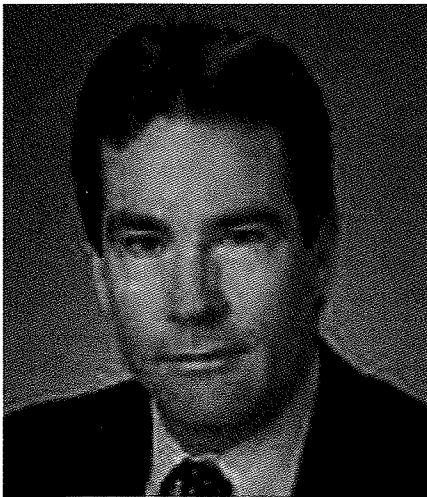
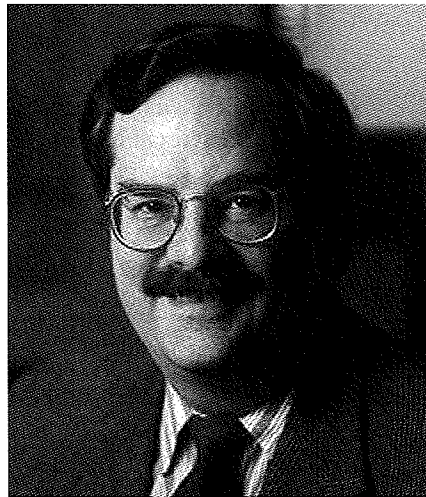


Report of the Deposit Accounts Task Force to the Article 9 Drafting Committee

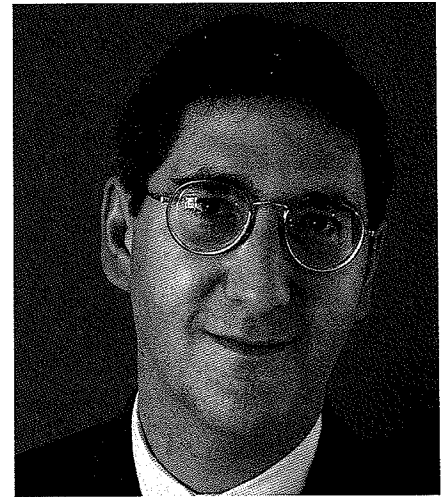
By John F. Hilson, Professor Bruce A. Markell,
Professor Stephen L. Sepinuck and
Professor William D. Warren



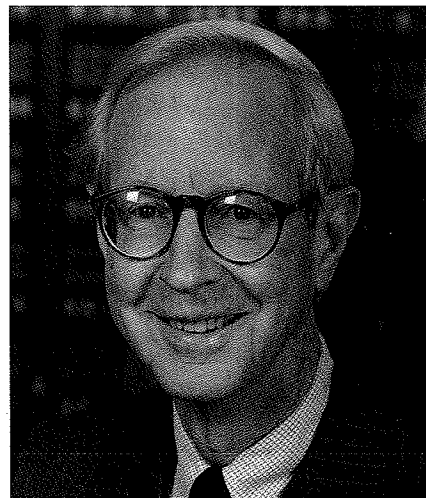
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1975–present, and at Stanford, 1972–75, as Scott Professor of Law. He was also Dean of the UCLA School of Law, 1975–82. He is the author of numerous books and articles on Commercial Law and Bankruptcy, and served as Co-Reporter of the NCCUSL-ALI Current Payments Project that produced Revised UCC Articles 3 and 4 and new Article 4A, 1985–1990. He was also Co-Reporter of the Uniform Consumer Credit Code, 1965–74, Consultant to the Federal Reserve Board on Truth in Lending, 1968–72, and Fair Credit Billing, 1974–76, and Chair of the Federal Reserve Board Consumer Advisory Commission, 1979–80. He served as consultant to the California Legislature on the Uniform Commercial Code (1960–63), consultant to the California Law Revision Commission of Creditors' Remedies, 1971–75, and a member of the National Bankruptcy Conference, 1975–97. Of counsel, Irell & Manella, Los Angeles, 1983–present.

