

ALASKA LEGISLATURE COMMITTEE FILES 1999-2000 8672

9861 HOUSE JUDICIARY

and in 1933 added a provision allowing creditors to be bound by the state's adjustment plan. [FN94] These laws were constitutionally challenged soon thereafter in *Faitoute Iron & Steel Co. v. City of Asbury Park, N.J.* [FN95] The plaintiffs were holders of defaulted bonds issued prior to the enactment of the New Jersey statutes. [FN96] Under the readjustment plan, the plaintiff's bonds were converted to new bonds, bearing reduced interest from the original bonds. [FN97] The plaintiffs claimed that since the New Jersey laws constituted municipal bankruptcy legislation, enactment of federal Chapter 9 had preempted New Jersey's statutes, making their enforcement unconstitutional. [FN98] Alternatively, they asserted that their rights under the Contracts Clause [FN99] had been violated. [FN100]

The Supreme Court upheld the New Jersey statutes on broad grounds. [FN101] Citing *United States v. Bekins*, [FN102] the Court emphasized the care with which the federal statutes had been drawn, specifically in order to avoid restricting states' control over their fiscal affairs. [FN103] Finding significance in the fact that the New Jersey statutes expressly forbid resort to Chapter 9 without approval of the Municipal Finance Commission, the Court refused to find that state power to manage financial problems of state subdivisions could be absorbed into the federal statutes. [FN104]

Congress, however, disagreed with the Supreme Court and enacted what is now section 903. [FN105] Section 903 prevents state authorization of compositions of indebtedness which are binding on non-consenting creditors. [FN106] Congress' stated purpose in enacting this section was to ensure equal treatment of municipal bondholders throughout the nation. [FN107]

*1013 While it is generally accepted that states cannot exercise bankruptcy powers, [FN108] there may be reason to believe the principle survives. [FN109] In 1975, the New York legislature enacted emergency legislation in an effort to deal with New York City's fiscal crisis. [FN110] As part of the plan, the time for payment on municipal notes was extended, with additional interest for those who exchanged their old notes for new ones. [FN111]

Noteholders challenged the practice as a violation of the Contracts Clause and of the Bankruptcy Act. [FN112] The court rejected the Contracts Clause challenge, [FN113] relying on the reasoning of *Faitoute Iron & Steel*. [FN114] The plaintiffs' Bankruptcy Act challenge [FN115] was rejected as well, because the New York legislation involved 'extension' rather than 'composition', which the court ruled was not precluded under the Act. [FN116] Thus, it may be that federal courts will still allow some involuntary aspects in state debt composition plans, a power usually assumed to be reserved to the federal bankruptcy court. [FN117]

Michigan, Pennsylvania, Illinois, and Nevada have enacted detailed plans for addressing municipal fiscal distress which differ from the New York and New Jersey plans because they do not include the supervision of reorganization plans by state courts. [FN118] All of the plans contain statutory authority to appoint a financial management team to review the entity's *1014 finances, then create and implement a plan of action. [FN119] The Michigan and Pennsylvania plans specifically allow the review team or its chairperson to authorize a Chapter 9 filing, although for some entities approval of the Governor is required as well. [FN120]

In Illinois, on the other hand, the statutes are silent about a municipality's authority to file Chapter 9 proceedings. The financial planning and supervision commission, and its financial advisor, have powers and duties similar to the financial management teams in Pennsylvania and Michigan, including the authority to recommend that the unit of local government file a petition under Chapter 9. [FN121] However, nebulous language like 'authority to recommend' is not the same as specific power to authorize, and it is unlikely that courts will be willing to construe such language as expressed state authority under the amended section 109(c)(2). [FN122] Nevada's plan is also silent on bankruptcy, omitting any reference even to recommending Chapter 9 filing within the allotted

powers of the review team or its members. [FN123]

*1015 D. Statutory Provisions Which Preclude Municipal Bankruptcy

Only Georgia has a statute which specifically prohibits municipalities from filing Chapter 9 without exception. [FN124] Other states, however, have designed their governmental structure in such a way that bankruptcy filing is essentially impossible, even though not prohibited. [FN125] In addition, since Congress amended section 109(c)(2) to require specific enabling legislation, the many states which are entirely silent on the matter, for all practical purposes, preclude it.

Kansas has a unique set of laws which require all political subdivisions to operate on a cash-only basis. [FN126] Some debt is permitted, but strictly limited. [FN127] Since it is unlawful to incur debt beyond the rigid parameters allowed by the state, circumstances which might lead to bankruptcy are virtually impossible.

Another state with a unique statutory design is Massachusetts. [FN128] First, Massachusetts, like many other states, has carefully limited amounts and types of debt which entities are permitted to incur. [FN129] But, before a municipality can assume a financial liability, a two-thirds approval vote of its citizens is required. [FN130] If a municipality determines that it is unable to pay its debts, the Commissioner of Revenue must be notified. [FN131] If the Commissioner concurs with the municipality's conclusion following a separate investigation, the State Treasurer must pay what is owed on the debt. [FN132] The money owed by the municipality will then be recovered, plus costs and interest, from money otherwise payable from the state to the local entity. [FN133] No provision enabling entities to file under Chapter 9 is included in the Massachusetts Code.

*1016 Finally, twenty-one states simply have not enacted any enabling legislation, nor developed statutory plans for dealing with municipal fiscal distress. [FN134] A number of these states had Chapter 9 filings prior to the 1994 Amendments, and where courts found authorization for those filings, it was under the general powers. [FN135] In these states, political subdivisions which continue to suffer financial stress will no longer have the protection of the federal bankruptcy court unless the state passes authorizing legislation. [FN136]

V. The Continuing Threat of Insolvency

When municipalities incur debt, it is generally in the form of bonds, issued for the purpose of financing revenue-producing projects, such as roads, utilities, swimming pools, and school buildings. [FN137] Society has determined that local governments need the flexibility to finance necessary improvements through municipal bonds, with the consent of the citizens. [FN138] Unfortunately, all municipalities continue to face economic hardships, and those hardships, without stable guidance from the state, can lead to uncertainty in the bond market. [FN139]

A number of factors can cause a municipality to default on its bonds. [FN140] First, a serious recession can result in a reduction in revenues so that the municipality cannot pay on its debts while maintaining necessary services. [FN141] Bridgeport, Connecticut's experience is illustrative. [FN142] The combined effects of a large poor population, a declining tax base and political battles pushed Bridgeport into filing bankruptcy. [FN143] Many other *1017 cities have problems which mirror Bridgeport's, and perhaps it is only a matter of time until others follow into default. [FN144]

Of course, our system includes the ability of local governments to raise taxes to meet the community's needs, but taxpayers are increasingly hostile to higher taxes without visible benefits. [FN145] Perhaps the clearest manifestations of that hostility are measures such as Proposition 13 [FN146] in California, where taxpayers amended the state constitution to limit the ability of

government to raise taxes. [FN147] Taxpayers are also attracted to "flat tax" proposals, with widely disputed effects on available revenues. [FN148] Municipal bankruptcy commentator James E. Spiotto said this, regarding the tension between limits on taxation and necessary public spending:

The difficulty with an artificial and unrealistic tax cap and similar constitutional limits on taxation is that there are certain municipal services that are required and expected by the citizenry. If revenues available to municipalities are capped in an unrealistic and artificial way, obviously the ability of municipalities to supply those services is significantly curtailed. That is not to say that there should not be limits on the spending of public dollars or that taxation should be allowed to become an unlimited resource in the hands of a misguided or misdirected governmental body. It is merely to state the obvious fact that, when there is a ceiling on revenues unrelated to costs and expenses, there will be a tension. [FN149]

One of the largest sources of revenue to the states is the federal government. [FN150] When a recession hits, demand for federal programs such as food stamps, unemployment and Medicaid increase dramatically, and the federal government responds by increasing the states' allotments. [FN151]

However, Congress has threatened to enact a balanced budget amendment to the Constitution, a move which appears to have considerable *1018 popular support. [FN152] Under any amendment proposal, increases in federal aid to states would depend on either a federal tax increase or cuts in other programs. [FN153] Some proposals require a "super-majority" of all members in both the House and the Senate for any tax increase. [FN154] It is, of course, uncertain what effect an amendment would have on municipal finances, but it undoubtedly could threaten a city's ability to survive recessionary times.

Other possible causes of default are negligent or fraudulent mismanagement by the governing body or by particular officials. [FN155] This can include such things as incompetent budgeting, imprudent investments and even misuse of funds for political or personal gain. [FN156] The Orange County [FN157] case in California is demonstrative, where risky investments, inspired in part by efforts to offset the effects of Proposition 13, led to bankruptcy. [FN158]

Orange County is apparently not the last major American urban entity to face a fiscal crisis brought on by financial mismanagement. On November 26, 1996, Miami, Florida, Mayor Joe Carollo requested the governor to declare a "financial emergency" in Miami, as a first step toward gaining major state assistance for the city. [FN159] Earlier in the year, both the city finance manager and city manager were forced to resign as the result of a corruption scandal. [FN160] The budget shortfall is estimated to be at least \$68 million, and as an immediate result, Miami's bond ratings have dropped precipitously, making it difficult for the city to work its way out of debt through bond sales. [FN161] One idea to resolve the crisis includes abolishing the Miami city government, and absorbing it into surrounding Dade County. [FN162]

Yet another precipitating cause for default, large liability judgments, is particularly applicable to general municipalities (as opposed to special purpose districts). [FN163] Imagine the predicament a rural school district or a *1019 small town would face with a judgment equal to or greater than its total budget for an entire year if, for instance, a school bus or a town truck struck a car and permanently injured the car driver. It is inconceivable that the taxpayers of a poor, rural area could shoulder such a debt and keep the schools or the town operating as usual. [FN164] In fact, a number of municipalities have already been pushed into bankruptcy by large tort judgments and environmental claims. [FN165] Furthermore, environmental claims under CERCLA [FN166] are steadily increasing and are likely to threaten municipalities, the owners of many former and current industrial sites, long into the future. [FN167]

VI. A Time for State Action

In light of the perpetual need for municipal debt financing and the myriad of potential threats to financial stability, access to the bankruptcy courts continues to be a matter worthy of careful scrutiny by the states. Now that Congress has made specific authorization the law, each state must evaluate to what extent a municipality within its borders may have access to such a remedy. It is no longer enough to leave it to the bankruptcy court to analyze state law, searching for state authorization for subdivisions to enter into bankruptcy.

States have begun the process of evaluating their statutory schemes to determine what their position on municipal bankruptcy will be. Missouri, for instance, has enacted straightforward enabling legislation following the adoption of the 1994 Bankruptcy Reform Act, with its revision of section *1020 109(c)(2). [FN168] This is a state which has had some experience in recent years with municipal bankruptcy filings. [FN169] Evidently, Missouri found compelling value in the bankruptcy process, and has chosen to keep the option available to its political subdivisions.

Illinois is also poised to consider enabling legislation. [FN170] The Illinois State Bar Association has been studying the matter since 1994, and its proposed enabling legislation is expected to be considered by the Illinois General Assembly during the 1996-97 term. [FN171] If enacted, authority to file Chapter 9 would be added to the general powers of state municipalities, a far broader measure than the present Illinois provision allowing the financial planning and supervision committee to recommend filing. [FN172]

*1021 California, on the other hand, which has consistently authorized municipal bankruptcy, has contemplated restrictions on authority to file Chapter 9. [FN173] In the wake of the Orange County bankruptcy filing, [FN174] a bill was introduced into the California State Assembly which would drastically alter access to Chapter 9 for California municipalities. [FN175] The bill required specific authorization by the legislature for each Chapter 9 filing, and required the municipality's debt adjustment plan to be submitted to the legislature before submission to the bankruptcy court. [FN176] The amended statute contained language which purported to preserve specific authorization to be a Chapter 9 debtor, but delay and conflict inherent in the political process may very well make access to Chapter 9 unavailable when it is most needed. [FN177] At least for the present, California municipalities *1022 remain able to become Chapter 9 debtors, since the bill was rejected in committee. [FN178]

Perhaps other states are studying the matter and considering appropriate legislation. Evidence exists as well that some states are unaware of the change in section 109(c)(2), or have not yet considered what approach to take under the amended statute. [FN179] In any event, the inconsistency of state statutes for dealing with municipal bankruptcy, or the lack of any statutory framework, is confusing for the bond market, for municipal authorities and for bankruptcy practitioners. Some consistency is needed to end this confusion, and that consistency could be attained through the development and adoption of uniform laws.

One of the primary criticisms of bankruptcy law concerns uniformity of the law within the meaning of the Bankruptcy Clause. [FN180] Because widely divergent state laws are so thoroughly entwined with the federal Bankruptcy Code, uniformity is far from evident in this context. [FN181] But the Supreme Court, in *Hanover National Bank v. Moyses*, [FN182] determined that only "geographical uniformity" and not "personal uniformity" is required by the Constitution. [FN183] Debtors within a state must be treated equally, but there is no requirement for the states to deal uniformly with debtors. [FN184] Adoption of uniform laws for managing municipal insolvency might leave considerable divergence between states, but would increase uniformity in a broad sense, reducing confusion for those who deal with municipal finances.

State insolvency laws are sometimes accused of actually being bankruptcy law, and thus preempted by Congress exercising its power under the Bankruptcy Clause. [FN185] Clearly, section 903 [FN186] limits state action short of what is available in bankruptcy court. However, New Jersey's statutory scheme for adjustment or composition of claims of creditors is still good law, and recomposition plans in other states like Pennsylvania, *1023 Michigan and Illinois have not been significantly challenged. [FN187] State-based plans, with a last resort of filing in federal court under Chapter 9, probably would survive constitutional challenge. [FN188]

Some commentators have suggested expanding the powers of the bankruptcy courts under Chapter 9, granting the court broad powers to reorganize, sell city property and raise taxes. [FN189] Similar provisions are available to the court under Chapter 11 of the Bankruptcy Code [FN190] to assist in the reorganization of businesses. Making Chapter 9 more like Chapter 11 would permit the bankruptcy court to actively and aggressively restore the financial stability of an insolvent municipality. [FN191]

However, in today's political climate favoring the down-sizing of federal government, block grants to states, and the reduction of federal regulations, such proposals are likely "dead on arrival" at Congress. Moreover, Congress did not change Chapter 9 in the 1994 revisions, it only changed access to it by amending section 109(c)(2). Thus, Congress continues to stand behind the provisions in Chapter 9, but it intends for states to actively decide to what extent their political subdivisions can take advantage of it. [FN192]

It has also been advocated that states should be given power to displace federal municipal bankruptcy law with state municipal bankruptcy law. [FN193] Such a move would require repealing section 903, thus reviving the state bankruptcy precedent as enunciated in *Faitoute Iron & Steel*. [FN194] This action would also be a drastic change from the existing system, and might rekindle arguments about the Contracts Clause and Bankruptcy Clause conflict. [FN195] In addition, new arguments are likely to arise over conflict with full faith and credit for neighboring states' bankruptcy decisions. [FN196] Finally, it might necessitate dual federal and state systems, in order to accommodate states without their own bankruptcy system—a potentially costly alternative. [FN197]

As previously suggested, a preferable improvement to the current system would be the development of uniform laws for state management of *1024 municipal financial problems, which the states could adopt in their entirety, or with modifications. [FN198] The existing Chapter 9 process, while limited in the scope of its powers, has been effective, particularly in assisting special districts. [FN199] Chapter 9 should remain available to those states that wish to utilize it, as a last resort in the event all other efforts to resolve the entity's problems fail.

A number of states have extremely comprehensive statutory plans already in place, which would serve as excellent models for uniform laws. [FN200] As a first step, states should consider requiring balanced budgets for their subdivisions. This will not cure already existing deficits, but will require discipline and push municipalities toward finding solutions. [FN201] In the event the entity cannot solve its financial problems by itself, the uniform law framework should be available to direct the municipal authorities toward a solution. A skeletal framework of what should be included in the uniform laws follows:

1. Definitions—what entities are included, what officials locally and on the state level are responsible, and what kinds and amounts of debts are covered.
2. Preliminary review—specific authority to a particular person (state treasurer, tax commissioner, governor) or agency to make a preliminary review of the fiscal problems; also, a list of events which will trigger the initial review, what persons can initiate; standards for further action.

23 OHENULR 1001

Page 10

(Cite as: 23 Ohio N.U. L. Rev. 1001, *1024)

3. Financial oversight authority/commission-at least a team of state officials and others with professional financial expertise appointed with power to do any or all of the following: appoint a paid temporary manager, analyze the budget, recommend new revenue sources, recommend budget cuts, recommend the sale of municipal property/assets, issue bonds for the benefit of the entity (accompanied by standards and goals for the municipality to comply with before receiving funds), authorize filing of Chapter 9, do long-term financial planning, negotiate for a state loan or grant, review and renegotiate labor contracts, and recommend dissolution.

*1025 4. Procedure to end state oversight who decides and what standards must be met. [FN202]

VII. Conclusion

Municipal bankruptcy remains a controversial issue. However, the lack of revision to Chapter 9 provisions, combined with the change to section 109(c)(2) in the 1994 Bankruptcy Reform Act, indicates that Congress is reasonably satisfied with Chapter 9, but now expects states to indicate to what extent they will allow political subdivisions to take advantage of that process. The states have adopted a wide range of approaches to municipal insolvency, resulting in confusion in the bond market and lack of direction for municipal authorities and financial planners. Municipal finances are threatened from multiple directions and states have a responsibility to give guidance to their political subdivisions.

The time is ripe for the development of uniform laws for the management of municipal insolvency. If adopted by the states, clarity and stability would be attached to a historically murky area of the law. The bond market would have an improved measure of the security attached to municipal bonds. Chapter 9 should remain as a viable ultimate alternative, but careful state supervision and a uniform approach may eliminate its need in the future. *1026 Page 1 Appendix-Cover Letter

[Address]

October ____

[Name]

[Title]

[Agency]

[Address]

Dear [Name]:

I am a third year law student at Ohio Northern University College of Law. I am involved in an independent-study research and writing project concerning municipal bankruptcies under Chapter 9 of the Bankruptcy Code. The primary focus of the project concerns access to Chapter 9 since enactment of the 1994 Bankruptcy Code Amendments.

As you may know, access to Chapter 9 under 11 U.S.C. section 109 (c) has always been quite narrow and deferential to state control. However, before the 1994 amendments a municipality could be a debtor in a Chapter 9 case if "generally authorized" by state law to be a Chapter 9 debtor. The majority of courts liberally interpreted this section by ruling a municipality eligible if generally authorized to conduct and transact business and enter into contracts under state law. There may have been some Chapter 9 cases in [State] undertaken through this interpretation of the statute.

Section 109 (c)(2) was amended in 1994 to require that a municipality must be "specifically authorized" to be a debtor in a Chapter 9 case. Part of my article will be a survey of all 50 states, including the various approaches applied by the states to Chapter 9. Because I cannot find enabling legislation in your state, or because what appears to be enabling legislation is not entirely clear, I am requesting further information.

Please take a few minutes to complete the enclosed survey form. I have enclosed a self-addressed,

23 OHIO L.R. 1001

Page 11

(Cite as: 23 Ohio N.U. L. Rev. 1001, *1026)

stamped envelope to facilitate return. Copies of any relevant documents may be attached if you so desire. Thank you in advance for your assistance.

I know that your office is extremely busy, but I am under considerable time restraint. Please attempt to provide answers as soon as feasible, so that I may include reliable information about your state in my article. I will gladly provide you with information which I have collected once the article has been completed. Thank you again

Sincerely,

Daniel J. Freyburg

Enclosures

*1027 Page 2 Appendix-Survey Form

1. Please identify your state. _____

2. Is there enabling legislation currently in effect in your state? Yes ___ No ___

If so, please identify statute. _____

3. Is there any enabling legislation pending or otherwise being considered by your state legislature? Yes ___ No ___

If so, please identify House or Senate Bill number. _____

4. If there is no legislation either in effect or pending, how would your state handle a request by a municipality for permission to file bankruptcy?

5. Is there a specific agency, commission, or other person or persons to whom such a request would be referred for evaluation and/or approval? Yes ___ No ___

If yes, please identify by title. _____

If yes, what role would such agency, commission, person(s) play?

Please provide any other information concerning Chapter 9 as applied in your state which might be helpful to a bankruptcy practitioner in your state.

Preparer: _____

Phone: _____

FN1. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5, 12-24 (1995); Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. Chi. L. Rev. 425, 450-55 (1993).

FN2. U.S. Const. amend. X. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Id.

FN3. U.S. Const. art. I, § 8, cl. 4. The Congress shall have the power "[t]o establish . . .

uniform laws on the subject of bankruptcies throughout the United States." *Id.*

FN4. See discussion *infra*, Part II and III, and accompanying notes.

FN5. Larry Winograd, *San Jose Revisited: A Proposal for Negotiated Modification of Public Sector Bargaining Agreements Rejected under Chapter 9 of the Bankruptcy Code*, 37 *Hastings L.J.* 231, 288 (1985). In municipal bankruptcies, unlike those under other chapters of the code, the court has little authority over the debtor's affairs. *Id.* The court may not interfere with property and revenues, nor with political or governmental powers. *Id.*

FN6. 11 U.S.C. §§ 101-1330 (1994).

FN7. See Part III *infra*.

FN8. 11 U.S.C. §§ 901-946 (1994).

FN9. Pub. L. No. 103-394, 108 Stat. 4106 (codified as amended in scattered sections of 11 U.S.C.).

FN10. 11 U.S.C. § 109(c)(2)(1994).

FN11. § 109(c)(2) (emphasis added). The italicized words are new language replacing the former "generally authorized" language.

