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COMMITTEE REPORT
SENATE

FURTHER: None

2/19/81

Date:

~~2/19/81~~ April 6, 1981

Mr. President:

The Committee on JUDICIARY has had SB 77
commercial transactions

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass *order 100* do not pass
- do pass with attached amendments(s)
- replace with CS for _____ same title
 new title
- and recommends _____
- AND attaches a "Letter of Intent" New Fiscal Note
- reports it back without recommendation
- referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

Sen. Kenneth C. Rice
Sen. [unclear]

CHAIRMAN

CODE REVISION COMMISSION



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WM. GRANT CALLOW

ALASKA STATE LEGISLATURE
POUCH V, STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

EXECUTIVE SECRETARY
BILLY G. BERRIER

January 19, 1981

The Honorable Bob Mulcahy
Chairman, Labor and Commerce Committee
Alaska State Senate
Pouch V, State Capitol
Juneau, Alaska 99811

✓ The Honorable Patrick M. Rodey
Chairman, Judiciary Committee
Alaska State Senate
Pouch V, State Capitol
Juneau, Alaska 99811

Re: SB 77--Articles 8 and 9 of the
Uniform Commercial Code

Dear Chairmen Mulcahy and Rodey:

The Alaska Code Revision Commission has submitted SB 77 regarding Articles 8 and 9 of the Uniform Commercial Code. The commission is extremely interested in securing passage of the bill during this legislative session, if possible. Further, a member of the commission will be available to present testimony on behalf of the bill upon notification.

In an effort to be of assistance, I am enclosing a copy of the commission's transmittal memorandum which briefly sets out the need for this revision along with a copy of the memoranda prepared by the Division of Legal Services outlining the differences between existing law and proposed changes.

Commission secretary, Catherine Walsh, can be contacted at extension 4878 in order to coordinate testimony in the event hearings are shortly forthcoming.

We appreciate your attention to this matter and any assistance you can provide in securing SB 77's passage.

Very truly yours,

John W. Abbott, Chairman
Alaska Code Revision Commission

JWA:chw

Enclosures

WOLFE
CRANE
CUMMINGS
IN OREGON

LAW OFFICES OF
KEANE, HARPER, PEARLMAN AND COPELAND
420 L STREET
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ANCHORAGE, ALASKA 99501

REGISTRY OFFICE
3500 FIFTH AVE. TOWER
PORTLAND, OREGON 97201
TELEPHONE (503) 224-4100

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March 4, 1981

J. DAVID BENNETT
DAVID W. HARPER
ROBERT E. O'NEALS
GORDON W. KEANE
THOMAS M. LANGE
DONALD W. PEARLMAN
RICHARD L. SADLER

RANDALL E. DUNN
DAVID N. GOULDER

RECEIVED

MAR 09 1981

Hon. Robert Mulcahy
Chairman, Senate Labor and
Commerce Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: Senate Bill 77

Dear Senator Mulcahy:

The Legislature is to be commended for considering amendments to the state Uniform Commercial Code which will make the UCC more understandable and effective. I have reviewed Senate Bill 77 and find that, on the whole, it incorporates many worthwhile changes to the UCC. I have only one minor suggestion. Section 23 of the bill, which amends AS 45.09.105, could state expressly that mortgages are limited to real property security interests. This could be easily done by modifying the definition of "mortgage", contained in subsection (a)(12) at page 13, line 14 of SB 77, to the following: "'Mortgage' means a consensual security interest in real estate created by a real estate mortgage, a trust deed on real estate, or the like;". This supplemental definition clearly excludes various consensual interests which are not primarily security devices, such as leasehold rights, from the definition of "mortgage".

Sincerely,

KEANE, HARPER, PEARLMAN
and COPELAND

Robert Hume

Robert H. Hume, Jr.

RHH:kh

*Mike - Copy Sen. Rod. y with
this letter
THM
RBL*

ALASKA CODE REVISION COMMISSION



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ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

EXECUTIVE SECRETARY
BILLY G. BERRIER

MEMORANDUM

TO: The Honorable Patrick M. Rodey
Chairman, Senate Judiciary Committee

FROM: John W. Abbott, Chairman
Alaska Code Revision Commission *John W. Abbott*

DATE: March 23, 1981

RE: Commentary to SB 77--Uniform Amendments to the
Uniform Commercial Code, Articles 8 & 9

The attached two memoranda were prepared for the Alaska Code Revision Commission in July and August of 1978 by Kenneth E. Vassar when he was legislative counsel for the Legislative Affairs Agency. The references in his original memoranda are now revised to conform to the current section numbering in Alaska Statutes and SB 77.

JWA:chw

Attachments


STATE OF ALASKA THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

July 27, 1978

SUBJECT: Uniform Commercial Code--Article 8
TO: Alaska Code Revision Commission
FROM: Kenneth E. Vassar, Legislative Counsel 

This memorandum will explain points of difference between Article 8 of the Uniform Commercial Code (UCC) and AS 45.05.612 - 45.05.688.

UCC Article 8 and AS 45.05.612 - 45.05.688 relate to investment securities. Each body of law contains parallel sections; therefore, to as great an extent as possible, the following discussion will proceed in numerical sequence through those sections of Alaska law which have deviated from the uniform act.

AS 45.05.614 and its counterpart, UCC sec. 8-102, provide definitions for terms used in their respective articles; however, section 614 includes a definition which is not in the UCC section and modifies a definition which is in the UCC section.

The definition in sec. 614 which is not in 8-102 is for the term "proper form." Prior to 1962, the UCC included such a definition, but in that year 8-102 was amended to delete the definition. At the same time UCC sec. 8-208 was amended to delete the term for which the definition in 8-102 had been supplied. Since it was the amendment to 8-208 which formed the basis for the decision to delete the definition of "proper form" in 8-102, this discussion will continue now out of numerical sequence to examine the difference between UCC sec. 8-208 and the corresponding Alaska law, AS 45.05.638.

AS 45.05.638 and UCC sec. 8-208 enumerate the warranties made to a bona fide purchaser (that is, a purchaser for value without notice of the particular defect in the security) by a person who places his signature upon a security as authenticating trustee, registrar, transfer agent, or the like. AS 45.05.638 includes a warranty that "the security is genuine and in proper form." Hence, the need for a definition of "proper form." Since 1962, the UCC has replaced the warranty quoted above with the following:

(a) the security is genuine; and ...

(c) he (the person signing the security) has reasonable grounds to believe that the security is in the form and within the amount the issuer is authorized to issue.

The Permanent Editorial Board of the National Conference of Commissioners on Uniform State Laws noted the following reason for the change:

As enacted in New York [prior to amendment by L.1963, c.1003] Section 8-208 reduced the warranty as to form to a warranty that the security is in the form which the authenticating trustee, registrar, or transfer agent was authorized to sign or countersign. Under the case law, the responsibility of such party appears to go somewhat further. The Editorial Board believes that its recommended amendment correctly reflects the responsibility indicated by the case law while also reducing the warranty as to form appearing in the 1958 Text [Alaska's version]. In actual practice authenticating trustees, registrars and transfer agents usually rely upon counsel as to matters of form. Among other things, the amendment takes into account such practice.

In terms of burden placed upon an authenticating trustee, registrar, transfer agent, or the like, the Alaska version of this section places a greater burden by imposing an absolute warranty that the form is proper, whereas the UCC version requires only reasonable grounds to believe that the security is in the form the issuer is authorized to issue. Three states have melded the two versions together to achieve a third version which is more burdensome still. In Indiana, Missouri and Montana the effect of the signature of an authenticating trustee, registrar, transfer agent or the like is to warrant that the security is in proper form and that there are reasonable grounds to believe that it is in the form the issuer is authorized to issue.

Returning now to AS 45.05.614 and UC^T sec. 8-102, it was noted earlier that section 614 modifies a definition in section 8-102. The definition in question is for "clearing corporation." Under section 8-102(3), a clearing corporation is defined as a corporation

(a) at least ninety per cent of the capital stock of which is held by or for one or more persons (other than individuals) each of whom

(i) is subject to supervision or regulation pursuant to the provisions of federal or state banking laws or state insurance laws, or

(ii) is a broker or dealer or investment company registered under the Securities Exchange Act of 1934 or the Investment Company Act of 1940, or

(iii) is a national securities exchange or association registered under a statute of the United States such as the Securities Exchange Act of 1934, and none of whom, other than a national securities exchange or association, holds in excess of twenty per cent of the capital stock of such corporation; and

(b) any remaining capital stock of which is held by individuals who have purchased such capital stock at or prior to the time of their taking office as directors of such corporation and who have purchased only so much of such capital stock as may be necessary to permit them to qualify as such directors. (emphasis added)

The emphasized portion of the definition is deleted in AS 45.05.614. The effect of this deletion is to increase the number of corporations which may fall into the class of clearing corporations.

UCC sec. 8-320, which corresponds to AS 45.05.677, establishes the role a clearing corporation plays in the transfer or pledge of a security or of any interest in a security. A transfer or pledge under these sections "has the effect of a delivery of a security in bearer form or duly endorsed in blank." The official UCC comment to this section states:

Consistent with the underlying purposes and policies of this Act "to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties" -- subsection (2)(b) of Section 1-102 -- this Section expressly authorizes a newly developing and commercially useful method of transferring or pledging securities on the organized securities markets, particularly among brokers and banks but not necessarily so limited.

A 1973 amendment to 8-102 changed the definition of "clearing corporation." Previously, it had defined such a corporation as

a corporation all of the capital stock of which is held by or for a national securities exchange or association registered under a statute of the United States such as the Securities Exchange Act of 1934.

The UCC official comment to the current definition, which replaced the definition above, provides:

This section also defines a "clearing corporation" in a manner which permits not only national securities exchanges, but also banks, insurance companies, and similar organizations to participate in the control and management of such a corporation through ownership of shares, in order to facilitate the making of transfers of securities and lessen the delays and errors which have caused difficulty in the past during periods of high activity in the securities markets.

Alaska's version of the definition might include an official comment paraphrased from that given above as follows:

This section also defines a "clearing corporation" in a manner which permits not only national securities exchanges, banks, insurance companies and similar organizations, but also individuals to participate in the control and management of such a corporation through ownership of shares.

The next point of departure between the Alaska statutes and the UCC is the absence in the Alaska statutes of any section which corresponds to UCC sec. 8-107, which provides:

(1) Unless otherwise agreed and subject to any applicable law or regulation respecting short sales, a person obligated to deliver securities may deliver any security of the specified issue in bearer form or registered in the name of the transferee or indorsed to him or in blank.

(2) When the buyer fails to pay the price as it comes due under a contract of sale the seller may recover the price

(a) of securities accepted by the buyer; and

(b) of other securities if efforts at their resale would be unduly burdensome or if there is no readily available market for their resale.

This sections reflects the treatment of securities of a particular issue as "fungibles." that is, goods of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Thus, a person obligated to deliver securities need not deliver any specific instrument, but may select any security of the proper issue, in bearer form or appropriately registered or indorsed. While the Alaska statutes do not contain the specific section quoted above, the treatment of securities as fungible goods may be supported with similar effect by reference to other Alaska statutes. AS 45.05.020(17) defines "fungible" as follows:

(17) "fungible" with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit.

And AS 45.05.028(c) allows for usage of trade by providing:

(c) a course of dealing between parties and a usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

Since usage of trade in investment securities most likely would include the treatment of securities as fungibles, it would probably be permissible for a person in Alaska obligated to deliver securities to deliver any security of the specified issue. This conclusion is reinforced by the inclusion of the term "or securities" in the definition of "fungible."

However, the second subsection of 8-107, while basically restating a common law rule of recovery of damages, is not susceptible to the same type of reasoning which allows the first subsection to be read into Alaska law, and there are two reasons why this is so. First, there is no Alaska statute of general applicability which contains substantially similar terms, and, second, the verbatim adoption by the state of almost every other section of this article of the UCC, combined with the total exclusion in the Alaska statutes of this section, leads to a strong inference that the terms of this section were not intended to apply in Alaska.

UCC sec. 8-107 was intended to follow the common law rule enunciated, but not followed, in Agar v. Orda, 190 N.E. 479 (1934). In Agar, the court ruled that the adoption in New York of the Sales Act preempted the common law action for the price. The Sales Act provided a recovery of damages remedy. Alaska's Sales Act, AS 45.05.036 - 45.05.242, provides for an action to recover the contract price of goods sold but refused by the buyer; however, under the express terms of AS 45.05.038, that section is applicable only to the sections of the Sales Act.

It might be argued that AS 01.10.010 should allow the common law rule to apply. That section provides:

So much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States or with any law passed by the legislature of the State of Alaska is the rule of decision in this state.

Nevertheless, the section must be considered in light of the recent federal district court decision of Aleut Corp. v. Arctic Slope Regional Corp., 424 F. Supp. 397, (D. Alaska 1976) in which the court considered the applicability in Alaska of sequestration, a provisional contract remedy available at common law. The court noted:

Given the harsh nature of the remedy of sequestration and the fact that the Alaska legislature has spelled out in some detail the procedure for obtaining other similar remedies while it has not enacted a sequestration statute, the implication is clear that Alaska has decided that sequestration of the nature sought in an action to require a regional corporation organized under the Alaska Native Claims Settlement Act to place certain funds in secure and liquid investments pending litigation is not available and has preempted the common law with a complex statutory scheme. (at p. 400

In Hockley v. Hargett, 510 P.2d 1123 (1973), the Washington court, faced with an identical issue, reached the opposition conclusion, that sequestration was available despite legislative silence on the question. Legislative silence in Alaska, at least until our Supreme Court has an opportunity to address the issue, leaves the question of the availability of an action for the price unanswered.

