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Revising Article 9 to Reduce Wasteful Litigation

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REVISING ARTICLE 9 TO REDUCE WASTEFUL LITIGATION

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I. INTRODUCTION

For reasons that are unclear to me, the committees reviewing the articles of the Uniform Commercial Code and drafting revisions are congenitally conservative. Perhaps these committees take their charge too seriously, namely, to revise, not to revolutionize. Perhaps their intimate knowledge of the subject matter exaggerates the importance of each section and consequently magnifies the apparent size of every change. In any case, my own experience with two such committees tells me that the members quickly become focused on revisions and amendments that any outsider would describe as modest. To the extent that the revision of any of the articles of the UCC is going to be more than modest, the push must come from academics or practicing commercial lawyers outside of these committees. In this Essay I accept my own offer to propose a modification in Article 9 that most commercial lawyers will think is more than modest. For myself, I claim only that it might be at the upper bound of modest change; viewed from a distance, it certainly is not revolutionary.

II. THE PROPOSAL AND ITS LEGAL EFFECT

I propose that the drafters of Article 9 repeal section 9-301(1). That subsection provides:

> Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of . . . (b) a person who becomes a lien creditor before the security interest is perfected . . . .[1]

To one unfamiliar with Article 9 of the UCC, the consequences of such revision will not be obvious. To begin to understand those consequences, consider the first sentence of section 9-201:

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* Robert A. Sullivan Professor of Law, University of Michigan Law School. I thank Robert Fogler, my research assistant, who performed the Augean task of digging through 888 cases in which trustees in bankruptcy challenged a creditor's security interest.

1. U.C.C. § 9-301(1)(b) (1990).

> Except as otherwise provided by this Act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors.[2]

Section 9-201 makes even an unperfected security interest king of the hill "[e]xcept as otherwise provided by this Act."[3] Unless some other rule contained in Article 9 deposes an unperfected security interest, it is king.[4] Section 9-301(1)(b) does subordinate unperfected security interests to the rights of lien creditors. If that subsection were removed, the priority would be reversed and an unperfected security interest would be superior to a lien creditor's claim.

The direct and most obvious effect of the repeal of section 9-301(1)(b) would be to subordinate a creditor who had procured a judicial lien—usually after judgment and levy—to an unperfected secured creditor who had a security interest in the personal property on which the lien creditor levied.[5] Because creditors with judicial liens on personal property[6] are more scarce than wise men in President Clinton's Cabinet, this consequence would be unimportant.[7] I predict that subordination of the judicial lien creditor's claim to an unperfected secured creditor's claim in

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2. *Id.* § 9-201.

3. *Id.*

4. As Professor Carlson has pointed out, to describe the secured creditor as king is an overstatement. *See* David G. Carlson, *Death and Subordination Under Article 9 of the Uniform Commercial Code: Senior Buyers and Senior Lien Creditors*, 5 CARDOZO L. REV. 547 (1984). In fact, the creditor is subject not only to contrary rules in Article 9 but also to rules of the common law, such as those dealing with fraudulent conveyances and others that are brought to Article 9 via § 1-103. *See id.* at 563-64. Of course, a mere reference to § 1-103 does not provide a coherent answer because widespread introduction of common-law ideas would completely diminish the force of the clause in § 9-201. *See id.*

5. Perhaps the law could be written so that any secured creditor who failed to make a claim known within a reasonable period after a competing lien arose could not later assert it. The application of § 9-301(1)(c) would have that effect, at least with respect to buyers at any sale on lien creditor's foreclosure. Although buyers at such a sale would not be ordinary course buyers, they would be protected by § 9-301(1)(c) against the claims of any unperfected secured creditor.

6. This includes all such liens except garnishment and attachment liens on wages and bank accounts.

7. A LEXIS search of all reported federal and state cases in 1991 and 1992 yielded only five cases involving an Article 9 dispute between an unperfected secured creditor and a judgment lien creditor: *In re* Rader, 144 B.R. 864 (Bankr. W.D. Mo. 1992); Wickson v. Burruano, No. 51-11-16, 1991 Conn. Super. LEXIS 1801 (1991); Crossroads Bank v. Corim, Inc., 418 S.E.2d 601 (Ga.), *vacated*, 422 S.E.2d 676 (Ga. App. 1992); Front Row Seating, Inc. v. New England Concerts, Ltd., 602 N.E.2d 1103 (Mass. App. Ct. 1992); National City Bank v. Golden Acre Turkeys, Inc., 604 N.E.2d 149 (Ohio 1992).

The LEXIS search that was used ("DATE AFT 1990 and UNPERFECT! w/90 LIEN w/10 CREDITOR!") produced 78 cases. Of the 13 cases involving a dispute between a non-trustee lien creditor and an unperfected secured creditor, nine involved government IRS liens and drug or burglary forfeiture liens.

Article 9 and outside of bankruptcy would go almost unnoticed by lawyers and courts.

Because trustees in bankruptcy are as ubiquitous as judicial lienors are scarce, the principal effect of the repeal of section 9-301(1)(b) would be in bankruptcy. As every commercial lawyer knows, § 544(a) of the Bankruptcy Code[8] makes the trustee in bankruptcy a hypothetical lien creditor on the date the petition is filed. From that date the trustee in bankruptcy has the rights that a hypothetical lien creditor would have under state law. Indirectly, the combination of § 544(a) and section 9-301(1)(b) elevates not only the trustee in bankruptcy—our hypothetical lien creditor—but also his or her flock of unsecured creditors of the bankrupt debtor over unperfected secured creditors. Because the trustee in bankruptcy uses § 544(a) to strike down the unperfected security interest, the unsecured creditors who have claims against the bankruptcy estate are enriched. This is because the collateral that is released from the avoided security interest is treated merely as an asset of the estate and, thus, subject to all of the claims of the unsecured creditors.

Section 544(a)(1) rides on state law; it gives the federally created trustee in bankruptcy only the rights that a lien creditor has under state law.[9] Therefore, a repeal of section 9-301(1)(b), that subordinates the lien creditor to the unperfected secured creditor in state law, also subordinates the trustee in bankruptcy. Nothing in § 544(a) or in any other section of the Bankruptcy Code gives the trustee in bankruptcy an independent right under federal law to strike down an unperfected security interest.[10]

Before one considers the arguments for and against my proposal, understand how limited its effect is. Mostly it will impose the same priority on unsecured creditors in bankruptcy that would apply to them

8. 11 U.S.C. § 544(a) (1988).

9. *See id.* § 544(a)(1).

10. Under current law the trustee in bankruptcy could use 11 U.S.C. § 547, to attack a security interest that had not been perfected at the time the bankruptcy was filed. The change that I propose in § 9-301 would remove that right because the definition of the "time of transfer" and of "perfection" in itself depends on state law. With the removal of § 9-301(1)(b), § 547(e) would make an unfiled security interest—now defined as unperfected—into a perfected security interest under § 547(e)(1)(B). This is because after it attached, no "creditor on a simple contract" could acquire a judicial lien that would be superior to the interest of the secured creditor. Therefore, "perfection" for bankruptcy purposes would occur at the same time as attachment. Accordingly, § 547(e)(2)(A) would treat the transfer as made at the time such transfer takes effect between the transferor and transferee. All this would mean that the transfer would be outside the 90-day preference period if the security interest attached more than 90 days prior to the petition; if within the 90-day period, the transfer would still not be preferential if value were given by the secured creditor simultaneously with the attachment of the security interest.

outside bankruptcy. Section 9-201 now grants priority to unperfected secured creditors over unsecured creditors unless the former procure a lien. Only a minuscule part of all unsecured creditors in and out of bankruptcy ever procure judicial liens. Therefore, my proposal would merely put these unsecured creditors in bankruptcy in the same status that they would suffer outside of bankruptcy, namely, a status subordinate to the unperfected secured creditors.

Note, too, that many creditors under the current version of the Uniform Commercial Code achieve perfection and the attendant priority without filing, taking possession of the collateral or performing any other public act. For example, a secured purchase money seller of consumer goods has an automatically perfected security interest superior not only to unsecured creditors, but also to subsequently secured creditors and to lien creditors. Section 9-302(1) gives a series of less important examples of creditors who achieve priority over others simply by executing a security agreement with the debtor. Therefore, superiority of one who has done no public perfecting act is not unknown to Article 9, nor has such priority caused any obvious difficulties for the credit market.

Understand what the repeal of section 9-301(1)(b) would not do. It would not give an unperfected secured creditor priority over a perfected secured creditor under section 9-312. Thus, if secured creditors wished to have protection against other secured creditors, they would still have to perfect their security interest, usually by a filing. For that reason, many secured creditors would file financing statements even under the regime I propose.

The basic argument for my proposal is straightforward—to eliminate waste. This waste is the cost of unnecessary filings and needless litigation over the efficacy of secured creditors' perfection. I also argue that fairness supports my proposal; on that question I would expect reasonable people to differ. Consider the arguments.

