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ARTICLE 9'S "LOST" WORDS: COLUMN 6

This is column 6 in a series regarding words or phrases in Article 9 which have ambiguous, debatable, or uncertain meanings. This column focuses on the meaning of "rights arising out of collateral" in Article 9's "proceeds" definition.

The former (pre-2001) version of Section 9-306(1) defined proceeds as "whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds" and "[i]nsurance payable by reason of loss or damage to the collateral."[1] Revised Article 9, after significant efforts from the drafting committee on proceeds-related issues, "expand[ed] the definition beyond that contained in former Section 9-306 and resolve[d] ambiguities in the former section."[2] One part of that expansion shows up in Section 9-102(a)(64)(C), which includes "rights arising out of collateral" as proceeds. Article 9 does not elaborate on the meaning of that phrase, and, while Official Comment 13 to Section 9-102 discusses proceeds extensively, it says nothing about it either. Professors McDonnell and Nehf have noted that "[t]he most general and abstract language in the proposed new definition of proceeds is that of Section 9-102(a)(64)(C) which includes 'rights arising out of collateral.' "[3] Earlier drafts of Revised Article 9 appear to be quiet on the meaning of this phrase.[4]

Perplexingly, this phrase could be broad, or alternatively, could add very little. Professor Lipson has noted that "[t]his cryptic phrase . . . [may] be quite expansive and pick up all kinds of rights associated with original collateral, including intangible rights in technologies and data associated with original collateral."[5] On the other hand, a treatise on intellectual property views the meaning of the phrase differently:

> The 1992 report of the PEB Study Group envisioned a proceeds concept broad enough to cover property that the debtor would be entitled to claim by virtue of debtor's ownership of original collateral and collateral so closely associated that inclusion would be implicit. This notion of proceeds "would embrace all forms of distributions on account of securities, partnership interests, and other intangibles . . . that do not involve an 'exchange.' " Permanent Editorial Bd. for the Uniform Commercial Code, PEB Study Group Uniform Commercial Code Article 9: Report 110-11 (1992). The PEB Study Group cautioned against a causal model limited only by the secured party's ability to trace the collateral right into the new property noting that "[a]t some point, the acquisition of assets by the debtor . . . will be too attenuated for those assets to be considered proceeds." There is no indication that the "rights arising" language finally adopted in

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> § 9-102(a)(64)(C) was designed to go very far beyond the vision of the PEB Study Group. In fact, in their summary of "significant revisions," the drafters of the new definition seemed to attach very little independent significance to the "rights arising" concept. Their summary refers to "distributions on account of collateral" and "claims arising out of loss . . . or damage" as examples of the kind of "rights and property that arise out of collateral." U.C.C. § 9-101, cmt. 4(f). As already noted, these two "examples" have independent status as proceeds under the language in U.C.C. § 9-102(a)(64)(B) and (D).[6]

Another source, the Clarks' treatise *Secured Transactions Under the UCC*, states:

> The Comments do not explain what ["rights arising out of collateral"] is designed to reach. It could function quite innocently to confirm that interest on deposited proceeds or other collateral is proceeds. But at the same time the danger arises that this language could erode the contrast categories which the present disposition requirement is designed to suggest. One could ask, for example, whether new advances to which a debtor is entitled because of an increase in a collateral pool are "rights arising out of collateral" or whether the offspring of animal collateral are covered by this prong of the new definition.
>
> [Courts] should be cautious not to extend the 'proceeds' category so far as to create 'surprise' interests in a debtor's assets not in some way disclosed by the collateral description in the security agreement.[7]

A few courts have examined the meaning of the phrase "rights arising out of collateral." In *In re HSF Holding, Inc*.,[8] the court considered the Lipson and McDonnell commentaries in concluding that a spare engine to be delivered to a buyer/debtor constituted "rights arising out of" collateral consisting of a shipbuilding contract between the buyer/debtor and a shipbuilder. The court ultimately relied on the commentary in the treatise *Secured Transactions Under the UCC* mentioned above (that the proceeds category should not be extended so far as to create surprise interests in a debtor's assets). Applying that formulation to the facts of the case, the court held that it would not be a surprise that a security agreement covering a debtor's rights in a shipbuilding contract would cover a spare engine to be delivered with the ship. Thus, the engine was proceeds.