FN12. 11 U.S.C. § 109(c)(2) (1988).

FN13. 6 William L. Collier, *Collier on Bankruptcy* 900.LEH[1] 900-23 (Lawrence P. King ed., 15th ed. 1991).

FN14. Act of May 24, 1934, ch. 657, 50 Stat. 653 (1937).

FN15. *Bankruptcy Act*, ch. 541, 30 Stat. 544 (1898) (repealed 1978).

FN16. 298 U.S. 513 (1936).

FN17. *Id.* In *Ashton*, a Texas water improvement district filed a bankruptcy petition under the new Act, seeking to adjust its bond indebtedness. *Id.* at 523. The district court dismissed the petition for lack of jurisdiction, finding that "petitioner is a mere agency or instrumentality of the state. . . . The bonds are contracts of the state, executed through this agency, and secured by taxes levied upon local property. Congress lacks power to authorize a federal court to readjust obligations." *Id.* at 524. The decision was 5-4, with Justice McReynolds delivering the majority opinion, dissent by Justice Cardozo, joined by Chief Justice Hughes, Justice Brandeis, and Justice Stone. *Id.* at 513.

FN18. *Id.* at 531. The Court stated, "If obligations of states or their political subdivisions may be subjected to the interference here attempted, they are no longer free to manage their own affairs; the will of Congress prevails over them. . . the sovereignty of the state. . . does not exist." *Id.* (citing *Farmers' & Mechanics' Sav. Bank v. Minnesota*, 232 U.S. 616, 626 (1914); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 430 (1819)). The Court continued by citing the Contracts Clause (U.S. Const. art. I, § 10), noting that states cannot pass statutes which impair contracts in any form including bankruptcy, nor could Congress enact any statute which might impair contracts. *Id.* "Neither consent nor submission by the states can enlarge

the powers of Congress; none can exist except those which are granted." *Id.* (citing *United States v. Butler*, 297 U.S. 1, 66 (1936)).

FN19. Municipal Bankruptcy Act, 50 Stat. 663 (1937).

FN20. 50 Stat. at 653. The 1937 Act: (1) prohibited interference with fiscal or governmental matters of municipalities; (2) limited the protection of bankruptcy to the taxing agency; (3) barred involuntary proceedings; (4) forbade judicial control or jurisdiction over property and revenues necessary for essential services; and (5) prohibited impairment of contractual obligations by states. James E. Spiotto, *Introduction to Municipal Bankruptcy*, 378 *PLJ/Real* 611, 614 (Jan.-Feb. 1992).

FN21. *United States v. Bekins*, 304 U.S. 27 (1938).

FN22. *Winograd*, *supra* note 5, at 272-73 (citing Note, *Municipal Bankruptcy, the Tenth Amendment and the New Federalism*, 89 *Harv. L. Rev.* 1871(1976) [hereinafter Note]). In *Bekins*, the Court did not expressly rely upon the changes in the law to distinguish *Ashton*. *Winograd*, *supra* note 5, at 272. Instead, Chief Justice Hughes compared the consensual nature of bankruptcy to the consensual arrangement between federal and state government in social security and unemployment law, concluding that the voluntary nature of the proceeding prevented interference with state sovereignty. *Winograd*, *supra* note 5, at 272. See *Bekins*, 304 U.S. at 27. The Chief Justice was joined by Justices Brandeis, Stone, Roberts, Reed, and Black, with Justices McReynolds and Butler dissenting and Justice Cardozo not participating. *Bekins*, 304 U.S. at 45, 54. The *Ashton* majority was depleted by the retirements of Justices Sutherland and VanDevanter, and by Justice Roberts switching sides. Note, *supra*, at 1897 n.169. The dissenters in *Ashton* were bolstered by the appointments of Justices Black and Reed. Note, *supra*, at 1897 n.169.

FN23. Jonathan J. Spitz, *Federalism, States, and the Power to Regulate Municipal Bankruptcies: Who May Be A Debtor Under Section 109(c)*, 9 *Bankr. Dev. J.* 621, 623 (1993). Of particular interest is the addition in 1946 of § 83(D), partially reversing the Supreme Court's holding in *Faitoute Iron & Steel Co. v. Asbury Park*, 316 U.S. 502 (1942) (upholding New Jersey law allowing municipalities to recompose debt over objections by creditors). Spitz, *supra*, at 623. See discussion and notes *infra*, Part IV.

FN24. Spitz, *supra* note 23, at 624.

FN25. *Winograd*, *supra* note 5, at 273.

FN26. *Winograd*, *supra* note 5, at 273.

FN27. Act of Apr. 8, 1976, Pub. L. No. 94-260, 90 Stat. 315 (codified in scattered sections of 11 U.S.C.). These revisions were later enacted in the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-1326 (1982) and scattered sections of U.S.C.). See also Spitz, *supra* note 23, at 624-25.

FN28. Act of Apr. 8, 1976, Pub. L. No. 94-260, § 82(b)(2), 90 Stat. 315 (1976) (codified at 11 U.S.C. § 402 (1982)); see 11 U.S.C. §§ 364(c)-(c) (incorporated by 11 U.S.C. § 901(a) (1982) after 1978).

FN29. Act of Apr. 8, 1976, Pub. L. No. 94-260, § 82(b)(1), 90 Stat. 315 (1976) (codified at 11 U.S.C. § 402 (1982)); see 11 U.S.C. § 365 (incorporated by 11 U.S.C. § 901(a) (1982) after

1978).

FN30. Winograd, *supra* note 5, at 275-76.

FN31. Winograd, *supra* note 5, at 275-76 n.204.

FN32. 11 U.S.C. § 109(c)(1)-(5) (1994). The statute reads:

An entity may be a debtor under chapter 9 of this title if and only if such entity-

(1) is a municipality;

(2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;

(3) is insolvent;

(4) desires to effect a plan to adjust such debts; and

(5) (A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter, (B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter, (C) is unable to negotiate with creditors because such negotiation is impracticable; or (D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.

§ 109(c)(1)-(5).

FN33. § 109(c)(1).

FN34. § 101(40).

FN35. § 109(c)(2). As noted in the Introduction to this comment, this section was changed to the present language in the 1994 Amendments. The states' current approaches to this requirement is the focus of this comment, and will be addressed further *infra*.

FN36. § 109(c)(3).

FN37. § 101(32)(C)(i)-(ii).

FN38. Spitz, *supra* note 23, at 628. A good statement to this effect is made in *In re Pleasant View Util. Dist.*, 24 B.R. 632, 639 n.6 (Bankr. M.D. Tenn. 1982):

The creditor intimates that the debtor could possibly receive more cash flow and thereby reduce its debt by increasing the rates charged to its customers. . . . In any event, the mere contingency that the District could improve its financial situation by increasing its rates does not alter the fact that at the present time the District cannot meet its debts as they mature.

Id. But in *In re City of Bridgeport*, 129 B.R. 332 (Bankr. D. Conn. 1991), the judge dismissed the case for failing to meet the insolvency requirement, primarily because more credit was available to the city. *Id.* at 337-39.

FN39. 11 U.S.C. § 109(c)(4) (1994).

FN40. Eric S. Pommer & Marc M. Friedman, *Municipal Bankruptcy and Its Effect on Government Contractors*, 25 Pub. Cont. L.J. 249, 264 (1996).

FN41. § 109(c)(5)(A).

FN42. § 109(c)(5)(B).

FN43. § 109(c)(5)(C).

FN44. § 109(c)(5)(D); § 647.

FN45. Eric W. Lam, *Municipal Bankruptcy: The Problem with Chapter 9 Eligibility-A Proposal to Amend 11 U.S.C. § 109 (c)(2)* (1988), 22 *Ariz. St. L.J.* 626, 631-32 (Fall 1990).

FN46. *Id.* at 631 (citing H.R. §207, 95th Cong., § 109(c) (1977), reprinted in *Legislative History of Bankr. L. Ed. (Law. Co-op.)* § 82:24, at 619 (1979)).

FN47. Act of Apr. 8, 1976, Pub. L. No. 94-260, 90 Stat. 315, 317 (codified at 11 U.S.C. §§ 401-418 (Supp. 1976)).

FN48. Lam, *supra* note 45, at 631 (citing H.R. Rep. No. 95-595, at 319, reprinted in *Legislative History of Bankr. L. Ed. (Law. Co-op.)* § 82:15, at 326 (1979)).

FN49. Lam, *supra* note 45, at 631 (citing S. 2266, 95th Cong. § 906 (1978), reprinted in *Legislative History of Bankr. L. Ed. (Law. Co-op.)* § 83:31, at 610 (1979)).

FN50. Lam, *supra* note 45, at 631-32. Lam notes that neither the House nor Senate debates and remarks explain why this language was chosen over the more restrictive House version. Lam, *supra* note 45, at 631-32. Nor was there any guidance in the *Legislative History* or the Code as to how courts were to interpret "generally authorized." Lam, *supra* note 45, at 631-32.

FN51. Act of Apr. 8, 1976, Pub. L. No. 94-260, 90 Stat. 315, 317 (codified at 11 U.S.C. §§ 401-418 (Supp. 1976)).

FN52. David S. Kupetz, *Municipal Debt Adjustment Under the Bankruptcy Code*, 27 *Urb. Law.* 531, 538 n.21 (1995).

FN53. For cases broadly construing 11 U.S.C. § 109(c)(2) prior to the 1994 Amendments, see: *In re Sullivan County Regional Refuse Disposal District*, 165 B.R. 60, 73 (Bankr. D. N.H. 1994) ("'[G]enerally authorized' language in 11 U.S.C. § 109(c)(2) should be broadly construed to provide municipalities maximum access to Chapter 9 within the constitutional limitations of the Tenth Amendment."); *In re City of Bridgeport*, 128 B.R. 688, 696 (Bankr. D. Conn. 1991) ("'generally authorized' should be given a broad construction"); *In re Villages at Castle Rock Dist. No. 4*, 145 B.R. 76, 82 (Bankr. D. Colo. 1990) ("[B]road general powers are sufficient to constitute general authorization for a chapter 9 filing."); *In re Greene County Hosp.*, 59 B.R. 388, 391 (Bankr. S. D. Miss. 1986) ("[S]tatutes . . . which grant an entity the general power to control its existence, operation and financial affairs, are a sufficient state authorization in spite of the lack of express language authorizing the entity to proceed in bankruptcy."); *In re City of Wellston*, 43 B.R. 348, 350 (Bankr. E.D. Mo. 1984) ("[A] municipality may be authorized to proceed as a debtor under Chapter 9, notwithstanding the absence of a State statute specifically authorizing such action, if it can be shown that the circumstances require actions which are otherwise permissible under a grant of general authority in the State law."); *In re Pleasant View Utility District*, 24 B.R. 632, 636 (Bankr. M.D. Tenn. 1982) ("[T]he term 'generally authorized' was intended to be given a broad interpretation.")

FN116. *Ropico*, 426 F. Supp. at 983.

FN117. *Winograd*, supra note 5, at 307.

FN118. See note 67 supra.

FN119. In Michigan, after preliminary review by the State Treasurer, the Governor appoints the review team, which includes the treasurer as a member. Mich. Comp. Laws Ann. § 141.1213 (West 1992). In Pennsylvania, a complaint alleging severe fiscal distress must be made to the Secretary of the Department of Internal Affairs. 63 Pa. Cons. Stat. Ann. § 5571 (West 1972). That department then makes an evaluation of the financial circumstances faced by the entity, and if the secretary determines a crisis exists, appoints a coordinator to create and implement a resolution of the financial problems. § 11701.221. In Illinois, a detailed request for assistance must be made by the entity to the Governor, who makes a preliminary review of the financial circumstances involved, then may appoint a commission. 50 Ill. Comp. Stat. Ann. § 320/5(b) (West 1993). In Nevada, complaint is made to the Nevada Tax Commission, which itself may take over management of the local government until the fiscal crisis has been resolved. Nev. Rev. Stat. § 354.675-.685 (Michie Supp. 1995).

FN120. Mich. Comp. Laws Ann. § 141.1222 (West 1992); 63 Pa. Cons. Stat. Ann. §§ 5571 (West 1972) (repealed in part 1987, 63 Pa. Cons. Stat. Ann. § 5571 (West Supp. 1996)); 63 Pa. Cons. Stat. Ann. § 11701.261, 12720.211 (West Supp. 1996). Authority to be a debtor only exists under the Pennsylvania statutes if granted by the Secretary of the Department of Internal Affairs, through his appointed coordinator, with the additional approval of the Governor in the case of larger (first-class) cities. Also, no filings under Chapter 9 will be authorized under any circumstances so long as any bonds are outstanding. 74 Pa. Cons. Stat. Ann. § 1773 and 63 (West Supp. 1996); Pa. Cons. Stat. Ann. § 12720.211 (West Supp. 1996).

FN121. 50 Ill. Comp. Stat. Ann. § 320/9(b)(4) (West 1993).

FN122. See Part VI infra for a discussion of a pending move in Illinois to provide for specific authorization under the state's general powers.

FN123. Nev. Rev. Stat. § 354.695 (Michie Supp. 1995). In fact, in Nevada, the local government has no option but to obey the solution plans of the tax commission, which is backed by the state courts to force compliance. § 345.715.

FN124. Ga. Code Ann. § 36-80-5 (1993).

FN125. See Kan. Stat. Ann. §§ 10-1101 to 1116, §§ 79-2938 to 2942 (1982) (cash only basis for political subdivisions; limits on debt); Mass. Gen. Laws Ann. ch. 44:14 (Law. Co-op. 1993) (no exemptions from liability to pay debts lawfully incurred).

FN126. Kan. Stat. Ann. § 10-1102 (1982).

FN127. §§ 10-1113, 10-1116.

FN128. Mass. Gen. Laws Ann. ch. 44 (Law. Co-op. 1993).

FN129. See id. at ch. 44:2 to :7.

FN130. Id.

FN131. *Id.* at ch. 44:19A.

FN132. *Id.*

FN133. Mass. Gen. Laws. Ann. ch. 44:19A (Law. Co-op. 1993). While the local taxing unit is thus relieved from the burden of its immediate problem, the debts it cannot pay, the ordinary flow of money from the state will end under this statutory framework. When state money assumed available and used in planning a budget dries up, the municipality is still going to be in serious financial trouble. Enough money for necessary government services is going to be hard to find.

FN134. See note 69 *supra*.

FN135. Indiana, Mississippi, New Hampshire, Tennessee, Utah, and West Virginia, all states without any current specific authorization, had filings between 1981 and 1994. Chapter 9 Revisited, Natalie R. Cohen, ed., *Fiscal Stress Monitor*, National Municipal Research 1-3 (Nov. 1994) (source of statistics: Administrative Office of the U.S. Courts) [hereinafter *Fiscal Stress Monitor*]. At least in Mississippi (*In re Greene County Hospital*, 59 B.R. 388, 391 (Bankr. S.D. Miss. 1986)), Tennessee (*In re Pleasant View Utility District*, 24 B.R. 632, 638-39 (Bankr. M.D. Tenn. 1982)), and New Hampshire (*In re Sullivan County Regional Refuse Disposal Dist.*, 165 B.R. 60, 75 (D. N.H. 1994)), the bankruptcy court found a municipality authorized through the general powers granted to political subdivisions under the former "generally authorized" language.

FN136. *Fiscal Stress Monitor*, *supra* note 135, at 3.

FN137. *Spiotto II*, *supra* note 64, at 7.

FN138. *Spiotto II*, *supra* note 64, at 18.

FN139. *Spiotto II*, *supra* note 64, at 18.

FN140. *Spiotto II*, *supra* note 64, at 5.

FN141. *Spiotto II*, *supra* note 64, at 5.

FN142. *In re City of Bridgeport*, 129 B.R. 332 (Bankr. D. Conn. 1991).

FN143. *Id.* For more information and analysis of the Bridgeport case, see generally Dorothy A. Brown, *Fiscal Distress and Politics: The Bankruptcy Filing of Bridgeport as a Case Study in Reclaiming Local Sovereignty*, 11 *Bankr. Dev. J.* 626 (1994-96); Rachael E. Schwartz, *This Way to the Egress: Should Bridgeport's Chapter 9 Filing Have Been Dismissed?*, 66 *Am. Bankr. L.J.* 103 (1992).

FN144. Schwartz, *supra* note 143, at 106-07.

FN145. *Spiotto II*, *supra* note 64, at 6.

FN146. Cal. Const., art. XIII A, § 1.

FN147. See *Spiotto II*, *supra* note 64, at 19.

FN148. See Spiotto II, supra note 64, at 18.

FN149. See Spiotto II, supra note 64, at 19. James E. Spiotto has written and lectured on the subject of municipal bankruptcy for the Practising Law Institute. He contributed a chapter to the treatise *State and Local Government Debt Financing* (Professor David Gelfand, ed., 1993), and a book, James E. Spiotto, *Defaulted Securities: A Prudent Indenture Trustee's Guide* (Am. Bankers Ass'n 1990).

FN150. Karen M. Paget, *The Balanced Budget Trap*, Am. Prospect, Nov.-Dec. 1996, at 22. States receive anywhere from one-fourth to one-third of their revenues from the federal government. Id. at 25.

FN151. Id.

FN152. Id. at 21-22.

FN153. Id. at 25.

FN154. Id. Paget points out the difficulty a legislator from a large urbanized state might have in convincing those from more rural states to vote in favor of a general tax increase, the bulk of which will go to aid the citizens of the larger state. Id.

FN155. Spiotto II, supra note 64, at 6.

FN156. Spiotto II, supra note 64, at 6.

FN157. *In re County of Orange*, 183 B.R. 594 (Bankr. C.D. Cal. 1995).

FN158. Id. at 601.

FN159. Will Lester, *Reeling Miami Seeking State Aid*, Plain Dealer, Nov. 28, 1996, at A19.

FN160. Id.

FN161. Id.

FN162. Id.

FN163. McConnell & Picker, supra note 1, at 470. "Special purpose districts" are entities created for a specific, narrow public purpose, such as irrigation, water, and drainage. See McConnell & Picker, supra note 1, at 470.

FN164. The suggested scenario is not entirely hypothetical. The author is aware of just such a situation developing in Ohio. A rural school district is contemplating bankruptcy after being hit with a large tort judgment from a bus crash. The state has taken the position that the school district is not authorized to be a debtor under Chapter 9, despite the fact that the district has no outstanding bonds, and a tax increase adequate to cover the judgment would devastate taxpayers. The state offered to loan the money to the school district, but such a loan would strap the taxpayers beyond their ability to pay just as surely as the judgment itself. See *Buchman v. Board of Educ.*, 652 N.E.2d 962 (Ohio Sup. Ct. 1995).

FN165. McConnell & Picker, supra note 1, at 470-71. For example, Bay St. Louis, Mississippi

suffered a \$370,000 judgment after a youth jumped off a municipal pier and broke his neck; South Tucson, Arizona was hit with a \$3.6 million judgment after one police officer shot and paralyzed another officer on the job; and Wapanucka, Oklahoma incurred a \$112,000 judgment when its water supply was fouled by an oil tanker crash. McConnell & Picker, *supra* note 1, at 470-71 (citing Advisory Commission on Intergovernmental Relations, Bankruptcies, Defaults, And Other Local Government Financial Emergencies 8 (1985)). All of these municipalities ultimately filed bankruptcy petitions. McConnell & Picker, *supra* note 1, at 470-71.

FN166. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9676 (1989 & Supp. 1991).

FN167. McConnell & Picker, *supra* note 1, at 471.

FN168. Mo. Ann. Stat. § 427.100 (West Supp. 1997).

FN169. Missouri had four Chapter 9 filings between 1981 and 1994. Fiscal Stress Monitor, *supra* note 135. Published opinions include: *In re Chilhowee R-IV School Dist.*, 145 B.R. 981 (Bankr. W.D. Mo. 1992) (while plaintiff initially challenged school district's authority to be a debtor, challenge was later dropped and court assumed authority existed); *In re City of Wellston*, 43 B.R. 348 (Bankr. E.D. Mo. 1984) (court's analysis determined city was authorized to be a debtor under general powers granted by the state to municipalities).

FN170. Michael J. Chmiel, Illinois Authorization for Chapter 9 Bankruptcy on Horizon, 33 Ill. St. B. Ass'n. Sec. Loc. Gov't. L. 2 (Sept. 1996).

FN171. *Id.* The Commercial, Banking and Bankruptcy Law Section Council of the Illinois State Bar Association (ISBA) did the initial study of this issue. *Id.* That group developed proposed enabling legislation and referred it to the Local Government Law Section Council, which voted to support the proposal. *Id.* The ISBA as a whole is expected to add its support and push for adopting by the General Assembly. *Id.* The Illinois Township Attorneys Association has separately endorsed the proposal. *Id.*

FN172. *Id.* See also note 116 and accompanying text *supra*, for discussion of current law in Illinois; the proposal calls for a new act under chapter 5-the "General Provisions" chapter of the Illinois Compiled Statutes, to be designated: Ill. Comp. Stat. Ann. §§ 240/0 to /2. Chmiel, *supra* note 170. The proposal follows:

Act 240. Bankruptcy Authorization Act

Section 240/0.01 Short title. Section 240/1. Purpose. Section 240/2. Authorization. Section 240/0.01. Short title. Section 240/0.01. Short title. §0.01. Short title. This Act may be cited as the Bankruptcy Authorization Act.

