
The Assignee of an Article 9 Security Interest: Two Sets of Drafting Errors and How to Live with Them

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I. INTRODUCTION

This essay deals with a couple of small, perhaps interstitial, issues; precisely the sort of questions that under current revision practices do not rise in importance to be dealt with in the 2010 Amendments. Once the agenda of issues is set, the limits created by that agenda must be observed.¹ Even if this essay had been available

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1. As a member of the Article 3, 4 and 4A Drafting Committee of 2002, I became painfully aware of these restrictions. The working agenda had been set by the NCCUSL Executive Committee. When we on the Drafting Committee noticed infelicities in the statute, we were informed firmly that curing those infelicities was not on our agenda, and,

when the agenda was being drafted, almost certainly the amendment process would not have addressed them. While the essay raises potential substantive issues, those issues have not been raised in any reported litigation, so under the rubric, ‘if it ain’t broke, don’t fix it’, the recommendation would have been to leave matters alone.

This essay concerns itself with difficulties resulting from applying the statutory language when a security interest has been assigned. Certain provisions of Article 9 fail to produce sensible results. This failure results from, in one case, a change in its text apparently made by the NCCUSL Style Committee, a group that is not supposed to make substantive changes in the draft statutes it reviews and in the other, a drafting error which is exacerbated by the change made by the Style Committee.² The essay then offers ways to reach sensible results despite the statute.

II. A PRIMER CONCERNING ASSIGNED SECURITY INTERESTS

In order to follow the argument of this essay, it is necessary to keep in mind how Article 9 treats assignments of security interests:

- (i) a security interest can be assigned;
- (ii) if the security interest is perfected by filing, the assignee can, but does not have to, become the secured party of record by having the fact of the assignment made part of the financing statement;³
- (iii) whether or not the assignee of a security interest becomes the secured party of record, the assignee has become the secured party.⁴

unless we could show that their existence had created serious problems, curing them would not be added to our agenda.

2. The Style Committee is one of the Standing Committees described in the Constitution of the Uniform Laws Conference. Its precise scope, as given in that constitution, is:

SECTION 5.1 STANDING COMMITTEES. The President shall appoint the following Standing Committees . . . (3) a Committee on Style, which shall appropriately revise as to phraseology and style, but without altering meaning or context, all Acts submitted to it by Special Committees and all Acts finally approved by the Conference, and which shall periodically review the Conference’s Drafting Rules for Uniform or Model Acts and make recommendations concerning them.

Constitution and Bylaws, UNIFORM L. COMMISSION, <http://nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=18> (last visited Nov. 12, 2010).

3. See U.C.C. § 9-310(c) (2008) (“If a secured party assigns a perfected security interest or agricultural lien, a filing under this article is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor.”).

4. See U.C.C. § 9-514 cmt. 2 (2008) (“[I]f an assignment is not filed, the assignor remains the secured party of record, with the power (even if not the right) to authorize the filing of effective amendments.”).

III. DEFINED TERMS DO NOT ALWAYS “MEAN”

Using defined terms solely in their defined meanings is a challenge for anyone drafting a statute. Former Article 9 took the precaution of introducing the section containing its definitions with the phrase: “In this Article unless the context otherwise requires.”⁵ Revised Article 9 boldly asserts, for each defined term, the defined term “means.”⁶ This style of drafting leaves no wiggle room in the event a defined term requires a meaning other than the one given in the definition. This essay examines two sets of places in Article 9 where the straitjacket created by no variation from defined meanings creates absurdities. It first shows that “a secured party . . . that has filed a financing statement against a person”⁷ cannot mean what it says in some common circumstances, and it then observes that the term “secured party” must mean “secured party of record” in at least three of the seventy-seven times the term “secured party” appears in Article 9.

IV. THE DRAFTING ERROR

Sections 9-605 and 9-628 are designed to work in tandem to address a somewhat unusual circumstance. Both sections deal with issues arising when a secured party, having an obligation to communicate with someone, cannot perform that obligation because the person to whom that obligation is owed is unknown to the secured party. Section 9-605 negates the duty,⁸ and section 9-628 says there can be no liability for

5. U.C.C. § 9-105(1) (1972).

6. U.C.C. § 9-105(a) (2008). The ALI 1998 Final Draft contained the saving words in its section 9-102. The NCCUSL 1998 Final Draft, written after the ALI Final Draft, lacked these critical words. To understand this mystery, one must know the process by which the UCC texts are approved. The UCC is a joint product of NCCUSL and the ALI. Each organization has its folkways. NCCUSL requires that the text of a uniform act be approved by being read twice, in two separate meetings. The ALI requires that a final text be approved at its annual meeting, which occurs in the spring. These two processes mesh comfortably, as the ALI annual meeting nests between the two NCCUSL readings.