In *Karle v. Visser*,[9] the Idaho Supreme Court held that a secured party with a security interest in a debtor's promissory note also held a valid security interest in the debtor's pending action to collect on the note under paragraph (c). That result seems correct. A secured party should certainly have a security interest in its debtor's right of recover under a promissory note that has been given as collateral.

In an opinion by respected Article 9 commentator Bruce A. Markell, the court in *In re Las Vegas Monorail Co*.[10] held that money derived from the operation of debtor's monorail was not proceeds of a security interest granted in a debtor's contract rights under a franchise agreement that permitted the debtor to operate the monorail (i.e. the money was not "rights arising out of" the contract rights). That result also seems correct. The debtor's rights to payment arose out of operating the monorail, not out of the franchise agreement.

Given the commentary and cases discussed above, it seems logical to read "rights arising out of the collateral" rather narrowly. As previously noted, the drafters of Revised Article 9 spent much time tinkering with and expanding the definition of proceeds. If the drafters had intended the "rights arising out of the collateral" category to be read broadly, the official comments (and/or the drafting history on Revised Article 9) would probably say something (anything!) about the phrase.

ENDNOTES:

[1]U.C.C. § 9-306(1) (repealed 2001).

[2]See, e.g., Freyermuth, Rethinking Proceeds: The History, Misinterpretation and Revision of U.C.C. Section 9-306, 69 Tul. L. Rev. 645 (1995).

[3]McDonnell & Nehf, 1C Secured Transactions Under the UCC § 24.03 ("The Comments do not explain what this prong of the definition is designed to reach.").

[4]See, e.g., The American Law Institute, Uniform Commercial Code Revised Article 9 Secured Transactions; Sales of Accounts, Chattel Paper, and Payment Intangibles, Council Draft No. 1 § 9-302(a)(5) (Nov. 15, 1995).

[5]Lipson, Remote Control: Revised Article 9 and the Ne-

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gotiability of Information, 63 Ohio St. L.J. 1327, 1374 (2002).

[6]Thomas M. Ward & Rita Heimes, Intellectual Property in Commerce § 2:30.

[7]McDonnell & Nehf, 1C Secured Transactions Under the UCC § 24.03[6].

[8]In re HSF Holding, Inc., 421 B.R. 716 (Bankr. D. Del. 2010).

[9]Karle v. Visser, 141 Idaho 804, 118 P.3d 136, 60 U.C.C. Rep. Serv. 2d 1240 (2005).

[10] In re Las Vegas Monorail Co., 429 B.R. 317, 53 Bankr. Ct. Dec. (CRR) 77, 71 U.C.C. Rep. Serv. 2d 521 (Bankr. D. Nev. 2010).

SECURED TRANSACTIONS LESSONS FROM HBO'S *THE VOW*

The seemingly unedited docuseries, HBO's *The Vow*, recently came to a merciful ending. The docuseries chronicles the cult NXIVM and its leader, Keith Raniere. The docuseries focuses in part on women cult members putting up "collateral" as part of their membership in a secretive self-improvement group formed under the NXIVM umbrella. That collateral evidently consisted of nude photos of themselves, videos with disparaging comments they made about family members, and access to their bank accounts.[1]

The relationship of this NXIVM collateral to Article 9 of the UCC raises some interesting questions which are briefly explored below.

Scope of Article 9

Article 9 applies, according to Section 9-109, to "a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract."[2] In turn, a security interest includes "an interest in personal property . . . which secures payment or performance of an obligation."[3] Thus, as Official Comment 2 to Section 9-109 indicates, Article 9 covers "all consensual security interests in personal property," subject to some stated exceptions.

Given this framework, a few points should be addressed about the NXIVM collateral. First, because Article 9 only applies to "consensual" security interests, to the extent the collateral was procured by duress or extortion, Article 9 would not apply. Presumably, the women who gave the NXIVM collateral would have full contractual defenses to the other party's use of this collateral.

