec. 38 provides that loss from any failure to comply with Article 9A may include loss from inability to obtain alternative financing.

Sec. 39 clarifies subsection captions.

Sec. 45 adds a new § 9A-407 explaining how to amend a pre-effective date financing statement.

Sec. 46 renumbers § 9A-407 as 408.

Sec. 47 renumbers § 9A-408 as 409.

### **Local (Washington State) Changes**

Sec. 1, 2, 3, 7, 8, 10, 12, and 13 correct various cross-references from “Article 9” to Article 9A.” Similarly, Sec. 11, 40, 41, 42, 43, 44 and 47 change “chapter 250, Laws of 2000” to “Article 62A.9A RCW.”

Sec. 4 deletes the second sentence of RCW 60.11.030(2) to eliminate inconsistency with other provisions of RCW 60.11.030 that make the lien of an orchard-crop handler effective without filing.

Sec. 5 conforms RCW 60.11.904 to RCW 60.11.9001, which is repealed by Sec. 48.

Sec. 9 conforms RCW 62A.2A-306 to RCW 62A.9A-333 as amended.

Sec. 11, 40, 41, 42, 43, 44, and 47 correct various cross-references to Article 62A.8 RCW (which employs a style of subsection designation that differs from the UCC official text). For the same reason, Sec. 16 corrects a cross-reference to Article 62A.5 RCW.

Sec. 28 corrects a grammatical error in subsection (b) of RCW 62A.9A-333 and adds a new subsection (c) that conforms Article 9A to existing RCW 62A.9-310 with respect to preparer and processor liens.

Sec. 39 provides (as explained in the covering memorandum) that a debtor’s statutory damages under RCW 62A.9A-625 are reduced by the amount of damages recovered for the same loss under RCW 62A.9A-626.

Sec. 41, 42, and 47 change references from the “effective date” of Article 9A to “July 1, 2001,” which of course is the effective date.

Sec. 43 corrects a cross-reference to RCW 62A.9-103.

Sec. 48 repeals RCW 60.11.9001, which duplicates RCW 60.11.904 as amended by Sec. 5.

Sec. 49 adds an emergency clause.

Daniel B. Ritter for the  
Uniform Commercial Code Committee  
October 4, 2000



**UNIFORM COMMERCIAL CODE  
REVISED ARTICLE 9 (SECURED TRANSACTIONS)**

**WASHINGTON COMMENTS**

**Prepared by  
UCC COMMITTEE  
BUSINESS LAW SECTION  
WASHINGTON STATE BAR ASSOCIATION**

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## **RCW 62A.9A-102. Definitions and Index of Definitions**

1. In general. Subsection (a) contains definitions for use “in this article.” Being designed for financing transactions, these definitions do not necessarily apply by analogy in other contexts, especially when the same term is defined differently in other articles of the Uniform Commercial Code. For example, there is a different definition of “goods” in Article 2 (Sales), of “instrument” in Article 3 (Commercial Paper), and of “good faith” in Article 5 (Letters of Credit).
2. Consumer obligation. Subsection (a)(25) has been expanded to include a definition of “consumer obligation.” This additional definition and corresponding changes in the definitions of “consumer transaction” and “consumer obligor” operate to exclude from the definition of consumer transaction any extension of credit involving more than \$40,000 – the amount of the homestead exemption under RCW 6.13.030 – unless the collateral is personal property used or expected to be used as a principal dwelling, *i.e.*, a manufactured home. Consequently, larger transactions will not qualify for special protections afforded consumers.
3. Manufactured homes as goods. For many years manufactured homes were treated as personalty and titled under the Washington motor vehicle statute, and a security interest in a manufactured home could be perfected only by notation on the certificate of title. See chapter 46.12 RCW. Chapter 65.20 RCW, enacted in 1989, provides a means for eliminating the title certificate and converting or merging a manufactured home into the real property on which it is installed. Once converted, the manufactured home is treated no differently than any other real property for title or security purposes. But until the title has been eliminated, the manufactured home is “not . . . real property in any form, including fixture law”. RCW 65.20.030. (Emphasis added.) Consistently with this scheme, the last sentence of the definition of “goods” in subsection (44) has been revised to make clear that a manufactured home converted to real property under chapter 65.20 RCW cannot be “goods”.
4. Instruments. In the second sentence of subsection (47), the definition of “instrument,” clauses (iv) and (v) have been added to the official text to make clear that an instrument under Article 9 must contain a promise or order to pay and does not include a writing that is expressly nontransferable – for example, a nontransferable “certificate of deposit.”
5. Manufactured home. – The definition of this term contained in Title 46 and chapter 65.20 RCW has been substituted for that of the official text.
6. Manufactured-home transaction. The definition of this term, found in subsection (54) of the official text, has been omitted as unnecessary under the Washington statutory scheme. See Comment No. 3, *supra*.
7. Mortgage. Under Washington property law, the definition of “mortgage” in subsection (55) encompasses deeds of trust and real estate contracts as well as traditional mortgages, but does not include an ownership interest.