As no objection was made to the savings words in section 9-102 at the ALI 1998 Annual Meeting, their disappearance had to be the work of the NCCUSL Committee on Style, which intensified its ongoing review of the statute between the ALI approval and NCCUSL’s annual meeting that summer. This inference was confirmed to me by a member of the Article 9 Drafting Committee. The NCCUSL Committee on Style has no authority to make substantive changes to drafts it edits. *See Constitution and Bylaws, supra* note 2. As this essay shows, the Style Committee made significant substantive changes when it removed the saving phrase.

7. The phrase appears twice, first in section 9-628(a)(1) and then in section 9-628(b)(2).

8. *See* U.C.C. § 9-605 (2008).

failure to perform these forgiven duties.⁹ The first of the two subsections in section 9-605 deal with the case where the person to whom the duty is owed is “a debtor or obligor” and the second, using similar language, deals with the case where the person to whom the duty is owed is another secured party.¹⁰ The problem this Part considers arises from the text of section 9-605(2) and the identical language in section 9-628(b)(2).

The goal of the combined statutory provisions is clear. They mean to protect a secured party from failure to perform its duty when performance of that duty is made impossible because necessary information—in this case either the fact that there is a debtor or the identity of the debtor—is unknown to the secured party. As the comment to section 9-605 notes, these statutory provisions, working together, “relieve a secured party from duties owed to a secured party or lienholder who has filed a financing statement against the debtor.”¹¹

The words of the statute state that an original secured party is protected from a claim made against it by a “secured party . . . that has filed a financing statement against [the debtor].”¹² What the statute means to say is that the original secured party is protected from “a secured party perfected by filing or a lienholder that has filed a financing statement.” Under most circumstances, these two verbal formulations will have no different effects. Unfortunately, there is a circumstance where the difference in wording leads to a difference in result. The difference occurs when the secured party to whom the duty is owed is one that has perfected its security interest but has not itself filed a financing statement. A secured party perfected by filing but who has not filed a financing statement comes into existence when a secured party is the assignee of the filed secured party.

An assignee of a secured party can either become the secured party of record or it can be an assignee whose interest is not of record. In either case, the assignee is a secured party that is perfected by filing but who has not filed a financing statement. In both cases, statutory language stands in the way of sensible results.

An assignee of a secured party who becomes a secured party of record does not attain that status by filing a financing statement. Instead, the record that makes the assignee a secured party of record must be filed by the previous secured party of record or with the authority of that person.¹³

9. See U.C.C. § 9-628 (2008).

10. Section 9-605 reads in relevant part: “A secured party does not owe a duty based on its status as a secured party . . . (2) to a secured party or lienholder that has filed a financing statement against a person, unless the secured party knows: (A) that the person is a debtor; and (B) the identity of the person.” U.C.C. § 9-605 (2008).

11. U.C.C. § 9-605 cmt. 2 (2008).

12. U.C.C. § 9-605(2) (2008).

13. Section 9-509, entitled “Persons Entitled to File a Record,” states a series of rules limiting that class of actors. U.C.C. § 9-509 (2008). Subsection (d) tells us: “A person may

The problem is this: the definition of “financing statement” makes clear that it consists of the totality of the various records filed during its history.¹⁴ Thus the term “financing statement” can mean only the unity of all its pieces. “Financing statement” cannot be read as just one or more parts of a financing statement, because to do so would contradict the meaning given to the term. That reality flowing from the definition of financing statement leads to a paradox once a record is filed naming an assignee. The paradox arises whether the original secured party of record files the assignment or whether the assignee, armed with authority from the secured party of record, does the actual filing of the assignment. In either case, the assignee has now become the secured party, but the assignee has not filed a financing statement. If the original secured party of record filed the assignment, then the assignee cannot claim to have filed any part of the financing statement. Even when the assignee, acting with authority from the secured party of record, files the assignment, the assignee cannot be “a secured party . . . that has filed a financing statement against the person.”¹⁵ At most, the assignee has filed a piece of the financing statement, and even that claim is open to doubt as its actions, completed with authority from the original secured party of record, could easily be characterized as the action of an agent for the original secured party.

As drafted, the exculpatory language is written in the negative. It states to whom a secured party owes no duty. That person is a secured party “that has filed a financing statement.”¹⁶ As written, the statute contains a strong negative pregnant. The secured party does owe a duty to someone who does not fall within the stated class. As the assignee cannot be the person “that has filed a financing statement,” the secured party will still owe a duty to that assignee.

The same logic applies with even more force when the security interest has been assigned, but the assignment is not made a matter of record. In that case, all parts of the financing statement were filed by a person who is no longer the secured party. Again, the secured party requiring protection will need to be protected from liability to the current secured party, and not the former secured party, but the assignee is not a secured party that has filed a financing statement.

file an amendment other than an amendment that adds collateral covered by a financing statement or an amendment that adds a debtor to a financing statement only if: (1) the secured party of record authorizes the filing . . .” *Id.* § 9-509(d). Of course, an assignee who was concerned about this odd corner of the statute could file its own financing statement, pursuant to section 9-509(c), thereby becoming a secured party who has “perfected by filing.” *Id.* § 9-312(a). In so doing, however, it risks losing the priority established by the earlier financing statement filed by the secured party of record.

