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Supergeneric Collateral Descriptions in Financing Statements and Notice Filing

Lissa Lamkin Broome
University of North Carolina School of Law, lbroome@email.unc.edu

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I. INTRODUCTION

In this article I discuss two significant changes to financing statement requirements made by Revised Article 9 and how those changes affect "notice filing." First, Revised section 9-504(2) permits "supergeneric" collateral indications, such as "all assets" or "all personal property," in financing statements. Former section 9-402(1) required that the financing statement "contain a statement indicating the types, or describing the items of collateral," and most cases under Former Article 9 that considered the issue concluded that a supergeneric indication was not permitted by this language.[1]

Second, Revised Article 9 does not require the debtor's signature on the financing statement, as did Former section 9-402(1). Instead, under Revised section 9-509, the secured party is authorized to file a financing statement covering the

* Wachovia Professor of Banking Law; Director, Center for Banking and Finance, University of North Carolina School of Law. Many thanks to Patrick Craig (UNC Law 2010) for his excellent research and help with this article.

1. *See infra* notes 10-11 and accompanying text.

"collateral described in the security agreement" when the security agreement is authenticated by the debtor, or to file an initial financing statement before the debtor has authenticated a security agreement if the debtor has authorized the filing in an authenticated record. This article analyzes these provisions further, considers their possible ramifications in several hypotheticals, reviews in detail one of the few cases discussing these issues, considers what effect these changes could potentially have on how "notice filing" is understood under Revised Article 9, and finally proposes some potential solutions.

II. REVISED ARTICLE 9 PROVISIONS: SUPERGENERIC COLLATERAL INDICATIONS AND AUTHORIZATION TO FILE A FINANCING STATEMENT

A security interest attaches when it becomes enforceable against the collateral in the circumstances described in Revised section 9-203. One element required for the creation of an enforceable security interest in many cases is that the "debtor has authenticated a security agreement that provides a description of the collateral."[2] The general test to determine if the description is sufficient is set forth in Revised section 9-108: the collateral description is sufficient "if it reasonably identifies what is described."[3] Reasonable identification may be provided by things such as a "specific listing," "category," or "type of collateral defined in [Article 9]."[4] Specifically excepted from a reasonable identification of the collateral, however, is a "description of collateral as 'all the debtor's assets' or 'all the debtor's personal property.'"[5]

A security interest is perfected if it has attached and the applicable requirements for perfection set forth in sections 9-310 through 9-316 have been satisfied.[6] An attached security interest is enforceable against the debtor, but perfection is necessary to enforce the security interest against other parties, such as lien creditors of the debtor (including the debtor's bankruptcy trustee) and other creditors of the debtor.[7] The general rule, subject to various exceptions, is that a "financing statement must be filed to perfect all security interests ."[8] The "financing statement is sufficient . . . if

2. U.C.C. § 9-203(b)(3)(A) (2008). For some collateral, the collateral description requirement may be met by the secured party's possession or control of the collateral pursuant to the debtor's security agreement. *Id.* § 9-203(b)(3)(B)-(D).

3. U.C.C. § 9-108(a) (2008).

4. U.C.C. § 9-108(b) (2008). Revised section 9-108(e) creates an exception to the ability to describe collateral by its type for commercial tort claims, consumer transactions, consumer goods, securities entitlements, and securities or commodity accounts. *Id.* § 9-108(e).

5. U.C.C. § 9-108(c) (2008).

6. U.C.C. § 9-308(a) (2008).

7. U.C.C. § 9-317 (2008).

8. U.C.C. § 9-310(a) (2008).

it . . . provides the name of the debtor" and the secured party (or the secured party's representative), and "*indicates* the collateral covered by the financing statement."[9]

A. *Indication of the Collateral in the Financing Statement*

The "indication" of the collateral in the financing statement may be broader than the "description" that "reasonably identifies" the collateral in the security agreement. Revised section 9-504 adds that a "financing statement sufficiently indicates the collateral that it covers" if it describes the collateral under section 9-108 *or* provides "an indication that the financing statement covers all assets or all personal property" of the debtor.[10]

Former section 9-402(1) required that the financing statement "contain a statement indicating the types, or describing the items of collateral," and most cases under the Former Article 9 considering the issue concluded that a supergeneric description was not permitted by this code language.[11] The comments to Revised section 9-504 state that permitting "all assets or all personal property" as an indication of the collateral in the financing statement is to "accommodate" the cases where debtors have granted a security interest in "all, or substantially all, of their assets."[12] The comment adds that "regardless of its breadth, a financing statement has no effect with respect to property indicated but to which a security interest has not attached."[13] Not discussed in the comment is whether and how a supergeneric collateral description in the financing statement would be effective if the secured party's security interest did not extend to all, or substantially all, of the debtor's assets.

9. U.C.C. § 9-502 (2008) (emphasis added).

10. U.C.C. § 9-504 (2008). The comments to section 9-504 provide that "an indication of collateral that would have satisfied the requirements of former section 9-402(1) (i.e., 'a statement indicating the types, or describing the items, of collateral') suffices." *Id*. § 9-504 cmt. 2.

11. William C. Hillman, *Introduction to Secured Transactions and Letters of Credit 1991: UCC Articles 9 and 5: Collateral Description, in* COLLATERAL DESCRIPTION 219, 234-35 nn. 29-34 (PLI Commercial Law & Practice, Course Handbook Ser. No. 589, 1991); James Charles Smith & Julian B. McDonnell, *Indication of Collateral, in* 1A SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 6C.06, § 6C.06[2] n.11 (Peter F. Coogan, et al.eds., 2010). *But see* Hillman, *supra*, at 234 n. 28.