### **RCW 62A.9A-108. Sufficiency of Description in Security Agreement.**

The official text is varied by adding a sentence to subsection (c) to make clear that the requirement of a reasonable identification of collateral, as distinguished from a supergeneric description (*e.g.*, “all assets of debtor”), applies only to the security agreement and not to the financing statement. Likewise, the caption to this section is expanded to indicate that the section pertains to security agreements.

### **RCW 62A.9A-109. Scope.**

1. Deposit accounts. Although Revised Article 9 generally applies to security interests in deposit accounts, subsection (d)(13) of the official text makes Article 9 inapplicable when the security interest is granted in a consumer transaction. The Washington variation limits the exclusion to deposit accounts on which checks can be drawn. Washington’s Article 9 will thus apply to a security interest granted by a consumer in a deposit account on which checks *cannot* be drawn, *e.g.*, most passbook savings accounts and time deposits.

2. Exclusion for state and local government. Until now, the official text of Article 9 has excluded coverage of transfers by governments and governmental units. The official text of Revised Article 9 eliminates that exclusion. However, Washington’s distinctive case law on municipal finance makes that elimination inappropriate in this state. Consequently, subsection (d)(14) has been added to continue the exclusion with respect to the State of Washington and its governmental units.

### **RCW 62A.9A-201. General Effectiveness of Security Agreement.**

Subsection (b) is intended to make clear that transactions subject to the Uniform Commercial Code remain subject to other applicable laws relating to consumers, to the regulation of loans and the extension of credit, and to consumer protection, including, without limitation, chapter 19.52 RCW (Interest-Usury), chapter 19.86 RCW (Consumer Protection Act), chapter 31.04 RCW (Consumer Loan Act), and chapter 63.14 RCW (Retail Installment Sales).

### **RCW 62A.9A-207. Rights and Duties of Secured Party Having Possession or Control of Collateral.**

Subsection (b) only applies to collateral in the possession of a secured party. Collateral must be capable of possession in order for subsection (b) to apply (See Official Comment 7 to this section, indicating that intangibles are not susceptible of “possession”). Therefore subsection (b) does not conflict with or limit the provisions of RCW 62A.9A-408(d), which restricts a secured party’s use of certain intangible collateral.

### **RCW 62A.9A-309. Security Interest Perfected Upon Attachment.**

Subsection (2) of the official text continues automatic perfection (without filing) for an assignment of accounts which does not transfer to the assignee a “significant” part of the assignor’s outstanding accounts. Washington had eliminated automatic perfection in that situation in response to the decision in *Architectural Woods, Inc. v. State*, 88 Wn. 2d 406, 562 P. 2d 248 (1977), which held an assignment to be automatically perfected because it was

casual and isolated, although it evidently constituted a large percentage of the assignor's total accounts. By specifying a quantitative test -- \$50,000, or 10% of the total amount, of the assignor's outstanding accounts and payment intangibles -- RCW 62A.9A-309(2) allows automatic perfection in accordance with the policy of the uniform act, while avoiding the uncertainty created by *Architectural Woods*.

**RCW 62A.9A-311. Perfection of Security Interests in Property Subject to Certain Statutes, Regulations, and Treaties.**

Subsection (b) provides that the filing of a financing statement does not perfect a security interest in (1) motor vehicles, (2) boats, or (3) fixtures, timber or minerals on property registered under the Torrens system.

**RCW 62A.9A-322. Priorities Among Conflicting Security Interests in and Agricultural Liens on Same Collateral.**

Subsection (g) expands the official text to provide that the crop lien statute, chapter 60.11 RCW, governs priority conflicts between secured parties and holders of agricultural liens subject to that statute.

**RCW 62A.9A-323 Future Advances.**

Under subsection (d) of RCW 62A.9A-323, a security interest securing a future advance is cut-off by a sale, even to one who is not a buyer in the ordinary course of business, unless the advance is made pursuant to a pre-existing commitment or within 45 days after the sale or such earlier time as the secured party learns of the sale. Subsection (f) gives a lessee of goods the same rights as a buyer. These provisions are consistent with the previous official text of Article 9, but inconsistent with RCW 62A.9-307(3), which omitted the 45-day cut-off period, thereby giving the secured party priority as to subsequent advances until he actually learned of the sale. Consequently, secured parties making future advances will henceforth need to monitor collateral at 45-day intervals to be fully protected against buyers and lessees.

