

Senate

COMMITTEE HEARINGS

**Committee on Judiciary, Consumer Affairs, and Campaign
Finance Reform**

The committee will hold a public hearing on the following items at the time specified below:

Tuesday, March 6, 2001
8:30 AM
Room 411 South, State Capitol
Madison, Wisconsin

HEISER, TEE, of Woodville, as a member of the Judicial Commission, to serve for the term ending August 1, 2002.

HOGAN, JOHN J., of Hazelhurst, as a member of the Public Defender Board, to serve for the term ending May 1, 2002.

LECLEIR, CLIFFORD F., of La Crosse, as a member of the Judicial Commission, to serve for the term ending August 1, 2002.

ROGERS, JAMES T., of Merrill, as a member of the Public Defender Board, to serve for the term ending May 1, 2003.

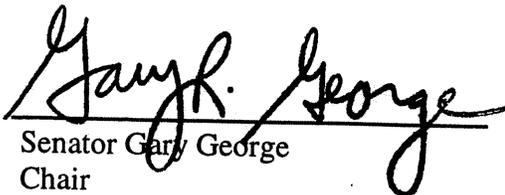
TYLER, BIANCA S., of Amery, as a member of the Judicial Commission, to serve for the term ending August 1, 2003.

Senate Bill 28

Relating to: relinquishing custody of a newborn child and granting rule-making authority.

By Senators Burke, Rosenzweig, Baumgart, Darling, S. Fitzgerald, Grobschmidt, Huelsman, Plache, Risser, Robson and Roessler; cosponsored by Representatives Plale, Jeskewitz, Ainsworth, Albers, Balow, Berceau, Bock, Boyle, Colon, Cullen, Freese, Gronemus, Hoven, Huber, Hundertmark, Jensen, Kestell, Krawczyk, Kreibich, Kreuser, Krusick, Ladwig, La Fave, J. Lehman, Miller, Montgomery, Musser, Olsen, Ott, Owens, Powers, Rhoades, Schneider, Schooff, Sherman, Sinicki, Staskunas, Steinbrink, Suder, Sykora, Turner, Urban, Vrakas, Walker, Ward and Wasserman.

The committee may take executive action on Senate Bill 9 and any of the items listed on this notice.



Senator Gary George
Chair



**WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM**

TO: SENATOR GARY R. GEORGE

FROM: Ronald Sklansky, Senior Staff Attorney

RE: Senate Substitute Amendment __ (LRBs0082/1) to 2001 Senate Bill 9

DATE: May 1, 2001

2001 Senate Bill 9, generally relating to secured transactions under the Uniform Commercial Code, was introduced on January 12, 2001. The bill revises ch. 409, Stats., based on a Model Act approved by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. This memorandum describes changes made to the bill by Senate Substitute Amendment __ (LRBs0082/1).

A. PRODUCTION-MONEY SECURITY INTEREST

Current law, in limited circumstances, provides that a creditor who has a perfected security interest in crops for new value given to enable the debtor to produce those crops has a priority in the collateral over an earlier perfected security interest. The priority applies only in a case in which the "new value" security interest is given not more than three months before the crops become growing crops and only if an earlier perfected security interest secures obligations due more than six months before the crops become growing crops. [See s. 409.312 (2), Stats.]

The drafters of the Model Act report that the priority contained in s. 409.312 (2), Stats., has been thought to be of little value for its intended beneficiaries and has been left out of the Model Act. In its place, the drafters provided an option for the states to consider. This option creates a production-money security interest and establishes this interest's priority over other security interests. [See Appendix II, Model Provisions for Production-Money Priority, in the Model Act.]

The substitute amendment incorporates portions of Appendix II of the Model Act regarding a production-money security interest. A production-money obligation occurs when a creditor gives new value to a debtor in order to allow the debtor to produce crops, if the new value is in fact used for the production of the crops. In this case, a production-money security interest will be created and that interest will have priority over a conflicting, nonproduction-money security interest in the same crops if the following conditions are met:

1. The production-money security interest is perfected by filing when new value is first given.
2. The production-money secured party sends a notice to the holder of the conflicting security interest not less than 20 or more than 30 days before the production-money secured party first gives new value, if the holder of the conflicting security interest had filed a financing statement before the date of the filing made by the production-money secured party.
3. The notification sent by the production-money secured party states that the production-money security interest is expected to be acquired and provides a description of the crops, the names and addresses of all the parties involved, the date on which the transaction would take place and the maximum amount of new value to be provided.

[See proposed ss. 409.102 (1) (pu) and (pv), 409.1035 and 409.3242, Stats., as contained in the substitute amendment.]

B. STATUTORY DAMAGES

Senate Bill 9 creates new statutory damages in the amount of \$500 in each case from a person that does any of the following:

1. Fails to properly release collateral.
2. Files a record that the person is not entitled to file.
3. Fails to file or send a required termination statement.
4. Fails to respond with an appropriate explanation regarding, or a waiver of, a liability for a deficiency following the disposition of collateral.
5. Fails to respond to a request for an accounting.

[See s. 409.623 (5) and (6), Stats., as contained in Senate Bill 9.]

The substitute amendment deletes the statutory damages contained in Senate Bill 9.

C. WORKER'S COMPENSATION

The substitute amendment creates s. 409.109 (4) (cm), Stats., to provide that ch. 409, Stats., does not apply to an assignment of a claim or right to receive compensation for injuries or sickness under a worker's compensation or worker's disability statute under any state.

D. USE OF SOCIAL SECURITY NUMBERS

Senate Bill 9 does not require that a financing statement be in a particular format. However, the bill provides that if a statutory form is used, a filing office must accept it. The statutory forms contained in Senate Bill 9 include places for the indication of a debtor's Social Security number. [See proposed s. 409.521, Stats., as contained in Senate Bill 9.]

The substitute amendment specifically provides that the presence or absence of a Social Security number on a form of record providing for the insertion of a Social Security number must not affect the decision of the filing office to accept or refuse the record for filing. In other words, the statutory forms will indicate that the inclusion of a Social Security number is optional and that a form not containing a Social Security number nevertheless must be accepted by a filing officer. [See proposed ss. 409.520 (1) and 409.521, Stats., as contained in the substitute amendment.]

E. APPROPRIATIONS

The substitute amendment creates a new appropriation by increasing the dollar amount for the appropriation to the Department of Financial Institutions by \$442,600 for fiscal year 2000-01 for the administration of ch. 409, Stats., including an increase in the authorized full-time employment (FTE) project positions for the department by 3.0 program assistant positions for the period ending on June 30, 2002.

F. TERMINATION STATEMENT

Current law provides that there is no fee for the filing of a termination statement with regard to a secured transaction under ch. 409, Stats. [See s. 409.404 (3), Stats.]

Senate Bill 9 provides that the fee for filing and indexing a record will be prescribed by filing-office rule. [See proposed s. 409.525 (1), Stats., as contained in Senate Bill 9.]

The substitute amendment specifically provides that there is no fee for the filing of a termination statement. [See proposed s. 409.525 (1m), Stats., as contained in the substitute amendment.]

G. TECHNICAL CHANGE

The substitute amendment corrects various references by replacing the phrase "1999 Act . . ." with the phrase "2001 Act . . ."

