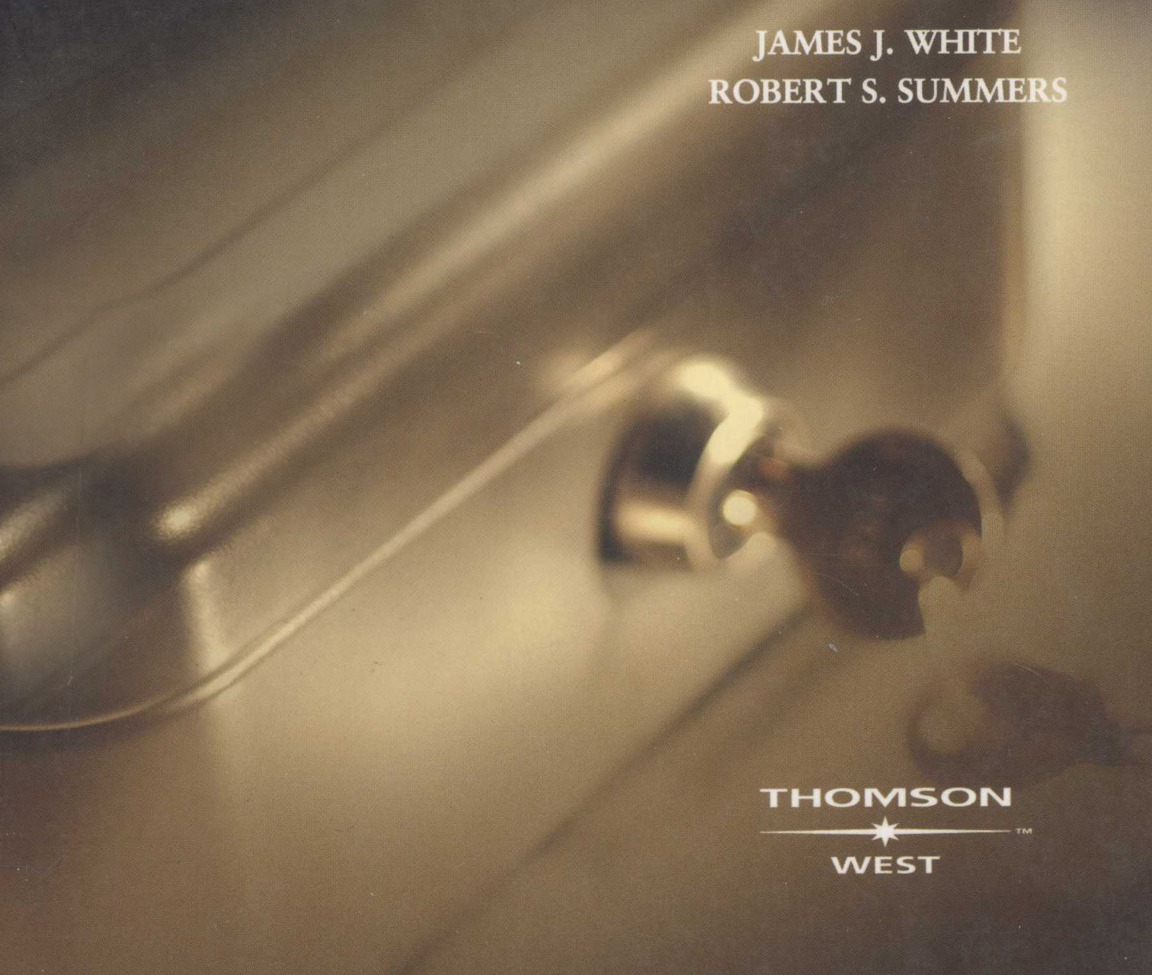
CONCISE HORNBOOKS

PRINCIPLES OF

Secured Transactions

JAMES J. WHITE
ROBERT S. SUMMERS



THOMSON
WEST

610 Opperman Drive
St. Paul, MN 55123
1–800–313–9378

Printed in the United States of America

ISBN: 978–0–314–18478–8

TEXT IS PRINTED ON 10% POST CONSUMER RECYCLED PAPER

Preface

This work is a modified and much reduce version of the relevant parts of the 5th Edition of J. White and R. Summers, The Uniform Commercial Code, Volume 4 (2007).

*

Acknowledgments

Professor White acknowledges the assistance of Michael A. Zellen, '07, University of Michigan Law School, and his administrative assistant, Janis Weston.