Prefatory Note: The authors comprised the Deposit Accounts Task Force, organized under the auspices of the Article 9 Drafting Committee in July, 1997 to review the then-current draft of revised Article 9 of the Uniform Commercial Code. The charge of the Task Force was to identify any problems with the draft and, where appropriate, suggest solutions. Over a nine-week period, Task Force members met by conference call on several occasions and exchanged draft memoranda. After reaching a consensus on the various issues they examined, the members produced a unanimous report. As the Task Force was completing its work, members received communications from a Drafting Committee member and from one of the project's Reporters concerning some aspects of the then-current draft. The Task Force decided to issue its report without delay, based on the then-current draft, and to respond to those communications at a later date. A short time later, it issued a unanimous supplemental report.

To aid readers, each major point of the two reports is followed by a brief description in italics of how the final draft of revised Article 9 deals with the matter. Citations to Code sections in the reports originally referred to provisions of the August, 1997 draft, except where expressly indicated otherwise. These references have been updated to correspond to the section numbers of revised Article 9, as adopted by the National Conference of Commissioners on Uniform State Laws in the summer of 1998.

I. Summary of Major Points

- Depository institutions will modify their standard deposit contracts to take a security interest in deposit accounts they maintain. Depository institutions will then have a markedly superior position, both as against the bankruptcy trustee and especially as against competing secured parties, than they have under current law in most jurisdictions.

- Permitting non-depository secured parties to perfect security interests in deposit accounts by filing is necessary to achieve the goal of making credit more available through the availability of deposit accounts as additional collateral.
- Unless the priority rules regarding proceeds of deposit accounts are modified, many lenders will require their debtors to close deposit accounts or obtain subordination agreements from their depository institutions as a condition of extending credit. In addition, lenders may establish or encourage others to establish new information markets, in an effort to discover when deposit accounts were first opened or when depository institutions otherwise first acquired a perfected security interest in specified deposit accounts they maintain.

II. Definitions—Section 9-102(a)

The definition of "Deposit Account" in section 9-102(a)(29) twice uses the word "account" without the word "deposit" in front of it. In each instance, the word is not intended to refer to an "account" as that term is defined in section 9-102(a)(2). For this reason, we recommend that the bracketed language in section 9-102(a) be retained. That language indicates that the definitions apply unless the context otherwise requires.

[The Drafting Committee deleted the bracketed language.]

III. Scope Issues—Section 9-109(d)(8)

Section 9-109(d)(8) provides that Article 9 will apply to security interests in insurance policies acquired as proceeds of other collateral. It is taken from current section 9-104(g) and does not represent a change in the law. It is intended

to cover rights to payment on insurance for damage to or destruction of collateral. However, we believe that the proposed changes to Article 9's treatment of deposit accounts necessitates a change to this provision. As we understand it, the intent of section 9-109(d)(8) is not to have whole insurance contracts constitute Article 9 collateral, rather than merely the right to payment on an insurance policy can be Article 9 collateral. However, section 9-109(d)(8) would appear to make the entire insurance contract Article 9 collateral if the debtor purchased the contract with funds from a collateralized deposit account. Theoretically, this issue could arise under current law, if a creditor claimed a security interest in a deposit account as proceeds of other collateral. However, tracing principles, such as the lowest intermediate balance rule, would likely limit what would constitute proceeds of the deposit account. With the coverage of security interests in deposit accounts as original collateral, all things purchased with funds from a collateralized deposit account will constitute proceeds. We believe that section 9-109(d)(8) should be reworded so that it will be restricted to its intended scope.

[The Drafting Committee made some minor alterations to the language and structure of this provision, none of which dealt with this concern.]

IV. Attachment Issues

A. Exclusion of Consumer Secured Transactions

Pursuant to section 9-109(d)(13), security interests in a deposit account in a consumer secured transaction would be excluded from the scope of revised Article 9. This would of course leave security interests in such transactions to the vagaries of the common law, under which depository institutions can take an effective security interest. We question whether this comports with the intent of the Drafting Committee. Perhaps the Committee really wishes not an exclusion but a prohibition. Just as section 9-204 in both the draft and in the current Code generally prohibits security inter-

ests from attaching to after-acquired consumer goods, the Drafting Committee may wish to prevent security interests from attaching in consumer secured transactions. This should provide additional consumer protection without unnecessarily interfering with freedom of contract since consumers can always convert a deposit account into either an instrument or investment property (e.g., a money-market account) and then still collateralize it.

[The Drafting Committee made no change in response to this comment.]