Additionally, and setting aside the matter of consent, Article 9 would also not apply to the NXIVM collateral if it was not deemed "personal property." The UCC does not define personal property. Black's Law Dictionary, however, defines it as "[a]ny movable or intangible thing that is subject to ownership and not classified as real property."[4] The term should presumably be defined broadly. As the leading Anderson UCC treatise indicates states:

> In view of the broad scope of revised Article 9, the term "personal property," as used in the definition of "security interest," must be deemed to extend to any kind of personal property, whether tangible or intangible, and whether or not the right is represented by, or embodied in, any document or instrument.[5]

On the precedent front, no reported cases appear to exist that apply Article 9 to anything like the NXIVM collateral. There are, however, good reasons to think that certain types of the NXIVM collateral should be classified for other purposes. For example, it is plenty logical that a person has a personal property right in their social media accounts.[6]

Lastly, it should be noted that, under Article 9, collateral need not secure a monetary debt. The NXIVM collateral was evidently put up to secure each woman's promise to either keep information about the society secretive or to remain in the society. If she broke her promise, her collateral was at risk. As noted, a security interest is an interest in personal property securing secures payment *or performance* of an obligation.[7] While security interests securing performance rather than payment are somewhat unusual, Article 9 certainly allows them. Thus, if the NXIVM collateral was obtained consensually and is considered personal property, the collateral could secure nothing more than the performance obligations agreed to by the woman putting up the collateral.

The Odd Fit of Article 9 to the NXIVM Collateral

Assuming that the NXIVM collateral falls within Article 9's scope, it would nevertheless be a very illogical fit. First, the only way for this type of security interest to attach is via a written security agreement authenticated by the debtor (the debtor being the woman granting the collateral).[8] It certainly does not seem like the NXIVM parties reduced any of their "collateral" agreements to writing, although perhaps a series of text messages could be strung together to establish a writing. If the attachment requirement failed, the recipient of the collateral simply would not have a security interest, and their disclosing of the secret collateral might be some sort of contract breach or tort.

If the recipient (secured party) had a security interest, he or she would need to file a financing statement to perfect that security interest.[9] But how would they describe the collateral in this publicly available document? A financing statement suf-

ficiently indicates the collateral that it covers if the financing statement reasonably identifies the collateral.[10] Would "that secretive thing that the secured party knows about but can't be mentioned here" suffice to describe the collateral? It would not seem so.

And lastly, consider the exercise of rights against this type of collateral post-default. Article 9 provides that, after default, a secured party "may sell, lease, license, or otherwise dispose" of the collateral.[11] Would releasing nude photos, harmful words, etc., count as "disposing" of the collateral?

There are many unknowns here, but one thing seems clear: Article 9 would be an o dd fit to NXIVM-type collateral.

ENDNOTES:

[1] https://www.cnn.com/2019/05/20/us/nxivm-trial-slave-master-testifies/index.html.

[2]U.C.C. § 9-109(a)(1).

[3]U.C.C. § 1-201(a)(35).

[4]Black's Law Dictionary, *personal property*, (11th ed. 2019).

[5]Anderson on the Uniform Commercial Code § 1-201:311 [Rev].

[6]See Argento, Whose Social Network Account? A Trade Secret Approach to Allocating Rights, 19 MICH. TELECOMM. & TECH. L. REV. 201 (2013) ("A social network account possesses some of the characteristics of property"); Mossof, What is Property? Putting the Pieces Back Together, 45 ARIZ. L. REV. 371 (Summer 2003).

[7]U.C.C. § 1-201(a)(35).

[8]U.C.C. § 9-203(b)(3)(A). As a side note, it seems like most of the NXIVM collateral would be considered a general intangible under Article 9.

[9]U.C.C. § 9-310(a).

[10]U.C.C. §§ 9-504(1); 9-108(a).

[11]U.C.C. § 9-610(a).

WEIRD GETS

Some news recently went around that a Starbucks employee had planted a tampon in the coffee of an off-duty police officer.[1] While investigation into this "furry cloth substance" by the Los Angeles Sheriff's Department "was unable to prove malicious intent on the part of the store employee," the story invokes a brief discussion of the notable history of UCC warranty cases involving food items containing a foreign object. These might be called "weird gets" cases.