RS:tl;ksm

Rossmiller, Dan

From: Kathryn Norton [knorton@thompsonplumb.com]
Sent: Monday, May 07, 2001 9:33 AM
To: 'jpoese@wisbar.org'
Subject: UCC Article 9

The reason the RPPT section objects to this proposed revision to Article 9 of the UCC is because of section 409.408 which negates restrictions on non-assignability of a payment intangible, whether contained in a document or statute. Wisconsin has a statute, contained in section 701 which specifically allows the creation of "spendthrift trusts" which restrict the assignability of income and/or residual interests in the Trust. Proposed section 409.408 would automatically nullify this crucial estate planning statute. This means that every "spendthrift trust" created in the State of Wisconsin will now be invalid and that beneficiaries will be able to control the disposition of the Trust despite the expressed intentions of the creator of the Trust. Thousands of Wisconsin families rely on "spendthrift trusts" as part of their estate plans - whether because of the "special needs" of the beneficiary, the susceptibility of the beneficiary to the influence of others, drug or alcohol addiction of the beneficiary, or because of simple estate and income tax planning purposes. Under current law, a grantor/settlor - be it a grandparent, parent, charitable benefactor, or other relative - can create a Trust which restricts the right of the beneficiary to pledge or assign his/her benefits from the Trust. If this right to restrict was not available, the Trust most likely would not be created. This proposed UCC Article 9 would undo all of that planning. In addition, it may have unintended income and estate tax consequences. There is a difference in income and estate taxation between Trusts where a beneficiary has a right to control the income verses one where the beneficiary has no right to control the income. If a beneficiary has the right to assign the income, that is an element of control, and might change the current income taxation of that trust.

The RPPT section feels that this right to assign, although essentially unenforceable against a Trustee, is a significant departure from current public policy in Wisconsin, and should not be enacted. We propose that an exception be created to exempt application of ss. 409.408 as it applies to Trusts which are which are governed by Wisconsin Statutes sec. 701.06.

701.06 <<http://www.legis.state.wi.us/statutes/01Stat0701.pdf>>

701.06 Spendthrift provisions and rights of creditors of beneficiaries.

701.06(1) <<http://www.legis.state.wi.us/statutes/01Stat0701.pdf>>

(1) Income beneficiaries. A settlor may expressly provide in the creating instrument that the interest in income of a beneficiary other than the

settlor is not subject to voluntary or involuntary alienation. The income interest of such a beneficiary cannot be assigned and is exempt from claims against the beneficiary until paid over to the beneficiary pursuant to the terms of the trust.

701.06(2) <http://www.legis.state.wi.us/statutes/01Stat0701.pdf>

(2) Principal beneficiaries. A settlor may expressly provide in the creating instrument that the interest in principal of a beneficiary other than the settlor is not subject to voluntary or involuntary alienation. The interest in principal of such a beneficiary cannot be assigned and is exempt from claims against the beneficiary, but a judgment creditor, after any payments of principal have become due or payable to the beneficiary pursuant to the terms of the trust, may apply to the court for an order directing the trustee to satisfy the judgment out of any such payments and the court in its discretion may issue an order for payment of part or all of the judgment.

701.06(3) <http://www.legis.state.wi.us/statutes/01Stat0701.pdf>

(3) Disclaimer or renunciation of an assignment. A disclaimer or renunciation by a beneficiary of part or all of his or her interest under a trust shall not be considered an assignment under

<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase=stats.nfo&jump=701.06%281%29&softpage=Document> sub. (1)
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase=stats.nfo&jump=701.06%281%29&softpage=Document> or
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase=stats.nfo&jump=701.06%282%29&softpage=Document> (2)
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase=stats.nfo&jump=701.06%282%29&softpage=Document> .

701.06(4) <http://www.legis.state.wi.us/statutes/01Stat0701.pdf>

(4) Claims for child support. Notwithstanding any provision in the creating instrument or
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase=stats.nfo&jump=701.06%281%29&softpage=Document> subs. (1)
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase=stats.nfo&jump=701.06%281%29&softpage=Document> and
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase=stats.nfo&jump=701.06%282%29&softpage=Document> (2)
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase=stats.nfo&jump=701.06%282%29&softpage=Document> , upon application of a person having a valid order directing a beneficiary to make payment for support of the beneficiary's child, the court may:

701.06(4)(a) <http://www.legis.state.wi.us/statutes/01Stat0701.pdf>

(a) If the beneficiary is entitled to receive income or principal under the trust, order the trustee to satisfy part or all of the claim out of part or

all of payments of income or principal as they are due, presently or in the future;

701.06(4)(b) <http://www.legis.state.wi.us/statutes/01Stat0701.pdf>
(b) In the case of a beneficiary under a discretionary trust, order the trustee to satisfy part or all of the claim out of part or all of future payments of income or principal which are to be made pursuant to the exercise of the trustee's discretion in favor of such beneficiary.

701.06(5) <http://www.legis.state.wi.us/statutes/01Stat0701.pdf>
(5) Claims for public support. Notwithstanding any provision in the creating instrument or

<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase=stats.nfo&jump=701.06%281%29&softpage=Document> subs. (1)
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase=stats.nfo&jump=701.06%281%29&softpage=Document> and
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase=stats.nfo&jump=701.06%282%29&softpage=Document> (2)
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase=stats.nfo&jump=701.06%282%29&softpage=Document>, if the settlor is legally obligated to pay for the public support of a beneficiary under

<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase=stats.nfo&jump=46.10&softpage=Document> or
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase=stats.nfo&jump=301.12&softpage=Document> 301.12
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase=stats.nfo&jump=301.12&softpage=Document> or the beneficiary is legally obligated to pay for the beneficiary's public support or that furnished the beneficiary's spouse or minor child under

<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase=stats.nfo&jump=46.10&softpage=Document> s. 46.10
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase=stats.nfo&jump=46.10&softpage=Document> or
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase=stats.nfo&jump=301.12&softpage=Document> 301.12
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase=stats.nfo&jump=301.12&softpage=Document>, upon application by the appropriate state department or county official, the court may:

701.06(5)(a) <http://www.legis.state.wi.us/statutes/01Stat0701.pdf>
(a) If such beneficiary is entitled to receive income or principal under the trust, order the trustee to satisfy part or all of the liability out of part or all of payments of income or principal as they are due, presently or in the future;

701.06(5)(b) <http://www.legis.state.wi.us/statutes/01Stat0701.pdf>

(b) Except as otherwise provided in
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=701.06%285%29%28c%29&softpage=Document> par. (c)
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=701.06%285%29%28c%29&softpage=Document> , in the case of a
beneficiary under a discretionary trust, order the trustee to satisfy part
or all of the liability out of part or all of future payments of income or
principal which are to be made pursuant to the exercise of the trustee's
discretion in favor of such beneficiary;

701.06(5)(c) <http://www.legis.state.wi.us/statutes/01Stat0701.pdf>

(c) In the case of a beneficiary under a discretionary trust who is a
settlor or a spouse or minor child of the settlor, order the trustee to
satisfy part or all of the liability without regard to whether the trustee
has then exercised or may thereafter exercise the trustee's discretion in
favor of the beneficiary.

701.06(5m) <http://www.legis.state.wi.us/statutes/01Stat0701.pdf>
(5m) Trust for disabled individual.

