

SOUTH CAROLINA BANKING LAW UPDATE

January 2001

Laurie A. Becker, Esq.
Nexsen Pruet Jacobs & Pollard, LLC
LBecker@NPJP.com
(803) 771-8900

The following update on Banking Law in the State of South Carolina (the “State”) covers the 8-month period commencing May 1, 2000 through December 31, 2000, picking up from—and slightly overlapping with—the last update presented to the South Carolina Bar Annual Meeting held in June 2000. In addition to a legislative and case law update, I include a summary of Revised Article 9 of the Uniform Commercial Code (“UCC”), as well as a brief discussion of the Uniform Electronic Transactions Act (“UETA”) and its federal counterpart the Electronic Signatures in Global and National Commerce Act (“E-SIGN”). Although neither Revised Article 9 of the UCC nor UETA have been adopted by the State Legislature, these are significant developments which immediately impact the South Carolina lawyer whose practice and clientele cross over state lines, and will inevitably impact all South Carolina lawyers because both uniform acts will in all likelihood be enacted in one form or another by the State Legislature in the near future.

1. LEGISLATIVE AND REGULATORY CHANGES

1. South Carolina Code **Session Laws**

1. Timeshare Lien Foreclosures

2000 Act No. 262, § 1, effective May 1, 2000, amended Chapter 32, Title 27 relating to Vacation Timesharing Plans by adding Article 3 entitled “Timeshare Lien Foreclosures” (codified at S.C. Code Ann. §§ 27-32-300 et seq.) Generally, Act No. 262 establishes streamlined procedures for foreclosure of assessment liens and mortgage liens against timeshare estates by giving persons a right to privately contract for a power of sale as their remedy in lieu of a judicial foreclosure.

In order to utilize the power of sale option, the mortgage or assessment lien must contain in conspicuous type the statement set forth in § 27-32-320. The statement includes the following provisions: (i) that the mortgagor acknowledges that upon default the mortgage may be foreclosed through a nonjudicial procedure pursuant to §§ 27-32-300 et seq.; (ii) that the mortgagor will not be responsible for any deficiency resulting from such sale; (iii) that a proper notice must be sent to the mortgagor by certified or registered mail and if notice is not accepted at the notice address, publication is an acceptable means of providing notice; and (iv) that a mortgagor may object to the nonjudicial procedure by sending a written objection to the trustee which automatically transfers the matter to a judicial foreclosure procedure; however, the mortgagor accepts the risk that he will be responsible for any deficiency judgment as well as potential personal liability for costs and attorney’s fees incurred in the judicial procedure if the court finds that there is complete absence of a

justifiable issue of either law or fact raised by the written objection or defense. S.C. Code Ann. § 27-32-320 (Law. Co-op. Supp. 2000).

A trustee may be any attorney licensed in South Carolina or a title insurance company, title insurance agent, or title insurance agency licensed in South Carolina, and the trustee may represent the lienholder foreclosing under this Article. S.C. Code Ann. § 27-32-315 (Law. Co-op. Supp. 2000). A trustee must allow at least a 30-day time period from the date notice of default is sent to mortgagor for the mortgagor to send a written objection. In the event the mortgagor sends the written objection to the trustee, the trustee is prohibited from proceeding with the nonjudicial foreclosure and the lienholder is required to file a foreclosure action per Article 7 of Chapter 3 of Title 29. S.C. Code Ann. § 27-32-325 (Law. Co-op. Supp. 2000). Section 27-32-335 sets forth the specific requirements of the notice of sale and the publication of the notice of sale in the newspaper of general circulation in the county where the timeshare estate is located.

Pursuant to § 27-32-340, a trustee must execute a certificate of compliance on the date of the sale, which certificate must include a statement indicating the manner of delivery of the notice of default and intent to sell and that the notice met the requirements of § 27-32-325, that the default was not timely cured, and that the trustee did not receive any written objections from the mortgagor. In addition, the trustee must confirm the notice of sale was published properly and mailed to the obligor, the owner of the timeshare estate, and all junior interest holders. Upon the sale, the trustee must issue a certificate of sale to the buyer as well as to all persons entitled to notice of sale under § 27-32-330. Ten days after the sale, assuming no challenges to the sale are served on the trustee, a trustee's deed must be issued by the trustee. S.C. Code Ann. § 27-32-355 (Law. Co-op. Supp. 2000).

