

## REVISED ARTICLE 9 CASES

(as of August 14, 2004)

compiled and analyzed by  
Keith A. Rowley  
Associate Professor of Law  
William S. Boyd School of Law  
University of Nevada Las Vegas

*The following reported cases apply or discuss one or more substantive provision(s) of Revised Article 9. If you are aware of other such cases, please notify me via e-mail at keith.rowley@ccmail.nevada.edu. The most current version of this annotated case list can be found at [http://www.law.unlv.edu/faculty/rowley/article\\_9\\_updates1.htm](http://www.law.unlv.edu/faculty/rowley/article_9_updates1.htm).*

### A. Cases Applying Revised Article 9

(1) *In re Hergert*, 275 B.R. 58, 47 U.C.C. Rep. Serv. 2d 1 (Bankr. D. Idaho 2002) (discussing the transition from OA9 to R9 under R9-703 & R9-704, the requisites for financing statements under OA9-402 and R9-502, the grounds for filing office rejection under R9-516, and the effectiveness under R9-520 of a financing statement accepted despite grounds for rejection);

(2) *Peoples v. Sebring Capital Corp.*, No. 01-C-5676, 2002 WL 406979, 52 Fed. R. Serv. 3d 197 (N.D. Ill. 2002) (using uniform adoption of R9 to certify a class involving debtors from numerous jurisdictions);

(3) *Usinor Industeel v. Leeco Steel Products, Inc.*, 209 F. Supp. 2d 880, 47 U.C.C. Rep. Serv. 2d 887 (N.D. Ill. 2002) (applying 2-401 & R9-203 to decide the respective rights of a seller with an unperfected security interest by reservation of title and a creditor with a security interest that was not perfected until after the sale under reservation of title; also an interesting discussion of whether the UCC or CISG governed the sales issues in the case);

(4) *In re Richards*, 275 B.R. 586 (Bankr. D. Colo. 2002) (discussing R9-203(g) in the context of bankruptcy trustee's strong-arm power over notes representing a right to payment secured by real property mortgages);

(5) *In re Grabowski*, 277 B.R. 388, 47 U.C.C. Rep. Serv. 2d 1219 (Bankr. S.D. Ill. 2002) (applying R9-502 & R9-504 and distinguishing between the level of detail required in a financing statement under R9-504 and in a security agreement under R9-108);

(6) *In re Valley Media, Inc.*, 279 B.R. 105, 47 U.C.C. Rep. Serv. 2d 1178 (Bankr. D. Del. 2002) (discussing, without deciding whether 2-326 or R9-319 governs, the treatment of consignments under both Article 2 and R9);

(7) *In re Cadiz Properties, Inc.*, 278 B.R. 744, 48 U.C.C. Rep. Serv. 2d 440 (Bankr. N.D. Tex. 2002) (holding that the lender's exercise of its rights under a pre-default agreement did not satisfy the strict foreclosure requirements of R9-620);

(8) *Surgicore, Inc. v. Principal Life Insurance Co.*, 48 U.C.C. Rep. Serv. 2d 736, 2002 WL 1052034 (N.D. Ill. 2002) (holding that ERISA preempts medical service provider’s ability to enforce “health care insurance receivables” under R9-607);

(9) *Arcadia Financial, Ltd. v. Southwest-Tex Leasing Co.*, 78 S.W.3d 619, 47 U.C.C. Rep. Serv. 2d 1371 (Tex. App. 2002) (applying R9-203, and particularly R9-203(b)(2));

(10) *In re Moffett*, 288 B.R. 721, 48 U.C.C. Rep. Serv. 2d 740 (Bankr. E.D. Va. 2002) (holding that repossession under R9 does not “transfer[] all material attributes of ownership in collateral from a debtor to the secured creditor” leaving the debtor with only “bare legal title ... excluded from the estate under” BC § 541(d); instead, the debtor’s R9-623 right to redeem after repossession but before the creditor sells or strictly forecloses on the collateral survives the debtor’s bankruptcy filing and becomes property of the debtor’s bankruptcy estate to which the BC § 362(a) automatic stay attaches, subject to a secured-creditor-in-possession’s right to adequate protection under BC § 361 – which is provided here by the debtor’s reorganization plan), *aff’d*, 289 B.R. 55, 49 U.C.C. Rep. Serv. 2d 1341 (E.D. Va.), *aff’d*, 356 F.3d 518, 52 U.C.C. Rep. Serv. 2d 539 (4th Cir. 2003);

(11) *Allco Enterprises, Inc. v. Goldstein Family Living Trust*, 51 P.3d 1275, 48 U.C.C. Rep. Serv. 2d 752 (Or. Ct. App. 2002) (finding insufficiently compelling evidence to upset the trial court’s finding that the lessor/secured creditor’s disposition of leased goods/collateral following default by the lessee/debtor was commercially reasonable where (1) lessee/debtor “offered no direct evidence that the equipment was sold for less than its value in any recognized market”; (2) lessee/debtor’s co-lessee testified that she “was aware of the sale, attended it, ... played a role in selecting the auctioneer” and “that as many as 25 potential bidders may have attended the auction”; (3) “there [wa]s no evidence that the auctioneer ... bid on or purchased equipment at the auction”; (4) when in doubt, the trial court credited the lessee/debtor with auction proceeds for assets subject to a lease in which lessee/debtor had no interest; and (5) lessee/debtor’s “complaint about undocumented advertising costs, unusual clerking sheets, and other paperwork irregularities, although relevant, was not compelling”);

(12) *In re Kellstrom Industries, Inc.*, 282 B.R. 787, 48 U.C.C. Rep. Serv. 2d 613 (Bankr. D. Del. 2002) (discussing the interplay between R9-110 and 2-403 *viz.* the right of an Article-2-security-interest-holding seller to withhold or stop delivery);

(13) *In re Wiersma*, 283 B.R. 294, 49 U.C.C. Rep. Serv. 2d 309 (Bankr. D. Idaho 2002) (holding that debtor’s causes of action for breach of contract and breach of warranty against a third party, whose electrical work at the debtor’s dairy resulted in injury to some of the debtor’s cows and reduced their milk production, were general intangibles and proceeds of the cows, but were not commercial tort claims under R9-102(42), and were therefore subject to the creditor’s security interest in, *inter alia*, the debtor’s livestock and general intangibles);

(14) *In re Rozier*, 283 B.R. 810, 48 U.C.C. Rep. Serv. 2d 1220 (Bankr. M.D. Ga. 2002) (holding that a secured creditor’s lawful self-help repossession of its debtor’s car four days before the debtor filed bankruptcy did not remove the car from the bankruptcy estate; under Georgia law, title remained with the debtor following the creditor’s repossession because the

repossessing creditor did not sell the collateral before the debtor filed bankruptcy), *aff'd*, 290 B.R. 910, 50 U.C.C. Rep. Serv. 2d 313 (M.D. Ga. 2003), *aff'd per curiam*, \_\_\_ F.3d \_\_\_, No. 03-12685, 2004 WL 1597976 (11th Cir. July 19, 2004);

(15) *Leasing One Corp. v. Caterpillar Financial Services Corp.*, 776 N.E.2d 408, 48 U.C.C. Rep. Serv. 2d 1505 (Ind. Ct. App. 2002) (holding that, under R9-320, a finance lessor which purchased a backhoe from the debtor did not take free of the security interest the debtor granted its seller/lessor because (1) the finance lessor failed to present evidence showing that it was a BIOCB and (2) even if it was a BIOCB, the finance lessor would only take free of security interests created by its seller, not by its seller's seller/lessor – **but the debtor was its seller; unless Indiana law is non-uniform in this respect, the seller created the SI when it granted it to its seller/lessor in exchange for the backhoe**) (N.B.: Because the court found that the finance lessor was not a BIOCB, it did not reach the question of whether the debtor's seller/lessor was truly a lessor; and, therefore, would have had a superior claim to the backhoe even if the finance lessor was a BIOCB.);

(16) *In re Stout*, 284 B.R. 511, 49 U.C.C. Rep. Serv. 2d 626 (Bankr. D. Kan. 2002) (observing that the R9 transition rules do not make enforceable a security interest that was not properly attached under OA9 when R9 took effect; and, therefore, holding that the creditor whose security agreement, entered into with the debtor before the effective date of R9, failed to describe the land on which the debtor's crops were growing remained unsecured after R9 took effect);

(17) *In re Houlihan's Restaurant, Inc.*, 286 B.R. 137, 49 U.C.C. Rep. Serv. 2d 180 (Bankr. W.D. Mo. 2002) (discussing the interplay of a seller's reclamation right under 2-702(2) and BC § 546(c) and the definition of lien creditor under R9-102, concluding that the seller's reclamation right was subordinated to the pre-existing secured creditor's interest in the debtor's inventory);