14. Section 9-102(a)(39) defines financing statement as a record “composed of an initial financing statement and any filed record relating to the initial financing statement.”

15. U.C.C. § 9-628(a)(1) (2008).

16. U.C.C. § 9-628(a)(1) (2008).

What the statute means to say is that once the limited facts stated both in section 9-604 and in section 9-628 subsections (a)¹⁷ or (b)¹⁸ have occurred, a secured party burdened by a statutory duty has no obligation or liability to “a secured party [perfected by a filed financing statement] or lienholder that has filed a financing statement.”¹⁹ If the statute had used that language, the anomaly noted here could not arise.²⁰ Had the Committee on Style left in the statute the freedom to revisit the meaning of the term “financing statement,” a court could at least consider using the formulation in the preceding sentence as the meaning to be given to the language in sections 9-604 and 9-628. But, as the term “financing statement” means only one thing, that sensible reconstruction of the statute would have to be made in direct contradiction of a statutory command.

V. THE SECURED PARTY AND THE SECURED PARTY OF RECORD: ABSURDITIES WITHIN UCC ARTICLE 9—SPECIFICALLY SECTIONS 9-324, 9-605, 9-621, 9-628, AND 9-611

“Secured party” and “secured party of record” are defined within Article 9:

In this article: . . . (72) “Secured party” means:

- (A) a person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding;
- (B) a person that holds an agricultural lien;
- (C) a consignor;
- (D) a person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold²¹

17. The relevant section reads:

Unless a secured party knows that a person is a debtor or obligor, knows the identity of the person, and knows how to communicate with the person:

- (1) the secured party is not liable to the person, or to a secured party or lienholder that has filed a financing statement against the person, for failure to comply with this article

U.C.C. § 9-628(a) (2008).

18. “A secured party is not liable because of its status as a secured party . . . (2) to a secured party or lienholder that has filed a financing statement against a person, unless the secured party knows: (A) that the person is a debtor; and (B) the identity of the person.” U.C.C. § 9-628(b) (2008).

19. U.C.C. § 9-628(b)(2) (2008).

20. This drafting glitch appears from the earliest drafts of Revised Article 9. Although it is the responsibility of the Article 9 Drafting Committee and not the Committee on Style, the rigidity of the definition of financing statement, introduced by the change apparently made by the Committee on Style, is the source of the extreme absurdities this unfortunate phrasing creates.

21. U.C.C. § 9-102(a)(72) (2008).

While “secured party of record” is not listed as a defined term, nonetheless the statute contains a definition for it:

A secured party of record with respect to a financing statement is a person whose name is provided as the name of the secured party or a representative of the secured party in an initial financing statement that has been filed. If an initial financing statement is filed under Section 9-514(a), the assignee named in the initial financing statement is the secured party of record with respect to the financing statement.²²

A secured party of record may or may not be the secured party. In the usual case, a filed financing statement containing the name of the secured party will name the actual secured party, so the secured party and the secured party of record are identical.²³ When the secured party and secured party of record are identical, each term refers to the same entity. When the two terms refer to different entities, then the entity that is the “secured party of record” has primacy. This conclusion follows from section 9-512(e), which states in relevant part, “[a]n amendment is ineffective to the extent it . . . purports to delete all secured parties of record and fails to provide the name of a new secured party.”²⁴

The major consequence of not amending the financing statement to show the assignment is stated bluntly in Comment 2 to section 9-514: “[h]owever, if an assignment is not filed, the assignor remains the secured party of record, with the power (even if not the right) to authorize the filing of effective amendments.”²⁵

There is no question that the drafters could use the term “secured party of record” when they meant to refer to that person. The term is used at least nine times in Article 9.²⁶ In addition to the comment just quoted, there is text in the statute itself, such as section 9-513(a), showing that the drafters could, and did, draw the distinction between the secured party and the secured party of record. That subsection, in relevant part, reads, “[a] secured party shall cause the secured party of record for a financing statement to file a termination statement for the financing statement”²⁷

22. U.C.C. § 9-511(a) (2008).

23. Section 9-514 permits the naming of an assignee as part of the initial financing statement. U.C.C. § 9-514(a) (2008). Section 9-511(a) notes: “If an initial financing statement is filed under section 9-514(a), the assignee named in the initial financing statement is the secured party of record with respect to the financing statement.” *Id.* § 9-511(a). The statement in the text, qualified as it is by the word “usual” remains true.

24. U.C.C. § 9-512(e)(2) (2008).

25. U.C.C. § 9-514 cmt. 2 (2008).

26. My word search of the computer readable versions of Article 9 has given me that number.

27. U.C.C. § 9-513(a) (2008).

The problem in statutory interpretation arises when the secured party and the secured party of record are not the same person, yet the statute refers only to the "secured party." The following examples will demonstrate that the drafters used the term "secured party" when they meant the "secured party of record." Reading "secured party" in these sections to mean the defined term "secured party" results in absurdity. Unfortunately, current fashions in statutory interpretation can require statutory literalism to prevail over sensible meaning.²⁸ In the case of Article 9, giving a meaning to a defined term other than the defined meaning requires ignoring the instruction in the statute itself.