Professor Summers acknowledges the assistance of Gina Jackson, his administrative assistant and Rose Stella, '07, Cornell Law School.

*

Summary of Contents

		Page
Chapter 1.	**Scope of Article 9**	**1**
Sec.		
1–1	Introduction	1
1–2	Basic Article 9 Scope Provisions, Section 9–109(a)	6
1–3	Security Interest or Lease?	9
1–4	Consignments as Security Interests	21
1–5	Quasi Consignment	24
1–6	Sales of Accounts, Chattel Paper, Payment Intangibles, Promissory Notes	26
1–7	Article 9 and Claims to Interests in, and Arising from, Real Estate	28
1–8	Agricultural and Other Statutory Liens, Section 9–109(a)(2)	32
1–9	Exclusions, Section 9–109(c) and (d)	34
1–10	Applicability of Article 9 to "Security Interests" that Arise under Article 2 on Sales, Sections 9–109(a)(5), 9–110	36
1–11	Federal Law That Overrides Article 9	38
Chapter 2.	**Creation and Perfection of Enforceable Article 9 Interests**	**43**
Sec.		
2–1	Introduction	44
2–2	Creation of Enforceable Article 9 Security Interests—Basic Requirements	44
2–3	Creation of Enforceable Article 9 Security Interests—"Attachment" and "Enforceability"	45
2–4	Perfection in General	54
2–5	Automatic Perfection, In General	55
2–6	Automatic Perfection—Purchase Money Security Interests in Consumer Goods, Section 9–103	57
2–7	Automatic Perfection—Certain Intangibles, Section 9–109	64
2–8	Perfection by Possession, Section 9–313	67
2–9	Control, Section 9–314	73
2–10	Perfection by Filing, In General	79
2–11	The Basics of Filing and the Effects of Imperfect Filing or Indexing	82

Page

Sec.

2–12 Filing, the Basics ... 89
2–13 Defective—Seriously Misleading? ... 98
2–14 The Effects of Post–Filing Changes on Perfection ... 99
2–15 Perfection in Multiple State Transactions, Sections 9–301 through 9–307 ... 103
2–16 Special Cases, Proceeds and Support Obligations ... 111

Chapter 3. The Bankruptcy Trustee vs. The Article 9 Claimant ... 117

Sec.

3–1 Introduction ... 117
3–2 Failure to Create a Security Interest that is Enforceable against the Debtor—The Trustee's Rights under Subsection 541(a) and Section 558 ... 119
3–3 Lack of Perfection as of Date of Bankruptcy—Trustee's Rights, Subsection 544(a) ... 120
3–4 Voidable Preferences, Section 547 ... 124
3–5 Exceptions to the Preference Rules, Section 547(c) ... 140
3–6 Trustee's Subrogation to the Claims of Others, Section 544(b) ... 144
3–7 Reclamation Rights vs. the Trustee in Bankruptcy, Sections 2–702, 546(c) ... 148

Chapter 4. Priority Conflicts ... 151

Sec.

4–1 Introduction ... 152
4–2 Rights of Unperfected Secured Creditors vs. Unsecured Creditors With and Without Judicial Liens ... 153
4–3 Basic Priorities among Conflicting Security Interests: First in Time, First in Right, Sections 9–322, 9–323 155
4–4 Purchase Money Security Interest: Second in Time, First in Right, Section 9–324 ... 160
4–5 Fixtures ... 168
4–6 Accessions and Commingled Goods, Sections 9–335, 9–336 ... 180
4–7 Priority in Deposit Accounts and Investment Property, Sections 9–327, 9–328 ... 182
4–8 Buyers of Goods, Sections 9–317, 9–320 ... 184
4–9 Protection of Purchasers of Farm Products ... 191
4–10 Buyers of Intangibles ... 193
4–11 "Double Debtor" and Other Weird Cases ... 200

Chapter 5. Default and Its Consequences ... 205

Sec.

