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TOWARD MAXIMUM FACILITATION OF INTENT TO CREATE ENFORCEABLE ARTICLE NINE SECURITY INTERESTS

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Article Nine of the Uniform Commercial Code generally facilitates individual autonomy in the creation of consensual security interests by imposing limited form and content requirements on security agreements.¹ Private autonomy is subordinated, however, where the Article's draftsmen believed that certain other policies required a degree of regulation.² Through the process of interpreting and applying a number of Code provisions which set forth the requirements for creating security interests,³ a court can effectuate what it considers to be the appropriate balance between facilitating the parties' intent to create a security interest and insuring that regulatory policies, such as protecting creditors and debtors from fraud and mistake, are enforced. A court may also effectuate its view of the appropriate balance

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¹ The approach of the Code generally is one of facilitation rather than regulation. See UNIFORM COMMERCIAL CODE § 1-102(3) (1972 version) & Comment 2 [hereinafter cited as UCC]. (Material differences between the 1972 Official Text and Uniform Commercial Code (1962 version) will be noted.) See generally Murphy, *Facilitation and Regulation in the Uniform Commercial Code*, 41 NOTRE DAME LAWYER 625, 626-28 (1966); Bunn, *Freedom of Contract under the Uniform Commercial Code*, 2 B.C. IND. & COM. L. REV. 59 (1960).

² Article Nine was designed to set out "a comprehensive scheme for the regulation of security interests in personal property and fixtures." UCC § 9-101, Comment. While the Article facilitates autonomy in the creation of security interests, it is highly regulatory in some other respects. For example, to perfect a security interest by filing, it is necessary to comply carefully with the Article's place of filing requirements. See UCC § 9-401. The Article also expressly recognizes that noncompliance with extra UCC regulatory statutes, such as the usury laws, might invalidate otherwise valid security agreements. UCC §§ 9-201, 9-203(4).

³ An example of such a provision is UCC § 9-203(1)(a), which conditions enforceability of a nonpossessory security interest by requiring that it be evidenced by a security agreement, signed by the debtor, which contains a description of the collateral. See also UCC §§ 9-105(1)(i), 9-110. See text at notes 7-10 *infra*.

through the manner in which it treats evidence which is offered by a litigant to demonstrate the parties' intent to create a security interest and to interpret the provisions of an alleged security agreement.

In the first section of this article it will be demonstrated that some courts have overregulated nonpossessory security agreements both through their interpretation of Article Nine and through their treatment of evidence of intent. The second part of this article will demonstrate that such overregulation is required neither to insure compliance with the language of Article Nine nor to achieve the general purposes of the Article Nine statute of frauds.⁴ This demonstration will reveal that both the provisions of Article Nine regulating the creation of nonpossessory security interests as well as the rules governing the interpretation of contracts should be construed and applied in such a manner as to permit maximum facilitation of private autonomy in the creation of security interests.

I. AN OVERREGULATION EXEMPLAR

A. *Overregulation Through Interpretation of Article Nine*

The basic rule under Article Nine is one of validation for privately agreed terms: "Except as otherwise provided by this Act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors."⁵ The draftsmen thus intended to allow individual secured parties and debtors to create customized security agreements.⁶ Three of Article Nine's provisions, however, provide a framework for the creation of an enforceable security interest which places some limits on this basic rule. The central provision which limits individual autonomy in the creation of Article Nine security interests is section 9-203(1)(a). This section provides that:

[A] security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless . . . the collateral is in the possession of the secured party pursuant to agreement, or *the debtor has signed a security agreement which contains a description of the collateral*. . . .⁷

⁴ UCC § 9-203(1)(a).

⁵ UCC § 9-201. UCC § 9-101, Comment states: "The rules set out in this Article are principally concerned with the limits of the secured party's protection against purchasers from and creditors of the debtor." "Term" is defined as "that portion of an agreement which relates to a particular matter." UCC § 1-201(42).

⁶ Persons are not free, however, to decide whether Article Nine will apply to their transaction. If the transaction is intended to create a security interest in personal property, the Article applies. UCC § 9-102(1)(a). The intent of the parties may be of little importance in determining the applicability of Article Nine to certain transactions. See 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 11.2, at 338 (1965). [hereinafter cited as GILMORE]. See note 88 *infra*.

⁷ UCC § 9-203(1)(a) (emphasis added). This section incorporates both the re-

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The second limit to the basic rule is found in section 9-105(1)(f) which defines a security agreement as "an agreement which creates or provides for a security interest."⁸ This provision is expanded by the general definition of agreement in Article One as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance"⁹ Section 9-110, the third Article Nine provision which limits private autonomy in the creation of security interests, states that "any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described."¹⁰ A number of courts have construed these provisions to demand a high degree of formalism and specificity for nonpossessory security agreements.¹¹ A sampling of these cases provides a basis from which to strike a more appropriate balance between facilitation and regulation of privately created security interests.

1. Granting Clause Requirement Cases

The question of whether a particular signed writing sufficiently evidences an agreement which "creates or provides for a security interest"¹² has been a frequent source of litigation under Article Nine. The cases addressing this issue have involved the sufficiency of promissory notes, financing statements, corporate resolutions, and other writings which do not contain typical security agreement language. A substantial number of these cases, beginning with the 1963 decision of

quirement that there be a written security agreement, signed by the debtor, which contains a description of the collateral and the requirement that there be "agreement" that the security interest attach. The latter requirement was stated separately in UCC § 9-204 (1962 version). The 1972 amendment was intended to cure the anomaly in the 1962 Official Text that a security interest could attach and be perfected but be unenforceable for lack of a written security agreement signed by the debtor. UCC §§ 9-204, 9-303 (1962 Version). See PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, FINAL REPORT 61-62 (1971).

The Code contains two exceptions to these general requirements for an enforceable security interest. No writing or signed security agreement is necessary to have an enforceable security interest arising under Article Two on sales so long as the debtor does not obtain lawful possession of the goods. UCC § 9-113. Such interests are non-consensual, so a writing and security agreement are not required. Since the secured party or his bailee would normally be in possession of the collateral, a filing is not necessary. *Id.*, Comment 2. See generally Hogan, *The Marriage of Sales to Chattel Security in the Uniform Commercial Code: Massachusetts Variety*, 38 B.U. L. REV. 571 (1958). Collecting banks can have an enforceable, nonconsensual security interest in items in their possession without compliance with the Article Nine formalities. UCC § 4-208.

⁸ UCC § 9-105(1)(f). UCC § 1-203(37) defines "security interest" as "an interest in personal property or fixtures which secures payment or performance of an obligation."

⁹ UCC § 1-201(3). See UCC § 9-105(4).

¹⁰ UCC § 9-110. There are several nonuniform versions of this section. See note 31 *infra*.

¹¹ *E.g.*, *In re Middle Atlantic Stud Welding Co.*, 503 F.2d 1133 (3d Cir. 1974); *Shelton v. Erwin*, 472 F.2d 1118 (8th Cir. 1973); *American Card Co. v. H.M.H. Co.*, 97 R.I. 59, 196 A.2d 150 (1963). See text at notes 12-49 *infra*.

¹² UCC § 9-105(1)(f).

the Rhode Island Supreme Court in *American Card Co. v. H.M.H. Co.*,¹³ have concluded that a writing must contain a grant or conveyance of a security interest to constitute a security agreement even when the intent to create a security interest is certain.¹⁴ A more recent example of the reasoning employed in cases such as *American Card* can be found in the opinion of the United States Court of Appeals for the Eighth Circuit in *Shelton v. Erwin*.¹⁵

In *Shelton*, the buyer purchased an automobile and executed a bill of sale which described the automobile, set out the terms of payment, and placed him under a duty to insure the automobile until payment was completed. The buyer also filed an application for a Missouri title showing himself as owner and the seller as lien holder. The certificate of title which was issued shortly thereafter also indicated this relationship. Subsequently, the buyer went bankrupt and the trustee in bankruptcy filed petitions against both the buyer and seller seeking title to and possession of the automobile. The district court, reversing the decision of the referee in bankruptcy, held that the bill of sale and title application satisfied the "modest" UCC requirements for a written security agreement.¹⁶ The court of appeals, while agreeing with the district court that "the parties clearly intended to create a security interest,"¹⁷ nevertheless held that the buyer and seller had not succeeded in creating such an interest since neither the bill of sale nor the title application was a "security agreement" within the Article Nine definition of that term.¹⁸

For a nonpossessory security interest to be enforceable, there must be a "security agreement,"¹⁹ which, under section 9-105(1)(l), is an agreement that "creates or provides for a security interest." The Eighth Circuit noted, however, that no explicit mention of a security interest was made in the bill of sale.²⁰ Furthermore, while the court recognized that "no precise words are required by the Code," it maintained that the language of section 9-105(1)(l) effectively requires some language in the agreement "actually conveying" a security interest.²¹ In the absence of such language, the agreement was unenforceable even though this result defeated the clear intent of the parties.²² The court justified its strict interpretation of Section

¹³ 97 R.I. 59, 63, 196 A.2d 150, 152 (1963).

¹⁴ See cases cited in notes 15 & 23 *infra*.

¹⁵ 472 F.2d 1118 (8th Cir. 1973).

¹⁶ *In re Shelton*, 343 F. Supp. 43, 44 (E.D. Mo. 1972).

¹⁷ 472 F.2d at 1119.

¹⁸ *Id.* at 1120.

¹⁹ UCC § 9-203(1)(a).

²⁰ 472 F.2d at 1120.

²¹ *Id.*

²² *Id.* The seller could not claim an equitable lien because Article Nine, by reducing the formal requirements needed to establish a security interest, was designed to abolish the doctrine for transactions within the scope of the Article. See *id.*; 1 GILMORE, *supra* note 6, § 11.4, at 345-46. But see *General Ins. Co. v. Lowery*, 412 F. Supp. 12 (S.

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9-105(1)(l) by stating that since the Code's requirements for the creation of an enforceable security interest are "not ambiguous," there is no reason to relax those requirements.²³

2. Inadequate Description Cases

Courts have also thwarted the intent of parties to create nonpossessory security agreements by focusing on the requirement imposed by sections 9-203(1)(a) and 9-110 that the agreement contain a reasonable description of the collateral. A recent example of a case in which a court found the temporal boundaries of the collateral insufficiently described is *In re Middle Atlantic Stud Welding Co.*²⁴ There the debtor had executed a security agreement which granted the secured party a security interest in "all Receivables and the proceeds thereof as security for the Liabilities."²⁵ The agreement defined receivables as "all of Debtor's Accounts Receivable" and liabilities as "any and all indebtedness of Debtor to Secured Party of every kind and description, now existing or hereafter arising."²⁶ The issue before the United States Court of Appeals for the Third Circuit was whether the phrase "all accounts receivable" was sufficient for purposes of Section 9-110 to "reasonably" identify after-acquired accounts as part of the described collateral.²⁷

The Third Circuit initially noted the lower court's finding that the debtor and secured party had intended to create a security interest in after-acquired accounts. With the recognition that floating liens on accounts receivable were widely used in current commercial practice, the reviewing court then concluded that there was a rational basis for the premise that "many" prospective lenders who read the security agreement "would be alerted that the parties may well have intended to include after-acquired accounts" in the collateral.²⁸ The Third Circuit decided, however, that the description was insufficient

D. Ohio 1976); *Warren Tool Co. v. Stephenson*, 11 Mich. App. 274, 161 N.W.2d 133 (1968).

²³ *Accord, e.g.*, *Mosley v. Dallas Entertainment Co.*, 496 S.W.2d 237, 240 (Tex. Civ. App. 1973) (financing statement cannot serve as a security agreement if it does not contain granting language); *White v. Household Finance Corp.*, 302 N.E.2d 828, 836-37 (Ind. App. 1973) (application for certificate of title showing lien in favor of creditor insufficient to create a security interest). *But see, e.g.*, *Peterson v. Ziegler*, — Ill. App. 3d—, 350 N.E.2d 356 (1976) (application for certificate of title for a house trailer indicating the existence of a lien creates a security interest); *Kreiger v. Hartig*, 11 Wash. App. 898, 900, 527 P.2d 483, 485 (1974) (application for certificate of automobile ownership noting secured party's security interest creates or provides for a security interest). *See generally* 1 GILMORE, *supra* note 6, § 11.4, at 347-48.

²⁴ 503 F.2d 1133 (3d. Cir. 1974), *noted in* 48 TEMP. L. Q. 833 (1975).

²⁵ 503 F.2d at 1134.

²⁶ *Id.*

²⁷ *Id.* at 1135. Under UCC § 9-204(1), a security agreement may provide that any or all obligations covered by the security agreement are to be secured by after-acquired collateral.