12. U.C.C. § 9-504 cmt. 2 (2008).

13. U.C.C. § 9-504 cmt. 2 (2008).

B. *Authorization to File a Financing Statement*

A second major change to the filing process in Revised Article 9 is the elimination of the requirement that the debtor sign the financing statement.[14] As noted in the Official Comment to Revised section 9-502, the "elimination of the signature requirement facilitates paperless filing," and was part of a stated "media neutrality" initiative of the drafting committee.[15] Although Revised section 9-502 does not require the debtor's signature on the financing statement, it does, however, provide that the secured party must be authorized to file the financing statement.[16] An authenticated security agreement authorizes the secured party to file a financing statement "covering . . . the collateral described in the security agreement."[17] Alternatively, the secured party could obtain an authenticated record to authorize the filing if the debtor and secured party have not finalized the security agreement.[18]

The 2010 Amendments to the Official Comments to section 9-322 also indicate that a later ratification of the filing by the debtor will relate back to the time of the initial filing. The effect of this is that the secured party's priority date is the date of the initial filing even though the filing was not authorized by the debtor until sometime later.[19] The new comment provides:

> [T]he unauthorized filing of an otherwise sufficient initial financing statement becomes authorized, and the financing statement becomes effective, upon the debtor's post-filing authorization or ratification of the filing. See Section 9-509, Comment 3. Because the authorization or ratification does not increase the notice value of the financing statement, the time of the unauthorized filing is the "time of filing" for purposes of subsection (a)(1). The same policy applies to the other priority rules in this part.[20]

14. *Compare* U.C.C. § 9-402 (1990), *with* U.C.C. § 9-502 (2008).

15. U.C.C. § 9-502 cmt. 3 (2008); s*ee, e.g.*, U.C.C. Revised Article 9: Secured Transactions; Sales of Accounts, Chattel Paper, and Payment Intangibles, *Council Draft No.1*, Reporters' Prefatory Notes and Statement of Policy Issues – 1995 Annual Meeting Draft, n.1 & n.3 (Nov. 17, 1995); *id.* § 9-402 Reporters' Explanatory Notes – 1995 Annual Meeting Draft, n.2.

16. U.C.C. § 9-509 (2008).

17. U.C.C. § 9-509(b) (2008).

18. U.C.C. § 9-509(a)(1) (2008).

19. U.C.C. §§ 9-322 cmt. 4, 9-509 cmt. 3 (Amendments to the Official Comments Draft 2010), *available at* http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=21.

20. U.C.C. § 9-322 cmt. 4 (Amendments to the Official Comments Draft 2010), *available at* http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=21.

III. THE EFFECT OF AN "ALL ASSETS" FINANCING STATEMENT ON THE DEBTOR'S ABILITY TO OBTAIN SECURED CREDIT FROM A SECOND SECURED PARTY

Let us consider a hypothetical situation in the context of these changes. Suppose that the debtor (DR) has authenticated a security agreement in favor of the first secured party (SP1) in which DR grants SP1 a security interest in "DR's inventory and after-acquired inventory" and that the security interest was attached when value was extended by SP1. Further, assume that SP1 filed a financing statement on February 1 of the current year with an indication of the collateral as "all assets of the debtor." We shall consider the effectiveness of this financing statement to perfect SP1's security interest in DR's inventory in several different scenarios.

A. *Scenario 1: "All Assets" Financing Statement Is Authorized by the Debtor*

In the first scenario DR authorized SP1 to file an "all assets" financing statement in the security agreement or otherwise. A form security agreement prepared by the American Bar Association includes a paragraph titled, "Authorization to File Financing Statements" that contains such an authorization.[21] In that paragraph, the debtor authorizes the secured party to file in any office any:

> [i]nitial financing statements and amendments thereto that (a) indicate the Collateral (i) as all assets of the Debtor or words of similar effect, regardless of whether any particular asset comprised in the Collateral falls within the scope of Article 9 of the Uniform Commercial Code of the State or such jurisdiction, or (ii) as being of an equal or lesser scope or with greater detail . . . .[22]

In the form security agreement this paragraph follows a paragraph in which the collateral is specifically described.

Assuming the DR read and understood language similar to that included in the form security agreement, SP1 is clearly authorized to file an "all assets" financing statement despite having a perfected security interest only in DR's inventory, and not in DR's other assets. If the debtor did not read or notice the broad authorization language in the security agreement, but rather just focused on the specific description of the collateral (contained in the prior paragraph of the form security agreement), then the debtor would still be bound by the broad authorization since the debtor's authentication of the security agreement is an objective manifestation of the debtor's

21. UNIF. COMMERCIAL CODE COMM., FORMS UNDER REVISED ARTICLE 9, at 88 (Jonathan C. Lipson ed., 2002).

22. *Id.* This sample security agreement paragraph also contains alternative language in which the debtor "ratifies its authorization" for any financing statements the secured party may have filed before the time the security agreement was authenticated. *Id.*

assent.[23] If SP1 then files the authorized financing statement indicating the collateral as "all assets" of the debtor, SP1 may later make a loan to DR covered by a subsequent authenticated security agreement that describes the collateral as "equipment and after-acquired equipment." SP1 may then rely on the "all assets" financing statement to perfect the security interest in the equipment. The greater benefit is that, as confirmed in the 2010 Amendments to the Official Comments, SP1's priority in the equipment collateral dates from the February 1 filing date of the "all assets" financing statement even though the security interest in DR's equipment was not created or perfected until some months later.[24] Given this, what if SP1 is not interested in making any subsequent loan to DR secured by equipment, or any other collateral? Will the *possibility* that SP1 could gain priority over a later secured party completely chill DR's ability to gain credit secured by Article 9 collateral from all other lenders? Presumably, a well-advised subsequent lender would be unwilling to extend a loan to DR to be secured by equipment or any other type of Article 9 collateral even if SP1 did not have a competing security interest at that time.