The operative question in a weird gets case is typically whether the seller has breached the implied warranty of merchantability under Section 2-314. That section describes several requirements that goods must meet in order to be "merchantable" and thus satisfy the warranty. Although none of the requirements apply directly to food, courts generally find that there is an implied warranty that food be reasonably fit for consumption.[2]

Two tests have emerged for analyzing a weird gets case: the foreign/natural test and the reasonable expectation test, which are discussed below. The California supreme court has also set forth a blended version of these tests,[3] which is also discussed below.

There are a shocking number of weird gets cases on the books. The cases range from the mundane (bone in clam chowder,[4] cherry pit in ice cream[5]) to the concerning (glass in chow mein[6]) to the extraordinary (sandwich infested with maggots[7]).

Foreign Natural Test

Some courts have applied the "foreign-natural" test, which considers food unfit for the ordinary purposes for which it is sold if an object found in the food does not occur naturally in that food. Under that test, a merchant is "exonerated from liability if the matter is an ingredient of the product in its natural state, which remains despite the processing of the product for consumption, such as a bone in a fish or meat dish or pieces of shells in a seafood dish" (citations omitted).[8] An oft-cited case in this area is *Webster v. Blue Ship Tea Room, Inc.*,[9] dealing with bone in clam chowder. Because bone naturally occurs in clam chowder, the plaintiff had no claim. According to the *Webster* court, "It is not too much to say that a person sitting down in New England to consume a good New England fish chowder embarks on a gustatory adventure which may entail the removal of some fish bones from his bowl as he proceeds."

Reasonable Expectation Test

Other courts have applied the "reasonable expectation" test for determining liability. A Florida appellate court in *Koperwas v. Publix Supermarkets, Inc.*,[10] described the test as follows:

> [W]hether food is fit for the purpose intended although it contains walnut shells or other substances must be based on what the consumer might reasonably expect to find in the food as served . . . and what is reasonably expected by a consumer is a jury question in most cases. But where the evidence is such that all reasonable men in the exercise of an honest and impartial judgment must draw the conclusion that no breach of duty on the part of defendant[s] has been shown, it is not error to direct a verdict in defendant[s'] favor.

Applying this test, the court found no breach of the implied

warranty of merchantability based on the presence of a clam shell found in clam chowder, because a consumer might reasonably expect to find shells in chowder.

On the other hand, the court in *O'Brien v. Dora Ferguson Catering, Inc.*,[11] applying the same test, held a bone in a chicken pie was a breach of the warranty of merchantability. The court figured that a customer would not reasonably expect to find a bone in a commercially prepared chicken pie.

Blended Test

In *Mexicali Rose v. Superior Court*,[12] a restaurant patron was injured by a bone in chicken enchiladas. The California Supreme Court came up with something of a mixed test, stating:

> Many cases adopting a "reasonable expectation" test, however, did not reject completely the foreign-natural test when the injury was caused by a substance natural to the food served. Rather, several courts have retained the foreign-natural distinction in applying the "reasonable expectation" test. In these cases, the "naturalness" of the substance is used to determine which theory of recovery should be allowed-strict liability, implied warranty and/or negligence. When it is found that the injury- producing substance is natural to the food product, such as a chicken bone in a chicken pie, these courts have [held] an injured plaintiff cannot state a cause of action based on the breach of the implied warranty of merchantability or strict products liability, because it is a matter of common knowledge that the natural substance is occasionally found in the food served.
>
> [T]he trend developing in courts recently considering the issue whether a plaintiff may recover for injuries caused by a natural or foreign substance can be summarized as follows: If the injury-producing substance is natural to the preparation of the food served, it can be said that it was reasonably expected by its very nature and the food cannot be determined to be unfit for human consumption or defective . . . . By contrast, if the substance is foreign to the food served, then a trier of fact additionally must determine whether its presence (i) could reasonably be expected by the average consumer and (ii) rendered the food unfit for human consumption or defective under the theories of the implied warranty of merchantability or strict liability.

Applying the test, the court held that the patron had stated a cause of action in negligence based on the restaurant's failure to exercise due care in preparing the enchiladas.

ENDNOTES:

[1]See https://www.cnn.com/2020/07/30/us/lapd-no-tampon-starbucks-drink-trnd/index.html.