²⁸ *Id.* at 1135-36.

to meet the requirement of section 9-110 because an express reference to after-acquired property was necessary to protect those few prospective lenders who might possibly be misled by the parties' description. The court reasoned that such a reference could easily have been incorporated into the security agreement.²⁹ Thus, acting largely in the belief that strict standards for collateral descriptions were required in order to protect third parties, the Third Circuit in *Middle Atlantic* exhibited a regulatory attitude toward the adequacy of descriptions of collateral in security agreements.³⁰

*In re Laminated Veneers Co.*³¹ is an example of a case in which a court found the physical characteristics of the collateral insufficiently described. There, the security agreement, which explicitly granted a security interest in specific items, including a truck, contained an omnibus clause which broadly granted a security interest in certain types of goods including "equipment."³² The issue in the case was whether

²⁹ *Id.* at 1136. *But see id.* at 1137-38 (Seitz, C.J. dissenting). It should be emphasized that the court's decision was based on UCC § 9-110, which requires a reasonable description of the collateral, and not on UCC § 9-204(1), which validates after-acquired property clauses. For a case that reflects the notion that UCC § 9-204(1) requires an express reference to after-acquired collateral, see *In re Taylored Products, Inc.* 5 UCC REP. SERV. 286, 289-91 (W.D. Mich. 1968). Based upon this view, UCC § 9-204(1) creates an additional statutory formality. This writer believes this to be incorrect. UCC § 9-204(1) has as its purpose the validation of after-acquired property clauses. "Formal Requisites" are provided in UCC § 9-203(1), which is the exclusive source for such requirements for security agreements. See UCC § 9-203, Comment 1. Moreover, UCC § 9-204(1) states that a "security agreement" may provide for after-acquired property, not that a "writing" or "written security agreement" may so provide. Thus, if a written after-acquired property clause is required, it must be through the general requirement of a written security agreement which contains a description of the collateral.

³⁰ *Accord, e.g.,* *DuBay v. Williams*, 417 F.2d 1277, 1284-85 (9th Cir. 1969) (security interest in after-acquired property not found where agreement stated: "Assignor desires to assign to assignee accounts receivable which . . . will become due . . ."). *But see, e.g., In re Nickerson & Nickerson, Inc.*, 452 F.2d 56, 56-57 (8th Cir. 1971) (security interest in after-acquired property found where agreement stated: "All . . . merchandise inventory held for resale"); *In re Page*, 16 UCC REP. SERV. 501, 504 (M.D. Fla. 1974) (security interest in after-acquired property found where agreement stated: "[A]ll the inventory and equipment located at 8002 North Armenia"). See generally Skilton, *Security Interests in After-Acquired Property Under the Uniform Commercial Code*, 1974 WIS. L. REV. 925, 932-37; Recent Cases, 48 TEMP. L. Q. 833, 835 (1975).

³¹ 471 F.2d 1124 (2d Cir. 1973), noted in Recent Cases, 39 MO. L. REV. 75 (1974); Comment, 19 N.Y.L.F. 365 (1973). New York has a nonuniform version of UCC § 9-110, but this would appear to have no effect on the precedential value of this case in jurisdictions which have enacted the Uniform version of UCC § 9-110 because the New York version differs only with respect to real estate. For the Uniform version, see the text at note 10 *supra*. The New York version provides that: "For the purpose of this Article any description of personal property or, except as otherwise required by subsection 2 of Section 9-402 relating to the content of a financing statement, real estate is sufficient whether or not it is specific if it reasonably identifies what is described." N.Y. UCC § 9-110 (McKinney 1964). A similar, more recent, Second Circuit case, but with a holding favorable to the secured party, is *In re Sarex Corp.*, 509 F.2d 689, 690-93 (2d Cir. 1975).

³² 471 F.2d at 1125. The omnibus clause read in part:

In addition to all the above enumerated items, it is the intention that this

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the secured party had an enforceable security interest in two automobiles.³³ The United States Court of Appeals for the Second Circuit upheld the bankruptcy trustee's contention that an examining creditor would conclude that, since the truck was the only vehicle specifically mentioned in the security agreement, it was the only one intended to be covered.³⁴ Although the generic description "equipment" used in the agreement was correct for classifying the cars under the Article Nine scheme for the classification of collateral, the purpose of this scheme was viewed by the court as one of determining the applicable set of filing requirements rather than of providing a set of statutorily approved descriptions of collateral for security agreements. Consequently, while "equipment" might be a sufficient description for a financing statement, it was an insufficient description for a security agreement.³⁵ As a result, in *Laminated Veneers*, the Second Circuit felt constrained to hold that the word "equipment" was not sufficiently specific to reasonably identify the automobiles as part of the collateral.³⁶

B. Overregulation Through Restrictive Interpretation of Security Agreement Language—"Tunnel Vision" Cases

Cases such as those previously discussed are examples of the way in which a court can actualize a regulatory bias through the interpretation and application of the statutory formalities for the creation of an enforceable security interest. An illustration of how a court can also give effect to this bias through the interpretation of security agreement language is to be found in *Mitchell v. Shepherd Mall State Bank*.³⁷ There, Section D of the form security agreement contained the heading "COLLATERAL" and subsection D.1 thereunder stated: "The security interest is granted in the following collateral: Describe

mortgage shall cover all chattels, machinery, [and] equipment . . . belonging to the mortgagor . . . now at the plant of Laminated Veneers Co., . . . and all chattels, machinery, fixtures, or equipment that may hereinafter be brought in or installed in said premises or any new premises of the mortgagor. . . .

Id. at 1125 n.l.

³³ *Id.*

³⁴ *Id.* But see *id.* at 1125-28 (Lumbard, J. dissenting).

³⁵ *Id.* at 1125. The courts have often been more sympathetic to broad security agreement descriptions. See Burke, *Secured Transactions*, 30 BUS. LAW. 893, 900 (1975). Concerning the use of generic descriptions in financing statements, see notes and text at notes 127-29 *infra*.

³⁶ The dissenting judge found that a security interest in the autos, along with most of the other assets owned by the debtor, had been established and that the description was adequate under the circumstances because a potential creditor considering lending against the autos would, at least, be placed on notice to determine if the autos were used as equipment by the debtor and were thus subject to a prior security interest. 471 F.2d at 1127.

³⁷ 458 F.2d 700 (10th Cir. 1972).

collateral."³⁸ In the space provided for the description appeared the typed statement: "See EQUIPMENT LIST attached hereto and made a part hereof, describing equipment, furniture and fixtures located at [certain] . . . stores."³⁹ A two-page list of equipment, furniture, and fixtures was attached to the security agreement. Subsection D.2 of the section on "COLLATERAL" directed the parties to "[c]lassify goods under (one or more of) the following Uniform Commercial Code categories," and contained five boxes labeled "Consumer Goods," "Equipment (business use)," "Inventory," "Accounts Receivable," and "Contract Rights."⁴⁰ All of the boxes, except the first one, were checked. Therefore, the collateral "described" (equipment, furniture and fixtures) in subsection D.1 was not the same as the collateral "classified" (equipment, inventory, accounts receivable and contract rights) in subsection D.2. Financing statements covering all machinery, equipment, fixtures, furniture, inventory, accounts receivable and contract rights were properly filed. After the debtor filed for bankruptcy the trustee contested the secured party's claim that the agreement secured inventory, accounts receivable and contract rights.

The district court held that since the description of the collateral in subsection D.1 was unambiguous, parol evidence to the effect that the parties intended to include inventory, accounts receivable and contract rights as collateral, should not have been received by the referee in bankruptcy.⁴¹ Furthermore, the court refused to find that subsection D.2 extended the security interest to inventory, accounts receivable and contract rights or that it even so clouded the intent of the parties that it was necessary to resort to parol evidence for clarification.⁴² The court stated that under the UCC the purpose of a classifications section such as subsection D.2 was to determine the answers to questions such as where a financing statement must be filed, and not to describe or to create a security interest.⁴³ Accordingly, a third party, who tried to determine what property was secured by this agreement, would be unlikely to regard subsection D.2 as determining the dimensions of the security interest.⁴⁴ Thus, the district court essentially decided that a third party should not be required to study and interpret all the provisions of a security agreement at the peril of not learning the full extent of the security interest it creates when an unambiguous provision, in this case subsection D.1,

³⁸ *Id.* at 702.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ 324 F. Supp. 1029, 1034 (W.D. Okla. 1971).

⁴² *Id.* at 1032. In reaching its holding, the district court recognized that subsection D.2 invited a misclassification because accounts receivable and contract rights cannot be classified as goods under Article Nine. *Id.* The 1972 Official Text of the Code has eliminated contract rights as a separate subclassification for intangible collateral. See UCC § 9-106.

⁴³ *Id.*

⁴⁴ *Id.* at 1033.

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is clearly designated in the agreement as containing a description of the collateral.

The affirming opinion of the United States Court of Appeals for the Tenth Circuit, while acknowledging the district court's considerations, focused on what it perceived to be a lack of language "creating or providing for" a security interest in accounts, contract rights and inventory in the security agreement. The court reasoned that the language in subsection D.1, that "[t]he security interest is granted in the following collateral,"⁴⁵ referred only to the items mentioned in the space provided below subsection D.1, while subsection D.2 contained no "granting" language of its own.⁴⁶ In determining what extrinsic evidence, if any, might be considered to illuminate the actual intent of the immediate parties, the court held that, despite the unambiguous reference to inventory, accounts receivable and contract rights in the financing statements, these statements could have no bearing on the case, since a financing statement cannot serve as a security agreement absent explicit "granting" language.⁴⁷ The court also agreed with the district court that the uncontroverted testimony of the bank's vice president, which was introduced in support of the secured party's contentions, was inadmissible because the description of collateral in subsection D.1 was unambiguous and, even if the form security agreement was ambiguous, it should be construed against the secured party draftsman.⁴⁸

The opinions in *Mitchell* demonstrate how restrictions on the admissibility of clarifying extrinsic evidence can define the legal effect of a security agreement in a manner which may be inconsistent with the actual intention of the parties.⁴⁹ This restrictive approach flowed from an equally regulatory construction and application of the Article Nine formalities.

II. TOWARD MAXIMUM FACILITATION OF THE INTENT OF THE PARTIES TO A SECURITY AGREEMENT

As demonstrated by the cases in the preceding exemplar, courts

⁴⁵ 458 F.2d at 702.

⁴⁶ *Id.* at 703.

⁴⁷ *Id.* at 703-04.

⁴⁸ *Id.* at 704.

⁴⁹ *Accord, e.g.,* *Rusch Factors, Inc. v. Passport Fashion, Ltd.*, 67 Misc. 2d 3, 6-7, 322 N.Y.S.2d 765, 768-69 (Sup. Ct.), *aff'd mem.*, 38 App. Div. 2d 690, 327 N.Y.S. 2d 356 (1971), *appeal denied*, 30 N.Y.2d 482, 280 N.E.2d 895, 330 N.Y.S.2d 1026 (1972) (extrinsic evidence not admissible to clarify security agreement in action involving third parties). *But see, e.g.,* *Guida v. Exchange Nat'l Bank*, 308 So.2d 148, 150 (Fla. Dist. Ct. App. 1975) (extrinsic evidence admitted to clarify security agreement in action between immediate parties); *In re Amex-Protein Development Corp.*, 504 F.2d 1056, 1060-62 (9th Cir. 1974) (extrinsic evidence admissible to clarify security agreement in an action between secured party and bankruptcy trustee); *In re Metzler*, 405 F. Supp. 622, 625 (N.D. Ala. 1975) (extrinsic evidence admissible to clarify security agreement in an action between secured party and bankruptcy trustee). See notes and text at notes 175-79 *infra*.

may marshal one or more arguments in support of a restrictive approach to the construction and application of Article Nine's framework for the creation of an enforceable, nonpossessory security interest and to the interpretation of security agreement language. The justifications most commonly given for a restrictive approach are first, that such an approach is required by the statutory language of Article Nine; and second, that such an approach is required for the protection of third parties. The balance of this article is devoted to evaluating the merits of these and related arguments.

A. The Statutory Language of Article Nine

The question of whether an enforceable, nonpossessory security interest has been created under the aforementioned Article Nine statutory formalities can be broken down into two significant subsidiary inquiries:⁵⁰

(1) Does the writing evidence a bargain of the immediate parties in fact, as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance,⁵¹ to create or provide for a security interest?⁵²

(2) Does the writing contain a description of the collateral which reasonably identifies what is described?⁵³

A proper response to these two inquiries can be reached and an appropriate balance between facilitation and regulation can be struck only if the origins, meaning, and policy underlying each requirement is understood.

⁵⁰ A third, less significant, inquiry under Article Nine is whether there is a writing signed by the debtor. UCC § 9-203 (1)(a). The requirement that a nonpossessory security agreement be evidenced by a signed writing was a typical requirement of the pre-Code personal property security statutes enacted when such assignments took on increased commercial importance, *see generally* 1 GILMORE, *supra* note 6, § 2.7, at 52, and was incorporated into the earliest versions of the Code. *See, e.g.*, UCC §§ 7-309, 7-405, 7-508, 7-611 & Comments (May 1949 Draft version). The draftsmen of the Code adopted the policy of requiring a signed writing containing a description of the collateral but they abandoned additional formal requirements such as acknowledgements and affidavits. *See, e.g.*, UCC §§ 7-309, 7-405, 7-508 & Comments (May 1949 Draft version). Early drafts required greater formality for security interests in consumer goods. *Id.* at § 7-611. The requirement that the writing be signed can be met under the present version of Article Nine by "any symbol executed or adopted by a party with present intention to authenticate a writing." UCC § 1-201(39). This requirement has not worked to defeat the probable intent of the parties to a security agreement as often as the other formalities have, *but see, e.g.*, *Food Service Equipment Co. v. First Nat'l Bank*, 121 Ga. App. 421, 174 S.E. 2d 216 (1970), and, therefore, will be given no further consideration herein.