If DR is in such a stranglehold by SP1, there is very little that DR can do under Revised Article 9. One option is for DR to authenticate a record requesting that SP1 "approve or correct a list of what the debtor believes to be the collateral securing an obligation,"[25] and SP1 must comply with that request within fourteen days of receiving it "by authenticating and sending to the debtor an approval or correction."[26] In our first scenario, SP1 could confirm that the collateral is limited to inventory and after-acquired inventory but still not be precluded from later taking a security interest in the debtor's equipment and thereby priming SP2 who might have extended a loan to debtor secured by equipment after receiving the authenticated list of collateral from SP1.

It is also possible that an amendment could be filed to the original financing statement to "delete collateral covered" by it or "otherwise amend the information provided" in it.[27] The amendment, however, must be authorized by the secured party of record.[28] A recalcitrant SP1 could refuse to authorize DR to file an amendment to

23. *See* E. ALLAN FARNSWORTH, CONTRACTS §4.26, at 312 (2d ed.1990) ("[S]ince the objective theory of contracts imposes no requirement that one intend or even understand the legal consequences of one's actions, one is not entitled to relief merely because one neither read the standard form nor considered the legal consequence of adhering to it.").

24. *See* U.C.C. § 9-322 cmt. 4 (Amendments to the Official Comments Draft 2010), *available at* http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=21.

25. U.C.C. § 9-210(a)(3) (2008).

26. U.C.C. § 9-210(b)(2) (2008).

27. U.C.C. § 9-512(a) (2008) (authorizing amendment in both Alternative A and Alternative B).

28. U.C.C. § 9-509(d)(1) (2008).

the financing statement narrowing the indication of the collateral to include only that collateral in which SP1 had or expected to have a security interest.

There might be other ways for SP2 to gain priority over SP1 since Article 9 has several exceptions to the first-to-file-or-perfect priority rule, and since filing is not an effective method of perfection, or is only one method of permissive perfection, for some collateral.[29] Where alternative methods of perfection are available, such as possession or control, it may be possible that perfection of a security interest in collateral by one of those methods would prevail in a priority contest as to particular collateral.[30] And, of course, filing a financing statement is not an effective method to perfect a security interest in money or deposit accounts, so if SP2 gets possession of money or control of a deposit account, it will prevail over SP1.[31] SP2 may also gain priority in collateral that is covered by a certificate of title[32] or fixture collateral via a fixture filing.[33]

Subject to the qualifications stated above, however, the general notion is that SP1's "all assets" financing statement gives SP1 a stranglehold over the debtor's ability to obtain additional credit secured by Article 9 collateral. If this analysis is correct, it would seem that all secured parties have a substantial incentive to include in their security agreements a paragraph similar to that in the model form in which the debtor authorizes the secured party to file an "all assets" financing statement. Presumably, a sophisticated or well-advised debtor would negotiate to delete this authorization to file an "all assets" financing statement from the security agreement. But, it would seem to present a significant advantage for SP1 to begin its secured transaction seeking this broad authority and hoping the debtor is not sophisticated, not well-advised, or does not notice this provision of the security agreement.

B. *Scenario 2: "All Assets" Financing Statement Is Not Specifically Authorized by the Debtor*

A second scenario is that DR did *not* specifically authorize the filing of an "all assets" financing statement in the security agreement or in a separate authorization but, despite the lack of specific authorization, SP1 filed an "all assets" financing

29. For instance, if SP2 could gain purchase money priority under Revised section 9-324(a) or section 9-324(b) it could gain priority over SP1 who has an earlier filed financing statement.

30. Under U.C.C. § 9-330, for instance, a second secured party who buys and takes possession of chattel paper or instruments will prevail over the prior-in-time secured party perfected by a filed financing statement in certain circumstances. A secured party who has control over investment property may have priority over a secured party whose security interest is perfected by filing. U.C.C. § 9-328(1) (2008).

31. U.C.C. § 9-312(b) (2008).

32. U.C.C. § 9-311(a) (2008).

33. U.C.C. § 9-334 (2008).

statement anyway. Since the debtor no longer signs the financing statement under Revised Article 9, the debtor would most likely be ignorant about the exact contents of the financing statement that is filed against it. Let us assume in this scenario that DR tries to obtain a loan from SP2 secured by equipment and SP2 finds the financing statement for SP1 that covers "all assets." Even if DR provides SP2 with SP1's authenticated collateral listing indicating that it is only claiming a security interest in inventory and after-acquired inventory, as discussed earlier, a cautious SP2 will likely decline to lend.

First, we should consider whether SP1's "all assets" financing statement serves to perfect SP1's security interest in DR's inventory. The security agreement authenticated by DR described the collateral as "inventory and after-acquired inventory" and thus the debtor has authorized the secured party to file a financing statement "covering the collateral described in the security agreement."[34] The troubling question is whether the financing statement, which refers instead to "all assets," is "authorized" and therefore effective to perfect a security interest in the inventory. The official comments provide some guidance on this question. An example in the official comment to the authorization section, Revised section 9-509, states:

> **Example 1:** Debtor authenticates a security agreement creating a security interest in Debtor's inventory in favor of Secured Party. Secured Party files a financing statement covering inventory and accounts. The financing statement is authorized insofar as it covers inventory and unauthorized insofar as it covers accounts.[35]

A similar example is found in the comments to Revised section 9-510:

> **Example 1:** Debtor authorizes the filing of a financing statement covering inventory. Under Section 9-509, the secured party may file a financing statement covering only inventory; it may not file a financing statement covering other collateral. The secured party files a financing statement covering inventory and equipment. This section provides that the financing statement is effective . . . to perfect a security interest in inventory but ineffective to perfect a security interest in equipment.[36]

These examples suggest that SP1's security interest in inventory is perfected, even though it does not currently have a perfected security interest in any other Article 9 collateral. These examples, however, could be distinguished from our scenario in that the financing statement specifically mentioned inventory, where in