Section 240/1. Purpose

§1. Purpose. The Congress of the United States has enacted certain laws enabling financially distressed persons to seek and obtain certain relief as set forth under Title 11 of the United States Code. This relief includes certain relief for local government generally set forth under Chapter 9 of said Title 11. And, whereas, it is the public policy of this State to provide for the public health, safety and welfare, and to provide assistance to units of local government in the formulation and implementation of proper financial accounting procedures, budgeting and taxing practices, it is the public policy of this State to support the reorganization of the financial affairs of a political subdivision of this State under the protection and procedures set forth under Chapter 9 of Title 11 of the United States Code.

Section 240/2. Authorization.

32. Authorization. The consent of this State is hereby granted to, and all appropriate powers are hereby conferred upon, any political subdivision organized under the laws of this State to institute any appropriate action authorized by any act of Congress of the United States relating to bankruptcy on the part of itself. Such political subdivisions are specifically authorized in their respective capacities to be debtors under Chapter 9 of Title 11 of the United States Code.

Chimel, supra note 170.

FN173. Kmetz, supra note 52, at 540 n.24.

FN174. In re County of Orange, 183 B.R. 594 (Bankr. C.D. Cal. 1995).

FN175. Kupetz, supra note 52, at 540 n.24 (citing G.A. 29, 121 Leg., 2nd Extraordinary Sess. (Cal. 1995)).

FN176. G.A. 29, 121 Leg., 2nd Extraordinary Sess. (Cal. 1995). The bill text follows:

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:SECTION 1.

Section 53760 of the Government Code is amended to read:53760. (a) Any taxing agency or instrumentality of this State, as that term is defined in Section 81 of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, as amended, 101 of Title 11 of the United States Code, with specific statutory approval of the Legislature, may file the petition mentioned in Section 83 of the act as a debtor under Chapter 9 (commencing with Section 901) of Title 11 of the United States Code and prosecute to completion all proceedings permitted by Sections 81, 82, 83, and 84 of the act. However, a plan for the adjustment of the municipality's debts, as provided in Section 941 or Section 942 of Title 11 of the United States Code, shall be submitted to the appropriate policy committee of the Legislature prior to being submitted to the United States Bankruptcy Court. (b) It is the intent of the Legislature that this section specifically authorizes a municipality, subject to the requirement of legislative approval specified in subdivision (a), to be a debtor under Chapter 9 (commencing with Section 901) of Title 11 of the United States Code as required by Section 109 of that title.

Id.

FN177. Id.

FN178. Id.

FN179. Survey responses from Attorney General and Legislative Counsel offices in a number of states indicate that the office is still assuming authority can be found from general municipal powers. A majority of the surveyed states without enabling statutes responded that they do not know what the state's response would be if a municipality became insolvent and wished to avail itself of Chapter 9. Some possibilities qualifiedly suggested by those responding were dissolution of the entity and specific legislation for each entity. Survey responses are on file with author.

FN180. Tabb, supra note 1, at 46-47.

FN181. Tabb, supra note 1, at 46-47.

FN182. 186 U.S. 181 (1902).

FN183. *Id.* at 188.

FN184. *Id.* at 190.

FN185. *Tabb*, *supra* note 1, at 47-9.

FN186. 11 U.S.C. § 903 (1994).

FN187. See Part IV and accompanying notes *supra* for discussion of the statutes in these states.

FN188. See generally *Spiotto II*, *supra* note 64, at 23-24.

FN189. *McConnell & Picker*, *supra* note 1, at 472-81.

FN190. 11 U.S.C. §§ 1101-1174 (1994).

FN191. *McConnell & Picker*, *supra* note 1, at 472-81.

FN192. See generally *Spiotto II*, *supra* note 64, at 22-24.

FN193. *McConnell & Picker*, *supra* note 1, at 479.

FN194. 316 U.S. 502 (1942).

FN195. *McConnell & Picker*, *supra* note 1, at 480.

FN196. *McConnell & Picker*, *supra* note 1, at 480 n.225.

FN197. *McConnell & Picker*, *supra* note 1, at 481 n.228.

FN198. *Spiotto II*, *supra* note 64, at 23-24.

FN199. *Spiotto II*, *supra* note 64, at 25. As an example, in Colorado a few years back, a large number of bonds were issued in anticipation of real estate development and the accompanying taxes, which never occurred. *Spiotto II*, *supra* note 64, at 25. Chapter 9 procedures ultimately provided an equitable solution for both the creditors and the special districts. *Spiotto II*, *supra* note 64, at 25. See *In re City of Colo. Springs Spring Creek Gen. Improvement Dist.*, 187 B.R. 683 (Bankr. D. Colo. 1995); *In re Wolf Creek Valley Metro. Dist. No. IV*, 138 B.R. 610 (Bankr. D. Colo. 1992); *In re Villages at Castle Rock Metro. Dist. No. 4*, 145 B.R. 76 (Bankr. D. Colo. 1990).

FN200. See discussion, Part IV.C. *supra*.

FN201. *Spiotto*, *supra* note 20, at 25-26.

FN202. This suggested framework was created by combining statutory provisions of Michigan (Mich. Comp. Laws Ann. §§ 141.1202-1226) (West 1992), Pennsylvania (63 Pa. Cons. Stat. Ann. §§ 11701.201-264) (West 1972), and Illinois (60 Ill. Comp. Stat. Ann. §§ 520/5 to /9) (West 1992), as well as general provisions in other state statutes. See also *Spiotto*,

supra note 20, at 24-29.

END OF DOCUMENT

IN RE *COPPER RIVER SCHOOL DISTRICT*:
COLLECTIVE BARGAINING AND CHAPTER 9
MUNICIPAL BANKRUPTCY

W. RICHARD FOSSEY* AND JOHN M. SEDORT†

I. INTRODUCTION

Beginning in the late 1970s, a number of school districts found it difficult to pay salary obligations under collective bargaining agreements with their employees.¹ Taxpayers' revolts, declining enrollment, shrinking state revenues, or other forces beyond a school district's control have often been responsible for this predicament.²

State law remedies for a school district unable to pay salaries under its collective bargaining agreements are often unclear and uncertain. Two school districts faced this problem by filing petitions under chapter 9 of the United States Bankruptcy Code ("the Code").³ San Jose Unified School District, a California school district, filed a chapter 9 petition in 1983 and obtained court approval for rejecting its

Copyright © 1989 by Alaska Law Review

* Member, Bankston, McCollum & Fossey, P.C., Anchorage, Alaska; J.D., 1980, University of Texas School of Law; M.A., 1974, University of Texas; B.A., 1970, Oklahoma State University; Member, Alaska Bar Association. Mr. Fossey served as legal counsel for the Copper River School District during the bankruptcy proceedings that are described in this article.

† Associate, Bankston, McCollum & Fossey, P.C., Anchorage, Alaska; J.D., 1987, University of Michigan Law School; B.A., 1984, Kalamazoo College; Member, Alaska Bar Association.

Portions of this article first appeared in Fossey, *Inability to Pay Salaries Under Collective Bargaining Agreements*, 50 EDUC. L. REP. 651 (Feb. 16, 1989) and is reprinted with permission from West Publishing Company. All rights are reserved.

The authors would like to thank Dianna Brinkman for her assistance in preparation of this article.

1. See, e.g., *Board of Educ. of Chicago v. Chicago Teachers Union Local 1*, 430 N.E.2d 1111 (Ill. 1981); *Minneapolis Ass'n of Adm'rs and Consultants v. Minneapolis Special School Dist. No. 1*, 311 N.W.2d 474 (Minn. 1981).

2. *Id.*

3. 11 U.S.C. §§ 901-946 (1982).

union contracts.⁴ Subsequently, the school district settled with its unions, and its bankruptcy proceedings were dismissed.⁵ Copper River School District, an Alaska school district, filed a chapter 9 petition in 1986.⁶ In April 1988, its reorganization plan was approved by the bankruptcy court.⁷ Under the reorganization plan, teachers' salaries were significantly reduced.⁸ This article will discuss *In re Copper River School District* and the legal implications of a chapter 9 petition on a school district's collective bargaining agreements.

II. IN RE COPPER RIVER SCHOOL DISTRICT: ONE SCHOOL DISTRICT'S EXPERIENCE WITH THE UNITED STATES BANKRUPTCY COURT

Copper River School District is located in central Alaska. The district covers approximately 25,000 square miles and includes Wrangell-St. Elias National Park. In 1985, the school district served about 500 school children at six school sites.⁹

During the 1985-86 school year, Copper River School District's average teacher salary was the highest in the State of Alaska,¹⁰ the state which had the highest average teacher salaries in the nation.¹¹ For that school year, the average salary for a Copper River School District teacher was \$49,065.¹² The school district estimated that 57.98% of its operating budget for the 1985-86 school year went to teachers' salaries.¹³

Under the current negotiated agreement with the school district's teachers' union, the school district's salary costs were scheduled to

4. *In re San Jose Unified School Dist.*, No. 583-02387-A (Bankr. N.D. Cal. filed June 30, 1983).

5. *Id.* See also Winograd, *San Jose Revisited: A Proposal for Negotiated Modification of Public Sector Bargaining Agreements Rejected Under Chapter 9 of the Bankruptcy Code*, 37 HASTINGS L.J. 231, 233-34 (1986).

6. *In re Copper River School Dist.*, No. 3-86-00830 (Bankr. D. Alaska filed Dec. 22, 1986).

7. Order Confirming Chapter 9 Plan dated April 8, 1988, *In re Copper River School Dist.*, No. 3-86-00830 (Bankr. D. Alaska filed Dec. 22, 1986).

8. Consent Order Modifying Plan dated April 8, 1988, and attached waiver dated April 8, 1988, executed by Copper Valley Teachers' Association, *In re Copper River School Dist.*, No. 3-86-00830 (Bankr. D. Alaska filed Dec. 22, 1986).

9. ALASKA DEPT OF EDUCATION, ALASKA EDUCATION DIRECTORY 26 (1986) (copy on file at offices of Alaska Law Review).

10. ASSOCIATION OF ALASKA SCHOOL BOARDS, ALASKA TEACHER SALARY AND BENEFITS FY 1986 AK-1 (1986) (copy on file at offices of Alaska Law Review).

11. *USA Today* reported that Alaska teachers' salaries were 164% of the national average. The newspaper did not report the year on which its statistics were based. *USA Today*, Feb. 19, 1987, at 5A.

12. ASSOCIATION OF ALASKA SCHOOL BOARDS, *supra* note 10.

13. Copper Valley Views, Feb. 5, 1986, at 1 (copy on file at offices of Alaska Law Review).

increase for the following school year.¹⁴ Unless adjustments were made, the highest paid teacher in the Copper River School District for the 1986-87 school year would have cost the school district over \$70,000 in salary, benefits, and extra-duty stipends for a nine-month contract.¹⁵

The Copper River School District receives virtually all of its revenues from the State of Alaska and has no authority to tax or issue bonds.¹⁶ Unfortunately, its revenues were not sufficient to pay the extraordinarily high salaries which its collective bargaining agreement required. During the 1984-85 school year, the school district had operated with a deficiency of revenues over expenditures of approximately \$433,000.¹⁷ During the 1985-86 school year, the school district's expenditures exceeded revenues by \$308,658. An emergency appropriation from the Alaska Legislature offset that deficit.¹⁸

In July 1986, in response to sharply declining oil revenues, the governor of Alaska cut state funding to all municipalities and school districts by ten percent.¹⁹ This development substantially increased Copper River School District's severe financial problems.

On September 29, 1986, the school district's accountants prepared a cash-flow projection for the 1986-87 school year. The accountants projected that the school district would be completely out of funds by April 1987 and would end Fiscal Year 1987 with a deficit of \$776,000.²⁰

The Copper River School District's collective bargaining agreement with its teachers was not due to expire until June 30, 1987.²¹ In November 1985, the school district reopened negotiations with the teachers' union in an attempt to negotiate salaries downward for the

14. NEGOTIATED AGREEMENT BETWEEN THE BOARD OF THE COPPER RIVER SCHOOL DISTRICT AND THE COPPER VALLEY TEACHERS' ASSOCIATION, JULY 1, 1984 - JUNE 30, 1987 [hereinafter NEGOTIATED AGREEMENT].

15. *Id.*

16. Chapter 14 of the Alaska Statutes describes the state's obligation to fund Alaska school districts. ALASKA STAT. § 14.17.010-14.17.250 (1987 & Supp. 1988).

17. COPPER RIVER SCHOOL DISTRICT, COMBINED FINANCIAL STATEMENTS AND SCHEDULES (June 30, 1985) (copy on file at offices of Alaska Law Review). Total school district expenditure for Fiscal Year 1985 was \$5,196,530. *Id.*

18. Accountants' report filed March 17, 1988, *In re Copper River School District*, No. 3-86-00830 (Bankr. D. Alaska filed Dec. 22, 1988).

19. See Memorandum from Leland L. Dishman, Superintendent of Copper River School District to Copper River School District employees (July 22, 1986) (copy on file at offices of Alaska Law Review).

20. Accountants' report, *supra* note 18.

21. NEGOTIATED AGREEMENT, *supra* note 14.

1986-87 school year.²² Negotiations were unsuccessful. In July 1986, the school district unilaterally cut all salaries by five percent below the previous year's salaries.²³ An advisory arbitrator subsequently endorsed these salary cuts for teachers.²⁴

The teachers' union filed a lawsuit in an effort to force the school district to submit salary cuts to binding arbitration.²⁵ On December 22, 1986, the Copper River School District filed a petition under chapter 9 of the Bankruptcy Code in the United States bankruptcy court in Anchorage, Alaska.²⁶ This action automatically stayed all grievances and litigation. The school district, meanwhile, continued to pay salaries at reduced levels.²⁷

Prior to filing the petition in bankruptcy court, the school district had considered a number of options to solve the financial crisis which was caused primarily by its high teachers' salary schedule. First, as stated above,²⁸ it had reopened negotiations in an effort to lower teachers' salaries. These negotiations were unsuccessful.²⁹ Second, it sought and received a one-time emergency legislative appropriation from the Alaska Legislature.³⁰ That appropriation solved the 1985-86 budget deficit but did not address the underlying problem — insufficient revenues to pay teachers' salaries under the collective bargaining agreement.

Next, the school district asked the Alaska Department of Education whether schools could be closed early due to insufficient revenue.³¹ Not surprisingly, the school district was told that closing

22. See Letter from Leland L. Dishman, Superintendent of Copper River School District to the Copper Valley Teachers' Association (Nov. 27, 1985) (copy on file at offices of Alaska Law Review).

23. Memorandum, *supra* note 19.

24. Copper River School District v. Copper Valley Teachers' Association (1986) (Kienast, Arb.).

25. Copper Valley Teachers' Ass'n v. Copper River School Dist., JAN-86-14779 Civil (Super. Ct. Anchorage filed Nov. 25, 1986).

26. *In re* Copper River School Dist., No. 3-86-00830 (Bankr. D. Alaska filed Dec. 22, 1986).

27. 11 U.S.C. § 362(a) (1982).

28. Letter, *supra* note 22.

29. It should be noted that the school superintendent for the school district when the chapter 9 petition was filed, Leland L. Dishman, was hired by the school board after the school district's financial crisis was apparent. Although in no way responsible for the school district's fiscal problems, he accepted the challenge of correcting them. The superintendent's leadership was largely responsible for the school district's financial recovery as described below.

30. COPPER RIVER SCHOOL DISTRICT, FY 1986 GENERAL PURPOSE FINANCIAL STATEMENTS 7 (June 30, 1986) (copy on file at offices of Alaska Law Review).

31. Telephone interview by Leland L. Dishman, Superintendent of Copper River School District, with the Department of Education.

schools early was not an option.³² Finally, the school district made drastic budget cuts, including staff reductions which jeopardized its efforts to obtain accreditation for its high schools by the Northwest Accrediting Association.³³ These budget cuts were not sufficient to balance the school district's budget.

Moreover, it appeared that legal remedies outside the bankruptcy court were uncertain at best. In *Subway-Surface Supervisors v. New York Transit Authority*,³⁴ the New York Court of Appeals upheld the right of New York City to modify collective bargaining obligations during a fiscal crisis where the city established that the modification served an "important purpose" and was "reasonable and necessary."³⁵ On the other hand, in *Sonoma County Organization of Public Employees v. County of Sonoma*,³⁶ the California Supreme Court ruled that legislation voiding cost of living increases for public employees was an unconstitutional impairment of collective bargaining contracts. In that case, the court stated that the state had failed adequately to establish that California's Proposition 13 constituted a financial emergency.³⁷

Some jurisdictions have ruled that a political entity's salary obligations may be set aside if requisite funds are not provided by the political entity with the powers of appropriation.³⁸ Copper River School District's crisis was due in part to a unilateral ten percent decrease in revenues by the State of Alaska for Fiscal Year 1987.³⁹ Nevertheless, no Alaska case law or statute authorized the school district unilaterally to cut salaries if the state cut funding to the school district.

The Copper River School District's primary goal was to provide an education program to school children of the Copper Valley for the 1986-87 school year. Alaska law gave the school district no clear guidance on how to proceed. Moreover, the school district wished to

32. See Letter from Steve Hole, Deputy Commissioner of Education, to Leland L. Dishman, Superintendent of Copper River School District (Jan. 28, 1987) (confirming the school district's obligation to keep schools open) (copy on file at offices of Alaska Law Review).

33. See Letter from Carl L. LaMarr, Chairman of Alaska Committee of the Northwest Accrediting Association, to Leland L. Dishman, Superintendent of Copper River School District (Feb. 24, 1986) (copy on file at offices of Alaska Law Review).

34. 44 N.Y.2d 101, 375 N.E.2d 384, 404 N.Y.S.2d 323 (1978).

35. *Id.* at 110, 375 N.E.2d at 389, 404 N.Y.S.2d at 328 (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977)).

36. 23 Cal. 3d 296, 591 P.2d 1, 152 Cal. Rptr. 903 (1979).

37. *Id.* at 313-14, 591 P.2d at 10, 152 Cal. Rptr. at 912-13.

38. See, e.g., *United Faculty of Florida v. Board of Regents*, 365 So. 2d 1073 (Fla. Dist. Ct. App. 1979).

39. Accountants' report, *supra* note 18.

avoid costly litigation with an uncertain outcome and a lengthy appeals process. Chapter 9 appeared to be the school district's best option.

Copper River School District operated under the jurisdiction of the United States bankruptcy court from December 1986 until April 1988.⁴⁰ At that time, a reorganization plan was approved by the bankruptcy court which permitted the school district to pay salaries at reduced levels.⁴¹ The reorganization plan included a stipulation by the teachers that all litigation and grievances would be dismissed and that no salary increases of any kind would be required unless agreed to in a new collective bargaining agreement.⁴² The school district's bankruptcy petition caused considerable furor. Members of NEA-Alaska, the state's largest teachers' union, picketed the federal bankruptcy court on the day of a critical hearing, and a number of local NEA-Alaska affiliates took out advertisements in a state newspaper protesting the school district's action.⁴³ Moreover, the teachers' union vigorously challenged, unsuccessfully, the school district's bankruptcy petition at every turn. The teachers' union was the only creditor group to challenge the school district's right to file the petition under chapter 9.⁴⁴

Nevertheless, the school district's decision did not adversely affect the quality of education. During the 1986-87 school year, the first year the school district was in bankruptcy, the school district's standardized test scores rose significantly to be among the highest in the state.⁴⁵ By reallocating resources from salaries to other areas of the school budget, under the jurisdiction of the bankruptcy court, the school district's per pupil expenditures actually increased.⁴⁶

40. *In re Copper River School Dist.*, No. 3-86-00830 (Bankr. D. Alaska filed Dec. 22, 1986).

41. Consent Order Modifying Plan, *supra* note 8, and Order Confirming Plan, *supra* note 7.

42. Waiver, *supra* note 8.

43. Anchorage Daily News, May 26, 1987.

44. The chapter 9 petition filed by the San Jose Unified School District was also vigorously opposed by the teachers' union. As an indication of the extent of the opposition, the San Jose Unified School District pleading index alone is nine pages long. *In re San Jose Unified School Dist.*, No. 583-02387-A (Bankr. N.D. Cal. filed June 30, 1983).

45. COPPER RIVER SCHOOL DISTRICT SUPERINTENDENT'S REPORT (Mar. 5, 1988) (copy on file at offices of Alaska Law Review).

46. COPPER RIVER SCHOOL DISTRICT, COMPARISON OF STUDENT EXPENDITURES TO TOTAL REVENUES FY 1984-FY 1988 (unpublished graph) (copy on file at offices of Alaska Law Review).

III. LEGAL IMPLICATIONS OF A CHAPTER 9 PETITION

In some ways, a chapter 9 petition is the municipal equivalent of a private party's petition to reorganize under chapter 11 of the United States Bankruptcy Code.⁴⁷ Reorganization, however, is the only option under chapter 9.⁴⁸ There are no provisions for liquidating a local political subdivision.

Nevertheless, there are important distinctions between chapter 9 and chapter 11. First, all chapter 9 proceedings are voluntary.⁴⁹ A governmental entity may not be forced into a chapter 9 proceeding involuntarily.⁵⁰ Second, in chapter 9, only the debtor has the power to propose a reorganization plan.⁵¹ Third, no trustee is appointed in a chapter 9 proceeding.⁵²

Finally, and perhaps most importantly, the bankruptcy court has limited authority to interfere with the political responsibilities of a municipality that has elected to reorganize under chapter 9. Section 904 of the United States Bankruptcy Code states:

Notwithstanding any power of the court, unless the debtor consents or the plan so provides, the court may not, by any stay, order, or decree, in the case or otherwise, interfere with—

- (1) any of the political or governmental powers of the debtor;
- (2) any of the property or revenues of the debtor; or
- (3) the debtor's use or enjoyment of any income-producing property.⁵³

This restriction is in direct contrast to the long shadow of control a court's statutory authority casts over the right of a chapter 11 debtor to operate while under the jurisdiction of the bankruptcy court.⁵⁴ Thus, a school board's authority to make decisions, including decisions to hire and fire staff members, to employ attorneys and accountants, and to undertake any other governmental act, is undiminished by the fact that the municipality is under the jurisdiction of the bankruptcy court.

