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# HILLMAN ON DOCUMENTING SECURED TRANSACTIONS

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# HILLMAN ON DOCUMENTING SECURED TRANSACTIONS

*Effective Drafting and Litigation*

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*Third Edition*

**Thomas S. Hemmendinger**

(formerly  
*Documenting Secured Transactions,*  
by William C. Hillman)

**Practising Law Institute  
New York City  
#223644**

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Legal Editor: Paul Matsumoto

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**First edition** 1987, originally published as *Documenting Secured Transactions: Problem Avoidance and Effective Drafting*, by William C. Hillman

**Second edition** 2002, published as *Documenting Secured Transactions: Effective Drafting and Litigation*, by William C. Hillman

**Third edition** 1987, published as *Hillman on Documenting Secured Transactions: Effective Drafting and Litigation*, by Thomas S. Hemmendinger

First softbound printing 2017

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LCCN: 2017953682

ISBN: 978-1-4024-2973-6 (compression binder)

ISBN: 978-1-4024-3008-4 (softbound)

*William C. Hillman dedicated the first edition to his sons,  
Hal and Dan:  
“A real book with footnotes.”*

*Thomas S. Hemmendinger dedicates this edition to  
LNKC  
with boatloads of love, admiration, and gratitude.*





## About the Author

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**THOMAS S. HEMMENDINGER** is of counsel to Brennan, Recupero, Cascione, Scungio & McAllister, LLP, of Providence, Rhode Island, and Taunton, Massachusetts. He counsels financial institutions, logistics companies, and other businesses on commercial loan documentation, Uniform Commercial Code matters, commercial transactions, workouts, and commercial and bankruptcy litigation. He regularly writes and teaches on these and other topics for lending institutions and for continuing legal education organizations. He is a member of the Uniform Law Commission (National Conference of Commissioners on Uniform State Laws) and a fellow of the American College of Commercial Finance Lawyers. He also belongs to the Association of Commercial Finance Attorneys, the American Bankruptcy Institute, and the American Bar Association's Business Law Section and Real Property, Trust and Estate Law Section. Mr. Hemmendinger received his A.B. from Brown University and his J.D. from the University of North Carolina School of Law.



# Table of Chapters

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<b>Chapter 1</b>	<b>Pleading and Proving a Prima Facie Case</b>
<b>Chapter 2</b>	<b>The Basics</b>
<b>Chapter 3</b>	<b>Scope</b>
<b>Chapter 4</b>	<b>The Documents</b>
<b>Chapter 5</b>	<b>Required (If Desired) Provisions</b>
<b>Chapter 6</b>	<b>Future Advances</b>
<b>Chapter 7</b>	<b>After-Acquired Collateral</b>
<b>Chapter 8</b>	<b>Identifying and Describing the Debtor</b>
<b>Chapter 9</b>	<b>Subsequent Changes by the Debtor</b>
<b>Chapter 10</b>	<b>Debtor's Address</b>
<b>Chapter 11</b>	<b>Secured Party's Name</b>
<b>Chapter 12</b>	<b>Secured Party's Address</b>
<b>Chapter 13</b>	<b>Collateral Description—In General</b>
<b>Chapter 14</b>	<b>Collateral Description—Security Agreement</b>
<b>Chapter 15</b>	<b>Collateral Description—Financing Statement</b>
<b>Chapter 16</b>	<b>Crops As Collateral</b>
<b>Chapter 17</b>	<b>Authorization; Signatures</b>
<b>Chapter 18</b>	<b>Alternatives to Perfection by Filing</b>
<b>Chapter 19</b>	<b>Priorities</b>
<b>Chapter 20</b>	<b>Amendments; Corrections</b>
<b>Chapter 21</b>	<b>Continuations</b>
<b>Chapter 22</b>	<b>Subordination</b>



# Table of Contents

---

<b>About the Author</b> .....	ix
<b>Table of Chapters</b> .....	xi
<b>Preface to the Third Edition</b> .....	xxi
<b>Preface to the Second Edition</b> .....	xxiii
<b>Preface to the First Edition</b> .....	xxv
<b>Introduction</b> .....	xxvii