2. Subcontractors' and Suppliers' Payment Protection Act

Article 3, cited as the "Subcontractors' and Suppliers' Payment Protection Act," was added to Chapter 6 of Title 29 by 2000 Act No. 295, § 1, effective May 26, 2000 (codified at §§ 29-6-210 to -290). When a governmental body is a party to the contract, this new Article provides subcontractors payment protection by requiring that contractors provide a labor and material payment bond for contracts in excess of \$50,000. If a governmental body is not a party to the contract and a contract requires a payment bond, the bond must be issued by a surety company licensed in the State with a "B+" minimum rating. In addition, in all contracts for the improvement of real property, no provision may "operate to derogate the rights of a construction contractor, subcontractor, supplier, or other proper claimant against a payment bond or other form of payment security or protection established by law." S.C. Code Ann. § 29-6-290 (Law. Co-op. Supp. 2000).

3. Personal Financial Security Act

Chapter 13, Title 16 of the SC Code was amended by adding Article 2 entitled the "Personal Financial Security Act" pursuant to 2000 Act No. 305, § 1, effective May 30, 2000. This Act addresses the criminal offense of financial identity fraud, which is defined as follows: "[W]hen he, without authorization or permission of another person and with the intent of unlawfully appropriating the financial resources of that person to his own use or the use of a third party, (1)

obtains or records identifying information which would assist in accessing the financial records of the other person; or (2) accesses or attempts to access the financial resources of the other person through the use of identifying information as defined in subsection (C).” S.C. Code Ann. § 16-13-510 (Law. Co-op. Supp. 2000). The list of “identifying information” includes social security numbers, driver’s license numbers, checking or savings account numbers, credit or debit card numbers, PIN numbers, or digital signatures. *Id.* The crime is deemed a felony with a court-determined fine and/or imprisonment for not more than ten years. Note that this Act is ***not applicable*** to the lawful acquisition of credit or other information in bona fide consumer or commercial transactions or in connection with an account by any financial institution or entity defined in the Fair Credit Reporting Act, 15 U.S.C.A. § 1681, or the Gramm-Leach-Bliley Financial Modernization Act, 113 Stat. 1338. S.C. Code Ann. § 16-13-530 (Law. Co-op. Supp. 2000).

4. Filing of Foreign Judgments

Section 15-35-920 provides a framework for filing and enforcing foreign judgments in South Carolina. Effective May 26, 2000, 2000 Act No. 306, § 1 amended § 15-35-920(A) by adding a definition for “contested judgment,” which definition includes “a judgment for which post-trial motions are pending before the trial court, notice of appeal has been filed, or an appeal is pending.” Section 15-35-920(C) provides that enforcement of the foreign judgment is stayed automatically if the judgment debtor files a motion for relief or notice of defense. Act 306 amended this section to provide that if the judgment is contested, it is also grounds for automatic stay “except as hereinafter provided.” Subsection (C) is further amended to prohibit any encumbrance of the judgment debtor’s property in furtherance of execution on the foreign judgment during the time when the stay or motion for relief is pending ***unless*** the judgment creditor shows that the debtor’s property “has been or is about to be disposed of or removed from this State with intent to defraud the judgment creditor, or to otherwise deplete the assets for purposes of avoiding payment of the judgment.”

Section 15-35-940(B), relating to a debtor’s motion for relief from foreign judgment, was also amended to allow the judgment creditor to move for enforcement or security of the foreign judgment after all appeals are concluded and the judgment is not further contested.

5. South Carolina Community Economic Development Act

Title 34 of the Code was amended to add Chapter 43 by Act No. 314, § 1, effective May 30, 2000. This new Chapter provides for the defining and certification of entities as “Community Development Corporations” (“CDCs”) and “Community Development Financial Institutions” (“CDFIs”). While the two entities are distinct, they share similar goals of developing and improving low-income communities and neighborhoods through economic and related development. A CDC focuses on efforts to enable the people in the community to become owners and managers of small business and producers of affordable housing and jobs in the community served. A CDFI provides credit, capital, or development services to small businesses or home mortgage assistance to individuals (primarily low-income individuals, minorities, females, or within rural areas). The Department of Commerce (“DOC”) certifies entities as CDCs and CDFIs and administers grants and loans to such entities from grants funds made available to the DOC by the General Assembly. In

addition, the DOC provides technical support to CDCs to aid them in the implementation of their projects. Limitations on amounts of grants and loans are set forth in § 34-43-50.