Under United States bankruptcy law, most school districts would qualify to avail themselves of chapter 9 protection. The Code only permits insolvent municipalities to file a chapter 9 petition if they are

47. Compare 11 U.S.C. §§ 901-946 (1982) with *id.* §§ 1101-1174.

48. *See id.* §§ 901-946.

49. *Id.* §§ 301, 921.

50. *Id.* § 921. *Cf. id.* § 303 (creditors have ability to begin an involuntary chapter 7 or chapter 11 proceeding against a private entity).

51. *Id.* § 941.

52. *Id.* § 901 (sections 1104 through 1106 of the Bankruptcy Code regarding trustees are not incorporated into chapter 9).

53. *Id.* § 904.

54. *See, e.g., id.* § 363.

generally authorized to be a debtor under state law.⁵⁵ "Municipality" is defined broadly as a "political subdivision or public agency or instrumentality of a State."⁵⁶ In several cases, bankruptcy courts have held that a municipality's broad grant of statutory authority under state law provides sufficient state authorization for a municipality to file for bankruptcy even though no specific statute grants a municipality the power to file a chapter 9 petition.⁵⁷ A municipality's general authority over its financial affairs is often sufficient state authorization to allow the municipality the protection offered by the Bankruptcy Code.⁵⁸ For example, the Copper River School District's school board, although given broad powers to manage and control the school district, is not specifically authorized by state law to file a chapter 9 petition.⁵⁹ Nevertheless, the teachers' union's motion to dismiss the school district's bankruptcy petition was denied.⁶⁰

Once under the jurisdiction of the bankruptcy court, a school district may alter its relationship with its public employees' unions under chapter 9. Municipal debtors are specifically granted the right to reject executory contracts.⁶¹ An unexpired collective bargaining agreement is an executory contract.⁶²

Prior to 1984, the standard a debtor must meet in order to have a collective bargaining agreement rejected was unclear. Rejection of executory contracts other than collective bargaining agreements was governed by the "business judgment" rule.⁶³

Although collective bargaining agreements are considered executory contracts under section 365 of the Code, traditionally a standard higher than the "business judgment" rule has been used to determine whether a collective bargaining agreement may be rejected.⁶⁴ Some controversy remained regarding the standard to be applied, however, because of its significant reverberations throughout the management/labor relationship. One line of reasoning required that the debtor

55. *Id.* § 109(c).

56. *Id.* § 101(29).

57. *See, e.g., In re Pleasant View Util. Dist.*, 24 Bankr. 632 (M.D. Tenn. 1982).

58. *In re Drainage Dist. No. 7*, 21 F. Supp. 798, 805 (E.D. Ark. 1937).

59. Copper River School District is a regional education attendance area organized pursuant to title 14, chapter 8, of the Alaska Statutes. ALASKA STAT. §§ 14.08.010-14.08.011 (1988). The powers and duties of a regional school board are listed in sections 14.08.101 and 14.08.111. *Id.* §§ 14.08.101, 14.08.111 (1988).

60. Order signed July 27, 1987, *In re Copper River School District*, No. 3-86-00830 (Bankr. D. Alaska filed Dec. 22, 1986).

61. 11 U.S.C. § 901 (1982).

62. *NLRB v. Bildisco*, 465 U.S. 513 (1984).

63. *In re Mingos*, 602 F.2d 38 (2d Cir. 1979).

64. *Bildisco*, 465 U.S. at 523-24.

show that economic collapse would be virtually inevitable absent rejection of the contract.⁶⁵ Alternatively, courts required only a showing that the collective bargaining agreement was burdensome to the estate and that the balance of equities was in favor of rejection.⁶⁶

The United States Supreme Court affirmed a higher standard for the rejection of a collective bargaining agreement in *National Labor Relations Board v. Bildisco & Bildisco*.⁶⁷ The Court did not, however, adopt the test urged by the labor union that in order to reject a collective bargaining contract, the debtor must demonstrate that the reorganization would fail absent rejection of the contract.⁶⁸ This is the strict standard which had previously been adopted by the Second Circuit in *Brotherhood of Railway and Airline Clerks v. REA Express, Inc.*⁶⁹ Instead, the Court opted for a more lenient standard permitting collective bargaining agreements to be rejected in bankruptcy proceedings where the agreement is shown to burden the bankruptcy estate and, after careful scrutiny, the equities are in favor of rejection of the labor contract.⁷⁰ The equities to be considered are only those equities which relate to the success of the reorganization.⁷¹ The Court also encouraged bankruptcy judges to insure themselves that "reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution."⁷²

The legislative history of the Code, as expressed by a 1978 United States Senate Report, indicates that the power to reject a collective bargaining agreement was included specifically to allow a municipal debtor to deal with its collective bargaining agreements.

Within the definition of executory contracts are collective bargaining agreements between the city and its employees. Such contracts may be rejected despite contrary State laws. Courts should readily allow the rejection of such contracts where they are burdensome. The rejection will aid the municipality's reorganization and in consideration of the equities of each case. On the last point, "[e]quities in favor of the city in chapter 9 will be far more compelling than the equities in favor of the employer in chapter 11. Onerous employment obligations may prevent a city from balancing its budget for some time. The prospect of an unbalanced budget may preclude

65. *Brotherhood of Railway, Airline and Steam Clerks v. REA Express, Inc.*, 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975).

66. *Shopmen's Union No. 455 v. Kevin Steel Prod., Inc.*, 519 F.2d 698 (2d Cir. 1975); *see also In re Brada-Miller Freight Sys., Inc.*, 702 F.2d 890 (11th Cir. 1983); *NLRB v. Bildisco*, 682 F.2d 72 (3d Cir. 1982).

67. 465 U.S. 513 (1984).

68. *Id.* at 525.

69. 523 F.2d 164, 167-69 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975).

70. *Bildisco*, 475 U.S. at 525-26.

71. *Id.* at 527.

72. *Id.* at 526.

judicial confirmation of the plan. Unless the city can reject its labor contracts, lack of funds may force cutbacks in police, fire, sanitation, and welfare services, imposing hardships on many citizens. In addition, because cities in the past have often seemed immune to the constraint of "profitability" faced by private businesses, the wage contracts may be relatively more onerous than those in the private sector." *Executory Contracts and Municipal Bankruptcy*, 85 *Yale L.J.* 957, 965 (1976) (footnote omitted). Rejection of the contracts may require the municipalities to renegotiate such contracts by state collective bargaining laws. It is intended that the power to reject collective bargaining agreements will pre-empt state termination provisions, but not state collective bargaining laws. Thus, a city would not be required to maintain existing employment terms during the renegotiation period.⁷³

Bildisco prompted Congress to adopt section 1113 of the Code as part of the 1984 bankruptcy legislation.⁷⁴ Section 1113 modifies both the substantive standard and the procedure necessary to reject a collective bargaining agreement. In order to reject the collectively bargained contract, the debtor must first propose those modifications to the union representative which are "necessary to permit the reorganization of the debtor" and which treat all affected parties "fairly and equitably."⁷⁵ In addition, the court must find that the union refused to propose modifications without good cause and that the balance of the equities "clearly favors rejection."⁷⁶ This is a higher standard than that set forth in *Bildisco*, but it probably does not rise to the economic survival standard required in *Brotherhood of Railway, Airline and Steam Clerks v. REA Express, Inc.*⁷⁷

Due to the location of section 1113 in the Bankruptcy Code, however, the statutory standard of section 1113 does not apply to petitions under chapter 9. The standard outlined in *Bildisco*, therefore, remains good law with regard to proceedings under chapter 9.⁷⁸ Thus, it appears that a municipal debtor has an easier burden than a private debtor when persuading a court to permit the rejection of a collective bargaining agreement.

The law is not developed in this area. Prior to *In re Copper River School District*, only one school district utilized chapter 9 to reject collective bargaining agreements. In 1983, the San Jose Unified School District, a California school district with enrollment of approximately

73. S. REP. NO. 989, 95th Cong., 2d Sess. 112 (1978), reprinted in App. 3 L. KING, COLLIER ON BANKRUPTCY § V at 112 (15th ed. 1988).

74. Pub. L. No. 98-353 (1984).

75. 11 U.S.C.A. § 1113(b)(6)(A) (Supp. 1988).

76. *Id.* § 1113(c).

77. See L. KING, COLLIER ON BANKRUPTCY § 365.03[1] (15th ed. 1988).

78. *Id.*

30,000 students, filed a chapter 9 petition.⁷⁹ That school district's financial crisis arose from an enrollment decline, with a consequent reduction in revenues, as well as property tax limits contained in California Proposition 13.⁸⁰

Prior to filing its chapter 9 petition, an arbitrator had ordered the San Jose Unified School District to restore wages withheld when the school board voted to defer a wage increase. The school district's fiscal impossibility defense was rejected by the arbitrator. The bankruptcy court granted the school district's request to reject its collective bargaining agreements approximately two months after the school district filed its chapter 9 petition. Nearly a year after the bankruptcy petition was filed, the school district reached a comprehensive settlement with its unions, and the bankruptcy proceedings were dismissed prior to the approval of a reorganization plan.⁸¹

In contrast to *In re San Jose Unified School District*, the Copper River School District was formally discharged from bankruptcy in April 1988 under a reorganization plan which reduced teachers' salaries.⁸² The teachers' union waived claims for higher salaries and accepted salary freezes and reductions during a hearing on the school district's motion to reject its collective bargaining agreement with the teachers.⁸³ The court indicated that absent the significant concessions made by the teachers' union, rejection of the collective bargaining agreement could have been appropriate.⁸⁴ Further, the court noted that the standards set forth in *Bildisco* would have been the test for determining whether the collective bargaining agreement could have been rejected by the school district.⁸⁵ A reorganization plan was then approved which included the teachers' union's waiver of salary claims pending the execution of a new collective bargaining agreement and the dismissal of all grievances and litigation.⁸⁶

A school district considering chapter 9 as a vehicle for adjusting collective bargaining agreements should consider not only the legal implications, but the political implications of such action as well. Shortly after the Copper River School District was discharged from bankruptcy, legislation was introduced in the Alaska Legislature prohibiting an Alaska regional school board from filing a petition as a

79. Winograd, *supra* note 5, at 232.

80. CAL. CONST. art. XIII-A.

81. Winograd, *supra* note 5, at 237-99.

82. Order Confirming Plan, *supra* note 7, and Consent Order Modifying Plan, *supra* note 8.

83. Waiver, *supra* note 8.

84. Transcript of confirmation hearing on March 24, 1988, *In re Copper River School Dist.*, No. J-86-00830 (Bankr. D. Alaska filed Dec. 22, 1986).

85. *Id.*

86. Consent Order Modifying Plan, *supra* note 8.

debtor under chapter 9 of the United States Bankruptcy Code.⁸⁷ NEA-Alaska listed bankruptcy restrictions as a legislative priority for the 1987 Alaska legislative session.⁸⁸ The organization supported legislation requiring a school district declaring bankruptcy to be placed under state receivership.⁸⁹

Although no legislation restricting a school district's right to file a chapter 9 petition was passed by the Alaska Legislature,⁹⁰ the fact that legislation was introduced and supported by Alaska's largest teachers' organization is an indication of the political response which could take place if a school district avails itself of the jurisdiction of a United States bankruptcy court.

Indeed, there appears to be a growing trend toward state intervention into the affairs of financially troubled school districts. According to a recent article in *The American School Board Journal*, New Jersey, Texas, Kentucky, New Mexico, and West Virginia have developed procedures for state intervention in local school districts.⁹¹ For example, Kentucky law permits the state superintendent for public instruction, with the concurrence of the state board of education, to intervene in the operations of an educationaly "deficient" school district if it fails to implement and approve education improvement plans adopted by the state.⁹²

If a school district maintains a sound educational program and is simply overwhelmed by economic factors beyond its control, state intervention hardly seems justified. State intervention or takeover would merely add an additional layer of bureaucracy by removing control of the district to the state level. Such removal would thereby eliminate the flexibility afforded by local control. Moreover, there is no indication that state control would be more effective than local school boards in dealing with financial concerns. Thus, chapter 9, which allows a school board to adjust its debts while maintaining local control of the schools, is preferable to state takeover legislation in cases involving purely financial difficulties.

87. H.B. 562, 15th Leg., 2d Sess., 1988 Alaska Sess. Laws.

88. NEA-ALASKA, NEA-AKTIVIST I (Mar. 1987).

89. *Id.*; H.B. 562, 15th Leg., 2d Sess., 1988 Alaska Sess. Laws.

90. H.B. 562 was sent to the House Health, Education and Social Services Committee. The Committee took no action with regard to the bill during the session.

91. Rzecer, *Jersey City Stands Firm Against Charges of Academic Bankruptcy*, 21 AM. SCHOOL BOARD J. 21 (Nov. 1988).

92. KY. REV. STAT. ANN. § 158.690(4) (Baldwin 1987). See also W. VA. CODE § 18-2E-5 (1988) (pertaining to West Virginia "takeover" legislation).

IV. CONCLUSION

Chapter 9 of the United States Bankruptcy Code is a reasonable option for insolvent school districts to reorganize their financial affairs. Federal bankruptcy law permits municipal debtors to reject burdensome collective bargaining agreements if necessary and stays litigation and administrative proceedings which may hinder a school district's reorganization. In the absence of clear state law remedies, chapter 9 is an effective means for an insolvent school district to reduce salaries and balance its budget.

A school district should consider the political implications of relief under chapter 9. Public employees' unions may attempt to close the door to bankruptcy court by supporting state legislation prohibiting a school district from filing a chapter 9 petition or providing for the takeover of a school district by the state if the school district does take such action. Unless adequate state remedies are provided for responding to a school district's financial crisis, such developments would be unfortunate. Local school boards, like private corporations and individuals, should be afforded an opportunity to adjust their debts under the United States Bankruptcy Code. To the extent chapter 9 gives a school district the means to reorganize its financial affairs and start afresh, the municipal bankruptcy statutes enhance and protect the local control of school districts by popularly elected school boards.

HB

239

FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. HB239

Revision Date/Time: _____	Dept Affected: <u>Natural Resources</u>
Title: <u>"An act relating to the Uniform Commercial Code...."</u>	BRU: <u>Information/Data Management</u>
Sponsor: <u>Rep. Murkowski</u>	Component: <u>Recorder's Office/UCC</u>
Requestor: <u>(H) L&C</u>	Component No. <u>802</u>

Expenditures/Revenues (Thousands of Dollars)
 Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	1.5	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	16.5	24.0	0.0	0.0	0.0	0.0
SUPPLIES	2.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	6.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS & CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	26.0	24.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES (1005)	0.0	(20.0)	(16.0)	(12.0)	(9.0)	(6.7)

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts	26.0	24.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	26.0	24.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2000) cost: \$ 0.0

POSITIONS

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS:

(Attach a separate page if necessary)

Under HB239, all UCC filings (except fixture filings, timber to be cut and as-extracted collateral) would be filed at the central filing office. Local district offices would continue to accept filings on fixtures, timber to be cut and as-extracted collateral, but all other filings would occur at the central office, simplifying the process immensely for filing officers and secured lenders alike.

The declining revenues shown above represent the decrease attributable to the gradual elimination of dual filings over the transitional period. Decreasing revenues are expected until all filings have transitioned to UCC Central, or lapsed.

..... continued on page 2.....

Prepared by:	Sharon Young <i>[Signature]</i>	Phone :	907 269-8882
Division:	Support Services Division	Date :	03-Feb-00
Approved by Commissioner:	John Shively <i>[Signature]</i>	Date:	03-02-2000
Agency:	Natural Resources		

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE
 For further distribution information call the Governor's Legislative Office

The initial anticipated increase in filings at UCC Central will be 30 to 40 percent per year, with a corresponding decrease at the local district level. After the transition period, the UCC Central volume should stabilize at 150 to 167 percent of its current total. The overall decrease in revenues for the component as a result of the change in filing office is expected to total \$63.7 over the five year transition period. The component regularly generates between \$1 and \$2.5 million in excess of its operating budget annually.

With the expected 50 to 67 per cent increase in UCC Central filings under this bill (approximately 10,000 to 15,000 documents per year), the component estimates that an additional two to two and a half FTE staff would be required in the UCC Central office to process the increased volume. This staffing would be handled via lateral transfers from the larger recording district offices. Little impact would be seen at the remote office sites as they do not currently have large volumes of UCC transactions under the current law. Because the component expects to utilize existing cross-trained employees from larger recording offices to handle the increased filing volume at UCC Central, the fiscal note does not request any new personal services funding to implement this bill. However, because this code revision would result in some major operational changes in the way UCC documents are processed, there are some secondary costs, including programming costs, that have to be considered in the implementation phase.

In order to meet the July 1, 2001 target implementation date, some programming costs would be incurred to implement usage of check digits as required by the bill, to establish a status code, to add a page count to UCC filings, and to facilitate purging of lapsed and terminated filings. This cost is estimated at one month of labor at a cost of \$6,000 in programming time. This expense would need to be incurred during FY01 in order to be ready for the July 1, 2001 target date. Other costs that would be required to implement this bill are related to staff training, user education sessions, notifications to users regarding changes, additional equipment for UCC Central public access library, and preparation and implementation of administrative rules and reporting mechanisms required under HB239. The component estimates a total expense in this area of \$20,000.

One of the goals of the revised UCC is to pave the way toward electronic filing and increased usage of technology in the UCC systems throughout the country. The component has identified costs of \$18,000 in information systems staff time to work toward accepting UCC filings electronically, accept payment for such filings electronically and utilize the national standard forms for electronic filings. An additional \$6,000 in programming time (one man-month) may be needed to update the UCC search programs to meet specifications expected to be included in the Model Administrative Rules referenced in the bill. Because the Model Rules are not yet in a final format, it is unknown at this time what their impact may be on existing programs.

Chair:
MILITARY AND VETERANS AFFAIRS

Member:
JUDICIARY
COMMUNITY AND REGIONAL AFFAIRS
LABOR AND COMMERCE



REPRESENTATIVE LISA MURKOWSKI
Government Hill • Elmendorf • East Anchorage

Session:
ALASKA STATE CAPITOL
JUNEAU, AK 99801-1182
PHONE: (907) 465-3783
FAX: (907) 465-2293
TOLL FREE: (877) 460-3783

Interim:
716 WEST 4TH AVENUE
ANCHORAGE, AK 99501-2133
PHONE: (907) 269-0174
FAX: (907) 269-0177

Sponsor Statement House Bill 239

Revised Uniform Commercial Code Article 9 – Secured Transactions

Trillions of dollars of commercial and consumer credit are granted each year in secured transactions under Article 9 of the Uniform Commercial Code (UCC). UCC Article 9 – Secured Transactions, provides a statutory framework that governs transactions in which a creditor takes a security interest in specific property of a debtor, allowing the creditor to take the property in the event the debtor defaults on the debt. Article 9 of the UCC has been adopted in every state and was last revised in 1972. Major revisions to Article 9 by the Uniform Law Commissioners were completed in 1998. These revisions bring Article 9 into the 21st Century.

There are many reasons Revised Article 9 should be adopted in Alaska:

- **Technology** Paper-based transactions are giving way to electronic transactions and revised Article 9 allows for this.
- **Volume** Article 9 was first proposed in 1951 and was last updated in 1972. Since then, the volume of commerce and credit has increased exponentially. The filing system revisions are particularly necessary to meet the problem of increased volume.
- **New Collateral** New kinds of property and transactions have been developed since Article 9 was last amended. The scope of Article 9 expands to keep up with these changes. Deposit accounts, health insurance receivables, and commercial tort claims are examples of new collateral.
- **Certainty of Perfection** Uncertainties about where to perfect a security interest under the original Article 9 are overcome in the revisions making the location of the debtor the place where the creditor perfects the security interest.
- **New Liens** Statutory, non-possessory liens have proliferated since Article 9 was originally approved. Such liens represent a risk for creditors, and a potential conflict with security interests in collateral if there is no public notice of their existence. Article 9 includes certain statutory,

non-possessory liens for the purposes of providing public notice and setting priorities between creditors.

- **Clarification of Rules** Historically, courts have interpreted provisions of Article 9 in conflicting ways. Some of their decisions have dealt with issues that were not explicitly addressed in the original Article 9. This has resulted in an ambiguous application of some rules. The revisions to Article 9 address and rectify the accrued ambiguities.
- **Simplified Filing** A simplified and unified statewide filing system of finance statements to perfect security interests replaces the original filing system, which allowed only certain local filing.
- **Consumer Impact** Revised Article 9 addresses consumer issues that were not considered in the original Article 9 such as a specific disclosure of creditor's deficiency rights and notice requirements upon repossession.
- **Commitment to Uniformity** Amendments to Article 9 have varied from state to state and thus have created differences that have impaired interstate transactions. In an effort to reestablish uniformity of the laws governing these transactions, the revisions address specific types of secured transactions like oil and gas and agriculture.