(18) *In re MJK Clearing, Inc.*, 286 B.R. 109, 49 U.C.C. Rep. Serv. 2d 11 (Bankr. D. Minn. 2002) (discussing the perils of tracing cash collateral without segregated accounts, to wit: plaintiff Ferris Baker Watts (FBW), a registered broker-dealer, established a master securities loan agreement with the debtor (MJK), whereby either party could borrow securities from the other, depositing with the lender cash or other collateral in an amount equal to or greater than the market value of the loaned securities; MJK was sorely affected by the market downturn following the events of 9/11/01, and eventually filed for bankruptcy protection, owing FBW \$18 million; because the agreement between MJK and FBW permitted MJK to commingle the cash collateral it received from FBW and any proceeds of said collateral with cash collateral and proceeds it received from any other source, and to use the commingled funds for any legitimate business purpose; and, because MJK, by the end of the day that FBW deposited the cash collateral in MJK's account, incurred a negative cash balance in the account, making the lowest intermediate balance rule of no use to FBW, the court granted the Chapter 7 trustee summary judgment against FBW, relegating FBW to the status of an unsecured creditor with a damages claim against the estate) (N.B.: This opinion should make an excellent teaching tool for those unafraid to introduce students to some securities law and sophisticated, though not necessarily intelligent as it turns out, financial dealings, as well as those who want a resonant example of how the stock market decline, that became a nose dive following 9/11/01, from which we have

not at this writing recovered, affects the world of secured transactions.), *aff'd*, No. CIV. 02-4775 RHK, 2003 WL 1824937 (D. Minn. Apr. 7, 2003), *aff'd*, 371 F.3d 397 (8th Cir. 2004);

(19) *In re MJK Clearing, Inc.*, 286 B.R. 862, 48 U.C.C. Rep. Serv. 2d 1244 (Bankr. D. Minn. 2002) (plaintiff Maple Securities faced similar problems to those of Ferris Baker Watts in the case discussed immediately above – though to a lesser degree, as MJK only owed Maple \$1 million when MJK filed for bankruptcy protection – and received the same bad news from the bankruptcy court: because MJK, at some point in time, incurred a negative cash balance, making the lowest intermediate balance rule of no use to Maple, the court granted the Chapter 7 trustee summary judgment against Maple, relegating it to the status of an unsecured creditor with a damages claim against the estate);

(20) *In re Robinson*, 285 B.R. 732, 49 U.C.C. Rep. Serv. 2d 327 (Bankr. W.D. Okla. 2002) (discussing the effect of pre-petition repossession for the purpose of sale on the bankruptcy estate's rights in the repossessed collateral and holding – as did *U.S. v. Whiting Pools, Inc.*, 462 U.S. 198 (1983), in the context of a Chapter 11 filing – that the secured party, whose repossession was proper under R9-609 and who gave proper pre-petition notice of intent to sell under R9-611, but did not sell prior to the debtor's bankruptcy filing, must turnover the repossessed collateral to the trustee of the debtor's Chapter 13 estate) (N.B.: This opinion should make an excellent teaching tool for analyzing the intersection of default, repossession, foreclosure, and pre-foreclosure bankruptcy. The court also expressly disavowed two prior 11th Circuit cases that held that, once the secured creditor obtained a repossession title certificate that would allow it to give clean title to a bona fide foreclosure purchaser, the debtor no longer retained any interest in the vehicle sufficient to warrant turnover.);

(21) *In re Downing*, 286 B.R. 900, 49 U.C.C. Rep. Serv. 2d 983 (Bankr. W.D. Mo. 2002) (discussing the insufficiency of the secured creditor's notice of sale to the debtor and, consequently, its inability to obtain a deficiency judgment for the debt outstanding after the foreclosure sale of the debtor's automobile, where the notice failed to inform the debtor (1) whether the sale would be public or private, (2) that the debtor would be liable for any deficiency remaining, (3) what the creditor claimed the indebtedness to be at the time of sale, and (4) that the debtor was entitled to an accounting of the exact amount of his indebtedness);

(22) *Vornado PS, L.L.C. v. Primestone Investment Partners, L.P.*, 821 A.2d 296, 49 U.C.C. Rep. Serv. 2d 1348 (Del. Ch. 2002) (holding that the secured creditor sold the debtor's collateral – limited partnership interests convertible one-for-one into shares traded on the NYSE – in a commercially reasonable manner when it bought the units for the closing per-share NYSE price at an auction advertised and conducted by Goldman Sachs, because all indications were that the secured creditor, who would have been excluded from participating in a private sale, was the party most likely to pay the highest price for the collateral), *aff'd*, 822 A.2d 397 (Del. 2003);

(23) *Chesapeake Investment Services, Inc. v. Olive Group Corp.*, No. 022654BLS, 2003 WL 369682 (Mass. Super. Ct. Jan. 30, 2003) (holding that a subordinated creditor lacked grounds for insecurity and lacked power to declare debtor in default when the debtor was current on all payments due to both the subordinated and the senior secured creditors; the court also notes that the subordinated secured creditor first filed a UCC-1 to perfect its interest in the debtor's

collateral more than 16 months after making the loan and some six months after it began to press the debtor to “cure” alleged defaults and to remedy the subordinated creditors alleged insecurity);

(24) *In re AvCentral, Inc.*, 289 B.R. 170, 49 U.C.C. Rep. Serv. 2d 1336 (Bankr. D. Kan. 2003) (holding that 49 U.S.C. § 44107, requiring recording of security interests in civil aircraft, preempts the normal perfection rules of R9 – even when the debtor and the secured creditor both understood at the time they created the security interest that the debtor had no intention of operating the aircraft as such, but rather intended to disassemble the aircraft and convert their components to inventory for sale – at least as long as the aircraft were still assembled at the time the security interest attached);

(25) *In re Atlantic Orient Corp.*, 290 B.R. 456, 49 U.C.C. Rep. Serv. 2d 1138 (Bankr. D.N.H. 2003) (holding that the winning bidder at the R9 foreclosure auction of the debtor’s assets failed to tender payment in a “commercially reasonable” manner within the time permitted by the agreement between the seller and the bidder – during which time the debtor filed bankruptcy – because the purchaser made a check for roughly one-third of the purchase price payable to the debtor, rather than to the seller; and, therefore, title to the items purchased at the foreclosure sale did not pass to the purchaser, but rather became part of the debtor’s bankruptcy estate);

(26) *Systran Financial Services Corp. v. Giant Cement Holding, Inc.*, 252 F. Supp. 2d 500, 50 U.C.C. Rep. Serv. 2d 305 (N.D. Ohio 2003) (holding that the factoring agreement at issue was a sale of accounts governed by R9; and, therefore, the factor took subject to the defenses and claims of an account debtor, including the account debtor’s right to invoke an arbitration clause in its agreement with the assignor) (Thanks to Jeff Paxton for first pointing this one out.);

(27) *In re Morgan*, 291 B.R. 795, 50 U.C.C. Rep. Serv. 2d 596 (Bankr. E.D. Tenn. 2003) (holding that, while automobiles are goods in which R9 governs security interests, R9-311 defers to an applicable state certificate of title statute on the question of whether a security interest in an automobile was properly perfected);

(28) *In re Sanders*, 291 B.R. 97 (Bankr. E.D. Mich. 2003) (finding that Chapter 13 debtors retain an interest in motor vehicles a secured creditor lawfully repossessed, but did not resell or strictly foreclose on, before the debtors filed their Chapter 13 petitions; and, therefore, that the vehicles were property of the debtors’ bankruptcy estates);

(29) *In re Stallings*, 290 B.R. 777 (Bankr. D. Idaho 2003) (finding that, “[e]ven in light of the expanded definition of ‘proceeds’ under [R9],” payments made by the federal government to the debtors under a disaster relief plan not in existence when the debtors filed bankruptcy were not proceeds of the debtors’ prepetition crops, nor did they fall within the scope of a cash collateral lien granted to a creditor by the bankruptcy court against the debtors’ “postpetition crops and crop proceeds”);

(30) *In re Custer*, 50 U.C.C. Rep. Serv. 2d 608, 2003 WL 1807137 (Bankr. N.D. Iowa 2003) (discussing the interplay of R9 and IOWA CODE § 321.50 and of a purchase money seller’s right under R9-317(5) to take priority over a lien creditor whose right arises after the sale, provided

that the purchase money seller perfects within 20 days after the debtor takes possession of the collateral, and the bankruptcy trustee's priority over unperfected security interests, and holding that, though the creditor's PMSI attached prior to the debtor's bankruptcy filing, the purchase money seller's failure to perfect within 20 days – in the midst of which period the debtor filed bankruptcy – gave the bankruptcy trustee priority over the purchase money seller);

(31) *Fidelity & Deposit Co. of Md. v. Royal Bank of Pa.*, No. Civ. A. 02-2674, 2003 WL 21250558 (E.D. Pa. May 1, 2003) (refusing to grant summary judgment on cross-motions by the plaintiff-surety and the defendant-secured creditor with respect to secured creditor's notice of the principal-debtor's default prior to the secured creditor's receipt of payment from the principal-debtor's customer, which the secured creditor used to pay down the credit it had extended to the principal-debtor; while the court recognized the general rule that funds received by the secured creditor before the surety had paid any claims against the surety bond were not subject to equitable subrogation, it left open the question whether, if the secured creditor had ample notice that the principal-debtor had defaulted before the secured creditor received the funds, it took with constructive notice of the surety's claim);