B. Affect of Ownership Changes on Security Interests in Deposit Accounts

The draft makes clear that if the debtor transfers funds from a collateralized deposit account to a new deposit account, the security interest attaches to the new deposit account as proceeds of the old. Section 9-332 comment 2. Some question remains, however, if the account remains the same (same identification number), but a new "depositor" is added (that is, another signatory with the right to withdraw funds and apply them to that signatory's own selfish ends). One might think that this is no different from a debtor transferring partial ownership—such as to a new joint tenant—in collateralized goods, such as a motor vehicle. Under the doctrine of *nemo dat non quod habet*, the collateral would certainly remain subject to the existing security interest. However, a deposit account is arguably different because the new joint owner may then make deposits. Does the security interest encumber such new deposits, or merely those deposits attributable to the original debtor? Presumably, this will not be a problem when the depositary institution itself is the secured party, since the new signatory to the deposit account contract will undoubtedly be required to sign a document that grants a security interest to the depositary institution. However, third parties with a security interest in the deposit account may not have the ability to compel the new owner to sign a security agreement and may even be unaware that a new sig-

natory has been added. This may not be a significant problem given the exclusion of consumer secured transactions. Nevertheless, we suggest that this issue be resolved by comment. We further suggest that the entire deposit account—that is, the depositary institution's entire obligation to pay on request or demand—be regarded as the collateral and that this be unaffected by the creation of a new joint owner of or signatory to the account.

[The Drafting Committee made no changes in response to this suggestion, and the Official Comments do not address it.]

C. DIP Accounts

We believe that the United States Trustee's Office will likely require that depositary institutions that maintain deposit accounts for debtors-in-possession waive any security interests in such deposit accounts, since acquiring a post-petition security interest typically is not in the ordinary course, and usually requires approval under 11 U.S.C. section 364. This is apparently already the practice in the Central District of California.

V. Perfection Issues

A. Perfection by Filing

We believe that the Drafting Committee should reconsider its decision not to permit perfection in a deposit account by filing a financing statement. We make this recommendation with due regard to the fact that the Drafting Committee has made its policy decision on this point, and that the Task Force's role was not to revisit policy issues. Nevertheless, for the reasons listed below, the Drafting Committee should reconsider.

In the current draft a Lender which is not the depositary institution may perfect a security interest in a deposit account as original collateral only by taking control under either section 9-104(a)(2) or (3). Filing a financing statement or giving notice to the depositary Bank is ineffective. Section 9-312(b)(1). Lender may acquire control under section 9-104(a)(2) only by obtaining Bank's consent that it

will comply with instructions of Lender directing disposition of the funds without further consent by Debtor, and section 9-342 provides that Bank is not obliged to give its consent to Lender's control under (a)(2). Certainly Lender cannot obtain control under section 9-104(a)(3) by becoming Bank's customer without Bank's acquiescence.

The effect of these provisions is that if Bank withholds its consent to Lender's obtaining control, Lender's security interest is unperfected and unperfected. It is thus subordinate to the rights of the bankruptcy trustee, and thus largely illusory. Moreover, there is nothing Lender can do about it. This presents a unique situation for a transaction covered by Article 9: Debtor and Lender cannot perfect a security interest in a right to payment owed Debtor without the consent of the account debtor (Bank). Even when Bank is not a creditor of Debtor, if it wishes to preserve the deposit account as a source against which it may setoff any claim in the future, Bank has the arbitrary power to block secured parties from perfecting a security interest in Debtor's deposit accounts by withholding its consent to control.

It is worth noting that the Article 8 control concept, section 8-106(d), for investment property is accompanied by perfection by filing. A broker holding a securities account can prevent a secured party from gaining control by withholding its consent but the secured party can perfect by filing without the consent of the broker. Section 9-312(a). It is not readily apparent what policy is furthered by denying debtors and creditors perfection by filing in deposit accounts while allowing them this right with respect to investment property, which can include such things as money market accounts. Comment 16 to section 9-109 speaks of the danger that debtors will "inadvertently" encumber deposit accounts allowing the secured party to "realize a windfall from a debtor's deposit accounts." We fail to see how additional security can ever create a "windfall," since the secured obligation can be satisfied only once. If the "windfall" results from the debtor's unintentional

collateralization of the deposit account, it is a "windfall" that is already available with respect to investment property, and one which, because of the exclusion of security interests in deposit accounts in consumer secured transactions, consumers cannot suffer.

