

*This is your Release #14 (November 2016)*

# Documenting Secured Transactions

## *Effective Drafting and Litigation*

*Second Edition*

by William C. Hillman

*Documenting Secured Transactions* continues to be the first stop for attorneys drafting and litigating under Article 9 of the Uniform Commercial Code. This Release #14, prepared by Thomas S. Hemmendinger, of counsel to Brennan, Recupero, Cascione, Scungio & McAllister, LLP, and author of PLI's *Hillman on Commercial Loan Documentation*, updates your treatise with numerous recent Article 9 documentation cases addressing a variety of important issues, including:

**Consignments.** While Revised Article 9 applies to all consignments, it is important to consult the **definition of "consignment"** and the nature of the consignee. A 2016 case from the Southern District of New York addresses the U.C.C.'s **three-pronged test** for determining if a transaction is a consignment, including the inquiry into whether the merchant is "generally known" by its creditors to be substantially engaged in the selling of others' goods. Courts have also wrestled with the meaning of the **final requirement for a consignment**—that "the transaction does not create a security interest that secures an obligation." *See* § 3:6.

**Leases.** The discussion of the scope of Article 9 with respect to leases, under both prior and current law, has been reorganized and expanded, and includes reference to recent cases addressing when a lease may be considered a security interest. *See* §§ 3:8, 3:8.1–3:8.2.

**Setoff.** With two exceptions, Revised Article 9 **does not apply to any right of setoff**. *See* § 3:11.8 for discussion of the scope of the application of the U.C.C. in such cases, including a 2015 case in which the court upheld an arbitrator's award that a contract provision allowing a creditor to set off the debt against the debtor's interest in various companies was outside the scope of Article 9.

*(continued on reverse)*

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**Interests in Real Estate.** With minor exceptions, the creation or transfer of an interest in or lien on real estate, including a lease or rent under a lease, is excluded from the scope of Article 9.

**Security Agreement.** There is a division of authority as to whether an **application for a title to a motor vehicle** showing the secured party as creditor is sufficient as a security agreement. The more liberal minority view is that it evidences the necessary intention, but the majority rule is otherwise. *See* § 5:2 for discussion (citing two recent cases illustrating both views).

**Secured Party's Name.** Revised Article 9 requires a financing statement to include the name of the secured party or representative of the secured party. Where a secured party amends a financing statement originally filed in its own name to show that the **secured party is now acting in a representative capacity**, such amendment does not affect the priority of the security interest. *See* § 12:1.

**Intangible Forms of Collateral. Trade secrets** have been determined to constitute “general intangibles.” *See* § 14:3.7.

**Agricultural Entitlement Programs.** Courts have struggled over the question of whether agricultural program payments constitute crop proceeds or contract rights, accounts, and general intangibles, and the results of these cases have not been uniform. *See* § 14:4.

**Fixtures.** Under the U.C.C., goods are “**fixtures**” when they become so related to particular real estate that an interest in them arises under real estate law. *See* § 14:6 for more details, as well as coverage of recent cases dealing with whether a **water treatment system** in a home is a fixture and whether a **mobile home** may constitute a fixture.

**Authorization; Signatures.** Discussion in § 18:1 covers, among other things, a **secured party's ability to “pre-file” a financing statement**, as well as recent decisions addressing the need for the secured party to obtain the debtor's authorization of the filing or later ratification of it under non-U.C.C. law.

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