States that have adopted Revised Article 9:

Arizona	Nebraska
California	Nevada
Maryland	Texas
Montana	

2000 Introductions:

Alaska	Minnesota
Delaware	Missouri
District of Columbia	New Hampshire
Hawaii	New Mexico
Illinois	Oklahoma
Indiana	South Carolina
Kansas	Tennessee
Kentucky	Vermont
Maine	Virginia
Michigan	Washington

CS FOR HOUSE BILL NO. 239()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE MURKOWSKI BY REQUEST

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to the Uniform Commercial Code; relating to secured**
2 **transactions; amending Rule 79, Alaska Rules of Civil Procedure; and providing**
3 **for an effective date."**

4 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 *** Section 1. AS 45.09 is repealed and reenacted to read:**

6 **Chapter 09. Secured Transactions.**

7 **Article 1. General Provisions.**

8 **Sec. 45.09.101. Short title. This chapter may be cited as Uniform**
9 **Commercial Code - Secured Transactions.**

10 **Sec. 45.09.102. Definitions. (a) In this chapter,**

11 **(1) "accession" means goods that are physically united with other goods**
12 **in a manner so that the identity of the original goods is not lost;**

13 **(2) "account," except as used in "account for,"**

14 **(A) means a right to payment of a monetary obligation, whether**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

or not earned by performance,

(i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of;

(ii) for services rendered or to be rendered;

(iii) for a policy of insurance issued or to be issued;

(iv) for a secondary obligation incurred or to be incurred;

(v) for energy provided or to be provided;

(vi) for the use or hire of a vessel under a charter or other contract;

(vii) arising out of the use of a credit or charge card or information contained on or for use with the card; or

(viii) as winnings in a lottery or other game of chance operated or sponsored by a state, a governmental unit of a state, or a person licensed or authorized to operate the game by a state or a governmental unit of a state;

(B) includes health care insurance receivables;

(C) does not include rights to payment evidenced by chattel paper or by an instrument, commercial tort claims, deposit accounts, investment property, letter-of-credit rights or letters of credit, or rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card;

(3) "account debtor" means a person obligated on an account, chattel paper, or general intangible, except that "account debtor" does not include persons obligated to pay a negotiable instrument even if the instrument constitutes part of chattel paper;

(4) "accounting," except as used in "accounting for," means a record

(A) authenticated by a secured party;

(B) indicating the aggregate unpaid secured obligations as of a date not more than 35 days earlier or 35 days later than the date of the record; and

1 (C) identifying the components of the obligations in reasonable
2 detail;

3 (5) "agricultural lien" means an interest, other than a security interest,
4 in farm products

5 (A) that secures payment or performance of an obligation for
6 (i) goods or services furnished in connection with a
7 debtor's farming operation; or

8 (ii) rent on real property leased by a debtor in
9 connection with the debtor's farming operation;

10 (B) that is created by statute in favor of a person who

11 (i) in the ordinary course of its business, furnished goods
12 or services to a debtor in connection with the debtor's farming
13 operation; or

14 (ii) leased real property to a debtor in connection with
15 the debtor's farming operation; and

16 (C) whose effectiveness does not depend on the person's
17 possession of the personal property;

18 (6) "applicant" means a person at whose request or for whose account
19 a letter of credit is issued, including a person who requests an issuer to issue a letter
20 of credit on behalf of another if the person making the request undertakes an obligation
21 to reimburse the issuer;

22 (7) "as-extracted collateral" means

23 (A) oil, gas, or other minerals that are subject to a security
24 interest that

25 (i) is created by a debtor having an interest in the
26 minerals before extraction; and

27 (ii) attaches to the minerals as extracted; or

28 (B) accounts arising out of the sale at the wellhead or minehead
29 of oil, gas, or other minerals in which the debtor had an interest before
30 extraction;

31 (8) "authenticate" means to

1 (A) sign; or

2 (B) execute or otherwise adopt a symbol, or to encrypt or
3 similarly process a record in whole or in part, with the present intent of the
4 authenticating person to identify the person and adopt or accept a record;

5 (9) "bank" means an organization that is engaged in the business of
6 banking, including a savings bank, savings and loan association, credit union, and trust
7 company;

8 (10) "beneficiary" means a person who, under the terms of a letter of
9 credit, is entitled to have its complying presentation honored, including a person to
10 whom drawing rights have been transferred under a transferable letter of credit;

11 (11) "broker" has the meaning given in AS 45.08.102(a);

12 (12) "cash proceeds" means proceeds that are money, checks, deposit
13 accounts, or the like;

14 (13) "certificated security" has the meaning given in AS 45.08.102(a);

15 (14) "certificate of title" means a certificate of title with respect to
16 which a statute provides for the security interest in question to be indicated on the
17 certificate as a condition or result of the security interest's obtaining priority over the
18 rights of a lien creditor with respect to the collateral;

19 (15) "chattel paper" means a record or records that evidence both a
20 monetary obligation and a security interest in specific goods, a security interest in
21 specific goods and software used in the goods, or a lease of specific goods, except that
22 "chattel paper" does not include charters or other contracts involving the use or hire
23 of a vessel; if a transaction is evidenced both by a security agreement or lease and by
24 an instrument or series of instruments, the group of records taken together constitutes
25 chattel paper;

26 (16) "check" has the meaning given in AS 45.03.104(f);

27 (17) "collateral" means the property subject to a security interest or
28 agricultural lien, including

29 (A) proceeds to which a security interest attaches;

30 (B) accounts, chattel paper, payment intangibles, and promissory
31 notes that have been sold; and

- 1 (C) goods that are the subject of a consignment;
- 2 (18) "commercial tort claim" means a claim arising in tort with respect
- 3 to which the claimant is
- 4 (A) an organization; or
- 5 (B) an individual and the claim
- 6 (i) arose in the course of the claimant's business or
- 7 profession; and
- 8 (ii) does not include damages arising out of personal
- 9 injury to or the death of an individual;
- 10 (19) "commodity account" means an account maintained by a
- 11 commodity intermediary in which a commodity contract is carried for a commodity
- 12 customer;
- 13 (20) "commodity contract" means a commodity futures contract, an
- 14 option on a commodity futures contract, a commodity option, or another contract if the
- 15 contract or option is traded on
- 16 (A) or subject to the rules of a board of trade that has been
- 17 designated as a contract market for the contract under federal commodities
- 18 laws; or
- 19 (B) a foreign commodity board of trade, exchange, or market
- 20 and is carried on the books of a commodity intermediary for a commodity
- 21 customer;
- 22 (21) "commodity customer" means a person for whom a commodity
- 23 intermediary carries a commodity contract on its books;
- 24 (22) "commodity intermediary" means a person who
- 25 (A) is registered as a futures commission merchant under
- 26 federal commodities law; or
- 27 (B) in the ordinary course of its business, provides clearance or
- 28 settlement services for a board of trade that has been designated as a contract
- 29 market under federal commodities laws;
- 30 (23) "communicate" means
- 31 (A) to send a written or other tangible record;

1 (B) to transmit a record by any means agreed upon by the
2 persons sending and receiving the record; or

3 (C) in the case of transmission of a record to or by a filing
4 office, to transmit a record by any means prescribed by filing office regulation;

5 (24) "consignee" means a merchant to whom goods are delivered in a
6 consignment;

7 (25) "consignment" means a transaction, regardless of its form, in
8 which a person delivers goods to a merchant for the purpose of sale and

9 (A) the merchant

10 (i) deals in goods of that kind under a name other than
11 the name of the person making delivery;

12 (ii) is not an auctioneer; and

13 (iii) is not generally known by the merchant's creditors
14 to be substantially engaged in selling the goods of others;

15 (B) with respect to each delivery, the aggregate value of the
16 goods is \$1,000 or more at the time of delivery;

17 (C) the goods are not consumer goods immediately before
18 delivery; and

19 (D) the transaction does not create a security interest that
20 secures an obligation;

21 (26) "consignor" means a person who delivers goods to a consignee in
22 a consignment;

23 (27) "consumer goods" means goods that are used or bought for use
24 primarily for personal, family, or household purposes;

25 (28) "consumer goods transaction" means a consumer transaction in
26 which

27 (A) an individual incurs an obligation primarily for personal,
28 family, or household purposes; and

29 (B) a security interest in consumer goods secures the obligation;

30 (29) "consumer obligor" means an obligor who is an individual and
31 who incurred the obligation as part of a transaction entered into primarily for personal,

1 family, or household purposes;

2 (30) "consumer transaction" means a transaction, including a consumer
3 goods transaction, in which

4 (A) an individual incurs an obligation primarily for personal,
5 family, or household purposes;

6 (B) a security interest secures the obligation; and

7 (C) the collateral is held or acquired primarily for personal,
8 family, or household purposes;

9 (31) "continuation statement" means an amendment of a financing
10 statement that

11 (A) identifies, by its file number, the initial financing statement
12 to which it relates; and

13 (B) indicates that it is a continuation statement for, or that it is
14 filed to continue the effectiveness of, the identified financing statement;

15 (32) "contract for sale" has the meaning given in AS 45.02.106(a);

16 (33) "customer" has the meaning given in AS 45.04.104(a);

17 (34) "debtor" means

18 (A) a person having an interest, other than a security interest or
19 other lien, in the collateral whether or not the person is an obligor;

20 (B) a seller of accounts, chattel paper, payment intangibles, or
21 promissory notes; or

22 (C) a consignee;

23 (35) "deposit account" means a demand, time, savings, passbook, or
24 similar account maintained with a bank except that the term does not include
25 investment property or accounts evidenced by an instrument;

26 (36) "document" means a document of title or a receipt of the type
27 described in AS 45.07.201(b);

28 (37) "electronic chattel paper" means chattel paper evidenced by a
29 record or records consisting of information stored in an electronic medium;

30 (38) "encumbrance" means a right, other than an ownership interest, in
31 real property, including mortgages and other liens on real property;

- 1 (39) "entitlement holder" has the meaning given in AS 45.08.102(a);
- 2 (40) "equipment" means goods other than inventory, farm products, or
- 3 consumer goods;
- 4 (41) "farm products" means goods, other than standing timber, with
- 5 respect to which the debtor is engaged in a farming operation and that are
- 6 (A) crops grown, growing, or to be grown, including
- 7 (i) crops produced on trees, vines, and bushes; and
- 8 (ii) aquatic goods produced in aquacultural operations;
- 9 (B) livestock, born or unborn, including aquatic goods produced
- 10 in aquacultural operations;
- 11 (C) supplies used or produced in a farming operation; or
- 12 (D) products of crops or livestock in their unmanufactured
- 13 states;
- 14 (42) "farming operation" means raising, cultivating, propagating,
- 15 fattening, grazing, or other farming, livestock, or aquacultural operation.
- 16 (43) "file number" means the number assigned to an initial financing
- 17 statement under AS 45.09.519(a);
- 18 (44) "filing office" means an office designated in AS 45.09.501 as the
- 19 place to file a financing statement;
- 20 (45) "filing office regulation" means a regulation adopted under
- 21 AS 44.37.027;
- 22 (46) "financial asset" has the meaning given in AS 45.08.102(a);
- 23 (47) "financing statement" means a record or records composed of an
- 24 initial financing statement and any filed record relating to the initial financing
- 25 statement;
- 26 (48) "fixture filing" means the filing of a financing statement covering
- 27 goods that are or are to become fixtures and satisfying AS 45.09.502(a) and (b),
- 28 including the filing of a financing statement covering goods of a transmitting utility
- 29 that are or are to become fixtures;
- 30 (49) "fixtures" means goods that have become so related to particular
- 31 real property that an interest in them arises under real property law;

1 (50) "general intangible" means personal property, including payment
2 intangibles, software, and things in action, other than accounts, chattel paper,
3 commercial tort claims, deposit accounts, documents, goods, instruments, investment
4 property, letter-of-credit rights, letters of credit, money, and, before extraction, oil, gas,
5 or other minerals;

6 (51) "good faith" means honesty in fact and the observance of
7 reasonable commercial standards of fair dealing;

8 (52) "goods" means things that are movable when a security interest
9 attaches; the term includes (A) fixtures; (B) standing timber that is to be cut and
10 removed under a conveyance or contract for sale; (C) the unborn young of animals;
11 (D) crops grown, growing, or to be grown, even if the crops are produced on trees,
12 vines, or bushes; and (E) manufactured homes; the term also includes a computer
13 program embedded in goods and supporting information provided in connection with
14 a transaction relating to the program if the program is associated with the goods in
15 such a manner that it customarily is considered part of the goods or if, by becoming
16 the owner of the goods, a person acquires a right to use the program in connection
17 with the goods; the term does not include a computer program embedded in goods that
18 consist solely of the medium with which the program is embedded; the term also does
19 not include accounts, chattel paper, commercial tort claims, deposit accounts,
20 documents, general intangibles, instruments, investment property, letter-of-credit rights,
21 letters of credit, money, or, before extraction, oil, gas, or other minerals;

22 (53) "governmental unit" means

23 (A) a subdivision, agency, department, county, parish,
24 municipality, or other unit of the government of the United States, a state, or
25 a foreign country;

26 (B) an organization having a separate corporate existence if the
27 organization is eligible to issue debt on which interest is exempt from income
28 taxation under the laws of the United States;

29 (54) "health care insurance receivable" means an interest in or claim
30 under a policy of insurance that is a right to payment of a monetary obligation for
31 health-care goods or services provided;

- 1 (55) "holder in due course" has the meaning given in AS 45.03.302;
- 2 (56) "instrument" means a negotiable instrument or other writing that
- 3 evidences a right to the payment of a monetary obligation and is not itself a security
- 4 agreement or lease and is of a type that in ordinary course of business is transferred
- 5 by delivery with any necessary endorsement or assignment; the term does not include
- 6 (A) investment property;
- 7 (B) letters of credit; or
- 8 (C) writings that evidence a right to payment arising out of the
- 9 use of a credit or charge card or information contained on or for use with the
- 10 card;
- 11 (57) "inventory" means goods, other than farm products, that
- 12 (A) are leased by a person as lessor;
- 13 (B) are held by a person for sale or lease or to be furnished
- 14 under a contract of service;
- 15 (C) are furnished by a person under a contract of service; or
- 16 (D) consist of raw materials, work in process, or materials used
- 17 or consumed in a business;
- 18 (58) "investment property" means a security, whether certificated or
- 19 uncertificated, security entitlement, securities account, commodity contract, or
- 20 commodity account;
- 21 (59) "issuer," with respect to a
- 22 (A) letter of credit or letter-of-credit right, means a bank or
- 23 other person that issues a letter of credit, except that the term does not include
- 24 an individual who makes an engagement for personal, family, or household
- 25 purposes;
- 26 (B) security, has the meaning given in AS 45.08.201(a);
- 27 (60) "jurisdiction of organization," with respect to a registered
- 28 organization, means the jurisdiction under whose law the organization is organized;
- 29 (61) "lease," "lease agreement," "lease contract," "leasehold interest,"
- 30 "lessee," "lessee in ordinary course of business," "lessor," and "lessor's residual
- 31 interest" have the meanings given in AS 45.12.103(a);

1 (62) "letter of credit" means a definite undertaking that satisfies the
2 requirements of AS 45.05.104 by an issuer to a beneficiary at the request or for the
3 account of an applicant or, in the case of a financial institution, to itself or for its own
4 account, to honor a documentary presentation by payment of delivery of an item of
5 value;

6 (63) "letter-of-credit right" means a right to payment and performance
7 under a letter of credit whether or not the beneficiary has demanded or is at the time
8 entitled to demand payment or performance; the term does not include the right of a
9 beneficiary to demand payment or performance under a letter of credit;

10 (64) "lien creditor" means

11 (A) a creditor who has acquired a lien on the property involved
12 by attachment, levy, or the like;

13 (B) an assignee for benefit of creditors from the time of
14 assignment;

15 (C) a trustee in bankruptcy from the date of the filing of the
16 petition; or

17 (D) a receiver in equity from the time of appointment;

18 (65) "manufactured home" means a structure, transportable in one or
19 more sections, that, in the traveling mode, is eight body feet or more in width or 40
20 body feet or more in length, or, when erected on site, is 320 or more square feet, and
21 that is built on a permanent chassis and designed to be used as a dwelling with or
22 without a permanent foundation when connected to the required utilities, and includes
23 the plumbing, heating, air-conditioning, and electrical systems contained in the
24 structure; the term includes a structure that meets all of the requirements of this
25 paragraph except the size requirements and with respect to which the manufacturer
26 voluntarily files a certification required by the United States Secretary of Housing and
27 Urban Development and complies with the standards established under Title 42, United
28 States Code;

29 (66) "manufactured home transaction" means a secured transaction

30 (A) that creates a purchase money security interest in a
31 manufactured home, other than a manufactured home held as inventory; or

1 (B) in which a manufactured home, other than a manufactured
2 home held as inventory, is the primary collateral;

3 (67) "merchant" has the meaning given in AS 45.02.104(a);

4 (68) "mortgage" means a consensual interest in real property, including
5 fixtures, that secures payment or performance of an obligation;

6 (69) "negotiable instrument" has the meaning given in AS 45.03.104;

7 (70) "new debtor" means a person who becomes bound as debtor under
8 AS 45.09.203(d) by a security agreement previously entered into by another person;

9 (71) "new value" means (A) money, (B) money's worth in property,
10 services, or new credit; or (C) release by a transferee of an interest in property
11 previously transferred to the transferee; the term does not include an obligation
12 substituted for another obligation;

13 (72) "nominated person" means a person whom the issuer

14 (A) designates or authorizes to pay, accept, negotiate, or
15 otherwise give value under a letter of credit; and

16 (B) undertakes by agreement or custom and practice to
17 reimburse;

18 (73) "noncash proceeds" means proceeds other than cash proceeds;

19 (74) "note" has the meaning given in AS 45.03.104;

20 (75) "obligor" means a person who, with respect to an obligation
21 secured by a security interest in or an agricultural lien on the collateral; (A) owes
22 payment or other performance of the obligation; (B) has provided property other than
23 the collateral to secure payment or other performance of the obligation; or (C) is
24 otherwise accountable in whole or in part for payment or other performance of the
25 obligation; the term does not include issuers or nominated persons under a letter of
26 credit;

27 (76) "original debtor" means a person who, as debtor, entered into a
28 security agreement to which a new debtor has become bound under AS 45.09.203(d);

29 (77) "payment intangible" means a general intangible under which the
30 account debtor's principal obligation is a monetary obligation;

31 (78) "person related to," with respect to an

- 1 (A) individual, means
2 (i) the spouse of the individual;
3 (ii) a brother, brother-in-law, sister, or sister-in-law of
4 the individual;
5 (iii) an ancestor or lineal descendant of the individual or
6 the individual's spouse; or
7 (iv) another relative, by blood or marriage, of the
8 individual or the individual's spouse who shares the same home with the
9 individual;
- 10 (B) an organization, means
11 (i) a person directly or indirectly controlling, controlled
12 by, or under common control with the organization;
13 (ii) an officer or director of, or a person performing
14 similar functions with respect to, the organization;
15 (iii) an officer or director of, or a person performing
16 similar functions with respect to, a person described in (i) of this
17 subparagraph;
18 (iv) the spouse of an individual described in (i), (ii), or
19 (iii) of this subparagraph; or
20 (v) an individual who is related by blood or marriage to
21 an individual described in (i), (ii), (iii), or (iv) of this subparagraph and
22 shares the same home with the individual;
- 23 (79) "proceeds" means the following property:
24 (A) whatever is acquired upon the sale, lease, license, exchange,
25 or other disposition of collateral;
26 (B) whatever is collected on, or distributed on account of,
27 collateral;
28 (C) rights arising out of collateral;
29 (D) to the extent of the value of collateral, claims arising out
30 of the loss, nonconformity, or interference with the use of, defects or
31 infringement of rights in, or damage to the collateral; or

1 (E) to the extent of the value of collateral and to the extent
2 payable to the debtor or the secured party, insurance payable by reason of the
3 loss or nonconformity of, defects or infringement of rights in, or damage to, the
4 collateral;

5 (80) "proceeds of the letter of credit" means the cash, check, accepted
6 draft, or other item of value paid or delivered upon honor or giving of value by the
7 issuer or any nominated person under the letter of credit, except that the term does not
8 include a beneficiary's drawing rights or documents presented by the beneficiary;

9 (81) "promissory note" means an instrument that evidences a promise
10 to pay a monetary obligation, does not evidence an order to pay, and does not contain
11 an acknowledgment by a bank that the bank has received for deposit a sum of money
12 or funds;

13 (82) "proposal" means a record authenticated by a secured party that
14 includes the terms on which the secured party is willing to accept collateral in full or
15 partial satisfaction of the obligation it secures under AS 45.09.620 - 45.09.622;

16 (83) "prove" has the meaning given in AS 45.03.103(a);

17 (84) "public finance transaction" means a secured transaction in
18 connection with which

19 (A) debt securities are issued;

20 (B) all or a portion of the securities issued have an initial stated
21 maturity of at least 20 years; and

22 (C) the debtor, obligor, secured party, account debtor or other
23 person obligated on collateral, assignor or assignee of a secured obligation, or
24 assignor or assignee of a security interest is a state or a governmental unit of
25 a state;

26 (85) "pursuant to a commitment," with respect to an advance made or
27 other value given by a secured party, means in accordance with a secured party's
28 obligation, whether or not a subsequent event of default or other event not within the
29 secured party's control has relieved or may relieve the secured party from its
30 obligation;

31 (86) "record," except as used in "for record," "of record," "record or

1 legal title," and "record owner," means information that is inscribed on a tangible
2 medium or that is stored in an electronic or other medium and is retrievable in
3 perceivable form;

4 (87) "registered organization" means an organization organized solely
5 under the law of a single state or the United States and as to which the state or the
6 United States must maintain a public record showing the organization to have been
7 organized;

8 (88) "sale" has the meaning given in AS 45.02.106(a);

9 (89) "secondary obligor" means an obligor to the extent that

10 (A) the obligor's obligation is secondary; or

11 (B) the obligor has a right of recourse with respect to an
12 obligation secured by collateral against the debtor or another obligor, or
13 property of either;

14 (90) "secured party" means

15 (A) a person in whose favor a security interest is created or
16 provided for under a security agreement, whether or not an obligation to be
17 secured is outstanding;

18 (B) a person that holds an agricultural lien;

19 (C) a consignor;

20 (D) a person to which accounts, chattel paper, payment
21 intangibles, or promissory notes have been sold;

22 (E) a trustee, indenture trustee, agent, collateral agent, or other
23 representative in whose favor a security interest or agricultural lien is created
24 or provided for; or

25 (F) a person who holds a security interest arising under
26 AS 45.02.401, 45.02.505, 45.02.711(c), AS 45.04.210, AS 45.05.118, or
27 AS 45.12.508(e);

28 (91) "securities account" has the meaning given in AS 45.08.501(e);

29 (92) "securities intermediary" has the meaning given in
30 AS 45.08.102(a);

31 (93) "security" has the meaning given in AS 45.08.102(a);

1 (94) "security agreement" means an agreement that creates or provides
2 for a security interest;

3 (95) "security certificate" has the meaning given in AS 45.08.102(a);

4 (96) "security entitlement" has the meaning given in AS 45.08.102(a);

5 (97) "send," in connection with a record or notification, means to

6 (A) deposit in the mail, deliver for transmission, or transmit by
7 another usual means of communication, with postage or cost of transmission
8 provided for, addressed to an address reasonable under the circumstances; or

9 (B) cause the record or notification to be received within the
10 time that it would have been received if properly sent under (A) of this
11 paragraph;

12 (98) "software" means a computer program and supporting information
13 provided in connection with a transaction relating to the program; the term does not
14 include a computer program that is included in the definition of "goods";

15 (99) "state" means a state of the United States, the District of
16 Columbia, Puerto Rico, the United States Virgin Islands, or a territory or insular
17 possession subject to the jurisdiction of the United States;

18 (100) "supporting obligation" means a letter-of-credit right or secondary
19 obligation that supports the payment or performance of an account, chattel paper, a
20 document, a general intangible, an instrument, or investment property;

21 (101) "tangible chattel paper" means chattel paper evidenced by a
22 record or records consisting of information that is inscribed on a tangible medium;

23 (102) "termination statement" means an amendment of a financing
24 statement that

25 (A) identifies by its file number the initial financing statement
26 to which it relates; and

27 (B) indicates either that it is a termination statement or that the
28 identified financing statement is no longer effective;

29 (103) "transmitting utility" means a person primarily engaged in the
30 business of

31 (A) operating a railroad, subway, street railway, or trolley bus;

1 (B) transmitting communications electrically,
2 electromagnetically, or by light;

3 (C) transmitting goods by pipeline or sewer; or

4 (D) transmitting or producing and transmitting electricity, steam,
5 gas, or water;

6 (104) "uncertificated security" has the meaning given in
7 AS 45.08.102(a).