The depository institution's complete control over perfection by third parties is unnecessary. Regardless of perfection, depositories have no duties to secured parties with respect to deposit accounts that they do not agree to have. Section 9-341. Moreover, perfection by filing goes only to the issue of protecting secured parties against trustees in bankruptcy and lien creditors; the depository's own priority is unaffected by another creditor's perfection. Sections 9-327 and 9-340. Thus, to the extent the rule is intended to obviate the need for depositories to search for filings, it is unnecessary. Indeed, because third parties can have an interest in a deposit account as proceeds of other collateral, and that interest can be perfected by filing, there seems little reason to deny perfection by filing for a security interest in a deposit account as original collateral.

We believe that a main purpose of including deposit accounts as original collateral within Article 9 is to enable creditors to take more reliable security interests in this rather ephemeral form of collateral. Given the draft's perfection and priority rules, however, we believe that third party lenders will not be encouraged to advance credit on the security of deposit accounts as original collateral. In fact, we fear that the result of prohibiting perfection by filing will be to make the revisions a large step backward in those jurisdictions where Article 9 already covers security interests in deposit accounts as original collateral and which currently permit perfection by either filing or notice to the depository.

[The Drafting Committee made no change in response to this comment.]

B. Section 9-104(a)(2)

We have two concerns about this provision, both of which can probably be fixed by comment.

First, comment 3 indicates that Lender can still have "control" over a deposit account even if its agreement with Bank is subject to specified conditions, such as a requirement that instructions be accompanied by certification of Debtor's default. While we agree with this comment, we believe that more guidance is needed on which conditions undermine control and which do not. As the Comment indicates, this is a problem in Article 8 with regard to investment property, where lawyers are often asked to give opinions on overnight repos. We trust that the Task Force on Investment Property will provide guidance for that problem that will also be useful here.

Second, a control agreement under section 9-104(a)(2) may raise problems respecting the customer-bank relationship under Article 4. Under section 4-402, Bank wrongfully dishonors a check of Debtor if it fails to pay a check that is "properly payable." Under section 9-401(a) a check is properly payable "if it is authorized by the customer and is in accordance with any agreement between the customer and bank." If Bank wrongfully dishonors a properly payable check, it may be liable for consequential damages. Section 4-402(b). Banks may be reluctant to enter into section 9-104(a)(2) control agreements allowing lenders to freeze accounts if they are going to be subject to suit by customers alleging consequential damages for dishonor of checks presented for payment after the freeze order is received. A careful reading of Article 4 would say that once Lender freezes the account in accordance with the control agreement, the check is no longer properly payable and Bank's dishonor would not be wrongful. But banks may want indemnity agreements from the parties on this issue and others, and, given the potential for consequential damages, the amount of the indemnity might be substantial. A comment indicating that dishonor pursuant to

or following Lender's instructions is not wrongful would be useful.

[The Drafting Committee made no change in response to these suggestions, and the Official Comments do not address it.]

C. Section 9-104(b)

Section 9-104(b) makes clear that the debtor's ability to direct the disposition of funds from a deposit account does not affect a secured party's control and therefore does not undermine the secured party's perfection. Currently, the provision contains bracketed language that would limit its cross-reference to subsections (a)(2) or (3) of the same section, which deal with control by a secured party other than the depository. The bracketed language should be eliminated so as to make clear that a depository institution which allows the debtor to direct the disposition of funds from the deposit account also will be deemed to have control.

[The Drafting Committee adopted this recommendation, and section 9-104(b) now refers to all of subsection (a).]

VI. Priority Issues

A. Priority in Proceeds of Deposit Accounts

We believe that there is a significant glitch in the current draft with respect to its treatment of items purchased with funds from a collateralized deposit account. We believe that the draft's rules lead to results which the Drafting Committee neither anticipates nor desires. This can best be explained through use of an example.

Lender takes and properly perfects a security interest in Debtor's existing and after-acquired equipment and inventory. Bank also extends credit to Debtor, taking a security interest in Debtor's deposit accounts maintained at Bank. Either to protect its interest in proceeds, or because Bank also obtains an interest in equipment and inventory,

Bank files a proper financing statement. Lender's filing predates Bank's filing. Debtor sells collateralized equipment or inventory and deposits the proceeds in a deposit account at Bank. At this point, although Lender has a perfected interest in these deposits as proceeds of collateral, Bank clearly has priority in the deposit account under section 9-327.