34. U.C.C. § 9-509(b)(1) (2008).
35. U.C.C. § 9-509 cmt. 4, ex. 1 (2008).
36. U.C.C. § 9-510 cmt. 2, ex. 1 (2008).

our scenario inventory is not specifically mentioned, although it is subsumed under the broad language of "all assets." The *ProGrowth*[37] case, described below provides at least one court's guidance on this more refined issue which is not directly addressed in the examples from the comments discussed above.[38]

A second issue arises if SP2 perfected a security interest in DR's equipment. Would SP2 be at risk of being primed by SP1's earlier filed "all assets" financing statement if SP1 later attached a security interest in DR's equipment as well? In other words, is the unauthorized "all assets" filing retroactively effective to perfect a security interest in equipment collateral when SP1 subsequently attaches a security interest in debtor's equipment? The revised comment to section 9-322 discussed above,[39] suggests that the date of priority is the date of filing, so, as in Scenario 1, SP1's "all assets" financing statement could chill debtor's ability to get personal property secured financing from another lender, at least with respect to filing collateral.

Finally, if SP2 explains to DR that it will not proceed with a loan because SP1's "all assets" financing statement puts SP2's priority in the equipment collateral in question, what recourse, if any, does DR have? Under Former Article 9, DR could simply refuse to sign an overbroad financing statement. Thus, if the financing statement listed the collateral as "inventory and equipment," but the security interest only extended to inventory, the debtor could refuse to sign the financing statement and force the debtor to present one that aligned with the scope of the security interest.[40] Under Revised Article 9, however, the debtor's signature is not required on the financing statement and the debtor may not even see the financing statement before it is filed. Therefore, there is no opportunity for the debtor to police the contents of the financing statement.

Under Revised Article 9, if a debtor subsequently discovers that the secured party has filed an overbroad financing statement, what recourse is available to the debtor? The debtor may seek to file a termination statement when "there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value;" or if

37. ProGrowth Bank, Inc. v. Wells Fargo Bank, N.A., No. 07-1577, 2009 WL 2982939 (D. Minn. Sept. 14, 2009).

38. *See infra* notes 76-89 and accompanying text.

39. U.C.C. §§ 9-322 cmt. 4, 9-509 cmt. 3 (Amendments to the Official Comments Draft 2010), *available at* http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=21.

40. *See* U.C.C. § 9-402 (1990). Even then, of course, the debtor is likely deprived of financing until the financing statement is of record, so a secured party might be able to coerce the debtor into signing an overbroad financing statement and avoid preparing another financing statement with a narrower description if the debtor were in desperate need of funds.

"the debtor did not authorize the filing of the initial financing statement."[41] A termination statement makes the entire financing statement invalid[42] so it is not a good tool to use where the financing statement is authorized with respect to some collateral, as in this case. A correction statement under Revised section 9-518 is another possibility. Its purpose, however, appears to be to allow debtors an opportunity to contest bogus filings that are on the record.[43] Therefore, the correction statement does nothing to change the effectiveness of the filed record other than alerting future creditors that the debtor contests the validity of the record.[44] So, even if a correction statement is filed, the "all assets" financing statement may still be effective to preserve priority in all of the debtor's assets for the secured party.

Perhaps the best the debtor can hope for is to pursue a claim for damages under Revised section 9-625(b) against SP1. That section provides that "a person is liable for damages in the amount of any loss caused by a failure to comply with [Revised Article 9]."[45] To recover, DR must (a) show that SP1 violated a provision of Revised Article 9, and (b) prove the actual damages that DR has sustained from that violation.[46] If filing a financing statement that is, at least in part, not authorized because it extends beyond the authorization with respect to the specific collateral listed in the security agreement is a violation of Article 9, then the first prong is satisfied. Official Comment 2 states that Revised section 9-625(b) is applicable to any noncompliance including failure to comply with the authorization provision of section 9-509(a).[47] Proving "actual damages" under the second prong may be difficult, especially if the harm that the debtor suffered was a "chilling" of his ability

41. U.C.C. § 9-513(b), (c) (2008); *see also id.* § 9-513 cmt. 2 ("If the debtor did not authorize the filing of a financing statement in the first place, the secured party of record should file or send a termination statement."). This works in conjunction with Revised section 9-509(d)(2), which gives the debtor the power to file an effective termination statement if the secured party fails to do so when required by Revised section 9-513. *Id.* § 9-509(d)(2).

42. U.C.C. § 9-513(d) (2008) ("[U]pon the filing of a termination statement with the filing office, the financing statement to which the termination statement relates ceases to be effective.").

43. U.C.C. § 9-518 (2008). *See* James Charles Smith & Julian B. McDonnell, *Authorization of Filing, in* 1A SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE, *supra* note 11, § 6C.05.

44. *See* U.C.C. § 9-518 cmt. 2 (Amendments to the Official Comments Draft 2010), *available at* http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=21.

The 2010 Amendments to Article 9 rename the Correction Statement as the Information Statement, in acknowledgement that the filing has no real effect. *Id.*

45. U.C.C. § 9-625(b) (2008); *see also id.* § 9-625 cmt. 2; Julian B. McDonnell, *Remedies, in* 1B SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE, *supra* note 11, § 8.17.

46. U.C.C. § 9-625(b) (2008).

47. U.C.C. § 9-625 cmt. 2 (2008).

to obtain additional financing. Nevertheless, the statute specifically states that "actual damages" includes "[l]oss resulting from the debtor's inability to obtain, or increased costs of, alternative financing."[48] Proving a specific amount as the damages, however, is no doubt harder in practice than this language might suggest.[49] If actual damages cannot be proved, the debtor may seek statutory damages under Revised section 9-625(e) in the amount of $500.