III. FAIRNESS[11]

Does fairness dictate that unperfected secured creditors be subordinated to lien creditors? To subsequent unsecured creditors? Although the section that I would repeal, section 9-301(1)(b), nominally subordinates unperfected secured creditors to lien creditors, its real impact in the law as practiced in today's bankruptcy and commercial courts

11. The following argument owes much to similar arguments made by Professor John McCoid. *See* John C. McCoid II, *Bankruptcy, the Avoiding Powers, and Unperfected Security Interests*, 59 AM. BANKR. L.J. 175 (1985). In his article, Professor McCoid also examines the history of the bankruptcy trustee's avoidance powers. *Id.* at 189-90.

is to subordinate the unperfected secured creditors to unsecured creditors who have no lien. The perverse effect of the combination of § 544(a) and section 9-301(1)(b) is a reversal of the priority in bankruptcy between an unperfected secured creditor and an unsecured creditor that would prevail under section 9-201 outside of bankruptcy. Therefore, in evaluating the fairness of my proposal, I argue that one should view the competitors as an unperfected secured creditor on one side, and an unsecured creditor without a lien on the other. To suggest that the true competitor is a lien creditor is to ignore today's reality in which judicial liens are few and bankruptcies are many.

If one so views the competition (i.e., between an unperfected secured creditor and an unsecured creditor without a lien), it is easy to argue that the secured creditor should have priority. The secured creditor has at least taken a security interest; by hypothesis the unsecured creditor has not. Although some state laws formerly elevated subsequent unperfected unsecured creditors over unperfected security interests, those laws changed with the adoption of section 9-201. The very adoption of section 9-201 is a judgment by the drafters of Article 9 and by the legislatures of all fifty states that it is right and proper that an unperfected security interest should have superiority over an unsecured creditor's claim. The adoption of section 9-201 reversed the contrary laws of several states.[12]

Fundamentally, section 9-201 rests upon the empirical judgment that few if any general creditors rely on the filing records when they lend. Neither the plumber, carpenter, accountant, Commonwealth Edison nor any other thousands of general creditors check the files to determine who has a financing statement on file before it decides whether it will extend unsecured credit in the form of the sale of goods or services. In the words of the trade, these are "non-reliance creditors" and are not entitled to protection of a lack of filing because they would not rely on it in any case.

It is exactly these people—the dross of Article 9 subordinated by section 9-201—whom the trustee transforms into the precious persons entitled to section 9-301(1)(b)'s priority even though none of them has ever procured a lien. One might respond that some of these creditors could and would themselves have procured judicial liens—and so the benefits of section 9-301(1)(b)—had the same result not been available by pushing the debtor into bankruptcy. That is a fair claim, but I wonder how much it proves. Being an unsecured creditor in a bankruptcy in

12. *See, e.g.*, CAL. COMM. CODE § 9201 (West 1990); CONN. GEN. STAT. ANN. § 42a-9-201 (West 1990); FLA. STAT. ANN. § 679.201 (West 1990 & Supp. 1993).

which the trustee or the debtor-in-possession is treated as a secured creditor is not the same as being a lien creditor in one's own right. A person who becomes a lien creditor obtains a property right in the particular asset to which the lien attaches. In bankruptcy, on the other hand, one simply shares along with many other pigs at the trough. In that sense, putting a debtor into bankruptcy and enjoying the benefits of § 544(a) is not the same as enjoying the benefits of a lien under state law. That is at least one reason why unsecured creditors should not think of bankruptcy for their debtors as an alternative to their own lien.

Nevertheless, I concede that some unsecured creditors would have a greater incentive to procure a judicial lien in a regime where bankruptcy was infrequent or the trustee enjoyed no lien creditor rights than in the current regime. For the reasons given above, I believe the number of unsecured creditors that would procure a judicial lien in the former but not the latter regime is quite small.

If one ignores bankruptcy and focuses on state law competition between unperfected secured creditors and lien creditors, what is fair? Some potential lien creditors might act or fail to act in reliance upon the state of the filing record. For example, a prospective lien creditor might levy on a particular asset and fail to levy on another because the UCC filings appear to show that there is no security interest on either and because the first was more valuable or easily liquidated than the second. If a secured creditor has an undisclosed but superior security interest in the first asset, the lien creditor might be injured, at least to the extent of the cost of the levy. If the second asset were sold to a bona fide purchaser or subjected to a superior claim by the time our creditor turns to it, the creditor's loss would be greater. Conceivably, too, the potential lien creditor could rest upon existing rights and not pursue lien rights upon default if the record were devoid of filing and he or she was so lulled into the belief that there were many assets available. Of course, once it became known that unfiled security interests were superior to judicial liens, neither of these forms of reliance would be reasonable.

In an elaborate article dealing with lien creditors' claims on real property, Professor Schechter has argued that unfiled claims should be subordinate to lien creditors' claims.[13] Part of his argument is based on

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13. Dan S. Schechter, *Judicial Lien Creditors Versus Prior Unrecorded Transferees of Real Property: Rethinking the Goals of the Recording System and Their Consequences*, 62 S. CAL. L. REV. 105 (1988). Under the real property priority rules of many states, including New York, California and Ohio, unrecorded transfers of real estate to bona fide purchasers have priority over subsequent lien creditors even though they are subordinate to the rights of subsequent purchasers. In effect, the recording laws of these states treat lien creditors as non-reliance parties and do not protect them. *See, e.g.*, CAL. CIV. CODE § 1214 (West 1982 & Supp. 1993);

cases that illustrate the reliance of potential lien creditors.[14] Ignoring for the moment the differences between personal property and real property and the differences in reliance that might attend a lien creditor's claim on one versus the other,[15] I do not find Professor Schechter's citations persuasive. The illustrations in his footnote 95 of "number of cases" that show reliance are three.[16] One is from 1965, one from 1931, and the third is from 1928.[17]

That real estate law routinely grants priority to unrecorded transferees over subsequent lien creditors suggests that at least some believe it to be the fairest outcome. In real property law, it is common for an unrecorded real estate transfer to be subordinate to the rights of a subsequent bona fide purchaser, but superior to the rights of a subsequent lien creditor. Presumably, these decisions are based on ad hoc judgments about lien creditors' reliance and about the fairness of their subordination. Some courts openly question the injury suffered by the subordination of a lien creditor in these circumstances.[18] I do not believe that fairness dictates victory for the lien creditor over an unperfected secured creditor. The potential injury inflicted by a failure to file is so problematic and inconsequential that I see no unfairness in asking a lien creditor to suffer that hypothetical injury.

But treating the conflict as one between an unperfected secured creditor and a lien creditor misses the point. Because the real competitor for the unperfected secured creditor is not a lien creditor under state law but an unsecured creditor whose debtor is in bankruptcy, I think it ultimately unnecessary to argue the morality of an unperfected secured creditor's supremacy over a lien creditor. In summary, the real fairness argument—that an *unsecured* general creditor without a lien has a moral claim to superiority over the rights of an unperfected secured creditor—

N.Y. REAL PROP. LAW §§ 290-291 (McKinney 1989); OHIO REV. CODE ANN. § 5301.25(A) (Anderson 1989).

14. Schechter, *supra* note 13, at 135 n.95.

15. Because the dollar amounts are likely to be larger and the collateral harder to hide or to dispose of, one might hypothesize that both secured and unsecured creditors would rely more heavily on the record when they are dealing with real estate than when they are dealing with personal property, particularly personal property such as accounts or proceeds that are short-lived and readily subject to disposition.

16. Schechter, *supra* note 13, at 135 n.95.

17. *Id.* (citing Hansen v. G & G Trucking Co., 236 Cal. App. 2d 481, 46 Cal. Rptr. 186 (1965); Caltrider v. Caples, 153 A. 445 (Md. 1931); and Iknoian v. Winter, 94 Cal. App. 223, 270 P. 999 (1928)).

18. *See* Osin v. Johnson, 243 F.2d 653, 657 (D.C. Cir. 1957); Davis v. Johnson, 246 S.E.2d 297, 300-01 (Ga. 1978); Aberdeen Fed. Sav. & Loan Ass'n v. Empire Manufactured Homes, Inc., 672 P.2d 409, 411 (Wash. Ct. App. 1983).

was properly rejected by the drafters of section 9-201. It has been resurrected only by the alchemy of § 544(a) and section 9-301(1)(b).

IV. WASTE

My basic argument for the superiority of an unperfected security interest depends not on fairness; it depends on efficiency. My proposal could eliminate waste in two ways. First, the proposal would render certain filings by secured creditors unnecessary. Those who seek priority only over the trustee in bankruptcy and not over other perfected secured creditors or bona fide purchasers would not need to file. Second, and more importantly, my proposal would eliminate a significant percentage of all of the litigation under Article 9, namely, litigation on the question of whether a particular security interest is perfected.