Let me start with a clear example. Section 9-611 states to whom a secured party disposing of collateral must give notice. One category of recipients consists of:

- [A]ny other secured party or lienholder that, 10 days before the notification date, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that:
- (i) identified the collateral;
 - (ii) was indexed under the debtor's name as of that date; and
 - (iii) was filed in the office in which to file a financing statement against the debtor covering the collateral as of that date²⁹

28. Precisely this way of reading statute created the basis for the notorious *Commercial Money Center* opinion. The court chose to give "chattel paper" a literal meaning.

'Chattel paper' means a *record or records* that *evidence* both a monetary obligation and a security interest in or a lease of specific goods As used in this paragraph, "monetary obligation" means a monetary obligation secured by the goods or owed under a lease of the goods This language on its face defines chattel paper to mean the "records" that "evidence" certain things, including monetary obligations. Payment streams stripped from the underlying leases are not records that evidence monetary obligations -- they *are* monetary obligations. Therefore, we agree with NetBank that the payment streams are not chattel paper.

350 B.R. 465, 475-76 (B.A.P. 9th Cir. 2006), *rev'g*, 56 U.C.C. Rep. Serv. (West) 54 (Bankr. S.D. Cal. Jan. 27, 2005).

The 2010 Amendments by way of comment, disowns this crabbed reading of Article 9's language:

If, taken together, the lessor's rights to payment and with respect to the leased goods are evidenced by chattel paper, then, contrary to *In re Commercial Money Center, Inc.*, 350 B.R. 465 (Bankr. App. 9th Cir. 2006), an assignment of the lessor's right to payment constitutes an assignment of the chattel paper. Although an agreement excluding the lessor's rights with respect to the leased goods from an assignment of the lessor's right to payment may be effective between the parties, the agreement does not affect the characterization of the collateral to the prejudice of creditors of, and purchasers from, the assignor.

U.C.C. § 9-102 cmt. 5 (as amended 2010).

29. U.C.C. § 9-611(c)(3)(B) (2008).

Consider how this language applies literally when the original secured party has assigned its security interest but the assignor has not created a record of that assignment. After the transaction of assignment, the assignee has become the secured party. This subsection would require giving notice to the assignee and not the secured party of record. Of course, the secured party required to give the notice would have no way of knowing that the assignee exists, much less the assignee's identity.

To conclude that the notice must be given to the secured party rather than the secured party of record requires stating obvious and total nonsense. The notification is to go to the secured party revealed by those filings. Yet, the true secured party is not part of the filing. The only way to make sense of this part of the statute is to read "secured party" to mean "secured party of record." That reading is the only one that makes any sense in both reality and context. Furthermore, that reading does not create a problem in the standard case where the secured party and the secured party of record are the same entity. Either label requires notification be given to the same person.

Precisely the same problem arises in section 9-621. That section instructs a secured party proposing to accept the collateral in full or partial satisfaction of its obligation to send its proposal to, among other persons, "any other secured party or lienholder that . . . held a security interest in or other lien on the collateral perfected by the filing of a financing statement . . ."³⁰ If the secured party is an assignee whose assignment is not of record, this section asks the secured party to do the impossible unless "secured party" is read to mean "secured party of record."

Another example of the problem that arises when the secured party and the secured party of record differ appears in section 9-324(b), although neither term appears in that section. This subsection describes the actions a secured party with a purchase money security interest in inventory must take to achieve priority over a prior-in-time filed lender against that same inventory.³¹ The purchase money lender must send "an authenticated notification to the holder of the conflicting security interest."³² The "holder of the conflicting security interest" has to mean the same thing as the secured party.³³ If the inventory lender has assigned its security interest, the assignee becomes the holder of the conflicting security interest. If there is no record of the assignment, there is no obvious way that the purchase money lender could identify much less notify the holder of that conflicting security interest. The problem is made even more severe because section 9-324(b)(3) requires the holder of that first-filed security interest to receive the notification.³⁴

30. U.C.C. § 9-621(a)(2) (2008).

31. *See* U.C.C. § 9-324(b) (2008).

32. U.C.C. § 9-324(b)(2) (2008).

33. U.C.C. § 9-324(b)(2) (2008).

34. "[T]he holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory . . ." U.C.C. § 9-324(b)(3)

What connects these three examples is the need of a secured party to communicate to another secured party. Comment 2 to section 9-514³⁵ shows that the drafters were concerned with who would have the right to make changes in the public record. The consequence to secured parties needing to communicate with other secured parties when the secured party was not the secured party of record did not, apparently, concern them. The exculpatory language in section 9-605(2), could, of course, be read to say what it means rather than what it says.³⁶ That generous reading still will not help the secured party burdened by a duty to communicate. That exculpatory provision applies when the secured party does not know the identity of the debtor.³⁷ The section does not speak to cases where the secured party burdened with the duty to communicate does know the identity of the debtor but does not know the identity of the secured party that is to receive the communication.