AS 45.05.650(c) and (e) provide:

(c) If a security is delivered by an intermediary known to be entrusted with delivery of the security on behalf of another or with collection of a draft or other claim against the delivery, the intermediary by the delivery warrants only his own good faith and authority even though he has purchased or made advances against the claim to be collected against the delivery. A broker is not an intermediary within the meaning of this subsection.

(e) A broker gives to his customers and to the issuer and a purchaser the warranties provided in this section and has the rights and privileges of a purchaser under this section. The warranties of and in favor of the broker acting as an agent are in addition of applicable warranties given by and in favor of his customer.

The corresponding UCC section, 8-306, eliminates the last sentence of (c) above. The following paragraphs from the official comment explain the distinction:

(3) Subsections (3) and (4) are designed to eliminate all substantive warranties in the case of deliveries by intermediaries and pledgees. Such parties deal primarily with the draft or other claim, and, having no access to direct knowledge about the security, they cannot be held to warrant its genuineness or validity.

Further, following Appenzellar v. McCall, 150 Misc. 897, 270 N.Y.S. 748 (1934), although the so-called "stock-broker" normally functions as a broker (see definition of "broker", Section 8-303) (the identical definition is provided in AS 45.05.644) and on a few occasions another institution such as a bank may function as a broker, e.g. for a standard broker's commission or similar compensation, nevertheless both the so-called "stock-broker" and the bank can qualify for the protection given by subsections (3) and (4) to an "intermediary" where in the particular transaction it does not function as a broker, e.g. delivering securities on a customer's instructions, either without charge or for a nominal handling charge.

Under Alaska's version of the section, the broker would not be qualified for the protection of (c) even if he were acting merely as an intermediary.

AS 45.05.654 and UCC sec. 8-308 list the people who may endorse a security for transfer. UCC sec. 8-308(3)(b) includes as an "appropriate person"

where the person so specified [by the security or by special indorsement to be entitled to the security] is described as a fiduciary but is no longer serving in a described capacity, -- either that person or his successor.

AS 45.05.654(c)(2) contains the same language except that the phrase "either that person or" is deleted. The reason that the phrase is included in the UCC version was explained by the editorial board as follows:

The amendment is recommended as clarification to avoid any risk that the general requirement of indorsement by "an appropriate person" in any way militates against the clear intention of subsection (3)(a) of Section 8-403 [also found at AS 45.05.682(c)(1)] to permit the issuer to rely on the continued power to act of a fiduciary named in a security until receipt of written notice to the contrary.

KEV:hjd

CODE REVISION COMMISSION



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ALASKA STATE LEGISLATURE
FOUCH Y. STATE CAPITOL
JUNEAU, ALASKA 99811
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EXECUTIVE SECRETARY
BILLY G. BERRIER

MEMORANDUM

TO: Chairman, Alaska Legislative Council

FROM: John W. Abbott, Chairman *John W. Abbott*
Alaska Code Revision Commission

DATE: January 9, 1981

RE: Articles 8 and 9 of the Uniform
Commercial Code

Pursuant to the authority in AS 24.20.075(c), on December 5, 1978, the Alaska Code Revision Commission transmitted to the Alaska Legislative Council a draft bill that became SB 55 in the Eleventh Legislature. It was not enacted. Had it been enacted, the bill would have amended Articles 8 and 9 of Alaska's Uniform Commercial Code (UCC) to include uniform amendments adopted by the National Conference of Commissions on Uniform State Laws.

The bill is being resubmitted with the request that it be introduced for consideration by the Twelfth Legislature.

One reason for forming a code revision commission was for study of and recommendations on uniform state laws. It was recognized that future problems can be avoided if uniform legislation is carefully considered by a body that has time and expertise to devote to it and can give the legislature informed recommendations about it.

This bill deals with investment securities (Article 8) and secured transactions (Article 9), areas of commercial law where uniformity among the states is particularly important. The merits of the amendments and the goal of continued uniformity among the states warrants reintroduction of the bill.

An analysis of these uniform amendments prepared by Kenneth E. Vassar of the staff of the Legislative Affairs Agency is also enclosed. It remains equally as pertinent as it was

MEMORANDUM REGARDING UNIFORM AMENDMENTS TO
THE UNIFORM COMMERCIAL CODE (UCC)--ARTICLE 8
ON INVESTMENT SECURITIES (Sections 1-14 and 72 in SB 77)

MARCH 1981

This memorandum will explain points of difference between Article 8 of the Uniform Commercial Code (UCC) and AS 45.08.101 - 45.08.406.

UCC Article 8 and AS 45.08.101 - 45.08.406 relate to investment securities. Each body of law contains parallel sections; therefore, to as great an extent as possible, the following discussion will proceed in numerical sequence through those sections of Alaska law which have deviated from the uniform act.

AS 45.08.102 and its counterpart, UCC sec. 8-102, provide definitions for terms used in their respective articles; however, section 102 includes a definition which is not in the UCC section and modifies a definition which is in the UCC section.

The definition in sec. 102 which is not in 8-102 is for the term "proper form." Prior to 1962, the UCC included such a definition, but in that year 8-102 was amended to delete the definition. At the same time UCC sec. 8-208 was amended to delete the term for which the definition in 8-102 had been supplied. Since it was the amendment to 8-208 which formed the basis for the decision to delete the definition of "proper form" in 8-102, this discussion will continue now out of numerical sequence to examine the difference between UCC sec. 8-208 and the corresponding Alaska law, AS 45.08.208.

AS 45.08.208 and UCC sec. 8-208 enumerate the warranties made to a bona fide purchaser (that is, a purchaser for value without notice of the particular defect in the security) by a person who places his signature upon a security as authenticating trustee, registrar, transfer agent, or the like. AS 45.08.208 includes a warranty that "the security is genuine and in proper form." Hence, the need for a definition of "proper form." Since 1962, the UCC has replaced the warranty quoted above with the following:

(a) the security is genuine; and . . .

(c) he (the person signing the security) has reasonable grounds to believe that the security is in the form and within the amount the issuer is authorized to issue.

The Permanent Editorial Board of the National Conference of Commissioners on Uniform State Laws noted the following reason for the change:

As enacted in New York [prior to amendment by L.1963, c.1003] Section 8-208 reduced the warranty as to form to a warranty that the security is in the form which the authenticating trustee, registrar, or transfer agent was authorized to sign or countersign. Under the case law, the responsibility of such party appears to go somewhat further. The Editorial Board believes that its recommended amendment correctly reflects the responsibility indicated by the case law while also reducing the warranty as to form appearing in the 1958 Text [Alaska's version]. In actual practice authenticating trustees, registrars and transfer agents usually rely upon counsel as to matters of form. Among other things, the amendment takes into account such practice.

In terms of burden placed upon an authenticating trustee, registrar, transfer agent, or the like, the Alaska version of this section places a greater burden by imposing an absolute warranty that the form is proper, whereas the UCC version requires only reasonable grounds to believe that the security is in the form the issuer is authorized to issue. Three states have melded the two versions together to achieve a third version which is more burdensome still. In Indiana, Missouri and Montana the effect of the signature of an authenticating trustee, registrar, transfer agent or the like is to warrant that the security is in proper form and that there are reasonable grounds to believe that it is in the form the issuer is authorized to issue.

Returning now to AS 45.08.102 and UCC sec. 8-102, it was noted earlier that section 102 modifies a definition in section 8-102. The definition in question is for "clearing corporation." Under section 8-102(3), a clearing corporation is defined as a corporation

(a) at least ninety per cent of the capital stock of which is held by or for one or more persons (other than individuals) each of whom

(i) is subject to supervision or regulation pursuant to the provisions of federal or state banking laws or state insurance laws, or

(ii) is a broker or dealer or investment company registered under the Securities Exchange Act of 1934 or the Investment Company Act of 1940, or

(iii) is a national securities exchange or association registered under a statute of the United States such as the Securities Exchange Act of 1934, and none of whom, other than a national securities exchange or association, holds in excess of twenty per cent of the capital stock of such corporation; and

(b) any remaining capital stock of which is held by individuals who have purchased such capital stock at or prior to the time of their taking office as directors of such corporation and who have purchased only so much of such capital stock as may be necessary to permit them to qualify as such directors. (emphasis added)

The emphasized portion of the definition is deleted in AS 45.-08.102. The effect of this deletion is to increase the number of corporations which may fall into the class of clearing corporations.

UCC sec. 8-320, which corresponds to AS 45.08.320, establishes the role a clearing corporation plays in the transfer or pledge of a security or of any interest in a security. A transfer or pledge under these sections "has the effect of a delivery of a security in bearer form or duly endorsed in blank." The official UCC comment to this section states:

Consistent with the underlying purposes and policies of this Act 'to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties' -- subsection (2)(b) of Section 1-102 -- this Section expressly authorizes a newly developing and commercially useful method of transferring or pledging securities on the organized securities markets, particularly among brokers and banks but not necessarily so limited.

A 1973 amendment to 8-102 changed the definition of "clearing corporation." Previously, it had defined such corporation as

a corporation all of the capital stock of which is held by or for a national securities exchange or association registered under a statute of the United States such as the Securities Exchange Act of 1934.

The UCC official comment to the current definition, which replaced the definition above, provides:

This section also defines a 'clearing corporation' in a manner which permits not only national securities exchanges, but also banks, insurance companies, and similar organizations to participate in the control and management of such a corporation through ownership of shares, in order to facilitate the making of transfers of securities and lessen the delays and errors which have caused difficulty in the past during periods of high activity in the securities markets.

Alaska's version of the definition might include an official comment paraphrased from that given above as follows:

This section also defines a 'clearing corporation' in a manner which permits not only national securities exchanges, banks, insurance companies and similar organizations, but also individuals to participate in the control and management of such a corporation through ownership of shares.

The next point of departure between the Alaska statutes and the UCC is the absence in the Alaska statutes of any section which corresponds to UCC sec. 8-107, which provides:

(1) Unless otherwise agreed and subject to any applicable law or regulation respecting short sales, a person obligated to deliver securities may deliver any security of the specified issue in bearer form or registered in the name of the transferee or indorsed to him or in blank.

(2) When the buyer fails to pay the price as it comes due under a contract of sale the seller may recover the price

(a) of securities accepted by the buyer; and

(b) of other securities if efforts at their resale would be unduly burdensome or if there is no readily available market for their resale.

This section reflects the treatment of securities of a particular issue as "fungibles," that is, goods of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Thus, a person obligated to deliver securities need not deliver any specific instrument, but may select any

security of the proper issue, in bearer form or appropriately registered or indorsed. While the Alaska statutes do not contain the specific section quoted above, the treatment of securities as fungible goods may be supported with similar effect by reference to other Alaska statutes. AS 45.01.201(17) defines "fungible" as follows:

(17) "fungible" with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit.

And AS 45.01.205(c) allows for usage of trade by providing:

(c) a course of dealing between parties and a usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

Since usage of trade in investment securities most likely would include the treatment of securities as fungibles, it would probably be permissible for a person in Alaska obligated to deliver securities to deliver any security of the specified issue. This conclusion is reinforced by the inclusion of the term "or securities" in the definition of "fungible."

However, the second subsection of 8-107, while basically restating a common law rule of recovery of damages, is not susceptible to the same type of reasoning which allows the first subsection to be read into Alaska law, and there are two reasons why this is so. First, there is no Alaska statute of general applicability which contains substantially similar terms, and, second, the verbatim adoption by the state of almost every other section of this article of the UCC, combined with the total exclusion in the Alaska statutes of this section, leads to a strong inference that the terms of this section were not intended to apply in Alaska.

UCC sec. 8-107 was intended to follow the common law rule enunciated, but not followed, in Agar v. Orda, 190 N.E. 479 (1934). In Agar, the court ruled that the adoption in New York of the Sales Act preempted the common law action for the price. The Sales Act provided a recovery of damages remedy. Alaska's Sales Act, AS 45.02.101 - 45.02.725, provides for an action to recover the contract price of goods sold but refused by the buyer; however, under the express terms of AS 45.02.102, that section is applicable only to the sections of the Sales Act.

It might be argued that AS 09.10.010 should allow the common law rule to apply. That section provides:

So much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States or with any law passed by the legislature of the State of Alaska is the rule of decision in this state.

Nevertheless, the section must be considered in light of the recent federal district court decision of Aleut Corp. v. Arctic Slope Regional Corp., 424 F. Supp. 397 (D. Alaska 1976), in which the court considered the applicability in Alaska of sequestration, a provisional contract remedy available at common law. The court noted:

Given the harsh nature of the remedy of sequestration and the fact that the Alaska legislature has spelled out in some detail the procedure for obtaining other similar remedies while it has not enacted a sequestration statute, the implication is clear that Alaska has decided that sequestration of the nature sought in an action to require a regional corporation organized under the Alaska Native Claims Settlement Act to place certain funds in secure and liquid investments pending litigation is not available and has preempted the common law with a complex statutory scheme. (at p. 400)

In Hockley v. Hargett, 510 P.2d 1123 (1973), the Washington court, faced with an identical issue, reached the opposite conclusion, that sequestration was available despite legislative silence on the question. Legislative silence in Alaska, at least until our Supreme Court has an opportunity to address the issue, leaves the question of the availability of an action for the price unanswered.