First consider the cost of filing itself. One must decide where to file, prepare the documents for filing, present them for filing, pay the fee, and later check whether one's own filing has been properly made. Undoubtedly, some accomplish these through clerical personnel; however, others engage an expensive lawyer to ensure the filing is properly performed. If the creditor's only interest is in defeating a trustee in bankruptcy and the creditor is unconcerned about other competitors, the creditor can save the entire cost of preparing, filing, searching and the like.[19]

The greater cost of the current system arises from litigation over perfection. Here lawyers will be involved on both sides and both (one directly and the other indirectly) will be paid by the creditors. Because this litigation arises mostly in bankruptcy, the secured creditor will pay its lawyer directly, and the unsecured creditors, who are the beneficiaries of the insolvent bankruptcy estate, will pay the trustee and the trustee's lawyer indirectly.

With the help of a research assistant and LEXIS, I have tried to find all of the cases in bankruptcy between the beginning of 1980 and the end of 1990 in which the issue before the court was the perfection of a security interest in personal property. These are cases in which the trustee used § 544(a) to challenge the perfection of the secured creditor's security interest. Although the search revealed 888 reported decisions, less than half actually involved disputes over the perfection of a security interest. Some dealt with the attachment of a security interest under section 9-203, some with security in real property that my proposal will not

19. For an analysis of the deficiencies of the filing system, see Peter A. Alces & Robert M. Lloyd, *An Agenda for Reform of the Article 9 Filing System*, 44 OKLA. L. REV. 99, 105-08 (1991).

address, and a few contained no issue at all concerning perfection. Ultimately, I found 343 reported cases in which the perfection issue would never have been litigated under my proposed regime. In all of them the trustee in bankruptcy would have been subordinate and the secured creditor would have taken the asset or been treated as a perfected secured creditor within the Bankruptcy Code.

Finding 343 cases is only the beginning of wisdom. How should one evaluate the savings in lawyers' and trustees' fees that could have been enjoyed had none of these issues been litigated? First, how much on average do these cost? The most direct costs are lawyers' fees, second are trustees' fees and the time of the court system. In addition, of course, there is the time and cost of various witnesses and experts, investigation and the like. The estimation is further complicated by the fact that some of the cases went all the way to the court of appeals,[20] an expensive proposition, whereas many were settled on motion before the bankruptcy court.[21]

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20. There were 15 cases in the courts of appeals, 27 cases in the district courts, and 301 in the bankruptcy courts.

21. In the following cases, the parties disputed whether the security interest was perfected according to Article 9 and the trustee won (unperfected security interest): Compliance Marine, Inc. v. Campbell (*In re* Merritt Dredging Co.), 839 F.2d 203 (4th Cir. 1988); Mixon v. Anderson (*In re* Ozark Restaurant Equip. Co.), 816 F.2d 1222 (8th Cir. 1987); Sanyo Elec. Inc. v. Taxel (*In re* World Fin. Servs. Ctr.), 78 B.R. 239 (Bankr. 9th Cir. 1987); First Nat'l Bank v. Turley, 705 F.2d 1024 (8th Cir. 1983); Pitrat v. Morris (*In re* Santa Fe Adobe, Inc.), 34 B.R. 774 (Bankr. 9th Cir. 1983); Sommers v. IBM, 640 F.2d 686 (5th Cir. 1981); Viking Credit Corp. v. JJ's Home Style Laundry, Inc. (*In re* JJ's Home Style Laundry, Inc.), 123 B.R. 22 (Bankr. E.D. Va. 1990); First E. Bank v. Minichello (*In re* Minichello), 120 B.R. 17 (Bankr. M.D. Pa. 1990); Bullock v. Roost (*In re* Gold Key Properties, Inc.), 119 B.R. 787 (Bankr. D. Or. 1990) (mem.); Karnes v. Salem Nat'l Bank (*In re* Fullop), 125 B.R. 536 (Bankr. S.D. Ill. 1990); O'Rourke v. Ramey Truck & Equip. Co. (*In re* IDK Logging, Inc.), 116 B.R. 788 (Bankr. E.D. Wash. 1990); National Peregrine, Inc. v. Capitol Fed. Sav. & Loan Ass'n (*In re* Peregrine Entertainment, Ltd.), 116 B.R. 194 (C.D. Cal. 1990); Fitzgerald v. Westmark Fed. Credit Union (*In re* Thompson), No. 89-00045-7, 1990 Bankr. LEXIS 1504 (Bankr. D. Idaho June 26, 1990) (mem.); *In re* Harris, 115 B.R. 376 (Bankr. M.D. Fla. 1990); Jettmar v. The New 5510, Inc. (*In re* The New 5510, Inc.), 114 B.R. 317 (Bankr. D.D.C. 1990); Wheels, Inc. v. Otasco, Inc. (*In re* Otasco, Inc.), 111 B.R. 976 (Bankr. N.D. Okla. 1990); Smith v. Mulnix (*In re* Wittenburg), 113 B.R. 66 (Bankr. M.D. Fla. 1990); Armstrong v. Metropolitan Fed. Bank (*In re* Chapman), 113 B.R. 561 (Bankr. D.N.D. 1990); Drewes v. United States (*In re* Bukowski), 109 B.R. 932 (Bankr. D. Minn. 1990) (mem.); Newton v. First Am. Nat'l Bank (*In re* Webb), 106 B.R. 517 (Bankr. E.D. Tenn. 1989); Dodson v. One Valley Bank (*In re* Johnson), 105 B.R. 352 (Bankr. S.D.W. Va. 1989) (mem.); *In re* Quality Seafoods, Inc., 104 B.R. 560 (Bankr. D. Mass. 1989); Craft Architectural Metals Corp. v. European Am. Bank (*In re* Craft Architectural Metals Corp.), 104 B.R. 584 (Bankr. E.D.N.Y. 1989); Scott v. McArthur Sav. & Loan Co. (*In re* Winnett), 102 B.R. 635 (Bankr. S.D. Ohio 1989); *In re* Pretzer, 100 B.R. 879 (Bankr. N.D. Ohio 1989); Advanced Aviation, Inc. v. Vann (*In re* Advanced Aviation, Inc.), 101 B.R. 310 (Bankr. M.D. Fla. 1989); First Nat'l Bank v. Minnesota