VI. DOING IT ALMOST RIGHT

Section 9-210 deals with the need for communication to a secured party, but in this section the person needing to make the communication is the debtor.³⁸ The section sets forth the types of information that a debtor might seek from a secured party, such as the items of the debtor's property that are subject to the secured party's security interest or the amount of the obligations secured by the collateral. Subsections (b) and (c) impose on a secured party who has received such a request from the debtor an obligation to respond within fourteen days to that request or suffer penalties.³⁹ Of interest for this essay are subsections (d) and (e). These two subsections are parallel in structure; subsection (d) dealing with a request concerning collateral, and subsection (e) dealing with requests concerning a statement of obligations.⁴⁰ Each of the subsections imposes obligations on the "recipient" of the communication from the debtor. Each subsection requires the recipient in the stated circumstances, within fourteen days, to send to the debtor "an authenticated record: (1) disclaiming any interest in the [collateral] obligations; and (2) if known to the recipient, providing the name and mailing address of any assignee of or successor to the recipient's interest in the [collateral] obligations."⁴¹

(2008).

35. See U.C.C. § 9-514 cmt. 2 (2008); *see also supra* text accompanying note 26.

36. See U.C.C. § 9-605(2) (2008).

37. See U.C.C. § 9-605(2) (2008).

38. See U.C.C. § 9-210 (2008).

39. U.C.C. § 9-210(b)-(c) (2008).

40. U.C.C. § 9-210(d)-(e) (2008).

41. U.C.C. § 9-210(d)-(e) (2008).

Comment 5 explains the reason for this obligation imposed on a recipient (not the secured party):

A debtor may be unaware that a creditor with whom it has dealt has assigned its security interest or the secured obligation. Subsections (d) and (e) impose upon recipients of requests under this section the duty to inform the debtor that they claim no interest in the collateral or secured obligation, respectively, and to inform the debtor of the name and mailing address of any known assignee or successor.⁴²

The recipient has this obligation whether or not the assignee or the successor has become the secured party of record. The drafting here is remarkably careful, as the person receiving the debtor's message is the 'recipient' and not the secured party. The use of the word "recipient" removes from this section any of the difficulties created when the recipient of a message is no longer the secured party, but the statute requires the communication to be given to the secured party.⁴³

The contrast between the Part 6 provisions and this pair of provisions in section 9-210 cannot be greater. In Part 6, the secured party must make certain communications.⁴⁴ To whom that communication is to be made, in the ordinary case, can be found only from the public record. Yet a communication that relies on that public record will not comply with the statute if the assignment of the security interest is not of record. The debtor who seeks information, relying on the rights created by section 9-210, is protected if the inquiry goes to the wrong party, even if the public record does not provide the information the debtor needs to determine the true secured party.

A secured party of record who is no longer the secured party who receives a communication from a secured party attempting to perform its obligations in Part 6 does not have obligations parallel to those imposed on the recipient of section 9-210 communications. Why this is so is not at all obvious. The same question can be asked in the context of section 9-324(b). When a secured party with a purchase money security interest in inventory sends the required notice to the earlier-filed secured party of record, if that secured party of record is no longer the secured party, that recipient has no obligation to communicate that notice to the true secured party.

42. U.C.C. § 9-210 cmt. 5 (2008).

43. As the caption to this part notes, the drafting here is almost right. The term recipient is undefined. Taken literally, a debtor could send requests for information to anyone in the world, and impose on that recipient of that request the duty to respond, claiming no interest in the collateral. As Comment 5 to section 9-210 makes clear, the drafters assumed that any recipient of such a request for information would be a "creditor with whom [the debtor] has dealt." U.C.C. § 9-210 cmt. 5 (2008).

44. See *supra* text accompanying notes 29-39.

VII. STATUTORY INTERPRETATION MAXIMS

Ever since Llewellyn's classic article, "Thrust and Parry",⁴⁵ it has been impossible to say that courts observe a single theory of statutory interpretation. For each "principle" of statutory interpretation, there is a counter-principle. Even so, some maxims seem to have greater currency than their contradictory counterparts. These common shibboleths on statutory interpretation stand against concluding that "secured party" can, in some contexts, mean "secured party of record." First, the statute itself says not to give meanings to defined terms that are not the defined meaning.⁴⁶ Second, the statute itself uses both the term "secured party" and "secured party of record," allowing for the conclusion that the drafters knew how to use the term "secured party of record" when they meant the text to refer to a secured party of record.⁴⁷ Third is the principle that different words in a statute should be given different meanings.⁴⁸ Lastly, section 9-210 conclusively illustrates that the drafters recognized exactly this problem in a parallel situation and drafted to take account of the difficulties that arise if the term "secured party" is used when the meaning is the "secured party of record."⁴⁹