(32) & (33) *In re Spearing Tool & Mfg. Co.*, 292 B.R. 579, 51 U.C.C. Rep. Serv. 2d 572 (Bankr. E.D. Mich.) (holding that R9-503(1)(a) does not affect the validity of a federal tax lien filing that was not made under the debtor's registered name – the IRS filed against “Spearing Tool & MFG Company, Inc.,” rather than “Spearing Tool and Manufacturing Co.” – and was not revealed by a search using the standard search logic of the filing office) (Thanks to Brendan Best for alerting me to this one.), *rev'd*, 302 B.R. 351 (E.D. Mich. 2003) (holding that a federal tax lien filing that was not made under the debtor's registered name and was not revealed by a search using the standard search logic of the filing office was legally insufficient to give notice to a subsequent secured creditor; and, therefore, the secured creditor without notice was entitled to priority over the prior-misfiled federal tax lien);

(34) *In re Pasteurized Eggs Corp.*, 296 B.R. 283, 51 U.C.C. Rep. Serv. 2d 274 (Bankr. D.N.H. 2003) (holding that a security interest in a patent must be perfected by filing a UCC-1 in the appropriate state; filing in the U.S. PTO is insufficient to perfect the secured party's interest);

(35) *In re Erwin*, 50 U.C.C. Rep. Serv. 2d 933, 2003 WL 21513158 (Bankr. D. Kan. 2003) (holding that a UCC-1 filed against “Mike Erwin,” rather than “Michael A. Erwin,” was not seriously misleading, despite the fact that a search using the “Michael A. Erwin” did not reveal the UCC-1 filed against “Mike Erwin,” because R9 does not specify what name is to be used for an individual debtor and the UCC-1 filed against “Mike Erwin” – the name by which the debtor was generally known – served the “notice” function and would have been found by a searcher “exercis[ing] some reasonable diligence in formulating” its search request) (Jeff Paxton alerted me to this case the same day I found it on Westlaw.);

(36) *In re Quisenberry*, 295 B.R. 855, 51 U.C.C. Rep. Serv. 2d 548 (Bankr. N.D. Tex. 2003) (holding that bank, which exercised a right of setoff, less than 90 days before the debtor filed bankruptcy, by applying the amount of a check payable to the debtor to reduce the outstanding balance of the debtor's indebtedness to the bank, did not do so pursuant to its security agreement

with the debtor, because the security agreement did not describe the collateral to include any non-proceeds and there was no evidence that the check was proceeds of the identified collateral);

(37) *Automotive Finance Corp. v. Smart Auto Center, Inc.*, 334 F.3d 685, 51 U.C.C. Rep. Serv. 2d 297 (7th Cir. 2003) (holding that (1) the secured creditor did not deny the debtor the right to redeem his repossessed vehicles under R9-623 because the debtor never tendered the full amount due, but rather offered to tender the full amount due contingent on selling his dealership, essentially asking the secured creditor to agree to new repayment terms, which R9-623 does not require of the secured creditor, (2) the secured creditor disposed of the repossessed vehicles in a commercially reasonable manner, irrespective of the fact that the secured creditor might have been able to sell the vehicles otherwise for a better price, by selling some of the vehicles at auction and by privately selling others that were less attractive to potential auction buyers, and (3) the fact that the secured creditor had a prior relationship with the party who purchased the vehicles sold privately did not, without more, make the private sale commercially unreasonable);

(38) *Sovereign Bank v. Alvarado*, No. X06CV990152752S, 2003 WL 21771751 (Conn. Super. Ct. July 15, 2003) (holding that summary judgment was inappropriate on the commercial reasonableness of the secured creditor's post-repossession sale of the collateral where, despite the fact that the secured creditor credited the debtor with the fair market value of the collateral at the time of resale, rather than the actual resale price, thereby reducing the debtor's deficiency, the secured creditor failed to offer any evidence in support of its summary judgment motion that the sale was commercially reasonable);

(39) *Citizens Bank of New Hampshire v. Carigan*, No. CV02080444, 2003 WL 22006289 (Conn. Super. Ct. Aug. 1, 2003) (holding that Connecticut's Foreclosure Moratorium Act, CONN. GEN. STAT. § 49-31d *et seq.*, did not apply to prevent a secured party from foreclosing its perfected interest in a promissory note secured by the debtor's mobile home);

(40) & (41) *In re S.M. Acquisition Co.*, 296 B.R. 452, 51 U.C.C. Rep. Serv. 2d 867 (Bankr. N.D. Ill. 2003) (holding, *inter alia*, that (1) the debtor had rights in collateral, for purposes of R9-203(b), despite the fact that the debtor did not possess the collateral and had not accepted it at the relevant time because it was awaiting a third party's testing and "debugging" of the collateral; (2) the challenged security interest attached to and was perfected in all of the debtor's existing and after-acquired property, regardless of its location, notwithstanding a provision in the security agreement requiring the debtor to maintain the collateral, once received, in one of four designated locations; (3) a pre-existing statutory lienholder's failure to record its lien relieved the secured party from any obligation to notify the lienholder of the secured party's intent to lend the debtor money secured by collateral that might also be subject to the unrecorded statutory lien; and (4) even though the pre-existing statutory lienholder repeatedly performed work for the debtor that entitled the lienholder to artisan's liens, each performance gave rise to a discrete lien, and the liens did not congeal into a single lien that rolled over indefinitely until the debtor fully paid the lienholder for all work ever performed) (N.B.: This meaty opinion is worth reading, if for no other reason, because of its colorful description of statutory liens as "parasitic... attach[ing] only to specific chattel under a particular bailment" and "disappearing" "once the underlying claim that the lien is secured is paid." One wonders whether the court was inspired to use the parasite example by the fact that the party asserting the lien was named "Matrix."),

*remanded for additional factual findings*, No. 03-CV-7072, 2004 WL 1151575 (N.D. Ill. Apr. 29, 2004) (finding that the bankruptcy court’s opinion did not contain sufficient factual findings for the district court to determine whether the debtor had sufficient rights in the collateral for the creditor’s security interest to attach prior to the debtor’s bankruptcy filing);

(42) *Agriliance, L.L.C. v. Runnells Grain Elevator, Inc.*, 272 F. Supp. 2d 800, 51 U.C.C. Rep. Serv. 2d 756 (S.D. Iowa 2003) (holding that a landlord’s lien, perfected under IOWA CODE § 570.1(2), takes priority over a prior-perfected R9 security interest in crops growing on the land subject to the landlord’s lien and proceeds arising from those crops);

(43) *Wells Fargo Home Mortgage, Inc. v. McCarthy*, 51 U.C.C. Rep. Serv. 2d 853, 2003 WL 21791219 (Minn. Ct. App. 2003) (emphatically invoking R9-109(d)(11) to hold that R9 does not apply to mortgages on real property);

(44) *Agriliance, L.L.C. v. Farmpro Services, Inc.*, 52 U.C.C. Rep. Serv. 2d 36, 2003 WL 21976033 (S.D. Iowa 2003) (holding that, while “the priority rules of Article 3 govern over the priority rules of Article 9,” thus giving a holder in due course of a negotiable instrument a superior claim to the instrument than a pre-existing secured creditor with a perfected interest in the same instrument, the party in questions was not a holder in due course because it knew of the secured creditor’s claim at the time it came into possession of the instrument; moreover, it had signed a subordination agreement giving the secured creditor priority over its pre-existing claim against the collateral and proceeds – including the instrument, which the court found to be proceeds of the collateral subject to the subordination agreement; therefore, the secured party was entitled to priority over the pre-existing creditor who had agreed to subordinate its claim in favor of the secured party and who could not claim the protection of holder in due course status because of its knowledge of the secured party’s claim to the proceeds of the debtor’s collateral);

(45) *In re Invenux, Inc.*, 298 B.R. 442, 51 U.C.C. Rep. Serv. 2d 563 (Bankr. D. Colo. 2003) (holding that R9-203 does not displace the common law right to reform a writing – here, the security agreement – on the basis of mutual mistake – here, regarding the description of collateral and that the parol evidence rule does not bar the secured party’s attempts to proffer extrinsic evidence supporting its claim of mutual mistake, despite the “crystal clear” language of the security agreement, because “[w]here there is a claim of mutual mistake, the parol evidence rule simply has no application and a court may consider extrinsic evidence which goes to the question of exactly what the agreement of the parties was and whether that agreement was expressed in the written document”);

(46) *Sonic Engineering, Inc. v. Konover Construction Co. South*, 51 U.C.C. Rep. Serv. 2d 844, 2003 WL 22133874 (Conn. Super. Ct. 2003) (holding that a secured creditor had satisfied R9-203(b) by, *inter alia*, advancing \$700,000 to the debtor and controlling the deposit account collateral in accordance with R9-104, despite the debtor’s ability to draw funds from the deposit account, subject to the secured creditor’s instructions);

(47) *In re E-Z Serve Convenience Stores, Inc.*, 299 B.R. 126, 51 U.C.C. Rep. Serv. 2d 858 (Bankr. M.D.N.C. 2003) (holding that the debtor’s residual interest in the unearned portion of a retainer it paid its law firm prior to filing bankruptcy was a pre-petition general intangible –

rather than money, a deposit account, or a general intangible that only arose when the attorneys were instructed to withdraw during the bankruptcy proceedings – and, therefore, was subject to the secured creditor’s perfected pre-petition interest in the debtor’s general intangibles);