8 (b) In addition, AS 45.01 contains general definitions and principles of
9 construction and interpretation applicable throughout this chapter.

10 **Sec. 45.09.103. Purchase money security interest; application of payments;
11 burden of establishing.** (a) In this section,

12 (1) "purchase money collateral" means goods or software that secures
13 a purchase money obligation incurred with respect to that collateral; and

14 (2) "purchase money obligation" means an obligation of an obligor
15 incurred as all or part of the price of the collateral or for value given to enable the
16 debtor to acquire rights in or the use of the collateral if the value is in fact so used.

17 (b) A security interest in goods is a purchase money security interest

18 (1) to the extent that the goods are purchase money collateral with
19 respect to that security interest;

20 (2) if the security interest is in inventory that is or was purchase money
21 collateral, to the extent that the security interest secures a purchase money obligation
22 incurred with respect to other inventory in which the secured party holds or held a
23 purchase money security interest; and

24 (3) to the extent that the security interest secures a purchase money
25 obligation incurred with respect to software in which the secured party holds or held
26 a purchase money security interest.

27 (c) A security interest in software is a purchase money security interest to the
28 extent that the security interest also secures a purchase money obligation incurred with
29 respect to goods in which the secured party holds or held a purchase money security
30 interest if the debtor acquired its interest in the software

31 (1) in an integrated transaction in which it acquired an interest in the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

goods; and

(2) for the principal purpose of using the software in the goods.

(d) The security interest of a consignor in goods that are the subject of a consignment is a purchase money security interest in inventory.

(e) In a transaction other than a consumer goods transaction, if the extent to which a security interest is a purchase money security interest depends on the application of a payment to a particular obligation, the payment must be applied

(1) in accordance with any reasonable method of application to which the parties agree;

(2) in the absence of the parties' agreement to a reasonable method, in accordance with an intention of the obligor manifested at or before the time of payment; or

(3) in the absence of an agreement to a reasonable method and a timely manifestation of the obligor's intention, in the following order:

(A) to obligations that are not secured; and

(B) if more than one obligation is secured, to obligations secured by purchase money security interests in the order in which those obligations were incurred.

(f) In a transaction, other than a consumer goods transaction, a purchase money security interest does not lose its status as such even if

(1) the purchase money collateral also secures an obligation that is not a purchase money obligation;

(2) collateral that is not purchase money collateral also secures the purchase money obligation; or

(3) the purchase money obligation has been renewed, refinanced, consolidated, or restructured.

(g) In a transaction other than a consumer goods transaction, a secured party claiming a purchase money security interest has the burden of establishing the extent to which the security interest is a purchase money security interest.

(h) The limitation of the rules in (e) - (g) of this section to transactions other than consumer goods transactions is intended to leave to the court the determination

L

1 of the proper rules in consumer goods transactions. The court may not infer from that
2 limitation the nature of the proper rule in consumer goods transactions and may
3 continue to apply established approaches.

4 **Sec. 45.09.104. Control of deposit account.** (a) A secured party has control
5 of a deposit account if

6 (1) the secured party is the bank with which the deposit account is
7 maintained;

8 (2) the debtor, secured party, and bank have agreed in an authenticated
9 record that the bank will comply with instructions originated by the secured party
10 directing disposition of the funds in the account without further consent by the debtor;
11 or

12 (3) the secured party becomes the bank's customer with respect to the
13 deposit account.

14 (b) A secured party that has satisfied (a) of this section has control even if the
15 debtor retains the right to direct the disposition of funds from the deposit account.

16 **Sec. 45.09.105. Control of electronic chattel paper.** A secured party has
17 control of electronic chattel paper if the record or records comprising the chattel paper
18 are created, stored, and assigned in such a manner that

19 (1) a single authoritative copy of the record or records exists that is
20 unique, identifiable, and, except as otherwise provided in (4) - (6) of this section,
21 unalterable;

22 (2) the authoritative copy identifies the secured party as the assignee
23 of the record or records;

24 (3) the authoritative copy is communicated to and maintained by the
25 secured party or its designated custodian;

26 (4) copies or revisions that add or change an identified assignee of the
27 authoritative copy can be made only with the participation of the secured party;

28 (5) each copy of the authoritative copy and any copy of a copy is
29 readily identifiable as a copy that is not the authoritative copy; and

30 (6) any revision of the authoritative copy is readily identifiable as an
31 authorized or unauthorized revision.

1 **Sec. 45.09.106. Control of investment property.** (a) A person has control
2 of a certificated security, uncertificated security, or security entitlement as provided in
3 AS 45.08.106.

4 (b) A secured party has control of a commodity contract if

5 (1) the secured party is the commodity intermediary with which the
6 commodity contract is carried; or

7 (2) the commodity customer, secured party, and commodity
8 intermediary have agreed that the commodity intermediary will apply any value
9 distributed on account of the commodity contract as directed by the secured party
10 without further consent by the commodity customer.

11 (c) A secured party having control of all security entitlements or commodity
12 contracts carried in a securities account or commodity account has control over the
13 securities account or commodity account.

14 **Sec. 45.09.107. Control of letter-of-credit right.** A secured party has control
15 of a letter-of-credit right to the extent of any right to payment or performance by the
16 issuer or a nominated person if the issuer or nominated person has consented to an
17 assignment of proceeds of the letter of credit under AS 45.05.114(c) or otherwise
18 applicable law or practice.

19 **Sec. 45.09.108. Sufficiency of description.** (a) Except as otherwise provided
20 in (c) - (e) of this section, a description of personal or real property is sufficient,
21 whether or not it is specific, if it reasonably identifies what is described.

22 (b) Except as otherwise provided in (d) of this section, a description of
23 collateral reasonably identifies the collateral if it identifies the collateral by

24 (1) specific listing;

25 (2) category;

26 (3) except as otherwise provided in (e) of this section, a type of
27 collateral defined in AS 45.01 - AS 45.09, AS 45.12, or AS 45.14 (Uniform
28 Commercial Code);

29 (4) quantity;

30 (5) computational or allocational formula or procedure; or

31 (6) except as otherwise provided in (c) of this section, another method

1 if the identity of the collateral is objectively determinable.

2 (c) A description of collateral as "all the debtor's assets" or "all the debtor's
3 personal property" or using words of similar import does not reasonably identify the
4 collateral.

5 (d) Except as otherwise provided in (e) of this section, a description of a
6 security entitlement, securities account, or commodity account is sufficient if it
7 describes

8 (1) the collateral by those terms or as investment property; or

9 (2) the underlying financial asset or commodity contract.

10 (e) A description only by type of collateral defined in AS 45.01 - AS 45.09,
11 AS 45.12, or AS 45.14 (Uniform Commercial Code) is an insufficient description of

12 (1) a commercial tort claim; or

13 (2) in a consumer transaction, consumer goods, a security entitlement,
14 a securities account, or a commodity account.

15 **Sec. 45.09.109. Scope.** (a) Except as otherwise provided in (c) and (d) of this
16 section, this chapter applies to

17 (1) a transaction, regardless of its form, that creates a security interest
18 in personal property or fixtures by contract;

19 (2) an agricultural lien;

20 (3) a sale of accounts, chattel paper, payment intangibles, or promissory
21 notes;

22 (4) a consignment;

23 (5) a security interest arising under AS 45.02.401, 45.02.505,
24 45.02.711(c), or AS 45.12.508(e), as provided in AS 45.09.110; and

25 (6) a security interest arising under AS 45.04.210 or AS 45.05.118.

26 (b) The application of this chapter to a security interest in a secured obligation
27 is not affected by the fact that the obligation is itself secured by a transaction or
28 interest to which this chapter does not apply.

29 (c) This chapter does not apply to the extent that

30 (1) a statute, regulation, or treaty of the United States preempts this
31 chapter;

1 (2) another statute of this state expressly governs the creation.
2 perfection, priority, or enforcement of a security interest created by this state or a
3 governmental unit of this state;

4 (3) a statute of another state, a foreign country, or a governmental unit
5 of another state or a foreign country, other than a statute generally applicable to
6 security interests, expressly governs creation, perfection, priority, or enforcement of
7 a security interest created by the state, country, or governmental unit; or

8 (4) the rights of a transferee beneficiary or nominated person under a
9 letter of credit are independent and superior under AS 45.05.114.

10 (d) This chapter does not apply to

11 (1) a landlord's lien, other than an agricultural lien;

12 (2) a lien, other than an agricultural lien, given by statute or other rule
13 of law for services or materials, but AS 45.09.333 applies with respect to priority of
14 the lien;

15 (3) an assignment of a claim for wages, salary, or other compensation
16 of an employee;

17 (4) a sale of accounts, chattel paper, payment intangibles, or promissory
18 notes as part of a sale of the business out of which they arose;

19 (5) an assignment of accounts, chattel paper, payment intangibles, or
20 promissory notes that is for the purpose of collection only;

21 (6) an assignment of a right to payment under a contract to an assignee
22 that is also obligated to perform under the contract;

23 (7) an assignment of a single account, payment intangible, or
24 promissory note to an assignee in full or partial satisfaction of a preexisting
25 indebtedness;

26 (8) a transfer of an interest in or an assignment of a claim under a
27 policy of insurance, other than an assignment by or to a health care provider of a
28 health care insurance receivable and any subsequent assignment of the right to
29 payment, but AS 45.09.315 and 45.09.322 apply with respect to proceeds and priorities
30 in proceeds;

31 (9) an assignment of a right represented by a judgment, other than a

1 judgment taken on a right to payment that was collateral;

2 (10) a right of recoupment or setoff, but

3 (A) AS 45.09.340 applies with respect to the effectiveness of
4 rights of recoupment or setoff against deposit accounts; and

5 (B) AS 45.09.404 applies with respect to defenses or claims of
6 an account debtor;

7 (11) the creation or transfer of an interest in or lien on real property,
8 including a lease or rents thereunder, except to the extent that provision is made for

9 (A) liens on real property in AS 45.09.203 and 45.09.308;

10 (B) fixtures in AS 45.09.334;

11 (C) fixture filings in AS 45.09.501, 45.09.502, 45.09.512,
12 45.09.516, and 45.09.519; and

13 (D) security agreements covering personal and real property in
14 AS 45.09.604;

15 (12) an assignment of a claim arising in tort, other than a commercial
16 tort claim, but AS 45.09.315 and 45.09.322 apply with respect to proceeds and
17 priorities in proceeds; or

18 (13) an assignment of a deposit account in a consumer transaction, but
19 AS 45.09.315 and 45.09.322 apply with respect to proceeds and priorities in proceeds.

20 **Sec. 45.09.110. Security interests arising under AS 45.02 or AS 45.12.** A
21 security interest arising under AS 45.02.401, 45.02.505, 45.02.711(c), or
22 AS 45.12.508(e) is subject to this chapter. However, until the debtor obtains
23 possession of the goods,

24 (1) the security interest is enforceable even if AS 45.09.203(b)(3) has
25 not been satisfied;

26 (2) filing is not required to perfect the security interest;

27 (3) the rights of the secured party after default by the debtor are
28 governed by AS 45.02 or AS 45.12; and

29 (4) the security interest has priority over a conflicting security interest
30 created by the debtor.

31 **Article 2. Security Agreements; Security Interests.**

1 **Sec. 45.09.201. General effectiveness of security agreement.** (a) Except as
2 otherwise provided in AS 45.01 - AS 45.09, AS 45.12, and AS 45.14 (the Uniform
3 Commercial Code), a security agreement is effective according to its terms between
4 the parties, against purchasers of the collateral, and against creditors.

5 (b) A transaction subject to this chapter is subject to

6 (1) an applicable rule of law that establishes a different rule for
7 consumers;

8 (2) another statute or regulation that regulates the rates, charges,
9 agreements, and practices for loans, credit sales, or other extensions of credit; and

10 (3) consumer protection statutes or regulations.

11 (c) In case of conflict between this chapter and a rule of law, statute, or
12 regulation described in (b) of this section, the rule of law, statute, or regulation
13 controls. Failure to comply with a statute or regulation described in (b) of this section
14 has only the effect the statute or regulation specifies.

15 (d) This chapter does not

16 (1) validate a rate, charge, agreement, or practice that violates a rule
17 of law, statute, or regulation described in (b) of this section; or

18 (2) extend the application of the rule of law, statute, or regulation to
19 a transaction not otherwise subject to it.

20 **Sec. 45.09.202. Title to collateral immaterial.** Except as otherwise provided
21 with respect to consignments or sales of accounts, chattel paper, payment intangibles,
22 or promissory notes, the provisions of this chapter with regard to rights and obligations
23 apply whether title to collateral is in the secured party or the debtor.

24 **Sec. 45.09.203. Attachment and enforceability of security interest;**
25 **proceeds; supporting obligations; formal requisites.** (a) A security interest attaches
26 to collateral when it becomes enforceable against the debtor with respect to the
27 collateral unless an agreement expressly postpones the time of attachment.

28 (b) Except as otherwise provided in (c) - (i) of this section, a security interest
29 is enforceable against the debtor and third parties with respect to the collateral only
30 if

31 (1) value has been given;

1 (2) the debtor has rights in the collateral or the power to transfer rights
2 in the collateral to a secured party; and

3 (3) one of the following conditions is met:

4 (A) the debtor has authenticated a security agreement that
5 provides a description of the collateral and, if the security interest covers
6 timber to be cut, a description of the land concerned;

7 (B) the collateral is not a certificated security and is in the
8 possession of the secured party under AS 45.09.313 under the debtor's security
9 agreement;

10 (C) the collateral is a certificated security in registered form,
11 and the security certificate has been delivered to the secured party under
12 AS 45.08.301 under the debtor's security agreement; or

13 (D) the collateral is deposit accounts, electronic chattel paper,
14 investment property, or letter-of-credit rights, and the secured party has control
15 under AS 45.09.104, 45.09.105, 45.09.106, or 45.09.107 under the debtor's
16 security agreement.

17 (c) The provisions of (b) of this section are subject to

18 (1) AS 45.04.210 on the security interest of a collecting bank;

19 (2) AS 45.05.118 on the security interest of a letter-of-credit issuer or
20 nominated person;

21 (3) AS 45.09.110 on a security interest arising under AS 45.02 or
22 AS 45.12; and

23 (4) AS 45.09.206 on security interests in investment property.

24 (d) A person becomes bound as debtor by a security agreement entered into
25 by another person if, by operation of law other than this chapter or by contract,

26 (1) the security agreement becomes effective to create a security
27 interest in the person's property; or

28 (2) the person becomes generally obligated for the obligations of the
29 other person, including the obligation secured under the security agreement, and
30 acquires or succeeds to all or substantially all of the assets of the other person.

31 (e) If a new debtor becomes bound as debtor by a security agreement entered

1 into by another person,

2 (1) the agreement satisfies (b)(3) of this section with respect to existing
3 or after-acquired property of the new debtor to the extent the property is described in
4 the agreement; and

5 (2) another agreement is not necessary to make a security interest in
6 the property enforceable.

7 (f) The attachment of a security interest in collateral gives the secured party
8 the rights to proceeds provided by AS 45.09.315 and is also attachment of a security
9 interest in a supporting obligation for the collateral.

10 (g) The attachment of a security interest in a right to payment or performance
11 secured by a security interest or other lien on personal or real property is also
12 attachment of a security interest in the security interest, mortgage, or other lien.

13 (h) The attachment of a security interest in a securities account is also
14 attachment of a security interest in the security entitlement carried in the securities
15 account.

16 (i) The attachment of a security interest in a commodity account is also
17 attachment of a security interest in the commodity contracts carried in the commodity
18 account.

19 **Sec. 45.09.204. After-acquired property; future advances.** (a) Except as
20 otherwise provided in (b) of this section, a security agreement may create or provide
21 for a security interest in after-acquired collateral.

22 (b) A security interest does not attach under a term constituting an
23 after-acquired property clause to

24 (1) consumer goods, other than an accession when given as additional
25 security, unless the debtor acquires rights in them within 10 days after the secured
26 party gives value; or

27 (2) a commercial tort claim.

28 (c) A security agreement may provide that collateral secures, or that accounts,
29 chattel paper, payment intangibles, or promissory notes are sold in connection with,
30 future advances or other value, whether or not the advances or value are given
31 pursuant to a commitment.

1 **Sec. 45.09.205. Use or disposition of collateral permissible.** (a) A security
2 interest is not invalid or fraudulent against creditors solely because

3 (1) the debtor has the right or ability to

4 (A) use, commingle, or dispose of all or part of the collateral,
5 including returned or repossessed goods;

6 (B) collect, compromise, enforce, or otherwise deal with
7 collateral;

8 (C) accept the return of collateral or make repossessions; or

9 (D) use, commingle, or dispose of proceeds; or

10 (2) the secured party fails to require the debtor to account for proceeds
11 or replace collateral.

12 (b) This section does not relax the requirements of possession if attachment,
13 perfection, or enforcement of a security interest depends upon possession of the
14 collateral by the secured party.

15 **Sec. 45.09.206. Security interest arising in purchase or delivery of financial**
16 **asset.** (a) A security interest in favor of a securities intermediary attaches to a
17 person's security entitlement if

18 (1) the person buys a financial asset through the securities intermediary
19 in a transaction in which the person is obligated to pay the purchase price to the
20 securities intermediary at the time of the purchase; and

21 (2) the securities intermediary credits the financial asset to the buyer's
22 securities account before the buyer pays the securities intermediary.

23 (b) The security interest described in (a) of this section secures the person's
24 obligation to pay for the financial asset.

25 (c) A security interest in favor of a person who delivers a certificated security
26 or other financial asset represented by a writing attaches to the security or other
27 financial asset if

28 (1) the security or other financial asset

29 (A) in the ordinary course of business, is transferred by delivery
30 with any necessary endorsement or assignment; and

31 (B) is delivered under an agreement between persons in the

1 business of dealing with such securities or financial assets; and

2 (2) the agreement calls for delivery against payment.

3 (d) The security interest described in (c) of this section secures the obligation
4 to make payment for the delivery.

5 **Sec. 45.09.207. Rights and duties of secured party having possession or**
6 **control of collateral.** (a) Except as otherwise provided in (d) of this section, a
7 secured party shall use reasonable care in the custody and preservation of collateral in
8 the secured party's possession. In the case of chattel paper or an instrument,
9 reasonable care includes taking necessary steps to preserve rights against prior parties
10 unless otherwise agreed.