Debtor purchases new equipment or inventory with funds from the deposit account at Bank. Regardless of the applicable tracing rules, Lender has a perfected security interest in that after-acquired property. Bank will claim an interest in that property as proceeds of the deposit account. Priority in this property is no longer governed by section 9-327, but by the general first-to-file-or-perfect rule of section 9-322(a)(1) and (b).

We believe that the Drafting Committee wants and expects Lender to have priority in this situation. However, that may not be the case. Lender's priority will date from its filing against Debtor. Bank's priority will date not from its filing against equipment and inventory, but from its perfection in Debtor's deposit account. *See* sections 9-314(c) and 9-322(a)(1). This may well be the time when the deposit account was opened, since attachment will often occur then¹ and perfection will be automatic. Section 9-104(a)(1).

Assuming this is a correct interpretation of the current draft, the results can have a profound and unintended effect. Inventory lenders who file first and who receive no notification under section 9-324(a) (regarding PMSIs in inventory) can be primed by depositary institutions

who file subsequently. As long as Bank files before, or within 20 days after, Debtor acquires new inventory as proceeds of the deposit account, *see* section 9-315(d)(3), Bank will defeat the rights of Lender. Lender thus must check for new filings constantly in order to ensure that it does not extend credit on the strength of new inventory in which it will have a junior interest. Alternatively, Lender can insist that Debtor deal exclusively with it, and enforce this requirement by demanding that Debtor provide subordination or control agreements for every existing deposit account, or evidence that such accounts have been closed. In either case, the draft imposes significant new burdens on routine financing transactions.

[The Drafting Committee addressed this concern by adding section 9-322(d), which applies a different priority rule for certain proceeds of a deposit account. This new rule, which extends to all goods, gives priority to whoever filed first, rather than to whoever filed or perfected first. This would appear to solve the problem addressed by the Task Force.]

B. Section 9-327

A secured party who obtains control over a deposit account by becoming the depositary institution's customer under section 9-104(a)(3) has priority over the depositary institution's claims against the debtor. Section 9-327(4). *See also* section 9-340(c). Provisional comment 4 to section 9-327 indicates that additional clarification is needed on what happens if both the debtor and the secured party are indebted to the depositary institution. We agree and encourage the Drafting Committee to develop rules for when both the debtor and secured party are indebted to the depositary institution, and rules for when the secured party—but not the debtor—is indebted to the depositary institution.

[The Drafting Committee made no changes to section 9-327, and the reference to the need for clarification was dropped from the Official Comments. However, the Drafting Committee did add the last clause to section 9-340(c), which

restricts the secured party's priority over the depositary institution's setoff rights to those setoff rights based on a claim against the debtor. Presumably, any set-off rights the depositary institution has under the common law that are based on a claim against the secured party remain available.]

C. Section 9-332

Provisional comment 5 acknowledges that a secured party may have recourse to payments made from a collateralized deposit account under other areas of law, but indicates that the Drafting Committee has not yet decided how to address or reference them. We urge that the Code or comments note that such remedies exist and are cumulative—that is, unaffected by the Code—but that there be no attempt to exhaustively list such remedies.

[The Drafting Committee made no change to the text of the Code and the reference to other remedies was dropped from the Official Comments.]

D. Section 9-332 and Setoff

Comment 2 to section 9-332 indicates that “[a] transfer of funds from a deposit account, to which subsection (b) applies, normally will be made by check, by funds transfer, or by debiting the debtor's deposit account and crediting another depositor's account.” We question whether this is or needs to be broad enough to include setoff by the depositary institution. In effecting setoff, a bank will typically debit the debtor's deposit account and credit its loan account. There is no transfer of funds and the concerns for the payment system underlying section 9-332 do not apply. However, in some settings it may be important to determine whether by taking this action the depositary institution has cut off another party's security interest. This could arise, for example, if some secured party, most probably one with a proceeds interest, asserted marshaling arguments because it had an interest only in the deposit account while the depositary institution had other collateral as well.

1. We expect that after enactment of the revisions to Article 9, the requisites for attachment will often occur when the deposit account is opened. Certainly depositary institutions will put a security interest into their standard deposit account contracts. Although their promise to honor checks drawn on the account may not constitute giving the necessary value, promising to honor overdrafts may be. Moreover, many depositors will already be indebted to their depositary institution.