VIII. A WAY OUT, ALMOST

The need to read "secured party" as "secured party of record" arises when Article 9 requires one secured party to contact another secured party whose security interest is perfected by filing. Common statutory doctrines stand between the words of the

45. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Constructed*, 3 VAND. L. REV. 395 (1950). For a critique of Llewellyn's work see Michael Sinclair, "Only a Sith Thinks Like That": Llewellyn's "Dueling Canons," *One to Seven*, 50 N.Y.L. SCH. L. REV. 919 (2006), and Michael Sinclair, "Only a Sith Thinks Like That": Llewellyn's "Dueling Canons," *Eight to Twelve*, 51 N.Y.L. SCH. L. REV. 1003 (2007). For a more favorable view of Llewellyn's enterprise, see Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes To You?*, 45 VAND. L. REV. 561 (1992).

46. See NORMAN J. SINGER & J.D. SHAMBIE SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION § 47:7 (7th ed. 2007) ("As a rule, a definition which declares what a term means is binding upon the courts."); see Llewellyn, *supra* note 45, at 403 ("[Canon] 9. Definitions and rules of construction contained in an interpretation clause are part of the law and binding.").

47. See Llewellyn, *supra* note 45, at 404 ("[Canon] 17. The same language used repeatedly in the same connection is presumed to bear the same meaning throughout the statute.").

48. See SINGER, *supra* note 46, § 46:6 ("The same words used twice in the same act are presumed to have the same meaning. Likewise, courts do not construe different terms within a statute to embody the same meaning.") (footnote omitted).

49. See *supra* Part VI.

statute and this sensible result. There is, however a solution from within the statute itself – a solution suggested by Comment 6 to section 9-324. That comment reads as follows:

Inasmuch as the address provided as that of the secured party on a filed financing statement is an “address that is reasonable under the circumstances,” the holder of a purchase-money security interest may satisfy the requirement to “send” notification to the holder of a conflicting security interest in inventory by sending a notification to that address, even if the address is or becomes incorrect. See Section 9-102 (definition of “send”). Similarly, because the address is “held out by [the holder of the conflicting security interest] as the place for receipt of such communications [i.e., communications relating to security interests],” the holder is deemed to have “received” a notification delivered to that address. See Section 1-201(26).⁵⁰

This Comment excerpts short passages from rather long definitions. The full statutory texts provide further reasons to believe that the Comment points the way toward providing a way to live with the statute as written. “Send . . . means: (A) to deposit in the mail, deliver for transmission, or transmit by any other usual means of communication, with postage or cost of transmission provided for, *addressed to any address reasonable under the circumstances.*”⁵¹

This Comment provides an argument for a secured party that fails to contact the true secured party because the true secured party is an assignee not of record. The true secured party has failed to include in the public record information about its existence, much less its location. The Comment states bluntly that a notice sent to a wrong address operates as a sufficient notice, so if an assignee were of record and the record gave the wrong address, a notice sent to that address would be sufficient.⁵²

Is there any real difference between that case and the case where the assignee is not of record, so that the financing statements show only the wrong secured party? Unfortunately, there is. The Comment does not address the problem this essay concerns. The Comment presupposes that the communication is addressed to the secured party. When the secured party is not the secured party of record, a communication sent to the secured party of record has not been sent to the secured party. Obviously, the policy outlined in the Comment could equally apply to the case where the secured party is not the secured party of record. The rigidity of the statutory definitions defining “secured party” and “secured party of record” precludes making a policy argument built on the logic of the Comment to reach a sensible

50. U.C.C. § 9-324 cmt. 6 (2008). The Article 1 citation within this Comment is to former Article 1. *See* U.C.C. § 1-201 (1972). Revised Article 1 contains the same language in its section 1-202. *See* U.C.C. § 1-202(e) (2008).

51. U.C.C. § 9-102(74)(A) (2008) (emphasis added).

52. U.C.C. § 9-324 cmt. 6 (2008).

result. Any literalist reading of the statute could easily distinguish between the case where the communication is addressed to the secured party at the address supplied by the secured party, and the case where the communication has not been sent to the secured party at all.

IX. REALISTIC SOLUTIONS

A. *The Best Solution*

The simplest solution to the problem identified in this essay is to adopt Revised Article 1. Section 1-201 introduces the definitions section with this language: “Unless the context otherwise requires, words or phrases defined in this section, or in the additional definitions contained in other articles of [the Uniform Commercial Code] that apply to particular articles or parts thereof, have the meanings stated.”⁵³ In this one sentence, the inflexibility arising from the Style Committee’s intervention in Article 9 appears to have disappeared. As always with issues of statutory interpretation, there are canons that would allow for a contrary conclusion. For example, the specific overrides the general⁵⁴; therefore the “means” of Article 9 trumps the general statement in Article 1. Trumping that argument is the canon that the later adopted statute overrides the earlier.⁵⁵ As Revised Article 1 is the later statute, its provision controls.