In conjunction with the addition of Chapter 43 to Title 34, Article 25 of Chapter 6 of Title 12, relating to income tax credits, was amended to add § 12-6-3530. This new section allows taxpayers, beginning in tax years after 2000, to claim as a credit against their state income tax 33% of all amounts invested in a CDC or CDFI with any excess amount over their tax liability allowed to be carried over for 10 years. The taxpayer must obtain a certificate from the DOC certifying that the entity is a CDC or CDFI and then the taxpayer files this certificate with his annual state income tax return to claim the credit. Banks and financial institutions chartered by the State may also invest in CDCs and CDFIs up to a maximum of 10% of such bank's total capital and surplus.

Chapter 43 shall terminate on June 30, 2005 unless reauthorized by the General Assembly.

6. Purchase Money Security Interests

2000 Act No. 339, § 1, effective June 6, 2000, amends § 36-9-301 to increase the "grace period" for filing of a purchase money security interest ("PMSI") from ten days to *twenty* days. Similarly, § 36-9-312(4) was amended by § 2 of Act No. 339 to provide that a PMSI in collateral other than inventory has priority over a conflicting security interest in the same collateral or its proceeds if the PMSI is perfected at the time the debtor receives possession of the collateral or within *twenty* days thereafter. Finally, § 36-9-313(4)(a) was amended by § 3 of Act No. 339 to give a PMSI in fixtures priority over the owner of the real estate if the fixture filing is made before the goods become fixtures or within *twenty* days thereafter.

****NOTE:** This increase in the grace period is consistent with Revised Article 9's PMSI provisions (see discussion in Section III below).

7. Interest Rate on Money Decrees and Judgments

Section 34-31-20(B) of the 1976 Code was amended by 2000 Act No. 344, § 1, effective June 6, 2000, to decrease the annual legal interest rate on money decrees and judgments from 14% to 12%.

2. Pre-Filed Bills for the 2001 Legislative Session

The following bills were pre-filed by the House in December 2000 (the Senate did not allow pre-filings):

1. Collection of a Dishonored Check by a State Agency

Bill 3017 introduced December 6, 2000 by Representative Kirsh proposes to amend Chapter 11 of Title 34, relating to bank deposits, by adding § 34-11-140. This new section would require state agencies to attempt to collect dishonored checks returned to them, and the collected revenues equal to the face amount of the dishonored check and a \$25 service charge may be retained and

expended by the state agency with any unused amount to be deposited in the general fund at the end of the fiscal year.

2. Notice of Dishonor and Suspension of Collection Efforts

Bill 3020 introduced December 6, 2000 by Representative Taylor proposes to amend Chapter 11 of Title 34 by adding § 34-11-115 and Chapter 5 of Title 37 by adding § 37-5-118. Section 34-11-115 requires a 30-day notice period by the holder of a dishonored check to the drawer of the check before submitting the check to a check recovery service. In addition, once the check recovery service receives notice of wrongful dishonor or bona fide dispute after it begins its collection efforts, the service must immediately halt its collection efforts. Non-compliance with this new section is punishable by a fine of not less than \$100 per occurrence. Section 37-5-118 is identical to § 34-11-115 except that it applies to a *creditor* who is the holder of a dishonored check.

3. Increased Time Period for Service and Filing of Mechanics' Liens

Bill 3041 introduced December 6, 2000 by Representative Kirsh proposes to amend § 29-5-90 to increase the time period for service and filing of a mechanic's lien upon the owner from "within 90 days" to within **120** days after the labor or furnishing of materials has ceased.