AS 45.08.306(c) and (e) provide:

(c) If a security is delivered by an intermediary known to be entrusted with delivery of the security on behalf of another or with collection of a draft or other claim against the delivery, the intermediary by the delivery warrants only his own good faith and authority even though he has purchased or made advances against the claim to be collected against the delivery. A broker is not an intermediary within the meaning of this subsection.

(e) A broker gives to his customers and to the issuer and a purchaser the warranties provided in this section and has the rights and privileges of a purchaser under this section. The warranties of and in favor of the broker acting as an agent are in addition of applicable warranties given by and in favor of his customer.

The corresponding UCC section, 8-306, eliminates the last sentence of (c) above. The following paragraphs from the official comment explain the distinction:

(3) Subsections (3) and (4) are designed to eliminate all substantive warranties in the case of deliveries by intermediaries and pledgees. Such parties deal primarily with the draft or other claim, and, having no access to direct knowledge about the security, they cannot be held to warrant its genuineness or validity.

Further, following Appenzellar v. McCall, 150 Misc. 897, 270 N.Y.S. 748 (1934), although the so-called 'stock-broker' normally functions as a broker (see definition of "broker", Section 8-303) (the identical definition is provided in AS 45.08.303) and on a few occasions another institution such as a bank may function as a broker, e.g. for a standard broker's commission or similar compensation, nevertheless both the so-called 'stock-broker' and the bank can qualify for the protection given by subsections (3) and (4) to an 'intermediary' where in the particular transaction it does not function as a broker, e.g. delivering securities on a customer's instructions, either without charge or for a nominal handling charge.

Under Alaska's version of the section, the broker would not be qualified for the protection of (c) even if he were acting merely as an intermediary.

AS 45.08.308 and UCC sec. 8-308 list the people who may endorse a security for transfer. UCC sec. 8-308(3)(b) includes as an "appropriate person"

where the person so specified [by the security or by special indorsement to be entitled to the security] is described as a fiduciary but is not longer serving in a described capacity, -- either that person or his successor.

AS 45.08.308(c)(2) contains the same language except that the phrase "either that person or" is deleted. The reason that the phrase is included in the UCC version was explained by the editorial board as follows:

The amendment is recommended as clarification to avoid any risk that the general requirement of indorsement by "an appropriate person" in any way militates against the clear intention of subsection (3)(a) of Section 8-403 [also found at AS 45.08.-403(c)(1)] to permit the issuer to rely on the continued power to act of a fiduciary named in a security until receipt of written notice to the contrary.

ALASKA CODE REVISION COMMISSION



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EXECUTIVE SECRETARY
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MEMORANDUM

TO: The Honorable Patrick M. Rodey
Chairman, Senate Judiciary Committee

FROM: John W. Abbott, Chairman
Alaska Code Revision Commission *John W. Abbott*

DATE: March 23, 1981

RE: Commentary to SB 77--Uniform Amendments to the
Uniform Commercial Code, Articles 8 & 9

The attached two memoranda were prepared for the Alaska Code Revision Commission in July and August of 1978 by Kenneth E. Vassar when he was legislative counsel for the Legislative Affairs Agency. The references in his original memoranda are now revised to conform to the current section numbering in Alaska Statutes and SB 77.

JWA:chw

Attachments

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

July 27, 1978

SUBJECT: Uniform Commercial Code--Article 8
TO: Alaska Code Revision Commission
FROM: Kenneth E. Vassar, Legislative Counsel

This memorandum will explain points of difference between Article 8 of the Uniform Commercial Code (UCC) and AS 45.05.612 - 45.05.688.

UCC Article 8 and AS 45.05.612 - 45.05.688 relate to investment securities. Each body of law contains parallel sections; therefore, to as great an extent as possible, the following discussion will proceed in numerical sequence through those sections of Alaska law which have deviated from the uniform act.

AS 45.05.614 and its counterpart, UCC sec. 8-102, provide definitions for terms used in their respective articles; however, section 614 includes a definition which is not in the UCC section and modifies a definition which is in the UCC section.

The definition in sec. 614 which is not in 8-102 is for the term "proper form." Prior to 1962, the UCC included such a definition, but in that year 8-102 was amended to delete the definition. At the same time UCC sec. 8-208 was amended to delete the term for which the definition in 8-102 had been supplied. Since it was the amendment to 8-208 which formed the basis for the decision to delete the definition of "proper form" in 8-102, this discussion will continue now out of numerical sequence to examine the difference between UCC sec. 8-208 and the corresponding Alaska law, AS 45.05.638.

AS 45.05.638 and UCC sec. 9-208 enumerate the warranties made to a bona fide purchaser (that is, a purchaser for value without notice of the particular defect in the security) by a person who places his signature upon a security as authenticating trustee, registrar, transfer agent, or the like. AS 45.05.638 includes a warranty that "the security is genuine and in proper form." Hence, the need for a definition of "proper form." Since 1962, the UCC has replaced the warranty quoted above with the following:

(a) the security is genuine; and ...

(c) he (the person signing the security) has reasonable grounds to believe that the security is in the form and within the amount the issuer is authorized to issue.

The Permanent Editorial Board of the National Conference of Commissioners on Uniform State Laws noted the following reason for the change

As enacted in New York [prior to amendment by L.1963, c.1003] Section 8-208 reduced the warranty as to form to a warranty that the security is in the form which the authenticating trustee, registrar, or transfer agent was authorized to sign or countersign. Under the case law, the responsibility of such party appears to go somewhat further. The Editorial Board believes that its recommended amendment correctly reflects the responsibility indicated by the case law while also reducing the warranty as to form appearing in the 1958 Text [Alaska's version]. In actual practice authenticating trustees, registrars and transfer agents usually rely upon counsel as to matters of form. Among other things, the amendment takes into account such practice.

In terms of burden placed upon an authenticating trustee, registrar, transfer agent, or the like, the Alaska version of this section places a greater burden by imposing an absolute warranty that the form is proper, whereas the UCC version requires only reasonable grounds to believe that the security is in the form the issuer is authorized to issue. Three states have melded the two versions together to achieve a third version which is more burdensome still. In Indiana, Missouri and Montana the effect of the signature of an authenticating trustee, registrar, transfer agent or the like is to warrant that the security is in proper form and that there are reasonable grounds to believe that it is in the form the issuer is authorized to issue.

Returning now to AS 45.05.614 and UCC sec. 8-102, it was noted earlier that section 614 modifies a definition in section 8-102. The definition in question is for "clearing corporation." Under section 8-102(3), a clearing corporation is defined as a corporation

(a) at least ninety per cent of the capital stock of which is held by or for one or more persons (other than individuals) each of whom

(i) is subject to supervision or regulation pursuant to the provisions of federal or state banking laws or state insurance laws, or

(ii) is a broker or dealer or investment company registered under the Securities Exchange Act of 1934 or the Investment Company Act of 1940, or

(iii) is a national securities exchange or association registered under a statute of the United States such as the Securities Exchange Act of 1934, and none of whom, other than a national securities exchange or association, holds in excess of twenty per cent of the capital stock of such corporation; and

(b) any remaining capital stock of which is held by individuals who have purchased such capital stock at or prior to the time of their taking office as directors of such corporation and who have purchased only so much of such capital stock as may be necessary to permit them to qualify as such directors. (emphasis added)

The emphasized portion of the definition is deleted in AS 45.05.614. The effect of this deletion is to increase the number of corporations which may fall into the class of clearing corporations.

UCC sec. 8-320, which corresponds to AS 45.05.677, establishes the role a clearing corporation plays in the transfer or pledge of a security or of any interest in a security. A transfer or pledge under these sections "has the effect of a delivery of a security in bearer form or duly endorsed in blank." The official UCC comment to this section states:

Consistent with the underlying purposes and policies of this Act "to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties" -- subsection (2)(b) of Section 1-102 -- this Section expressly authorizes a newly developing and commercially useful method of transferring or pledging securities on the organized securities markets, particularly among brokers and banks but not necessarily so limited.

A 1973 amendment to 8-102 changed the definition of "clearing corporation." Previously, it had defined such a corporation as

a corporation all of the capital stock of which is held by or for a national securities exchange or association registered under a statute of the United States such as the Securities Exchange Act of 1934.

The UCC official comment to the current definition, which replaced the definition above, provides:

This section also defines a "clearing corporation" in a manner which permits not only national securities exchanges, but also banks, insurance companies, and similar organizations to participate in the control and management of such a corporation through ownership of shares, in order to facilitate the making of transfers of securities and lessen the delays and errors which have caused difficulty in the past during periods of high activity in the securities markets.

Alaska's version of the definition might include an official comment paraphrased from that given above as follows:

This section also defines a "clearing corporation" in a manner which permits not only national securities exchanges, banks, insurance companies and similar organizations, but also individuals to participate in the control and management of such a corporation through ownership of shares.

The next point of departure between the Alaska statutes and the UCC is the absence in the Alaska statutes of any section which corresponds to UCC sec. 8-107, which provides:

(1) Unless otherwise agreed and subject to any applicable law or regulation respecting short sales, a person obligated to deliver securities may deliver any security of the specified issue in bearer form or registered in the name of the transferee or indorsed to him or in blank.

(2) When the buyer fails to pay the price as it comes due under a contract of sale the seller may recover the price

(a) of securities accepted by the buyer; and

(b) of other securities if efforts at their resale would be unduly burdensome or if there is no readily available market for their resale.

This sections reflects the treatment of securities of a particular issue as "fungibles," that is, goods of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Thus, a person obligated to deliver securities need not deliver any specific instrument, but may select any security of the proper issue, in bearer form or appropriately registered or indorsed. While the Alaska statutes do not contain the specific section quoted above, the treatment of securities as fungible goods may be supported with similar effect by reference to other Alaska statutes. AS 45.05.020(17) defines "fungible" as follows:

(17) "fungible" with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit.

And AS 45.05.028(c) allows for usage of trade by providing:

(c) a course of dealing between parties and a usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

Since usage of trade in investment securities most likely would include the treatment of securities as fungibles, it would probably be permissible for a person in Alaska obligated to deliver securities to deliver any security of the specified issue. This conclusion is reinforced by the inclusion of the term "or securities" in the definition of "fungible."

However, the second subsection of 8-107, while basically restating a common law rule of recovery of damages, is not susceptible to the same type of reasoning which allows the first subsection to be read into Alaska law, and there are two reasons why this is so. First, there is no Alaska statute of general applicability which contains substantially similar terms, and, second, the verbatim adoption by the state of almost every other section of this article of the UCC, combined with the total exclusion in the Alaska statutes of this section, leads to a strong inference that the terms of this section were not intended to apply in Alaska.

UCC sec. 8-107 was intended to follow the common law rule enunciated, but not followed, in Agar v. Orda, 190 N.E. 479 (1934). In Agar, the court ruled that the adoption in New York of the Sales Act preempted the common law action for the price. The Sales Act provided a recovery of damages remedy. Alaska's Sales Act, AS 45.05.036 - 45.05.242, provides for an action to recover the contract price of goods sold but refused by the buyer; however, under the express terms of AS 45.05.038, that section is applicable only to the sections of the Sales Act.

It might be argued that AS 01.10.010 should allow the common law rule to apply. That section provides:

So much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States or with any law passed by the legislature of the State of Alaska is the rule of decision in this state.

Nevertheless, the section must be considered in light of the recent federal district court decision of Aleut Corp. v. Arctic Slope Regional Corp., 424 F. Supp. 397, (D. Alaska 1976) in which the court considered the applicability in Alaska of sequestration, a provisional contract remedy available at common law. The court noted:

Given the harsh nature of the remedy of sequestration and the fact that the Alaska legislature has spelled out in some detail the procedure for obtaining other similar remedies while it has not enacted a sequestration statute, the implication is clear that Alaska has decided that sequestration of the nature sought in an action to require a regional corporation organized under the Alaska Native Claims Settlement Act to place certain funds in secure and liquid investments pending litigation is not available and has preempted the common law with a complex statutory scheme. (at p. 400

In Hockley v. Hargett, 510 P.2d 1123 (1973), the Washington court, faced with an identical issue, reached the opposition conclusion, that sequestration was available despite legislative silence on the question. Legislative silence in Alaska, at least until our Supreme Court has an opportunity to address the issue, leaves the question of the availability of an action for the price unanswered.

AS 45.05.650(c) and (e) provide:

(c) If a security is delivered by an intermediary known to be entrusted with delivery of the security on behalf of another or with collection of a draft or other claim against the delivery, the intermediary by the delivery warrants only his own good faith and authority even though he has purchased or made advances against the claim to be collected against the delivery. A broker is not an intermediary within the meaning of this subsection.

(e) A broker gives to his customers and to the issuer and a purchaser the warranties provided in this section and has the rights and privileges of a purchaser under this section. The warranties of and in favor of the broker acting as an agent are in addition of applicable warranties given by and in favor of his customer.

The corresponding UCC section, 8-306, eliminates the last sentence of (c) above. The following paragraphs from the official comment explain the distinction:

(3) Subsections (3) and (4) are designed to eliminate all substantive warranties in the case of deliveries by intermediaries and pledgees. Such parties deal primarily with the draft or other claim, and, having no access to direct knowledge about the security, they cannot be held to warrant its genuineness or validity.