[2]Mix v. Ingersoll Candy Co., 6 Cal. 2d 674, 680, 59 P.2d 144 (1936) (overruled by, Mexicali Rose v. Superior Court, 1 Cal. 4th 617, 4 Cal. Rptr. 2d 145, 822 P.2d 1292, Prod. Liab. Rep. (CCH) P 13026, 16 U.C.C. Rep. Serv. 2d 607 (1992)).

[3]Mexicali Rose v. Superior Court, 1 Cal. 4th 617, 4 Cal. Rptr. 2d 145, 822 P.2d 1292, Prod. Liab. Rep. (CCH) P 13026, 16 U.C.C. Rep. Serv. 2d 607 (1992).

[4]Webster v. Blue Ship Tea Room, Inc., 347 Mass. 421, 198 N.E.2d 309, 1964 A.M.C. 2187, 2 U.C.C. Rep. Serv. 161 (1964).

[5]Williams v. Braum Ice Cream Stores, Inc., 1974 OK CIV APP 63, 534 P.2d 700, 15 U.C.C. Rep. Serv. 1019 (Ct. App. 1974), opinion amended, 16 U.C.C. Rep. Serv. 627 (Okla. 1975).

[6]Goetten v. Owl Drug Co., 6 Cal. 2d 683, 59 P.2d 142 (1936).

[7]Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939).

[8]18 Williston on Contracts § 52:91 (4th ed.).

[9]Webster v. Blue Ship Tea Room, Inc., 347 Mass. 421, 198 N.E.2d 309, 1964 A.M.C. 2187, 2 U.C.C. Rep. Serv. 161 (1964).

[10]Koperwas v. Publix Supermarkets, Inc., 534 So. 2d 872, Prod. Liab. Rep. (CCH) P 12012, 7 U.C.C. Rep. Serv. 2d 733 (Fla. 3d DCA 1988).

[11]O'Brien v. Dora Ferguson Catering, Inc., 1988 Mass. App. Div. 150, 6 U.C.C. Rep. Serv. 2d 1434 (1988).

[12]Mexicali Rose v. Superior Court, 1 Cal. 4th 617, 4 Cal. Rptr. 2d 145, 822 P.2d 1292, Prod. Liab. Rep. (CCH) P 13026, 16 U.C.C. Rep. Serv. 2d 607 (1992).

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CONSUMER CREDIT REPORT (INCORPORATING THE TRUTH IN LENDING REVIEW)

A SAMPLER OF RECENT ACTIVITY ON THE CONSUMER FINANCE FRONT

Payday Lending

On the payday lending front, Nebraska's voters recently approved a ballot measure which would establish a 36% interest rate cap on payday loans.[1] The vote is somewhat interesting in that a majority of voters favored Donald Trump in the presidential race. While one might expect payday lending restrictions in more liberal states, the vote may indicate that payday lending issues do not necessarily follow the typical partisan lines. The Nebraska approach follows a trend of states either rejecting payday lending or strongly restricting interest rates on payday loans.[2] Of course, state restrictions can only go so far. Many payday lenders have sought the protection of other state laws by making internet-based loans, or they have teamed with Native American tribes or national banks as workarounds to state payday lending restrictions.

Banks and Securitizations

In an earlier version of this law letter,[3] we discussed *Madden v. Midland Funding, LLC*,[4] which raised questions about whether a national or state bank could assign debt without triggering usury laws. The OCC's recent Final Rule "Permissible Interest on Loans that Are Sold, Assigned, or Otherwise Transferred"[5] was intended to clarify that such an assignment would not trigger usury issues. Nevertheless, the plaintiffs in recent actions in *Cohen v. Capital One Funding, LLC*[6] and *Petersen v. Chase Card Funding, LLC*,[7] claimed that banks violated New York usury law by securitizing credit card receivables. Distinguishing their cases from *Madden*, the district courts tossed those actions on motions to dismiss.