4. Decreased Lien Period for Judgments on Real Property with Renewal Option

Bill 3064 introduced December 6, 2000 by Representative Keegan proposes to amend § 15-35-810 to reduce the lien period of real property judgments and decrees from a period of ten years to **one year** from the date of the final judgment or decree "unless renewed or revived for a period of five additional years as provided in Section 15-39-30." Section 15-39-20 would be amended similarly to allow the enforcement of final judgments at any time within **one year** after the entry of judgment and adds that "[a] final judgment may be renewed or revived for a period of five additional years as provided in Section 15-39-30." Thus, Section 15-39-30's proposed amendments reflect the option to renew or revive a final judgment or decree for a period of five years in accordance with SC Rules of Civil Procedure, and if a final judgment becomes dormant, it may be renewed or revived by an action filed in the manner provided by the SC Rules of Civil Procedure if filed within three years from the time the judgment became dormant. An action to renew or revive must be filed in the court of the county where the original judgment was obtained.

A. Selected Federal Issues

1. Gramm-Leach-Bliley Act¹

On November 12, 1999, the President signed the Financial Services Act of 1999, also known as the Gramm-Leach-Bliley Act (“GLB Act”). While this Act is too voluminous to summarize here, I highlight some of the more significant provisions that impact banking/financial institution clients. The GLB Act repeals Section 20 of the Banking Act of 1933, commonly referred to as the “Glass-Steagall Act,” and formally permits affiliations between banks, insurance companies, and securities firms. The Bank Holding Company Act of 1956 is also amended by the GLB Act to broaden permissible holding company activities to those that are “financial in nature” and authorizes a new form of holding company—a Financial Holding Company (“FHC”). The FHCs are limited to activities that are “financial in nature” and other “complementary” activities. Under the provisions of the GLB Act, certain banks may conduct limited financial activities either through (i) holding company subsidiaries regulated by the Federal Reserve Board, or (ii) financial subsidiaries regulated by the Office of the Comptroller of the Currency (the “OCC”). Also, regulation of bank securities activities now falls under the SEC

One of the most significant aspects of the GLB Act deals with the collection and distribution of personal and financial information by banks, insurers, securities firms, and other “financial institutions” (as defined under the GLB Act). Every financial institution is required to develop written privacy policies that must be disclosed conspicuously and annually to their customers, which policies must describe in which situations “nonpublic personal information” will be shared with affiliates and unaffiliated third parties. While certain customer information sharing is generally allowed amongst affiliates, each consumer is entitled to opt out of the sharing of non-public personal information with unaffiliated third parties such as telemarketers and other direct marketers and the opt out notice must be provided to the consumer *before* the financial institution shares any personally identifiable financial information with any nonaffiliated third parties. Finally, banks are always prohibited from disclosing customer account numbers and access codes to unaffiliated third parties for telemarketing or direct marketing purposes.

****NOTE:** Financial institutions do not need to comply with these privacy provisions until July 1, 2001, even though the effective date of the provisions is November 13, 2000. The privacy provisions of the GLB Act can be found at 15 U.S.C. § 6801 *et seq.*, with corresponding regulations at 12 C.F.R. § 40.

¹This portion of the outline is based in part upon the following articles: Geoffrey M. Connor, Gramm-Leach-Bliley: New Rules for the Financial Services Industry, PRAC. LAW. 39 (Mar. 2000) and Edward Fenno, Federal Internet Privacy Law, 12 S.C. LAW. 36 (Jan./Feb. 2001).

2. Electronic Signatures in Global and National Commerce Act²

On June 30, 2000, the President signed S. 761, titled the Electronic Signatures in Global and National Commerce Act (“E-SIGN”), which became effective October 1, 2000. E-SIGN was based upon, and overlaps significantly with, the Uniform Electronic Transactions Act (“UETA”) which is discussed below in Section IV. E-SIGN preempts state law with respect to electronic records and signatures unless a state has adopted the official version of UETA without any state-specific variations OR a state adopts another law specifying alternative procedures or requirements for the use and acceptance of electronic records and signatures NOT inconsistent with E-SIGN and that do not require or accord preference to specific technologies.