<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=701.06%285%29%28c%29&softpage=Document> Subsection (5)
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=701.06%285%29%28c%29&softpage=Document> does not apply to any
trust that is established for the benefit of an individual who has a
disability which has continued or can be expected to continue indefinitely,
substantially impairs the individual from adequately providing for his or
her own care or custody, and constitutes a substantial handicap to the
afflicted individual if the trust does not result in ineligibility for
public assistance under
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=ch.%2049&softpage=Document> ch. 49
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=ch.%2049&softpage=Document> . A trustee of a trust which is
exempt from claims for public support under this subsection shall notify the
county department under
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=46.215&softpage=Document> s. 46.215
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=46.215&softpage=Document> or
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=46.22&softpage=Document> 46.22
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=46.22&softpage=Document> in the county where the disabled
beneficiary resides of the existence of the trust.

701.06(6) <http://www.legis.state.wi.us/statutes/01Stat0701.pdf>

(6) Settlor as beneficiary. Notwithstanding any provision in the creating instrument and in addition to the remedies available under

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<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=701.06%284%29&softpage=Document> subs. (4)
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=701.06%284%29&softpage=Document> and
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=701.06%285%29&softpage=Document> (5)
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=701.06%285%29&softpage=Document> where the settlor is a
beneficiary, upon application of a judgment creditor of the settlor, the
court may, if the terms of the instrument require or authorize the trustee
to make payments of income or principal to or for the benefit of the
settlor, order the trustee to satisfy part or all of the judgment out of
part or all of the payments of income or principal as they are due,
presently or in the future, or which are payable in the trustee's
discretion, to the extent in either case of the settlor's proportionate
contribution to the trust.
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701.06(7) <http://www.legis.state.wi.us/statutes/01Stat0701.pdf>

(7) Subsequent modification of court's order. Any order entered by a court under

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<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=701.06%284%29&softpage=Document> sub. (4)
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
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<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=701.06%285%29&softpage=Document> (5)
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=701.06%285%29&softpage=Document> or
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=701.06%286%29&softpage=Document> (6)
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=701.06%286%29&softpage=Document> is subject to modification
upon application of an interested person.
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701.06(8) <http://www.legis.state.wi.us/statutes/01Stat0701.pdf>

(8) Exempt assets. Assets of a trust, to the extent they are exempt from claims of creditors under other statutes, shall not be subject to

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<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=701.06%284%29&softpage=Document> sub. (4)
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=701.06%284%29&softpage=Document>,
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=701.06%285%29&softpage=Document> (5)
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&infobase
=stats.nfo&jump=701.06%285%29&softpage=Document> or
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<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&intofbase
=stats.nfo&jump=701.06%286%29&softpage=Document> (6)
<http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=79747&intofbase
=stats.nfo&jump=701.06%286%29&softpage=Document> .

Thanks for your help.

Kathryn L. Norton
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Madison, WI 53717
(608) 833-1300

National Conference of Commissioners on Uniform State Laws
211 East Ontario, Suite 1300, Chicago, Illinois 60611•312/915-0195•Facsimile 312/915-0187

John M. McCabe
Legislative Director / Legal Counsel
jmmccabe@nccusl.org

Memo to: Legislative Council, Members of the Legislative Committee

Subject: Public Finance Provisions; Structured Settlements; Workers' Compensation; Special Needs Trusts in Revised Article 9 of the UCC

Date: March 21, 2001

Public Finance Transactions

Revised Article 9 does not exclude public finance transactions as the 1972 version of Article 9 does. This has caused some consternation among state and municipal authorities, and particularly among attorneys specializing in municipal bond services. There has been some extensive discussion with the National Association of Bond Lawyers (NABL) in the last month over this issue. As a result, the Standby Committee for Revised Article 9 has agreed to allow amendments that will protect the status quo respecting public finance transactions. For most states that will mean amending Section 9-109 to exclude such transactions exactly as excluded in 9-104(e) of current Article 9. I attach a memorandum from the Revised Article 9 Reporters, Steve Harris and Chuck Mooney, which contains the appropriate language for this purpose.

Please note that these suggested amendments are not appropriate in every state. In some states, all or part of public finance transactions have been made subject to current Article 9. The status quo will be to apply Article 9 to such transactions. In others, specific statutes pertaining to the attachment and perfection of security interests in public finance transactions exist outside of Article 9, but are related to it with respect to priority rules. Utah, for example, just adopted such a regime taking Revised Article 9 into account. In states that do not have the straight-forward exclusion found in current 9-104(e), specifically tailored amendments will be necessary (or no amendments at all in some instances).

In many jurisdictions, the issue has already been raised. If it has not been, I would not advise raising it. If it is raised, then you will have to ascertain the appropriate response. The national office and the 9 Task Force will provide assistance, on request.

The Standby Committee has agreed to work with the National Association of Bond Lawyers at a future time to reconsider the public finance issue. Until that time, the status quo in your state and any amendments needed to retain the status quo are the advised course of action.

Structured Settlements, Workers' Compensation, Special Needs Trusts

One of the major scope changes in Revised Article 9 involves payment streams: accounts, general intangibles, payment intangibles and the like. It is easier to pledge such payment streams as collateral under Revised Article 9 than is possible under current Article 9. There are some payment streams that merit special consideration, however. Their particular status was not considered when Revised Article 9 was being drafted. Included in that very small group are annuity payments for structured settlements of personal injury claims, payments for workers' compensation and payments to beneficiaries under certain special needs trusts (sometimes called medicaid trusts) subject to federal law.

The fundamental issue is whether provisions in agreements pertaining to these payment streams that prohibit or restrict assignment of payment rights and some statutes that prohibit or restrict assignment of these payment rights will be overridden by the provisions of 9-406(d) and (f), and 9-408 (c) of Revised 9.

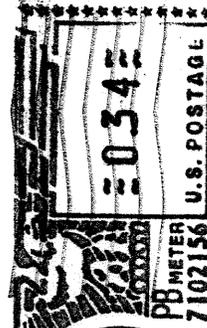
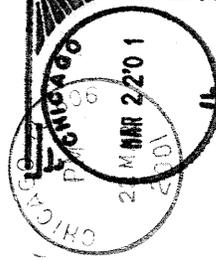
The Standby Committee for Revised Article 9 has determined that these payment streams may be excluded from the provisions of these sections. The insurance industry has appeared with amendments in many states, and the conclusion is not to oppose amendments to these sections so long as they do nothing more than exclude these specific kinds of payment streams from the anti-assignment override provisions in 9-406 and 9-408.

There are elements of the financing industry engaged in purchasing payment rights based on structured settlement agreements (not workers' compensation or special needs trusts, however). A number of companies apparently do this kind of financing. This is not main-stream secured financing and does not rely upon Article 9 in many instances, although it is not clear what the nature of all of these transactions is. If a dispute arises over amendments to Section 9-406 and 9-408 respecting the exclusion of structured settlement payment streams, the prevailing advice is to let the interests battle the issue out. Obviously, it is essential to avoid delaying current Revised Article 9 bills over this issue. If a conflict arises, the best solution is to urge a separate bill and let the legislature decide on the issue. Where bills are already finished, all we need to do is to monitor the bills to keep them within the bounds of the issues raised.