Further, following Appenzeller v. McCall, 150 Misc. 897, 270 N.Y.S. 748 (1934), although the so-called "stock-broker" normally functions as a broker (see definition of "broker", Section 8-303) (the identical definition is provided in AS 45.05.644) and on a few occasions another institution such as a bank may function as a broker, e.g. for a standard broker's commission or similar compensation, nevertheless both the so-called "stock-broker" and the bank can qualify for the protection given by subsections (3) and (4) to an "intermediary" where in the particular transaction it does not function as a broker, e.g. delivering securities on a customer's instructions, either without charge or for a nominal handling charge.

Under Alaska's version of the section, the broker would not be qualified for the protection of (c) even if he were acting merely as an intermediary.

AS 45.05.654 and UCC sec. 8-308 list the people who may endorse a security for transfer. UCC sec. 8-308(3)(b) includes as an "appropriate person"

where the person so specified [by the security or by special indorsement to be entitled to the security] is described as a fiduciary but is no longer serving in a described capacity, -- either that person or his successor.

AS 45.05.654(c)(2) contains the same language except that the phrase "either that person or" is deleted. The reason that the phrase is included in the UCC version was explained by the editorial board as follows:

The amendment is recommended as clarification to avoid any risk that the general requirement of indorsement by "an appropriate person" in any way militates against the clear intention of subsection (3)(a) of Section 8-403 [also found at AS 45.05.682(c)(1)] to permit the issuer to rely on the continued power to act of a fiduciary named in a security until receipt of written notice to the contrary.

KEV:hjd

MEMORANDUM REGARDING UNIFORM AMENDMENTS TO
THE UNIFORM COMMERCIAL CODE (UCC--ARTICLE 9
ON SECURED TRANSACTIONS (Sections 15-71 in SB 77)

MARCH 1981

This memorandum will explain points of difference between Article 9 of the Uniform Commercial Code (UCC) and AS 45.09.101 - 45.09.507.

UCC Article 9 and AS 45.09.101 - 45.09.507 relate to secured transactions. Article 9 has been substantially revised in recent years; the Alaska law has not been revised to conform with changes in the UCC version. The result is a large number of discrepancies between the two versions; this discussion will follow the Alaska law in numerical sequence.

1. AS 45.09.102

AS 45.09.102 relates to the policy and scope of this article of AS 45.09. AS 45.09.102(a) provides:

(a) Except as otherwise provided in sec. 103 of this chapter on multiple state transactions, secs. 101 - 507 of this chapter apply, as far as concerns personal property and fixtures in the jurisdiction of the state,

(1) to a transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, accounts, or contract rights; and

(2) to a sale of accounts, contract rights, or chattel paper.

UCC sec. 9-102 contains the same provisions, except that it:

(1) deletes 'in sec. 103 of this chapter on multiple state transactions' following 'Except as otherwise provided';

(2) deletes 'so far as concerns any personal property and fixtures in the jurisdiction of the state' following 'this chapter apply;'

(3) deletes the references to 'contract rights' in paragraphs (1) and (2).

The reason for the first two deletions is the feeling on the part of the Commissioners on Uniform State Laws that this article of the UCC should be dedicated to secured transactions and that general questions of conflicts of laws should be left to Article 1 of the code.

The references to "contract rights" were deleted as unnecessary and confusing. This term has been deleted from all sections of UCC Article 9. Prior to 1972, the UCC distinguished a "contract right" from an "account" in terms of whether the right to payment had matured. If the right to payment under a contract had not yet been earned by performance by the creditor, then it was a "contract right." If the right to payment had matured, then it was an "account." Under the revised version, it is irrelevant whether the right to payment has been earned by performance. An account is defined in UCC sec. 9-106 as

any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance.

2. AS 45.09.103

AS 45.09.103 establishes rules for the choice of law where accounts, contract rights, general intangibles, and equipment relate to another jurisdiction. The UCC counterpart, 9-103, has been completely revised in accord with the sentiment expressed by the first two deletions in 9-102. The section now concerns itself exclusively with perfection of security interests and the effect of perfection or non-perfection. It establishes the basic rule that the controlling law, as to perfection of the security interests and the effect of perfection, is the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected. There are certain exceptions to the rule which are listed.

3. AS 45.09.104

AS 45.09.104 excludes certain transactions from coverage under Article 9. Its counterpart, UCC sec. 9-104, contains similar provisions; however, there are noteworthy differences. Section 104(5) provides that the chapter does not apply to an equipment trust covering railway rolling stock. UCC sec. 9-104 deletes this provision with the following explanation:

The whole thrust of Article 9 is to eliminate differences based on the form of a transaction, and the equipment trust serves the same function as other purchase money forms of financing. In fact, a form known as the 'New York

equipment trust' comes closer to a conditional sales contract than it does to a Pennsylvania equipment trust, and thus the former exclusion left substantial uncertainty.

In place of this deleted paragraph, the UCC section inserts the following:

(e) to a transfer by a government or governmental subdivision or agency.

The Alaska section had previously included a paragraph which is similar in nature to the new UCC paragraph. Alaska's paragraph provides:

(12) to a security interest created by or on behalf of the state or any of its political subdivisions (including but not limited to the unorganized borough or any city or borough of any class, whether home rule or not) or any service area, public enterprise, public corporation, agency or instrumentality of the state or of any of its political subdivisions.

The UCC official comment explains its paragraph as follows:

Certain governmental borrowings include collateral in the form of assignments of water, electricity or sewer charges, rents on dormitories or industrial buildings, tools, etc. Since these assignments are usually governed by special provisions of law, these governmental transfers are excluded from this Article.

AS 45.09.104(6) provides:

to a sale of accounts, contract rights, or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts, contract rights, or chattel paper which is for the purpose of collection only, or a transfer of a contract right to an assignee who is also to do the performance under the contract.

UCC sec. 9-104(f) deletes references to "contract rights" in this paragraph and adds at the end of the phrase "or a transfer of a single account to an assignee in whole or in partial satisfaction of a pre-existing indebtedness."

The latter amendment reflects the general scope of the article, which includes all commercial financing transactions.

The transfer of a single account in satisfaction of a pre-existing indebtedness is a personal transaction not encompassed by the article.

Both the UCC section and the Alaska statute exclude transfers of interests in insurance policies and in deposit accounts. However, the UCC section notes that these interests are nevertheless subject to 9-603 (proceeds; secured party's rights on disposition of collateral) and 9-132 (priorities among conflicting security interests in the same collateral). Both sections also exclude rights represented by a judgment, but the UCC section notes that this does not include a judgment taken on a right to payment which was collateral.

4. AS 45.09.105

AS 45.09.105 and UCC sec. 9-105 provide definitions and indices of definitions. The UCC section includes several definitions which are not in the Alaska section. The following list includes the definitions not included in the Alaska section with parenthetical notes containing the official reason, if any, for their inclusion:

'Deposit account' means a demand, time, savings, passbook or like account maintained with a bank, savings and loan association, credit union or like organization, other than an account evidenced by a certificate of deposit (A definition of "deposit account" has been added to facilitate references to such accounts in the section on proceeds (Section 9-306));

'Encumbrance' includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests (Definitions of "encumbrance" and "mortgage" have been added as the basis for the use thereof in Section 9-313);

'Mortgage' means a consensual interest created by a real estate mortgage, a trust deed on real estate, or the like;

An advance is made 'pursuant to commitment' if the secured party has bound himself to make it, whether or not a subsequent event of default or other event not within his control has relieved or may relieve him from his obligation (A definition of "pursuant to commitment" has been added as the basis for use of this concept in Sections 9-301, 9-307, and 9-132);

'Transmitting utility' means any person primarily engaged in the railroad, street railway or trolley bus business, the electric or electronics communications transmission business, the transmission of goods by pipeline, or the transmission or the production and transmission of electricity, steam, gas or water, or the provision of sewer service (A definition of "transmitting utility" has been added to identify a class of debtor with special filing problems on far-flung properties, for which special filing rules are stated in Part 4).

In addition to definitions which are not in the Alaska law, the UCC section includes references to definitions which are not referenced in the Alaska section. These references include

"Attach"--Section 9-203

"Construction mortgage"--Section 9-313(1)

"Fixture"--Section 9-313(1)

"Fixture filing"--Section 9-313(1)

"United States"--Section 9-103

Other definitions which are included in the Alaska statute have been modified in the UCC section. AS 45.09.105(2) defines "chattel paper" as follows:

A writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods [, but a charter or other contract involving the use or hire of a vessel is not chattel paper]; when a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitute a chattel paper.

The portion in brackets has been added in the UCC section. The UCC note on the reason for this portion follows:

To make clear that no type of ship charter is to be considered chattel paper. Many types of ship financing based on assignment of a charter involve international transactions, and there are numerous executed copies of the charter. Under

Section 9-308 an assignment of chattel paper perfected by delivery of the chattel paper prevails over an assignment perfected by filing. Application of this rule would require the parties to change traditional practices in order to control all executed copies. Moreover, it is desirable to treat all types of ship charters alike, and some cannot be deemed chattel paper.

The Alaska definition [with the UCC addition in brackets] of "document"

document of title as defined in the general definitions of sec. 20 of this chapter [, and a receipt of the kind described in subsection (2) of Section 7-201].

The UCC addition includes the kind of receipt issued by a person who is not technically a warehouseman, as described in Section 7-201(2) and AS 45.07.201(b).

The UCC definition of "goods" includes two items which are not listed in the Alaska section. They are "minerals or the like (including oil and gas) before extraction" and "standing timber which is to be cut and removed under a conveyance or contract for sale." It deletes a reference in the Alaska version to "other things in action." The UCC explanation of the latter modification is:

The exclusion of 'other things in action' from the definition of 'goods' has been deleted as unnecessary. 'General intangibles,' which under Section 9-106 includes 'things in action,' are themselves excluded from the definition of goods.

5. AS 45.09.106

AS 45.09.106 defines "account;" "contract right;" "general intangibles." The UCC section has been modified to delete references to "contract right."

6. No Corresponding Alaska Statute

The UCC article has adopted a section (9-114) which is not included in the Alaska law. The new section attempts to clarify the relationship between the filing rule for consignments under UCC sec. 2-326 (AS 45.02.326) and Article 9. The UCC comment explains as follows:

An uncertainty has existed under the 1962 Code whether the filing rule in Section 2-326(3) applicable to true consignments requires only filing under Part 4 of Article 9 or also requires notice to prior inventory secured parties of the debtor under Section 9-312(3). The new Section 9-114 accepts the latter view and provides in substance that, in order to protect his ownership of the consigned goods, the consignor must give the same notice to an inventory secured party of the debtor that he would have to give if his transaction with the consignee was in the form of a security transaction instead of in the form of a consignment. This new section follows closely the language of Section 9-312(3) [AS 45.09.312(c)].

7. AS 45.09.203

AS 45.09.203 relates to the enforceability of security interests. AS 45.09.204 establishes when security interests attach. UCC sec. 9-203 has modified these sections by combining them into one. The purpose was to cure "the former anomaly that a security interest could attach and be perfected, and yet be unenforceable against anyone for lack of a written security agreement."

In addition, the requirement that a security agreement covering oil, gas or minerals to be extracted contain a description of the land concerned has been eliminated in the UCC section. The reason for this change is that the article does not recognize a security interest in such collateral until it has been extracted from the land.

Finally, the new UCC section adds a new subsection to make clear that claims to proceeds under section 9-306 (AS 45.-09.306) do not require a statement in the security agreement, for it is assumed that the parties so intend unless otherwise agreed.

8. AS 45.09.204

The provisions of AS 45.09.204 which do not deal with the attachment of a security interest have been modified in the corresponding UCC section.

The provisions in AS 45.09.204(b) have been eliminated altogether in the UCC section. That subsection provides:

(b) For the purposes of this section, the debtor has no rights

(1) in crops until they are planted or otherwise become growing crops; in the young of livestock until they are conceived;

(2) in fish until caught; in oil, gas, or minerals until they are extracted; in timber until it is cut;

(3) in a contract right until the contract has been made;

(4) in an account until it comes into existence.

The reason for the deletion is that the subsection was unnecessary and in some cases confusing. Its operation appeared to be arbitrary, according to the UCC, and it was believed that the questions considered were best left to the courts.

The modified UCC version also eliminated the paragraph corresponding to AS 45.09.204(d)(1). That paragraph provided that no security interests in crops attaches under an after-acquired property clause to crops which become such more than one year after the security agreement, unless the agreement involved certain real estate transactions. The official comment states:

The obvious purpose of this provision was to protect a necessitous farmer from encumbering his crops for many years in the future. The provision did not work because there was no corresponding limit on the scope of a financing statement covering crops and under the Code's notice-filing rules the priority position of a security arrangement covering successive crops would be as effectively protected by the filing of a first financing statement whether the granting clause as to successive crops was in one security agreement with an after-acquired property clause or in a succession of security agreements. On the other hand the clause did require an annual security agreement for crops even when the encumbrance on crops was agreed to as part of a long-term financing covering farm machinery and other assets. The provision thus appeared to be meaningless in operation except to cause unnecessary paperwork, but it did introduce some element of uncertainty as to its purpose.