**RCW 62A.9A-333. Priority of Certain Liens Arising by Operation of Law.**

Subsection (b) continues the Washington variation in RCW 62A.9-310 by which a possessory lien has priority over a security interest only if the lien is statutory and the statute expressly confers priority.

**RCW 62A.9A-334. Priority of Security Interests in Fixtures and Crops.**

1. Manufactured homes. Subsection (e)(4) of the official text provides a special priority rule for security interest in manufactured homes that become fixtures. This rule has been deleted as irrelevant under the Washington statutory scheme. See Washington Comment No. 2 to RCW 62A.9A-102.

2. Crop liens. The Washington variation of subsection (j), in conjunction with subsection (i) and Washington's crop lien statute, chapter 60.11 RCW, gives a security interest in

growing crops priority over real property interests except as otherwise provided in RCW 60.11.050. The real property interests thus subordinated include all liens arising under Titles 60 and 61 of RCW except those expressly given priority by RCW 60.11.050.

**RCW 62A.9A-406. Discharge of Account Debtor; Notification of Assignment; Identification and Proof of Assignment; Restrictions on Assignment of Accounts, Chattel Paper, Payment Intangibles, and Promissory Notes Ineffective.**

Subsection (f) of the official text has been omitted so as to preserve existing Washington statutes that expressly prohibit, or require governmental approval for, transfers of accounts or chattel paper; *e.g.*, RCW 67.70.100, which requires court approval to assign lottery winnings.

**RCW 62A.9A-506. Effect of Errors or Omissions.**

Under subsection (c), a financing statement with an error in the debtor's name is seriously misleading if the error would not be disclosed by a search using the standard search logic of the filing office. This provision overrules *In re Esparza*, 118 Wn.2d 251, 821 P.2d 1216 (1992).

**RCW 62A.9A-515. Duration and Effectiveness of Financing Statement; Effect of Lapsed Financing Statement.**

Subsection (b) of the official text provides an extended period for the effectiveness of a financing statement relating to a public-finance transaction or a manufactured home transaction. This subsection has been omitted as unnecessary in Washington because of the exclusion for Washington State public-finance transactions and the treatment of manufactured homes under chapter 65.20 RCW. See, respectively, Washington Comment to RCW 62A.9A-109 and Washington Comment No. 2 to RCW 62A.9A-102.

**RCW 62A.9A-525. Fees.**

Instead of fixing filing fees by statute, the Washington variation gives the department of licensing rule-making authority similar to that previously conferred by RCW 62A.9-409. The statute specifies those services for which fees are allowed and expressly allows an additional fee for expedited service.

**RCW 62A.9A-527. Duty to Report.**

RCW 62A.9A-527 omits as unnecessary the official text provision detailing what subjects must be covered in the annual reports submitted by the department of licensing.

**RCW 62A.9A-601. Rights After Default; Judicial Enforcement; Consignor or Buyer of Accounts, Chattel Paper, Payment Intangibles, or Promissory Notes.**

To avoid doubt, subsection (h) states that rights and remedies under Part 6 of Revised Article 9 do not override applicable provisions of RCW 62A.9A-408, which restricts a secured party's use of certain types of intangible collateral.

**RCW 62A.9A-602. Waiver and Variance of Rights and Duties.**

Consistently with Washington case law (*e.g.*, *Freuhauf Trailer Co. of Canada Ltd. v. Chandler*, 67 Wn. 2d 704, 409 P. 2d 651 (1966)), Washington variations of this section and RCW 62A.9A-624(a) preserve the ability of a guarantor to waive suretyship defenses prior to default.

**RCW 62A.9A-604. Procedure if Security Agreement Covers Real Property or Fixtures.**

The rules in subsection (c) and (d) on removal of fixtures are made expressly applicable to manufactured homes. Otherwise, under chapter 65.20 RCW, those rules would not apply to manufactured homes. See Washington Comment No. 2 to RCW 62A.9A-102.

**RCW 62A.9A-607. Collection and Enforcement by Secured Party.**

When a promissory note secured by a mortgage of real property has been sold or pledged, subsection (b) gives the transferee the same right that the transferor had to foreclose the mortgage nonjudicially. In Washington, of course, the only kinds of “mortgage” that can be foreclosed nonjudicially are real estate contracts and deeds of trust satisfying the requirements of chapter 61.24 RCW. To exercise a right of nonjudicial foreclosure, the transferee of the secured note must record an affidavit setting forth specified facts concerning his right to foreclose.