5–1 Introduction ... 205
5–2 Defining "Default" ... 207
5–3 Defining "Default," Acceleration Clauses ... 209

Sec.		Page
5–4	Creditor's Alternatives Upon Default	212
5–5	Collection Rights of the Secured Party, Sections 9–606, 9–607	215
5–6	Repossession in General, Section 9–609	218
5–7	Repossession, Self–Help	218
5–8	Repossession, Judicial Action	221
5–9	"Strict Foreclosure," Sections 9–620, 9–621, 9–622	222
5–10	Foreclosure by Sale or other Disposition after Default, Sections 9–610 and 9–627	226
5–11	Notice, Sections 9–611, 9–612, 9–614, 9–615	235
5–12	Legal Consequences of Sale and Application of Proceeds, Sections 9–615, 9–617, and 9–619	238
5–13	Remedies for Secured Creditor's Failure to Comply with Part Six of Article 9	239

Table of Cases 245
Index 251

*

Table of Contents

Page

Chapter 1. Scope of Article 9 .... **1**

Sec.

1–1 Introduction 1
  a. The History of Article 9 1
  b. Important Definitions and Concepts in Article 9 3
    Problem 5
1–2 Basic Article 9 Scope Provisions, Section 9–109(a) 6
1–3 Security Interest or Lease? 9
  Problem 10
  a. The Problem 10
    1. True Leases 12
  b. Section 1–203 Sign Posts 14
    1. Security Interest, not a Lease 14
    2. Lease, not a Security Interest 15
    3. More Section 1–203 Guidelines 18
  c. Reversionary Interest 19
  d. Nominal Consideration 19
    Problem 20
1–4 Consignments as Security Interests 21
1–5 Quasi Consignment 24
1–6 Sales of Accounts, Chattel Paper, Payment Intangibles, Promissory Notes 26
  Problem 27
1–7 Article 9 and Claims to Interests in, and Arising from, Real Estate 28
  Problem 31
1–8 Agricultural and Other Statutory Liens, Section 9–109(a)(2) 32
1–9 Exclusions, Section 9–109(c) and (d) 34
1–10 Applicability of Article 9 to "Security Interests" that Arise under Article 2 on Sales, Sections 9–109(a)(5), 9–110 36
1–11 Federal Law That Overrides Article 9 38

Chapter 2. Creation and Perfection of Enforceable Article 9 Interests **43**

Sec.

2–1 Introduction 44

Sec.		Page
2–2	Creation of Enforceable Article 9 Security Interests—Basic Requirements	44
2–3	Creation of Enforceable Article 9 Security Interests—"Attachment" and "Enforceability"	45
	a. Security Agreement	46
	b. Description	48
	c. Authenticate	50
	d. Value	52
	e. Rights in the Collateral	53
2–4	Perfection in General	54
2–5	Automatic Perfection, In General	55
2–6	Automatic Perfection—Purchase Money Security Interests in Consumer Goods, Section 9–103	57
	a. Purchase Money Status	58
	b. Consumer Goods	61
	Problem	63
	c. Conclusion	63
2–7	Automatic Perfection—Certain Intangibles, Section 9–109	64
2–8	Perfection by Possession, Section 9–313	67
	a. Pledgeable Property	68
	b. Possession	69
	c. Possession by Whom	70
2–9	Control, Section 9–314	73
	a. Deposit Accounts	74
	b. Investment Property	76
	Problem	78
2–10	Perfection by Filing, In General	79
2–11	The Basics of Filing and the Effects of Imperfect Filing or Indexing	82
	Problem	88
2–12	Filing, the Basics	89
	a. Name of Debtor	90
	b. Addresses	93
	c. Description of Collateral	94
	d. Some Collateral Description Cases prior to the 1999 Code	96
2–13	Defective—Seriously Misleading?	98
2–14	The Effects of Post–Filing Changes on Perfection	99
	Problem	99
2–15	Perfection in Multiple State Transactions, Sections 9–301 through 9–307	103
	a. Pre 1999 Rules	103
	b. General Rule—1999 Revision	104
	Problem	108
	c. Exceptions to the General Rule of Section 9–301(1)	108

Page

Sec.

2–15 Perction in Multiple State Transactions, Sections 9–301 through 9–307—Continued
d. Change in Governing Law, Section 9–316 109
Problem 110
2–16 Special Cases, Proceeds and Support Obligations 111
a. Proceeds, Attachment and Definition 111
b. Proceeds, Perfection 113
c. Supporting Obligations 115
Problem 116

Chapter 3. The Bankruptcy Trustee vs. The Article 9 Claimant **117**

Sec.