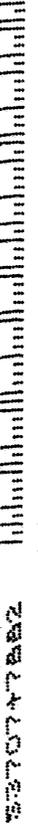
Obviously, if you have a question about the content of any amendments offered, contact the national office for assistance.



211 E. ONTARIO STREET, SUITE 1300
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Gary R. George
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Madison, WI 53707-7882



National Conference of Commissioners on Uniform State Laws
211 East Ontario, Suite 1300, Chicago, Illinois 60611•312/915-0195•Facsimile 312/915-0187

John M. McCabe
Legislative Director / Legal Counsel
jmmccabe@nccusl.org

Memo to: Legislative Council, Legislative Committee

Subject: Enclosure on Public Finance Transactions Amendments in Revised Article 9

Date: March 26, 2001

It just came to my attention that I inadvertently left the enclosure off the memorandum that went out last week. Sorry! It is attached.

Enc

MEMORANDUM TO: Article 9 Standby Committee
FROM: Steve Harris and Chuck Mooney
DATE: January 29, 2001
RE: Exclusion of Governmental-Debtor Transactions

We recommend that the version of Revised Section 9-109(c) and (d) which appears below (and which is identical to that previously circulated to the Standby Committee) be approved for enactment in those states that wish to exclude governmental-debtor transactions from Revised Article 9. As you know, this approach reverts to the formulation in Former 9-104(e), with adjustments to take account of the term "governmental unit," which is defined in Revised Section 9-102.

1. Text of Exclusion. Former 9-104(e) appears to have been construed in only eight cases. The exclusion's reference to "government" does not appear to have confused anyone or given rise to any problems. We see no need to try to improve upon it in the context of the present quick-fix project.

2. Choice of Law. As we mentioned in our earlier transmittal, a jurisdiction adopting this reformulation need not make changes to its choice-of-law or transition provisions, inasmuch as under the law of that jurisdiction Revised Article 9 would not apply to transactions in which the transferor is a governmental unit. A forum court sitting in a jurisdiction that has adopted the uniform version of Revised Article 9 normally would look to the location of a governmental unit for the law applicable to perfection and priority. If the governmental unit's jurisdiction has adopted this reformulated version of Revised Section 9-109, then its Revised Article 9 would not apply. However, if the collateral were, for example, investment property, the forum then would look to its Revised Section 9-305, which could lead it to the law of a jurisdiction whose perfection and priority rules *would* apply to governmental unit transfers under the uniform version of Revised 9-109. That result is, of course, unavoidable unless one were to make adjustments to the versions of Revised Article 9 already enacted in a majority of the states.

If a jurisdiction adopts this reformulation and it also adopts its own official comments patterned on the uniform official comments or approves or appends the uniform official comments, corresponding adjustments in the comments will be necessary. However, we did not find any statutory cross-references in the statutory text of Revised Article 9 that would require revision.

SECTION 9-109. SCOPE.

* * *

(c) **[Extent to which article does not apply.]** This article does not apply to the extent that:

(1) a statute, regulation, or treaty of the United States preempts this article; or

~~(2) another statute of this State expressly governs the creation, perfection, priority, or enforcement of a security interest created by this State or a governmental unit of this State;~~

~~(3) a statute of another State, a foreign country, or a governmental unit of another State or a foreign country, other than a statute generally applicable to security interests, expressly governs creation, perfection, priority, or enforcement of a security interest created by the State, country, or governmental unit; or~~

~~(4) the rights of a transferee beneficiary or nominated person under a letter of credit are independent and superior under Section 5-114.~~

(d) **[Inapplicability of article.]** This article does not apply to:

* * *

(12) an assignment of a claim arising in tort, other than a commercial tort claim, but Sections 9-315 and 9-322 apply with respect to proceeds and priorities in proceeds; ~~or~~

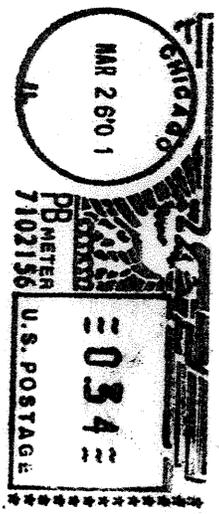
(13) an assignment of a deposit account in a consumer transaction, but Sections 9-315 and 9-322 apply with respect to proceeds and priorities in proceeds; or

(14) a transfer by a government or governmental unit.

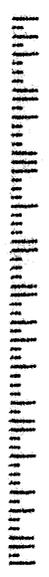


211 E. ONTARIO STREET, SUITE 1300
CHICAGO, ILLINOIS 60611

Gary R. George
Room 118 South
P.O. Box 7882
Madison, WI 53707-7882



53707-7882





State of Wisconsin
Department of Financial Institutions

Tommy G. Thompson, **Governor**

John F. Kundert, **Secretary**

TO: State Senator Gary George

FROM: Wisconsin Department of Financial Institutions
Wisconsin Register of Deeds Association
State Bar of Wisconsin

SUBJECT: Concerns of Registers of Deeds regarding Revised UCC Article 9

DATE: February 28, 2001

At your request, representatives of the Wisconsin Department of Financial Institutions, the Wisconsin Registers of Deeds Association and the State Bar of Wisconsin have met extensively since the Senate Judiciary Committee had its hearing on SB 9 last week. We are pleased that all of the issues of concern raised by the Wisconsin Register of Deeds Association during their testimony and afterwards have been addressed.

1. UCC forms include social security numbers.

As you know, the State Bar of Wisconsin has been working with your office in the crafting of an amendment that will satisfactorily address concerns related to the fact that there is a block for the social security number on the statutory, national UCC filing form. We have all agreed to an amendment that will add an asterisk in the item specified for the social security number and a footnote at the bottom of the page notifying the submitter that the social security number is not required in Wisconsin. In addition, the Department of Financial Institutions will specify clearly in the instructions with regard to use of the UCC form that the social security number is optional. The amendment also includes statutory language which reads as follows: "The presence or absence of a social security number on a form of record providing for the insertion of a social security number as such shall not affect the decision of the filing office to accept or refuse the record for filing."

2. Liability of recording office.

Existing legal protections for recording offices from liability are carried forward in the revised UCC Article 9.

3. Refusal to accept record effective as filed record.

In the course of our discussions, we were able to clarify that all filings that are rejected will have an attached rejection notice stating the date and time it was first submitted for filing. If a filing is rejected for a reason covered under s. 409.516 (2), Wis. Stats., and the filing is resubmitted, the resubmitted filing is

the document put on record. If a filing is wrongfully rejected and the submitter states the filing was wrongfully submitted, the copy of the scanned document, rejection notice and a notice from the filing office stating it was wrongfully rejected will be filed and given a filing number, date and time.

4. Acceptance of over payment.

The Department of Financial Institutions recognizes the concern of the Wisconsin Register of Deeds Association with regard the requirement that filings with overpayments be accepted and how overpayments will be refunded. It was agreed that this issue would be resolved administratively and clarified in a memorandum of understanding that will be entered into between the Department of Financial Institutions and those Registers of Deeds Offices which choose to become agents of the State of Wisconsin as it relates to UCC filings.

5. Searches and exact matches only.

As a result of our discussions, there was a general understanding as to the value of having a standard search logic which will be the same in all filing offices. For clarity, the standard search logic will be written and published in the Administrative Rules.