Util. Contracting, Inc. (*In re* Minnesota Util. Contracting, Inc.), 101 B.R. 72 (Bankr. D. Minn. 1989); *In re* Ballard, 100 B.R. 526 (Bankr. D. Nev. 1989); Dabney v. Information Exch., Inc. (*In re* Information Exch., Inc.), 98 B.R. 603 (Bankr. N.D. Ga. 1989); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Van Kylen (*In re* Van Kylen), 98 B.R. 455 (Bankr. W.D. Wis. 1989); *In re* Neutgens, No. 86-40520, 1989 Bankr. LEXIS 2725 (Bankr. D. Mont. Mar. 13, 1989); Olm Assocs. v. Bright Banc Sav. Assoc. (*In re* Olm Assocs.), 98 B.R. 271 (Bankr. N.D. Tex. 1989); Lyn-Dee Dairy Farm, Inc. v. Schafsma (*In re* Lyn-Dee Dairy Farm, Inc.), 97 B.R. 95 (Bankr. M.D. Fla. 1989); Gennet v. Hartman (*In re* Wilson), 95 B.R. 841 (Bankr. S.D. Fla. 1989); Avair, Inc. v. Fairchild Aircraft Corp. (*In re* Avair, Inc.), 98 B.R. 261 (Bankr. W.D. Va. 1988); Walsh v. Shoenthal (*In re* Trail), No. 88-00819, 1988 Bankr. LEXIS 1967 (Bankr. W.D. Pa. Dec. 1, 1988); Kearney Hotel Partners v. Richardson (*In re* Kearney Hotel Partners), 92 B.R. 95 (Bankr. S.D.N.Y. 1988); John Oliver Co. v. BayBank Merrimack Valley (*In re* John Oliver Co.), 91 B.R. 643 (Bankr. D.N.H. 1988); *In re* Howards Appliance Corp., 91 B.R. 204 (E.D.N.Y. 1988), *rev'd*, 874 F.2d 88 (2d Cir. 1989); *In re* Waters, 90 B.R. 946 (Bankr. N.D. Iowa 1988); Grant v. Citizens First Bank (*In re* Eisaman), 90 B.R. 528 (Bankr. M.D. Fla. 1988); Anderson v. Hercules, Inc. (*In re* Creel), 118 B.R. 372 (Bankr. D.S.C. 1988); Armstrong v. Rohweder (*In re* Brower), 104 B.R. 226 (Bankr. D.N.D. 1988); Anderson v. Blackman (*In re* Karisda, Inc.), 90 B.R. 196 (D.S.C. 1988); Carlson v. Seeley (*In re* Maxwell), 89 B.R. 46 (Bankr. W.D. Mo. 1988) (mem.); Inn at Grand Glaize, Ltd. v. National Bank (*In re* Inn at Grand Glaize, Ltd.), 89 B.R. 40 (Bankr. W.D. Mo. 1988) (mem.); Radice Corp. v. First Nat'l Bank (*In re* Radice Corp.), 88 B.R. 422 (Bankr. S.D. Fla. 1988); U.S. Cylinders, Inc. v. Vital Breathing Prods. (*In re* Vital Breathing Prods.), 98 B.R. 97 (Bankr. N.D. Ga. 1988); *In re* Milcher, 86 B.R. 103 (Bankr. W.D. Mich. 1988); *In re* Carmack, 84 B.R. 625 (Bankr. W.D. Mo.), *rev'd*, 94 B.R. 148 (W.D. Mo.), *aff'd in part and rev'd in part*, No. 88-4157-CV-C-5, 1988 U.S. Dist. LEXIS 15693 (W.D. Mo. Sept. 29, 1988); Bank of Carbondale v. Terry Pierson, Inc. (*In re* Terry Pierson, Inc.), 84 B.R. 533 (Bankr. S.D. Ill. 1988); Hill v. Earthman (*In re* Hill), 83 B.R. 522 (Bankr. E.D. Tenn. 1988); *In re* Waters, 83 B.R. 594 (Bankr. N.D. Iowa 1988); Brown v. Belarus Mach., Inc. (*In re* Service Lawn & Power, Inc.), 83 B.R. 515 (Bankr. E.D. Tenn. 1988); *In re* Davadick, 82 B.R. 391 (Bankr. W.D. Pa. 1988); Remes v. Ford Motor Credit Co. (*In re* Churchwell), 80 B.R. 855 (Bankr. W.D. Mich. 1987); Kleinfeld v. Citrus Park Bank (*In re* Clover Leaf Dairy), 79 B.R. 499 (Bankr. M.D. Fla. 1987); Underwood v. Kensington Mortgage & Fin. Co. (*In re* Tuders), 77 B.R. 904 (Bankr. N.D. Ala. 1987); *In re* Hinson, 77 B.R. 34 (Bankr. M.D.N.C. 1987); Sendore, Inc. v. Pongetti (*In re* Columbus Typewriter Co.), 75 B.R. 834 (Bankr. N.D. Miss. 1987); First Am. Bank & Trust Co. v. Harris (*In re* Stewart), 74 B.R. 350 (Bankr. M.D. Ga. 1987); Kingsley v. First Am. Bank (*In re* Kingsley), 73 B.R. 767 (Bankr. D.N.D. 1987); *In re* Lemon, No. 84-04235-A, 1987 Bankr. LEXIS 673 (Bankr. N.D. Fla. Apr. 13, 1987); Dunn v. Alexander Lumber Co. (*In re* Kirk), 71 B.R. 510 (C.D. Ill. 1987); Navarro v. IBM, 70 B.R. 94 (Bankr. N.D. Tex. 1987); *In re* Weaver, 69 B.R. 554 (Bankr. W.D. Ky. 1987); McTevia v. Adamo (*In re* Atlantic Mortgage Corp.), 69 B.R. 321 (Bankr. E.D. Mich. 1987); Todd v. Production Credit Ass'n (*In re* Todd), 70 B.R. 204 (Bankr. N.D. Iowa 1986); Baron v. Waldo (*In re* Waldo), 70 B.R. 16 (Bankr. N.D. Iowa 1986); Keystone Acceptance Corp. v. Nardulli & Sons Co. (*In re* Nardulli & Sons Co.), 66 B.R. 882 (Bankr. W.D. Pa. 1986); *In re* Howards Appliance Corp., 69 B.R. 47 (Bankr. E.D.N.Y. 1986), *aff'd*, 91 B.R. 208 (E.D.N.Y. 1988); *In re* Madison's Partner Group, 67 B.R. 629 (Bankr. D. Minn. 1986); Central Nat'l Bank v. Donahue (*In re* Cordes), 65 B.R. 678 (Bankr. N.D. Ill. 1986); General Elec. Credit Corp. v. Nardulli & Sons Co. (*In re* Nardulli & Sons Co.), 66 B.R. 871 (Bankr. W.D. Pa. 1986); Robinson v. Howard Bank (*In re* Kors, Inc.), 64 B.R. 163 (D. Vt. 1986); Brinkmann v. White Farm Equip. Co. (*In re* White Farm Equip. Co.), 63 B.R. 800 (Bankr. N.D. Ill. 1986); Andriacchi's, Inc. v. Pike (*In re* Pike), 62 B.R. 765 (W.D. Mich. 1986); Production Credit Ass'n v. Lane (*In*

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v. Pillsbury Co. (*In re* Wood), 38 B.R. 375 (Bankr. D. Idaho 1983); Kaye v. Williams (*In re* Munzenreider Corp.), 34 B.R. 82 (Bankr. M.D. Fla. 1983); Barrington v. Farmers Home Admin., 34 B.R. 55 (Bankr. M.D. Fla. 1983); Cohen v. Spinelli (*In re* Simonelli), 33 B.R. 777 (Bankr. M.D. Fla. 1983); *In re* My Place or Yours, Inc., 34 B.R. 197 (Bankr. D. Vt. 1983); *In re* Sterling Wood Prods., 34 B.R. 183 (Bankr. E.D.N.Y. 1983); Commercial Union Ins. Co. v. Davies Ins. Servs. (*In re* Davies Ins. Servs.), 33 B.R. 252 (Bankr. W.D. Pa. 1983); Castle Rock Ind. Bank v. S.O.A.W. Enters. (*In re* S.O.A.W. Enters.), 32 B.R. 279 (Bankr. W.D. Tex. 1983); Still v. Cal-Maine Foods (*In re* Mayfield), 31 B.R. 900 (Bankr. E.D. Tenn. 1983); *In re* Cripps, 31 B.R. 541 (Bankr. W.D. Okla. 1983); Harwell v. First Nat'l Bank (*In re* Sewell), 32 B.R. 116 (Bankr. N.D. Ala. 1983); Patco, Inc. v. Hammond (*In re* Hammond), 31 B.R. 517 (Bankr. W.D. Okla. 1983); *In re* Jerome, 31 B.R. 266 (Bankr. D. Vt. 1983); Brent Explorations, Inc. v. Karst Enters. (*In re* Brent Explorations, Inc.), 31 B.R. 745 (Bankr. D. Colo. 1983); Maxl Sales Co. v. Critiques, Inc. (*In re* Critiques, Inc.), 29 B.R. 941 (Bankr. D. Kan. 1983); Nazar v. Southern (*In re* Southern), 32 B.R. 761 (Bankr. D. Kan. 1983); Caris Supermarket, Inc. v. Fratello (*In re* Caris Supermarket, Inc.), 28 B.R. 623 (Bankr. E.D.N.Y. 1983); Paul Arpin Van Lines v. Babb (*In re* Hughen), 38 B.R. 13 (Bankr. W.D. Okla. 1983); Rock Hill Nat'l Bank v. York Chem. Indus. (*In re* York Chem. Indus.), 30 B.R. 583 (Bankr. D.S.C. 1983); *In re* International Home Design, Inc., 28 B.R. 584 (Bankr. W.D. Mo. 1983) (mem.); Johnson v. First Nat'l Bank (*In re* Johnson), 28 B.R. 292 (Bankr. N.D. Ill. 1983); *In re* Satterwhite, 28 B.R. 178 (Bankr. M.D. Ala. 1983); Lighting Showcase, Inc. v. Ile, Inc. (*In re* Ile, Inc.), 32 B.R. 71 (Bankr. S.D. Fla. 1983); Reno Courts Ltd. v. ABW Assocs. (*In re* ABW, Inc.), 29 B.R. 88 (Bankr. D. Nev. 1983); Peoples Bank v. McDonald (*In re* Maryville Sav. & Loan Corp.), 27 B.R. 701 (Bankr. E.D. Tenn. 1983); Lincoln Nat'l Bank v. Conti (*In re* Conti), 27 B.R. 175 (Bankr. S.D. Ohio 1983); *In re* Amsco, Inc., 26 B.R. 358 (Bankr. D. Conn. 1982); Edleman v. Grand Valley Nat'l Bank (*In re* Haines & Baker Excavating, Inc.), 25 B.R. 869 (Bankr. W.D. Mich. 1982); GMAC v. Waligora, 24 B.R. 905 (W.D.N.Y. 1982); Bierly v. Bierly (*In re* Bierly), 28 B.R. 57 (Bankr. M.D. Pa. 1982); Seattle-First Nat'l Bank v. Jones (*In re* Circle Fabrication, Inc.) No. 81-00246-232, slip op. (Bankr. E.D. Wash. Sept. 30, 1982); Hassett v. Revlon, Inc. (*In re* O.P.M. Leasing Servs.), 23 B.R. 104 (Bankr. S.D.N.Y. 1982); *In re* Moriarty, 22 B.R. 689 (Bankr. D. Neb. 1982); Ford Motor Credit Co. v. Ken Gardner Ford Sales (*In re* Ken Gardner Ford Sales), 23 B.R. 743 (E.D. Tenn. 1982); *In re* Mayfield, 22 B.R. 423 (Bankr. E.D. Tenn. 1982); Southwest Nat'l Bank v. Southworth (*In re* Southworth), 22 B.R. 376 (Bankr. D. Kan. 1982); Bell v. Ameritrust Co. (*In re* Moore), 21 B.R. 898 (Bankr. E.D. Tenn. 1982); Underground Flint, Inc. v. Viro, Inc., 80 B.R. 87 (E.D. Mich. 1982); First Nat'l Exch. Bank v. Kelly (*In re* Kelly), 21 B.R. 495 (Bankr. W.D. Va. 1982); *In re* McBee, 20 B.R. 361 (Bankr. W.D. Tex. 1982), *rev'd*, 714 F.2d 1316 (5th Cir. 1983); *In re* American Riggers, Inc., 19 B.R. 473 (Bankr. S.D. Ohio 1982); Alsted Automotive Warehouse, Inc. v. Ford Motor Co. (*In re* Alsted Automotive Warehouse, Inc.), 16 B.R. 926 (Bankr. E.D.N.Y. 1982); Koenig, Inc. v. Ateco Equip., Inc. (*In re* Ateco Equip., Inc.), 17 B.R. 230 (Bankr. W.D. Pa. 1982); Venn v. Finance Am., 19 B.R. 155 (Bankr. N.D. Fla. 1982); First Nat'l Bank v. Turley (*In re* Turley), 17 B.R. 99 (Bankr. D.S.D. 1981); Citizens Bank v. Sportswear Shoppe (*In re* Sportswear Shoppe), 15 B.R. 970 (Bankr. W.D. Mo. 1981); Young v. Pentagon Fed. Credit Union (*In re* Bundy), 15 B.R. 819 (Bankr. S.D.N.Y. 1981); Litton Indus. Credit Corp. v. Dunn Bros. (*In re* Dunn Bros.), 16 B.R. 42 (Bankr. W.D. Va. 1981); Pongetti v. Lackey (*In re* Elvis Presley Heights Supermarket, Inc.), 13 B.R. 956 (Bankr. N.D. Miss. 1981) (mem.); *In re* Bindl, 13 B.R. 148 (Bankr. W.D. Wis. 1981); Kanasky v. Purbeck (*In re* R. Purbeck & Assocs.), 12 B.R. 406 (Bankr. D. Conn. 1981); McDaniel v. American Druggists Ins. Co. (*In re* National Buy-Rite, Inc.), 11 B.R. 196 (Bankr. N.D. Ga. 1981); Hale v. Kontaratos (*In re* Kontaratos), 10 B.R. 956 (Bankr. D. Me. 1981); Cash Register Sys., Inc. v. Munsey Corp. (*In re* Munsey Corp.), 10 B.R. 864 (Bankr. E.D. Pa. 1981); Busch v. Washington Communications Group (*In re* Washington Communications Group), 10 B.R. 676 (Bankr. D.D.C. 1981); *In re* Decker, 10 B.R. 440 (Bankr. W.D. La. 1981); Goodman v. Schenck (*In re* Swafford