E-SIGN provides a nationwide, federal rule that authorizes electronic signatures and electronic notarizations, acknowledgments, and verifications of electronic records in transactions affecting interstate or foreign commerce. Basically, E-SIGN grants electronic records and signatures legal parity with their paper and ink counterparts by stating that a record or signature is NOT to be denied legal effect and enforceability solely because it is in electronic form or because an electronic signature or record is used in their formation. E-SIGN does not require the use and acceptance of electronic records and signatures, instead the parties must agree to accept electronic records and signatures; however, certain transactions such as wills, adoption, divorce, and other matters of family law are exempted from the provisions of E-SIGN.

The primary definitions set forth in E-SIGN are as follows:

- a. **“Electronic”** means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
- b. **“Electronic signature”** means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.
- c. **“Record”** means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- d. **“Electronic record”** means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.

E-SIGN neither requires the parties use specific technology to verify the identity of a signing party or the integrity of the record itself nor does it accord preferred status to signatures or records

²This portion of the outline is based in part on Robert A. Wittie & Jane K. Winn, Electronic Records and Signatures under the Federal E-SIGN Legislation and the UETA, 56 BUS. LAW. 293 (Nov. 2000).

that use specific technologies. In fact, private parties may determine their own limitations and criteria for accepting and sending electronic records and signatures.

Because a detailed summary is beyond the scope of this update, I just mention that E-SIGN has special requirements and rules for consumer transactions, record retention, electronic filings with governmental agencies, and the use of “transferable records” (the electronic equivalent of negotiable instruments, which is further limited under E-SIGN to promissory notes secured by real property).

II. CASE LAW

A. United States Court of Appeals (Fourth Circuit)

1. Statute of Limitations for Collecting on a Promissory Note

In Cadle Co. v. Berkeley Plaza Assocs., 215 F.3d 1317 (4th Cir. 2000) (unpublished), the United States Court of Appeals for the Fourth Circuit affirmed the District Court’s finding that the letters written by Berkeley, the debtor, to Cadle, the creditor, with respect to negotiating payment of a promissory note constituted promises to pay the principal owed on the promissory note and *not* the disputed underpaid interest, default interest, or late fees. Therefore, Cadle’s suit brought in August 1998 on the promissory note which matured in August 1991 was barred by the 6-year statute of limitations (under Virginia law). The various letters written during 1996-97 to Cadle by Berkeley’s attorney did not constitute renewed promises to pay the interest and fees and thus did not reset the statute of limitations.

2. Survivorship of a Prepayment Premium in a Promissory Note

In MIE Maryland Executive Park General Partnership v. LaSalle Nat’l Bank, 215 F.3d 1320 (4th Cir. 2000) (unpublished), the Fourth Circuit discussed whether a substantial prepayment premium contained in a non-recourse promissory note survived a subsequent Loan Modification Agreement negotiated eight years later. When Plaintiffs tried to negotiate a refinancing in 1999, the Defendants would not release their lien without first receiving the over \$3 million prepayment premium. Plaintiffs argued that the Loan Modification Agreement deletes the prepayment premium even though the Loan Modification Agreement did not address the prepayment premium and the conversations that took place during the negotiations were evidence of an intent to delete same, the Court disagreed. The provisions of the Loan Modification Agreement were clear and unambiguous without any mention or modification of the prepayment premium provisions, and the parol evidence rule (per Maryland law) barred the negotiation conversations as extrinsic evidence.

3. Effect on Related Loan Upon Repudiation of Lease Agreement

In WRH Mortgage, Inc. v. S.A.S. Assocs., 214 F.3d 528 (4th Cir. 2000), the Fourth Circuit found that the repudiation of the Lease by the Bank's receiver excused SAS's performance under the same integrated contract. In October 1985, the parties entered into a Construction, Loan and Lease Agreement (the "Lease") for a 25-year term whereby the Bank agreed to finance, supervise, and then lease the newly constructed bank branch building from SAS, and SAS would construct the bank branch building and lease it to the Bank. SAS opted to take a permanent loan from the Bank payable over 25 years, which loan was evidenced by a promissory note (the "Note"). SAS's obligations to pay the loan were subject to offset for any amounts due and owing under the Lease by the Bank. The Bank paid SAS monthly the difference between its monthly payments due under the Lease and the slightly smaller loan payments owed by SAS to the Bank.