The comments to Revised section 9-625 also suggest another method of recovery against SP1: tort law.[50] The overbroad financing statement might give rise to a tort claim for slander of title, which, if proved, also presents the possibility of recovery of punitive damages.[51] The comment cautions, however, that "to the extent that damages in tort compensate the debtor for the same loss dealt with by this Article, the debtor should be entitled to only one recovery."[52]

The amount of damages due a debtor when the secured party filed an overbroad financing statement was considered by the Supreme Court of Alaska in *Kazan v. Dough Boys, Inc*.[53] The debtor, Dough Boys, bought two businesses from Kazan in two separate transactions—Europa Bakery and Caf Europa.[54] The second transaction, the purchase of Caf Europa, was on credit supplied by Kazan.[55] Dough Boys executed a security agreement in which it granted a security interest in and authorized Kazan to file a financing statement as to the equipment, inventory, fixtures, accounts, and general intangibles of the business operated under the name Caf Europa.[56] Kazan filed a financing statement that covered the equipment, inventory, fixtures, accounts, and general intangibles of Dough Boys, and not limited to the assets of only Caf Europa.[57]

Dough Boys paid the note it signed for the purchase of Caf Europa in 2002, but Kazan did not terminate the financing statement, nor did Dough Boys request that he do so.[58] Presumably, the financing statement remained of record because under the

48. U.C.C. § 9-625(b) (2008).

49. *See* discussion of Kazan v. Dough Boys, 201 P.3d 508 (Alaska 2009), *infra* notes 53-76 and accompanying text.

50. U.C.C. § 9-625 cmt. 3 (2008).

51. Revised section 9-625(c) also provides for the possibility of punitive damages, but only in a consumer goods transaction. U.C.C. § 9-625(c) (2008).

52. U.C.C. § 9-625 cmt. 3 (2008). In an email exchange on the UCC listserv in the summer of 2010, one participant suggested that U.C.C. § 1-305 (2005) in conjunction with Revised section 9-625(b) provide only for actual damages and no consequential or punitive damages. This participant's view was that a tort remedy is not available.

53. 201 P.3d at 510.

54. *Id*.

55. *See id*.

56. *Id.* at 511.

57. *Id*.

58. *See id*. 510-11.

security agreement, the security interest in the assets of Caf Europa secured not only the debt related to its purchase, but also all amounts Dough Boys might owe Kazan in the future as a result of the sales agreement.[59]

Several years later, Dough Boys was in negotiations to sell Caf Europa and Europa Bakery to Sagaya.[60] Dough Boys requested that Kazan amend its financing statement to cover only the Caf Europa assets.[61] Kazan refused to do so until his claims against Dough Boys were resolved.[62] Those claims, which if they arose out of the sale were secured by the assets of Caf Europa, included unpaid employee withholding taxes, and a claim by an employee for payment for work he performed while Kazan still owned the business.[63] Following this refusal, a settlement was negotiated where Sagaya paid Kazan $60,000 in return for Kazan's release of his claims against Dough Boys, including, presumably, his security interest in the assets of Dough Boys.[64]

When Dough Boys was sued by Kazan's former employee for unpaid wages, Dough Boys filed a third party complaint against Kazan.[65] Kazan brought counter-claims relating to money Kazan owed to the IRS.[66] Kazan's counterclaims were dismissed in a summary judgment order.[67] At trial, Dough Boys "argued that Kazan refused to correct his overbroad financing statement and that Kazan held the financing statement 'hostage to extract' $60,000 from its sale of Caf Europa."[68] The trial court found that "'Kazan used his lien . . . to leverage a payment of $60,000 from Dough Boys as a part of the sale."[69] Accordingly, the trial court awarded Dough Boys the $60,000 that Sagayo paid Kazan instead of them, finding that:

> If Kazan had not filed an overly broad description of the property subject to the UCC lien, he would not have been paid the $60,000. This court is left with the firm conviction that Kazan had no basis for the $60,000 payment. The claims Kazan had or thought he had . . . did not entitle Kazan to the lien he had filed against the Dough Boys property. He should have released the UCC lien when requested to do so by Dough Boys.[70]

59. *See id*. at 511.
60. *See id.*
61. *Id.*
62. *Id.*
63. *Id.* at 512.
64. *Id.* at 511.
65. *Id.* at 511-12.
66. *Id.* at 512.
67. *Id.*
68. *Id.*
69. *Id.* at 515.
70. Kazan v. Dough Boys, 201 P.3d 508, 512 (Alaska 2009).

Kazan appealed the award of damages to the Superior Court, which affirmed "that Kazan's 'lien' was overbroad, and that Kazan 'extracted the $60,000 payment from Sagaya because of his overbroad lien.'"[71] The Supreme Court of Alaska granted Kazan's petition for rehearing and reversed the trial court arguing that the trial court's ruling had the effect of rescinding one side of the settlement agreement that gave $60,000 to Kazan, while holding him to his portion of the agreement in which he released his claims against Dough Boys, including the security interest.[72] The court further found that "Dough Boys did not suffer any damages from Kazan's overbroad financing statement."[73]

While it was suggested above that a debtor faces a steep hill to climb in trying to prove the actual damages it suffered as a result of an overbroad financing statement, this case seems to present a situation where the damages are clear. Arguably, absent having to get the overbroad filing off the record, Dough Boys would have received $60,000 more as payment for Caf Europa because Sagaya would have paid it the $60,000 instead of Kazan.[74] It is possible, that the other claims Kazan released Dough Boys from in the settlement accounted for some of the $60,000 value, but there is at least a starting point ($60,000) for the liability here.