(48) *In re Cepas*, 51 U.C.C. Rep. Serv. 2d 841, 2003 WL 22149571 (Bankr. C.D. Ill. 2003) (holding that the debtor’s assignment of \$2,500 of the debtor’s \$77,657.20 claim again bankrupt corporation to the law firm that handled the corporation’s bankruptcy filing was not excluded by R9-109(d)(6) and that, because the law firm failed to take any steps to perfect its interest in the assignment, the law firm was an unsecured creditor of the debtor – who filed bankruptcy roughly nine months after making the assignment – and the \$2,500 was part of the debtor’s bankruptcy estate);

(49) *In re Schwinn Cycling & Fitness, Inc.*, 51 U.C.C. Rep. Serv. 2d 1224, 2003 WL 22213504 (Bankr. D. Colo. 2003) (holding that the TiB’s strong-arm powers allowed it to avoid the lien of a secured creditor whose interest was perfected by possession and then by the 20-day grace period, provided by R9-312(f) following delivery of the goods to the debtor, became unperfected when it failed to file a financing statement within the 20-day grace period, despite the facts that the debtor filed its bankruptcy petition during the 20-day grace period and that the secured creditor was still perfected per R9-312(f) when the debtor filed its bankruptcy petition);

(50) *Zink v. Vanmiddlesworth*, 300 B.R. 394, 51 U.C.C. Rep. Serv. 2d 892 (N.D.N.Y. 2003) (affirming the bankruptcy court’s determination that an inventory PMSI creditor did not have priority under R9-324(d) over a pre-existing inventory secured creditor because the debtors took possession of the PMSI collateral before the PMSI creditor perfected its PMSI and because the PMSI creditor failed to notify the pre-existing inventory secured creditor as required by R9-324(d)(2)-(4));

(51) & (52) *In re Kinderknecht*, 300 B.R. 47, 51 U.C.C. Rep. Serv. 2d 1234 (Bankr. D. Kan. 2003) (endorsing *In re Erwin*, *supra*, and concluding that a financing statement filed against the individual debtor’s common nickname – Terry – was not seriously misleading, entitling the TiB to avoid the security interest as unperfected, where a reasonably diligent searcher would have found the financing statement by searching “Terry” as well as the debtor’s legal name – Terrance; the court makes particular note of the facts that the debtor filed his Chapter 7 petition “Terry,” rather than Terrance, that he listed the secured debt at issue in his bankruptcy schedules, and that an actual search using each of the two search methods authorized by the Kansas Secretary of State turned up no results for “Terrance Kinderknecht” and thirteen results for “Terry Kinderknecht” – including the secured debt at issue), *rev’d*, 308 B.R. 71 (B.A.P. 10th Cir. 2004) (reversing the bankruptcy court, disavowing *Erwin*, and holding that Kansas law requires that a financing statement against an individual debtor be filed against his or her legal name) (N.B.: Alas, the crowing of the BAP’s supporters notwithstanding, the BAP offers no guidance on (1) where to find an individual debtor’s “legal name” or (2) how to resolve conflicts in the event that two or more permissible sources of a debtor’s “legal name” – e.g., birth certificate, driver’s license, Social Security card, passport – yield different legal names.);

(53) *Receivables Purchasing Co. v. R&R Directional Drilling, L.L.C.*, 588 S.E.2d 831 (Ga. Ct. App. 2003) (holding that a UCC-1 filed against “Net work Solutions, Inc.” – rather than

“Network Solutions, Inc.” – was seriously misleading under R9-506(c) where a search of the filing office’s records using its standard search method did not reveal the financing statement filed against the debtor’s incorrect name) (Thanks to Clare Oliva for calling both this case and the next one to my attention.);

(54) *In re Summit Staffing Polk County, Inc.*, 305 B.R. 347 (Bankr. M.D. Fla. 2003) (holding that a UCC-1 filed against “Randy A. Vincent” and “Summit Staffing” was not seriously misleading after Randy A. Vincent d/b/a Summit Staffing incorporated as “Summit Staffing of Polk County, Inc.” because a search of the filing office’s records, in the name of Summit Staffing of Polk County, Inc., using the filing office’s standard search method revealed the financing statement listing “Summit Staffing” as a debtor);

(55) *In re Menasche*, 301 B.R. 757, 52 U.C.C. Rep. Serv. 2d 286 (Bankr. S.D. Fla. 2003) (holding that, under *In re Kalter*, 292 F.3d 1350 (11th Cir. 2002) (applying Florida law), ownership of motor vehicle collateral passes to the repossessing secured creditor upon repossession, subject to any statutory right of redemption, and that a Chapter 13 debtor cannot satisfy R9-623 by paying the full redemption amount over the course of the debtor’s Chapter 13 plan);

(56) *Ford Motor Credit Co. v. Midwest Diesel Service, Inc.*, Nos. Civ. 02-2924 (JRT/FLN) & Civ. 02-2925 (JRT/FLN), 2003 WL 22901837 (D. Minn. Nov. 26, 2003) (relying on R9-402 in holding that a secured creditor is not a successor-in-interest to its debtor for purposes of a contract between the debtor and a third party);

(57) *Bonem v. Golf Club of Georgia, Inc.*, 591 S.E.2d 462, 52 U.C.C. Rep. Serv. 2d 280 (Ga. Ct. App. 2003) (holding that the debtor, who “paid” a non-refundable initiation fee to join the plaintiff golf club by means of a promissory note “secured” by his membership in the club, was not entitled to defend the club’s suit for unpaid dues by arguing that the club, after terminating his membership, failed to dispose of his membership in a commercially reasonable manner, because the debtor never acquired any property interest in the club by means of his membership, leaving no collateral for the club to repossess or sell);

(58) *Muscat v. Gray*, No. 086814/2003, 2003 WL 23023768 (N.Y. Civ. Ct. Dec. 19, 2003) (holding that, where the proprietary lease between the debtor and the creditor co-op gave the creditor the authority to foreclose on the debtor’s unit and sell the debtor’s shares in the co-op in the event the debtor defaulted, the co-op was authorized by R9-601 & R9-604, after default, to foreclose and sell the shares at a commercially reasonable non-judicial sale, and that, the co-op having done so by means of a public auction, the party who purchased the shares at the auction was subject to any defenses or claims the debtor had against the co-op);

(59) *Pankratz Implement Co. v. Citizens National Bank*, No. 02-C-647 (Kan. Dist. Ct., Reno County Dec. 31, 2003) (following *In re Erwin* and the bankruptcy court’s decision in *Kinderknecht*, both discussed *supra*, and finding that a financing statement filed in the appropriate office against “Roger House” was not seriously misleading to a subsequent creditor searching under the debtor’s correct name: “Rodger House”) (Thanks, again, to Clare Oliva for calling this case to my attention.);

(60) *In re King*, 305 B.R. 152 (Bankr. S.D.N.Y. 2004) (holding that a secured creditor that previously foreclosed on some, but not all, of the debtor's eligible collateral, need not prove that it satisfied R9-610 & R9-620 with respect to the previously-foreclosed upon collateral before it could seek to foreclose on additional eligible collateral in order to more fully satisfy the debtor's outstanding debt);

(61) *digiGAN, Inc. v. iValidate, Inc.*, 52 U.C.C. Rep. Serv. 2d 1022, 2004 WL 203010 (S.D.N.Y. 2004) (holding that the creditor's strict foreclosure was not defective because it failed to notify a third party to which the debtor claims to have sold the collateral prior to the strict foreclosure because the creditor did not have actual or constructive notice of the third party's claim, as required by R9-621, where the creditor strictly foreclosed, pursuant to R9-620, after the debtor defaulted, the creditor gave the debtor timely notice of its intent to strictly foreclose, and the debtor failed to timely object);

(62) *In re Cohen*, 305 B.R. 886 (B.A.P. 9th Cir. 2004) (holding that a promissory note, which included a provision directing the debtors' personal injury attorney to use the proceeds of a pending personal injury lawsuit to pay any amount due to the creditors on the note when the suit settled or the debtors won a judgment, was neither an equitable assignment of all of the debtors' rights to the proceeds of the lawsuit, a security interest excluded from Article 9 because it was an assignment of an account or payment intangible made "in full or partial satisfaction of a pre-existing indebtedness," R9-109(d)(7), nor an automatically-perfected security interest made by means of assigning to the creditors "accounts or payment intangibles which does not by itself or in conjunction with other assignments to the same assignee transfer a significant part of the assignor's outstanding accounts or payment intangibles," R9-309(2); instead, it gave rise to a security interest in the debtors' general intangibles, which the creditors failed to perfect by filing, as required by R9-310(a));

(63) *In re Barker*, 306 B.R. 339 (Bankr. E.D. Cal. 2004) (holding that an account debtor is entitled to assert against an assignee of the account creditor any defenses and claims the account debtor has against the assignor/account creditor including, in the case of an account debt arising from a consumer goods transaction, any defenses and claims afforded the debtor by FTC Rule 433, and that any right the assignee has to force the assignor to "take back" the disputed account debt does not affect the account debtor's defenses and claims against the assignee);