## **Chapter 1 Pleading and Proving a Prima Facie Case**

§ 1:1	Introduction .....	1-1
§ 1:2	Agreement .....	1-2
§ 1:2.1	The Instrument .....	1-2
§ 1:2.2	Secured Party .....	1-3
§ 1:2.3	Debtor .....	1-3
§ 1:3	Obligation .....	1-3
§ 1:4	Collateral .....	1-4
§ 1:4.1	Identification .....	1-4
§ 1:4.2	Ownership .....	1-4
§ 1:4.3	Perfection .....	1-5
§ 1:4.4	Priority Among Competing Interests .....	1-5
§ 1:5	Default .....	1-6

## **Chapter 2 The Basics**

§ 2:1	Introduction .....	2-1
§ 2:2	Agreement .....	2-3
§ 2:3	Value .....	2-5
§ 2:4	Rights in the Collateral .....	2-5
§ 2:5	Validity .....	2-8
§ 2:6	Perfection .....	2-9
§ 2:6.1	Under Current Law .....	2-9
§ 2:6.2	Under Prior Law .....	2-13

**Chapter 3     Scope**

§ 3:1	Introduction .....	3-2
§ 3:2	Subrogation Rights .....	3-3
§ 3:3	Bailment for Use or Processing .....	3-4
§ 3:4	Unpaid Seller's Rights .....	3-4
§ 3:5	Deposit Accounts .....	3-4
§ 3:6	Consignments .....	3-6
§ 3:7	Assignments for the Benefit of Creditors .....	3-11
§ 3:8	Leases .....	3-11
§ 3:8.1	Leases Under Prior Law .....	3-11
§ 3:8.2	Leases Under Current Law .....	3-13
§ 3:9	Liquor Licenses .....	3-14
§ 3:10	Sale of Accounts, Chattel Paper, Payment Intangibles, or Promissory Notes .....	3-14
§ 3:11	Specific Exclusions for Secured Transactions .....	3-20
§ 3:11.1	Federal Preemption .....	3-20
[A]	Aircraft .....	3-20
[B]	Ships/Vessels .....	3-21
[C]	Patents .....	3-22
[D]	Trademarks .....	3-25
[E]	Copyrights .....	3-27
[F]	Vehicles Used in Interstate Commerce; Railroad Rolling Stock .....	3-28
[G]	Treasury Securities .....	3-28
[H]	Government Title Retention .....	3-28
[I]	Federal Prohibition of Pledge .....	3-29
[J]	Broadcasting Licenses .....	3-30
§ 3:11.2	Landlord's Lien .....	3-31
§ 3:11.3	Other Statutory Liens .....	3-31
[A]	Mechanics Liens .....	3-31
[B]	Non-Possessory Liens .....	3-31
[C]	Agricultural Liens .....	3-31
§ 3:11.4	Wage Claims .....	3-32
§ 3:11.5	Governmental Transfers .....	3-32
§ 3:11.6	Insurance Policies .....	3-33
§ 3:11.7	Judgments .....	3-35
§ 3:11.8	Setoff .....	3-36
§ 3:11.9	Interests in Real Estate .....	3-38
§ 3:11.10	Transfers of Tort Claims .....	3-44

**Chapter 4     The Documents**

§ 4:1	Introduction .....	4-1
§ 4:2	Security Agreement .....	4-4
§ 4:3	Financing Statement .....	4-12

*Table of Contents*

**Chapter 5 Required (If Desired) Provisions**

§ 5:1 Generally ..... 5-1

**Chapter 6 Future Advances**

§ 6:1 Introduction ..... 6-1  
§ 6:2 Necessity for Specific Language ..... 6-2  
§ 6:3 The Relatedness Rule..... 6-3  
    § 6:3.1 Cases Under Old Article 9 ..... 6-4  
    § 6:3.2 The Relatedness Rule Under Current Law ..... 6-6  
§ 6:4 Other Considerations ..... 6-7