9. AS 45.09.206

AS 45.09.206 provides that an agreement by a buyer not to assert against an assignee of the seller any claim or

defense he may have against the seller will be enforced if the assignee is an assignee for value, in good faith, and without notice of a claim or defense. The corresponding UCC section, 9-206, includes such agreements made by lessees. The UCC explanation is as follows:

In view of the substantial growth in lease financing and the quite parallel application of problems dealt with by this section to both conditional sale contracts and leases, it is believed this section should be made applicable to leases as well as to more traditional purchase money security interests.

10 AS 45.09.301

AS 45.09.301 lists the class of people who take priority over unperfected security interests. It includes persons who become lien creditors without knowledge of the security interest and before it is perfected. The UCC section, 9-301, eliminates knowledge as a factor for these people. The official reason states:

The former section denied the lien creditor priority even though he had knowledge when he got involved by extending credit, if he acquired knowledge while attempting to extricate himself. It was completely inconsistent in spirit with the rules of priority between security interests, where knowledge plays a very minor role.

AS 45.09.301 also defines "lien creditor." A lien creditor is a creditor who has acquired a lien on the property involved by attachment, levy, or the like. The UCC section adds a subsection which provides:

A person who becomes a lien creditor while a security interest is perfected takes subject to the security interest only to the extent that it secures advances made before he becomes a lien creditor or within 45 days thereafter or made without knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien.

This new subsection provides an absolute priority for the security interest over a judgment lien for 45 days regardless of knowledge of the secured party concerning the judgment lien. If, however, the advance is made after the 45 days, the advance will not have priority unless it was made or committed without

knowledge of the lien obtained by legal proceedings. The importance of the rule is important in effectuating the intent of the Federal Tax Lien Act of 1966, although its importance may not be great as between secured parties making subsequent advances and judgment lien creditors.

11. AS 45.09.302

AS 45.09.302 delineates when filing is required to perfect a security interest and the security interests to which the filing provisions do not apply. Paragraph (a)(3) includes as a security interest to which the filing provisions do not apply a purchase money security interest in farm equipment having a purchase price not in excess of \$2,500; but filing is required for a fixture under sec. 313 of the chapter or for a motor vehicle required to be licensed.

The UCC section, 9-302, deletes the reference to farm equipment in the belief that it was inappropriate; the effect of the rule was to make farmers' equipment unavailable to them as collateral for loans from some lenders. The UCC section inserts a new paragraph which

exempts from filing rules security interests created by assignments of beneficial interests in trusts and estates, because these assignments are not ordinarily thought of as subject to this Article, and a filing rule might operate to defeat many assignments.

In addition, the UCC section replaces the language above relating to fixtures and motor vehicles with the following:

but filing is required for a motor vehicle required to be registered; and fixture filing is required for priority over conflicting interests in fixtures to the extent provided in Section 9-313 [AS 45.09.313].

This makes filing for fixtures applicable only for priority against real estate interests.

The UCC section also adds a new paragraph to this subsection which exempts from filing assignments for the benefit of creditors. Such transactions were not felt to be "financing transactions."

Subsection (c) of AS 45.09.302 also exempts from the filing requirements of the chapter security interests in property subject to a statute of the United States providing for national registration or subject to a statute of Alaska providing

for central filing. The UCC section replaces this subsection with two new subsections. One subsection exempts from the article transactions as to which an adequate system of filing, state or federal, has been set up outside the article, and the other subsection makes clear that when such a system exists perfection of a relevant security interest can be had only through compliance with that system (that is, filing under the article is not a permissible alternative).

Alaska's statute includes a subsection which is not in the UCC version. It exempts from the requirements of sections 401(a)(1) and (2), 403(b), (c), and (e) and 407 of the chapter security interests in personal property of any description created by a deed of trust or mortgage made by a corporation primarily engaged in the business of a common carrier by rail, the furnishing of telephone or telegraph service, the transmission of oil, gas or petroleum products by pipeline, or the production, transmission or distribution of electricity, steam, gas, or water. The sections from which these security interests are exempted relate, respectively, to the place of filing, duration of and fee for filing, and information from a filing officer. The subsection provides a separate filing system for these security interests. The House Judiciary Committee report on the bill which added this subsection states:

Current law requires all chattel mortgages to be renewed every five years by a new filing. The purpose of the current law is to clean out the files of paid off mortgages that have not been formally released. Most chattel mortgages are for periods of less than five years.

This bill relieves the mortgagee from refiling mortgages every five years if the mortgage is signed by specified public utilities. Most public utility financing is long term and includes real property as well as personal. This bill does not defeat the purpose of the present law. (House Journal, 1967, p. 310)

12. AS 45.09.304

AS 45.09.304(a) relates to perfection of security interests in chattel paper, instruments, and negotiable documents. It provides:

A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in instruments (other than instruments which constitute part of chattel paper) can be perfected only by the

secured party's taking possession, except as provided in (d) and (e) of this section.

UCC sec. 9-304 adds "money or" after "A security interest in" in the second sentence. It also adds a reference to 9-306 on proceeds at the end of the sentence as a further exception to that section. The change corrects an inadvertent omission in the 1962 text and makes clear that a security interest in money cannot be perfected by filing.

AS 45.09.304(e) provides a 21-day period during which a security interest remains perfected without filing if a secured party has a perfected security interest in an instrument, a negotiable document, or goods in possession of a bailee other than one who has issued a negotiable document for the goods, and makes the goods or documents representing the goods available to the debtor for sale or exchange. The UCC section adds a phrase which makes it clear that this period deals only with perfection and that there must be compliance with the notice provisions of Section 9-312(3) in order to achieve priority over earlier inventory financiers. Corresponding clarifying changes have been made in Section 9-312(3).

13. AS 45.09.305

AS 45.09.305 provides for the perfection of security interests without filing. It lists the types of interests which may be so perfected. The UCC section, 9-305, adds to the Alaska list "money" to clarify the special position of money.

14. AS 45.09.306

AS 45.09.306(a) defines "proceeds." The UCC section, 9-306, adds a sentence to the definition which provides:

Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement.

The intent of this sentence is to overrule various cases to the effect that proceeds of insurance on collateral are not proceeds of the collateral. The "except" clause is intended to preserve the integrity of an insurance contract which specifies the person to whom the insurance is payable.

AS 45.09.306 also delineates the secured party's rights on disposition of collateral. It includes a perfected right to proceeds if the party claims them in a financing statement. The revised UCC version eliminates this "financing statement" procedure in favor of treating the filed claim to the original collateral as constituting automatically a filing as to proceeds on the theory that this was the intent of the parties, unless

otherwise agreed. To this principle, the UCC version states a limitation: where the filing as to the original collateral is an inappropriate means of perfection as to proceeds of certain types, or is made at a place that is inappropriate as to such proceeds, the filed claim to the original collateral perfects the claim to proceeds for only 10 days.

AS 45.09.306 relates to perfected security interests in insolvency proceedings. The revised UCC version makes various changes to make clear that the claim to cash allowed in insolvency is exclusive of any other claim based on tracing.

14. AS 45.09.307

AS 45.09.307 establishes when a buyer of goods takes free of security interests. The section equates consumer goods with farm equipment having an original purchase price not in excess of \$2,500. This equation is deleted in the revised UCC section (9-307) in accordance with the change made in 9-302(1) (c) [see "11" of this memo relating to AS 45.09.302].

The revised UCC section also adds a new subsection which provides:

(3) A buyer other than a buyer in ordinary course of business (subsection (1) of this section) takes free of a security interest to the extent that it secures future advances made after the secured party acquires knowledge of the purchase, or more than 45 days after the purchase, whichever first occurs, unless made pursuant to a commitment entered into without knowledge of the purchase and before the expiration of the 45 day period.

This new subsection clarifies the extent to which future advances under a security interest may outrank an intervening right.

16. AS 45.09.308

AS 45.09.308 establishes the circumstances under which a purchaser of chattel paper of a nonnegotiable instrument will take priority over a security interest. The UCC section, 9-308, has rewritten this language for clarity and to include negotiable instruments as well as nonnegotiable.

17. AS 45.09.312

AS 45.09.312 relates to priorities among conflicting security interests in the same collateral. Subsection (a) of that section specifies several sections which contain rules for determining priorities between security interests and such other

claims in the situations covered in those sections. For cases not covered in those sections, section 312 states general rules of priority. The UCC section, 9-312, has rewritten this subsection and substantially simplified its coverage.

Subsection (c) states the circumstances which must exist for a purchase money security interest in inventory collateral to have priority over a conflicting security interest in the same collateral. This subsection has been substantially modified in the UCC version. The UCC version includes provisions which establish how often notice must be given under that subsection. The period of five years was chosen by analogy to the duration of a financing statement. It also addresses the question of the priority status of the security interest in inventory temporarily perfected for 21 days without filing or perfection in a situation which begins with release of a pledged document under section 9-304(5). [See "12" of this memo relating to AS 45.09.304(e).] The answer provided is the usual rule that the purchase-money claimant to preserve his priority resulting from the document must give the required notice before the debtor receives possession of the inventory. If the secured party fails to give timely notice, he loses his priority under this subsection. Finally, it provides guidelines for establishing the priority between a person claiming accounts as proceeds of inventory and a person claiming the accounts by direct filing with respect thereto. The general rule enunciated is that a prior right to inventory does not confer a prior right to any proceeds except identifiable cash proceeds received on or before the delivery of the inventory (i.e., without the intervention of an account).

The UCC section reaches a different result in the next subsection relating to purchase money security interests in collateral other than inventory. Here, where it is not ordinarily expected that the collateral will be sold and that proceeds will result, it seems appropriate to give the party having a purchase money security interest in the original collateral an equivalent priority in its proceeds. The Alaska section is unclear on this point.

Subsection (e) of section 312 contains two principal rules: a first-to-file rule where both competing security interests are perfected by filing, and a first-to-perfect rule when either of the security interests is or both of them are perfected otherwise than by filing. Subsection (f) provides:

(f) For the purpose of the priority rules of (e) of this section, a continuously perfected security interest shall be treated at all times as if perfected by filing if it was originally so perfected, and it shall be

treated at all times as if perfected otherwise than by filing if it was originally perfected otherwise than by filing.

These subsections have led to considerable debate over questions of "proceeds." The revised UCC section answers the questions raised by these subsections by stating a single rule in subsection (5) which ranks conflicting perfected security interests by their priority in time, dating back to the respective times when without interruption the security interests were either perfected or were the subjects of appropriate filings, and by deleting the provisions of subsection (f) in the Alaska section and inserting in its place a provision which states that a date of filing or perfection as to collateral is also a date of filing or perfection as to proceeds for the purposes of subsection (5).

The UCC section adds a new subsection which states priority rules for an intervening pledge in reference to a subsequent advance by an earlier-filed secured party.

18. § 45.09.313

AS 45.09.313 relates to security interests in fixtures. The rules established in that section for priority do not apply to goods incorporated into a structure; encumbrances upon fixtures or real estate may be created under the law applicable to real estate. Subsections (b) and (c) are subject to limitations stated in subsection (d). Subsection (b) provides for the priority of a security interest in goods before they become fixtures over the claims of all persons who have an interest in the real estate. Subsection (c) provides that a security interest which attaches to goods after they become fixtures is valid against all persons subsequently acquiring interests in the real estate but is invalid against a person with an interest in the real estate at the time the security interest attaches to the goods who has not consented in writing to the security interest or disclaimed an interest in the goods as fixtures. Subsection (d) lists certain occasions which will not lead to the result dictated by (b) and (c). Subsection (e) allows a secured party, on default, to remove his collateral from the property.

UCC sec. 9-313 has completely rewritten this section. It introduces and defines the term "fixture filing." When a filing is intended to give the priority advantages discussed in the section against real estate interests, the filing must be for record in the real estate records and indexed therein, so that it will be found in a real estate search. The general principle of priority announced in this section is set forth in paragraph (4)(b). It is basically that a fixture filing gives to the fixture security interest priority as against other real estate interests according to the usual priority rule of

conveyancing, that is, the first to file or record prevails. The section provides that no security interest exists in ordinary building materials incorporated into an improvement on land. Paragraph (4), which is the core provision of the section, provides:

(4) A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where

(a) the security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within ten days thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate; or

(b) the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate; or

(c) the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any method permitted by this Article; or

(d) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this Article.

Further subsections provide that even a nonperfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner if the latter has consented in writing to the security interest or the debtor has a right to remove the goods as against the encumbrancer or owner (if the debtor's right terminates, the priority of the security

interest continues for a reasonable time); that a security interest in fixtures is generally subordinate to a construction mortgage recorded before the goods become fixtures; and that the secured party may, on default, remove his collateral from the property.

19. AS 45.09.318

The variation between this section of the Alaska statutes and the UCC version relate to elimination of the term "contract right" in UCC sec. 9-106.

20. AS 45.09.401

AS 45.09.401(a) lists the proper place to file in order to perfect a security interest in various types of collateral. This subsection is in conformance with "second alternative" for subsection (1) under the pre-1972 UCC sec. 9-401. The Alaska subsection requires filing for goods which are or are to become fixtures in the office where a mortgage on the real estate concerned would be filed or recorded. The revised UCC subsection also requires filing in the same place for security interests in collateral which is timber or minerals.

AS 45.09.401(d) provides:

If collateral is brought into the state from another jurisdiction, the rules stated in sec. 103 of this chapter determine whether filing is necessary in this state.

The revised UCC section deletes "If collateral is brought into the state from another jurisdiction,".