6. Legal descriptions required on subsequent filings.

It was clarified that this concern is adequately covered under s. 409.516 (2) 4, which specifies that fixture filings may be rejected if there is not a sufficient legal description.

7. UCC-3's (real property) filings.

It was clarified that there is only one form of UCC filing under the revised Article 9 and that UCC-3 filings, as we now know them, do not exist. When a UCC form is submitted to the county and it has the Real Estate filing box checked, it will be filed in that county's real estate records. If that county is an agent for DFI and they receive a UCC form and real estate box is not checked, they will file that as a central UCC filing, scan the document and enter the information on the central UCC Index.

8. Public availability of records.

As a result of our discussions, there was a general understanding that the UCC Index and all scanned documents will be available for public searching, checking and making copies.

In addition to discussions on the above concerns, conference calls with members of the UCC Committee as well as the Department's UCC Advisory Council provided an opportunity for a thorough discussion of other issues as well. The Department of Financial Institutions and the State Bar of Wisconsin have both pledged to continue to work closely with Wisconsin's Registers of Deeds as we move into the implementation of a revised UCC Article 9.

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William F. Mundt
Michael R. Vaughan
Richard W. Pitzner
William J. Rameker
James D. Sweet
Stephen L. Morgan
Robert A. Pasch
Debbie Garten
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Robert J. Lightfoot II
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21 February 2001

Of Counsel
John P. Desmond
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HAND-DELIVERED

The Honorable Gary R. George
P.O. Box 7882
Madison, WI 53707-7882

Re: SB 9

Dear Senator George:

Following the hearing yesterday on SB 9, I reviewed the material on so-called Appendix II in the wake of the disagreement between those arguing for NCCUSL and the Wisconsin Agri-Business Council on the number of states that have enacted Appendix II. The data is still slow in being generally available, but it appears to me that this is the current status with regard to Appendix II.

Twenty-eight states plus the District of Columbia have enacted Revised Article 9. Of these states, Maine, North Carolina, Vermont and West Virginia have incorporated Appendix II as part of their enactment. Nebraska has done something different and I will leave it to you to determine whether their "sui generis" thing falls into one category or the other. You will recall that John McCabe of NCCUSL thought it should not be counted substantively as an Appendix II enactment.

However one may choose to count Nebraska, the fact remains that the overwhelming number of states, including all our neighboring states, have rejected Appendix II in their enactments to date. On behalf of the Wisconsin Bankers Associations, I continue to hope that you will choose to reject Appendix II as well.

If you have any further questions or comments about this matter, please feel free to get in touch. Thank you for your consideration of this matter and for your consideration of our suggested changes as well.

Sincerely

Michael R. Vaughan

MRV:bg
210054
George lt 1

cation need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this Part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this Article.

§ 9-505. Compulsory Disposition of Collateral; Acceptance of the Collateral as Discharge of Obligation.

(1) If the debtor has paid sixty per cent of the cash price in the case of a purchase money security interest in consumer goods or sixty per cent of the loan in the case of another security interest in consumer goods, and has not signed after default a statement renouncing or modifying his rights under this Part a secured party who has taken possession of collateral must dispose of it under Section 9-504 and if he fails to do so within ninety days after he takes possession the debtor at his option may recover in conversion or under Section 9-507(1) on secured party's liability.

(2) In any other case involving consumer goods or any other collateral a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor if he has not signed after default a statement renouncing or modifying his rights under this subsection. In the case of consumer goods no other notice need be given. In other cases notice shall be sent to any other secured party from whom the secured party has received (before sending his notice to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. If the secured party receives objection in writing from a person entitled to receive notification within twenty-one days after the notice was sent, the secured party must dispose of the collateral under Section 9-504. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation.

§ 9-506. Debtor's Right to Redeem Collateral.

At any time before the secured party has disposed of collateral or entered into a contract for its disposition under Section 9-504 or before the obligation has been discharged under Section 9-505(2) the debtor or any other secured party may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorneys' fees and legal expenses.

§ 9-507. Secured Party's Liability for Failure to Comply With This Part.

(1) If it is established that the secured party is not proceeding in accordance with the provisions of this Part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this Part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus 10 per cent of the cash price.

(2) The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner. The principles stated in the two preceding sentences with respect to sales also apply as may be appropriate to other types of disposition. A disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable.

04/09/01 13:19

☎ 608 257 5502

STATE BAR OF WIS

☑ 002/002
☑ 002/002

03/19/01 16:20

☎



SCOTT McCALLUM

**Governor
State of Wisconsin**

March 12, 2001

HAND-DELIVERED

The Honorable Scott R. Jensen
Assembly Speaker
State Capitol
Room 211 West
Madison, WI 53702

Re: 2001 Assembly Bill 111

Dear Speaker Jensen:

2001 Assembly Bill 111, introduced by Representatives Cullen and Gundrum, cosponsored by Senators George and Hueltsman, relates to the adoption of the Revised Uniform Commercial Code ("UCC") Article 9-Secured Transactions.

2001 Assembly Bill 111 contains a fiscal note in excess of \$10,000. Pursuant to Wis. Stats. § 16.47(2), I consider this bill to be an emergency bill and authorize passage of 2001 Assembly Bill 111 prior to passage of the Budget Bill.

Thank you for your attention in regard to this matter.

Sincerely,

A handwritten signature in black ink that reads "Scott McCallum".

Scott McCallum
Governor

SM/crt

**STATE BAR
of WISCONSIN®**

5302 Eastpark Blvd.
P.O. Box 7158
Madison, WI 53707-7158

FAX COVER SHEET**To**

Name: Dan Rossmiller
Company:
Fax: 266-7381

From

Sender: Jenny Boese
Phone: (608) 250-6045
Fax: (608) 257-4343
Email: jboese@wisbar.org

Fax Status

Page count: 2 page(s) including cover sheet
Date Sent: April 9, 2001

Message

Dan,

Attached is the emergency letter from the Governor. I called Burke's office and they will check with the Senator to see what his thoughts are on dipping.

Jenny

P.S. The letter is to AB111 so I am checking on getting one (who needs to request it) to SB9.

JB

Rossmiller, Dan

From: Rossmiller, Dan
Sent: Monday, March 19, 2001 3:26 PM
To: 'G George'
Subject: Senate Bill

Sen GRG:

Ron Sklansky forwarded this to me. It was an e-mail he prepared regarding the Bankers Amendment to the UCC, Art. 9.

Ron indicates that he can put this into a memo if you would like.

Dan

You have asked for a brief description of the short Wisconsin Bankers' Association amendment to AB 111. There are three parts to the amendment as follows:

1. Items 1 to 5 deal with purchase money security interests. The bill provides that a purchase money security interest has certain specific priorities over the security interests of other creditors. The bill also provides that a purchase money security interest will not be extinguished, in general, when the **non consumer goods** collateral involved is used to support the extension of other credit or when the obligation has been renewed, refinanced, consolidated or restructured. The bill leaves to the courts the effect of a purchase money security interest in **consumer goods** when new relationships between the lender, debtor and collateral occur. That is, the original purchase money security interest may lose its status or possibly might be extinguished. The amendment proposes to treat consumer goods in the same manner as non consumer goods are treated under the bill.