Suit Against Telephone Warranties Callers

I suspect many people have been inundated lately with calls regarding their expiring vehicle warranties. One individual has had enough. In a recent class action filed in New Jersey, lead plaintiff Eli Reisman has alleged that Independent Insurance Consultants Inc. of Florida, a company that sells extended car warranties, violated the Telephone Consumer Protection Act by making unwanted phone calls.[8]

FTC Sues Merchant Cash Advance Provider

In August 2020, the FTC sued two affiliated merchant cash advance (MCA) providers and their chief executive officer and president for alleged unfair and deceptive conduct in violation of Section 5 of the FTC Act.[9] Notably, the FTC Act applies to small business-to-business loans (which MCAs) are, in addition to consumer transactions. The complaint alleges that that MCA providers falsely represented in ads that they would not require collateral or guarantees, falsely represented that they would provide substantially higher advances than they actually did, and wrongly withdrew money from customers' accounts.

On a related note that may impact this case, the U.S. Supreme Court recently agreed to decide whether Section 13(b) of the FTC Act authorizes the FTC to seek monetary relief, such as restitution, rather than merely injunctive relief.[10]

CFPB Activities

Section 129H of the Truth in Lending Act (TILA) establishes special appraisal requirements for "higher-risk mortgages." The CFPB, along with other agencies, issued joint final rules implementing these requirements. Those agencies' rules exempted transactions of $25,000 or less. The amount may be adjusted annually. The threshold was increased to $27,200 effective January 1, 2020. The CFPB recently announced that the threshold will remain at that amount for the year 2021.[11]

On another matter, in November, the CFPB sued Driver Loan, LLC and its CEO, claiming violations of Dodd-Frank as a result of unfair, deceptive, or abusive acts or practices (the business offered short-term loans, repayable in daily installments, to rideshare drivers).[12] The lawsuit claims that the defendants falsely represented that consumers' deposits were FDIC insured and marketed loans with lower interest rates than it actually made.

ENDNOTES:

[1]See https://electionresults.nebraska.gov/resultsSW.aspx?text=Race&type=PA&map=CTY.

[2]See Malone & Skiba, Regulation and Recent Trends in High-Interest Credit Markets, 16 Ann. Rev. L. & Soc. Sci. 311 (2020) (noting 36% interest rate caps in South Dakota and Colorado).

[3]FDIC Publishes Final "Valid When Made" Rule, 54 No. 8 U.C.C. Law Letter NL 7 (Aug. 2020).

[4]Madden v. Midland Funding, LLC, 786 F.3d 246 (2d Cir. 2015).

[5] https://occ.gov/news-issuances/bulletins/2020/bulletin-2020-57.html.

[6]Cohen v. Capital One Funding, LLC, 2020 WL 5763766 (E.D. N.Y. 2020).

[7]Peterson v. Chase Card Funding, LLC, 2020 WL 5628935 (W.D. N.Y. 2020).

[8]Reisman v. Independent Insurance Consultants Inc., Case 2:20-cv-16423 (D. N.J. Nov. 18, 2020).

[9]See https://www.ftc.gov/system/files/documents/cases/1823202yellowstonecomplaint.pdf.

[10]See *AMG Capital Management, LLC, et al. v. FTC*, Case 16-17197; https://www.supremecourt.gov/docket/docketfiles/html/public/19-508.html.

[11]See https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/appraisals-higher-priced-mortgage-loans-exemption-threshold-adjustments/.

[12]*Bureau of Consumer Financial Protection v. Driver Loan, LLC and Angelo Jose Sarjeant*, Case 1:20-cv-24550-DLG (S. D. Fla. Nov. 5, 2020). Available at https://files.consumerfinance.gov/f/documents/cfpb_driver-loan-llc-angelo-jose-sarjeant_complaint_2020-11.pdf.

ON THE SHELF (CONSUMER CREDIT REPORT)

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UCC Cases (UCC-CS)

UCC Cases Plus (UCC-CS+)

Uniform Commercial Code Law Journal (UCCLJ)

UCC Bulletin (UCCBUL)

Uniform Commercial Code Law Letter (UCCLAWLET)

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Uniform Commercial Code Permanent Editorial Board Commentary (UCC-PEB)

Uniform Commercial Code (White & Summers) (WS-UCC)

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Uniform Commercial Code State Variations (UCC-VAR)

Uniform Commercial Code Official National Forms (UCC-ART9FM)

Uniform Commercial Code - Article 9. Secured Transactions (UCC-SECTR)

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