**Chapter 7 After-Acquired Collateral**

§ 7:1 Generally ..... 7-1

**Chapter 8 Identifying and Describing the Debtor**

§ 8:1 The Owner Versus the “Owe-er” ..... 8-1  
§ 8:2 Debtor’s Name ..... 8-4  
    § 8:2.1 Individuals ..... 8-4  
    § 8:2.2 Registered Organizations ..... 8-7  
    § 8:2.3 Non-Registered Organizations ..... 8-9  
    § 8:2.4 Estates and Trusts ..... 8-9  
§ 8:3 Errors and Misnomers ..... 8-10  
    § 8:3.1 Current Law ..... 8-10  
    § 8:3.2 Prior Law ..... 8-14  
        [A] Individual Names ..... 8-14  
        [B] Entity Names Other Than Partnerships ..... 8-16  
        [C] Trade Names; Partnerships ..... 8-18

**Chapter 9 Subsequent Changes by the Debtor**

§ 9:1 Change of Name ..... 9-1  
    § 9:1.1 Current Law ..... 9-1  
    § 9:1.2 Prior Law ..... 9-2  
§ 9:2 Incorporation ..... 9-3  
§ 9:3 Change of Location ..... 9-8

**Chapter 10 Debtor’s Address**

§ 10:1 Current Law ..... 10-1  
§ 10:2 Old Article 9 ..... 10-1

**Chapter 11 Secured Party's Name**

§ 11:1 Current Law ..... 11-1  
 § 11:2 Prior Law ..... 11-3

**Chapter 12 Secured Party's Address**

§ 12:1 Current Law ..... 12-1  
 § 12:2 Prior Law ..... 12-2

**Chapter 13 Collateral Description—In General**

§ 13:1 Introduction ..... 13-1  
 § 13:2 Goods ..... 13-2  
     § 13:2.1 Consumer Goods ..... 13-4  
     § 13:2.2 Farm Products ..... 13-5  
     § 13:2.3 Inventory ..... 13-7  
     § 13:2.4 Equipment ..... 13-9  
 § 13:3 Intangible Forms of Collateral ..... 13-10  
     § 13:3.1 Chattel Paper ..... 13-10  
     § 13:3.2 Documents ..... 13-11  
     § 13:3.3 Instruments ..... 13-11  
     § 13:3.4 Accounts ..... 13-12  
     § 13:3.5 Other "Intangible" Classifications ..... 13-14  
     § 13:3.6 Investment Property ..... 13-16  
     § 13:3.7 General Intangibles ..... 13-17  
 § 13:4 Agricultural Entitlement Programs ..... 13-24  
 § 13:5 Other Agricultural Issues ..... 13-27  
 § 13:6 Fixtures ..... 13-27  
 § 13:7 Post-Agreement Change of Classification ..... 13-29

**Chapter 14 Collateral Description—Security Agreement**

§ 14:1 General Rule ..... 14-1  
 § 14:2 Exceptions to the General Rule ..... 14-3  
 § 14:3 Generic and Other Broad Descriptions ..... 14-4  
 § 14:4 Errors in Collateral Descriptions ..... 14-9

**Chapter 15 Collateral Description—Financing Statement**

§ 15:1 Introduction ..... 15-1  
 § 15:2 Case Law ..... 15-2



*Table of Contents*

**Chapter 16 Crops As Collateral**

§ 16:1 Simplification by Revised Article 9 ..... 16-1  
§ 16:2 Prior Law ..... 16-2

**Chapter 17 Authorization; Signatures**

§ 17:1 Effect of Revised Article 9 ..... 17-1  
§ 17:2 Prior Law ..... 17-3

**Chapter 18 Alternatives to Perfection by Filing**

§ 18:1 Introduction ..... 18-1  
§ 18:2 Possession ..... 18-2  
§ 18:3 Control ..... 18-3  
    § 18:3.1 Deposit Accounts ..... 18-4  
    § 18:3.2 Electronic Documents of Title ..... 18-5  
    § 18:3.3 Electronic Chattel Paper ..... 18-6  
    § 18:3.4 Investment Property ..... 18-7  
    § 18:3.5 Letter-of-Credit Rights ..... 18-9  
§ 18:4 Automatic Perfection ..... 18-10  
§ 18:5 Goods Covered by a Certificate of Title ..... 18-11  
    § 18:5.1 Motor Vehicles As Equipment or Consumer  
            Goods ..... 18-11  
    § 18:5.2 Motor Vehicles as Inventory ..... 18-13  
    § 18:5.3 Vessels ..... 18-13