The revised UCC section also adds two new subsections. The first new subsection provides a special rule for filing of a security interest in collateral, including fixtures, of a transmitting utility. The filing would be in a state office (presumably the Department of Administration in Alaska) rather than a local office in order to avoid the necessity of multiple filings for fixtures located in many areas of the state. The second new subsection establishes the residence of an organization for the purposes of the section. It is the place of business if the organization has one or its chief executive office if it has more than one place of business.

21. AS 45.09.402

AS 45.09.402 relates to amendments to and formal requisites of a financing statement. Several changes in UCC sec. 9-402 are conforming changes to new requirements in 9-401 that certain financing statements covering such collateral as timber

and minerals be filed in the real estate records. The UCC section also responds to objections that the name of the debtor might not be in the real estate chain of title. Since 9-313(4) (a) and (b) permit fixture filing against persons in possession of the real estate who do not have interests of record, 9-402 requires the naming of an owner of record of the real estate in such cases, and 9-403(7) requires indexing the fixture filing against the name.

A new subsection in the UCC section makes it possible for a real estate mortgage to serve as a financing statement, and a related change in 9-403(6) makes it unnecessary to file continuation statements for such a financing statement.

Further changes in the UCC section provide that only the debtor need sign the statement rather than both the debtor and the secured party; that a secured party instead of the debtor may sign a statement to perfect a security interest in collateral as to which the filing has lapsed or collateral acquired after a change of name, identity or corporate structure of the debtor; and that a financing statement sufficiently shows the name of the debtor if it gives the individual, partnership or corporate name of the debtor, whether or not it adds other trade names or names of partners.

22. AS 45.09.403

AS 45.09.403 relates to the duration of filing, the effect of lapsed filing, the duties of the filing officer, and what constitutes a filing. UCC sec. 9-403 differs from the Alaska section in that it makes every financing statement (except those in which the debtor is a transmitting utility and those which are real estate mortgages effective as fixture filings under 9-402) effective for a full five years. It also provides for the continued effectiveness of a statement during an insolvency proceeding until the end of the proceeding and for 60 days thereafter, or until the expiration of the five year period, whichever is later. Upon lapse, under the UCC section, the security interest becomes unperfected, unless it is perfected without filing. If the security interest becomes unperfected upon lapse, it is deemed to have been unperfected as against a person who became a purchaser of lien creditor before lapse.

A new subsection would give the filing officer authority to charge extra fees if the financing statement does not conform to a uniform prescribed size and content.

23. AS 45.09.404

AS 45.09.404 relates to termination statements. The UCC section, 9-404, requires the filing of termination statements

in the case of consumer goods even without a demand by the consumer. This is not provided in the Alaska section. Other than in the case of consumer goods, the termination statement is required only upon written demand by the debtor.

24. AS 45.09.405

AS 45.09.405 relates to the assignment of security interests, the duties of filing officers, and fees. The Alaska section leaves the determination of fees to the administrative director of courts; the UCC section, 9-405, would establish the fees statutorily. Various changes have been made in the UCC section to conform with changes in other sections of Part 4 of the UCC article.

25. AS 45.09.406

AS 45.09.406 relates to releases of collateral, the duties of the filing officer, and fees. The comments under "24" are applicable to changes made in the UCC section, 9-406.

26. AS 45.09.407

AS 45.09.407 relates to information from the filing officer. The comments under "24" are applicable to changes made in the UCC section, 9-407.

27. No Corresponding Alaska Statute

A new UCC section, 9-408, provides as follows:

A consignor or lessor of goods may file a financing statement using the terms 'consignor,' 'consignee,' 'lessor,' 'lessee' or the like instead of the terms specified in Section 9-402. The provisions of the Part shall apply as appropriate to such a financing statement but its filing shall not of itself be a factor in determining whether or not the consignment or lease is intended as security (Section 1-201 (37)). However, if it is determined for other reasons that the consignment or lease is so intended, a security interest of the consignor or lessor which attaches to the consigned or leased goods is perfected by such filing.

This new section adopts the filing system of the article to consignments and leases. Filing of consignments is required under certain conditions (sections 2-326(3), 9-114). Filing of true leases which are not security interests is not required; but because the question whether a lease is a true lease may be a close one, filing is permitted for leases.

28. AS 45.09.501

AS 45.09.501(c) prohibits the waiver or variance of certain rules in the chapter relating to default to the extent that they give rights to the debtor and impose duties on the secured party. An exception is allowed as provided with respect to compulsory disposition of collateral in section 505(a). The revised UCC section, 9-501, makes a "purely technical" change by referring to the UCC section corresponding to AS 45.09.504 as well as to that corresponding to section 505(a). The change clears up an ambiguity as to whether a debtor could after default agree on the time within which a sale might be held or the time after which a secured party might keep the goods in lieu of a sale.

29. AS 45.09.504

AS 45.09.504 relates to the allowable means of disposing of collateral after default. It requires reasonable notice of the disposition to be given by the secured party to the debtor and "except in the case of consumer goods, to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in the state or who is known by the secured party to have a security interest in the collateral." The UCC section, 9-504, replaces the quoted language with "if he has not signed after default a statement renouncing or modifying his right to notification of sale."

The reason for the change is provided in the official reasons as follows:

Under the 1962 Code the secured party giving notice of sale had to notify (except in the case of consumer goods) not only every other person who had duly filed a financing statement indexed in the name of the debtor in the state and who still had a security interest in the collateral, but also any other person known by the secured party to have an interest in the collateral. This meant that the secured party had to search the records in every case of notice of sale, to ascertain whether there were any other secured parties with financing statements that might be deemed to cover the collateral in question. Moreover, he ran the risk that some informal communication by letter, or even orally, might be deemed to have given him knowledge of the interest of that other party. These burdens of searching the record and of checking the secured party's files

were greater than the circumstances called for because as a practical matter there would seldom be a junior secured party who really had an interest needing protection in the case of a foreclosure sale. Therefore, a change is made requiring notice to persons other than the debtor only if such persons had notified the secured party in writing of their claim of an interest in the collateral before he sent his notification to the debtor or before the debtor's renunciation of his rights.

30. AS 45.09.505

AS 45.09.505 allows a secured party in possession, after default, to retain the collateral in satisfaction of the obligation and requires notification similar to that required in section 504. The UCC section, 9-505, contains a modification similar to that made in the previous section.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

FOUCH V. STATE CAPITOL
JUNEAU, ALASKA 99811
907 465-2800

MEMORANDUM

August 3, 1978

SUBJECT: Uniform Commercial Code - Article 9
TO: Alaska Code Revision Commission
FROM: Kenneth E. Vassar
Legislative Counsel *(KV)*

This memorandum will explain points of difference between Article 9 of the Uniform Commercial Code (UCC) and AS 45.05.690 - 45.05.794.

UCC Article 9 and AS 45.05.690 - 45.05.794 relate to secured transactions. Article 9 has been substantially revised in recent years; the Alaska law has not been revised to conform with changes in the UCC version. The result is a large number of discrepancies between the two versions; this discussion will follow the Alaska law in numerical sequence.

1. AS 45.05.692

AS 45.05.692 relates to the policy and scope of this article of AS 45.05. AS 45.05.692(a) provides:

(a) Except as otherwise provided in sec. 694 of this chapter on multiple state transactions and in sec. 696 of this chapter on excluded transactions, secs. 690 - 794 of this chapter apply, as far as concerns personal property and fixtures in the jurisdiction of the state,

(1) to a transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, accounts, or contract rights; and

(2) to a sale of accounts, contract rights, or chattel paper.

UCC sec. 9-102 contains the same provisions, except that it:

- (1) deletes "in sec. 694 of this chapter on multiple state transactions" following "Except as otherwise provided";
- (2) deletes "so far as concerns any personal property and fixtures in the jurisdiction of the state" following "this chapter apply;"
- (3) deletes the reference to "contract rights" in paragraphs (1) and (2).

The reason for the first two deletions is the feeling on the part of the Commissioners on Uniform State Laws that this article of the UCC should be dedicated to secured transactions and that general questions of conflicts of laws should be left to Article 1 of the code.

The references to "contract rights" were deleted as unnecessary and confusing. This term has been deleted from all sections of UCC Article 9. Prior to 1972, the UCC distinguished a "contract right" from an "account" in terms of whether the right to payment had matured. If the right to payment under a contract had not yet been earned by performance by the creditor, then it was a "contract right." If the right to payment had matured, then it was an "account." Under the revised version, it is irrelevant whether the right to payment has been earned by performance. An account is defined in UCC sec. 9-106 as

any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance.

2. AS 45.05.694

AS 45.05.694 establishes rules for the choice of law where accounts, contract rights, general intangibles, and equipment relate to another jurisdiction. The UCC counterpart, 9-103, has been completely revised in accord with the sentiment expressed by the first two deletions in 9-102. The section now concerns itself exclusively with perfection of security interests and the effect of perfection or non-perfection. It establishes the basic rule that the controlling law, as to perfection of the security interests and the effect of perfection, is the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected. There are certain exceptions to the rule which are listed.

3. AS 45.05.696

AS 45.05.696 excludes certain transactions from coverage under Article 9. Its counterpart, UCC sec. 9-104, contains similar provisions; however,

There are noteworthy differences. Section 696(5) provides that the chapter does not apply to an equipment trust covering railway rolling stock. UCC sec. 9-104 deletes this provision with the following explanation:

The whole thrust of Article 9 is to eliminate differences based on the form of a transaction, and the equipment trust serves the same function as other purchase money forms of financing. In fact, a form known as the "New York equipment trust" comes closer to a conditional sale contract than it does to a Pennsylvania equipment trust, and thus the former exclusion left substantial uncertainty.

In place of this deleted paragraph, the UCC section inserts the following:

(e) to a transfer by a government or governmental subdivision or agency.

The Alaska section had previously included a paragraph which is similar in nature to the new UCC paragraph. Alaska's paragraph provides:

(12) to a security interest created by or on behalf of the state or any of its political subdivisions (including but not limited to the unorganized borough or any city or borough of any class, whether home rule or not) or any service area, public enterprise, public corporation, agency or instrumentality of the state or of any of its political subdivisions.

The UCC official comment explains its paragraph as follows:

Certain governmental borrowings include collateral in the form of assignments of water, electricity or sewer charges, rents on dormitories or industrial buildings, tools, etc. Since these assignments are usually governed by special provisions of law, these governmental transfers are excluded from this Article.

AS 45.05.696(6) provides:

to a sale of accounts, contract rights, or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts, contract rights, or chattel paper which is for the purpose of collection only, or a transfer of a contract right to an assignee who is also to do the performance under the contract.

UCC sec. 9-104(f) deletes references to "contract rights" in this paragraph and adds at the end of the phrase "or a transfer of a single account to an assignee in whole or partial satisfaction of a pre-existing indebtedness."

The latter amendment reflects the general scope of the article, which includes all commercial financing transactions. The transfer of a single account in satisfaction of a pre-existing indebtedness is a personal transaction not encompassed by the article.

Both the UCC section and the Alaska statute exclude transfers of interests in insurance policies and in deposit accounts. However, the UCC section notes that these interests are nevertheless subject to 9-603 (proceeds; secured party's rights on disposition of collateral) and 9-112 (priorities among conflicting security interests in the same collateral). Both sections also exclude rights represented by a judgment, but the UCC section notes that this does not include a judgment taken on a right to payment which was collateral.

4. AS 45.05.698

AS 45.05.698 and UCC sec. 9-105 provide definitions and indices of definitions. The UCC section includes several definitions which are not in the Alaska section. The following list includes the definitions not included in the Alaska section with parenthetical notes containing the official reason, if any, for their inclusion:

"Deposit account" means a demand, time, savings, passbook or like account maintained with a bank, savings and loan association, credit union or like organization, other than an account evidenced by a certificate of deposit (A definition of "deposit account" has been added to facilitate references to such accounts in the section on proceeds (Section 9-306));

"Encumbrance" includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests (Definitions of "encumbrance" and "mortgage" have been added as the basis for the use thereof in Section 9-313);

"Mortgage" means a consensual interest created by a real estate mortgage, a trust deed on real estate, or the like;

An advance is made "pursuant to commitment" if the secured party has bound himself to make it, whether or not a subsequent event of default or other event not within his control has relieved or may

Division Commission

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from his obligation (A definition of "purusant to commit-
been added as the basis for use of this concept in Sections 9-
1, and 9-132);

"transmitting utility" means any person primarily engaged in the
broad, street railway or trolley bus business, the electric or
electronics communications transmission business, the transmission
of goods by pipeline, or the transmission or the production and
transmission of electricity, steam, gas or water, or the provision
of sewer service (A definition of "transmitting utility" has been
added to identify a class of debtor with special filing problems on
far-flung properties, for which special filing rules are stated in
Part 4).