11 (b) Except as otherwise provided in (d) of this section, if a secured party has
12 possession of collateral,

13 (1) reasonable expenses, including the cost of insurance and payment
14 of taxes or other charges, incurred in the custody, preservation, use, or operation of the
15 collateral are chargeable to the debtor and are secured by the collateral;

16 (2) the risk of accidental loss or damage is on the debtor to the extent
17 of a deficiency in any effective insurance coverage;

18 (3) the secured party shall keep the collateral identifiable, but fungible
19 collateral may be commingled; and

20 (4) the secured party may use or operate the collateral

21 (A) for the purpose of preserving the collateral or its value;

22 (B) as permitted by an order of a court having competent
23 jurisdiction; or

24 (C) except in the case of consumer goods, in the manner and
25 to the extent agreed by the debtor.

26 (c) Except as otherwise provided in (d) of this section, a secured party having
27 possession of collateral or control of collateral under AS 45.09.104, 45.09.105,
28 45.09.106, or 45.09.107

29 (1) may hold as additional security any proceeds, except money or
30 funds, received from the collateral;

31 (2) shall apply money or funds received from the collateral to reduce

1 the secured obligation unless remitted to the debtor; and

2 (3) may create a security interest in the collateral.

3 (d) If the secured party is a buyer of accounts, chattel paper, payment
4 intangibles, or promissory notes or a consignor,

5 (1) the provisions of (a) of this section do not apply unless the secured
6 party is entitled under an agreement

7 (A) to charge back uncollected collateral; or

8 (B) otherwise to full or limited recourse against the debtor or
9 a secondary obligor based on the nonpayment or other default of an account
10 debtor or other obligor on the collateral; and

11 (2) the provisions of (b) and (c) of this section do not apply.

12 **Sec. 45.09.208. Additional duties of secured party having control of**
13 **collateral.** (a) This section applies to a case in which there is no outstanding secured
14 obligation and the secured party is not committed to make advances, incur obligations,
15 or otherwise give value.

16 (b) Within 10 days after receiving an authenticated demand by the debtor a
17 secured party

18 (1) having control of a deposit account under AS 45.09 104(a)(2) shall
19 send to the bank with which the deposit account is maintained an authenticated
20 statement that releases the bank from further obligation to comply with instructions
21 originated by the secured party;

22 (2) having control of a deposit account under AS 45.09.104(a)(3) shall

23 (A) pay the debtor the balance on deposit in the deposit
24 account; or

25 (B) transfer the balance on deposit into a deposit account in the
26 debtor's name;

27 (3) other than a buyer, having control of electronic chattel paper under
28 AS 45.09.105 shall

29 (A) communicate the authoritative copy of the electronic chattel
30 paper to the debtor or its designated custodian;

31 (B) if the debtor designates a custodian that is the designated

1 custodian with which the authoritative copy of the electronic chattel paper is
2 maintained for the secured party, communicate to the custodian an
3 authenticated record releasing the designated custodian from further obligation
4 to comply with instructions originated by the secured party and instructing the
5 custodian to comply with instructions originated by the debtor; and

6 (C) take appropriate action to enable the debtor or its designated
7 custodian to make copies of or revisions to the authoritative copy that add or
8 change an identified assignee of the authoritative copy without the consent of
9 the secured party;

10 (4) having control of investment property under AS 45.08.106(d)(2) or
11 AS 45.09.106(b) shall send to the securities intermediary or commodity intermediary
12 with which the security entitlement or commodity contract is maintained an
13 authenticated record that releases the securities intermediary or commodity
14 intermediary from further obligation to comply with entitlement orders or directions
15 originated by the secured party; and

16 (5) having control of a letter-of-credit right under AS 45.09.107 shall
17 send to each person having an unfulfilled obligation to pay or deliver proceeds of the
18 letter of credit to the secured party an authenticated release from further obligation to
19 pay or deliver proceeds of the letter of credit to the secured party.

20 **Sec. 45.09.209. Duties of secured party if account debtor has been notified**
21 **of assignment.** (a) Except as otherwise provided in (c) of this section, this section
22 applies to a case in which

23 (1) there is no outstanding secured obligation; and

24 (2) the secured party is not committed to make advances, incur
25 obligations, or otherwise give value.

26 (b) Within 10 days after receiving an authenticated demand by the debtor, a
27 secured party shall send to an account debtor that has received notification of an
28 assignment to the secured party as assignee under AS 45.09.406(a) an authenticated
29 record that releases the account debtor from further obligation to the secured party.

30 (c) This section does not apply to an assignment constituting the sale of an
31 account, chattel paper, or payment intangible.

1 **Sec. 45.09.210. Request for accounting; request regarding list of collateral**
2 **or statement of account.** (a) In this section,

3 (1) "request" means a record of a type described in (2), (3), or (4) of
4 this subsection;

5 (2) "request for an accounting" means a record authenticated by a
6 debtor requesting that the recipient provide an accounting of the unpaid obligations
7 secured by collateral and reasonably identifying the transaction or relationship that is
8 the subject of the request;

9 (3) "request regarding a list of collateral" means a record authenticated
10 by a debtor requesting that the recipient approve or correct a list of what the debtor
11 believes to be the collateral securing an obligation and reasonably identifying the
12 transaction or relationship that is the subject of the request;

13 (4) "request regarding a statement of account" means a record
14 authenticated by a debtor requesting that the recipient approve or correct a statement
15 indicating what the debtor believes to be the aggregate amount of unpaid obligations
16 secured by collateral as of a specified date and reasonably identifying the transaction
17 or relationship that is the subject of the request.

18 (b) Subject to (c) - (f) of this section, a secured party, other than a buyer of
19 accounts, chattel paper, payment intangibles, or promissory notes or a consignor, shall
20 comply with a request within 14 days after receipt

21 (1) in the case of a request for an accounting, by authenticating and
22 sending to the debtor an accounting; and

23 (2) in the case of a request regarding a list of collateral or a request
24 regarding a statement of account, by authenticating and sending to the debtor an
25 approval or correction.

26 (c) A secured party that claims a security interest in all of a particular type of
27 collateral owned by the debtor may comply with a request regarding a list of collateral
28 by sending to the debtor an authenticated record including a statement to that effect
29 within 14 days after receipt.

30 (d) A person who receives a request regarding a list of collateral, who claims
31 no interest in the collateral when the person receives the request, and who claimed an

1 interest in the collateral at an earlier time shall comply with the request within 14 days
2 after receipt by sending to the debtor an authenticated record

3 (1) disclaiming interest in the collateral; and

4 (2) if known to the recipient, providing the name and mailing address
5 of an assignee of or successor to the recipient's security interest in the collateral.

6 (e) A person who receives a request for an accounting or a request regarding
7 a statement of account, who claims no interest in the obligations when the person
8 receives the request, and who claimed an interest in the obligations at an earlier time
9 shall comply with the request within 14 days after receipt by sending to the debtor an
10 authenticated record

11 (1) disclaiming interest in the obligations; and

12 (2) if known to the recipient, providing the name and mailing address
13 of an assignee of or successor to the recipient's interest in the obligations.

14 (f) A debtor is entitled without charge to one response to a request under this
15 section during a six-month period. The secured party may require payment of a charge
16 not exceeding \$25 for each additional response.

17 Article 3. Perfection and Priority.

18 Sec. 45.09.301. Law governing perfection and priority of security interests.

19 Except as otherwise provided in AS 45.09.303 - 45.09.306, the following rules
20 determine the law governing perfection, the effect of perfection or nonperfection, and
21 the priority of a security interest in collateral:

22 (1) except as otherwise provided in this section, while a debtor is
23 located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect
24 of perfection or nonperfection, and the priority of a security interest in collateral;

25 (2) while collateral is located in a jurisdiction, the local law of that
26 jurisdiction governs perfection, the effect of perfection or nonperfection, and the
27 priority of a possessory security interest in that collateral;

28 (3) except as otherwise provided in (4) of this section, while negotiable
29 documents, goods, instruments, money, or tangible chattel paper is located in a
30 jurisdiction, the local law of that jurisdiction governs

31 (A) perfection of a security interest in the goods by filing a

1 fixture filing;

2 (B) perfection of a security interest in timber to be cut; and

3 (C) the effect of perfection or nonperfection and the priority of
4 a nonpossessory security interest in the collateral;

5 (4) the local law of the jurisdiction in which the wellhead or minehead
6 is located governs perfection, the effect of perfection or nonperfection, and the priority
7 of a security interest in as-extracted collateral.

8 **Sec. 45.09.302. Law governing perfection and priority of agricultural liens.**

9 While farm products are located in a jurisdiction, the local law of that jurisdiction
10 governs perfection, the effect of perfection or nonperfection, and the priority of an
11 agricultural lien on the farm products.

12 **Sec. 45.09.303. Law governing perfection and priority of security interests**
13 **in goods covered by a certificate of title.** (a) This section applies to goods covered
14 by a certificate of title even if there is no other relationship between the jurisdiction
15 under whose certificate of title the goods are covered and the goods or the debtor.

16 (b) Goods become covered by a certificate of title when a valid application for
17 the certificate of title and the applicable fee are delivered to the appropriate authority.
18 Goods cease to be covered by a certificate of title at the earlier of the time

19 (1) the certificate of title ceases to be effective under the law of the
20 issuing jurisdiction; or

21 (2) the goods become covered subsequently by a certificate of title
22 issued by another jurisdiction.

23 (c) The local law of the jurisdiction under whose certificate of title the goods
24 are covered governs perfection, the effect of perfection or nonperfection, and the
25 priority of a security interest in goods covered by a certificate of title from the time
26 the goods become covered by the certificate of title until the goods cease to be covered
27 by the certificate of title.

28 **Sec. 45.09.304. Law governing perfection and priority of security interests**
29 **in deposit accounts.** (a) The local law of a bank's jurisdiction governs perfection,
30 the effect of perfection or nonperfection, and the priority of a security interest in a
31 deposit account maintained with that bank.

1 (b) The following rules determine a bank's jurisdiction for purposes of
2 AS 45.09.301 - 45.09.342:

3 (1) if an agreement between the bank and the debtor governing the
4 deposit account expressly provides that a particular jurisdiction is the bank's
5 jurisdiction for purposes of AS 45.09.301 - 45.09.342, this chapter, or AS 45.01 -
6 AS 45.09, AS 45.12, or AS 45.14 (Uniform Commercial Code), that jurisdiction is the
7 bank's jurisdiction;

8 (2) if (1) of this subsection does not apply and an agreement between
9 the bank and its customer governing the deposit account expressly provides that the
10 agreement is governed by the law of a particular jurisdiction, that jurisdiction is the
11 bank's jurisdiction;

12 (3) if neither (1) nor (2) of this subsection applies and an agreement
13 between the bank and its customer governing the deposit account expressly provides
14 that the deposit account is maintained at an office in a particular jurisdiction, that
15 jurisdiction is the bank's jurisdiction;

16 (4) if (1), (2), or (3) of this subsection does not apply, the bank's
17 jurisdiction is the jurisdiction in which the office identified in an account statement as
18 the office serving the customer's account is located;

19 (5) if (1), (2), (3), or (4) of this subsection does not apply, the bank's
20 jurisdiction is the jurisdiction in which the chief executive office of the bank is
21 located.

22 **Sec. 45.09.305. Law governing perfection and priority of security interests**
23 **in investment property.** (a) Except as otherwise provided in (c) of this section, the
24 following rules apply:

25 (1) while a security certificate is located in a jurisdiction, the local law
26 of that jurisdiction governs perfection, the effect of perfection or nonperfection, and
27 the priority of a security interest in the certificated security represented by the security
28 certificate;

29 (2) the local law of the issuer's jurisdiction as specified in
30 AS 45.08.110 governs perfection, the effect of perfection or nonperfection, and the
31 priority of a security interest in an uncertificated security;

1 (3) the local law of the securities intermediary's jurisdiction as specified
2 in AS 45.08.110(e) governs perfection, the effect of perfection or nonperfection, and
3 the priority of a security interest in a security entitlement or securities account;

4 (4) the local law of the commodity intermediary's jurisdiction governs
5 perfection, the effect of perfection or nonperfection, and the priority of a security
6 interest in a commodity contract or commodity account.

7 (b) The following rules determine a commodity intermediary's jurisdiction for
8 purposes of AS 45.09.301 - 45.09.342:

9 (1) if an agreement between the commodity intermediary and
10 commodity customer governing the commodity account expressly provides that a
11 particular jurisdiction is the commodity intermediary's jurisdiction for purposes of
12 AS 45.09.301 - 45.09.342, this chapter, or AS 45.01 - AS 45.09, AS 45.12, or
13 AS 45.14 (Uniform Commercial Code), that jurisdiction is the commodity
14 intermediary's jurisdiction;

15 (2) if (1) of this subsection does not apply and an agreement between
16 the commodity intermediary and commodity customer governing the commodity
17 account expressly provides that the agreement is governed by the law of a particular
18 jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction;

19 (3) if neither (1) nor (2) of this subsection applies and an agreement
20 between the commodity intermediary and commodity customer governing the
21 commodity account expressly provides that the commodity account is maintained at
22 an office in a particular jurisdiction, that jurisdiction is the commodity intermediary's
23 jurisdiction;

24 (4) if (1), (2), or (3) of this subsection does not apply, the commodity
25 intermediary's jurisdiction is the jurisdiction in which the office identified in an
26 account statement as the office serving the commodity customer's account is located;

27 (5) if (1), (2), (3), or (4) of this subsection does not apply, the
28 commodity intermediary's jurisdiction is the jurisdiction in which the chief executive
29 office of the commodity intermediary is located.

30 (c) The local law of the jurisdiction in which the debtor is located governs

31 (1) perfection of a security interest in investment property by filing;

1 (2) automatic perfection of a security interest in investment property
2 created by a broker or securities intermediary; and

3 (3) automatic perfection of a security interest in a commodity contract
4 or commodity account created by a commodity intermediary.

5 **Sec. 45.09.306. Law governing perfection and priority of security interests**
6 **in letter-of-credit rights.** (a) Subject to (c) of this section, the local law of the
7 issuer's jurisdiction or a nominated person's jurisdiction governs perfection, the effect
8 of perfection or nonperfection, and the priority of a security interest in a letter-of-credit
9 right if the issuer's jurisdiction or nominated person's jurisdiction is a state.

10 (b) For purposes of AS 45.09.301 - 45.09.342, an issuer's jurisdiction or
11 nominated person's jurisdiction is the jurisdiction whose law governs the liability of
12 the issuer or nominated person with respect to the letter-of-credit right as provided in
13 AS 45.05.116.

14 (c) This section does not apply to a security interest that is perfected only
15 under AS 45.09.308(d).

16 **Sec. 45.09.307. Location of debtor.** (a) In this section, "place of business"
17 means a place where a debtor conducts its affairs.

18 (b) Except as otherwise provided in this section, the following rules determine
19 a debtor's location:

20 (1) an debtor who is an individual is located at the individual's principal
21 residence;

22 (2) a debtor that is an organization and has only one place of business
23 is located at its place of business;

24 (3) a debtor that is an organization and has more than one place of
25 business is located at its chief executive office.

26 (c) The provisions of (b) of this section apply only if a debtor's residence,
27 place of business, or chief executive office, as applicable, is located in a jurisdiction
28 whose law generally requires information concerning the existence of a nonpossessory
29 security interest to be made generally available in a filing, recording, or registration
30 system as a condition or result of the security interest's obtaining priority over the
31 rights of a lien creditor with respect to the collateral. If (b) of this section does not

1 apply, the debtor is located in the District of Columbia.

2 (d) A person that ceases to exist, have a residence, or have a place of business
3 continues to be located in the jurisdiction specified by (b) and (c) of this section.

4 (e) A registered organization that is organized under the law of a state is
5 located in that state.

6 (f) Except as otherwise provided in (i) of this section, a registered organization
7 that is organized under the law of the United States and a branch or agency of a bank
8 that is not organized under the law of the United States or a state are located

9 (1) in the state that the law of the United States designates if the law
10 designates a state of location;

11 (2) in the state that the registered organization, branch, or agency
12 designates if the law of the United States authorizes the registered organization,
13 branch, or agency to designate its state of location; or

14 (3) in the District of Columbia if neither (1) nor (2) of this subsection
15 applies.

16 (g) A registered organization continues to be located in the jurisdiction
17 specified by (e) or (f) of this section notwithstanding

18 (1) the suspension, revocation, forfeiture, or lapse of the registered
19 organization's status as such in its jurisdiction of organization; or

20 (2) the dissolution, winding up, or cancellation of the existence of the
21 registered organization.

22 (h) The United States is located in the District of Columbia.

23 (i) A branch or agency of a bank that is not organized under the law of the
24 United States or a state is located in the state in which the branch or agency is licensed
25 if all branches and agencies of the bank are licensed in only one state.

26 (j) A foreign air carrier, under the Federal Aviation Act of 1958, as amended,
27 is located at the designated office of the agent upon which service of process may be
28 made on behalf of the carrier.

29 (k) This section applies only for purposes of AS 45.09.301 - 45.09.342.

30 **Sec. 45.09.308. When security interest or agricultural lien is perfected;**
31 **continuity of perfection.** (a) Except as otherwise provided in this section and

1 AS 45.09.309, a security interest is perfected if it has attached and all of the applicable
2 requirements for perfection in AS 45.09.310 - 45.09.316 have been satisfied. A
3 security interest is perfected when it attaches if the applicable requirements are
4 satisfied before the security interest attaches.

5 (b) An agricultural lien is perfected if it has become effective and all of the
6 applicable requirements for perfection in AS 45.09.310 have been satisfied. An
7 agricultural lien is perfected when it becomes effective if the applicable requirements
8 are satisfied before the agricultural lien becomes effective.

9 (c) A security interest or agricultural lien is perfected continuously if it is
10 originally perfected by one method under this chapter and is later perfected by another
11 method under this chapter, without an intermediate period when it was unperfected.

12 (d) Perfection of a security interest in collateral also perfects a security interest
13 in a supporting obligation for the collateral.

14 (e) Perfection of a security interest in a right to payment or performance also
15 perfects a security interest in a security interest, mortgage, or other lien on personal
16 or real property securing the right.

17 (f) Perfection of a security interest in a securities account also perfects a
18 security interest in the security entitlements carried in the securities account.

19 (g) Perfection of a security interest in a commodity account also perfects a
20 security interest in the commodity contracts carried in the commodity account.

21 **Sec. 45.09.309. Security interest perfected upon attachment.** The following
22 security interests are perfected when they attach:

23 (1) a purchase money security interest in consumer goods, except as
24 otherwise provided in AS 45.09.311(b) with respect to consumer goods that are subject
25 to a statute or treaty described in AS 45.09.311(a);

26 (2) an assignment of accounts or payment intangibles that does not, by
27 itself or in conjunction with other assignments to the same assignee, transfer a
28 significant part of the assignor's outstanding accounts or payment intangibles;

29 (3) a sale of a payment intangible;

30 (4) a sale of a promissory note;

31 (5) a security interest created by the assignment of a health care

1 insurance receivable to the provider of the health care goods or services;

2 (6) a security interest arising under AS 45.02.401, 45.02.505,
3 45.02.711(c), or AS 45.12.508(e), until the debtor obtains possession of the collateral;

4 (7) a security interest of a collecting bank arising under AS 45.04.210;

5 (8) a security interest of an issuer or nominated person arising under
6 AS 45.05.118;

7 (9) a security interest arising in the delivery of a financial asset under
8 AS 45.09.206(c);

9 (10) a security interest in investment property created by a broker or
10 securities intermediary;

11 (11) a security interest in a commodity contract or a commodity
12 account created by a commodity intermediary;

13 (12) an assignment for the benefit of all creditors of the transferor and
14 subsequent transfers by the assignee thereunder; and

15 (13) a security interest created by an assignment of a beneficial interest
16 in a decedent's estate.

17 **Sec. 45.09.310. When filing required to perfect security interest or**
18 **agricultural lien; security interests and agricultural liens to which filing provisions**
19 **do not apply.** (a) Except as otherwise provided in (b) of this section and
20 AS 45.09.312(b), a financing statement must be filed to perfect all security interests
21 and agricultural liens.

22 (b) The filing of a financing statement is not necessary to perfect a security
23 interest

24 (1) that is perfected under AS 45.09.308(d), (e), (f), or (g);

25 (2) that is perfected under AS 45.09.309 when it attaches;

26 (3) in property subject to a statute, regulation, or treaty described in
27 AS 45.09.311(a);

28 (4) in goods in possession of a bailee that is perfected under
29 AS 45.09.312(d)(1) or (2);

30 (5) in certificated securities, documents, goods, or instruments that is
31 perfected without filing or possession under AS 45.09.312(e), (f), or (g);

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

- (6) in collateral in the secured party's possession under AS 45.09.313;
- (7) in a certificated security that is perfected by delivery of the security certificate to the secured party under AS 45.09.313;
- (8) in deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights that is perfected by control under AS 45.09.314;
- (9) in proceeds that is perfected under AS 45.09.315; or
- (10) that is perfected under AS 45.09.316.

(c) If a secured party assigns a perfected security interest or agricultural lien, a filing under this chapter is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

Sec. 45.09.311. Perfection of security interests in property subject to certain statutes, regulations, and treaties. (a) Except as otherwise provided in (d) of this section, the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to

(1) a statute, regulation, or treaty of the United States whose requirements for a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt AS 45.09.310(a);

(2) AS 28.10; however, during a period in which collateral is inventory held for sale by a person who is in the business of selling goods of that kind, the filing provisions of AS 45.09.501 - 45.09.527 apply to a security interest in that collateral created by that person as debtor; or

(3) a certificate-of-title statute of another jurisdiction that provides for a security interest to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the property.