**Chapter 19 Priorities**

§ 19:1 Introduction ..... 19-2  
§ 19:2 The General Rule ..... 19-2  
    § 19:2.1 Unperfected Security Interests ..... 19-3  
    § 19:2.2 The Superior Rights of Purchase-Money  
            Secured Parties ..... 19-4  
        [A] Perfection of PMSIs ..... 19-4  
    § 19:2.3 Priority As Against Lien Creditors ..... 19-5  
    § 19:2.4 Priority Against Consignments ..... 19-6  
    § 19:2.5 Priority Against Buyers in Ordinary Course ..... 19-6  
    § 19:2.6 Priority Against Non-BIOCOB Buyers ..... 19-7  
    § 19:2.7 Priority Against Possessory Liens ..... 19-8  
§ 19:3 Special Classes of Collateral ..... 19-8  
    § 19:3.1 Documents ..... 19-8  
    § 19:3.2 Instruments ..... 19-8

§ 19:3.3	Chattel Paper .....	19-9
§ 19:3.4	Investment Property .....	19-10
§ 19:3.5	Deposit Accounts.....	19-10
§ 19:3.6	Letter-of-Credit Rights.....	19-11
§ 19:4	Proceeds.....	19-12
§ 19:4.1	The Basics .....	19-12
§ 19:4.2	General Priority Rules.....	19-13
[A]	Proceeds of Inventory.....	19-13
[B]	Money .....	19-14
[C]	Where First-in-Time Rule Not Applicable .....	19-14
[D]	Returned or Repossessed Goods.....	19-14
§ 19:5	Statutory and Agricultural Liens .....	19-15
§ 19:6	Unpaid Sellers .....	19-15
§ 19:7	Fixtures.....	19-16
§ 19:8	Manufactured Homes .....	19-16
§ 19:9	Crops.....	19-17
§ 19:10	Accessions .....	19-17
§ 19:11	Commingled Goods.....	19-17
§ 19:12	The Optional Provisions for Production-Money Security Interests .....	19-17
§ 19:13	Conflicts with Federal Tax Liens .....	19-18

**Chapter 20 Amendments; Corrections**

§ 20:1	Amendments.....	20-1
§ 20:2	Correcting the Record.....	20-2

**Chapter 21 Continuations**

§ 21:1	General Rules .....	21-1
§ 21:2	Effect of Insolvency Proceedings and Other Litigation ...	21-5
§ 21:3	Exceptions to the Five-Year Rule .....	21-7
§ 21:4	Duration of Perfection Under Other Law.....	21-8

**Chapter 22 Subordination**

§ 22:1	Introduction .....	22-1
§ 22:2	Generally.....	22-1
§ 22:3	Multiple Secured Parties .....	22-2

*Table of Contents*

<b>Appendix A</b>	<b>Sources of Revised Article 9 Sections from Old Article 9 and Other Code Sections</b> .....	App. A-1
<b>Appendix B</b>	<b>Changes from Old Article 9 to Revised Article 9</b> .....	App. B-1
	<b>Table of Authorities</b> .....	T-1
	<b>Index</b> .....	I-1



## Preface to the Third Edition

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Bill Hillman wrote the first two editions of this book at critical stages in the life of U.C.C. Article 9. The first edition came along when the original statute was a well-travelled adult. It showed that the courts still had much to teach about how to (and how not to) draft secured transactions documentation. Then, just as Revised Article 9 went into force in all states, Bill rewrote the book to guide both transactional lawyers and litigators through the transition.

Now that Bill has retired from the bench, and a generation of highly skilled and experienced lawyers has grown up using what was once this “new” law, my task is to present Revised Article 9 as it has come into its own.

This edition has been written from the perspective that Revised Article 9 is a mature law in its own right. But it also recognizes that pre-revision case law is still useful for understanding and interpreting much of the current statute.