Kazan v. Dough Boys illustrates an overbroad financing statement filing that, according to the trial court, Kazan used to hold Dough Boys "'hostage,'" and used this lien to "leverage" payment of $60,000 from Dough Boys.[75] This is exactly the advantage that I posited that a secured party with an overbroad financing statement might obtain. Yet the Supreme Court of Alaska, while acknowledging the overbroad financing statement, found that the debtor did not prove that it suffered any damage from it, notwithstanding the fact that it presumably received $60,000 less in sales price because of the settlement it entered into with Kazan.[76]

IV. *PROGROWTH BANK, INC. V. WELLS FARGO BANK, N.A.*

In the *ProGrowth* case, the District Court for Minnesota, on remand from the Court of Appeals for the Eighth Circuit, had the opportunity to consider the effect of a financing statement that was filed against more collateral than the collateral in which the secured party had a security interest.[77] The debtor, Hanson, granted a security

71. *Id.* at 513.
72. *Id.* at 516.
73. *Id.*
74. *Id.* at 512.
75. *Id.*
76. *Id*. at 515-16.
77. ProGrowth Bank, Inc. v. Wells Fargo Bank, N.A., No. 07-1577, 2009 WL 2982939, at *1 (D. Minn. Sept. 14, 2009).

interest in two annuity contracts to Global One.[78] Wells Fargo, acting as the collateral agent, prepared two initial financing statements, one to cover each annuity contract.[79] The first financing statement, purporting to cover Annuity Contract No. L9E00015, indicated the collateral as follows:

> All of Debtor's right, title, and interest in and to, assets and rights of Debtor, wherever located and whether now owned or hereafter acquired or arising, and all proceeds and products in that certain Annuity Contract No.: LE900015 issued by Lincoln Benefit Life in the name of Debtor . . . .[80]

This collateral indication had two errors in it; the contract number of the annuity had some characters in the wrong order and the name of the issuer of the annuity was incorrectly listed as Lincoln Benefit Life when the annuity was actually issued by Fidelity & Guarantee.[81] Wells Fargo, again acting as collateral agent for Global, then filed a second financing statement to cover the second annuity contract that indicated the collateral as follows:

> All of Debtor's right, title, and interest in and to, assets and rights of Debtor, wherever located and whether now owned or hereafter acquired or arising, and all proceeds and products in that certain Annuity Contract No.: L9E00016 issued by Lincoln Benefit Life in the name of Debtor . . . .[82]

Although the annuity contract number in this second financing statement was correct, Lincoln Benefit Life was identified as the issuer of the annuity instead of Fidelity & Guarantee.[83] A second secured party, ProGrowth, subsequently took a security interest in the same two annuity contracts and filed appropriate financing statements with accurate indications of the collateral to perfect its security interests.[84]

This case arose in the context of a priority contest between ProGrowth and Wells Fargo as the collateral agent for Global One.[85] The district court held that the financing statements filed on behalf of Global One were seriously misleading as a result of the errors in the language describing the annuity contracts.[86] Moreover, the court held that the "all assets" language referred only to the debtor's rights arising out

78. *Id.*
79. *See id.* at *1-2.
80. *Id.* at *1.
81. *Id.* at *2.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at *3.

of the annuity contracts and not to all the debtor's assets.[87] The court further stated that even if the "all assets" language was sufficient to put ProGrowth on notice that there might be a security interest in some property of Hanson, possibly including the annuities, the erroneous issuer designation and incorrect annuity contract number were seriously misleading and the "all assets" language could not overcome that.[88] Thus, the second secured party, ProGrowth, had priority in the annuity contracts since it was the only secured party with a perfected security interest in them.[89]

On appeal, the Eighth Circuit disagreed with this conclusion finding that although the indication of the annuity contracts might be seriously misleading, the "all assets" language was a separate indication of collateral and not just a modification relating to the annuity contract.[90] Therefore, the Eighth Circuit found the "all assets" language sufficient to put potential creditors on notice that there might be a security interest in some of Hanson's property.[91] The court further stated that even if the financing statements could be read in two ways—"all assets" as applying only to rights arising out of the annuity contract or as a separate indication of collateral—the possibility of a reading that included all assets of the debtor, put ProGrowth on notice of the possibility of a pre-existing security interest in favor of another creditor.[92] So, under the Eighth Circuit's analysis, each financing statement was sufficient to serve the notice function and perfect the security interest in the annuity contract since the annuity contract was subsumed within the "all assets" language.[93] This finding would allow Global One, via its collateral agent Wells Fargo, to prevail over ProGrowth as the first secured party to file with respect to each annuity contract.[94]

On remand from the Eighth Circuit the district court considered whether the debtor Hanson had authorized the filing of an "all assets" financing statement.[95] At

87. *Id.*

88. *Id.*

89. *Id.*

90. ProGrowth Bank, Inc. v. Wells Fargo Bank, N.A., 558 F.3d 809, 813-14 (8th Cir. 2009).

91. *Id.* at 814 ("[N]otice filing has served its purpose of alerting subsequent creditors to the possibility that a piece of collateral may be covered . . . .").

92. *Id*.

93. *Id.* at 813-14.

94. *See id.* at 815 (finding that Global One's financing statements were sufficient to perfect its security interests in the annuity contracts, reversing the summary judgment in favor of ProGrowth, and remanding to the district court for further proceedings consistent with the Eighth Circuit's opinion).