⁵¹ *See* UCC §§ 9-203(1), 1-201(3).

⁵² UCC § 9-105(1)(l).

⁵³ *See* UCC §§ 9-110, 9-203 (1)(a).

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1. The Requirement that the Writing Create or Provide for a Security Interest

Neither the statute nor its comments specify any mandatory term which the security agreement must contain other than a description of the collateral. Although "security agreement" is defined by section 9-105(1)(l) as an agreement which "creates or provides for a security interest," this is a definitional provision only; it does not create a requirement that the writing contain words of grant, creation, or any other specified term.⁵⁴ Presumably, if the draftsmen had intended to require active words of creation, such a precise requirement would have been separately expressed, or at least alluded to, in the language of or comments to section 9-203 which is captioned "Attachment and Enforceability of Security Interests; . . . Formal Requisites."⁵⁵ Moreover, a requirement of such "magic words" would have been inconsistent with the simplification in personal property security law that the draftsmen were attempting to achieve.⁵⁶

The official comments to section 9-203 indicate that the draftsmen of Article Nine, when requiring a writing that "creates or provides" for a security interest, intended to require those types of writings which could function *qua* statute of frauds to provide minimum evidence of a possible security interest and a minimum safeguard against fraudulent or mistaken claims of secured status.⁵⁷ One class of memoranda which should rise to the level of security agreements under this test includes writings which, while not expressly granting a security interest, are on their face referable to or descriptive of a possible security agreement, security interest, or secured status. Writings of this type would include, for example, a promissory note which contains a passive reference to a security agreement;⁵⁸ a letter from the debtor acknowledging or referring to a

⁵⁴ See, e.g., *Kreiger v. Hartig*, 11 Wash. App. 898, 527 P.2d 483 (1974). But see, e.g., *Shelton v. Erwin*, 472 F.2d 1118 (8th Cir. 1973). See text at notes 12-23 *supra*.

⁵⁵ Section captions are made part of the UCC by § 1-109.

⁵⁶ See text at notes 180-81 *infra*.

⁵⁷ UCC § 9-203, Comments 3 and 5; see *In re Numeric Corp.*, 485 F.2d 1328, 1331 (1st Cir. 1973). See generally 1 GILMORE, *supra* note 6, § 11.4, at 347-48. Providing these sorts of assurances is the basic purpose of Anglo-American statutes of frauds. See generally Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 FORD L. REV. 39, 64-69 (1974) [hereinafter cited as Perillo].

Under UCC § 9-203 both the debtor to an alleged security agreement and third parties can assert that the agreement is not enforceable. UCC § 9-203(1). Under some statutes of frauds only the parties to an agreement and their privies can raise the defense. See 2 A. CORBIN, ON CONTRACTS § 289, at 54 (1950) [hereinafter cited as CORBIN].

⁵⁸ For example, a promissory note should be sufficient if it contains language such as "This note is secured by a security agreement of even date herewith." See e.g., *In re Amex-Protein Development Corp.*, 504 F.2d 1056, 1057 (9th Cir. 1974); *In re Center Auto Parts*, 6 UCC REP. SERV. 398, 399 (C.D. Cal. 1968). But see, e.g., *Safe Deposit & Trust Bank Co. v. Berman*, 393 F.2d 401, 403 (1st Cir. 1968); *In re Penn Housing Corp.*, 367 F. Supp. 661, 662-63 (W.D. Pa. 1973); *Barth Bros. v. Billings*, 68 Wis. 2d 80, 88-90, 227 N.W.2d 673, 678 (1975).

security interest;⁵⁹ an application for a certificate of title which refers to the alleged secured party as a lien holder;⁶⁰ a corporate resolution which ratifies or refers to a secured transaction or which authorizes an officer of the debtor corporation to enter into a secured transaction;⁶¹ and a letter written by a debtor to his account debtor⁶² requesting the account debtor to pay the debt to the alleged secured party.⁶³

Many courts have determined that such writings rise to the level of security agreements.⁶⁴ For example, in *In re Amex-Protein Development Corp.*,⁶⁵ the United States Court of Appeals for the Ninth Circuit held that a promissory note containing the words "[t]his note is secured by a Security Interest in subject personal property as per invoices" created or provided for a security interest.⁶⁶ The court adopted the opinion of the district court which concluded that passive language referring to a security interest, as well as active language creating or granting a security interest, can "create or provide" for a security interest. In reaching this conclusion, the court defined "create" as a transitive verb meaning "to bring into existence" and "provide" as an intransitive verb meaning "to make a proviso or stipulation."⁶⁷ Thus, the court concluded that UCC section 9-105(1)(l) "may be satisfied not only when a security interest is caused to be or brought into existence, but also when provision or stipulation is made therefor."⁶⁸

⁵⁹ For example, a letter should be sufficient if it contained language such as "Please find enclosed a copy of our security agreement." See, e.g., *In re Fibre Glass Boat Corp.*, 324 F. Supp. 1054, 1055-56 (S.D. Fla.), *aff'd mem.*, 448 F.2d 781 (5th Cir. 1971). But see *In re Penn Housing Corp.*, 367 F. Supp. 661, 663 (W.D. Pa. 1973).

⁶⁰ See, e.g., *Peterson v. Ziegler*, — Ill. App. 3d —, 350 N.E.2d 356 (1976). *Clark v. Vaughn*, 504 S.W.2d 550, 551-52 (Tex. Civ. App. 1974); *Kreiger v. Hartig*, 11 Wash. App. 898, 900, 527 P.2d 483, 485 (1974). But see, e.g., *Shelton v. Erwin*, 472 F.2d 1118, 1120 (8th Cir. 1973) (see text at notes 15-23 *supra*); *In re E.F. Anderson & Son, Inc.*, 12 UCC REP. SERV. 567, 570 (M.D. Ga. 1973); *First County Nat'l Bank & Trust Co. v. Canna*, 124 N.J. Super. 154, 159, 305 A.2d 442, 445 (App. Div. 1973).

⁶¹ For example, a corporate resolution would be sufficient if it contained language such as "Resolved, that the treasurer of this corporation is hereby authorized to execute and deliver to secured party a financing statement to cover secured party's security interest." See, e.g., *In re Numeric Corp.*, 485 F.2d 1328, 1332 (1st Cir. 1973). But see *L & V Co. v. Asch*, 267 Md. 251, 252, 297 A.2d 285, 286 (1972).

⁶² "Account debtor" means "the person who is obligated on an account, chattel paper or general intangible . . ." UCC § 9-105 (1)(a).

⁶³ For example, a letter should be sufficient if it contained language such as "Please make your checks in payment for my services payable jointly to myself and secured party." See, e.g., *In re Nunnemaker Transportation Co.*, 456 F.2d 28, 31-32 (9th Cir. 1972); *In re Consolidated Steel Corp.*, 11 UCC REP. SERV. 408, 410 (M.D. Fla. 1972); *Citizens & Southern Nat'l Bank v. Capital Construction Co.*, 112 Ga. App. 189, 190-91, 144 S.E.2d 465, 466 (1965); cf. *Miller v. Wells Fargo Bank*, 406 F. Supp. 452, 476-77 (S.D.N.Y. 1975).

⁶⁴ See cases cited in notes 58-63 *supra*.

⁶⁵ 504 F.2d 1056 (9th Cir. 1974).

⁶⁶ *Id.* at 1057-60.

⁶⁷ *Id.* at 1058.

⁶⁸ *Id.*

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Courts have also held that a financing statement can meet the minimum requirements of the section 9-203(1)(a) statute of frauds if it contains language such as "this financing statement secures a note for money advanced."⁶⁹ These holdings are correct and consistent with cases such as *Amex-Protein* because such financing statements contain language referring to a security interest. Thus, while the financing statements may not "create" a security interest, they do "provide" for such an interest.

What of financing statements which do not contain such language? A writing which meets the formal requisites of UCC section 9-402 for financing statements must refer to the secured status of a possible secured party and must be, on its face, referable to and descriptive of a possible security interest.⁷⁰ Thus, a section 9-402 financing statement should serve as the minimum writing required by Article Nine. However, while there is other commentary support for this proposition,⁷¹ judicial acceptance of it is totally lacking. Courts which have considered the question have been troubled both by the absence of active granting language in bare financing statements⁷² and by two related arguments. First, it has been contended that a financing statement cannot serve as a security agreement because the Code contemplates the security agreement functioning as the writing which creates a security interest and the financing statement functioning as the writing which gives notice of a security interest.⁷³ Second, the argument has been advanced that a financing statement should not be viewed as providing the necessary minimum assurances of a possible security interest because it can be executed and prefiled before a security agreement is actually entered into and may remain of record even if agreement is never reached.⁷⁴

⁶⁹ See, e.g., *Evans v. Everett*, 279 N.C. 352, 357-58, 183 S.E.2d 109, 112-13 (1971); *First Nat'l Bank & Trust Co. v. Olivetti Corp.*, 130 Ga. App. 896, 898, 204 S.E.2d 781, 783 (1974). But see *In re Taylor Mobile Homes, Inc.*, 17 UCC REP. SERV. 565, 568-69 (E. D. Mich. 1975); *Mosley v. Dallas Entertainment Co.*, 496 S.W.2d 237, 240 (Tex. Civ. App. 1973).

⁷⁰ UCC § 9-402(1): "A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral." The use of a nominee as secured party is permissible. See *In re Cushman Bakery*, 526 F.2d 23, 31-34 (1st Cir. 1975), cert. denied, 96 S. Ct. 1670 (1976).

⁷¹ See generally 1 GILMORE, *supra* note 6, § 11.4, at 346-48; 6E BENDER'S UNIFORM COMMERCIAL CODE SERVICE, Reporter Digest 2-1679, 2-1683 (1976); J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 23-3, at 791 (1972) [hereinafter cited as UCC Handbook].

⁷² See, e.g., *Crete State Bank v. Lauhoff Grain Co.*, 195 Neb. 605, —, 239 N.W.2d 789, 791 (1976); *Transport Equip. Co. v. Guaranty State Bank*, 518 F.2d 377, 380 (10th Cir. 1975).

⁷³ See, e.g., *In re Taylor Mobile Homes, Inc.*, 17 UCC REP. SERV. 565, 567 (E.D. Mich. 1975); *American Card Co., Inc. v. H.M.H. Co.*, 97 R.I. 59, 62-63, 196 A.2d 150, 152 (1963).

⁷⁴ See, e.g., *In re Shoreline Electric Supply, Inc.*, 18 UCC REP. SERV. 231, 235 (D. Conn. 1975). See UCC § 9-402(1).

It has already been demonstrated that section 9-203(1)(a) does not require active granting or conveying language.⁷⁵ Nor do these other arguments require a holding that a financing statement containing the minimum language required by section 9-402 cannot rise to the level of a section 9-203(1)(a) memorandum. First, the general functional distinction between security agreements as writings which create security interests and financing statements as writings which give notice of security interests is accurate, but it does not necessarily lead to the conclusion that a financing statement cannot serve both functions. Indeed, Professor Grant Gilmore, who was a principal draftsman of Article Nine, has concluded that there is no sensible basis for the discrepancies between the formal requisites in sections 9-203 and 9-402, and that a writing which conforms to section 9-402 is sufficient to satisfy the Article Nine statute of frauds.⁷⁶ Thus, the notice function of a financing statement does not preclude it from creating or providing for a security interest as well. Second, there is also always the possibility that a financing statement alleged to be a security agreement was actually prefiled for an anticipated secured transaction which was never consummated.⁷⁷ Such a prefiling might be made to insure that the secured party would enjoy perfected status from the date of the filing if a security agreement was ultimately entered into and a security interest ultimately attached to the collateral. On the other hand, it is at least as likely that a security agreement was actually entered into either before or after the execution or filing of the financing statement. In many reported cases the secured party either prefiled and then actually entered into a security agreement with the debtor or entered into such an agreement before he filed.⁷⁸ No signed writing, not even a formal security agreement, can provide an absolute guarantee that an enforceable security interest in the collateral described was in fact created.⁷⁹ Consequently, the ability of parties to prefile financing statements should not lead courts to conclude that such statements can not satisfy the Article Nine statute of frauds.

When determining whether a writing provides the necessary minimum evidence of a possible secured status and minimum safeguard against fraudulent or mistaken claims, courts should consider the commercial context. As a general matter, it is permissible to

⁷⁵ See text at notes 54-79 *supra*.

⁷⁶ See 1 GILMORE, *supra* note 6, § 11.4, at 346-48. Many courts have found that security agreements serve a notice function in addition to the creation function. See note and text at note 123 *infra*.

⁷⁷ See generally UCC HANDBOOK, *supra* note 71, § 25-4.

⁷⁸ Compare, e.g., *Borg-Warner Acceptance Corp. v. First Nat'l Bank* — Minn. —, 238 N.W.2d 612, 613 (1976), with *First Nat'l Bank & Trust Co. v. Atlas Credit Corp.*, 417 F.2d 1081, 1082 (10th Cir. 1969).