If one looks at the text of the 2010 Amendments, section 9-102 starts: “In this article” and not “in this article unless the context otherwise requires.”⁵⁶ What meaning is to be attached to this continuation of the 2001 text? Possibly, none at all, as the 2010 amendments repeat the previous text when the amendments do not change the text. The question of “means” versus “unless the context otherwise requires” was not on the drafting committee’s agenda. As the question was not on the agenda, a decent argument can be made that no significance can be attached to the continuation of the previous text.

Of course, the drafting history is not the only interpretative source. Once the amendments are adopted by the states, then within a specific state’s interpretative structure, the canon that later adopted language can control the earlier could become the rule of interpretation.⁵⁷ Within that rule of interpretation, would the issue turn on whether the legislature re-adopted the “means” or did it simply insert the new and revised definitions into the existing statute, leaving the prior earlier adopted version

53. U.C.C. § 1-201(a) (2008).

54. See Llewellyn, *supra* note 45, at 405 (Canon 21).

55. See *id.* at 401 (Canon 3).

56. U.C.C. § 9-102(a) (2008).

57. See Llewellyn, *supra* note 45, at 401 (Canon 3).

untouched? The complexity of the arguments necessary to evade Revised Article 1's position on this question suggests that evasion may not be worth its costs.

B. What Can Be Done in States That Have Not Yet Adopted Revised Article 1?

In states that have not adopted Revised Article 1, Judge Friendly provides a means to a solution for the problem this essay addresses. In *Dick Warner Cargo Handling Co. v. Aetna Business Credit Inc.*, he had to answer the question of the meaning of "future advance."⁵⁸ Only some future advances can have priority over a lien creditor, and it was conceded that the funds in question would be the type of future advances not entitled to priority over the lien creditor if these funds were in fact future advances.⁵⁹ The precise issue was whether attorneys' fees and other expenses incurred after Dick Warner's successful garnishment of funds in Aetna's hands nonetheless could have priority over Dick Warner's garnishment.⁶⁰ In this opinion, Judge Friendly created the category of non-advance to permit attorneys' fees accruing after the garnishment to increase the secured party's claim and diminish the value of the garnishment.⁶¹ Of interest here is his technique. Note that he concedes that a literal reading of the statute required the opposite result:

The necessity for this conclusion [the garnishment can be squeezed] is most readily illustrated by the common arrangement whereby a debtor makes a secured promise to pay interest on his secured debt. No one could plausibly argue that a debtor's periodic incurring of an obligation to pay interest was the receipt of an "advance" by him. Yet, on Warner's literal reading, § 9-301(4) would give priority to a lien creditor over a lender's perfected security interest not only as to interest on protected advances accruing *after* the creation of a lien, a result which we regard as inconsistent with the basic purposes of the U.C.C., but also as to the debtor's obligation to pay interest that accrued *before* the levy, a result that could not possibly have been deliberate. A review of the circumstances and commentary accompanying the 1972 amendments to the U.C.C., which added § 9-301(4), convinces us that no such result was intended, the letter of that section notwithstanding.⁶²

58. 746 F.2d 126, 128 (2d Cir. 1984).

59. *Id.*

60. *Id.* at 129.

61. *Id.* at 130.

62. *Id.* at 130-31. The statutory section at issue was former section 9-301(4), the substance of which parallels current section 9-323(b). Compare U.C.C. § 9-301(4) (1972), with U.C.C. § 9-323(b) (2008). The former text reads as follows:

A person who becomes a lien creditor while a security interest is perfected takes subject to the security interest only to the extent that it secures advances made before he becomes a lien creditor or within 45 days thereafter or made without

This essay considers how a literal reading of the Article 9 sections at issue leads to absurd results. A judge with Judge Friendly's fortitude can simply ignore what a statute says and instead read it to say what it means. That course of action is, of course, available in the event the questions raised in this essay are litigated in a state that has not yet adopted Revised Article 1. In those states, such a judge could interpolate into the definitions in section 9-102 the words, "unless the context otherwise requires." To insist that the defined terms "mean" with no possibility of flexibility would require believing that the drafters intended to write absurdity. That conclusion would convince a judge with Judge Friendly's capacity for certainty that "no such result was intended."

Judicial fashions have changed since Judge Friendly's time. A penchant for treating statutory texts as if they have no context is very much today's mode.⁶³ Whether in the larger picture we are better or worse off as a consequence of this change in judicial attitudes is a topic for a different essay. This essay does illustrate that statutory literalism comes at a price. Revised Article 1, by loosening the meaning of defined terms, suggests that, at least for commercial law, that price has been too high.

C. Does a Secured Party Deserve to Be Protected from an Assignee Not of Record?

Part IV of this essay asks, in the statutory provisions it analyzes, whether the words "secured party" ought to be read as "secured party of record."⁶⁴ The answer to that question could be yes for two reasons. First, the policy stated in Comment 2 to section 9-514⁶⁵ should apply equally to notices as it does to the question of who controls the power to file. Second, as this essay has already asserted, following the statute literally results in "obvious and total nonsense." As a matter of rhetoric, this essay has prejudged that question. The answer to the question is not as totally clear as a matter of policy, nor should rhetoric alone persuade.