How does this affect a consumer? I discussed this question with an attorney from Consumers Union. Apparently, the bottom line is that if a purchase money security interest in one item cannot be easily extinguished, if it continues on and on, a consumer may purchase numerous items, make payments over a long period of time, ultimately default and then lose all of the collateral. The Consumers Union believes that this is unfair to the consumer who believes, after many payments, that one or many of the purchases have been paid, that the consumer owns those items and that the only collateral in jeopardy is that for which payment has not yet been made. With this amendment, Consumers Union also believes that a result negotiated between creditor and debtor representatives will be undone in an unfair manner.

2. Item 6 eliminates the fee for a termination statement. Consumers Union is in favor of this.

3. Items 7 to 9 eliminate certain automatic statutory damages in favor of a debtor when a creditor does not comply with certain of its responsibilities under the law. The WBA contends that the bill will invite wasteful litigation. Consumers Union argues that this advantage for consumers again was part of the give and take of the bargaining process over Article 9 of the Uniform Commercial Code and its unilateral removal would be unfair to debtors.

Let me know if you have any questions.

Ron

Dan Rossmiller
Chief of Staff
Office of Senator Gary R. George
608-266-2500
877-474-2000 (toll free)

Exec Session on AB III

AA 1

14-0

deb changes
excludes worker's comp
mainly see see
spending authority to DFI

AA 2

Appendix II

14-0

Bankers / Agri-Business
compromise

AA 3

W's. Bankers Assn
amdt. *

8-7 (party
line)
adopted

* tried to amend to restore language of bill
re: court case-by-case review

AA 4

First-in, First Out

defeated
by large
margin
9-5

concerns w/ Bankers Amdt.

PMSI - dual collateralization

statutory damages

new in Art. 9 (not in current law)

requires compliance w/ paperwork
requirements in Art. 9

likely to come up on Assembly floor on
Thurs

dual collateralization rule
never extinguishes

§

§§ 5-8

were bargained over

consumer groups want to
ensure that consumers get
relief from debt

consumer keeps paying thinking
it is being applied to first
thing purchased

consumer groups wanted a
first-in, first out
application of payments

piece of collateral can
collaterally discharge obligations

PMSI has super priority

lender doesn't want PMSI
extinguished by subsequent
purchase

may be reduced when
consumer purchases another
consumer good but never
extinguishes

503 statutory damage
- automatic

lenders have self-help
relief thru repossession

breach of the peace
standard



State of Wisconsin
Department of Financial Institutions

Tommy G. Thompson, **Governor**

John F. Kundert, **Secretary**

TO: State Senator Gary George

FROM: Wisconsin Department of Financial Institutions
Wisconsin Register of Deeds Association
State Bar of Wisconsin

SUBJECT: Concerns of Registers of Deeds regarding Revised UCC A

DATE: February 28, 2001

10 copies
6978

At your request, representatives of the Wisconsin Department of Financial Institutions, the Wisconsin Registers of Deeds Association and the State Bar of Wisconsin have met extensively since the Senate Judiciary Committee had its hearing on SB 9 last week. We are pleased that all of the issues of concern raised by the Wisconsin Register of Deeds Association during their testimony and afterwards have been addressed.

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As you know, the State Bar of Wisconsin has been working with your office in the crafting of an amendment that will satisfactorily address concerns related to the fact that there is a block for the social security number on the statutory, national UCC filing form. We have all agreed to an amendment that will add an asterisk in the item specified for the social security number and a footnote at the bottom of the page notifying the submitter that the social security number is not required in Wisconsin. In addition, the Department of Financial Institutions will specify clearly in the instructions with regard to use of the UCC form that the social security number is optional. The amendment also includes statutory language which reads as follows: "The presence or absence of a social security number on a form of record providing for the insertion of a social security number as such shall not affect the decision of the filing office to accept or refuse the record for filing."

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Prepared by
Marvel A. Lemke, UCC Chair
Wisconsin Register of Deeds Association

Concerns with referenc

• **UCC Prescribed I**

Includes Social Securi

• **Liability of Recording Office**

There are three areas of concern to registers about liability for their actions with respect to UCC filings.

- (1) Failure to index a debtor name accurately.
- (2) Wrongful rejection of a filing for some other reason than those set forth in 9-516(b).
- (3) Failure to reject a filing for one of the reasons than those set forth in 9-516(b).

A filing that contains one of the critical errors but not rejected will remain on the record of the office until it lapses. If it is determined that the filing was not perfected because of the error, a liability issue may arise.

Those recording offices that conduct searches for the public may also have a liability issue if the results of the search are for any reason not correct.

• **Refusal to accept record; record effective as filed record.**

409.516(4) A record that is communicated to the filing office with tender of the filing fee, but which the filing office refuses to accept for a reason other one set forth in sub (2), is effective as a filed record....

409.520(2) Communication concerning refusal. If a filing office refuses to accept a record for filing, the filing office shall communicate to the person that presented the record the fact of and reason for the refusal and the date and time the record would have been filed.

Question: Is it necessary for the recorder to assign a number, date and time (thereby requiring a receipt to be generated and enable bookkeeping systems to account for a document to be filed but being returned to customer).

• **Too much money**

If a recorder rejects a UCC filing because it is submitted with too much money, a hidden lien is created – yet a recorder may be restricted by law from accepting overpayments.

- **“Exact matches only” searches**

According to an article in the NACRC (National Association of County Recorders), state central filing offices are expected to develop a new search strategy that will require the entry of the full name of the debtor, for which only the exact matching entries in the index will be returned.

- **Legal Descriptions required on subsequent filings**

Current legislation requires the legal description to be on the face of the original instrument. Many recorders currently require legal descriptions on subsequent filings (amendments, continuations, terminations) so a complete history of filings can be found in the tract index.

- **UCC-3 (Real Property) Filings**

Will UCC-3 real property filings be required to be put in both local filing office tract index and state central filing office system.

- **Public Availability of Records**

409.523(6) Public Availability of Records – At least weekly, the department of financial institutions shall offer to sell or license to the public on a nonexclusive basis, in bulk, copies of all records filed in it under this subchapter, in every medium from time to time available to the department of financial institutions. Question: Will local filing real property filing offices that are governed under this chapter, be required to make available, real property records “on a nonexclusive basis, in bulk, copies of all records filed” in their offices.

Proposed Amendments to SB 9

1. Page 46, delete lines 17 and 18 and substitute:
“(5) APPLICATION OF PAYMENT. If the extent to which a”.
2. Page 47, delete lines 7 and 8 and substitute:
“(6) NO LOSS OF STATUS OF PURCHASE-MONEY SECURITY INTEREST. A purchase-money security interest does not lose its status as such, even”.
3. Page 47, delete lines 17 and 18 and substitute:
“(7) BURDEN OF PROOF. A secured party claiming a”.
4. Page 47, delete lines 21 to 24.
5. Page 48, delete lines 1 and 2.
6. Page 131, after line 15, insert:
“(5) NO FEE. There is no fee for the filing of a termination statement.”.
7. Page 179, line 1, delete “, (4), and (6)” and substitute “and (4)”.
8. Page 179, delete lines 21 to 25.
9. Page 180, delete lines 1 to 14.