Furniture Co.), 10 B.R. 293 (Bankr. N.D. Ga. 1981); *In re* L & K Transp. Co., 8 B.R. 921 (Bankr. D. Mass. 1981); *In re* Rahberg Farms, Inc., 8 B.R. 244 (Bankr. W.D. Wis. 1981); Maremont Mktg., Inc. v. Marshall (*In re* G.G. Moss Co.), 9 B.R. 47 (Bankr. E.D. Va. 1981); Sapir v. Mancuso (*In re* Kambourelis), 8 B.R. 138 (Bankr. N.D.N.Y. 1981); McDonald v. National Bank (*In re* Hill), 7 B.R. 433 (Bankr. W.D. Okla. 1980); Strickler v. Thomas (*In re* Thomas), 7 B.R. 389 (Bankr. W.D. Va. 1980); Styler v. Local Loan Fin. Servs. (*In re* Lanctot), 6 B.R. 576 (Bankr. D. Utah 1980); Carter v. Greene County Bank (*In re* Wilhoit), 6 B.R. 574 (Bankr. E.D. Tenn. 1980); Retreading Equip., Inc. v. Murphy (*In re* Murphy), 5 B.R. 596 (Bankr. N.D. Ga. 1980); St. Paul Fire & Marine Ins. Co. v. Roy A. Dart Ins. Agency (*In re* Roy A. Dart Ins. Agency), 5 B.R. 207 (Bankr. D. Mass. 1980); Associates Commercial Corp. v. Trim-Lean Meat Prods., Inc. (*In re* Trim-Lean Meat Prods., Inc.), 5 B.R. 190 (Bankr. D. Del. 1980), *aff'd*, 10 B.R. 333 (D. Del. 1981); Circus Time, Inc. v. Grunman Credit Corp. (*In re* Circus Time, Inc.), 5 B.R. 4 (Bankr. D. Me. 1980) (mem.); Goger v. United States (*In re* Eady), 4 B.R. 1 (Bankr. N.D. Ga. 1980).

In the following cases, the parties disputed whether the security interest was perfected according to Article 9 and the trustee lost (security interest perfected): Branderhorst v. Central Iowa Prod. Credit Ass'n (*In re* Branderhorst), 843 F.2d 311 (8th Cir. 1988); General Elec. Credit Corp. v. Nardulli & Sons, Inc., 836 F.2d 184 (3d Cir. 1988); Norwest Bank v. Bergquist (*In re* Rolain), 823 F.2d 198 (8th Cir. 1987); Load-It, Inc. v. VTCC, Inc. (*In re* Load-It, Inc.), 774 F.2d 1077 (11th Cir. 1985); Gray v. Grant Wholesale Corp., 758 F.2d 1000 (4th Cir. 1985); Armstrong v. State Bank (*In re* Gelking), 754 F.2d 778 (8th Cir. 1984), *cert. denied*, 473 U.S. 906 (1985); *In re* Chaseley's Foods, Inc., 726 F.2d 303 (7th Cir. 1983); Biane v. United Cal. Bank (*In re* Biane), 20 B.R. 659 (Bankr. 9th Cir. 1982); Ingersoll-Rand Fin. Corp. v. Nunley, 671 F.2d 842 (4th Cir. 1982); *In re* Circus Time, Inc., 641 F.2d 39 (1st Cir. 1981); GMAC v. Rupp, 122 B.R. 436 (D. Utah 1990), *aff'd*, 951 F.2d 283 (10th Cir. 1991); A-1 Credit Corp. v. Big Squaw Mountain Corp. (*In re* Big Squaw Mountain Corp.), 122 B.R. 831 (Bankr. D. Me. 1990); *In re* Heritage House Interiors, Inc., 122 B.R. 605 (Bankr. M.D. Fla. 1990); Karnes v. Salem Nat'l Bank (*In re* Fullop), 125 B.R. 536 (Bankr. S.D. Ill. 1990), *aff'd*, 133 B.R. 627 (S.D. Ill. 1991); Fokkena v. First Nat'l Bank (*In re* McLaughlin Farms, Inc.), 120 B.R. 493 (Bankr. N.D. Iowa 1990); C Tek Software, Inc. v. New York State Business Venture Partnership (*In re* C Tek Software, Inc.), 117 B.R. 762 (Bankr. D.N.H. 1990) (mem.); *In re* Aguiar, 116 B.R. 223 (Bankr. D. Idaho 1990); GMAC v. Roach (*In re* Roach), 115 B.R. 200 (Bankr. E.D. Mo. 1990) (mem.); *In re* Kelton Motors, Inc., 117 B.R. 87 (Bankr. D. Vt. 1990) (mem.); NCNB Nat'l Bank v. Fogarty (*In re* Fogarty), 114 B.R. 788 (Bankr. S.D. Fla. 1990); Sternco, Inc. v. Associates Leasing (*In re* Rose Way, Inc.), 113 B.R. 527 (Bankr. S.D. Iowa 1990); Walker v. Tennessee State Bank (*In re* Williams), 112 B.R. 913 (Bankr. E.D. Tenn. 1990); Unsecured Creditors' Comm. v. Shawmut Worcester County Bank (*In re* Ivy Properties, Inc.), 109 B.R. 10 (Bankr. D. Mass. 1989); National Peregrine, Inc. v. Capitol Fed. Sav. & Loan Ass'n (*In re* National Peregrine, Inc.), No. 89-01991, 1989 Bankr. LEXIS 2469 (Bankr. C.D. Cal. Nov. 14, 1989), *rev'd*, 116 B.R. 194 (C.D. Cal. 1990); Pokela v. Red Owl Stores, Inc. (*In re* Dakota Country Store Foods, Inc.), 107 B.R. 977 (Bankr. D.S.D. 1989); Frank v. Norbel Credit Union (*In re* Murray), 109 B.R. 245 (Bankr. E.D. Mich. 1989); Menkel v. Sun Bank & Trust Co. (*In re* Freedom Rental & Leasing), 102 B.R. 848 (Bankr. M.D. Fla. 1989); *In re* Simpson Motor Co., 101 B.R. 813 (Bankr. N.D. Ga. 1989); Kroh Operating Ltd. v. Barnett Bank (*In re* Kroh Bros. Dev. Co.), 101 B.R. 114 (Bankr. W.D. Mo. 1989); *In re* Halvorson, 102 B.R. 736 (Bankr. D.N.D. 1989); Wabash Valley Power Ass'n v. United States (*In re* Wabash Valley Power Ass'n), 114 B.R. 613 (S.D. Ind. 1989); Merchants Bank v. Reddington/Sunstar Ltd. Partnership (*In re* Reddington/Sunstar Ltd. Partnership), 100 B.R. 1 (Bankr. D. Ariz. 1988); *In re* Ramey, 93 B.R. 136 (Bankr. E.D. Tenn. 1988); Miller v. Salem Energy Supplies & Servs. (*In re* Salem Energy Supplies & Servs.), 92 B.R. 361 (Bankr. S.D. Ill. 1988); *In re* Waters, 90 B.R. 946 (Bankr. N.D. Iowa 1988); Schaaf & Johnson, Inc. v. Crabtree Constr. Co. (*In re* Crabtree Constr. Co.), 87 B.R. 212 (Bankr.