(64) *iFlex Inc. v. Electroply, Inc.*, No. Civ. 03-2513 (DWF/SRN), 2004 WL 502179 (D. Minn. Mar. 4, 2004) (holding that an unsecured creditor cannot challenge an otherwise-proper foreclosure sale due to lack of prior notice or commercial unreasonableness);

(65) *In re Gaylord Grain L.L.C.*, 306 B.R. 624 (B.A.P. 8th Cir. 2004) (holding that the creditor failed to perfect its security interest in the debtor's tractor by filing because, while the tractor was equipment in the hands of the debtor, the tractor was subject to Missouri's certificate of title statute, which provided that notation on the certificate of title was the creditor's exclusive method of perfecting its lien against the debtor's tractor);

(66) *Will v. Mill Condominium Owners' Ass'n*, 848 A.2d 336 (Vt. 2004) (holding that condominium association's R9 foreclosure sale of the debtor's condominium interest, though

public, was not commercially reasonable where (1) only one person bid on the debtor's condominium interest; (2) the lone bidder purchased the debtor's interest for precisely the amount of the debtor's delinquent dues, attorneys' fees, and costs of foreclosure; (3) the seller told the lone bidder the minimum acceptable bid, and the bidder bid precisely that amount; and (4) the sales price was less than 5% of the fair market value of the condominium and less than 15% of its fair market value had it been subject to the mortgage that the seller and bidder erroneously believed it to be) (N.B.: The court also mentions that the debtor and the seller – the association's attorney – discussed postponing the sale to give the debtor time to cure her default and that, on the day of the sale and unaware that the sale had already been concluded, the debtor wire-transferred sufficient funds to the seller to cure her delinquent dues, attorneys' fees, and costs of foreclosure. However, these facts do not find their way into the court's explanation of its holding that the sale was not commercially reasonable.);

(67) *First Capital Corp. v. Norfolk Southern Ry.*, No. 3:03-CV-214-M, 2004 WL 718975 (N.D. Tex. Mar. 31, 2004) (holding that an account creditor's assignee failed to provide the account debtor adequate notice of the assignee's right to receive payments where (1) the assignee sent written notice of the assignment to a location at which the account debtor employed only one person, whose job duties did not vest him with sufficient authority to receive the notice on his employer's behalf, rather than to the notice address in the account debtor's contract with the assignor; and (2) the assignee's alleged oral communications were, likewise, with persons whose jobs did not authorize them to accept notice to bind the account debtor);

(68) *Baldwin v. Castro County Feeders I, Ltd.*, 678 N.W.2d 796 (S.D. 2004) (holding that the written security agreement satisfied R9-203, entitling the creditor to take a security interest in the proceeds of the collateral, despite twice misstating the debtor's name and leaving blank the feedlot or feedlots in which the collateral were located because (1) the debtor scratched out the incorrect name on the signature line, signed with his correct name, and admitted at trial that he entered into the agreement with the creditor; and (2) the agreement only covered cattle that the debtor delivered to the creditor's feedlot complex in Hart, Texas and to which the creditor provided feed "and related services");

(69) *SK Global America, Inc. v. John Roberts, Inc.*, 778 N.Y.S.2d 5 (N.Y. App. Div. 2004) (holding that third party, who received notice of the secured party's claim to the debtor's collateral and the financial proceeds thereof, could not thereafter be a buyer in the ordinary course of business, a good faith purchaser for value, or an trustee of the subject collateral and proceeds);

(70) *In re Hurst*, 308 B.R. 298 (Bankr. S.D. Ohio 2004) (holding that the secured creditor, which allowed its financing statements against the debtors motor-vehicles-held-as-inventory to lapse without timely filing a continuation statement, was unperfected under both OA9 and R9);

(71) *In re Chris-Don, Inc.*, 308 B.R. 214 (Bankr. D.N.J. 2004) (holding that R9 – by means of R9-408 – supersedes prior state law prohibiting consensual liens against liquor licenses);

(72) *In re North*, 310 B.R. 152 (Bankr. D. Ariz. 2004) (holding that (1) the law of the state in which collateral subject to a certificate of title statute is titled governs the perfection of a security

interest in said collateral; (2) the secured creditor properly perfected its security interest, despite failing to note its interest on the original certificate of title, because the debtor impliedly authorized the secured creditor to apply for a substitute certificate of title properly reflecting its security interest by irrevocably appointing the secured creditor as the debtor's "attorney-in-fact to execute financ[ing] statements and documents of title"; and (3) the secured creditor maintained its perfection because the debtor never retitled the vehicle in another jurisdiction) (N.B.: The court also explains, in dicta, that, because R9 eliminates the distinction between "mobile goods" and other goods for purposes of obtaining and maintaining perfection, and only requires re-perfection of nonpossessory security interests if the *debtor* relocates, had the collateral not been subject to a certificate of title statute, the secured creditor would have properly perfected in the state in which the debtor resided at the time of attachment and maintained its perfection despite the debtor relocating the collateral to another state for a period of more than four months.);

(73) *Pride Hyundai, Inc. v. Chrysler Financial Co.*, 369 F.3d 603 (1st Cir. 2004) (predicting that the Massachusetts Supreme Judicial Court would adopt the approach to dragnet clauses advocated by R9-204 cmt. 5, particularly in light of the heightened good faith standard in R9-102(a)(43), rather than following non-Article 9 Massachusetts case law limiting dragnet clauses to debts "of the general kind" as, "or which bear a sufficiently close relationship to," the original indebtedness that a court can infer the debtor's consent to subject the later-arising debt to the pre-existing security agreement, and holding that the plain language of the dragnet clause at issue, bolstered by course of dealing, industry custom, and the lack of any evidence of bad faith or unfair dealing, trumped the debtor's *ex post* claim that it did not subjectively intend the dragnet clause to cover the later-arising debt at issue);

(74) *Motors Acceptance Corp. v. Rozier*, 597 S.E.2d 367 (Ga. 2004) (agreeing, in response to a certified question from the Eleventh Circuit, with the district judge's prediction – *see Motors Acceptance Corp. v. Rozier*, 290 B.R. 910, 50 U.C.C. Rep. Serv. 2d 313 (M.D. Ga. 2003), discussed *supra* – that ownership of collateral does not pass, under Georgia law, upon repossession for nonpayment of an installment loan sales contract) (N.B.: The court makes some nice statutory construction points supporting its conclusion – arguing, in essence, that if ownership passed/reverted to the repossessing creditor, then many of R9's post-default provisions would be nonsensical.);

(75) *Coxall v. Clover Commercial Corp.*, \_\_\_ N.Y.S.2d \_\_\_, No. 64006/03, 2004 WL 1326451 (N.Y. Civ. Ct. June 8, 2004) (holding that the repossessing secured creditor failed to satisfy the notice and commercially reasonable sale requirements of R9-611 and -610, respectively, where there was no evidence that one debtor received any written notice at all, the notices received by the other debtor failed to satisfy all of the requirements of R9-613 & -614, and the secured creditor resold the collateral to the original seller, who had assigned its security interest to the repossessing creditor, in a private sale for 18.5% of the price the debtors paid for the collateral only four months after the debtors purchased it; therefore, (1) the repossessing secured creditor was not entitled to seek a deficiency judgment from the debtors, under either the "absolute bar" rule the court felt compelled to apply to the consumer transaction at issue or the "rebuttable presumption" rule R9 applies to all non-consumer transactions, though it was entitled

to recover from the debtors the sums owed to it prior to repossession and its repossession charges; and (2) the debtors were entitled to recover from the repossessing secured creditor statutory damages, set forth in R9-625, for failing to give the debtors proper pre-disposition notice and failing to dispose of the repossessed collateral in a commercial reasonable manner) (N.B.: The court noted that the “absolute bar” rule was a minority rule, but that it was the one currently in effect in the relevant Appellate Department. It also noted that non-consumer debtors whose deficiencies were eliminated or reduced under R9-626 could not recover R9-625 damages, and that Professors White and Summers felt the same rule should be extended to consumer debtors, notwithstanding the neutral position taken by R9-625 cmt. 3. However, because New York law under OA9 permitted a debtor to recover damages from a secured creditor who lost the right to seek a deficiency because the creditor failed to comply with OA9, and because R9 did not displace existing law for consumer transactions, the court applied the pre-R9 New York rule.);

(76) *Citibank (South Dakota), N.A. v. Mincks*, 135 S.W.3d 545 (Mo. Ct. App. 2004) (holding that an account debtor who never received the goods for which she was charged has the same defenses against the assignee of her debt as she had against the seller who assigned her debt to the assignee and that, “if the account debtor’s defenses on an assigned claim arise from the transaction that gave rise to the [account debt], it makes no difference whether the defense ... accrues before or after the account debtor is notified of the assignment” (quoting R9-404 cmt.));