3–1 Introduction 117
3–2 Failure to Create a Security Interest that is Enforceable against the Debtor—The Trustee's Rights under Subsection 541(a) and Section 558 119
3–3 Lack of Perfection as of Date of Bankruptcy—Trustee's Rights, Subsection 544(a) 120
Problem 123
3–4 Voidable Preferences, Section 547 124
Problem 127
a. Transfer 128
b. The Debtor's Property 129
c. For the Benefit of 129
d. For or on Account of an Antecedent Debt 135
e. Insolvency 136
f. Ninety Days 136
Problem 137
g. "Hypothetical Liquidation," under Section 547(b)(5) 138
h. Insiders 139
3–5 Exceptions to the Preference Rules, Section 547(c) 140
Problem 143
3–6 Trustee's Subrogation to the Claims of Others, Section 544(b) 144
Problem 147
3–7 Reclamation Rights vs. the Trustee in Bankruptcy, Sections 2–702, 546(c) 148

Chapter 4. Priority Conflicts **151**

Sec.

4–1 Introduction 152
4–2 Rights of Unperfected Secured Creditors vs. Unsecured Creditors With and Without Judicial Liens 153
Problem 154

Sec.		Page
4–3	Basic Priorities among Conflicting Security Interests: First in Time, First in Right, Sections 9–322, 9–323	155
	Problem	157
	a. After–Acquired Property	157
	b. Future Advances	158
4–4	Purchase Money Security Interest: Second in Time, First in Right, Section 9–324	160
	a. In General	160
	b. Purchase Money	161
	Problem	164
	c. Rules of Priority	165
	d. Proceeds of Purchase Money Secured Creditor	167
	e. Other Cases	168
4–5	Fixtures	168
	a. Fixtures and Fixture Filings, Section 9–102(a)(40) and (41)	169
	b. Fixture Priority Rules, Section 9–334(d)–(h)	171
	1. Purchase Money Security Interest, Section 9–334(d), (h)	172
	2. Subsequent Real Estate Interests, Section 9–334(e)(1)	173
	3. "Non Fixture" Fixtures, Section 9–334(e)(2)	174
	4. Lien Creditors—The Trustee in Bankruptcy, Section 9–334(e)(3)	175
	5. Manufactured Homes, Section 9–334(e)(4)	175
	c. Remedy, Section 9–604(c), (d) and (b)	178
	Problem	179
4–6	Accessions and Commingled Goods, Sections 9–335, 9–336	180
	a. Accessions	180
	b. Commingled Goods	181
4–7	Priority in Deposit Accounts and Investment Property, Sections 9–327, 9–328	182
	a. Investment Property	182
	b. Deposit Accounts	184
4–8	Buyers of Goods, Sections 9–317, 9–320	184
	a. Buyers vis-à-vis Unperfected Secured Creditors	185
	b. Buyers in the Ordinary Course vs. Perfected Secured Creditors	185
	c. Relationship Between Sections 9–320 and 2–403	189
	d. Consumer Buyers of Consumer Goods vs. Secured Creditors	191
4–9	Protection of Purchasers of Farm Products	191
4–10	Buyers of Intangibles	193
	a. Buyers of Chattel Paper and Instruments	193
	1. Chattel Paper	193

Page

Sec.

4–10 Buyers of Intangibles—Continued
 2. Instruments 196
 b. Priority Rights of other Purchasers and Transferees, Sections 9–331, 9–332 197
 c. Returns and Repossessed Goods 199
4–11 "Double Debtor" and Other Weird Cases 200
 a. Double Debtors 200
 b. Priority of Security Interests Created by a New Debtor 201
 Problem 202
 c. Good Faith 202
 d. Estoppel 203
 e. Subrogation 204

Chapter 5. Default and Its Consequences 205

Sec.

5–1 Introduction 205
5–2 Defining "Default" 207
5–3 Defining "Default," Acceleration Clauses 209
5–4 Creditor's Alternatives Upon Default 212
5–5 Collection Rights of the Secured Party, Sections 9–606, 9–607 215
5–6 Repossession in General, Section 9–609 218
5–7 Repossession, Self–Help 218
5–8 Repossession, Judicial Action 221
5–9 "Strict Foreclosure," Sections 9–620, 9–621, 9–622 222
5–10 Foreclosure by Sale or other Disposition after Default, Sections 9–610 and 9–627 226
 a. Safe Harbors 228
 b. Pre–1999 Case Law 229
 c. Price 232
 d. Disposition to Related Parties 232
5–11 Notice, Sections 9–611, 9–612, 9–614, 9–615 235
 a. In General 235
 b. Public or Private Notice 238
 c. Summary 238
5–12 Legal Consequences of Sale and Application of Proceeds, Sections 9–615, 9–617, and 9–619 238
5–13 Remedies for Secured Creditor's Failure to Comply with Part Six of Article 9 239
 a. Denial or Reduction of Deficiency 239
 b. Other Statutory Remedies 241
 c. Punitive Damages 242

Page

Sec.