S.D. Fla. 1988); Charter First Mortgage, Inc. v. Oregon Bank (*In re* Charter First Mortgage, Inc.), No. 683-07420, 1988 Bankr. LEXIS 2653 (Bankr. D. Or. May 24, 1988); Manufacturers Acceptance Corp. v. Caribank Corp. (*In re* Manufacturers Acceptance Corp.), 86 B.R. 729 (Bankr. S.D. Fla. 1988); *In re* Waters, 83 B.R. 594 (Bankr. N.D. Iowa 1988), *withdrawn*, 90 B.R. 946 (Bankr. N.D. Iowa 1988); Frank v. Second Nat'l Bank (*In re* Gilbert), 82 B.R. 456 (Bankr. E.D. Mich. 1988); Maloney v. Stewart Title & Trust (*In re* Nichols), 88 B.R. 871 (Bankr. C.D. Ill. 1988); Schmidt v. Farmers Nat'l Bank (*In re* Schmidt), No. 87-483-R, 1987 U.S. Dist. LEXIS 15510 (W.D. Okla. Oct. 14, 1987); *In re* Long Chevrolet, Inc., 79 B.R. 759 (N.D. Ill. 1987) (mem.); *In re* Atlas Technologies, Inc., 78 B.R. 394 (E.D.N.Y. 1987) (mem.); Provident Hosp. & Training Ass'n v. GMAC Mortgage Co. (*In re* Provident Hosp. & Training Ass'n), 79 B.R. 374 (Bankr. N.D. Ill. 1987); Gill v. United States (*In re* Boogie Enters.), 79 B.R. 4 (C.D. Cal. 1987) (mem.), *rev'd*, 866 F.2d 1172 (9th Cir. 1989); Hatfields & McCoys, Inc. v. First Tampa Capital Corp., 78 B.R. 312 (Bankr. N.D. Fla. 1987); *In re* Neatex, Inc., 77 B.R. 808 (Bankr. D. Nev. 1987); Gillian v. Covington County Bank (*In re* Little), 78 B.R. 610 (Bankr. M.D. Ala. 1987); *In re* Domestic Fuel Corp., 70 B.R. 455 (Bankr. S.D.N.Y. 1987); Hunter v. McHenry (*In re* McHenry), 71 B.R. 60 (Bankr. N.D. Ohio 1987); Steinberg v. American Nat'l Bank & Trust Co. (*In re* Meyer-Midway, Inc.), 65 B.R. 437 (Bankr. N.D. Ill. 1986); Vincent Gaines Implement Co. v. United States (*In re* Vincent Gaines Implement Co.), 71 B.R. 14 (Bankr. E.D. Ark. 1986); Murphy v. Griffel (*In re* Wegner), 61 B.R. 414 (Bankr. D. Mont. 1986), *rev'd*, 839 F.2d 533 (9th Cir. 1988); Douglas Hereford Ranch, Inc. v. Farmers & Merchants Bank (*In re* Douglas Hereford Ranch, Inc.), 59 B.R. 863 (Bankr. D. Mont. 1986); Woodson v. Community Bank & Trust Co. (*In re* B & S Motor Freight, Inc.), 59 B.R. 259 (Bankr. N.D. Okla. 1986); *In re* Coody, 59 B.R. 164 (Bankr. M.D. Ga. 1986); *In re* Farnham, 57 B.R. 241 (Bankr. D. Vt. 1986); Apex Oil Co. v. Tims (*In re* Armstrong), 56 B.R. 781 (W.D. Tenn. 1986); *In re* Lipply, 56 B.R. 68 (Bankr. N.D. Ind. 1985); *In re* Pounds, No. 3-84-01156, slip op. (S.D. Ohio Dec. 6, 1985); Ledford v. Easy Living Furniture (*In re* Jackson), No. 3-84-00195, slip op. (S.D. Ohio Sept. 13, 1985); Schilling v. Peoples State Bank (*In re* Hazle Farm & Power Equip.), 53 B.R. 30 (Bankr. W.D. Ky. 1985); Armstrong v. Hustad (*In re* Flaten), 50 B.R. 186 (Bankr. D.N.D. 1985); FDIC v. Fidelity Elecs., Ltd. (*In re* Fidelity Elecs., Ltd.), 52 B.R. 475 (Bankr. S.D. Fla. 1985); F.R. of N.D., Inc. v. First Nat'l Bank (*In re* F.R. of N.D., Inc.), 54 B.R. 645 (Bankr. D.N.D. 1985); Herrell v. Bank of Elroy (*In re* Mitchell Bros. Constr., Inc.), 52 B.R. 92 (Bankr. W.D. Wis. 1985); Greeman Motor, Inc. v. United N.M. Bank [sic] (*In re* Greeman Motors, Inc.), 48 B.R. 611 (Bankr. D.N.M. 1985); Robinson v. United States SBA (*In re* Catamount Dyers, Inc.), 50 B.R. 788 (Bankr. D. Vt. 1985); First State Bank v. Deeb (*In re* Deeb), 47 B.R. 848 (Bankr. N.D. Ala. 1985); *In re* Ridley, 50 B.R. 51 (Bankr. M.D. Tenn. 1985); *In re* Edwards Equip. Co., 46 B.R. 689 (Bankr. W.D. Okla. 1985); Pearson v. Salina Coffee House, Inc. (*In re* Beacon Realty Inv. Co.), 44 B.R. 875 (Bankr. D. Kan. 1984), *rev'd*, 61 B.R. 538 (D. Kan. 1986), *aff'd*, 831 F.2d 1531 (10th Cir. 1987); Richmond Fixture & Equip. Co. v. Hyman (*In re* Southern Properties, Inc.), 44 B.R. 838 (Bankr. E.D. Va. 1984); Tinsley & Groom v. West Ky. Prod. Credit Ass'n (*In re* Tinsley & Groom), 49 B.R. 85 (Bankr. W.D. Ky. 1984); Minot Area Dev. Corp. v. Armstrong (*In re* Trestle Valley Recreation Area, Inc.), 45 B.R. 458 (Bankr. D.N.D. 1984); Martin v. Landers (*In re* Butcher), 43 B.R. 513 (Bankr. E.D. Tenn. 1984); *In re* Air Vermont, Inc., 40 B.R. 323 (Bankr. D. Vt. 1984); McLemore v. Liberty State Bank (*In re* Johnson), 39 B.R. 478 (Bankr. M.D. Tenn. 1984); *In re* Granny Frannies, Inc., 39 B.R. 377 (Bankr. D.S.C. 1984); Schneider v. Ray (*In re* Roberts), 38 B.R. 128 (Bankr. D. Kan. 1984); *In re* P.C.A. Landgrading & Design Contractors, Inc., 37 B.R. 468 (Bankr. E.D. Mo. 1984); Pendleton v. Dealer Warehouse, Inc. (*In re* Pendleton), 40 B.R. 306 (Bankr. W.D. Ky. 1984); United States v. McMannis (*In re* McMannis), 39 B.R. 98 (Bankr. D. Kan. 1984); Gillund v. Minot Builders Supply Ass'n (*In re* Lebus-Albrecht Lumber Co.), 38 B.R. 58 (Bankr. D.N.D. 1984); Wood v. Pillsbury Co. (*In re* Wood), 38 B.R. 375 (Bankr. D. Idaho 1983); Chase Manhattan Bank v. Ramco Well Serv., Inc. (*In re* Ramco Well Serv., Inc.), 32 B.R. 525 (Bankr. W.D. Okla. 1983);