(77) *In re Sycom Enterprises, L.P.*, 310 B.R. 669 (Bankr. D.N.J. 2004) (holding that the TiB was acting in good faith and within its rights under R9-405 when it settled all claims among the debtor and certain creditors, including one that extinguished a third party’s security interest in payments the debtor would receive under a particular contract, where the debtor had not begun to perform that contract – and, thus, had not earned the right to any proceeds – prior to filing its Chapter 7 bankruptcy petition, and debtor’s liquidation bankruptcy made it impossible for the debtor to ever perform the subject contract);

(78) *In re Tops Appliance City, Inc.*, 372 F.3d 510 (3d Cir. 2004) (holding that (1) the debtor’s grant of a security interest in the debtor’s interest in certain commercial leases and the debtor’s agreement to assign to its creditor all proceeds from the debtor’s sale of its interest in three commercial leases to third party Best Buy, in exchange for the creditor’s agreement to apply the sale proceeds to pay down the debtor outstanding loan balance, was a transfer of intangible personal property subject to R9, not a transfer of real property; and, therefore, (2) the secured creditor properly perfected its security interest in the debtor’s contract rights to occupy the leased premises, and the proceeds of any sale or license thereof, by filing);

(79) *In re Yantz*, No. 04-10370, 2004 WL 1397580 (Bankr. D. Vt. June 22, 2004) (holding that creditor failed to properly perfect her security interest in the debtor’s snowmobile by a filing in accordance with R9-310, where the relevant Vermont statute did not require a certificate of title, much less certificate-of-title notation, for snowmobiles older than model year 2004, but leaving open the possibility of equitable perfection, citing *In re Howard’s Appliance Corp.*, 874 F.2d 88 (2d Cir. 1989), if the parties created a valid security interest and “the Debtor engaged in misleading or fraudulent conduct bearing on perfection”);

(80) *Huntington National Bank v. Global Publishing Papers, Inc.*, \_\_\_ A.2d \_\_\_, No. 1099 MDA 2003, 2004 WL 1386219 (Pa. Super. Ct. June 22, 2004) (holding that (1) Pennsylvania’s R9-301, in effect when the parties’ priorities were established, dictated that the law of the individual debtor’s residence in effect at the time the parties’ priorities were established – Florida’s OA9 – governed the priority dispute between a secured creditor that filed its financing statement in the appropriate Florida office in February 2001 and a judgment creditor who became a judgment lien creditor by recording its judgment in Pennsylvania in November 2001; (2) under Florida’s OA9, the SC’s February 2001 filings in Florida and the other states where the collateral was then located perfected its security interest); and (3) under Pennsylvania’s R9, the fact that the collateral subsequently relocated to another jurisdiction did not upset the secured creditor’s perfection because the debtor did not relocate to another jurisdiction) (N.B.: Early in its opinion, the court notes that this case exemplifies “the type of ‘horrendous complications’ that arise in a multi-state dispute where the forum state has enacted Revised Article 9 but the state of perfection has not” (quoting R9-701 cmt.). Here, the court applies Florida law to see whether the secured creditor perfected its interest under Florida’s OA9 by filing in Florida, then applies Pennsylvania law to see whether the creditor remained perfected under R9 despite the collateral’s relocation. It will be interesting to see what happens to this case on appeal.))

(81) *Marandola v. Marandola Mechanical, Inc.*, No. PB 03-5949, 2004 WL 1542229 (R.I. Super. Ct. June 29, 2004) (holding that a “Joint Check Agreement,” whereby the general contractor agreed to make all checks for materials furnished by the vendor jointly payable to the subcontractor and the vendor and the vendor agreed to endorse the checks to enable the vendor to receive the full amounts thereof up to an agreed maximum, did not constitute an assignment of a right to payment excluded from R9 by virtue of R9-109(d)(6) or of accounts or payment intangibles automatically perfected under R9 by virtue of R9-309(2); and, therefore, the vendor was an unsecured creditor of the debtor’s bankruptcy estate) (N.B.: After finding that the Joint Check Agreement was not an express assignment, the court finds that it was an “equitable assignment,” but that the vendor/assignee failed to satisfy its burden of proving that the equitable assignment satisfied either R9-109(d)(6) or R9-309(2).);

(82) *In re Estis*, 311 B.R. 592 (Bankr. D. Kan. 2004) (holding that a secured creditor’s repossession of the debtor’s car less than two weeks before the debtor filed bankruptcy did not remove the car from the bankruptcy estate because (1) Kansas law afforded the debtor the right to redeem the car for a period following repossession; (2) if ownership passed/reverted to the repossessing creditor, then many of the post-default provisions in R9, Part 6 would be nonsensical; and (3) the creditor’s attempt, prior to the debtor’s filing, to obtain a repossession title from the relevant state agency – which was not issued until after the debtor filed bankruptcy – suggests that the creditor knew that it did not have title in the car at the time the debtor filed bankruptcy) (citing, *inter alia*, *Motors Acceptance Corp. v. Rozier*, *supra*, and G. Ray Warner, *Repossession Titles and Turnover Under Revised Article 9*, AM. BANKR. INST. J., Mar. 2004, at 22); and

(83) *MP Star Financial, Inc. v. Cleveland State University*, No. 03AP-1156, 2004 WL 1615067 (Ohio Ct. App. July 20, 2004) (holding that R9-109(d)(14) protects a government, state, or governmental unit that, despite receiving proper notice from an assignee of its account

creditor that future payments should be remitted to the assignee instead of the account creditor, continues making payment to the account creditor, rather than to the assignee).

## **B. Cases Discussing R9 in Dicta**

(1) *McDannold v. Star Bank, N.A.*, 261 F.3d 478, 45 U.C.C. Rep. Serv. 2d 210 (6th Cir. 2001) (dicta discussing proceeds under R9);

(2) *First State Bank v. Clark*, 635 N.W.2d 29, 45 U.C.C. Rep. Serv. 2d 689 (Iowa 2001) (same);

(3) *Harris v. Key Bank N.A.*, 193 F. Supp. 2d 707, 48 U.C.C. Rep. Serv. 2d 428 (W.D.N.Y.) (dicta discussing strict foreclosure under R9-620), *aff'd*, 51 Fed. Appx. 346 (2d Cir. 2002);

(4) *In re Payless Cashways, Inc.*, 273 B.R. 789, 47 U.C.C. Rep. Serv. 2d 366 (Bankr. W.D. Mo. 2002) (dicta discussing the sufficiency under R9-503 of a debtor's name on a financing statement);

(5) *In re Dial Business Forms, Inc.*, 273 B.R. 594, 47 U.C.C. Rep. Serv. 2d 815 (Bankr. W.D. Mo.) (dicta discussing the effect of a lapse in perfection on the lapsed secured creditor's priority versus junior secured creditors and judicial lien creditors), *aff'd*, 283 B.R. 537, 48 U.C.C. Rep. Serv. 2d 1461 (B.A.P. 8th Cir. 2002), *aff'd*, 341 F.3d 738, 51 U.C.C. Rep. Serv. 2d 815 (8th Cir. 2003);

(6) *Giles v. First Virginia Credit Services, Inc.*, 560 S.E.2d 557, 46 U.C.C. Rep. Serv. 2d 913 (N.C. Ct. App. 2002) (dicta discussing breach of peace under R9-609);

(7) *Key Bank N.A. v. Huntington National Bank*, 47 U.C.C. Rep. Serv. 2d 837, 2002 WL 701941 (Ohio Ct. App. 2002) (citing R9-103's disavowal of the "transformation rule" in the course of holding that pre-R9 Ohio law did not categorically extinguish PMSIs in equipment due to cross-collateralization with non-PMSI collateral);

(8) *In re Chorney*, 277 B.R. 477, 47 U.C.C. Rep. Serv. 2d 1122 (Bankr. W.D.N.Y. 2002) (holding that, because the debtor filed bankruptcy on October 26, 2000, and BC § 544 establishes the TiB's rights "as of the commencement of the case," R9-702 and R9-709, respectively, dictated that OA9 govern the dispute, but then discussing R9-109 cmt. 15 and questioning whether the explicit exclusion of structured settlement payments in R9-406 should be taken as evidence that they were not excluded under OA9 given the absence of similar language);

(9) *Singer Asset Finance Co. v. Bachus*, 741 N.Y.S.2d 618, 48 U.C.C. Rep. Serv. 2d 1207 (N.Y. App. Div. 2002) (citing R9-406's exclusion of structured settlement payments as persuasive authority to treat an irrevocable assignment of rights to structured settlement payments as outside the scope of OA9);

(10) *In re Alabama Land & Mineral Corp.*, 292 F.3d 1319, 48 U.C.C. Rep. Serv. 2d 379 (11th Cir. 2002) (referring to the new definition of “deposit account” and R9-102 cmt. 12 for guidance on the perfection of a certificate of deposit governed by OA9);

(11) *In re Bonds Distributing Co.*, 39 Fed. Appx. 895, 48 U.C.C. Rep. Serv. 2d 1212 (4th Cir. 2002) (applying OA9, but using R9-502 & R9-516 – and White & Summers’s commentary thereon – as persuasive authority for the nonessential nature of the secured party’s address in a financing statement);