(b) Compliance with the requirements of a statute, regulation, or treaty described in (a) of this section for obtaining priority over the rights of a lien creditor is equivalent to the filing of a financing statement under this chapter. Except as otherwise provided in (d) of this section, AS 45.09.313, and 45.09.316(d) and (e) for goods covered by a certificate of title, a security interest in property subject to a statute, regulation, or treaty described in (a) of this section may be perfected only by

1 compliance with those requirements, and a security interest so perfected remains
2 perfected notwithstanding a change in the use or transfer of possession of the
3 collateral.

4 (c) Except as otherwise provided in (d) of this section and AS 45.09.316(d)
5 and (e), duration and renewal of perfection of a security interest perfected by
6 compliance with the requirements prescribed by a statute, regulation, or treaty
7 described in (a) of this section are governed by the statute, regulation, or treaty. In
8 other respects, the security interest is subject to this chapter.

9 (d) During a period in which collateral is inventory held for sale or lease by
10 a person or leased by that person as lessor and that person is in the business of selling
11 or leasing goods of that kind, this section does not apply to a security interest in that
12 collateral created by that person as debtor.

13 **Sec. 45.09.312. Perfection of security interests in chattel paper, deposit**
14 **accounts, documents, goods covered by documents, instruments, investment**
15 **property, letter-of-credit rights, and money; perfection by permissive filing;**
16 **temporary perfection without filing or transfer of possession. (a) A security**
17 **interest in chattel paper, negotiable documents, instruments, or investment property**
18 **may be perfected by filing.**

19 (b) Except as otherwise provided in AS 45.09.315(c) and (d) for proceeds,

20 (1) a security interest in a deposit account may be perfected only by
21 control under AS 45.09.314;

22 (2) and except as otherwise provided in AS 45.09.308(d), a security
23 interest in a letter-of-credit right may be perfected only by control under AS 45.09.314;
24 and

25 (3) a security interest in money may be perfected only by the secured
26 party's taking possession under AS 45.09.313.

27 (c) While goods are in the possession of a bailee that has issued a negotiable
28 document covering the goods, a security interest

29 (1) in the goods may be perfected by perfecting a security interest in
30 the document; and

31 (2) perfected in the document has priority over a security interest that

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

becomes perfected in the goods by another method during that time.

(d) While goods are in the possession of a bailee that has issued a nonnegotiable document covering the goods, a security interest in the goods may be perfected by

- (1) issuance of a document in the name of the secured party;
- (2) the bailee's receipt of notification of the secured party's interest; or
- (3) filing as to the goods.

(e) A security interest in certificated securities, negotiable documents, or instruments is perfected without filing or the taking of possession for a period of 20 days from the time the security interest attaches to the extent that it arises for new value given under an authenticated security agreement.

(f) A perfected security interest in a negotiable document or goods in possession of a bailee, other than one that has issued a negotiable document for the goods, remains perfected for 20 days without filing if the secured party makes available to the debtor the goods or documents representing the goods for the purpose of

- (1) ultimate sale or exchange; or
- (2) loading, unloading, storing, shipping, transshipping, manufacturing, processing, or otherwise dealing with the goods or documents representing the goods in a manner preliminary to their sale or exchange.

(g) A perfected security interest in a certificated security or instrument remains perfected for 20 days without filing if the secured party delivers the security certificate or instrument to the debtor for the purpose of

- (1) ultimate sale or exchange; or
- (2) presentation, collection, enforcement, renewal, or registration of transfer.

(h) After the 20-day period specified in (e), (f), or (g) of this section expires, perfection depends upon compliance with this chapter.

Sec. 45.09.313. When possession by or delivery to secured party perfects security interest without filing. (a) Except as otherwise provided in (b) of this section, a secured party may perfect a security interest in negotiable documents, goods,

1 instruments, money, or tangible chattel paper by taking possession of the collateral.
2 A secured party may perfect a security interest in certificated securities by taking
3 delivery of the certificated securities under AS 45.08.301.

4 (b) With respect to goods covered by a certificate of title issued by this state,
5 a secured party may perfect a security interest in the goods by taking possession of the
6 goods only in the circumstances described in AS 45.09.316(d).

7 (c) With respect to collateral other than certificated securities and goods
8 covered by a document, a secured party takes possession of collateral in the possession
9 of a person other than the debtor, the secured party, or a lessee of the collateral from
10 the debtor in the ordinary course of the debtor's business, when the person

11 (1) in possession authenticates a record acknowledging that the person
12 holds possession of the collateral for the secured party's benefit; or

13 (2) takes possession of the collateral after having authenticated a record
14 acknowledging that it will hold possession of collateral for the secured party's benefit.

15 (d) If perfection of a security interest depends upon possession of the collateral
16 by a secured party, perfection occurs no earlier than the time the secured party takes
17 possession and continues only while the secured party retains possession.

18 (e) A security interest in a certificated security in registered form is perfected
19 by delivery when delivery of the certificated security occurs under AS 45.08.301 and
20 remains perfected by delivery until the debtor obtains possession of the security
21 certificate.

22 (f) A person in possession of collateral is not required to acknowledge that it
23 holds possession for a secured party's benefit.

24 (g) If a person acknowledges that it holds possession for the secured party's
25 benefit,

26 (1) the acknowledgment is effective under (c) of this section or
27 AS 45.08.301(a), even if the acknowledgment violates the rights of a debtor; and

28 (2) unless the person otherwise agrees or law other than this chapter
29 otherwise provides, the person does not owe a duty to the secured party and is not
30 required to confirm the acknowledgment to another person.

31 (h) A secured party having possession of collateral does not relinquish

1 possession by delivering the collateral to a person other than the debtor or a lessee of
2 the collateral from the debtor in the ordinary course of the debtor's business if the
3 person was instructed before the delivery or is instructed contemporaneously with the
4 delivery to

5 (1) hold possession of the collateral for the secured party's benefit; or

6 (2) redeliver the collateral to the secured party.

7 (i) A secured party does not relinquish possession, even if a delivery under (h)
8 of this section violates the rights of a debtor. A person to whom collateral is delivered
9 under (h) of this section does not owe a duty to the secured party and is not required
10 to confirm the delivery to another person unless the person otherwise agrees or law
11 other than this chapter otherwise provides.

12 **Sec. 45.09.314. Perfection by control.** (a) A security interest in deposit
13 accounts, electronic chattel paper, investment property, or letter-of-credit rights, or may
14 be perfected by control of the collateral under AS 45.09.104, 45.09.105, 45.09.106, or
15 45.09.107.

16 (b) A security interest in deposit accounts, electronic chattel paper, or letter-of-
17 credit rights is perfected by control under AS 45.09.104, 45.09.105, or 45.09.107 when
18 the secured party obtains control and remains perfected by control only while the
19 secured party retains control.

20 (c) A security interest in investment property is perfected by control under
21 AS 45.09.106 from the time the secured party obtains control and remains perfected
22 by control until

23 (1) the secured party does not have control; and

24 (2) one of the following occurs:

25 (A) if the collateral is a certificated security, the debtor has or
26 acquires possession of the security certificate;

27 (B) if the collateral is an uncertificated security, the issuer has
28 registered or registers the debtor as the registered owner; or

29 (C) if the collateral is a security entitlement, the debtor is or
30 becomes the entitlement holder.

31 **Sec. 45.09.315. Secured party's rights on disposition of collateral and in**

1 proceeds. (a) Except as otherwise provided in this chapter,

2 (1) a security interest or agricultural lien continues in collateral
3 notwithstanding sale, lease, license, exchange, or other disposition of the security
4 interest or agricultural lien unless the secured party authorized the disposition free of
5 the security interest or agricultural lien; and

6 (2) a security interest attaches to any identifiable proceeds of collateral.

7 (b) Proceeds that are commingled with other property are identifiable proceeds
8 if the proceeds

9 (1) are goods, to the extent provided by AS 45.09.336; and

10 (2) are not goods, to the extent that the secured party identifies the
11 proceeds by a method of tracing, including application of equitable principles, that is
12 permitted under law other than this chapter with respect to commingled property of the
13 type involved.

14 (c) A security interest in proceeds is a perfected security interest if the security
15 interest in the original collateral was perfected.

16 (d) A perfected security interest in proceeds becomes unperfected on the 21st
17 day after the security interest attaches to the proceeds unless

18 (1) the following conditions are satisfied

19 (A) a filed financing statement covers the original collateral;

20 (B) the proceeds are collateral in which a security interest may
21 be perfected by filing in the office in which the financing statement has been
22 filed; and

23 (C) the proceeds are not acquired with cash proceeds;

24 (2) the proceeds are identifiable cash proceeds; or

25 (3) the security interest in the proceeds is perfected other than under
26 (c) of this section when the security interest attaches to the proceeds or within 20 days
27 thereafter.

28 (e) If a filed financing statement covers the original collateral, a security
29 interest in proceeds that remains perfected under (d)(1) of this section becomes
30 unperfected at the later of

31 (1) when the effectiveness of the filed financing statement lapses under

1 AS 45.09.515 or is terminated under AS 45.09.513; or

2 (2) the 21st day after the security interest attaches to the proceeds.

3 **Sec. 45.09.316. Continued perfection of security interest following change**
4 **in governing law.** (a) A security interest perfected under the law of the jurisdiction

5 designated in AS 45.09.301(1) or 45.09.305(c) remains perfected until the earliest of

6 (1) the time perfection would have ceased under the law of that
7 jurisdiction;

8 (2) the expiration of four months after a change of the debtor's location
9 to another jurisdiction;

10 (3) the expiration of one year after a transfer of collateral to a person
11 who thereby becomes a debtor and is located in another jurisdiction; or

12 (4) the expiration of one year after a new debtor located in another
13 jurisdiction becomes bound under AS 45.09.203(d).

14 (b) If a security interest described in (a) of this section becomes perfected
15 under the law of the other jurisdiction before the earliest time or event described in (a)
16 of this section, it remains perfected thereafter. If the security interest does not become
17 perfected under the law of the other jurisdiction before the earliest time or event, it
18 becomes unperfected and is considered never to have been perfected as against a
19 purchaser of the collateral for value.

20 (c) A possessory security interest in collateral, other than goods covered by a
21 certificate of title and as-extracted collateral consisting of goods, remains continuously
22 perfected if

23 (1) the collateral is located in one jurisdiction and subject to a security
24 interest perfected under the law of that jurisdiction;

25 (2) after the event described in (1) of this subsection occurs, the
26 collateral is brought into another jurisdiction; and

27 (3) upon entry into the other jurisdiction, the security interest is
28 perfected under the law of the other jurisdiction.

29 (d) Except as otherwise provided in (e) of this section, a security interest in
30 goods covered by a certificate of title that is perfected by a method under the law of
31 another jurisdiction when the goods become covered by a certificate of title from this

1 state remains perfected until the security interest would have become unperfected under
2 the law of the other jurisdiction had the goods not become so covered.

3 (e) A security interest described in (d) of this section becomes unperfected as
4 against a purchaser of the goods for value and is considered never to have been
5 perfected as against a purchaser of the goods for value if the applicable requirements
6 for perfection under AS 45.09.311(b) or 45.09.313 are not satisfied before the earlier
7 of

8 (1) the time the security interest would have become unperfected under
9 the law of the other jurisdiction had the goods not become covered by a certificate of
10 title from this state; or

11 (2) the expiration of four months after the goods had become so
12 covered.

13 (f) A security interest in deposit accounts, letter-of-credit rights, or investment
14 property that is perfected under the law of the bank's jurisdiction, the issuer's
15 jurisdiction, a nominated person's jurisdiction, the securities intermediary's jurisdiction,
16 or the commodity intermediary's jurisdiction, as applicable, remains perfected until the
17 earlier of

18 (1) the time the security interest would have become unperfected under
19 the law of that jurisdiction; or

20 (2) the expiration of four months after a change of the applicable
21 jurisdiction to another jurisdiction.

22 (g) If a security interest described in (f) of this section becomes perfected
23 under the law of the other jurisdiction before the earlier of the time or the end of the
24 period described in (f) of this section, it remains perfected thereafter. If the security
25 interest does not become perfected under the law of the other jurisdiction before the
26 earlier of that time or the end of that period, it becomes unperfected and is considered
27 never to have been perfected as against a purchaser of the collateral for value.

28 **Sec. 45.09.317. Interests that take priority over or take free of unperfected**
29 **security interest or agricultural lien.** (a) An unperfected security interest or
30 agricultural lien is subordinate to the rights of a person

31 (1) entitled to priority under AS 45.09.322; and

1 (2) who becomes a lien creditor before the earlier of the time the
2 security interest or agricultural lien is perfected or a financing statement covering the
3 collateral is filed.

4 (b) Except as otherwise provided in (e) of this section, a buyer, other than a
5 secured party, of tangible chattel paper, documents, goods, instruments, or a security
6 certificate takes free of a security interest or agricultural lien if the buyer gives value
7 and receives delivery of the collateral without knowledge of the security interest or
8 agricultural lien and before it is perfected.

9 (c) Except as otherwise provided in (e) of this section, a lessee of goods takes
10 free of a security interest or agricultural lien if the lessee gives value and receives
11 delivery of the collateral without knowledge of the security interest or agricultural lien
12 and before it is perfected.

13 (d) A licensee of a general intangible or a buyer, other than a secured party,
14 of accounts, electronic chattel paper, general intangibles, or investment property other
15 than a certificated security takes free of a security interest if the licensee or buyer
16 gives value without knowledge of the security interest and before it is perfected.

17 (e) Except as otherwise provided in AS 45.09.320 and 45.09.321, if a person
18 files a financing statement with respect to a purchase money security interest before
19 or within 20 days after the debtor receives delivery of the collateral, the security
20 interest takes priority over the rights of a buyer, lessee, or lien creditor that arise
21 between the time the security interest attaches and the time of filing.

22 **Sec. 45.09.318. No interest retained in right to payment that is sold; rights**
23 **and title of seller of account or chattel paper with respect to creditors and**
24 **purchasers.** (a) A debtor that has sold an account, chattel paper, payment intangible,
25 or promissory note does not retain a legal or equitable interest in the collateral sold.

26 (b) For purposes of determining the rights of creditors of, and purchasers for
27 value of an account or chattel paper from, a debtor that has sold an account or chattel
28 paper, while the buyer's security interest is unperfected, the debtor is considered to
29 have rights and title to the account or chattel paper identical to those the debtor sold.

30 **Sec. 45.09.319. Rights and title of consignee with respect to creditors and**
31 **purchasers.** (a) Except as otherwise provided in (b) of this section, for purposes of

1 determining the rights of creditors of, and purchasers for value of goods from, a
2 consignee, while the goods are in the possession of the consignee, the consignee has
3 rights and title to the goods identical to those the consignor had or had power to
4 transfer.

5 (b) For purposes of determining the rights of a creditor of a consignee, law
6 other than this chapter determines the rights and title of a consignee while goods are
7 in the consignee's possession if, under AS 45.09.301 - 45.09.342, a perfected security
8 interest held by the consignor would have priority over the rights of the creditor.

9 **Sec. 45.09.320. Buyer of goods.** (a) Except as otherwise provided in (e) of
10 this section, a buyer in ordinary course of business, other than a person buying farm
11 products from a person engaged in farming operations, takes free of a security interest
12 created by the buyer's seller, even if the security interest is perfected and the buyer
13 knows of its existence.

14 (b) Except as otherwise provided in (e) of this section, a buyer of goods from
15 a person who used or bought the goods for use primarily for personal, family, or
16 household purposes takes free of a security interest, even if perfected, if the buyer buys

17 (1) without knowledge of the security interest;

18 (2) for value;

19 (3) primarily for the buyer's personal, family, or household purposes;

20 and

21 (4) before the filing of a financing statement covering the goods.

22 (c) To the extent that it affects the priority of a security interest over a buyer
23 of goods under (b) of this section, the period of effectiveness of a filing made in the
24 jurisdiction in which the seller is located is governed by AS 45.09.316(a) and (b).

25 (d) A buyer in ordinary course of business buying oil, gas, or other minerals
26 at the wellhead or minehead or after extraction takes free of an interest arising out of
27 an encumbrance.

28 (e) The provisions of (a) and (b) of this section do not affect a security interest
29 in goods in the possession of the secured party under AS 45.09.313.

30 **Sec. 45.09.321. Licensee of general intangible and lessee of goods in**
31 **ordinary course of business.** (a) In this section, "licensee in ordinary course of

1 business" means a person who becomes a licensee of a general intangible in good
2 faith, without knowledge that the license violates the rights of another person in the
3 general intangible, and in the ordinary course from a person in the business of
4 licensing general intangibles of that kind. A person becomes a licensee in the ordinary
5 course if the license to the person comports with the usual or customary practices in
6 the kind of business in which the licensor is engaged or with the licensor's own usual
7 or customary practices.

8 (b) A licensee in ordinary course of business takes its rights under the license
9 free of a security interest in the general intangible created by the licensor even if the
10 security interest is perfected and the licensee knows of its existence.

11 (c) A lessee in ordinary course of business takes its leasehold interest free of
12 a security interest in the goods created by the lessor even if the security interest is
13 perfected and the lessee knows of its existence.

14 **Sec. 45.09.322. Priorities among conflicting security interests in and**
15 **agricultural liens on same collateral.** (a) Except as otherwise provided in this
16 section, priority among conflicting security interests and agricultural liens in the same
17 collateral is determined according to the following rules:

18 (1) conflicting perfected security interests and agricultural liens rank
19 according to priority in time of filing or perfection; priority dates from the earlier of
20 the time a filing covering the collateral is first made or the security interest or
21 agricultural lien is first perfected if there is no period thereafter when there is neither
22 filing nor perfection;

23 (2) a perfected security interest or agricultural lien has priority over a
24 conflicting unperfected security interest or agricultural lien;

25 (3) the first security interest or agricultural lien to attach or become
26 effective has priority if conflicting security interests and agricultural liens are
27 unperfected.

28 (b) For the purposes of (a)(1) of this section, the time of filing or perfection
29 as to a security interest in collateral

30 (1) is also the time of filing or perfection as to a security interest in
31 proceeds; and

1 (2) supported by a supporting obligation is also the time of filing or
2 perfection as to a security interest in the supporting obligation.

3 (c) Except as otherwise provided in (f) of this section, a security interest in
4 collateral that qualifies for priority over a conflicting security interest under
5 AS 45.09.327, 45.09.328, 45.09.329, 45.09.330, or 45.09.331 also has priority over a
6 conflicting security interest in

7 (1) supporting obligation for the collateral; and

8 (2) proceeds of the collateral if

9 (A) the security interest in proceeds is perfected;

10 (B) the proceeds are cash proceeds or of the same type as the
11 collateral; and

12 (C) in the case of proceeds that are proceeds of proceeds, all
13 intervening proceeds are cash proceeds, proceeds of the same type as the
14 collateral, or an account relating to the collateral.

15 (d) Subject to (e) of this section and except as otherwise provided in (f) of this
16 section, if a security interest in chattel paper, deposit accounts, negotiable documents,
17 instruments, investment property, or letter-of-credit rights is perfected by a method
18 other than filing, conflicting perfected security interests in proceeds of the collateral
19 rank according to priority in time of filing.

20 (e) The provisions of (d) of this section apply only if the proceeds of the
21 collateral are not cash proceeds, chattel paper, negotiable documents, instruments,
22 investment property, or letter-of-credit rights.

23 (f) The provisions of (a) - (e) of this section are subject to

24 (1) the provisions of (g) of this section and the other provisions of
25 AS 45.09.301 - 45.09.342;

26 (2) AS 45.04.210 with respect to a security interest of a collecting
27 bank;

28 (3) AS 45.05.118 with respect to a security interest of an issuer or
29 nominated person; and

30 (4) AS 45.09.110 with respect to a security interest arising under
31 AS 45.02 or AS 45.12.

1 (g) A perfected agricultural lien on collateral has priority over a conflicting
2 security interest in or agricultural lien on the same collateral if the statute creating the
3 agricultural lien so provides.

4 **Sec. 45.09.323. Future advances.** (a) Except as otherwise provided in (c) of
5 this section, for purposes of determining the priority of a perfected security interest
6 under AS 45.09.322(a)(1), perfection of the security interest dates from the time an
7 advance is made to the extent that the security interest secures an advance that

8 (1) is made while the security interest is perfected only

9 (A) under AS 45.09.309 when it attaches; or

10 (B) temporarily under AS 45.09.312(e), (f), or (g); and

11 (2) not made pursuant to a commitment entered into before or while
12 the security interest is perfected by a method other than under AS 45.09.309 or
13 45.09.312(e), (f), or (g).

14 (b) Except as otherwise provided in (c) of this section, a security interest is
15 subordinate to the rights of a person who becomes a lien creditor while the security
16 interest is perfected only to the extent that the security interest secures advances made
17 more than 45 days after the person becomes a lien creditor unless the advance is made

18 (1) without knowledge of the lien; or

19 (2) pursuant to a commitment entered into without knowledge of the
20 lien.

21 (c) The provisions of (a) and (b) of this section do not apply to a security
22 interest held by a secured party that is a buyer of accounts, chattel paper, payment
23 intangibles, or promissory notes or a consignor.

24 (d) Except as otherwise provided in (e) of this section, a buyer of goods other
25 than a buyer in ordinary course of business takes free of a security interest to the
26 extent that it secures advances made after the earlier of

27 (1) the time the secured party acquires knowledge of the buyer's
28 purchase; or

29 (2) 45 days after the purchase.

30 (e) The provisions of (d) of this section do not apply if the advance is made
31 pursuant to a commitment entered into without knowledge of the buyer's purchase and