⁷⁹ For example, the debtor's signature might have been procured through fraud. Or, the agreement might not be enforceable by the secured party because of a failure to give value. See UCC §§ 1-103; 9-203. See text at note 93 *infra*.

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use evidence of a commercial usage as well as other oral evidence of the situation or relation of the parties and other surrounding circumstances at the time an agreement was allegedly made to explain a memorandum produced for the purpose of satisfying a statute of frauds.⁸⁰ This principle should be applicable under the Code given its emphasis on the importance of commercial context.⁸¹ The Article Nine definition of "security agreement", as expanded by the Article One definition of "agreement," seemingly opens the door to contextual explanation.⁸² Thus, writings presented for the purpose of satisfying section 9-203(1)(a) should be read in the light of the commercial usages of secured creditors and debtors and such other explanatory evidence.

A bill of sale is an example of a document which, through such explanation, may "create or provide" for a security interest. On its face a bill of sale describes a possible sale, not a secured transaction. Yet, Official Comment 4 to UCC section 9-203 indicates that a person should be able to protect his "equity of redemption" by proving that the bill of sale purporting to describe a sale resulting in the passage of title from himself as seller to a buyer actually describes a security transfer and, in effect, creates or provides for a security interest.⁸³ In fact, bills of sale are used, on occasion, to memorialize security agreements.⁸⁴ On the authority of Comment 4, secured parties,⁸⁵ as well as debtors,⁸⁶ have been permitted to introduce evidence demon-

⁸⁰ See generally 2 CORBIN, *supra* note 57, §§ 527-28.

⁸¹ See generally Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of our New Commercial Law*, 11 VILL. L. REV. 213, 227-29, 250-53 (1966).

⁸² UCC §§ 1-201(3), 9-105(1)(f). UCC § 1-201, Comment 3 states: "As used in this Act the word [agreement] is intended to include full recognition of usage of trade, course of dealing, course of performance and the surrounding circumstances as effective parts thereof" This statutory mandate to the courts to look beyond the four corners of a written document to ascertain the parties' true intent is consistent with the Code's policy of permitting continued expansion of commercial practices by measuring commercial persons' obligations in a commercial context. UCC § 1-102 states: "(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies. (2) Underlying purposes and policies of this Act are . . . (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties" For examples of cases that employ contextual explanation in determining whether a security interest was created, see *In re Numeric Corp.*, 485 F.2d 1328, 1332 (1st Cir. 1973); *In re Penn Housing Corp.*, 367 F. Supp. 661, 662-65 (W.D. Pa. 1973). The extent to which the parol evidence rule and principles of contract interpretation might affect efforts to explain is discussed in the notes and text at notes 110 & 161 *infra*.

⁸³ UCC § 9-203, Comment 4:

Under this Article as under prior law a debtor may show by parol evidence that a transfer purporting to be absolute was in fact for security and may then, on payment of the debt, assert his fundamental right to return of the collateral and execution of an acknowledgement of satisfaction.

See UCC § 2-106(1).

⁸⁴ See 1 GILMORE, *supra* note 6, § 2.6, at 48-49.

⁸⁵ E.g., *Wambach v. Randall*, 484 F.2d 572, 575 (7th Cir. 1973). See generally GILMORE, *supra* note 6, § 2.6, at 50 n.9.

⁸⁶ See, e.g., *In re Joseph Kranner Hat Co.*, 482 F.2d 937, 939-40 (2d Cir. 1973).

strating that both written agreements absolute in form as well as bills of sale actually represent security agreements.

Leases of personalty should be viewed with a similar commercial understanding. On their face, leases evidence a possible transaction in which both the lessor and the lessee have an interest in the leased personalty. Their interests, depending on the terms of the lease and other factors, may actually be that of Article Nine secured creditor and debtor.⁸⁷ Thus, there should be no restriction on the admission of extrinsic evidence showing that a lease of personalty does in fact "create or provide" for a security interest in the personalty which is the subject of the lease.⁸⁸

⁸⁷ UCC § 9-102(2) states that the "Article applies to security interests created by . . . lease . . ." The UCC § 1-201(37) provides a test for determining whether a lease actually creates a security interest:

Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

⁸⁸ For an example of a case where the court admitted extrinsic evidence to determine that a lease created or provided for a security interest, see *In re Telemax Corp.*, 10 UCC REP. SERV. 1316, 1318-19 (S.D.N.Y. 1971).

It is possible for a court to determine that a transaction is, in reality, a lease for security subject to Article Nine as distinguished from a true lease, but that the writings which evidence the transaction are not sufficient under § 9-203. *In re Lufkin*, 15 UCC REP. SERV. 708 (D. Me. 1974), is an example. In *Lufkin* the collateral, a tractor which the debtor had originally taken possession of pursuant to a written memorandum of an oral agreement which contained an option to purchase, had been rightfully repossessed. The rental document was not signed by the debtor, but did describe the collateral. The debtor wrote the creditor expressing his understanding of the necessity for the repossession and promising to make future payments on time. The sending of the letter which was signed by the debtor and which described the collateral, along with the payment of the arrearages, resulted in the return of the collateral. The court concluded, after considering a variety of evidence extrinsic to the writings, that a security agreement rather than a bona fide lease was intended, at least from the time that the parties finalized the arrangement for the return of the tractor. The court also acknowledged that it would seem appropriate to consider the rental document and the letter written by the debtor together as a security agreement. Nonetheless, the court found that:

although the letter is signed by the debtor, it neither creates nor provides for a security interest. . . . The rental memorandum might be said to create or provide for a security interest . . . inasmuch as it constitutes a lease with an option to purchase, but it was not signed by the debtor. Moreover, it would appear that the security interest itself actually was created by oral agreement between the parties and therefore that it is not enforceable under § 9-203(1)(a) and (b).

Id. at 711-12 (citations omitted). If the court had found an enforceable security interest, it would have been unperfected for lack of filing. This lack of filing was the sounder basis on which to hold in favor of the bankruptcy trustee.

Admitting extrinsic evidence in order to determine whether a lease is a true lease or a lease for security may be reconcilable with a highly regulatory interpretation of § 9-203 because both approaches may be seen as working to protect third parties. There is a probable judicial bias that most leases are disguised security agreements which can

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The question of whether a writing "creates or provides for a security interest" becomes more difficult when an alleged secured party produces a document which lacks express granting language; which is not, on its face, referable to a security agreement, security interest, secured status, or any other sort of in rem rights or status with respect to personalty; and which is not sometimes used by secured creditors and debtors to evidence what is actually a secured transaction. A promissory note on which an alleged secured party is named payee, but which contains no reference to a possible secured transaction, would be an example of such a writing.⁸⁹ Since such a bare promissory note is consistent with both secured and unsecured status, should the alleged secured party be permitted to establish a security interest through the use of explanatory extrinsic evidence? Permitting a creditor to introduce extrinsic evidence of secured status upon the production of a bare promissory note might open the door to false or mistaken claims of security which interested third persons would have difficulty rebutting. Additionally, the debtor, usually insolvent, may have little reason to carefully consider or rebut the false or mistaken claims of secured status.⁹⁰ The issue must be resolved against the alleged secured party in such a case, not because triers of fact are not able to sift out fraudulent or mistaken claims most of the time, but because Article Nine should be read as requiring that the writing evidence a possible secured transaction. The circumstances surrounding the execution of the note might demonstrate an intent to create a security interest.⁹¹ Such evidence, however, would have the effect of

affect the admissibility and the weight that a court is willing to give to different types of evidence relevant to intent. See generally Hawland, *The Impact of the Uniform Commercial Code on Equipment Leasing*, 1972 ILL. L. F. 446, 448, 451-52. This bias is at least partially founded on judicial dislike for "secret liens" of which persons who deal with the lessee-debtor have no notice. See *In re Lockwood*, 16 UCC REP. SERV. 195, 199 (D. Conn. 1974). A bias in favor of protecting third persons may also be found in cases where the issue is the sufficiency of a writing under § 9-203. See notes and text at notes 119-23 *infra*.

The question of whether a lease is a true lease may be said to depend on the intent of the parties, but their actual intent may have little to do with the outcome. See UCC § 1-201(37). Rather, it is the commercial and economic reality of the device created by the parties which controls. Thus, the objective of this determination of intent is different from the intent-finding process in contractual interpretation, where actual intention is sought to have binding effect. Under either process, however, the parol evidence rule should not operate to prevent the admission of evidence extrinsic to the writing in order to determine "intent." See note 90 *infra*. See Peden, *The Treatment of Equipment Leases as Security Agreement and the Uniform Commercial Code*, 13 WM. & MARY L. REV. 110, 136-40 (1971); Hawland, *The Impact of the Uniform Commercial Code on Equipment Leasing*, 1972 ILL. L. F. 446, 451-52.

⁸⁹ See, e.g., *McCorquodale v. Holiday, Inc.*, 90 Nev. 67, 69-70, 518 P.2d 1097, 1098 (1974); *In re Nottingham*, 6 UCC REP. SERV. 1197 (E.D. Tenn. 1969).

⁹⁰ But see *In re Metzler*, 405 F. Supp. 622, 623-24 (N.D. Ala. 1975) (Bankrupt debtor did take interest in claim of alleged secured party).

⁹¹ See *In re Overbrook & Barson's, Inc.*, 5 UCC REP. SERV. 546, 549-52 (E.D. Pa. 1968), *aff'd*, 304 F. Supp. 233 (E.D. Pa. 1969).

Evidence of a course of dealing or other circumstances peculiar to the secured creditor and debtor should be admissible to interpret a writing if a § 9-203(1)(a)

varying or supplementing the contents of the note. There is nothing in the writing which can be interpreted or explained to show such an intent. Thus, to permit a creditor to establish secured status on the basis of such a writing would violate the section 9-201(1)(a) statute of frauds because it provides no evidence of a possible secured status nor does it protect against mistaken or fraudulent claims of secured status.⁹²

None of the writings which, as suggested above,⁹³ meet section 9-203(1)(a)'s requirement that a writing create or provide for a security interest additionally serve to insure that a security agreement was actually made. Yet, findings of noncompliance with section 9-203(1)(a) have provided a convenient, albeit an analytically incorrect, basis for courts to hold against an alleged secured party in instances where they doubted that there was, in fact, the intent to enter into a security agreement.⁹⁴ It would be preferable for courts to recognize that the statute of frauds hurdle may be cleared by a variety of writings ranging from a formal security agreement to a bare financing statement or bill of sale, but that these writings may carry different evidentiary weights in demonstrating that there was a security agreement. For example, a secured party that relies on a bare financing statement to overcome the statute of frauds threshold might have to introduce more extrinsic evidence of his secured status than would a secured party who can produce a financing statement and a promissory note which both contain passive references to a security interest.⁹⁵ In this vein, it is to be hoped that those courts that continue to take a more restrictive view of the "create or provide" language than that suggested herein will recognize that even if a bare financing statement, a promissory note with a passive reference to a security interest, or other such documents are not seen as meriting security agreement status individually, such documents may cumulatively provide the requisite minimum assurances of a possible security agreement required by section 9-203(1)(a).⁹⁶

memorandum is present. See, e.g., *Bramble Trans., Inc. v. Sam Senter Sales, Inc.*, 294 A.2d 97, 102-03 (Del. Super. Ct. 1971), *aff'd*, 294 A.2d 104 (Del. 1972). See note and text at note 90 *supra*. But see *Borg-Warner Acceptance Corp. v. First Nat'l Bank*, — Minn., —, 238 N.W.2d 612, 614-15 (1976).

⁹² See *In re Nottingham*, 6 UCC REP. SERV. 1197, 1199 (E.D. Tenn. 1969). See generally J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 308 (1970). Query whether the existence of "part performance" should enable the alleged secured party to go forward despite the lack of a sufficient writing? See *In re Trucker's Int'l, Inc.*, 17 UCC REP. SERV. 1337, 1342 n.4 (W.D. Wash. 1975).

⁹³ See notes and text at notes 59-63 *supra*.

⁹⁴ See *In re Shoreline Electric Supply, Inc.*, 18 UCC REP. SERV. 231, 235-36 (D. Conn. 1975).

⁹⁵ The parol evidence rule and principles of contract interpretation may affect the consideration of such evidence by a court. See notes and text at notes 110 & 161 *infra*.

⁹⁶ See *In re Penn Housing Corp.*, 367 F. Supp. 661, 662-64 (W.D. Pa. 1973). One document may "create or provide" while another may contain the description of the collateral. See, e.g., *In re Center Auto Parts*, 6 UCC REP. SERV. 398, 399-400 (C.D. Cal.

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2. The Requirement that the Writing Contain a Description of the Collateral

One purpose of the writing requirement, according to the draftsmen's comments, is to provide some evidence of what property is subject to the security interest created by a security agreement.⁹⁷ As a result, in addition to requiring a writing which "creates or provides for a security interest," Article Nine also requires that the writing contain a description of the collateral.⁹⁸ By requiring a description that "reasonably identifies what is described," and which "make[s] possible the identification of the thing described," the draftsmen intended a break with pre-Code requirements of exact and detailed descriptions.⁹⁹ Since the adequacy of particular descriptions is tested on a case by case basis and has generated considerable litigation,¹⁰⁰ it is important to analyze more closely the purpose of the description requirement.

