

**GOLDBERG, KOHN, BELL, BLACK,
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A T T O R N E Y S A T L A W

***COMMERCIAL FINANCE
CLIENT ALERT***

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Expanded Scope of Revised Article 9

Property subject to the Uniform Commercial Code can be, in most cases, readily financed, because a lender can perfect a security interest with relative certainty using the simple and straight-forward procedure set forth in the Uniform Commercial Code. Certain property not subject to the Uniform Commercial Code cannot be readily financed because vague perfection rules make it more difficult for a lender to perfect a security interest in such property. Revised Article 9 attempts to remedy this problem by expanding its scope to a number of types of property which are not included within current Article 9. Among the types of property which are not included within the scope of current Article 9, but which are included within the scope of Revised Article 9, are the following:

Health-Care Insurance Receivables.

Monetary claims under insurance policies arising from health-care goods or services are referred to under Revised Article 9 as "health-care-insurance receivables." These receivables are a subset of "accounts." Current Article 9 does not specifically identify such receivables. Within a security

agreement, the standard definition of "accounts" should be expanded to include a reference to health-care-insurance receivables.

Deposit Accounts. With the exception of four states (Illinois being one of the four states), current Article 9 excludes deposit accounts from its scope. Revised Article 9 has deposit accounts within its scope and accordingly, security agreements should be revised to include deposit accounts as part of the collateral in which the secured party has a lien (if the intention is for the secured party to have a lien on all assets of the debtor).

Letter-of-Credit Rights. A right to payment or performance under a letter of credit, whether electronic or written, is defined under Revised Article 9 as a "letter-of-credit right." As is the case with "payment intangibles" (described below), "letter-of-credit rights" are a subset of "general intangibles." Within a security agreement, the standard definition of the term "general intangibles," in order to be all-encompassing, should include specific

references to both payment intangibles and letter-of-credit rights.

Software. Software which is imbedded in goods in such a manner that it is customarily considered a part of the goods is now treated as "goods" for purposes of Revised Article 9. A definition of the term "goods" contained within a security agreement should be so broadened. Software not embedded in the goods is a subcategory of "general intangibles" under Revised Article 9. The definition of "general intangibles" in a security agreement should also include the term "software" to insure a security interest is obtained in software no matter how it is categorized under Revised Article 9.

Commercial Tort Claims. A new category of collateral under Revised Article 9 consists of commercial tort claims. A debtor may only grant a security interest in a commercial tort claim to the extent that the commercial tort claim arose out of a business. A security interest under Revised Article 9 may not include damages for death or personal injury. If a commercial tort claim is contractually settled, it no longer falls under this definition. Also, if the commercial tort claim is evidenced by a right to payment under a settlement agreement, but is not formally translated into written form such as an instrument, chattel paper or otherwise, the claim becomes a "payment intangible" which is described below. A debtor can only grant a security interest in a commercial tort claim to the extent that it exists when the security interest is granted. In other words, unlike other property, a debtor may not grant a security interest in commercial tort claims which arise after the security agreement is executed.

Aside from adding property to its scope, Revised Article 9 alters, in certain respects, the types of property that fall within the Article 9 property categories. Examples of this are as follows:

Accounts. Revised Article 9 significantly expands the definition of "accounts" to include rights that are likely to be classified under the category of "general intangibles" under current Article 9. Current Article 9 limits the term "accounts" to rights to payment arising out of the sale or lease of goods or the rendering of services. Revised Article 9 creates new rights to payment arising out of almost any kind of a transfer of an interest in property. In addition to health-care-insurance receivables as described above, the definition of "accounts" is expanded under Revised Article 9 to include credit card receivables and payments arising out of (i) real property sold, leased, assigned or otherwise disposed of, (ii) services rendered or to be rendered, (iii) a policy of insurance or (iv) licensing of tangible and intangible property. Accordingly, within a security agreement, the definition of the term "accounts" should be expanded to include these new categories of rights to payment.

Payment Intangibles. Under Revised Article 9, "payment intangibles" are defined as "general intangibles" under which the account debtor's principal obligation is a monetary obligation. Many rights to receive payments under a contractual obligation constitute "accounts," but those that do not will be treated as "payment intangibles," a subset of "general intangibles." An example would include a lender's right to receive payments under a loan agreement, to the extent that the right to receive payment is not evidenced by an instrument.

Chattel Paper. The definition of "chattel paper" remains unchanged under Revised Article 9, but it has been subdivided into two categories: (i) "electronic chattel paper" which is chattel paper evidenced by a record or records expressed in an electronic medium and (ii) "tangible chattel paper" which is chattel paper where information evidencing the record or records is inscribed on a tangible medium such as a writing. Within a security agreement, the definition of "chattel paper" should be broadened to include both types of chattel paper.

Investment Property. Revised Article 9 defines "investment property" to include certificated and uncertificated securities, securities accounts, and security entitlements, all of which are defined under UCC Article 8, and also includes commodity contracts and commodity accounts which are defined under Revised Article 9. A "commodity account" is an account maintained by a commodity intermediary (a person who is registered as a futures commission merchant under federal commodities law) in which a commodity contract is carried for a commodity customer. A "commodity contract" is a commodity futures contract, an option on a commodity futures contract, a commodity option, or another contract if the contract or option is either traded on a contract market pursuant to federal commodities laws or traded on a foreign commodity board of trade.

1. **Instrument.** The definition of "instrument" under Revised Article 9 no longer includes (i) investment property, (ii) letters of credit or (iii) credit card receivables. Revised Article 9 does include the subcategory "promissory note," which is an instrument evidencing a promise to pay (rather than an order to pay such as a check) a monetary obligation. The definition of "instrument," within a security agreement, should be broadened to include "promissory notes" in the possession of a debtor.

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