McDonald v. Security Nat'l Bank & Trust Co. (*In re* McGetrick), 31 B.R. 294 (Bankr. W.D. Okla. 1983); *In re* Burgess, 30 B.R. 364 (Bankr. W.D. Okla. 1983); United States v. Freeland (*In re* Chaseley's Foods, Inc.), 30 B.R. 452 (N.D. Ind. 1983); Mottaz v. Dixon (*In re* Dixon), 29 B.R. 304 (Bankr. S.D. Ill. 1983); Coats State Bank v. Grey (*In re* Grey), 29 B.R. 286 (Bankr. D. Kan. 1983); Yeager Trucking v. Circle Leasing Corp. (*In re* Yeager Trucking), 29 B.R. 131 (Bankr. D. Colo. 1983); *In re* Skyland, Inc., 28 B.R. 354 (Bankr. W.D. Mich. 1983), *aff'd sub nom. In re* National Welding, 61 B.R. 314 (W.D. Mich. 1986); Robinson v. Hyatt (*In re* Hyatt), 26 B.R. 162 (Bankr. E.D. Mich. 1983); Gemini at Dadeland, Ltd. v. Biscayne Bank (*In re* Gemini at Dadeland, Ltd.), 24 B.R. 57 (Bankr. S.D. Fla. 1982); H. Meyer Dairy Co. v. Midwestern Food Stores, Inc. (*In re* Midwestern Food Stores, Inc.), 21 B.R. 944 (Bankr. S.D. Ohio 1982); *In re* Tele/Resources, Inc., 21 B.R. 358 (Bankr. S.D.N.Y. 1982); *In re* Springfield Casket Co., 21 B.R. 223 (Bankr. S.D. Ohio 1982); Willamette Prod. Credit Ass'n v. Lovelady (*In re* Lovelady), 21 B.R. 182 (Bankr. D. Or. 1982); Seidle v. Tashman (*In re* Jam Fine Furniture, Inc.), 19 B.R. 578 (Bankr. S.D. Fla. 1982); Roemelmeyer v. Capital Bank (*In re* L.M.S. Assocs.), 18 B.R. 425 (Bankr. S.D. Fla. 1982); GMAC v. Teefy Pontiac Co. (*In re* Teefy Pontiac Co.), 16 B.R. 425 (Bankr. E.D. Pa. 1982); Westinghouse Credit Corp. v. Dugas (*In re* Stofko), 17 B.R. 115 (Bankr. W.D. Pa. 1981); Utah Agricorp, Inc. v. Twelves, Civ. No. C 81-0653J, slip op. (D. Utah Nov. 23, 1981); *In re* Rex Printing, Inc., 14 B.R. 403 (Bankr. N.D. Ind. 1981); *In re* Bindl, 13 B.R. 148 (Bankr. W.D. Wis. 1981); Green v. D.D. Joseph Trading Co. (*In re* KLK Furs, Inc.), 21 B.R. 32 (Bankr. S.D.N.Y. 1981); Jahn v. North Am. Van Lines (*In re* Trivett), 12 B.R. 373 (Bankr. E.D. Tenn. 1981); Ingersoll-Rand Fin. Corp. v. Nunley, 11 B.R. 528 (W.D. Va. 1981); Dodson v. Wessex Mining Corp. (*In re* Boden Mining Corp.), 11 B.R. 562 (Bankr. S.D.W. Va. 1981); Data Gen. Corp. v. Still (*In re* Ault), 6 B.R. 58 (Bankr. E.D. Tenn. 1980).

In the following cases, the parties disputed whether the creditor possessed an unperfected security interest or an interest such as a lessor's that would be superior to the trustee's interest without filing. The trustee won (unperfected secured interest): Pacific Express, Inc. v. Teknekron Infoswitch Corp. (*In re* Pacific Express, Inc.), 780 F.2d 1482 (9th Cir. 1986); Towne Realty, Inc. v. A-1 Hydro Mechanics Corp. (*In re* A-1 Hydro Mechanics Corp.), No. 87-00881, 1989 U.S. Dist. LEXIS 12215 (D. Haw. Sept. 13, 1989); Woodson v. Ford Motor Credit Co. (*In re* Thompson), 101 B.R. 658 (Bankr. N.D. Okla. 1989), *rev'd*, 114 B.R. 278 (N.D. Okla. 1990); Communications Co. of Am. v. Mitel, Inc. (*In re* Communications Co. of Am.), 84 B.R. 822 (Bankr. M.D. Fla. 1988); Woodson v. GMAC (*In re* Harvey), 80 B.R. 533 (Bankr. N.D. Okla. 1987); Brinkmann v. White Farm Equip. Co. (*In re* White Farm Equip. Co.), No. 86-7808, 1987 U.S. Dist. LEXIS 13892 (N.D. Ill. May 1, 1987); Nynex Bisc v. Beker Indus. (*In re* Beker Indus.), 69 B.R. 937 (Bankr. S.D.N.Y. 1987); Woodson v. Tom Bell Leasing (*In re* Breece), 58 B.R. 379 (Bankr. N.D. Okla. 1986); Horizon Processing Co. v. Charter Int'l Oil Co. (*In re* Charter Co.), 49 B.R. 513 (Bankr. M.D. Fla. 1985); *In re* Catamount Dyers, Inc., 43 B.R. 564 (Bankr. D. Vt. 1984); *In re* Hillebrand Metal Works, Inc., 38 B.R. 956 (Bankr. N.D. Ill. 1984); Continental Fire Trucks, Inc. v. John Grappone, Inc. (*In re* Continental Fire Trucks, Inc.), 33 B.R. 713 (Bankr. D. Mass. 1983); Agritrade Corp. v. General Coffee Corp. (*In re* General Coffee Corp.), 32 B.R. 23 (Bankr. S.D. Fla. 1983); W.N. Provenzano, Inc. v. Monahan & Co. (*In re* Monahan & Co.), 29 B.R. 579 (Bankr. D. Mass. 1983); Eastern Leasing Corp. v. Pye (*In re* Pye), 13 B.R. 307 (Bankr. D. Me. 1981); Livesey Enters. v. Smith Management, Inc. (*In re* Smith Management, Inc.), 8 B.R. 346 (Bankr. W.D. Wis. 1980).

In the following cases, the trustee lost (lease or absolute title retained by creditor): Wall Tire Distribs., Inc. v. Wright (*In re* Wall Tire Distribs., Inc.), 116 B.R. 867 (Bankr. M.D. Ga. 1990); General Microcomputer, Inc. v. Crow-Williams #11 (*In re* General Microcomputer, Inc.), 118 B.R. 96 (Bankr. N.D. Ind. 1989); Woodson v. Ford Motor Credit Co. (*In re* Cole), 100 B.R. 561 (Bankr. N.D. Okla. 1989), *aff'd*, 114 B.R. 278 (N.D. Okla. 1990); Novack v.

But there are still more uncertainties. How many reported decisions were not captured by the research? Worst of all, how many decisions are unreported? Should one assume that for every mouse seen, forty go undetected? Or is the ratio only one for one or five for one? I have no way of knowing, but surely not all of the opinions were reported, and I suspect that my reported opinions are a small minority of the total. In my judgment, society's total expenditure on these cases—all saved under my proposal—could not be less than millions per year, and it might be as high as tens of millions.[22]

Clearly the elimination of many filings and much litigation about the legal effect of such filings will produce a large efficiency dividend.

Business Credit Leasing, Inc. (*In re* Novack), 88 B.R. 353 (Bankr. N.D. Okla. 1988); *In re* Purity Ice Cream Co., 90 B.R. 183 (Bankr. D.S.C. 1988); Bank of N.Y. v. Olympia & York Fla. Equity Corp. (*In re* Holywell Corp.), 51 B.R. 56 (Bankr. S.D. Fla. 1985); United States v. Economy Cab & Tool Co. (*In re* Economy Cab & Tool Co.), 47 B.R. 708 (Bankr. D. Minn. 1985); Sight & Sound, Inc. v. Wright, 36 B.R. 885 (S.D. Ohio 1983); United States v. American Pouch Foods, Inc. (*In re* American Pouch Foods, Inc.), 30 B.R. 1015 (N.D. Ill. 1983), *aff'd*, 769 F.2d 1190 (7th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986); Coode v. M & J Fin. Corp. (*In re* Boling), 13 B.R. 39 (Bankr. E.D. Tenn. 1981); Drabkin v. Continental Ill. Bank & Trust Co. (*In re* Auto-Train Corp.), 9 B.R. 207 (Bankr. D.D.C. 1981).