5–13 Remedies for Secured Creditor's Failure to Comply with Part Six of Article 9—Continued

d. Torts 243

e. Relationship between Damages and Denial of or Restriction of a Deficiency 244

TABLE OF CASES 245

INDEX 251

Chapter 1

SCOPE OF ARTICLE 9

Analysis

Section
1–1. Introduction.
  a. The History of Article 9.
  b. Important Definitions and Concepts in Article 9.
1–2. Basic Article 9 Scope Provisions, Section 9–109(a).
1–3. Security Interest or Lease?
  a. The Problem.
    1. True Leases.
  b. Section 1–201(37) Sign Posts.
    1. Security Interest, not a Lease.
    2. Lease, not a Security Interest.
    3. More Section 1–201(37) Guidelines.
  c. Reversionary Interest.
  d. Nominal Consideration.
  e. Some Cases and Examples under Section 1–201(37).
1–4. Consignments as Security Interests.
1–5. Quasi Consignment.
1–6. Sales of Accounts, Chattel Paper, Payment Intangibles, Promissory Notes.
1–7. Article 9 and Claims to Interests in, and Arising from, Real Estate.
1–8. Agricultural and Other Statutory Liens, Section 9–109(a)(2).
1–9. Exclusions, Section 9–109(c) and (d).
1–10. Applicability of Article 9 to "Security Interests" that Arise under Article 2 on Sales, Sections 9–109(a)(5), 9–110.
1–11. Federal Law that Overrides Article 9.

---

§ 1–1 Introduction

a. The History of Article 9

Although Article 9 was the most innovative of the original Code articles, it did not spring full grown from the forehead of Grant Gilmore, Allison Dunham, or even Karl Llewellyn.[1] The drafters

§ 1–1

1. All three seem to have come upon the idea of a unitary security device at about the same time. G. Gilmore, Security Interests in Personal Property § 9.2 at 290 n. 2 (1965). The most important early general discussion of Article 9 is Gilmore, The Secured Transactions Article of the Commercial Code, 16 Law and Contemp. Prob. 27 (1951).

drew heavily on a large body of separate pre-Code personal property security law. In pre-Code days, the lawyer had to work with a variety of security devices, each governed by its own body of law. These included the pledge, the chattel mortgage, the conditional sale, the trust receipt, and the factor's lien.

Versions of Article 9 (the 1962 Code, amended in 1972) were adopted in all of the states. The 1962 Official Text of Article 9 was the victim of more state amendments than other Articles. Partly for this reason, a committee constituted by the Code's Permanent Editorial Board completed a new version of the Article in 1971.[2] This new version was embodied in the 1972 Official Text and is sometimes referred to as the 1972 Code. A "Revised Article 9" now known as the "1999 Article 9" was adopted by the National Conference of Commissioners on Uniform State Laws in the summer of 1998. The 1999 revision is much more comprehensive than the 1972 revision. The 1999 revision has been adopted by all of the states.

The 1999 Article 9 contains dozens of changes from the 1972 version—some large, some small. It is not organized in the same way as the former Code. Most of the old sections have been renumbered, and some sections have been dismembered, with their parts spread among new sections. Because of this renumbering, one must be careful about section numbers in reported decisions. The 1999 Article is both more certain and more complex than its predecessors. At the insistence of lawyers who were careful to a fault, it bristles with phrases familiar to tax lawyers: "except as otherwise provided in section x * * *." The cost of resolving the many uncertainties of the 1972 Code is length and complexity. While the new Code makes the sophisticated lawyer's job easier, it makes the student's comprehension more difficult.