Section 9-210 shows that the drafters knew how to deal with the problem of failed communication resulting from the secured party of record not being the secured party. Nowhere in the other provisions discussed in this essay does Article 9

knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien.
U.C.C. § 9-301(4) (1972).

63. Justice Scalia is a principal supporter of this view. For a quick, but magisterial treatment of Justice Scalia's understanding of statutory interpretation, see *In re Kane*, 336 B.R. 477 (Bankr. D. Nev. 2006).

64. Or, in the case of section 9-324, should the words "holding a security interest" be read as the "secured party of record?" See U.C.C. § 9-324 (2008).

65. U.C.C. § 9-514 cmt. 2 (2008) ("However, if an assignment is not filed, the assignor remains the secured party of record, with the power (even if not the right) to authorize the filing of effective amendments.").

impose any burden on a secured party of record who is not the secured party, equivalent to the burden imposed on a recipient under section 9-210. The silence in the statute must count for something.

Article 9 makes clear circumstances where the secured party is entitled to notice.⁶⁶ The failure of the secured party to receive that notice could set off a chain of consequences which will result in injury to that secured party. Nonetheless, there can be a perverse result if the statute is read to mean what it literally says. A secured party that gives notice to the secured party of record has done all it could. The statute says, however, that the secured party's duty is to give notice to the secured party. The secured party has failed to perform its statutory obligation when the secured party that is to receive the notice is not the secured party of record. To the extent the failure of the secured party to give notice to the true secured party results in injury, that failure of the secured party to perform its statutorily defined obligations entitles the injured secured party to damages.⁶⁷

Giving damages under those circumstances is perverse because the secured party that is not a secured party of record is the author of its own injury. A secured party that is not the secured party of record always has the choice to make itself the secured party of record. There can be reasons why an assignee does not want to become the secured party of record, but such an assignee nonetheless consciously chooses not to receive notices. Every assignment arises as a matter of contract. There is absolutely nothing in law or policy that would prevent the parties to an assignment, where the assignee is not to become the secured party of record, from including in the contract an obligation on the secured party of record to relay to the assignee—the true secured party—any notices it receives. With contract clauses providing for relaying communications, communication with the secured party of record will result in communication to the true secured party. These two practical points do not, however, change the statutory text. Communication must be made to the secured party and not to the secured party of record.

X. CONCLUSION

Article 9 imposes on some secured parties the duty to communicate to other secured parties. When the secured party burdened with a duty to communicate to another secured party cannot know the identity of the recipient of that communication, Article 9 does not provide adequate relief to the burdened party. Sections 9-604 and 9-628 set out to provide exactly that relief in one narrow circumstance. If the reason the burdened secured party cannot know the identity of the recipient of a required message because the burdened secured party does not

66. See *supra* Part V.

67. See U.C.C. § 9-625(b) (2008) (“[A] person is liable for damages in the amount of any loss caused by a failure to comply with this article.”).

know who the debtor is, then those sections set out to relieve the burdened secured party from that duty. Unfortunately, the precise language used in those sections does not perfectly accomplish this narrow goal. If the duty is owed to a secured party that has become a secured party by way of assignment, the exculpatory language does not reach this class of secured parties. The duty, which would otherwise be excused, remains owing to this one sub-class of secured parties. Assignees who benefit from this drafting glitch are innocent beneficiaries of what has to have been an unintended gift. The complete irrationality of this gift could justify a court ignoring the definition of “financing statement” and excuse impossible communications to not just some, but all secured parties who are perfected by a filed financing statement.

Outside of the narrow factual predicates described in sections 9-604 and 9-628, Article 9 does not provide an excuse for a secured party faced with an impossible duty to communicate. The statute could have provided an excuse for a failed communication when, in the three places the statute says “secured party of record” it must mean “secured party.” The excuse should have been extended to the one other provision which must mean “secured party of record” when it says “the holder of the conflicting security interest.”⁶⁸ In the absence of an excuse provision, the burdened secured party must seek indulgence from a court to read these defined terms to mean something other than their defined meanings. Standard canons of statutory interpretation stand against making that substitute in this tightly and carefully drafted statute. The secured party not of record who does not receive a notice can appeal to the language of the statute to support the conclusion that, nonetheless, it is owed that notice.

The assignee not of record has complete responsibility for its not receiving notices. The assignee not of record knows that any person required to communicate to it in its capacity as secured party cannot know of that assignee’s existence, much less where to locate it. The inaction of the assignee not of record has created that circumstance. A secured party burdened by a statutory duty that fails to perform its duty in these circumstances bears a cost resulting from a situation not of its making. In light of the relative equities of these parties, finding a way of protecting a secured party from the inaction of a secured party that is not of record is a worthwhile goal.

68. See U.C.C. § 9-324 (2008).