In addition to definitions which are not in the Alaska law, the UCC
section includes references to definitions which are not referenced in
the Alaska section. These references include

"Attach" Section 9-203

"Construction mortgage" Section 9-313(1)

"Fixture" Section 9-313(1)

"Fixture filing" Section 9-313(1)

"United States" Section 9-103

Other definitions which are included in the Alaska statute have been
modified in the UCC section. AS 45.05.692(2) defines "chattel paper" as
follows:

A writing or writings which evidence both a monetary obligation and
a security interest in, or a lease of specific goods [, but a charter
or other contract involving the use or hire of a vessel is not
chattel paper]; when a transaction is evidenced both by such a
security agreement or a lease and by an instrument or a series of
instruments, the group of writings taken together constitutes a
chattel paper

The portion in brackets has been added in the UCC section. The UCC note
on the reason for this portion follows:

To make clear that no type of ship charter is to be considered chattel paper. Many types of ship financing based on assignment of a charter involve international transactions, and there are numerous executed copies of the charter. Under Section 9-308 an assignment of chattel paper perfected by delivery of the chattel paper prevails over an assignment perfected by filing. Application of this rule would require the parties to change traditional practices in order to control all executed copies. Moreover, it is desirable to treat all types of ship charters alike, and some cannot be deemed chattel paper.

The Alaska definition [with the UCC addition in brackets] of "document"

document of title as defined in the general definitions of sec. 20 of this chapter [, and a receipt of the kind described in subsection (2) of Section 7-201].

The UCC addition includes the kind of receipt issued by a person who is not technically a warehouseman, as described in Section 7-201(2) and AS 45.05.542(b).

The UCC definition of "goods" includes two items which are not listed in the Alaska section. They are "minerals or the like (including oil and gas) before extraction" and "standing timber which is to be cut and removed under a conveyance or contract for sale." It deletes a reference in the Alaska version to "other things in action." The UCC explanation of the latter modification is:

The exclusion of "other things in action" from the definition of "goods" has been deleted as unnecessary. "General intangibles," which under Section 9-106 includes "things in action," are themselves excluded from the definition of goods.

5. AS 45.05.700

As 45.05.700 defines "account;" "contract right;" "general intangibles." The UCC section has been modified to delete references to "contract right."

6. No Corresponding Alaska Statute

The UCC article has adopted a section (9-114) which is not included in the Alaska law. The new section attempts to clarify the relationship between the filing rule for consignments under UCC sec. 2-326 (AS 45.-05.120) and Article 9. The UCC comment explains it as follows:

relieve him from his obligation (A definition of "pursuant to commitment" has been added as the basis for use of this concept in Sections 9-301, 9-307, and 9-132);

"Transmitting utility" means any person primarily engaged in the railroad, street railway or trolley bus business, the electric or electronics communications transmission business, the transmission of goods by pipeline, or the transmission or the production and transmission of electricity, steam, gas or water, or the provision of sewer service (A definition of "transmitting utility" has been added to identify a class of debtor with special filing problems on far-flung properties, for which special filing rules are stated in Part 4).

In addition to definitions which are not in the Alaska law, the UCC section includes references to definitions which are not referenced in the Alaska section. These references include

"Attach" Section 9-203

"Construction mortgage" Section 9-313(1)

"Fixture" Section 9-313(1)

"Fixture filing" Section 9-313(1)

"United States" Section 9-103

Other definitions which are included in the Alaska statute have been modified in the UCC section. AS 45.05.692(2) defines "chattel paper" as follows:

A writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods [, but a charter or other contract involving the use or hire of a vessel is not chattel paper]; when a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes a chattel paper.

The portion in brackets has been added in the UCC section. The UCC note on the reason for this portion follows:

to make clear that no type of ship charter is to be considered chattel paper. Many types of ship financing based on assignment of a charter involve international transactions, and there are numerous executed copies of the charter. Under Section 9-308 an assignment of chattel paper perfected by delivery of the chattel paper prevails over an assignment perfected by filing. Application of this rule would require the parties to change traditional practices in order to control all executed copies. Moreover, it is desirable to treat all types of ship charters alike, and some cannot be deemed chattel paper.

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The UCC article has adopted a section (9-114) which is not included in the Alaska law. The new section attempts to clarify the relationship between the filing rule for consignments under UCC sec. 2-326 (AS 45.05.120) and Article 9. The UCC comment explains it as follows:

An uncertainty has existed under the 1962 Code whether the filing rule in Section 2-326(3) applicable to true consignments requires only filing under Part 4 of Article 9 or also requires notice to prior inventory secured parties of the debtor under Section 9-312(3). The new Section 9-114 accepts the latter view and provides in substance that, in order to protect his ownership of the consigned goods, the consignor must give the same notice to an inventory secured party of the debtor that he would have to give if his transaction with the consignee was in the form of a security transaction instead of in the form of a consignment. This new section follows closely the language of Section 9-312(3) [AS 45.-05.754(c)].

7. AS 45.05.720

AS 45.05.720 relates to the enforceability of security interests. AS 45.05.722 establishes when security interests attach. UCC sec. 9-203 has modified these sections by combining them into one. The purpose was to cure "the former anomaly that a security interest could attach and be perfected, and yet be unenforceable against anyone for lack of a written security agreement."

In addition, the requirement that a security agreement covering oil, gas or minerals to be extracted contain a description of the land concerned has been eliminated in the UCC section. The reason for this change is that the article does not recognize a security interest in such collateral until it has been extracted from the land.

Finally, the new UCC section adds a new subsection to make clear that claims to proceeds under section 9-306 (AS 45.05.742) do not require a statement in the security agreement, for it is assumed that the parties so intend unless otherwise agreed.

8. AS 45.05.722

The provisions of AS 45.05.722 which do not deal with the attachment of a security interest have been modified in the corresponding UCC section.

The provisions in AS 45.05.722(b) have been eliminated altogether in the UCC section. That subsection provides:

(b) For the purposes of this section, the debtor has no rights

(1) in crops until they are planted or otherwise become growing crops; in the young of livestock until they are conceived;

- (2) in fish until caught; in oil, gas, or minerals until they are extracted; in timber until it is cut;
- (3) in a contract right until the contract has been made;
- (4) in an account until it comes into existence.

The reason for the deletion is that the subsection was unnecessary and in some cases confusing. Its operation appeared to be arbitrary, according to the UCC, and it was believed that the questions considered were best left to the courts.

The modified UCC version also eliminated the paragraph corresponding to AS 45.05.722(d)(1). That paragraph provided that no security interest in crops attaches under an after-acquired property clause to crops which become such more than one year after the security agreement, unless the agreement involved certain real estate transactions. The official comment states:

The obvious purpose of this provision was to protect a necessitous farmer from encumbering his crops for many years in the future. The provision did not work because there was no corresponding limit on the scope of a financing statement covering crops and under the Code's notice-filing rules the priority position of a security arrangement covering successive crops would be as effectively protected by the filing of a first financing statement whether the granting clause as to successive crops was in one security agreement with an after-acquired property clause or in a succession of security agreements. On the other hand the clause did require an annual security agreement for crops even when the encumbrance on crops was agreed to as part of a long-term financing covering farm machinery and other assets. The provision thus appeared to be meaningless in operation except to cause unnecessary paperwork, but it did introduce some element of uncertainty as to its purpose.

9. AS 45.05.726

AS 45.05.726 provides that an agreement by a buyer not to assert against an assignee of the seller any claim or defense he may have against the seller will be enforced if the assignee is an assignee for value, in good faith, and without notice of a claim or defense. The corresponding UCC section, 9-206, includes such agreements made by lessees. The UCC explanation is as follows:

In view of the substantial growth in lease financing and the quite parallel application of problems dealt with by this section to both conditional sale contracts and leases, it is believed this section should be made applicable to leases as well as to more traditional purchase money security interests.

10. AS 45.05.732

AS 45.05.732 lists the class of people who take priority over unperfected security interests. It includes persons who become lien creditors without knowledge of the security interest and before it is perfected. The UCC section, 9-301, eliminates knowledge as a factor for these people. The official reason states:

The former section denied the lien creditor priority even though he had knowledge when he got involved by extending credit, if he acquired knowledge while attempting to extricate himself. It was completely inconsistent in spirit with the rules of priority between security interests, where knowledge plays a very minor role.

AS 45.05.732 also defines "lien creditor". A lien creditor is a creditor who has acquired a lien on the property involved by attachment, levy, or the like. The UCC section adds a subsection which provides:

A person who becomes a lien creditor while a security interest is perfected takes subject to the security interest only to the extent that it secures advances made before he becomes a lien creditor or within 45 days thereafter or made without knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien.

This new subsection provides an absolute priority for the security interest over a judgment lien for 45 days regardless of knowledge of the secured party concerning the judgment lien. If, however, the advance is made after the 45 days, the advance will not have priority unless it was made or committed without knowledge of the lien obtained by legal proceedings. The importance of the rule is important in effectuating the intent of the Federal Tax Lien Act of 1966, although its importance may not be great as between secured parties making subsequent advances and judgment lien creditors.

11. AS 45.05.734

AS 45.05.734 delineates when filing is required to perfect a security interest and the security interests to which the filing provisions do not apply. Paragraph (a)(3) includes as a security interest to which

the filing provisions do not apply a purchase money security interest in farm equipment having a purchase price not in excess of \$2,500; but filing is required for a fixture under sec. 756 of the chapter or for a motor vehicle required to be licensed.

The UCC section, 9-302, deletes the reference to farm equipment in the belief that it was inappropriate; the effect of the rule was to make farmers' equipment unavailable to them as collateral for loans from some lenders. The UCC section inserts a new paragraph which

exempts from filing rules security interests created by assignment of beneficial interests in trusts and estates, because these assignments are not ordinarily thought of as subject to this Article, and a filing rule might operate to defeat many assignments.

In addition, the UCC section replaces the language above relating to fixtures and motor vehicles with the following:

"but filing is required for a motor vehicle required to be registered; and fixture filing is required for priority over conflicting interests in fixtures to the extent provided in Section 9-313 [AS 45.05.756]."

This makes filing for fixtures applicable only for priority against real estate interests.

The UCC section also adds a new paragraph to this subsection which exempts from filing assignments for the benefit of creditors. Such transactions were not felt to be "financing transactions."

Subsection (c) of AS 45.05.734 also exempts from the filing requirements of the chapter security interests in property subject to a statute of the United States providing for national registration or subject to a statute of Alaska providing for central filing. The UCC section replaces this subsection with two new subsections. One subsection exempts from the article transactions as to which an adequate system of filing, state or federal, has been set up outside the article, and the other subsection makes clear that when such a system exists perfection of a relevant security interest can be had only through compliance with that system (that is, filing under the article is not a permissible alternative).

Alaska's statute includes a subsection which is not in the UCC version. It exempts from the requirements of sections 768(a)(1) and (2), 772(b), (c), and (e) and 780 of the chapter security interests in personal property of any description created by a deed of trust or mortgage made by a corporation primarily engaged in the business of a common carrier

by rail, the furnishing of telephone or telegraph service, the transmission of oil, gas or petroleum products by pipeline, or the production, transmission or distribution of electricity, steam, gas, or water. The sections from which these security interests are exempted relate, respectively, to the place of filing, duration of and fee for filing, and information from a filing officer. The subsection provides a separate filing system for these security interests. The House Judiciary Committee report on the bill which added this subsection states:

Current law requires all chattel mortgages to be renewed every five years by a new filing. The purpose of the current law is to clean out the files of paid off mortgages that have not been formally released. Most chattel mortgages are for periods of less than five years.

This bill relieves the mortgagee from refiling mortgages every five years if the mortgage is signed by specified public utilities. Most public utility financing is long term and includes real property as well as personal. This bill does not defeat the purpose of the present law. (House Journal, 1967, p. 310)

12. AS 45.05.738

AS 45.05.738(a) relates to perfection of security interests in chattel paper, instruments, and negotiable documents. It provides:

A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in instruments (other than instruments which constitute part of chattel paper) can be perfected only by the secured party's taking possession, except as provided in (d) and (e) of this section.

UCC sec. 9-304 adds "money or" after "A security interest in" in the second sentence. It also adds a reference to 9-306 on proceeds at the end of the sentence as a further exception to that section. The change corrects an inadvertent omission in the 1962 text and makes clear that a security interest in money cannot be perfected by filing.

AS 45.05.738(e) provides a 21-day period during which a security interest remains perfected without filing if a secured party has a perfected security interest in an instrument, a negotiable document, or goods in possession of a bailee other than one who has issued a negotiable document for the goods, and makes the goods or documents representing the goods available to the debtor for sale or exchange. The UCC section adds a phrase which makes it clear that this period deals only with

perfection and that there must be compliance with the notice provisions of Section 9-312(3) in order to achieve priority over earlier inventory financiers." Corresponding clarifying changes have been made in Section 9-312(3).

13. AS 45.05.740

AS 45.05.740 provides for the perfection of security interests without filing. It lists the types of interests which may be so perfected. The UCC section, 9-305, adds to the Alaska list "money" to clarify the special position of money.

14. AS 45.05.742

AS 45.05.742(a) defines "proceeds". The UCC section, 9-306, adds a sentence to the definition which provides:

Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement.

The intent of this sentence is to overrule various cases to the effect that proceeds of insurance on collateral are not proceeds of the collateral. The "except" clause is intended to preserve the integrity of an insurance contract which specifies the person to whom the insurance is payable.

AS 45.05.742 also delineates the secured party's rights on disposition of collateral. It includes a perfected right to proceeds if the party claims them in a financing statement. The revised UCC version eliminates this "financing statement" procedure in favor of treating the filed claim to the original collateral as constituting automatically a filing as to proceeds on the theory that this was the intent of the parties, unless otherwise agreed. To this principle, the UCC version states a limitation: where the filing as to the original collateral is an inappropriate means of perfection as to proceeds of certain types, or is made at a place that is inappropriate as to such proceeds, the filed claim to the original collateral perfects the claim to proceeds for only 10 days.