As part of the Article Nine statute of frauds, the description requirement seeks to provide both minimum written evidence that a security interest in the alleged collateral was intended, as well as minimum protection against mistaken or fraudulent claims of security in particular collateral.¹⁰¹ Whether the description provides such evidence and protection is the precise issue that a court must resolve when it is asked to test a description against section 9-203(1)(a).

A description, such as "all debtor's inventory," which is broad enough to include the particular collateral claimed should be ade-

1968). In cases where one writing is signed and others are not, there should be no flat requirement of a completely identifying internal reference in the signed writing to the unsigned papers. Extrinsic evidence should be admissible to link the various writings together. See, e.g., *In re Amex-Protein Development Corp.*, 504 F.2d 1056, 1060-61 (9th Cir. 1974). See generally 2 CORBIN, *supra* note 57, §§ 512, 515. There should be no problem in relating multiple documents if they are all signed and they all relate to the same transaction. See, e.g., *Amex-Protein*. But see *In re Shoreline Electric Supply, Inc.*, 18 UCC REP. SERV. 231 (D. Conn. 1975). Multiple writings should be useable for purposes of satisfying § 9-203(1)(a) even if the parties actually intended but failed to execute a formal security agreement. E.g., *In re Numeric*, 485 F.2d 1328, 1331 (1st Cir. 1973). But see *In re Taylor Mobile Homes*, 17 UCC REP. SERV. 565, 569 (E.D. Mich. 1975).

⁹⁷ UCC § 9-203, Comment 3.

⁹⁸ See text at notes 7-10 *supra*.

⁹⁹ UCC § 9-110 & Comment. The secured party can have a security interest in proceeds of any kind even if the security agreement does not describe or mention them. UCC. § 9-203(3); 9-306(1). The word "proceeds" alone is an adequate description to cover proceeds of any kind under the 1962 Official Text. UCC § 9-203(1)(b) (1962 Text).

¹⁰⁰ See generally Burke, *Secured Transactions*, 31 BUS. LAW. 1583, 1589-90 (1976); Note, 27 OKLA. L. REV. 469, 474-76 (1974); Recent Cases, 39 MO. L. REV. 75, 77-78 (1974).

¹⁰¹ UCC § 9-203, Comment 5; UCC HANDBOOK, *supra* note 71, § 23-3, at 787-88. The definition of security agreement as an agreement which "creates or provides for a security interest" would seem to require some description of collateral even if a description term was not specifically required.

quate for section 9-203(1)(a) purposes.¹⁰² This description provides minimum evidence that the dimensions of the alleged security interest can be no greater than all the debtor's inventory, and rules out an enforceable security interest in assets not described, such as accounts receivable or equipment. It both provides minimum protection against mistaken or fraudulent claims of secured status and makes it possible to identify what inventory, if any, is actually encumbered. Thus, contrary to the decision in *Middle Atlantic*,¹⁰³ a security interest in "accounts" should be sufficient for purposes of section 9-203(1)(a) to include present and future accounts. Further, contrary to the decision in *In re Laminated Veneers Co.*,¹⁰⁴ a security interest in "equipment" should be sufficient to include a particular automobile used as equipment by the debtor.¹⁰⁵ In both cases, since the descriptions satisfied the Article Nine statute of frauds, the parties should have been permitted to introduce evidence of whether they actually intended the security interest to cover the claimed assets.¹⁰⁶

Of course, such broad descriptions are most often used to describe a security interest which is intended to attach to all or substantially all of the debtor's assets within the described class, and are often accompanied by a list of subclasses of assets or particular assets within the broad class. Such descriptions can be troublesome.¹⁰⁷ For example, it may be alleged that the security agreement description "all the debtor's equipment including punch presses, drill presses, lathes, and

¹⁰² See, e.g., UCC HANDBOOK, *supra* note 71, § 23-3, at 788; *Security Tire & Rubber Co. v. Hlass*, 246 Ark. 1113, 1116-18, 441 S.W.2d 91, 93-94 (1969); cf. 1 GILMORE, *supra* note 6, § 11.4 at 350. An appropriate perspective to adopt when measuring the breadth of a description and other aspects of its adequacy is discussed in the notes and text at notes 152-55 *infra*.

A court may not be willing to narrow the effect of a broad description by including only certain items within the description where the court concludes that the description is not ambiguous. See note 110 *infra*. If the description is contained in a completely integrated writing, the parol evidence rule may operate to exclude evidence that a security interest in specific items only was intended. UCC HANDBOOK, *supra* note 71, § 23-3, at 788-89.

¹⁰³ 503 F.2d 1113 (3d Cir. 1974). See notes and text at notes 24-30 *supra*.

¹⁰⁴ 471 F.2d 1124 (2d Cir. 1973). See notes and text at notes 31-36 *supra*.

¹⁰⁵ Concerning the use of even broader security agreement descriptions, see *Leasing Service Corp. v. American Nat'l Bank & Trust Co.*, 19 UCC REP. SERV. 252, 261 (D.N.J. 1976); *In re Lockwood*, 16 UCC REP. SERV. 195, 200 (D. Conn. 1974); *James Talcott, Inc. v. Franklin Nat'l Bank*, 292 Minn. Rep. 277, 285-88, 194 N.W.2d 775, 781-83 (1972).

¹⁰⁶ It has been argued that a description such as "all debtor's inventory" can be adequate for § 9-203(1)(a) purposes only when there is an actual intent to cover all the debtor's inventory. Comment, 19 N.Y.L.F. 365, 374 (1973). Presumably, evidence of intent would be admitted under § 9-203(1)(a) for the limited purpose of measuring the description's adequacy. The approach taken in this paper is one advocating the facilitation of intent. This approach would first consider whether a description is broad enough to satisfy the Article Nine statute of frauds for the property in dispute. Actual intent to encumber the asset would then be determined in order that the security agreement could be enforced according to the parties' actual intent.

¹⁰⁷ See the descriptions used in *Laminated Veneers* and *Mitchell* in the text at notes 32 & 38 *supra*.

all other machinery used in debtor's machine shop" includes a desktop computer owned by the debtor and used in his business offices when the security agreement was entered into and value was given. This description is an adequate description of the computer under the Article Nine statute of frauds because the computer is a part of the debtor's equipment. The real issue is whether the parties actually intended the security interest to attach to the computer.¹⁰⁸ As the written description can be no more than evidence of intent, this description could be used to support arguments both for or against an intent to encumber the computer. The parties' intent must be ascertained through the process of contract interpretation which is governed by extra-Code law and in which, contrary to the approach taken in *Mitchell*,¹⁰⁹ evidence of meaning extrinsic to the writing should always be admissible whether or not the writing seems ambiguous.¹¹⁰ On the other hand, an alleged secured party should

¹⁰⁸ The real issue of intent may be confused with the question of the adequacy of the description for § 9-203(1)(a) purposes. See, e.g., *In re Little Brick Shirthouse*, 10 UCC REP. SERV. 1360, 1362 (N.D. Ill. 1972). These issues were not clearly delineated in *Laminated Veneers* and *Mitchell* discussed in the notes and text at notes 31-49 *supra*.

¹⁰⁹ See text at notes 37-49 *supra*.

¹¹⁰ See cases cited in note 49 *supra*. Under Professor Corbin's view, extrinsic evidence may always be introduced for purposes of interpreting a writing:

[E]xtrinsic evidence is always necessary in the interpretation of a written instrument: in determining the meaning and intention of the parties who executed or relied upon it, in applying it to the objects and persons involved in the litigated or otherwise disputed issues, in determining the specific legal operation that justice requires to be given to the written instrument. In this process of interpretation, no relevant credible evidence is inadmissible merely because it is extrinsic; all such evidence is necessarily extrinsic. When a court makes the often repeated statement that the written words are so plain and clear and unambiguous that they need no interpretation and that evidence is not admissible, it is making an interpretation on the sole basis of the extrinsic evidence of its own linguistic experience and education, of which it merely takes judicial notice.

The so-called parol evidence rule is not a rule of evidence and has no application in the process of interpretation of a written instrument. It is now most commonly described as a rule of substantive law, even by a court that erroneously applies it to exclude relevant credible evidence. The supposed rule is so variable in its formulation, and its application as an exclusionary rule is so generally avoided in so many ways, that it is erroneous and unjust to apply it for the purpose of excluding evidence that is offered in aid of interpretation. When it is established by relevant credible evidence that the parties have mutually assented to a specific written instrument as a complete and accurate statement of the terms of their contract (an integration) and the words of that instrument have been properly interpreted with the aid of all relevant extrinsic evidence, that instrument operates as a discharge of all antecedent agreements and negotiations (oral or written) that are inconsistent therewith. This is a rule of substantive contract law, not a rule of evidence. Such antecedent agreements (oral or written) are not rendered inadmissible in evidence; they are merely rendered inoperative by having been discharged by a subsequent agreement that has been duly proved and interpreted.

Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L. Q. 161, 188-89 (1965). See generally 3 CORBIN, *supra* note 57, §§ 532-60, 573-96 (1960);

not be allowed to prove that the security agreement description "one Brand A desk-top computer, serial number X," was intended to describe the debtor's machine shop equipment. This description does not provide the minimum written evidence and minimum protection required by the Article Nine statute of frauds with respect to any personalty other than the computer¹¹¹ because it is not broad enough to include any other asset.

It is understandable that the issue of the adequacy of a security agreement description under section 9-203(1)(a) and the issue of what the parties actually intended are not often clearly delineated in such cases where the same writings may be relevant to both questions. But it is important that each be separately analyzed to avoid making the written description requirement a higher barrier against proof of intent than was actually intended by the UCC's draftsmen.

3. No Other Required Terms

While Article Nine expressly requires a writing which creates or provides for a security interest and which contains a description of the collateral, the presence of other terms which one might normally expect to find in a security agreement are not prerequisites to enforceability, even though they might lend credence to a claim that a security agreement was actually made.¹¹² For example, there is no express requirement that the writing contain provisions describing the indebtedness secured or the events which would constitute a default by

RESTATEMENT (SECOND) OF CONTRACTS §§ 238, 240 (Tent. Drafts. Nos. 1-7, 1973). The parol evidence rule contained in the sales article of the UCC does not operate to exclude extrinsic evidence introduced for interpretive purposes. See UCC § 2-202, Comment 2; See generally 3 CORBIN, *supra* note 57, § 579. The parol evidence rule cannot apply for any purpose if the writing is not an integration, see 3 CORBIN, *supra* note 57, § 582, and many of the writings which have been held to rise to the level of a security agreement are unlikely candidates for this status. See note and text at note 64 *supra*. It must be noted, however, that many courts do not agree with Professor Corbin's approach. These courts apply the "plain meaning rule" which does not permit resort to extrinsic evidence if the writing appears to the court to be unambiguous on its face. See *Borg-Warner Acceptance Corp. v. First Nat'l Bank*, — Minn. —, —, 238 N.W.2d 612, 614-15 (1976). See generally J. CALAMARI & J. PERILLO, CONTRACTS § 50, at 97-98 (1970). It should further be noted that this process of interpretation is a two-edged sword, since in this process, bankruptcy trustees and other interested third parties are free to prove that a narrower security interest than that apparently described in the security agreement was actually intended. In fact, bankruptcy trustees have been successful in demonstrating that the actual, intended security interest is narrower than the described security interest. They certainly should always be free to do so. *E.g.*, *In re Hardin*, 11 UCC REP. SERV. 392, 394-95 (E.D. Wis.), *aff'd*, 458 F.2d 938 (7th Cir. 1972); *In re Eshleman*, 10 UCC REP. SERV. 750, 752-53 (E.D. Pa. 1972). See generally Note, 34 U. PITT. L. REV. 691, 696-97 (1973).

¹¹¹ See note and text at note 157 *infra*.

¹¹² Section 9-203, Comment 3 states: "One purpose of the formal requisites stated in subsection (1)(a) is evidentiary. The requirement of written record minimizes the possibility of future dispute as to the terms of a security agreement and as to what property stands as collateral for the obligation secured."

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the debtor in order for a writing to rise to the level of a security agreement, although some courts have suggested that such provisions are required.¹¹³ In response to this judicial suggestion, it should be noted that the possession of the collateral by the secured party is a statutory substitute for a writing which complies with all formal requirements. While it is true that the evidentiary need for a written record is greater when the collateral is in the debtor's possession,¹¹⁴ one learns nothing about such matters as the size of the indebtedness or what will constitute a default from the fact that a secured party is in possession. Perhaps it is dangerous to make too much of the equivalence of possession of the collateral for possessory security and the writing requirement for nonpossessory security, given that there is often a writing dealing with such matters in a pledge transaction,¹¹⁵ and given that pledge law, which had worked for hundreds of years before nonpossessory security became a commercial necessity, was not to be lightly tampered with by the draftsmen of Article Nine in creating a new statutory writing requirement.¹¹⁶ However, a potential secured creditor seeking knowledge of matters such as the size of the debt or acts of default is no better off if he learns that a secured party is in possession of collateral than if he learns that the collateral is described in a financing statement which provides the name and address of the secured party.¹¹⁷ Thus, the equivalence of possession and the

¹¹³ *E.g.*, *Needle v. Lasco Indus., Inc.*, 10 Cal. App. 3d 1105, 1108-09, 89 Cal. Rptr. 593, 595-96 (1970); *White v. Household Fin. Corp.*, 302 N.E.2d 828, 837 (Ind.) App. 1973).