[The Drafting Committee made no change in response to this comment. Sections 340 and 341 generally preserve whatever common-law rights to setoff the depository institution may have, but revised Article 9 does not expressly indicate whether or when the exercise of setoff cuts off another party's security interest.]

E. The Interaction of Sections 9-332 and 9-615(g)

We believe that these two provisions are irreconcilable. Section 9-615(g) describes the circumstances when a junior security party may receive collateral (usually collections) subject to a senior security interest, and still keep it. Derived in part from the definition of "buyer in ordinary course" in current section 1-201(9), that section uses the standard of "good faith and without knowledge that the receipt violates the rights of the holder a security interest." This standard is clearly different from the collusion standard set forth in section 9-332, and raises the following hypothetical:

Assume Lender engages in accounts receivable financing with Debtor. Debtor maintains its deposit accounts at Bank, which also finances Debtor's fleet of corporate cars. Bank takes a security interest in all deposit accounts, and refuses to enter into a control or subordination agreement with Lender, telling Lender that it wants to protect its security interest to the fullest. Lender now has knowledge of Bank's security interest.

After encountering financial difficulties, Debtor approaches Lender to attempt a workout, and in the course of those negotiations discloses that Debtor is in default with Bank on its car leases. Debtor then tenders a check to Lender, drawn on a deposit account at Bank, that partially pays Lender's accrued interest. May Lender present this check and keep any proceeds?

Under the collusion standard of section 9-332, we think so. Lender is simply following a normal course of action in collecting its debt; it is not colluding with Debtor to Bank's disadvantage. Under the standard in section (g), we are not sure. Under the revised good faith standard, not only is subjective intent important, but so are reasonable commercial standards of fair dealing. We think the morals of the marketplace are such that Lender would be permitted to take the check and cash it. We also think that, having knowledge of the security interest and the default, it is with knowledge that taking such funds will violate Bank's rights (although "violate" seems a pretty strong term, it appears to cover a lot of innocuous activity).

The discrepancy between section 9-332 and section 9-615(1)(g) should be removed. One possible solution is to make section 9-332 subject to the rule of section 9-615(1)(g). However, we can see no reason why junior secured parties should be treated worse than payees from a collateralized deposit account who have no security interest. It would be ironic indeed if their greater rights left them in a more vulnerable position. Thus, we recommend that the two provisions employ the same standard.

[Section 9-615(g) was rewritten to refer solely to proceeds of a "disposition"; all reference to "collections" was deleted. This would appear to avoid the conflict perceived by the Task Force. This conclusion is further supported by section 9-607 comment 5, which in dealing with the collection rights of a junior lienor, expressly refers to section 9-332.]

F. Section 9-340(a)

Section 9-340(a) indicates that "a depository institution with which a deposit account is maintained may exercise against a secured party that holds a security interest in the deposit account any right of recoupment or set-off." As comment 2 indicates, this provision is designed to permit the depository to exercise its common-law setoff and recoupment rights despite the claim of a

secured party. We note, however, that some judicial opinions have concluded that the existence of a security interest in an account debtor's obligation destroys the mutuality needed for setoff between the account debtor and the debtor. Thus, while section 9-340(a) appears to make clear that Article 9 will not impair the depository's setoff rights, it may be under the common law that those are lost anyway. We do not believe that the draft should be changed because of this, because depository institutions will likely all take a security interest in accounts they maintain, and thus be assured of priority under section 9-327. Nevertheless, the Task Force wishes to make sure that the Drafting Committee is aware that section 9-340(a) may not be adequate to ensure that the depository institution's setoff and recoupment rights take priority over the rights of some other secured party.

[The Drafting Committee made no change in response to this comment.]

VII. Enforcement Issues

A. Section 9-602(a)

We believe that some of the cross references in sections 9-602(a) to 9-607 are incorrect. Perhaps they were simply not changed when provisions were shuffled in the latest draft. In any event, we suggest that the references be as follows:

Section 9-602(a)(3) should refer to section 9-607(c), not section 9-607(a);

Section 9-602(a)(4) should refer to section 9-608(a)(3), not section 9-607(d);

Section 9-602(a)(5) should refer to section 9-608(a)(4), not section 9-607(d);

[The Drafting Committee adopted these changes.]