In 1992 when the Bank went into receivership, the receiver exercised its statutory rights under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") to repudiate the Lease because it deemed the Lease to be "burdensome." In response, SAS did not make any loan payments claiming its obligations to pay the loan were discharged by the repudiation of the Lease. The Court found the Lease and the Note to be a single, integrated contract and affirmed the District Court's finding that the repudiation of the Lease discharged SAS from its obligations to repay the loan, stating "we see no reason to depart from the common law contractual rule excusing performance by a party whose contract has been repudiated by the other party to the same integrated contract."

4. Wire Fraud Must Victimize the Financial Institution to be Actionable

In United States v. Ubakanma, 215 F.3d 421 (4th Cir. 2000), a Defendant pled guilty to wire fraud and challenged his conviction and sentencing as a Class B felony offense, claiming he pled guilty to a Class D felony rather than the Class B felony (Class D has a 5-year maximum term while Class B has a 30-year maximum term). To be deemed a Class B felony, the facts must show that a financial institution was harmed or victimized in some manner. The Fourth Circuit found that the District Court correctly concluded that a Class B felony offense of wire fraud "'affected' a financial institution only if the institution itself was victimized by the fraud, as opposed to the scheme's mere utilization of the financial institution in the transfer of funds." In this case, funds were transferred into and out of accounts of various financial institutions as part of the Defendant's wire fraud scheme but no facts were produced that showed any actual harm to any the financial institutions involved. Thus, the court held that Defendant should have been convicted of a Class D wire fraud offense.

5. Dominion or Control Over Joint Checking Account and CD

In United States v. Morgan, 224 F.3d 339 (4th Cir. 2000), the issue before the Court was whether Mrs. Morgan had proved she had a legal right, title, or interest that was vested or superior to her husband Defendant's so that she could prevent forfeiture of the joint assets sought in the government's forfeiture action under 21 U.S.C. § 853. The Fourth Circuit affirmed the District Court's finding that Mrs. Morgan lacked dominion or control over the joint checking account and certificate of deposit; thus she did not have a property interest sufficient to prevent forfeiture. Mrs. Morgan's name was on the checking account but she never wrote any checks or withdrew money

from the account. Similarly with the certificate of deposit, Mrs. Morgan did not deposit any money into nor draw any money out of the CD and the facts indicated the Defendant controlled the use of the CD. Therefore, the Court agreed that Mrs. Morgan was nothing more than a nominal owner of both accounts and thus the accounts were held to be subject to forfeiture.

6. What Constitutes “Scheme or Artifice” under the Bank Fraud Statute

In United States v. Colton, 231 F.3d 890 (4th Cir. 2000), the Fourth Circuit held that “even absent an independent duty to disclose, misleading or deceitful conduct designed to conceal material information from a financial institution” violates the federal bank fraud statute which prohibits any knowing “scheme or artifice . . . to defraud a financial institution.” Colton appeals his bank fraud and conspiracy convictions claiming that he had neither made any affirmative misrepresentations nor breached any fiduciary, statutory, or other independent legal duty to disclose information to the financial institutions involved.

Colton and his partner Laskin had defaulted on a \$3.1 million loan from Trustbank in 1991. After Trustbank was placed into conservatorship by the Resolution Trust Corporation (“RTC”), Gemini Asset Managers was hired by RTC to take over the disposition of the failed loan and determined that selling the note to a third party for \$1.5 million was its best option. So Colton and Laskin utilized a shell corporation funded by a trust set up by Laskin in early 1991 (and previously used to defraud the RTC in the workout of a prior defaulted loan) and purchased their own note for \$1.5 million (resulting in over \$2 million in profit because they turned around and sold the project to Wal-Mart for \$3.59 million that same day).

The Government agreed that no affirmative material misrepresentations were made by Colton and Laskin but contended that Colton and Laskin purposefully concocted a scheme to conceal material information with the intent to mislead the RTC. The Court applied its common-law understanding of fraudulent concealment and found that Colton and Laskin actively sought ways to defraud the RTC by hiding and diverting attention away from the fact that they had direct interests in the trust and shell corporation in an attempt to negotiate a sale of the note at a substantial discount. Therefore, the Court concluded that a jury reasonably could find that Colton and Laskin engaged in an elaborate scheme to conceal information they knew would affect the RTC’s decision to sell the note at a 50% discount, and thus Colton’s conviction was affirmed as violating the bank fraud statute.