It could be argued that UCC § 9-203 does require a signed agreement which creates or provides for a security interest and that it would be difficult to conclude that such an agreement had been reached if no debt was specified. This argument might be bolstered by the definition of security interest contained in UCC § 1-201(37) as "an interest in personal property . . . which secures payment or performance of an obligation." See *Needle v. Lasco Indus.*, 10 Cal. App. 3d 1105, 1107-09, 89 Cal. Rptr. 593, 594-96 (1970). Such an argument is not persuasive in light of the Code's lack of an express debt description requirement, particularly when it is realized that such a requirement was common under pre-Code law. See 1 BENDER'S UCC SERV. § 3.16(1)(b)(1974). It is also not persuasive because the purpose of UCC § 9-203 is to provide minimum written evidence of a possible security agreement and not to require an entire, integrated written security agreement. Moreover, it is not possible to determine the size of the obligation secured from the mere fact of possession by a secured party under a possessory security interest.

There is no statutory requirement that the writing contain an express after-acquired property clause if a security interest in after-acquired property was intended. See note 29 *supra*.

¹¹⁴ See UCC § 9-203, Comment 3.

¹¹⁵ *Id.*

¹¹⁶ The draftsmen of Article Nine did consider the codification of the law of pledges with some modifications. See UCC §§ 7-201 through 7-210 (May 1949 draft). However, they did not add a writing requirement. *Id.* at 7-202. See generally 1 GILMORE, *supra* note 6, § 1.6.

¹¹⁷ See UCC § 9-402. The formal requirements for a financing statement and its notice function are considered in the notes and text at notes 125-29 *infra*. At least one state does require that information concerning the size of the debt be provided in a financing statement. See KY. REV. STAT. § 355.9-402(1).

writing requirement for nonpossessory security provides support for the notion that Article Nine requires no more than a writing which creates or provides for a security interest and which contains a description of the collateral.

B. Purposes of the Writing Requirement

In the preceding discussion of the statutory language of Article Nine, it has been established that the writing required by section 9-203(1)(a) has as its function the provision of minimum written evidence that a security interest in the alleged collateral was intended as well as the provision of minimum protection against mistaken or fraudulent claims of security in particular collateral. While writing requirements in general may serve a variety of other purposes,¹¹⁸ none of these should be read into section 9-203(1)(a) so as to require magic words or security agreement language in addition to that previously discussed.

1. Third Party Protection

The protection of the expectations of third persons plays an important role in judicial determinations of the sufficiency of writings claimed to be security agreements. As demonstrated by the decisions in *Middle Atlantic*,¹¹⁹ *Laminated Veneers*,¹²⁰ and *Mitchell*,¹²¹ the courts often may be concerned that a security agreement description is so vague, ambiguous or incomplete that a third party cannot determine whether a security interest was created in particular assets of the debtor. In essence, courts fear that to accept the secured party's arguments concerning the existence or scope of the alleged security interest would be to sanction judicially what may amount to a secret lien.¹²² Therefore, courts posit an important notice function for security agreements.¹²³ A determination of the type of notice function intended by Article Nine's draftsmen necessitates a general discussion of notice under Article Nine.

¹¹⁸ Professor Perillo has indicated that contractual formalities can have at least nine broadly outlined legal functions. Perillo, *supra* note 57, at 43-69. Only those which UCC § 9-203 might conceivably further are discussed in the text.

¹¹⁹ 503 F.2d 1133 (3d Cir. 1974). See text at notes 24-30 *supra*.

¹²⁰ 471 F.2d 1124 (2d Cir. 1973). See text at notes 31-36 *supra*.

¹²¹ 458 F.2d 700 (10th Cir. 1972). See text at note 44 *supra*.

¹²² *In re Lockwood*, 16 UCC REP. SERV. 195, 199 (D. Conn. 1974). Concern for the protection of third parties is most often voiced in cases concerning the adequacy of security agreement descriptions. See notes and text at notes 24-30 *supra*. It also appears in cases in which the issue is whether a particular writing "creates or provides" for a security interest. See *Morey Mach. Co. v. Great Western Indus. Mach. Co.*, 507 F.2d 987, 990 (5th Cir. 1975) (*per curiam*).

¹²³ See, e.g., *In re Middle Atlantic Stud Welding Co.*, 503 F.2d 1133, 1136 (3d Cir. 1974); *In re Laminated Veneers Co.*, 471 F.2d 1124, 1125 (2d Cir. 1973); *Mitchell v. Shepherd Mall State Bank*, 324 F. Supp. 1029, 1033 (W.D. Okla. 1971), *aff'd*, 458 F.2d 700 (10th Cir. 1972).

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Article Nine's draftsmen determined that a notice filing system was appropriate for publicizing most nonpossessory security interests in order that third parties might become aware of them.¹²⁴ The financing statement which can be filed as a notice document under this system is sufficiently descriptive if it contains "a statement indicating the types, or describing the items, of collateral."¹²⁵

Uniform Commercial Code section 9-110, which states that for purposes of Article Nine "any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described,"¹²⁶ fills out this description requirement. Many courts have permitted the use of broad descriptions in financing statements when the collateral consisted of fluid assets such as accounts or inventory because a more complete or specific description would be impossible without periodic refilings which are not required by the Code.¹²⁷ Courts have also permitted broad financing statement

¹²⁴ See UCC § 9-402, Comment 2; Coogan, *Public Notice under the Uniform Commercial Code and Other Recent Chattel Security Laws, Including "Notice Filing,"* 47 IOWA L. REV. 289, 317-19 (1962) [hereinafter cited as Coogan]. The system was not designed to provide complete protection for third parties. Professor Coogan points out that even if a person determines that there are no filings against the collateral in which he is interested, and that a secured party is not in possession of the collateral in which he is interested, it would be dangerous for him to assume that no person will be able to successfully claim priority in the collateral. For example, the property in which he is interested might be subject to other security interests that may be perfected automatically without either filing or possession. *Id.* at 339, 342-43. In addition to the many pitfalls fully discussed by Professor Coogan, there are others. For example, under UCC § 9-402(7), a financing statement may be effective even if the debtor has changed his name. See *Continental Oil Co. v. Citizens Trust & Savings Bank*, —Mich.—, —, 244 N.W.2d 243, 244-45 (1976); UCC § 9-402, Comment 7; UCC HANDBOOK, *supra* note 71, §23-16, at 837-41. Also under UCC § 9-402(7), a secured party is not under a duty to refile where he knows of or consented to a debtor's transfer of the collateral to a new debtor. See generally Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477, 526-27 (1973).

¹²⁵ UCC §§ 9-402(1); 9-403(4). There are special description requirements for realty-related personalty such as crops, minerals, and fixtures. UCC §§ 9-402(1), (5). A copy of a security agreement may be filed instead of a financing statement. UCC § 9-402(1).

¹²⁶ UCC § 9-110. It has been suggested that this criterion is so vague as to be of little value and thus, that the description requirement for financing statements could be dispensed with entirely. See Note, 4 VAL. L. REV. 205, 218-21 (1969). The draftsmen of Article Nine rejected a suggestion that notice filing be eliminated in favor of other safeguards. See 1 GILMORE, *supra* note 6, § 15.1, at 463-65. Section 9-110 also fills out the description requirements for security agreements. To explore the question whether the differences in function between the security agreement and financing statement require a difference in the description employed, see UCC HANDBOOK, *supra* note 71, § 23-3, at 787-88. See note and text at note 76 *supra*.

¹²⁷ *Heights v. Citizens Nat'l Bank*, —Pa.—, —, 342 A.2d 738, 743 (1975); UCC § 9-402, Comment 2. See UCC HANDBOOK *supra* note 71, §23-16, at 843-46; Note, 27 OKLA. L. REV. 469, 470-74 (1974). A financing statement description "new and used automobiles" has been held sufficient to indicate that a security interest in future automobiles was contemplated when it was apparent from the financing statement that the debtor was an automobile dealer. See *Biggins v. Southwest Bank*, 490 F.2d 1304, 1309 (9th Cir. 1973); *Bank of Utica v. Smith Richfield Springs, Inc.*, 58 Misc. 2d 113, 114, 294 N.Y.S.2d 797, 799 (Sup. Ct. 1968).

descriptions to describe nonfluid assets.¹²⁸ These liberal cases are correctly decided in light of the two functions contemplated by the Code's draftsmen for the financing statement: to provide a bare-bones notice that a security interest may exist presently or in the future in the collateral described; and to provide minimal additional information, such as the immediate parties' names and addresses, so that interested persons can investigate further to obtain other information such as the precise nature of the collateral, the size of the debt secured, or the conditions of default.¹²⁹

What can the interested third person do once he has learned that there may be a security interest? He can become a disinterested third party. Or, he can contact the secured party named in the financing statement for details. Although the secured party is not under an Article Nine duty to respond to third party inquiries,¹³⁰ he may be estopped from asserting a security interest if he fails to reveal it¹³¹ or provides incorrect information about it.¹³² Alternatively, the interested person can contact the debtor. If the third person does not wish to rely on the debtor's representations, section 9-208 of Article Nine provides a procedure under which the debtor may obtain certain information from the secured party.¹³³ The information which can be

¹²⁸ For example, in *In re Stegman*, 15 UCC REP. SERV. 225, 226-29 (S.D. Fla. 1974) the court held that the description "various equipment, see Schedule A attached hereto" was adequate even though the schedule was not attached. *Accord, e.g., In re Turnage*, 493 F.2d 505, 506-07 (5th Cir. 1974); *Maryland Nat'l Bank v. Porter-Way Harvester Mfg. Co.*, 300 A.2d 8, 9-11 (Del. 1972). *Contra, e.g., In re Lehner*, 427 F.2d 357, 358 (10th Cir. 1970). See generally UCC HANDBOOK, *supra* note 71, § 23-16, at 843-46. Although the Code permits the use of generic financing statement descriptions, there are practical reasons for using a more specific description. See Coogan, *supra* note 124, at 322-26.

¹²⁹ UCC § 9-402 & Comment 2. As to whether an after-acquired property clause is required in a financing statement, see *e.g., James Talcott, Inc. v. Franklin Nat'l Bank*, 292 Minn. 277, 288-92, 194 N.W.2d 775, 783-85 (1972). See note 127 *supra*.

¹³⁰ See Opinion of Attorney General of Virginia, 9 UCC REP. SERV. 974 (1971), interpreting UCC § 9-208. Although the secured party is not under a duty to respond, the address which appears for him on the financing statement is required to be one from which information concerning the security interest may be obtained. UCC § 9-402(1).

¹³¹ UCC § 1-103. See, *e.g., United States v. Gleaners & Farmers Coop. Elevator Co.*, 314 F. Supp. 1148, 1149-50 (N.D. Ind. 1970); *Mason State Bank v. Diamond*, — N.W.2d —, —, 16 UCC REP. SERV. 1168, 1174-80 (Iowa 1975).

¹³² See, *e.g., Avco Delta Corp. v. United States*, 459 F.2d 436, 440-42 (7th Cir. 1972); *Central Nat'l Bank & Trust Co. v. Community Bank & Trust Co.*, 528 P.2d 710, 713 (Okla. 1974).

¹³³ UCC § 9-208 provides in part:

- (1) A debtor may sign a statement indicating what he believes to be the aggregate amount of unpaid indebtedness as of a specified date and may send it to the secured party with a request that the statement be approved or corrected and returned to the debtor. When the security agreement or any other record kept by the secured party identifies the collateral a debtor may similarly request the secured party to approve or correct a list of the collateral.
- (2) The secured party must comply with such a request within two weeks after receipt by sending a written correction or approval. If

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obtained by a debtor on behalf of a third person under section 9-208 is the amount of the indebtedness and a list of collateral.¹³⁴ A third party receives protection directly by virtue of this provision in the situation where: the debtor properly includes in his request a good faith statement of the obligation and list of collateral; the secured party fails to approve or correct the statement or list in writing without a reasonable excuse; and the third party is actually misled. In such cases, the security interest is limited by the statement and list supplied by the debtor. Since, in the event of litigation, the interested third party would presumably have the burden of showing both that the debtor's statement of the obligation or list of collateral was prepared in good faith¹³⁵ and that he was misled by the debtor's representations, the availability of this relief may not place upon secured parties strong pressure to comply. While the spectre of monetary liability to the debtor which can result under section 9-208 may cause most secured parties to comply,¹³⁶ that will not provide solace to the third party who is unable to prove all of the necessary elements in his effort to have a noncomplying secured party forfeit all or part of a security interest. Despite the limitations of section 9-208, an interested third person clearly has the burden of further investigation under Article Nine if a financing statement containing an adequate description of the property was properly filed.¹³⁷

the secured party claims a security interest in all of a particular type of collateral owned by the debtor he may indicate that fact in his reply and need not approve or correct an itemized list of such collateral. If the secured party without reasonable excuse fails to comply he is liable for any loss caused to the debtor thereby; and if the debtor has properly included in his request a good faith statement of the obligation or a list of the collateral or both the secured party may claim a security interest only as shown in the statement against persons misled by his failure to comply . . .