B. Section 9-607(a)

We have two suggestions concerning this provision, the first linguistic and the second substantive.

Upon the debtor's default, a depositary institution secured in a deposit account it maintains has the right under section 9-607(a)(4) to "apply the funds in the account" to the secured obligation. Similarly, under section 9-607(a)(5) non-depositary secured parties may instruct the depositary to "pay the funds in the account" to the secured party. These references to "funds in the account" seem inappropriate for two reasons. *See also* section 9-332(b) (referring to "funds from a deposit account"). First, since "account" is a separate, defined term, the provision should reference the "deposit account," not merely "the account." Second, and more significantly, there are no "funds in the account." By nevertheless using that language the provisions invite lawyers and courts to treat deposit accounts as trust funds or as cash sitting in a vault, rather than what they are: merely the unsecured obligation of the bank. We suggest that section 9-607(a)(4) be phrased to authorize the depositary either to "apply the balance of such deposit account" to the secured obligation or to "debit the deposit account." A similar change should be made wherever the text refers to "funds in the account."

Section 9-607(a) permits the secured party to apply the balance in a deposit account to its debt upon the debtor's default. However, the secured party may simply wish to place an administrative hold on the account, without actually applying the amount. *See Gillman v. Chase Manhattan Bank*, 534 N.E.2d 824 (N.Y. 1989). We believe this is analogous to disabling tangible collateral and the Code should expressly permit it.

[The Drafting Committee made the linguistic changes suggested. It made no change in response to the substantive comment about freezing the deposit account.]

C. Section 9-341

There should be better integration of the rights of the depositary institution under section 9-607(a)(4) with the provisions of section 9-341. Section 9-341 provides that the rights and duties of a depositary institution are not terminated, suspended, or modified by the creation or perfection of a security interest in the deposit account. The drafters apparently intended this provision to protect depositary institutions from being affected by security agreements in deposit accounts they maintain, except to the extent they have agreed otherwise, such as in a control agreement. In this context, the provision implicitly is dealing only with security interests held by third parties. Certainly any security interest of the depositary institution itself is intended to affect its rights and duties with respect to the deposit account. Accordingly, section 9-341 should cross reference section 9-607(a)(4). Specifically, the introductory clause to section 9-341 should read: "Except as otherwise provided in Section 9-340(c) or Section 9-607(a)(4)."

[The Drafting Committee made no change in response to this suggestion.]

VIII. Supplemental Report of Deposit Accounts Task Force to The Article 9 Drafting Committee (November 10, 1997)

A. Questions Asked

The communications the Task Force received asked three questions:

1. Is the ability to acquire control through becoming the depositary institution's customer, section 9-104(a)(3), really needed?
2. Are the priority rules in sections 9-327(a)(4) and 9-340(c), which relate to perfection under section 9-104(a)(3), necessary and appropriate?

3. Should the rules in sections 9-327(a)(4) and 9-340(c) apply when the secured party owes money to the depositary institution, and if not, how should the Code express this?

B. Response

1. Question 1

We believe that section 9-104(a)(3), which permits a secured party to acquire control and, thereby, perfection by becoming the depositary institution's customer is unnecessary. We reach this conclusion for two main reasons. First, it is unlikely that control would be obtained under section 9-104(a)(3) in a situation which does not also give the secured party control under section 9-104(a)(2). Second, there is no clear rule about how one becomes a "depositary institution's customer with respect to a deposit account" for the purpose of section 9-104(a)(3). Certainly, one may become a customer with respect to a deposit account by becoming the nominal owner of that deposit account. However, since "nominal ownership" is not the phrase used in the draft, something else may also suffice.²

The only utility we see to section 9-104(a)(3) is twofold. First, it provides an analog to control over investment property, *see* section 8-106(d)(1), and to the extent possible the rules regarding deposit accounts and investment property should be harmonized because of the occasional difficulty of distinguishing between them. Second, it may allow a secured party to acquire control and perfection in a deposit accounts without the consent or knowledge of the depositary institution. In other words, the debtor and secured party could simply open a new deposit account in the secured party's name, and the depositary might never even know that its customer—the

2. *See, e.g., Leitzman v. Ruidoso State Bank*, 827 P.2d 1294 (N.M. 1992); *First National Bank v. Hobbs*, 450 S.W.2d 298 (Ark. 1990); *Schoenfelder v. Arizona Bank*, 796 P.2d 881 (Ariz. 1990) (all treating someone without nominal ownership of a deposit account as the "customer" for the purposes of Article 4).

secured party—is not the beneficial owner of the deposit account. We do not believe that many debtors will consent to this type arrangement because it would presumably deprive them of all access to the deposit account. Moreover, if the Drafting Committee adopts our recommendation to permit perfection by filing, the small amount of flexibility that this option provides would become unnecessary.