(END)

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30 January 2001

Of Counsel
John P. Desmond
Harvey L. Wendel

HAND-DELIVERED

The Honorable Gary R. George
P.O. Box 7882
Madison, WI 53707-7882

Re: Proposed Changes to Revised Article 9

Dear Senator George:

Thank you for the opportunity to meet with you to discuss SB 9, the Article 9 revisions bill. I'd like to discuss changes in three areas of the bill. The changes are described below.

Dual Status Rule

We believe that the "dual status" rule which is now in the draft for commercial transactions should be extended to consumer transactions as well. What this rule essentially means is that a creditor with a purchase money security interest (PMSI) in collateral does not lose its status as a PMSI creditor simply because of a subsequent refinancing of the loan or a cross-collateralization clause contained in the loan documents. It appears that the National Conference may have ducked this issue because courts around the country have come to different conclusions on this issue as it relates to consumer transactions. However, it seems clearly to be in everyone's interest for this issue to be specifically addressed in the new Article 9, rather than left to the uncertainties of individual court decisions.

Current law is not clear on this subject in Wisconsin, as is true in most states, since the current Article 9 does not address this subject. Courts around the country have decided these cases both ways, demonstrating again that clarity will be helpful.

Our research indicates that not many cases in Wisconsin bankruptcy courts have dealt with this issue, but it apparently has come up from time to time and been resolved in varying fashion. WBA has attempted, through our forms, to resolve the question by specifying in the loan agreement how collateral would be considered and dealt with in this area. The consequence of our proposed amendment will be very positive for all parties in that this change makes it very clear what the law is with regard to a creditor's PMSI status notwithstanding cross-collateralization clauses or subsequent refinancing transactions. As a

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result, no one will need to litigate this particular issue, thus saving money in attorney's fees, costs and time for both the plaintiff and the defendant.

No Fee for Filing Termination Statements

We have suggested that it be specified that there is no fee for filing a termination statement. This is a benefit particularly to consumers, who may well otherwise be charged the fee for such a filing. The absence of a fee also removes a disincentive to filing a termination statement. This change would be consistent with current Wisconsin law which provides that such a fee shall not be charged. See existing § 409.404(3).

Automatic Awards

We also have suggested the elimination of an automatic award of \$500 for specified failures to comply with certain provisions of Article 9. The elimination of these automatic awards does not affect a successful plaintiff's ability to recover damages from a creditor. The ability to recover damages remains; we simply eliminate the ability to recover an extra \$500. This automatic award is a bad precedent; there is nothing like it in present Article 9. This kind of provision merely encourages litigation (an automatic award for even the most trivial violation) which adds costs eventually borne by all consumers.

Appendix II

We also vigorously oppose the inclusion of so-called Appendix II, which is not presently in the bill. Twenty-eight states as of the date of this letter have enacted Revised Article 9. With the possible exception of West Virginia (and I am still checking on that state), no state has included Appendix II in its enactment. The best summary as to why enacting states have shunned Appendix II is this: it does nothing for the farmer/borrower. What Appendix II does do is to create a super-priority lien for agricultural input suppliers. This super-priority lien will force conventional agricultural lenders to become more cautious in making their credit decisions, and thereby render many farmers "unbankable" who would be bankable under current law.

Under current law, the question of priority among competing creditors is almost never litigated because the answer is clear in almost every case: the first creditor to file has first priority. If Appendix II were included, the question of priority among competing lenders would almost always be litigated where one or more creditors claim a production money security interest.

Appendix II is drafted in a way that raises significant issues of interpretation and enforcement. This includes such basic questions as: What are "production money crops?" When is new value "given to enable the debtor to produce the crops?" Are proceeds identifiable to a particular crop? Does the credit qualify as new value given to enable the debtor to produce the crops? What is the extent to which a security interest is a "production

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money security interest?" These questions demonstrate that Appendix II would lead to less credit availability for farmers and higher financing costs for those who do borrow.

Wisconsin's financial institutions have a long and strong history of lending money to farmers at all stages of crop production. It is these conventional agricultural lenders who provide the financing capability for the farmer to commence business, much less keep it going. Input suppliers only come in at a specific point in time when a particular crop needs to be planted; they're not there to provide the farmer with all financing needs. Giving input suppliers a priority position over the existing secured lender who holds a blanket lien on a farmer's crop will disrupt agricultural financing relationships and force conventional ag lenders to revise their underwriting criteria when making these traditional, sustaining loans in the first place, given the unknowable future priority entry of an input supplier.

In summary, Appendix II may be a solution in search of a problem, in that there are currently less restrictive alternatives under state law and good old-fashioned communication with the farm borrower's lender which have worked both in theory and in practice for many years. While we are certainly mindful of the stressed economic conditions in the agricultural community, we believe that the tools which are available to protect the interests of ag input suppliers should work equally well in good times and in bad. In the vast majority of cases where traditional agricultural lenders are approached by their borrowers or suppliers of agricultural inputs, credit is routinely advanced to make payment to the ag input suppliers. In other cases, the traditional agricultural lender voluntarily subordinates its position to the lien of the ag input supplier. This system works, and should be maintained.

* * *

I hope this information about our proposed changes is helpful. In reviewing the laws of other states to prepare this letter, I am reminded of the number of non-uniform amendments to both existing Article 9 and Revised Article 9 that have been adopted by the various enacting states. It appears to me that no state enacted either the existing law or the proposed revision without making some changes. I hope you will believe our positions on these admittedly non-uniform amendments warrant your support. If you have any other questions or would like to discuss this further, please let me know.

Sincerely,



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**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRBa0260/1dn
PJD:kmg:rs

February 19, 2001

Here is the material that I believe you want as an amendment.

Model provisions relating to production-money security interests. Appendix II to this Article contains model definitions and priority rules relating to "production-money security interests" held by secured parties who give new value used in the production of crops. Because no consensus emerged on the wisdom of these provisions during the drafting process, the sponsors make no recommendation on whether these model provisions should be enacted.

APPENDIX II

MODEL PROVISIONS FOR PRODUCTION-MONEY PRIORITY

Legislative Note: States that enact these model provisions should add the following definitions to Section 9-102(a) following the definition of "proceeds" and preceding the definition of "promissory note", renumbering paragraphs in 9-102(a) accordingly:

() "Production-money crops" means crops that secure a production-money obligation incurred with respect to the production of those crops.

() "Production-money obligation" means an obligation of an obligor incurred for new value given to enable the debtor to produce crops if the value is in fact used for the production of the crops.

() "Production of crops" includes tilling and otherwise preparing land for growing, planting, cultivating, fertilizing, irrigating, harvesting, and gathering crops, and protecting them from damage or disease.

[MODEL SECTION [9-103A]. "PRODUCTION-MONEY CROPS";
"PRODUCTION-MONEY OBLIGATION"; PRODUCTION-MONEY
SECURITY INTEREST; BURDEN OF ESTABLISHING.

(a) A security interest in crops is a production-money security interest to the extent that the crops are production-money crops.

(b) If the extent to which a security interest is a production-money security interest depends on the application of a payment to a particular obligation, the payment must be applied:

(1) in accordance with any reasonable method of application to which the parties agree;

(2) in the absence of the parties' agreement to a reasonable method, in accordance with any intention of the obligor manifested at or before the time of payment; or

(3) in the absence of an agreement to a reasonable method and a timely manifestation of the obligor's intention, in the following order:

(A) to obligations that are not secured; and

(B) if more than one obligation is secured, to obligations secured by production-money security interests in the order in which those obligations were incurred.