This mechanism has been criticized as inadequate. Coogan, *supra* note 124, at 344-45; 1 GILMORE, *supra* note 6, § 15.3, at 472-75. Concerning the necessity of a written request by the debtor, see *Rainey v. Ford Motor Credit Co.*, 294 Ala. 139, 143, 313 So. 2d. 179, 183 (1975).

¹³⁴ See *In re Cushman Bakery*, 526 F.2d 23, 29 (1st Cir. 1975), *cert. denied*, 96 S. Ct. 1670 (1976). A secured party may have to reveal the location of collateral in order to comply with UCC § 9-208. See *Owen v. McKesson & Robbins Drug Co.*, 349 F. Supp. 1327, 1335 (N.D. Fla. 1972). A secured party who has made a representation under UCC § 9-208 is not precluded from taking additional collateral or making an additional advance even if the enlarged security interest would be perfected through the original filing and, thus, have priority over the person who acquired information. Coogan, *supra* note 124, at 345. But see *Coin-o-Matic Serv. Co. v. Rhode Island Hosp. Trust Co.*, 3 UCC REP. SERV. 1112 (R.I. Super. Ct. 1966). The reasoning in *Coin-o-Matic* has generally not been accepted. See UCC HANDBOOK, *supra* note 71, § 25-4, at 908.

¹³⁵ "Good faith" is defined as "honesty in fact in the conduct or transaction concerned." UCC §§ 1-201(19); 9-105(4). Thus, a list in which the debtor, through inadvertence, omitted certain items of collateral would meet the "good faith" requirement.

¹³⁶ See 1 GILMORE, *supra* note 6, § 15.3, at 475.

¹³⁷ The burden has been described in different ways and is, in part, a function of the specificity which a court believes Article Nine requires in financing statement descriptions. For example, in *Biggins v. Southwest Bank*, 490 F.2d 1304, 1308 (9th Cir. 1973), the court stated:

What role should the security agreement play in this process of discovery? Many courts have reasoned that its role in this respect is significant and that the security agreement itself must be considered a notice document.¹³⁸ In this vein, it has been suggested that the adequacy of a security agreement description may be measured by more liberal standards where the issue of enforceability arises between the immediate parties rather than between an immediate party and a third party.¹³⁹ A copy of the security agreement might be made available to a third party by the secured party or the debtor during the course of the third party's inquiry. However, cases emphasizing this notice function rarely indicate that any third person did in fact rely on a copy of the security agreement in deciding to give value.¹⁴⁰ In the absence of evidence that a security agreement did, in fact, serve such a notice function, courts make assumptions concerning how a third person might react to it. *In re Aragon Industries, Inc.*¹⁴¹ provides a good example of the way in which such assumptions may be questionable.

In *Aragon*, a leasing company sought reclamation from the debtor's bankruptcy estate of two forklift trucks. The "Equipment

Under the Code, an interested third party has the burden of continuing his investigation as to prior perfected security interests which may affect the proposed collateral for his particular agreement with the debtor. In this sense, the financing statement's purpose is to merely alert the third party as to the need for further investigation, never to provide a comprehensive data bank as to the details of prior security arrangements.

As a general rule, a financing description is sufficient if it describes the collateral in such a manner that reasonable inquiry will disclose the complete state of affairs. *Ray v. City Bank & Trust Co.*, 358 F. Supp. 630, 639 (S.D. Ohio 1973); *Yancey Bros. Co. v. Dehco, Inc.*, 108 Ga. App. 875, 878, 134 S.E.2d 828, 831 (1964) (relying on pre-Code law).

¹³⁸ See, e.g., *In re Munger*, 495 F.2d 511, 512-13 (9th Cir. 1974). See text at notes 28-30, 34 & 44 *supra*.

¹³⁹ See, e.g., *River Oaks Chrysler-Plymouth, Inc. v. Barfield*, 482 S.W.2d 925, 928 (Tex. Civ. App. 1972); *Rusch Factors, Inc. v. Passport Fashion, Ltd.*, 67 Misc. 2d 3, 7, 322 N.Y.S.2d 765, 768-69 (Sup. Ct.), *aff'd mem.*, 38 App. Div. 2d 690, 327 N.Y.S.2d 536 (1971), *appeal denied*, 30 N.Y.2d 482, 280 N.E.2d 895, 330 N.Y.S.2d 1026 (1972).

¹⁴⁰ The following cases are examples of the few opinions indicating that a third party may have actually sought out and relied upon the contents of a security agreement: *National Ropes, Inc. v. National Diving Serv., Inc.*, 513 F.2d 53 (5th Cir. 1975); *J. K. Gill Co. v. Fireside Realty, Inc.*, 262 Ore. 486, 499 P.2d 813 (1972). One possible reason for the small number of such cases is that if an interested third person actually read a security agreement and was misled, it is less likely that the secured party would be willing to litigate the adequacy of the security agreement. Often, it is a bankruptcy trustee, representing persons who gave value to the debtor and for whom there is no evidence of knowledge or concern about the possibility of being subject to a security interest, who asserts that the security agreement description is inadequate because it might somehow mislead third persons. See, e.g., *DuBay v. Williams*, 417 F.2d 1277 (9th Cir. 1969). The bankruptcy trustee can assert defenses of the debtor. 11 U.S.C. § 110(c) (1970). Thus, he can assert that the security agreement is not enforceable for lack of compliance with the Article Nine formalities. Of course, the minimum mandatory language required by § 9-203(1)(a) must be present even absent inspection of the security agreement by a third party. See *Leasing Serv. Corp. v. American Nat'l Bank & Trust Co.*, 19 UCC REP. SERV. 252, 262-63 (D.N.J. 1976). See note and text at note 152 *infra*.

¹⁴¹ 14 UCC REP. SERV. 1218 (S.D. Fla. 1973).

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Lease Agreement”¹⁴² specified, under a “Description of Equipment” heading, seven forklift trucks which were designated by model and serial numbers. The financing statement, which was properly filed, made reference to an attached copy of the lease. The two forklift trucks for which reclamation was sought were of the same model types as those described in the lease, but were not among those specifically designated by serial number.¹⁴³ Two other forklift trucks, which had been on the bankrupt’s premises at the time of its bankruptcy, were among those specifically described in the lease and were turned over to the leasing company. The evidence established that the leasing company, as part of its original dealings with the bankrupt, made a substitution for certain of the forklift trucks listed on the lease and that the two forklift trucks for which reclamation was sought were, in fact, among those delivered to the bankrupt in conjunction with the lease transaction.

Though the opinion does not suggest that any third party actually checked the record or was in any way misled by the description contained in the security agreement, the court adopted the perspective of a potential creditor considering the forklift trucks as collateral for a loan. In so doing, it held that the description was not adequate. The court reasoned that anyone inquiring would have found the financing statement and would have been referred to the attached equipment lease.¹⁴⁴ The court then assumed that the third party would go to the debtor’s premises and would have found both the two forklift trucks which were of the model types described, but which did not bear any of the specifically described serial numbers, as well as the two forklift trucks which were specifically described by serial numbers. After acknowledging that there was no evidence regarding the customs or practices of commercial parties in this sort of situation, the court weighed two additional assumptions. It could find that the hypothetical potential creditor would wonder whether the two undescribed forklift trucks were in some way related to the transaction represented by the equipment lease¹⁴⁵ or, it could find that the third party would assume that they were not—that they were acquired as a part of some other transaction, and that the five described forklift trucks which were not on the debtor’s premises had simply been dis-

¹⁴² It was conceded that the lease created a security interest and was, thus, subject to Article Nine. *Id.* at 1219. See UCC §§ 9-102(2), 1-201(37) and the text at notes 87-88 *supra*.

¹⁴³ For one model type, the serial numbers listed in the lease were 10669, 10739, 10676, 10836, 10824 and 10781. The truck claimed in the leasing company’s petition was serial number 11093. For the other model type, the serial number listed was 13114. The truck claimed was serial number 13135. 14 UCC REP. SERV. at 1219. Thus, for both trucks claimed, the serial numbers were not so far removed from the serial numbers described in the lease as to suggest that the trucks were obtained through an unrelated transaction. The reasonable inference would be to the contrary.

¹⁴⁴ *Id.* at 1221.

¹⁴⁵ *Id.* See note 147 *infra*.

posed of.¹⁴⁶ Since the two assumptions were equally plausible to the court, it resolved the issue in favor of the hypothetical third party because it believed that the description had the potential to mislead and prevent appropriate inquiry.¹⁴⁷

Although the court was willing to weigh heavily the interests of a hypothetical third party, the opinion is devoid of facts which could have helped to gauge his hypothetical response. For example, a third party's response would be different depending upon whether the forklift trucks were equipment or inventory.¹⁴⁸ One would suspect that since the trucks were leased, the debtor obtained them for use as equipment. If the trucks represented a significant portion of the debtor's equipment, that five of them were missing from the debtor's premises would insure that a third party, contemplating lending against the forklift trucks, would be at least as concerned about the status of the debtor's solvency as about the status of the nondescribed forklift trucks.¹⁴⁹ One must wonder whether a third party would rely on any assumption rather than investigate further prior to giving value on the security of the nonspecifically described forklift trucks. It is more plausible that an investigation, or a final refusal to give value, would be undertaken by the potential creditor than would an assumption be made that the lessee is financially sound, or that the nondescribed forklift trucks will never be claimed as security by the lessor. Thus, the *Aragon* court evaluated the adequacy of the memorandum relied upon by the secured party in light of unwarranted assumptions.

The court in *Aragon* was correct in determining that the writing required by Article Nine as a precondition to the enforceability of a security agreement can serve a notice function even though it is the financing statement which was intended as the primary notice document by the Code's draftsmen.¹⁵⁰ If the writing contains an ambiguous description or is otherwise in a form that reasonably and detrimentally misleads a third party, then the secured party, who would normally have had a role in drafting the document, should be held to the third party's interpretation.¹⁵¹ The absence of such misreliance cannot be conclusive on the adequacy of a writing claimed to be a sufficient section 9-203(1)(a) memorandum because this provision requires a written agreement which "creates or provides" for a security

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* The court said this situation was distinguishable from the one in which the description contained model numbers only. The court would not concede the adequacy of such a description, however. *Id.* at 1221. See note 157 *infra*.

¹⁴⁸ See UCC §§ 9-109(2), 9-109(4).

¹⁴⁹ The opinion does not indicate what happened to the five missing described forklift trucks. The lessor may have previously repossessed them. Or, if the substitution was not one-for-one, there may not have been seven forklift trucks to begin with. Or, the lessee may have sold them out of trust. Or. . . .

¹⁵⁰ This function would be included within the evidentiary function of the writing requirement. See note and text at note 97 *supra*. Third parties can assert that a security interest is not enforceable. See note 57 *supra*.

¹⁵¹ See text at notes 176-79 *infra*.

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interest and which "reasonably identifies what is described" regardless of whether a third party actually consults the writing.¹⁵² In determining the adequacy of a security agreement under these requirements, it is appropriate for a court to consider how a third party might react to it. Such judicial inquiry should recognize that the description required need not be autonomous nor evaluated without contextual references. It need only "make possible the identification of the thing described."¹⁵³ Any assumption made concerning how a third party might react should take into account the factual and commercial setting in which he would encounter the writing;¹⁵⁴ the caution which would be exercised by such a person deciding whether to give value to be secured by property which might be subject to a prior claim by some other person; and the various means of investigation available to determine what assets are actually encumbered. The third person hypothesized should be an individual of reasonable commercial prudence and sophistication.¹⁵⁵

This perspective on the security agreement *qua* notice document points the way to an appropriate general approach to the analysis of security agreement language when a third person is involved. First, it must be determined whether the language employed is adequate to satisfy section 9-203(1)(a). The court in *Aragon*¹⁵⁶ would have stood on more solid ground if it had concluded merely that the security agreement was not enforceable because it contained no description of the two forklift trucks claimed by the secured party. Although the full equipment lease agreement was not reproduced in the opinion, the secured party's argument that the description employed was adequate for the trucks claimed may have been akin to the argument, discussed previously, that the words "one desk-top computer" adequately described machine shop equipment.¹⁵⁷ Where the language employed satisfies the section 9-203(1)(a) statute of frauds, it is appropriate to proceed directly to determine the actual intent of the parties through the process of interpretation. For example, in *Mitchell v. Shephard Mall State Bank*,¹⁵⁸ where the court barred extrinsic evidence in deciding

¹⁵² See note and text at note 140 *supra*.

¹⁵³ See note 99 *supra*. See, e.g., *Marine Midland Bank v. Conerty Pontiac—Buick, Inc.* 37 Misc. 2d 311, 352 N.Y.S. 2d 953 (Sup. Ct. 1974).

¹⁵⁴ See, e.g., *In re A & T Kwik-N-Handi, Inc.* 12 UCC REP. SERV. 765 (M.D. Ga. 1973); *In re Munger*, 495 F.2d 511 (9th Cir. 1974). See notes and text at notes 80-82 *supra*.

¹⁵⁵ For example, unlike the third party in *Middle Atlantic*. See note and text at note 28 *supra*.

¹⁵⁶ 14 UCC REP. SERV. 1218 (S.D. Fla. 1973). See text at notes 141-49 *supra*.