22. One could make an accurate and quite reliable estimate of the costs of litigating perfection, but beyond my search of the reported cases, I have not attempted to do that. My research is basically bar stool research in which one questions a bankruptcy judge or bankruptcy lawyer on the next stool about his or her estimate of the cost in lawyers' fees of a perfection dispute in the bankruptcy court. My bar stool research has turned up such widely varying figures that I should be embarrassed to report them. One of my respondents who routinely represents trustees in these kinds of disputes says that in a complete, straightforward case, where there was no evidence to be presented other than the financing statement and no investigation to be done other than to procure the financing statement his fee would be no more than $750 to $1000. He was quick to point out that in another case last year his firm had charged $50,000 in a long suit with a secured creditor over its perfection. That respondent estimated that there are 100 unreported cases for every reported case. A second bankruptcy lawyer from the other end of the country estimated that the normal fee would be between $5000 and $10,000 and that the ratio of unreported to reported cases would be 20 to 1. My third respondent, a big city lawyer from Chicago, estimated the secured creditor's lawyer's fee in most of the cases worth arguing is $10,000 and up and believes that the ratio of unreported to reported decisions might be even higher than 100 to 1. My bankruptcy experts also disagreed on the question whether the number of perfection disputes is diminishing, rising or staying about the same.

If one starts with my 343 cases and assumes there are 100 unreported cases for every reported case, one concludes there are 34,300 cases in my eleven-year sample. Then if one assumes that the average cost of those cases including lawyers' fees for both sides, the time of the judge and the court apparatus and the cost of witnesses, is $10,000 per case, the total cost of these priority disputes over the eleven-year term would be nearly $350 million. That comes to an annual cost of more than $30 million, a number to be respected. If, on the other hand, one assumes that the ratio of unreported to reported is only 20 to 1 and that the cost per case is only $2000, then the total cost over the eleven-year period would be approximately $14 million, and annual cost would still be more than $1 million. I tend to believe that the higher number is closer than the lower one, but if pressed, I would quickly retreat into uncertainty.

The money that would otherwise be spent in filing, checking files and litigating over such filings will be available to the players in the credit market—secured and unsecured creditors and debtors. But the removal of the protection that is now afforded unsecured creditors in bankruptcy might itself stimulate wasteful behavior by those unsecured creditors in their effort to maintain their current position. One can only guess at the probability of such behavior and at its costs, but if its costs outweigh the benefits of the efficiencies to be gained, then my proposal should be rejected on efficiency grounds alone.

What are these potential inefficiencies? How likely are they to occur? And what is their cost? If general creditors act in reliance upon the state of the record (and in ignorance of their subordination under section 9-201 or in the confidence of their superiority over unperfected interests because of § 544(a) and section 9-301 in case of bankruptcy), it is conceivable that a change in the law will cause those creditors to take other action in order to return themselves to satisfactory protection. In response to my proposal, they could charge higher prices, they could take and perfect security themselves or they might even choose not to sell on credit. Neither common sense, anything in the data on bankruptcy, nor any of the anecdotal evidence I know about creditor behavior would support such a prediction.

Put yourself in the shoes of a perspicacious unsecured creditor. Under what circumstances would it make sense for you to change your current behavior because of the adoption of a proposal that I have made? First, you will be aware that outside of bankruptcy your claim is already subordinated to claims of unperfected secured creditors under section 9-201. That is to say, my proposal makes no change in the unsecured creditor's status, except in the case in which the creditor procures the judicial lien itself or in which the debtor is forced into bankruptcy and the trustee asserts a judicial lien on the unsecured creditor's behalf. In order to justify any change in your behavior because of the abolition of section 9-301(1)(b), you must have assumed in the current regime that you might be getting a lien or that some set of its debtors are likely to file for bankruptcy. To reiterate, my proposal does not change the relative priority of an unperfected security interest versus an unsecured creditor who has no judicial lien if the debtor is not in bankruptcy. To stir yourself in response to section 9-301(1)(b)'s repeal means that currently you must place some significant value on the potential right to be a lien creditor or recognize that some significant part of your debtors will find their way into bankruptcy and that your reward in bankruptcy will be diminished because of my proposal.

Because the average unsecured creditor's return is already so low as to approach insignificance in bankruptcy, it seems implausible that even a large reduction of that tiny return would justify a creditor's change in behavior. In a typical Chapter 11 case the unsecured creditor gets something like fifteen cents on the dollar (and perhaps a promise of future payments with an uncertain value); in the average Chapter 7 case the unsecured creditor gets something like four cents on the dollar.[23] Even if they were to lose that entire amount, it would be wasteful to take even moderately expensive steps to protect their claims. I predict, therefore, that inefficiencies caused by my proposal (in the form of wasteful unsecured creditor protective actions) would be de minimus.

If the efficiency gains from the reduction in filing and the elimination of litigation are as large as they might be, it is plausible that the unsecured creditors' share of those gains would exceed any loss that the unsecured creditors would suffer in bankruptcy because of their subordination in the new regime to unperfected secured creditors. Undoubtedly, the secured creditors would hope to pocket any savings enjoyed because of the absence of litigation over perfection and the reduction of filing costs. But in a competitive market, it is unlikely that all of the efficiency gains would rest in their pockets.

If the creditors' costs decline in a competitive market, one would expect the charges for credit to decline and thus for the debtor to enjoy some of the gains from the efficiency. Part of the debtor's gain could be passed in turn to the unsecured creditors in the form of greater payments prior to bankruptcy or in the form of greater payments in bankruptcy (because the debtor would theoretically be more solvent under the new regime having shared in the benefits of the new efficiency than under the current, less efficient regime). Because the unsecured creditors' average distributions in bankruptcy are already so low, it would take only a small

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23. *See* Michelle J. White, *Survey Evidence on Business Bankruptcy* (Jan. 11, 1993) (unpublished manuscript, on file with author) (citing Lynn M. LoPucki, *The Debtor in Full Control—Systems Failure Under Chapter 11 of the Bankruptcy Code?*, 57 AM. BANKR. L.J. 99, 247 (pts. 1 & 2) (1983)); *see also* Allan C. Eberhart et al., *Security Pricing and Deviations from the Absolute Priority Rule in Bankruptcy Proceedings*, 45 J. FIN. 1457 (1990); Lynn M. LoPucki & William C. Whitford, *Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. PA. L. REV. 125 (1990); Lawrence A. Weiss, *Bankruptcy Resolution: Direct Costs and Violation of Priority of Claims*, 27 J. FIN. ECON. 285 (1990).

Professor White used her own data and some data from other studies to compute her average values. In small Chapter 11 bankruptcies she found an average payoff to unsecured creditors of 14% to 16% at the time of reorganization plan adoption, plus promises to pay 18% to 22% more in future installments. White, *supra*. The latter figures are not discounted to account for delay in payment, or promises unfulfilled. For large Chapter 11 bankruptcies, the studies found an average payoff ranging from 49% to 69%. White, *supra*.

added dividend to make up any loss suffered to the secured creditors because of section 9-301(1)(b)'s repeal.

In summary, it is plausible that the efficiencies gained from eliminating some filings and much expensive litigation would be more than enough to cover any wealth transfer from the unsecured creditors to the secured creditors that might also occur as an incidental result of the repeal of section 9-301(1)(b). The real losers from my proposal are trustees, lawyers for the trustee and lawyers for the secured creditors who currently reap a fee from litigating over the question of perfection. If the remainder of my hypothesis is true, that expenditure is social waste.

V. Federal Law

In closing, I address an argument against my proposal that is completely unrelated to fairness or efficiency. Some maintain that there is no point in changing section 9-301(1)(b) because the Congress—which clearly has the power to do so—will simply amend § 544(a) to grant the trustee priority over unfiled security interests. There are several responses to that counsel of despair.

First, the same reasons that cause the states to repeal section 9-301(1)(b) should keep the Congress from amending § 544(a). If states believe it is fair that the trustee in bankruptcy should be subordinated to a secured creditor who has not filed a financing statement, why should the Congress differ? If it is waste for the trustee in bankruptcy to challenge inartfully perfected security interests, it is waste for the citizens of the United States, not just waste for the residents of a particular state. If my argument is right, it should persuade the Congress as well as the states.

A second response to the prophets of despair arises from recent history in the Congress. In the 1978 enactment of the Bankruptcy Reform Act and the subsequent amendments to that Act, the Congress has paid respect to the various forms of automatic perfection (i.e., perfection without filing) that have always been a part of section 9-302 of the UCC. Even though a variety of secured creditors are given perfection and priority over lien creditors without any public action, the Congress has never overturned this rule by expanding the powers of the trustee in bankruptcy. If, therefore, I am right in the arguments I make here, I see no reason why they should not persuade the Congress as well as the states.

VI. CONCLUSION

In my view, both the fairness and the efficiency arguments favor the change that I propose. Nowhere has God said that it is more fair for an unperfected secured creditor to be subordinate to a lien creditor than vice versa. In bankruptcy, where the real beneficiaries are unsecured creditors without liens, fairness—as expressed by the current section 9-201—tips my way. And the efficiency gains seem clear. The repeal of section 9-301(1)(b) might induce some inefficient behavior by unsecured creditors. But that is only speculation, and the modest return from any such behavior makes it improbable that any clear thinking creditor would pursue such wasteful behavior. If the truth were known, the expenditures that I would avoid may come close to a deadweight loss. They are expenditures that cost much but benefit creditors and debtors little.