The grand innovation of Article 9 in 1962 was the introduction of a "unitary" security device. Formerly there had been entirely separate bodies of law with various security devices: pledges, chattel mortgages, conditional sales, trust receipts, and many more. And the law was different from state to state; what was statutory in one place was in the cases elsewhere or completely missing from the published law. In place of this, Article 9 substituted one device and one set of basic terms: security agreement, secured party, debtor, collateral and security interest. In place of the various bodies of substantive law governing the various pre-Code security devices, the drafters substituted a single body of law in Article 9. Only a few of the pre-Code legal distinctions between different pre-Code devices based solely on the form of the collateral reappear in

2. See Perm. Ed. Bd. UCC Rev. Comm. Art. 9, Final Report (1971)

Article 9,[3] and they are generally attached either to the different types of collateral (e.g., goods, accounts, etc.) recognized in Article 9, or to functionally different types of security interests recognized in such collateral (e.g., possessory or non-possessory,[4] purchase-money or non-purchase-money[5]). Obviously, these distinctions could not be attached to different Article 9 security "devices," for the Article recognizes only one such device.

b. Important Definitions and Concepts in Article 9

Article 9 is filled with important and intricate definitions and concepts. Both this Chapter and the remaining four Chapters will deal in various ways with the concepts we discuss here. Often subtle differences in the law under Article 9 depend upon differences in definitions.

The first concept a student should understand is "attachment" of a security interest. A security interest "attaches" to the collateral of the debtor when it "becomes enforceable against the debtor." Usually that requires that (1) the debtor sign a document called a "security agreement" or, in digital parlance, authenticate a record, (2) the debtor own the collateral in which it is conveying an interest, and (3) the creditor make a loan. Once the security interest has "attached," it is effective between the two parties, the debtor and the creditor. Perfection, which we discuss below, is normally relevant only when the secured creditor falls into conflict with third parties such as the trustee in bankruptcy or other secured creditors.

Students should understand that the security agreement, typically a written or electronic form provided by the creditor, is both a deed (i.e., a conveyance of a property interest) and a contract. When the security interest has "attached" there is a conveyance of a property interest from the debtor to the creditor just as if the parties had used a deed. The security agreement, of course, will contain many promises of the debtor such as a promise to insure the collateral, a promise to make periodic financial reports to the creditor and, in a complex case, a variety of other promises and warranties. Although the security agreement is sometimes an elaborate document negotiated between the debtor and creditor, it can be as small as a single page. There is no magic form.

So attachment is important; it is the building block on which all the rights of the secured creditor are based. Without attachment there can be no perfection, and without attachment and perfection,

3. The best index to these appears in the lengthy official comment to § 9-102 of the 1972 Code.

4. See, e.g., §§ 9-203; 9-207.

5. See, e.g., §§ 9-103; 9-309(1); 9-317(e); 9-324.

the secured creditor loses to most third party competitors. The requirements for attachment are set out in section 9–203.

Perfection is the next step; without exception a secured creditor wishes its interest to be perfected. A perfected secured creditor defeats most other claimants to the collateral in which the creditor holds a security interest if the competitors' claims arose after the secured creditor's perfection. For example, an unperfected secured creditor loses to a lien creditor (historically someone who got a judgment and then had a sheriff seize the debtor's property obtained a "judicial lien" on the property seized) and also to any secured creditor whose interest attached later but who perfected first. The only lien creditor that most of you will meet is the trustee in bankruptcy who, under federal law, is treated as having a judicial lien on all of a bankrupt's assets on the date the bankruptcy petition is filed. This means that every creditor who does not properly perfect will be treated as an unsecured creditor in its debtor's bankruptcy. So perfection is just as important as attachment.

How does one "perfect"? In the large majority of cases, one perfects by filing a document called a "financing statement." A financing statement is a sparse document; it need only identify the debtor, the creditor, and describe the collateral against which the creditor has a claim. By searching the files under the debtor's name, subsequent parties can learn of outstanding security interests. In rare cases a secured creditor will perfect by taking possession of the collateral. When a pawn shop takes possession of a debtor's clarinet, the parties are entering into a perfected secured transaction. In some cases perfection is "automatic," and there are unusual cases in which perfection is attained by a process called "control." For now, we ignore the intricacies of automatic perfection and control. Sections 9–308 through 9–316 set out the rules for perfection.

"Collateral" is the generic term for any tangible or intangible asset belonging to the debtor in which the debtor grants a security interest to its secured creditor. Article 9 contains a set of devilishly intricate definitions of types of collateral. For example, goods are broken down into four categories: inventory (9–102(a)(48)), farm products (9–102(a)(34)), consumer goods (9–102(a)(23)), and equipment (9–102(a)(33)). Intangibles have even more complicated subdivisions: accounts, chattel paper, general intangibles, deposit accounts, documents, money, instruments, investment property, letters of credit, and letter of credit rights.

To see why knowledge of these definitions might be important, consider some examples. Assume the debtor grants security interest in all of its "farm products" to a secured creditor and the creditor