**RCW 62A.9A-611. Notification Before Disposition of Collateral.**

Subsection (c) continues the policy of the existing Washington variation in RCW 62A.9-504(c)(3) by requiring a secured party to give notice of nonjudicial disposition of collateral to other secured parties only if they have filed financing statements or have perfected by title certificate notation or under federal law.

**RCW 62A.9A-615. Application of Proceeds of Disposition; Liability for Deficiency and Right to Surplus.**

Washington omits subsection (f) of the official text, a new upset price procedure that would allow a debtor to challenge the sufficiency of the sale price obtained in a private foreclosure sale at which the purchaser was the secured party or its affiliate or a guarantor, even though the secured party proves that the sale was commercially reasonable.

**RCW 62A.9A-620. Acceptance of Collateral in Full or Partial Satisfaction of Obligation; Compulsory Disposition of Collateral.**

1. No consumer goods exclusion. By omitting subsections (a)(3) and (g) of the official text, Washington allows acceptance of any type of collateral, including consumer goods, in either full or partial satisfaction of a secured obligation and regardless of whether the collateral is in the possession of the secured party when the debtor consents to the acceptance.

2. No “constructive” election. In conformity with the official text, subsection (b) eliminates “constructive” strict foreclosure by which a secured party who delays too long to dispose of collateral is deemed to have elected to retain the collateral in full satisfaction of the secured obligations. Revised Article 9 thus overrules *Service Chevrolet, Inc. v. Sparks*, 99 Wn. 2d 199, 660 P. 2d 760 (1983). However, as noted in Official Comment No. 5, excessive delay in disposing of repossessed collateral is a factor in determining whether the eventual disposition is commercially reasonable.

**RCW 62A.9A-621. Notification of Proposal to Accept Collateral.**

RCW 62A.9A-621(a) continues the policy of the existing Washington variation in RCW 62A.9-505(2) by requiring a secured party to give notice to another secured party of its intention to retain collateral in satisfaction of secured obligations only if the other secured party has filed a financing statement or has perfected by title certificate notation or under federal law.

**RCW 62A.9A-624. Waiver.**

See Washington Comment to RCW 62A.9A-602.

**RCW 62A.9A-625. Remedies for Secured Party’s Failure to Comply with Article.**

The Washington variation to subsection (e)(4) allows a secured party 20 days after receipt of demand from a debtor to file a termination statement before incurring a \$500 penalty. In the official text this subsection, in conjunction with RCW 62A.9A-513, would impose the penalty automatically without debtor demand if the collateral is consumer goods.

**RCW 62A.9A-626. Action in Which Deficiency or Surplus Is in Issue.**

When a secured party seeks a deficiency after disposing of collateral in a manner that is not commercially reasonable, subsection (a) of the official text adopts the rebuttable presumption rule (*i.e.*, the value of the collateral is rebuttably presumed to have been equal to the amount of the secured obligations) but only for commercial transactions. For consumer transactions, subsection (b) of the official text adopts no rule, providing instead that the courts shall decide what rule to apply. By omitting subsection (b) of the official text and making a corresponding amendment to subsection (a), Washington adopts the rebuttable presumption rule for all transactions. Although the Washington Supreme Court had not yet addressed the issue, Division II of the Court of Appeals had applied the rebuttable presumption rule in a consumer transaction, *McChord Credit Union v. Parrish*, 61 Wn. App. 8, 809 P. 2d 759 (1991), while Divisions I and III had applied the rebuttable presumption rule in commercial transactions based on reasoning that would apply equally to consumer transactions. *Empire South, Inc. v. Repp*, 51 Wn. App. 868, 756 P. 2d 745 (1988); *Rotta v. Early Indus. Corp.*, 47 Wn. App. 21, 733 P. 2d 576 (1987). Consequently, this Washington variation from the official text is consistent with Washington case law.

**RCW 62A.2-210. Delegation of Performance; Assignment of Rights.**

Subsections (2) and (3) reflect the policy of RCW 62A.9A-406, which generally invalidates anti-assignment provisions in a contract between an account debtor and the obligee.

Subsection (7) has been added to enable a party to a sales contract to demand adequate assurances of performance when an assignment by the other party provides reasonable grounds for insecurity. If the assignment is merely for security, it is not likely to impair the other party's ability to obtain future performance due from the assignor. But even then, if under the circumstances the non-assigning party has reasonable grounds for insecurity, subsection (7) makes available the remedy afforded by RCW 62A.2-609.

**RCW 62A.2A-310. Lessor's and Lessee's Rights When Goods Become Accessions.**

Subsection (4)(c) has been added to conform to RCW 62A.9A-335(d).