2. Questions 2 and 3

Both sections 9-327(a)(4) and 9-340(c) would become unnecessary if section 9-104(a)(3) were deleted. As indicated in our original report, we agree with section 9-327 provisional comment 4 and encouraged the Drafting Committee to develop rules for when both the debtor and secured party are indebted to the depository institution, and rules for when the secured party—but not the

debtor—is indebted to the depository institution. Such rules would no doubt be difficult to draft and would undoubtedly add complexity to the Code. If section 9-104(a)(3) were deleted, there would be no need for special priority rules for when the secured party becomes the depository institution's customer. The parties would simply be free to work out whatever priority arrangement they wished if the normal rules of sections 9-327(a)(3) and 9-340 were not to their liking.

The Conference on Consumer Finance Law presents

COMMERCIAL AND CONSUMER SECURED CREDIT TRANSACTIONS UNDER REVISED UCC ARTICLE 9 AND RELATED LAWS AND REGULATIONS

March 12 – 14, 2001 • Ritz Plaza Hotel • Miami Beach, FL

Monday, March 12

8:30 – 9:20

Introduction to Revised UCC Article 9, Choice of Law, and Transition Rules; Inventory and Equipment Financing

Alvin C. Harrell • Professor of Law • Oklahoma City University,
School of Law • Oklahoma City, OK

9:20 – 10:10

Default, Repossession and Remedies

Don Rapson • Member, PEB and Article 9 Drafting Committee •
Deal, NJ

10:20 – 11:30

Consumer Issues in Revised Article 9

Thomas J. Buiteweg • GMAC Legal Staff • Detroit, MI

James M. Swartz • Ford Motor Credit • Dearborn, MI

11:30 – 12:30

Chattel Paper and Accounts Financing

Don Rapson • Member, PEB and Article 9 Drafting
Committee • Deal, NJ

Tuesday, March 13

8:30 – 9:20

Security Interests in Deposit Accounts and Certificates of Deposit Under Revised Article 9 and Related Laws

Benjamin D. Carpenter • Bankers Systems, Inc. • St. Cloud, MN

9:20 – 10:10

Consignments and Related Issues

James M. Swartz • Ford Motor Credit • Dearborn, MI

10:20 – 11:10

Redrafting Motor Vehicle Retail Installment Sales Contracts and Collection Letters to Comply with Revised Article 9

Paul Ayres • Hudson Cook • Washington, DC

11:10 – 12:00

The Electronic Signatures in Global and National Commerce Act

Thomas J. Buiteweg • GMAC Legal Staff • Detroit, MI

Wednesday, March 14

8:30 – 9:20

Vehicle Finance and Certificate of Title Litigation

David B. McCrea • Shutts & Bowen • Miami, FL

9:20 – 10:10

Lien Finance Perfection and Enforcement Under Revised Article 9

Marc J. Lifset • McNamee, Lochner, Titus & Williams • Albany,
NY

10:20 – 11:10

Revised Article 9's Impact on Security Interests in Real Property and Electronic Filing Issues

Joseph D. Looney • Hudson Cook • Washington, DC

11:10 – 12:00

Forms and Procedures for Compliance with New Article 9 Repossession Requirements

Michael W. Dunagan • Jameson and Dunagan • Dallas, TX

12:00 – 1:30 **Lunch**

1:30 – 2:20

Choice of Law in Certificate of Title Transactions

Alvin C. Harrell • Professor of Law • Oklahoma City University,
School of Law • Oklahoma City, OK

2:30 – 3:20

Boat Titles and Financing

Robert Fisher • Attorney at Law and Co-Chair, Yacht Finance
Subcommittee, Maritime Law Assoc. • Tenafly, NJ

3:30 – 4:20

Preferred Ship Mortgage Finance

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