95. ProGrowth Bank Inc. v. Wells Fargo Bank, N.A., No. 07-1577, 2009 WL 2982939, at *10 (D. Minn. Sept. 14, 2009). The court discussed extensively that this issue was part of ProGrowth's declaratory judgment action, but was not pursued on appeal since the district court ruled for ProGrowth based on the notice issue. *Id.* The district court

issue was whether or not an "all assets" financing statement could be considered authorized when the security interest claimed in the security agreement was less than all of the debtor's assets.[96] Despite ProGrowth's contentions, the court held that the question of authorization is not an "all-or-nothing" proposition, and that although the "debtor granted an interest only in the annuity contracts at issue,"[97] a financing statement is "'effective *only to the extent that it was filed* by a person entitled to do so under revised Section 9-509.'"[98] In support, the court cited Official Comment 4 to section 9-509, recognizing a partial authorization of the financing statement by the security agreement authenticated by the debtor.[99] As discussed earlier, that comment dealt with a security agreement that authorized a filing with respect to inventory, but the financing statement filed by the secured party covered inventory *and* accounts.[100] The comment stated that the "financing statement is authorized insofar as it covers inventory and unauthorized insofar as it covers accounts."[101]

ProGrowth argued that the concept of "partial authorization" should not apply where the unauthorized portion of the financing statement is the broad designation of "all assets" of the debtor rather than another specific type of collateral such as accounts.[102] The court, however, found that "there is no discernible reason why the same principle should not govern to likewise partially validate a financing statement that exceeds the scope of the security agreement by erroneously claiming an interest in 'all assets' of the debtor in addition to accurately claiming an interest in certain specified property."[103] In support of this conclusion, the court cited the Hawkland Treatise, which supports this specific result, and a bankruptcy court case, *In re Lull*.[104]

In *In re Lull*, the debtor granted the secured party in the security agreement a security interest in "all personal property and other assets" of the debtor and then specifically listed "goods, accounts, money, chattel paper, general intangibles,

seemed willing to consider the issue and not find itself barred from doing so under the mandate rule, but decided that it need not "conclusively resolve" the application of this rule "because even if Progrowth is thus permitted to pursue its argument that the debtor never authorized a supergeneric "all assets" security interest, any such argument is unsuccessful as a matter of law." *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at *11 (quoting *Effectiveness of filed records-Record exceeding authorization*, 9B Hawkland UCC Series [Rev] (West) § 9-510:3 (2001)).

99. *See id.*

100. *Id.*

101. U.C.C. § 9-509 cmt. 4 (2008).

102. *ProGrowth Bank*, 2009 WL 2982939, at *11.

103. *Id.*

104. *Id.* (citing *Effectiveness of filed records*, *supra* note 98); Bowers and Merena Auctions, L.L.C. v. James Lull (*In re* Lull), 386 B.R. 261, 264 (Bankr. D. Haw. 2008).

instruments, and the proceeds thereof."[105] The secured party filed a financing statement that indicated the collateral as "all assets and all personal property."[106] The court held that this financing statement was effective to perfect a security interest in the debtor's rare coins and auction proceeds.[107] Although the court correctly noted that a description of the collateral as "all assets" in the security agreement is not sufficient,[108] it found that the specific listing of collateral by type was still effective to create a security interest in that collateral.[109] The court concluded that the "all assets" financing statement was permitted and effective to perfect the security interest in the specific collateral types listed in the security agreement.[110] The court did not discuss whether the "all assets" financing statement was authorized by the debtor, but the language in the security agreement extending the security interest to all the debtor's assets, although ineffective to create a security interest in all assets, should be effective to authorize the secured party to file an "all assets" financing statement.[111] The court in *ProGrowth* used the *Lull* case as support for its holding by stating:

> Here, too, the supergeneric clause in the financing statement-although overbroad in terms of what the debtor actually authorized-suffices to have perfected Defendants' security interest in the annuity contracts. Because such a supergeneric clause is valid, it put ProGrowth on notice to inquire further as to the actual existence of any prior security interests in whatever property the debtor might have owned.[112]

Although the collateral indication was overbroad, the court on remand in *ProGrowth* concluded that the indication served the notice function and subsequent creditors must inquire further.[113] The answer to their inquiry, however, does not prevent the secured party from priming a subsequent creditor by gaining a later security interest in additional collateral that is perfected by the earlier "all assets" financing statement. Perhaps the only solution is for the subsequent secured party to extinguish the debt of the secured party who holds the overbroad financing statement.

105. *Lull*, 386 B.R. at 264.

106. *Id.*

107. *Id.* at 268.

108. *See* U.C.C. § 9-108 (2008).

109. *Lull*, 386 B.R. at 266.

110. *Id.*

111. *See id*. at 266-68.

112. ProGrowth Bank, Inc. v. Wells Fargo Bank, N.A., No. 07-1577, 2009 WL 2982939, at *12 (D. Minn. Sept. 14, 2009).

113. *Id.*

V. NOTICE FILING UNDER REVISED ARTICLE 9

Former Article 9 did not explicitly sanction financing statement indications of collateral as "all assets" or "all personal property," although those descriptions are now specifically permitted under Revised section 9-504(2). Cases under Former Article 9, moreover, found that:

> [P]hrases such as "all personal property," or "all present and future assets," described as "super-generics," [were] utterly insufficient, or at least not adequate to encompass specific classes of assets: "All personal property" is too broad to describe livestock and farm equipment or general intangibles, and "other physical assets" does not include inventory.[114]

Indeed, the concept of "notice" filing was confined considerably under former Article 9. One court said a financing statement is "sufficient if it provides enough information to put a person on notice of the existence of a security interest in a particular *type of property* so that further inquiry can be made about the property subject to the security interest."[115]

The conception of notice filing under Former Article 9 seemed to be that listing a generic collateral type, even when the security agreement only extended to a specific subset of that collateral type, was sufficient to put a later creditor on notice to inquire further as to which items of that particular type of collateral might be subject to the secured party's security interest. Barkley Clark, in his treatise on Former Article 9, suggested that "super-generic descriptions are really not descriptions at all by item or type, at least if the secured party is not, in fact, claiming everything under the sun. There also appears to be an *unarticulated policy against creditor overreaching*."[116]

When supergeneric financing statement collateral descriptions were sanctioned in the 2001 revisions to Article 9, the drafters may not have fully considered the potential overreaching, alluded to by Barkley Clark, which such descriptions could allow. As Clark suggests, the "notice" function of a financing statement might still be served in an "all assets" financing statement if indeed the security interest extends to all or virtually all of the debtor's assets, but that notice function seems to be subverted when an "all assets" financing statement is held, as in the *ProGrowth* case, to be sufficient to give the secured party notice that one particular annuity contract may be subject to the secured party's security interest.[117] The financing statement does not

114. Hillman, *supra* note 11, at 234-35 (footnotes omitted); *see also* BARKLEY CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶ 2.09[5][c] (2d ed. 1988) ("A supergeneric description is almost always invalid.").