(12) *Ryfun v. 406 West 46th St. Corp.*, 746 N.Y.S.2d 21, 48 U.C.C. Rep. Serv. 2d 733 (N.Y. App. Div. 2002) (holding that cooperative failed to satisfy OA9-504 & -505, and commenting in dicta that it likewise failed to satisfy R9-610 & -620, when the cooperative foreclosed on the stock certificate evidencing the debtor’s ownership in the cooperative);

(13) *In re Trico Steel Co.*, 282 B.R. 318, 48 U.C.C. Rep. Serv. 2d 1004 (Bankr. D. Del. 2002) (citing R9-110 & cmt. 5 in support of the court’s interpretation of the interplay between OA9-113, 2-702, and 2-705 viz. the right of an Article 2 seller to stop delivery upon learning of the buyer’s insolvency), *aff’d*, 302 B.R. 489 (D. Del. 2003);

(14) *In re Pacific/West Communications Group, Inc.*, 301 F.3d 1150, 48 U.C.C. Rep. Serv. 2d 462 (9th Cir. 2002) (holding that the California legislature’s adoption of R9, including its provision that R9 applies to proceeds of non-commercial tort claims, evidenced the non-applicability of OA9 to proceeds of non-commercial tort claims – particularly in light of pre-revision criticism of OA9-104 and an Assembly Committee Comment about the effect of R9-109);

(15) *In re Wuerzberger*, 284 B.R. 814, 49 U.C.C. Rep. Serv. 2d 641 (Bankr. W.D. Va. 2002) (discussing the language of and comments to R9-310 as supporting the court’s position that the assignee of a perfected security interest in a manufactured home need not, under the controlling Virginia certificate of title statute, amend the certificate of title to reflect its name, rather than its assignor’s name, in order to maintain perfection, provided that the assignment does not create a new security interest);

(16) *Commercial National Bank v. Seubert & Associates, Inc.*, 807 A.2d 297, 48 U.C.C. Rep. Serv. 2d 1112 (Pa. Super. Ct. 2002) (holding that R9-109(d)(6) & (8) did not retroactively apply to unearned commissions and expirations that pre-dated the effective date of R9, but then discussing the applicability of those provisions to the facts of the case and concluding that, even had R9 been in effect at the relevant time, the collateral at issue would not have been excluded under either R9-109(d)(6) or (8));

(17) *Morgan v. Farmers & Merchants Bank*, 856 So. 2d 811, 49 U.C.C. Rep. Serv. 2d 1019 (Ala. 2003) (citing authorities discussing R9 to support the court’s position that OA9 defines “instruments” more broadly than does Article 3);

(18) *Town House Department Stores, Inc. v. Ahn*, No. CVA01-018, 2003 WL 881004 (Guam Mar. 7, 2003) (discussing the commercial reasonableness of a foreclosure sale or other disposition of collateral under R9-610 & R9-627);

(19) *First Bethany Bank & Trust, N.A. v. Arvest United Bank*, 77 P.3d 595, 50 U.C.C. Rep. Serv. 2d 1209 (Okla. 2003) (holding that PMSIs in accounts are not entitled to super-priority under OA9-312(4) because accounts are “intangibles” that the debtor cannot “possess” – a position the court says is reinforced by R9-312, which replaced OA9-324, and which limits super-priority to PMSIs in tangibles and software);

(20) *Kindred of North Carolina, Inc. v. Bond*, 584 S.E.2d 846 (N.C. Ct. App. 2003) (concurrently citing parallel OA9 and R9 provisions in its opinion resolving a dispute that appears to be properly governed by OA9, the court discusses the creation and attachment of the subject security interest, the adequacy of the collateral description, and the secured party’s options following the debtor’s default);

(21) *In re FV Steel & Wire Co.*, 310 B.R. 390 (Bankr. E.D. Wis. 2004) (citing “[a] multitude of seminars and articles herald[ing] the advent of Revised Article 9,” whose expert speakers and authors preached the necessity of using a debtor’s correct legal name, rather than a trade name or nickname, and the torrent of publicity regarding same, among the factors supporting its holding that a UCC-1 filed under the incorporated debtor’s trade name was legally insufficient under OA9); and

(22) *McFarland v. Brier*, 850 A.2d 965 (R.I. 2004) (applying OA9, but remarking that the secured creditor, which perfected its interest in the debtor’s certificate of deposit under OA9 by possession, would also have perfected its interest under R9 by possession) (N.B.: The court offers a fairly methodical analysis of whether the CD in question was a “deposit account,” an “instrument,” or a “general intangible” – with particular attention to the effect of the CD bearing the legend “nontransferable” – and the perfection consequences of its determination. This could make a good teaching case despite the fact that the court decides it under OA9.).

### **C. Other Interesting Cases**

(1) *In re Henry*, Nos. 01-03369 & 02-9004, 2002 WL 539047 (Bankr. N.D. Iowa Apr. 5, 2002) (faced with a security agreement dated January 24, 2001, collateral in which the debtor’s rights attached in September 2001, and a July 1, 2001 effective date for R9, the court instructed the parties to brief which version of Article 9 applies and whether, if it applies, R9 dictates a different result from that previously reached by the court applying OA9);

(2) *In re Cypress Foods, Inc.*, 278 B.R. 622 (Bankr. M.D. Fla. 2002) (holding that OA9 governed the dispute before it, but confusing which provisions of Fla. Stat. ch. 679 comprise OA9 and which comprise R9);

(3) *Columbus Investments v. Lewis*, 48 P.3d 1222, 48 U.C.C. Rep. Serv. 2d 347 (Colo. 2002) (en banc) (holding that OA9 governed the dispute before it, but interchangeably citing OA9 and R9 provisions);

(4) *Hawaii v. FEMA*, 294 F.3d 1152, 47 U.C.C. Rep. Serv. 2d 1517 (9th Cir. 2002) (using the “commercial reasonableness” standard of R9-627 to inform its decision that the State of Hawaii had reasonably settled with insurers in the wake of Hurricane Iniki when those settlements failed to fully reimburse FEMA for benefits it paid out on the subject properties);

(5) *In re Ball*, 281 B.R. 706, 48 U.C.C. Rep. Serv. 2d 709 (Bankr. D. Kan. 2002) (holding that OA9 governed an adversary proceeding commenced after the effective date of R9 because the underlying bankruptcy was filed before R9’s effective date);

(6) *In re Thiara*, 285 B.R. 420, 49 U.C.C. Rep. Serv. 2d 1 (B.A.P. 9th Cir. 2002) (holding that crop insurance check was proceeds of the debtor’s destroyed-but-unharvested crop, despite the crop still being attached to real property at the time the debtor received the check) (N.B.: The court cites throughout the relevant part of the opinion to both OA9 and R9, but the facts suggest that it was applying OA9.);

(7) *In re New Haven Foundry, Inc.*, 285 B.R. 646, 49 U.C.C. Rep. Serv. 2d 304 (Bankr. E.D. Mich. 2002) (holding that OA9 governed a motion to lift the automatic stay to permit a set-off where, despite the fact that the debtor filed bankruptcy after R9 took effect, the movant’s set-off rights against the debtor arose from a June 15, 1999 order granting the movant relief from the stay in a bankruptcy proceeding initiated by an affiliate of the debtor);

(8) *In re Billingsley*, 290 B.R. 345 (Bankr. C.D. Ill. 2002) (holding that the TiB could avoid a security interest in 500 shares of stock owned by the debtor, granted to the secured creditor by means of an agreed judgment order, because the secured creditor never perfected by any of the means permitted under Article 9 or other statute) (N.B.: The court, without specifically addressing whether it was applying OA9 or R9, cites exclusively to OA9 despite the fact that the security interests arose and the debtor filed bankruptcy after the effective date of R9.);

(9) *In re Kroskie*, 315 F.3d 644, 49 U.C.C. Rep. Serv. 2d 632 (6th Cir. 2003) (holding that the Michigan Mobile Home Commission Act provides the exclusive means for perfecting a security interest in a mobile home; and, therefore, the secured creditor failed to perfect when it filed in the county real property records) (N.B.: The court, admittedly, was comparing the MHCA to OA9, not R9, but the result should be the same under R9.);

(10) *In re Sims*, 294 B.R. 198, 49 U.C.C. Rep. Serv. 2d 965 (B.A.P. 10th Cir. 2003) (holding that an assignment of “all right, title, and interest” in the funds held by the Chapter 13 trustee to the debtors’ law firm was not a security interest under R9-109(a)(1); and, therefore, was not subject to R9’s priority scheme);

(11) *Lakes v. Ryan*, No. CA2002-05-118, 2003 WL 231272 (Ohio Ct. App. Feb. 3, 2003) (suggesting that security interests in personal property can only be perfected by possession, and that they lapse as soon as the secured party relinquishes possession);

(12) *In re Clark*, 289 B.R. 474 (Bankr. M.D. Fla. 2003) (holding, without clarifying which version of Article 9 it was applying, that royalty interests severed from the land are personal, not real, property and must be transferred and perfected according to Article 9, rather than by deed);