(c) A production-money security interest does not lose its status as such, even if:

(1) the production-money crops also secure an obligation that is not a production-money obligation;

(2) collateral that is not production-money crops also secures the production-money obligation; or

(3) the production-money obligation has been renewed, refinanced, or restructured.

(d) A secured party claiming a production-money security interest has the burden of establishing the extent to which the security interest is a production-money security interest.

Legislative Note: This section is optional. States that enact this section should place it between Sections 9-103 and 9-104 and number it accordingly, e.g., as Section 9-103A or 9-103.1.

Official Comment

1. Source. New.

2. Production-Money Priority; "Production-Money Security Interest." This section is patterned closely on Section 9-103, which defines "purchase-money security interest." Subsection (b) makes clear that a security interest can obtain production-money status only to the extent that it secures value that actually can be traced to the direct production of crops. To the extent that a security interest secures indirect costs of production, such as general living expenses, the security interest is not entitled to production-money treatment.

[MODEL SECTION [9-324A]. PRIORITY OF PRODUCTION-MONEY SECURITY INTERESTS AND AGRICULTURAL LIENS.

(a) Except as otherwise provided in subsections (c), (d), and (e), if the requirements of subsection (b) are satisfied, a perfected production-money security interest in production-money crops has priority over a conflicting security interest in the same crops and, except as otherwise provided in Section 9-327, also has priority in their identifiable proceeds.

(b) A production-money security interest has priority under subsection (a) if:

(1) the production-money security interest is perfected by filing when the production-money secured party first gives new value to enable the debtor to produce the crops;

(2) the production-money secured party sends an authenticated notification to the holder of the conflicting security interest not less than 10 or more than 30 days before the production-money secured party first gives new value to enable the debtor to produce the crops if the holder had filed a financing statement covering the crops before the date of the filing made by the production-money secured party; and

(3) the notification states that the production-money secured party has or expects to acquire a production-money security interest in the debtor's crops and provides a description of the crops.

(c) Except as otherwise provided in subsection (d) or (e), if more than one security interest qualifies for priority in the same collateral under subsection (a), the security interests rank according to priority in time of filing under Section 9-322(a).

(d) To the extent that a person holding a perfected security interest in production-money crops that are the subject of a production-money security interest gives new value to enable the debtor to produce the production-money crops and the value is in fact used for the production of the production-money crops, the security interests rank according to priority in time of filing under Section 9-322(a).

(e) To the extent that a person holds both an agricultural lien and a production-money security interest in the same collateral securing the same obligations, the rules of priority applicable to agricultural liens govern priority.]
Legislative Note: This section is optional. States that enact this section should place it between Sections 9-324 and 9-325 and number it accordingly, e.g., as Section 9-324A or 9-324.1.

Official Comment

1. Source. New; replaces former Section 9-312(2).

2. Priority of Production-Money Security Interests and Conflicting Security Interests. This section replaces the limited priority in crops afforded by former Section 9-312(2). That priority generally was been thought to be of little value for its intended beneficiaries. This section attempts to balance the interests of the production-money secured party with those of a secured party who has previously filed a financing statement covering the crops that are to be produced. For example, to qualify for priority under this section, the production-money secured party must notify the earlier-filed secured party prior to extending the production-money credit. The notification affords the earlier secured party the opportunity to prevent subordination by extending the credit itself. Subsection (d) makes this explicit. If the holder of a security interest in production-money crops which conflicts with a production-money security interest gives new value for the production of the crops, the security interests rank according to priority in time of filing under Section 9-322(a).

3. Multiple Production-Money Security Interests. In the case of multiple production-money security interests that qualify for priority under subsection (a), the first to file has priority. See subsection (c). Note that only a security

interest perfected by filing is entitled to production-money priority. See subsection (b)(1). Consequently, subsection (c) does not adopt the first-to-file-or-perfect formulation.

4. Holder of Agricultural Lien and Production-Money Security Interest. Subsection (e) deals with a creditor who holds both an agricultural lien and an Article 9 production-money security interest in the same collateral. In these cases, the priority rules applicable to agricultural liens govern. The creditor can avoid this result by waiving its agricultural lien.

Six weeks ago, John McCabe of the NCCUSL sent me the following e-mail:

“Peter – The banks and agribusiness have been contending with each other from jurisdiction to jurisdiction over certain issues in Article 9 for years. There were issues over agricultural lending that were not resolved in the 1972 amendments to Article 9 and still are unresolved – at least in terms of finding some sort of consensus. One of those issues is the priority of security interests taken by “input” creditors, those entities of agribusiness which provide seed, feed, insecticide, etc., to farmers on credit. Ordinarily, a farmer will seek a crop loan from a lender before the planting season begins. The farmer may have a revolving credit arrangement with the lender. Basic crop lending is basically done by banks. The bank takes a security interest in the forthcoming crop and files a financing statement to perfect the interest. In the usual first in time, first in right fashion of Article 9, that security interest has priority over the subsequent security interests. Input credit by its very nature comes subsequently, as the farmer purchases materials to produce the crop. Agribusiness has never been happy with this state of affairs, claiming that its constituent companies should have a super priority over crop lenders. The banks have religiously resisted these

super priorities in the law wherever they may have "cropped" up. These are endemic battles, and there is often a history of strife in the legislatures going back many years.

"The Drafting Committee for Revised Article 9 tried to resolve the conflict and failed, exactly as all prior efforts have failed. The Drafting Committee did, however, create Appendix II. It provides for a production-money security interest, which provides a limited super priority for input creditors. In most states Appendix II has been ignored or defeated. I know of only two states in which it has been enacted, Maine and North Carolina.

"In terms of the legislative effort, my principal aim has been to guide the Revised Article 9 enactment process around any delay because of the controversy over Appendix II. Here in Illinois, we gathered the banks and agribusiness people around a table and announced that Appendix II would not be put in the bill unless the banks and agribusiness could resolve the issues among themselves. They could not reconcile, and Appendix II was not in the bill.

"The worst thing that can happen is an Appendix II controversy that stalls the entire Revised Article 9. This happened in Idaho in 2000 and was part of the reason that it did not pass in Colorado. This issue is a rump issue, and to allow it to stall or delay the entire bill is truly a "tail wagging the dog situation." It is to be avoided at all costs.

"If agribusiness interests wish to push the Appendix II issue, they should be counseled to do it in another bill than the principal Revised Article 9 bill. The banks will reflexively oppose this effort without fail. It is better to have them fight it out in the context of another bill than to muddy the waters with respect to Revised Article 9 because of that conflict.

“The Conference can be totally neutral on the basic fight between them.

“We have no portfolio either for or against Appendix II. We should also ignore the “threat to farmers” rhetoric that often arises in these debates. This is strictly a down and dirty creditor versus creditor debate. If farmers are affected, they are affected whichever way the dispute is resolved. Whoever loses and perceives a greater risk to credit-granting as a result, will exact a price on the extension of credit because of that perceived greater risk. It doesn’t make any difference if it is the basic crop lender or the input creditor. JMM”.

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