115. Heights v. Citizens Nat'l Bank, 342 A.2d 738, 743 (Pa. 1975) (emphasis added).

116. CLARK, *supra* note 114 (emphasis added).

117. ProGrowth Bank, Inc. v. Wells Fargo Bank, N.A., No. 07-1577, 2009 WL 2982939, at *12 (D. Minn. Sept. 14, 2009) ("Because such a supergeneric clause is valid, it

provide notice that there is a security interest in a specific item of Article 9 collateral that may be subsumed within a particular Article 9 collateral type listed in the financing statement, but rather, only notice that a security interest might exist in any particular item that is considered collateral subject to Article 9.[118]

If the debtor authorizes the financing statement to be filed with this broad collateral description that is one thing, but the *ProGrowth* case permits an "all assets" financing statement without requiring specific authorization for such filing in the security agreement or otherwise.[119] The court concluded that since each annuity contract was described in the security agreement and each is an asset of the debtor, the "all assets" financing statement is partially authorized as to the collateral actually described in the security agreement.[120] This result, if followed by other courts, invites a secured party to always file an "all assets" financing statement, since its filing will be considered authorized at least to the extent of the collateral actually described in the security agreement. Since under Revised Article 9, the debtor no longer signs the financing statement, the debtor has no opportunity to see the broad description and withhold its signature.[121] If the debtor discovers the supergeneric collateral description, there may be little the debtor can do to compel a narrowing of the financing statement's reach. *Dough Boys* illustrates the difficulty of proving actual damages, and other than modest statutory damages, no other remedies are available under Article 9.[122]

The most recent revisions to Revised Article 9 clarify that the debtor's later authorization of a filing as to specific collateral, perhaps in a subsequent security agreement that extends to additional collateral, will relate back to the date of the earlier filing of a financing statement whose description is broad enough to encompass that new collateral.[123] Thus, a subsequent secured party can always be primed by a secured party with a prior filed "all assets" financing statement. The second secured party should not make any loan to the debtor under those circumstances based on Article 9 collateral unless it has priority under a rule other than the first-to-file-or-perfect rule.[124] Because of the overreaching by the secured party with the "all assets" financing statement, the debtor may be denied access to additional credit or the subsequent secured party may need to assist the debtor in paying off the first secured party and having the "all assets" financing statement

put ProGrowth on notice to inquire further as to the actual existence of any prior security interests in whatever property the debtor might have owned.").

118. *Id.*

119. *See* discussion *supra* Part IV.

120. *See supra* notes 117-118 and accompanying text.

121. *See* U.C.C. § 9-502 (2008).

122. *See supra* notes 53-73 and accompanying text.

123. *See* discussion *supra* Part II.B.

124. *See supra* notes 29-33 and accompanying text.

terminated before proceeding further. The end result is the debtor may be put in a position that the drafters of Revised Article 9 likely did not contemplate and that the most recent revisions to Article 9 did not recognize or address. The concept of notice filing has been interpreted by the *ProGrowth* case to be virtually meaningless if secured parties react to the decision by filing "all assets" financing statements even when the current security interest is much narrower in scope.

VI. CONCLUSION

The 2001 changes, permitting an "all assets" financing statement and disposing of the debtor's signature on the financing statement, could mean the end of meaningful notice as to the scope of the security interest, assuming the *ProGrowth* case is followed by other courts. *ProGrowth* held that an "all assets" financing statement was authorized to the extent of the collateral actually described in the security agreement.[125] The 2010 clarification to the comment to section 9-322 further provides that a later authorization of a previously unauthorized filing is effective as of the time of the filing, not the time of the subsequent authorization of the filing.[126] It is possible that secured parties will attempt to take advantage of these changes and the *ProGrowth* interpretation to file an "all assets" financing statement in every case. Revised Article 9 leaves the debtor no effective recourse to narrow the description of the collateral in the financing statement. The initial secured party with the "all assets" financing statement can, therefore, effectively block all other lending to the debtor based on Article 9 collateral unless the subsequent secured party can find priority under a rule other than first-to-file-or perfect, or lend the debtor money to pay off the initial secured party and terminate its "all assets" financing statement. But then, the second secured party could seemingly perpetuate the overbroad collateral indication issue by filing its own unauthorized "all assets" financing statement.

One solution is to hope that courts, including the Eighth Circuit, reject *ProGrowth*. Other potential solutions would require amendment to Article 9 which may not be likely in the immediate future since 2010 amendments were just approved. Potential legislative fixes to the problems identified in this article include revising Article 9 to permit an "all assets" financing statement only when the security agreement covers all assets, or when the security agreement specifically authorizes an "all assets" filing. A second solution is to revise Article 9 to provide an effective way for the debtor to compel a narrowing of the collateral description in a financing statement if the security interest does not extend to all assets of the debtor. A third solution is to return to meaningful notice filing by adopting the pre-2001 revision

125. *See* discussion *supra* Part IV.

126. U.C.C. §§ 9-322 cmt. 4, 9-509 cmt. 3 (Amendments to the Official Comments Draft 2010), *available at* http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=21.

requirement of a listing of collateral by item or type in the financing statement and perhaps codifying the case law that refused to recognize "all assets" collateral listings in financing statements. Without these changes, the *ProGrowth* case has given secured parties a license to file overbroad financing statements and potentially prevent a debtor from seeking credit from other secured parties.