The goal of this book remains to share best practices within the broad legal framework. Case law continues to expose costly and needless drafting errors. The courts wrestle with applying a complex law to ever more intricate deals that have gone sideways. Once in a while, a ruling surprises the drafters of the Code, but whatever the result, lawyers can always learn how to do their jobs better.

The earlier editions of this book were engaging conversations between the author and the reader. I hope this new edition continues that conversation and that you find it useful.

THOMAS S. HEMMENDINGER  
*Providence, Rhode Island*  
*June 4, 2017*



## Preface to the Second Edition

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The first edition of this book began with a strong emphasis on drafting. Readers appeared to be primarily “doc[ument] persons,” as was the author, primarily concerned in creating coherent and integrated loan documentation for secured transactions large and small. Over the years the emphasis of the text changed, as the primary critics of loan documents changed from senior partners and opposing counsel to judges, primarily bankruptcy judges, who often sought guidance from the text. My viewpoint also changed, as I moved from practice onto the bench.

The mass of reported cases became increasingly sophisticated, as judges moved beyond technical drafting errors, actual or perceived, to questions of conflicts between documents within a transaction and onward to what I call the “Code Wars,” perceived conflicts between the aims of the Uniform Commercial Code to protect the rights of secured creditors and the goal of bankruptcy to insure equal distribution of assets among creditors. The interaction is sometimes blatant and sometimes rather subtle, but it cannot be ignored, especially with one express goal of the 2001 revision being to protect secured creditors from the trustee in bankruptcy.

The next few years will be interesting for those in the field as drafters and litigators. Pre-Revision precedents may be dragged bodily into the new era, whether they fit or not. Cases arising under the older statute will continue to be dominant in the courts for at least the next several years.

This edition will straddle the line, providing both coverage of the twentieth century Code and the Revision, since litigation will involve both and scriveners should be aware of the older errors, lest they repeat them.

WILLIAM C. HILLMAN  
*Boston, Massachusetts*  
*March 18, 2002*





## Preface to the First Edition

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More than twenty years ago I wrote a short law journal article analyzing the handful of Article 9 documentation cases then reported. My belief was that the litigation had resulted from unfamiliarity with the then new Uniform Commercial Code, and that the cases would soon fade away. This is unquestionably the worst prognostication of my life.

I look behind my desk at more than forty volumes of U.C.C. cases, indexed in a twenty-volume digest, and realize that the flow of cases is ever increasing.

In an attempt to keep up to date, I travel with stacks of advance sheets, briefs, and newsletters. This text has been written largely while in motion, or while resting after travel. The manuscript is well traveled, having been coffee-soaked over the Atlantic, stolen in Florida, and nibbled by kittens in Providence.

When Bill Cubberley of PLI suggested that my collection of notes be published, I agreed, on condition that a loose-leaf text be produced. The area is rapidly changing and developing and I hate pocket parts.

Readers will find the footnotes to contain more than just representative cases. I feel that counsel should be aware of decisions of the court where he is appearing, and so I have opted for comprehensiveness.

There are divergent views about the precedent value of lower court decisions—particularly bankruptcy court decisions. The purists seem to feel that only an opinion forged in the fire of the appellate process should be cited. I disagree. The lower courts are where the action is, and much useful information and reasoning is contained in trial court decisions.\*

There seems to be a hidden agenda behind many of these decisions, a return to what Grant Gilmore called “the worst formal requisites holdings under the nineteenth century chattel mortgage acts.” This may be caused by a judicial intuition that secured parties under the U.C.C. have too great ease in overreaching, which can only be controlled by an application of strictissimi juris to loan

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\* This was written long before a lower court black robe was even a gleam in the author's eye.—W.C.H.

HILLMAN ON DOCUMENTING SECURED TRANSACTIONS

documents. On the other hand, the cases may simply result from conservative interpretations in aid of preserving the integrity of the statutory scheme. The reader can draw his or her own conclusions.