(13) *In re Midland Transportation Co.*, 292 B.R. 181, 50 U.C.C. Rep. Serv. 2d 579 (Bankr. N.D. Iowa 2003) (discussing the interplay of Article 9 and the Iowa certificate of title statute, IOWA CODE § 321.50, and holding that a putative secured creditor whose interest had neither attached – because it did not either possess the collateral or have a security agreement signed by the debtor – nor been perfected in accordance with § 321.50 prior to the debtor’s bankruptcy filing was an unsecured creditor against whose claims the bankruptcy trustee had priority) (N.B.: Don’t be misled by the court’s repeated citations to the 2001 Iowa Code, which contains R9, not OA9. As Chris Hoving subsequently pointed out to me, the court is, in fact, discussing OA9, not R9 – though differences between the two appear irrelevant to the court’s discussion and holding.);

(14) *Dean Machinery Co. v. Union Bank*, 106 S.W.3d 510, 50 U.C.C. Rep. Serv. 2d 431 (Mo. Ct. App. 2003) (referring interchangeably to the text of OA9 and published commentary on R9 in deciding that the transaction at issue was a sale, not a lease, and that the seller failed to perfect the security interest implied in its right to reclaim under 2-401);

(15) *In re Kohlmeyer*, No. 02-9078, 2003 WL 21212609 (Bankr. N.D. Iowa May 14, 2003) (holding that the thirty-day perfection period for security interests in motor vehicles subject to Iowa’s certificate of title statute, IOWA CODE § 321.50, did not begin to run against a refinancing creditor until the creditor received the certificate of title, despite the fact that the prior lender’s lien had been extinguished more than thirty days before the refinancing creditor perfected its lien on the certificate of title);

(16) *In re Esteves Ortiz*, 295 B.R. 158 (B.A.P. 1st Cir. 2003) (applying Puerto Rico’s Commercial Transactions Act, which incorporates some, but not all of Article 9, and holding, based on Article 9 cases from other jurisdictions, that the creditor, *inter alia*, did not have an enforceable security interest in the debtor’s assets because the sole document signed by the debtor did not evidence a security interest);

(17) *In re Corvette Collection of Boston, Inc.*, 294 B.R. 409, 51 U.C.C. Rep. Serv. 2d 426 (Bankr. S.D. Fla. 2003) (following *Valley Media* and holding that the consignors lost priority to the consignee’s TiB because the consignors failed to file a UCC-1, a notice of lien with the Florida DMV, or otherwise provide notice that they owned the vehicles in question; as a result, the consignors were unsecured creditors of the consignee, despite the fact that the consignors still held the original certificates of title on the consigned vehicles at the time the consignee filed bankruptcy);

(18) *Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410 (5th Cir. 2003) (holding that a factor’s “purchase” of the debtor’s accounts receivable was better characterized as a secured loan against the debtor’s accounts, because the factor did not assume the risk of non-payment by the debtor’s account debtors; therefore, factor’s interest was second in time and priority to a Perishable Agricultural Commodities Act, 7 U.S.C. § 499a *et seq.*, lien that arose automatically in favor of seller who had sold fruits and vegetables to the debtor);

(19) *In re Argo Financial, Inc.*, 337 F.3d 516, 51 U.C.C. Rep. Serv. 2d 282 (5th Cir. 2003) (holding, 2-1, that R9 yielded to the Louisiana Civil Code provision dealing with perfecting an

interest in a motor vehicle; Judge Emilio Garza concurred in the result, but held that the court could and should have reached the same conclusion by applying R9 because the collateral at issue was not the motor vehicles themselves, but chattel paper evidencing the retail purchaser's obligation to make installment payments and the seller's security interest in the motor vehicles until the purchaser paid in full);

(20) *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320 (Minn. 2003) (considering arguments from both sides invoking some aspect of the definition of "general intangibles" in R9-102(a)(42) in trying to decide whether the term "intangibles ... related to the [seller's] Snowmobile Program" in an asset purchase agreement included the seller's antitrust claims against the buyer);

(21) *In re Doctors Hospital of Hyde Park, Inc.*, 337 F. 3d 951, 51 U.C.C. Rep. Serv. 2d 224 (7th Cir. 2003) (considering the interaction of former 9-318 with the Illinois Comptroller Act ("ICA"), and concluding that the Illinois legislature intended for the ICA to "trump" Article 9 to give the State priority over assignees of State contracts in the event of bankruptcy) (N.B.: Judge Posner commented that R9-404 did not change any of the language in OA9-318 material to its decision; therefore, one can imagine the same result if the ICA was challenged using R9-404, rather than OA9-318.);

(22) *Cooperative Agronomy Services v. South Dakota Department of Revenue*, 668 N.W.2d 718 (S.D. 2003) (refusing to use either OA9's or R9's definition of "farm products" to determine which "farm product warehousing and storage services" were exempt from South Dakota's state sales tax);

(23) *SEC v. Credit Bancorp, Ltd.*, 279 F. Supp. 2d 247, 51 U.C.C. Rep. Serv. 2d 492 (S.D.N.Y. 2003) (using a secured lender's inability to continue making secured future advances under R9-323 once the lender "has received notice of an adverse claim on the collateral" purportedly securing the advances by analogy to reject the argument that Article 8's refusal to impose a duty to investigate liens allows a party to ignore information confirming the existence of an adverse claim);

(24) *In re Watkins*, 298 B.R. 342 (Bankr. N.D. Ill. 2003) (holding that Illinois's "wildcard" personal property exemption, 735 ILL. COMP. STAT. ANN. 5/12-1001(b), did not apply to defeat an Article 9 security interest);

(25) *In re McFarlane*, 298 B.R. 878 (Bankr. W.D. Mo. 2003) (holding that 1999 legislation permitting a secured party to perfect its lien against a motor vehicle by filing a notice of lien with the Department of Revenue provided an *additional* permissible means of perfecting such liens, rather than the *sole* permissible means; therefore, secured creditors who had noted their liens on the original certificates of title for the subject vehicles were properly perfected despite not filing a notice of lien with the Department of Revenue);

(26) *Page v. Hotchkiss*, 52 U.C.C. Rep. Serv. 2d 365, 2003 WL 22962151 (Conn. Super. Ct. 2003) (citing, *inter alia*, R9-102(44)'s definition of "goods" in support of its conclusion that the

transaction at issue was predominantly for services, not goods; and, therefore, did not give rise to an implied warranty of merchantability);

(27) *In re Enron Corp.*, 302 B.R. 455, 52 U.C.C. Rep. Serv. 2d 781 (Bankr. S.D.N.Y. 2003) (applying non-uniform TEX. BUS. & COM. CODE 9.343, which grants oil and gas producers a security interest against the “first purchaser” for payment of the purchase price, and finding no such interest attached against the debtor because the debtor dealt only with an intermediary and failed to “mak[e] a voluntary communication to the interest owner[s] acknowledging [the interest owners’] rights to the oil and/or gas property or its proceeds”);

(28) *Singleton v. Stokes Motors, Inc.*, 595 S.E.2d 461 (S.C. 2004) (finding that R9-628 prevents a secured creditor who fails to give proper notice to more than one debtor or secondary obligor from having to pay more than one measure of R9-625 statutory damages, but holding that pre-R9 law governed the transaction at issue and that controlling pre-R9 law permitted multiple debtors and secondary obligors who did not receive the requisite notice to each recover the minimum statutory damages from the creditor who failed to give proper notice);

(29) *InterBusiness Bank, N.A. v. First National Bank of Mifflintown*, 318 F. Supp. 2d 230 (M.D. Pa. 2004) (holding that R9-709 required the court to apply OA9 to determine the respective priorities of the competing creditors where each creditor perfected – and, therefore, “established” – its claim prior to the effective date of R9) (N.B.: The court provides a nice analysis – admittedly, under OA9, but the analysis should be the same, with only the section numbers changed ..., under R9 – of the effect of assigning a perfected security interest on the assignee’s perfection and priority, as well as the perils of taking an assignment of a filed financing statement to which no security interest had attached at the time of the assignment.);

(30) *Multi-Grinding, Inc. v. Richardson Sales & Consulting Services, Inc.*, No. 245779, 2004 WL 1335813 (Mich. Ct. App. June 15, 2004) (rather cryptically finding the debtor’s “reliance on [Article 9] as a basis for avoiding liability to be misplaced because plaintiff’s meritorious claim [not to be confused with the several claims the trial court properly dismissed] *arises from the creation, rather than the enforcement, of the security interest*” (emphasis added)) (N.B.: Last time I checked, Article 9 had provisions governing both the creation and enforcement of security interests. I think what the court was trying to say is that, because the plaintiff was pleading that the security interest was, in essence, a fraudulent transfer, that Article 9 would govern only if the transfer was not for the purpose of defrauding the plaintiff. Still, it’s probably a good thing that this opinion is unpublished.); and

(31) *Brasher’s Cascade Auto Auction v. Valley Auto Sales & Leasing*, 15 Cal. Rptr. 3d 70 (Cal. Ct. App. 2004) (citing Alvin C. Harrell, *Oil and Gas Finance Under Revised UCC Article 9*, 33 TEX. TECH L. REV. 31 (2001), for the proposition that R1-201(b)(9) “loosen[s] up” the definition buyer-in-the-ordinary-course-of-business to include transactions that are unusual for the seller but consistent with industry standards, and hinting, in dicta, that R1-201(9) may affect what is “commercially reasonable” for purposes of R9).