AS 45.05.742 relates to perfected security interests in insolvency proceedings. The revised UCC version makes various changes to make clear that the claim to cash allowed in insolvency is exclusive of any other claim based on tracing.

15. AS 45.05.744

AS 45.05.744 establishes when a buyer of goods takes free of security interests. The section equates consumer goods with farm equipment having an original purchase price not in excess of \$2,500. This equation is deleted in the revised UCC section (9-307) in accordance with the change made in 9-302(1)(c) [see "11" of this memo relating to AS 45.05.-734].

The revised UCC section also adds a new subsection which provides:

(3) A buyer other than a buyer in ordinary course of business (subsection (1) of this section) takes free of a security interest to the extent that it secures future advances made after the secured party acquires knowledge of the purchase, or more than 45 days after the purchase, whichever first occurs, unless made pursuant to a commitment entered into without knowledge of the purchase and before the expiration of the 45 day period.

This new subsection clarifies the extent to which future advances under a security interest may outrank an intervening right.

16. AS 45.05.746

AS 45.05.746 establishes the circumstances under which a purchaser of chattel paper of a nonnegotiable instrument will take priority over a security interest. The UCC section, 9-308, has rewritten this language for clarity and to include negotiable instruments as well as nonnegotiable.

17. AS 45.05.754

AS 45.05.754 relates to priorities among conflicting security interests in the same collateral. Subsection (a) of that section specifies several sections which contain rules for determining priorities between security interests and such other claims in the situations covered in those sections. For cases not covered in those sections, section 754 states general rules of priority. The UCC section, 9-312, has rewritten this subsection and substantially simplified its coverage.

Subsection (c) states the circumstances which must exist for a purchase money security interest in inventory collateral to have priority over a conflicting security interest in the same collateral. This subsection has been substantially modified in the UCC version. The UCC version includes provisions which establish how often notice must be given under that subsection. The period of five years was chosen by analogy to the duration of a financing statement. It also addresses the question of the priority status of the security interest in inventory temporarily

perfected for 21 days without filing or perfection in a situation which begins with release of a pledged document under section 9-304(5). [See "12" of this memo relating to AS 45.05.738(e).] The answer provided is the usual rule that the purchase-money claimant to preserve his priority resulting from the document must give the required notice before the debtor receives possession of the inventory. If the secured party fails to give timely notice, he loses his priority under this subsection. Finally, it provides guidelines for establishing the priority between a person claiming accounts as proceeds of inventory and a person claiming the accounts by direct filing with respect thereto. The general rule enunciated is that a prior right to inventory does not confer a prior right to any proceeds except identifiable cash proceeds received on or before the delivery of the inventory (i.e., without the intervention of an account).

The UCC section reaches a different result in the next subsection relating to purchase money security interests in collateral other than inventory. Here, where it is not ordinarily expected that the collateral will be sold and that proceeds will result, it seems appropriate to give the party having a purchase money security interest in the original collateral an equivalent priority in its proceeds. The Alaska section is unclear on this point.

Subsection (e) of section 754 contains two principal rules: a first-to-file rule where both competing security interests are perfected by filing, and a first-to-perfect rule when either of the security interests is or both of them are perfected otherwise than by filing. Subsection (f) provides:

(f) For the purpose of the priority rules of (e) of this section, a continuously perfected security interest shall be treated at all times as if perfected by filing if it was originally so perfected, and it shall be treated at all times as if perfected otherwise than by filing if it was originally perfected otherwise than by filing.

These subsections have led to considerable debate over questions of "proceeds." The revised UCC section answers the questions raised by these subsections by stating a single rule in subsection (5) which ranks conflicting perfected security interests by their priority in time, dating back to the respective times when without interruption the security interests were either perfected or were the subjects of appropriate filings, and by deleting the provisions of subsection (f) in the Alaska section and inserting in its place a provision which states that a date of filing or perfection as to collateral is also a date of filing or perfection as to proceeds for the purposes of subsection (5).

The UCC section adds a new subsection which states priority rules for an intervening pledge in reference to a subsequent advance by an earlier-filed secured party.

18. AS 45.05.756

AS 45.05.756 relates to security interests in fixtures. The rules established in that section for priority do not apply to goods incorporated into a structure; encumbrances upon fixtures or real estate may be created under the law applicable to real estate. Subsections (b) and (c) are subject to limitations stated in subsection (d). Subsection (b) provides for the priority of a security interest in goods before they become fixtures over the claims of all persons who have an interest in the real estate. Subsection (c) provides that a security interest which attaches to goods after they become fixtures is valid against all persons subsequently acquiring interests in the real estate but is invalid against a person with an interest in the real estate at the time the security interest attaches to the goods who has not consented in writing to the security interest or disclaimed an interest in the goods as fixtures. Subsection (d) lists certain occasions which will not lead to the result dictated by (b) and (c). Subsection (e) allows a secured party, on default, to remove his collateral from the property.

UCC sec. 9-313 has completely rewritten this section. It introduces and defines the term "fixture filing." When a filing is intended to give the priority advantages discussed in the section against real estate interests, the filing must be for record in the real estate records and indexed therein, so that it will be found in a real estate search. The general principle of priority announced in this section is set forth in paragraph (4)(b). It is basically that a fixture filing gives to the fixture security interest priority as against other real estate interests according to the usual priority rule of conveyancing, that is, the first to file or record prevails. The section provides that no security interest exists in ordinary building materials incorporated into an improvement on land. Paragraph (4), which is the core provision of the section, provides:

(4) A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where

(a) the security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is

perfected by a fixture filing before the goods become fixtures or within ten days thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate; or

(b) the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate; or

(c) the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any method permitted by this Article; or

(d) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this Article.

Further subsections provide that even a nonperfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner if the latter has consented in writing to the security interest or the debtor has a right to remove the goods as against the encumbrancer or owner (if the debtor's right terminates, the priority of the security interest continues for a reasonable time); that a security interest in fixtures is generally subordinate to a construction mortgage recorded before the goods become fixtures; and that the secured party may, on default, remove his collateral from the property.

19. AS 45.05.766

The variation between this section of the Alaska statutes and the UCC version relate to elimination of the term "contract right" in UCC sec. 9-106.

20. AS 45.05.768

AS 45.05.768(a) lists the proper place to file in order to perfect a security interest in various types of collateral. This subsection is in conformance with "second alternative" for subsection (1) under the pre-1972 UCC sec. 9-401. The Alaska subsection requires filing for goods which are or are to become fixtures in the office where a mortgage on

the real estate concerned would be filed or recorded. The revised UCC subsection also requires filing in the same place for security interests in collateral which is timber or minerals.

AS 45.05.768(d) provides:

If collateral is brought into the state from another jurisdiction, the rules stated in sec. 694 of this chapter determine whether filing is necessary in this state.

The revised UCC section deletes "If collateral is brought into the state from another jurisdiction,".

The revised UCC section also adds two new subsections. The first new subsection provides a special rule for filing of a security interest in collateral, including fixtures, of a transmitting utility. The filing would be in a state office (presumably the Department of Administration in Alaska) rather than a local office in order to avoid the necessity of multiple filings for fixtures located in many areas of the state. The second new subsection establishes the residence of an organization for the purposes of the section. It is the place of business if the organization has one or its chief executive office if it has more than one place of business.

21. AS 45.05.770

AS 45.05.770 relates to amendments to and formal requisites of a financing statement. Several changes in UCC sec. 9-402 are conforming changes to new requirements in 9-401 that certain financing statements covering such collateral as timber and minerals be filed in the real estate records. The UCC section also responds to objections that the name of the debtor might not be in the real estate chain of title. Since 9-313(4)(a) and (b) permit fixture filing against persons in possession of the real estate who do not have interests of record, 9-402 requires the naming of an owner of record of the real estate in such cases, and 9-403(7) requires indexing the fixture filing against the name.

A new subsection in the UCC section makes it possible for a real estate mortgage to serve as a financing statement, and a related change in 9-403(6) makes it unnecessary to file continuation statements for such a financing statement.

Further changes in the UCC section provide that only the debtor need sign the statement rather than both the debtor and the secured party, that a secured party instead of the debtor may sign a statement to perfect a security interest in collateral as to which the filing has lapsed or collateral acquired after a change of name, identity or

corporate structure of the debtor; and that a financing statement sufficiently shows the name of the debtor if it gives the individual, partnership or corporate name of the debtor, whether or not it adds other trade names or names of partners.

22. AS 45.05.772

AS 45.05.772 relates to the duration of filing, the effect of lapsed filing, the duties of the filing officer, and what constitutes a filing. UCC sec. 9-403 differs from the Alaska section in that it makes every financing statement (except those in which the debtor is a transmitting utility and those which are real estate mortgages effective as fixture filings under 9-402) effective for a full five years. It also provides for the continued effectiveness of a statement during an insolvency proceeding until the end of the proceeding and for 60 days thereafter, or until the expiration of the five year period, whichever is later. Upon lapse, under the UCC section, the security interest becomes unperfected, unless it is perfected without filing. If the security interest becomes unperfected upon lapse, it is deemed to have been unperfected as against a person who became a purchaser or lien creditor before lapse.

A new subsection would give the filing officer authority to charge extra fees if the financing statement does not conform to a uniform prescribed size and content.

23. AS 45.05.774

AS 45.05.774 relates to termination statements. The UCC section, 9-404, requires the filing of termination statements in the case of consumer goods even without a demand by the consumer. This is not provided in the Alaska section. Other than in the case of consumer goods, the termination statement is required only upon written demand by the debtor.

24. AS 45.05.776

AS 45.05.776 relates to the assignment of security interests, the duties of filing officers, and fees. The Alaska section leaves the determination of fees to the administrative director of courts; the UCC section, 9-405, would establish the fees statutorily. Various changes have been made in the UCC section to conform with changes in other sections of Part 4 of the UCC article.

25. AS 45.05.778

AS 45.05.778 relates to releases of collateral, the duties of the filing officer, and fees. The comments under "24" are applicable to changes made in the UCC section, 9-406.

26. AS 45.05.780

AS 45.05.780 relates to information from the filing officer. The comments under "24" are applicable to changes made in the UCC section, 9-407.

27. No Corresponding Alaska Statute

A new UCC section, 9-408, provides as follows:

A consignor or lessor of goods may file a financing statement using the terms "consignor," "consignee," "lessor," "lessee" or the like instead of the terms specified in Section 9-402. The provisions of the Part shall apply as appropriate to such a financing statement but its filing shall not of itself be a factor in determining whether or not the consignment or lease is intended as security (Section 1-201(37)). However, if it is determined for other reasons that the consignment or lease is so intended, a security interest of the consignor or lessor which attaches to the consigned or leased goods is perfected by such filing.

This new section adapts the filing system of the article to consignments and leases. Filing of consignments is required under certain conditions (sections 2-326(3), 9-114). Filing of true leases which are not security interests is not required; but because the question whether a lease is a true lease may be a close one, filing is permitted for leases.

28. AS 45.05.782

AS 45.05.782(c) prohibits the waiver or variance of certain rules in the chapter relating to default to the extent that they give rights to the debtor and impose duties on the secured party. An exception is allowed as provided with respect to compulsory disposition of collateral in section 790(a). The revised UCC section, 9-501, makes a "purely technical" change by referring to the UCC section corresponding to AS 45.05.788 as well as to that corresponding to section 790(a). The change clears up an ambiguity as to whether a debtor could after default agree on the time within which a sale might be held or the time after which a secured party might keep the goods in lieu of a sale.

29. AS 45.05.788

AS 45.05.788 relates to the allowable means of disposing of collateral after default. It requires reasonable notice of the disposition to be given by the secured party to the debtor and "except in the case of consumer goods, to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in the state or who is known by the secured party to have a security interest in the collateral." The UCC section, 9-504, replaces the quoted language with "if he has not signed after default a statement renouncing or modifying his right to notification of sale."

The reason for the change is provided in the official reasons as follows:

Under the 1962 Code the secured party giving notice of sale had to notify (except in the case of consumer goods) not only every other person who had duly filed a financing statement indexed in the name of the debtor in the state and who still had a security interest in the collateral, but also any other person known by the secured party to have an interest in the collateral. This meant that the secured party had to search the records in every case of notice of sale, to ascertain whether there were any other secured parties with financing statements that might be deemed to cover the collateral in question. Moreover, he ran the risk that some informal communication by letter, or even orally, might be deemed to have given him knowledge of the interest of that other party. These burdens of searching the record and of checking the secured party's files were greater than the circumstances called for because as a practical matter there would seldom be a junior secured party who really had an interest needing protection in the case of a foreclosure sale. Therefore, a change is made requiring notice to persons other than the debtor only if such persons had notified the secured party in writing of their claim of an interest in the collateral before he sent his notification to the debtor or before the debtor's renunciation of his rights.

30. AS 45.05.790

AS 45.05.790 allows a secured party in possession, after default, to retain the collateral in satisfaction of the obligation and requires notification similar to that required in section 788. The UCC section, 9-505, contains a modification similar to that made in the previous section.

KEV:jdn

Com Code

UNIFORM COMMERCIAL CODE

1960 3 ADOPTED

NOT REPEALED REVISIONS (1971) SEVERAL TRANSFORMATIONS
(32 JURISDICTIONS HAVE ADOPTED)

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