WILLIAM C. HILLMAN  
*Bergen, Norway*  
*April 27, 1987*

# Introduction

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In the high and far-off times, the original author of this book noted here that the surface simplicity with which one can create security interests under Article 9 of the Uniform Commercial Code (U.C.C.) often traps the unwary. He said that the goal of Article 9—“to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty”<sup>1</sup>—has not been realized. In the words of the Second Circuit, “despite the simplification and clarification of the law, the answers to relatively straightforward questions remain clouded by uncertainty.”<sup>2</sup> It has been said that “at times the Uniform Commercial Code may seem to the reader as unintelligible as the Latin phrases which preceded it.”<sup>3</sup> The current version of Article 9, twice as long and thrice as complex as the original, adds to the bewildering morass.

Further complicating a full understanding of Article 9 is its venerable but complicated history. It has undergone a number of iterations since it first took the stage in the 1950s. To understand the volumes of case law on the subject, one has to be familiar with five of those versions.<sup>4</sup> The first broadly adopted version is commonly referred to as the 1962 Code. In 1972, Article 9 was amended to

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1. Prior U.C.C. § 9-101 official cmt.
  2. *Red Carpet Homes v. Gerling* (*In re Knapp*), 575 F.2d 341, 342 (2d Cir. 1978).
  3. *Inmi-Etti v. Aluisi*, 492 A.2d 917 (Md. Ct. Spec. App. 1985).
  4. “[Revised Article 9] supersedes former Uniform Commercial Code (UCC) Article 9. As did its predecessor, it provides a comprehensive scheme for the regulation of security interests in personal property and fixtures. For the most part this Article follows the general approach and retains much of the terminology of former Article 9. In addition to describing many aspects of the operation and interpretation of this Article, these Comments explain the material changes that this Article makes to former Article 9. Former Article 9 superseded the wide variety of pre-UCC security devices. Unlike the Comments to former Article 9, however, *these Comments dwell very little on the pre-UCC state of the law. For that reason, the Comments to former Article 9 will remain of substantial historical value and interest. They also will remain useful in understanding the background and general conceptual approach of this Article.*” U.C.C. § 9-101, cmt. (emphasis added).

address a number of issues that had arisen in practice.<sup>5</sup> In 1994, the new version of Article 8 on investment securities required a number of changes to Article 9.

In 1999, the sponsors of the U.C.C. thoroughly overhauled Article 9. This version has been adopted in all states, generally effective in 2001. A set of narrowly targeted but important amendments came out in 2010. All states have adopted them. In this book, we call the 1999 revision and the 2010 amendments “Revised Article 9,” “current Article 9,” or simply “Article 9,” and the prior versions “former Article 9,” “old Article 9,” or “prior Article 9.”

We concentrate on Revised Article 9, but provide old Article 9 background where it is helpful or necessary to understand the current statute. Case law under old Article 9 remains valid under Revised Article 9 on many topics, and this book points out where this is so.

In the course of these revisions, many provisions of Article 9 have been moved to different section numbers. To help the reader keep track of what went where and what came from where, this book includes an appendix comparing the section numbers in old Article 9 and Revised Article 9.

So it is doubtful that today the Fifth Circuit could, with as much assurance as it did in 1978, say that if one seeks, one will find.

At first glance, the UCC may appear to be a compendium of confusing and seemingly contradictory rules enacted to govern myriad business transactions. Upon closer scrutiny, the UCC is found to be a finely tuned statutory mechanism containing interlocking provisions designed to provide certainty in commercial transactions. Once the pieces of this puzzle are correctly aligned, the UCC furnishes an answer to almost any question involving the rights and liabilities of the parties to a covered transaction.<sup>6</sup>

Chapter 1 provides an outline of the proof of a *prima facie* case seeking to enforce an Article 9 security interest. It is keyed to the subsequent materials in the book where particular issues are discussed in depth. Readers with less than a rudimentary knowledge of secured transactions should read chapter 2 (The Basics) and chapter 3 (Scope) before proceeding further.

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5. “General Comment on the Approach of the Review Committee for Article 9” (included in the 1972 Official Text) by the Review Committee of the Permanent Editorial Board for the Uniform Commercial Code.

6. *Union Bank v. First Nat’l Bank*, 621 F.2d 790 (5th Cir. 1978).