¹⁵⁷ See notes and text at note 111 *supra*. The title or heading "Equipment" in the lease could not provide the minimum evidence and assurances required by § 9-203 for equipment not itemized because of the itemization. However, the statute would have been satisfied if this title or heading were followed by language such as "all equipment"; "forklift truck, model types A and B"; or "forklift trucks including but not limited to trucks with serial numbers x and y."

¹⁵⁸ 458 F.2d 700 (10th Cir. 1972). See notes and text at notes 37-49 *supra*.

whether a security interest existed in inventory, accounts receivable and contract rights, the intent of the parties should have been controlling, as the security agreement language provided the minimum evidence and protection for a security interest required by section 9-203(1)(a). Whether a security interest was actually intended in such collateral was certainly an open question under the writings presented to the *Mitchell* court.¹⁵⁹ In the absence of reliance by the third person on a reasonable but erroneous belief as to what the immediate parties intended in their agreement, the intent of the immediate parties should be ascertained and should then be binding on the third person.¹⁶⁰ Assuming that the parol evidence rule can be raised by or against a person not a party to the agreement,¹⁶¹ it should not operate to exclude extrinsic, interpretive evidence to any greater extent than when the immediate parties are involved in the litigation.¹⁶² Once the intended scope of the security interest has been determined, the court may finally proceed to apply the appropriate rule to determine whether it is the secured party or the third party that has the better rights in the collateral.

2. Other Purposes

Just as the protection of third parties does not require security agreement language in addition to that required by the minimum evidence and minimum protection function of section 9-203(1)(a), neither do the other purposes which might be read into the writing requirement. One such additional purpose for requiring a writing would be to insure that persons who are about to create a security interest in their assets sufficiently contemplate that act and its consequences. Such a purpose could provide a reason for requiring the use of specific granting language likely to caution a potential grantor that he is transferring something of value to another person. This purpose might also militate in favor of a higher degree of specificity in the description of the collateral when a consumer, rather than some more commercially knowledgeable person, is to be the debtor.¹⁶³ However,

¹⁵⁹ See 458 F.2d at 702.

¹⁶⁰ See *In re Thompson*, 8 UCC REP. SERV. 1407 (W.D. Wis. 1971). UCC § 1-103 permits a court to supplement the provisions of the UCC with the principles of law and equity.

¹⁶¹ See generally Note, 41 FORDHAM L. REV. 945, 959-68 (1973).

¹⁶² See note and text at note 110 *supra*.

¹⁶³ Colorado's nonuniform version of UCC § 9-110 requires a more specific description when the collateral consists of consumer goods. COL. REV. STAT. § 9-110 (1973) provides:

For the purposes of this article, any description of personal property is sufficient if it specifically identifies and itemizes in the security agreement what is described as to consumer goods, and whether or not it is specific if it reasonably identifies what is described as to all other personal property.

Some courts have exhibited hostility toward broad security agreement descriptions when the debtor is a consumer. Burke, *Secured Transactions*, 30 BUS. LAW. 893, 900 (1975).

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there is no mention of such a cautionary function for the protection of any class of debtors anywhere in Article Nine.¹⁶⁴ Its draftsmen incorporated, but then ultimately abandoned, such consumer protective requirements.¹⁶⁵ In addition, state and federal consumer credit legislation¹⁶⁶ will normally apply to require clear and conspicuous disclosure of security interests and related information to consumers.¹⁶⁷

Another purpose which might be read into Article Nine's writing requirement is that it is intended or should be applied to prevent the "monopolization" of the debtor's personality.¹⁶⁸ The general criticism of Article Nine on these grounds is based on two related notions: first, once a creditor has taken a properly perfected security interest in the debtor's present and future assets of a certain description, other potential creditors are foreclosed from being secured with first priority in these assets, and as a result, they may not be willing to give value to the debtor; second, the secured creditor with first priority may successfully reclaim all assets fitting the description in the event of bankruptcy, leaving other persons with legitimate but lower priority claims empty handed.¹⁶⁹ Prejudice against "monopolization" was very strong prior to the enactment of Article Nine,¹⁷⁰ and it is possible that opinions in which a security agreement is found to fail because of an inadequate description may in part reflect an application of this prejudice.¹⁷¹ It is not a new notion that cases ostensibly holding an

¹⁶⁴ The lack of consumer protection under Article Nine is treated at D. ROTHSCHILD & D. CARROLL, *CONSUMER PROTECTION: TEXT & MATERIALS* § 18.05 (Student ed. 1973).

¹⁶⁵ For example, UCC § 7-611(1) (May 1949 Draft version) included a requirement that the consumer receive a copy of the security agreement which conspicuously indicated that his goods could be repossessed.

¹⁶⁶ E.g., 15 U.S.C. §§ 1637(a)(7), 1638(a)(10), & 1639(a)(8) (1970); Mass. Gen. L. ch. 140c, §§ 1-13; KY. REV. STAT. § 371.210. See e.g. *Tinsman v. Moline Benef. Gin. Co.*, 531 F.2d 815 (7th Cir. 1976); *In re Bengston*, 3 UCC REP. SERV. 283 (D. Conn. 1975).

¹⁶⁷ The doctrine of unconscionability provides a means by which a court can police unreasonably broad descriptions of collateral in security agreements executed by consumers with little bargaining power. See UCC §§ 1-103, 2-302; *William v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 448-50 (D.C. Cir. 1965).

¹⁶⁸ See Comment, 48 DEN. L. J. 146, 152-53 (1971).

¹⁶⁹ See Hogan, *Future Goods, Floating Liens, and Foolish Creditors*, 17 STAN. L. REV. 822, 822-23 (1965).

¹⁷⁰ The history of personal property security law has been described as a "protracted guerrilla war" finally won by the guerrillas with the enactment of Article Nine. Gilmore, *Security Law, Formalism and Article 9*, 47 NEB. L. REV. 659, 659-60 (1968). The judiciary, long the leader of the anti-personal property security forces, *id.* at 659, may be the new guerrillas.

¹⁷¹ For example, in *In re Middle Atlantic Stud Welding Co.*, 503 F.2d at 1136, the court used the pre-Code prejudice against monopolization to support its holding that a description of collateral was insufficient. See text at notes 24-30 *supra*. It is no secret that a broad description of collateral in a security agreement may constitute an invitation for a court to reach an "equitable" solution to conflicting claims in collateral through ascertaining the "intent" of the parties. For example, in *Goodall Rubber Co. v. Mews Ready Mix Corp.*, 7 UCC REP. SERV. 1358, 1361 (Wis. Cir. Ct. 1970) the court stated:

From the court's reading of the cases, one can establish the rationale that

agreement unenforceable on the grounds of noncompliance with a statute of frauds may actually be the result of some other factor.¹⁷² Many of the formality cases have been decided in the context of a bankruptcy proceeding in which a first priority security interest has the most dramatic impact on lower priority interests. However, Article Nine should be read as a legislative judgment that "monopolization" is permissible as a matter of state law. Since bankruptcy trustees are provided with a variety of weapons to use against secured creditors under federal law,¹⁷³ there would appear to be little room for the operation of this prejudice in bankruptcy cases. Furthermore, a person who sells additional personalty to the debtor, or who gives value for the acquisition of such personalty, may qualify under Article Nine for a special purchase money priority over prior secured parties who might claim the additional personalty under an after-acquired property clause.¹⁷⁴

Still another purpose which may be read into Article Nine's writing requirements is that it is designed to promote careful drafting and clarification of the relationship between the parties to a security agreement. In *Mitchell v. Shephard Mall State Bank*,¹⁷⁵ this rationale was voiced in terms of construing the security agreement against the party who drafted it.¹⁷⁶ Under certain circumstances, it is appropriate for a court to accept the interpretation of contractual language offered by the party who did not draft the language.¹⁷⁷ This principle of contract interpretation is based on a policy of favoring the party to a form agree-

where subsequent creditors have made specific and substantial personal property available to the debtor, the courts are less ready to find that a prior creditor's description of the collateral "reasonably identifies" the after-acquired property to the prejudice of the hapless subsequent creditor. While this offers no *standard* of construction, it does offer an *explanation* (emphasis in original).

Accord, e.g., Mammoth Cave Prod. Credit Ass'n v. York, 429 S.W.2d 26, 28-29 (Ky. 1968).

¹⁷² See generally 2 CORBIN, *supra* note 57, § 275, at 11-12.

¹⁷³ See generally UCC HANDBOOK, *supra* note 71, §§ 24-1 through 24-10.

¹⁷⁴ See UCC §§ 9-107, 9-312(3), 9-312(4); *T.M. Cobb Co. v. County of Los Angeles*, — Cal. 3d —, —, 128 Cal. Rptr. 655, 664, 547 P.2d 431, 440 (1976). Any seller or lender, regardless of whether he qualifies for a purchase money priority, is free to pay off prior secured parties to obtain priority, or to attempt to obtain an agreement in which prior parties subordinate their rights. See UCC § 9-316.

¹⁷⁵ 458 F.2d 700 (10th Cir. 1972). See text at notes 37-49 *supra*.

¹⁷⁶ *Id.* at 704:

If the instrument be ambiguous the Bank and SBA made it so, they should not now be permitted to explain what is implicit in that which they failed to make explicit in the critical terms of the security agreement. The Code's requirements for the creation of security interests are simple and clearly set forth. Where forms to facilitate compliance with these requirements have been provided, the secured party ought to be able to fill in the blanks so as to avoid ambiguity with regard to the security interest granted.

¹⁷⁷ See generally 3 CORBIN, *supra* note 57, § 559, at 262.

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ment who had the weaker bargaining position.¹⁷⁸ It is also based on the assumption that the drafter of the contract is more likely to provide for his own interests at the expense of the other party and to know of, and perhaps even provide for, obscurities in meaning.¹⁷⁹ While these rationales may provide a valid means for clearing away an alternative, reasonable interpretation offered by a party to an agreement, they do not in themselves justify a strict interpretation of the Article Nine formalities. In the interpretation of the Code, the crucial factor should be the statutory language itself and the intent of the draftsmen. The intent of the draftsmen generally under Article Nine was to facilitate the intent of the immediate parties, given the minimum debtor-authenticated writing.¹⁸⁰ A writing requirement may serve to promote good draftsmanship and clarification of legal relationships;¹⁸¹ however, it can serve these functions, at best, in a very incidental manner.¹⁸² It is submitted that pragmatic considerations, such as avoiding litigation and avoiding an adverse judicial interpretation, do a better job of insuring that the parties will draw security agreements with a reasonable degree of care and accuracy. Moreover, courts should, particularly when they are dealing with a security agreement entered into by laymen without assistance of counsel,¹⁸³ be aware that the draftsmen of Article Nine intended a general simplification of security law. As Professor Gilmore has stated in describing the intent of the draftsmen: "Security law should cease to be a paradise for specialists and should become a playground for all the people—small town practitioners, county bankers, even widows and orphans. Taking a personal property security interest should be made as simple and easy as rolling off a log."¹⁸⁴

III. CONCLUSION

For a writing to rise to the level of an enforceable Article Nine security agreement under section 9-203(1)(a), it must be signed by the debtor and provide minimum written assurances that a security in-

¹⁷⁸ *Id.* at 266-68.

¹⁷⁹ RESTATEMENT (SECOND) OF CONTRACTS § 232 & comment at 526 (Tent. Drafts Nos. 1-7, 1973).

¹⁸⁰ See text at notes 183-84 *infra*.

¹⁸¹ Friedman, *Law, Rules, and the Interpretation of Written Documents*, 59 NW. U. L. REV. 751, 762-63 (1965).

¹⁸² See Perillo, *supra* note 57, at 56-58.

¹⁸³ Some courts have not been sympathetic to the fact that a layman attempted to formalize a security relationship. *E.g.*, First County Nat'l Bank & Trust Co. v. Canna, 124 N.J. Super. 154, 156-59, 305 A.2d 442, 443-45 (App. Div. 1973) (*per curiam*). Other courts have been charitable when dealing with a financial institution that has performed slipshod work in formalizing a security interest. *E.g.*, *In re Penn Housing Corp.*, 367 F. Supp. 661, 665 (W.D. Pa. 1973).

¹⁸⁴ Gilmore, *Security Law, Formalism and Article 9*, 47 NEB. L. REV. 659, 668 (1968). The draftsmen's premise that security law should be simplified went beyond the elimination of unnecessary formalism with respect to the written security agreement. See *id.* at 671-75.

terest was intended and minimum protection against mistaken or fraudulent claims of secured status. Many sorts of writings satisfy these requirements including those which, though lacking express granting language, refer to a possible security agreement, security interest, or secured status. Any security agreement description of collateral which is broad enough to include the personalty claimed by the alleged secured party should be sufficient. Considerations of third party protection, consumer protection, prevention of monopolization of debtor's assets, and clarification of commercial relationships do not mandate additional or more specific language for the minimum memoranda required. Once a court determines that a section 9-203(1)(a) memorandum is present, it should permit the introduction of extrinsic evidence in aid of interpreting the writing's meaning. This approach to section 9-203(1)(a) and the interpretation of security agreement language insures the maximum possible facilitation of intent to create enforceable security interests under Article Nine.