7. Lien on Arbitration Award Proceeds

In Pavilion Properties Limited Partnership v. Beal Bank, S.S.B., 2000 WL 1726533 (4th Cir. Nov. 21, 2000) (unpublished), the Fourth Circuit found that Beal Bank, as mortgagee, was entitled to a lien on the arbitration award granted Pavilion Properties Limited Partnership (“Pavilion”), as mortgagor, in Pavilion’s suit against the construction contractor. Pavilion secured a mortgage loan from HUD to finance the construction of apartment buildings in Columbia, South Carolina. When construction defects were discovered and not repaired to Pavilion’s satisfaction, Pavilion sued the contractor and prevailed in arbitration. Beal Bank asserted its entitlement to the arbitration proceeds as mortgagee, citing paragraph 9 of the mortgage which stated in part: “That all awards of damages

in connection with any . . . injury to any of said property, shall be paid to the mortgagee to be applied to the amount due under the Note secured hereby” The Court affirmed the District Court’s decision that the arbitration award was connected with the injury to the property under the mortgage and thus granted the arbitration proceeds to Beal Bank.

8. Securities Intermediary Liable to Entitlement Holder

In Powers v. American Express Fin. Advisors, Inc., 2000 WL 1784167 (4th Cir. Dec. 6, 2000) (unpublished), the Fourth Circuit affirmed the District Court’s finding that Powers was an entitlement holder to a joint investment account held by American Express as the securities intermediary, and that American Express’ transfer of the funds held in the account to the other joint holder without Powers’ signature was ineffective because both signatures were required for a transfer of more than \$50,000.

Powers and her boyfriend D’Ambrosia opened a joint investment account in July 1994 as joint tenants with right of survivorship, specifically checking a box on the application that stated only one signature was required for redemption requests *up to* \$50,000. The account was funded with \$15,000 from their joint bank account. Three years later after the couple broke up, D’Ambrosia requested American Express transfer the \$80,000 in the account to their FCNB joint bank account. American Express transferred the money without obtaining Powers’ signature, and D’Ambrosia absconded with the money.

Powers sued American Express under Maryland’s UCC § 8-107(b)(1) which deems a securities intermediary which transfers funds pursuant to an “ineffective entitlement order” liable to an entitlement holder for damages caused by the improper transfer. The Court agreed that the fax request by D’Ambrosia to American Express was an ineffective entitlement order because the agreement with American Express as the securities intermediary required both signatures for a transfer in excess of \$50,000. The Court awarded damages to Powers for the full amount of the investment account plus prejudgment interest.

B. United States District Court

1. Binding Contract Required Prior to Invoking UCC Remedies

In Williams-Garrett v. Murphy, 106 F. Supp. 2d 834 (D.S.C. 2000), Williams-Garrett, an elderly lady and amateur coin collector, claims that Murphy, a coin dealer, took her gold coins and traded them without her permission. Williams-Garrett sent a letter to Murphy indicating that she had never agreed to any trade, rejected any proposed trade, and requested that Mr. Murphy return her original coins. Mr. Murphy refused to return the coins claiming the transaction was completed. Both parties moved for summary judgment under various claims. The court rejected Williams-Garrett’s conversion claim, Unfair Trade Practices Act claim, UCC remedies claim, and the exploitation under the Omnibus Adult Protection Act claim, but did grant summary judgment to Murphy for the Breach of Fiduciary Duty claim.

For purposes of this update, I focus solely on the UCC remedies claim. Williams-Garrett argued that if the court determined a contract for the trade/sale of coins existed, then she would be

entitled to remedies under the UCC such as rejection or revocation of goods. The court stated that before it could make a determination of UCC remedies it first “must be established as a matter of law that an enforceable contract existed.” Citing Potomac Leasing Co. v. Otts Market, Inc., 358 S.E.2d 154, 156 (S.C. 1987), the court required that there be “a mutual manifestation of assent to the terms” in order for a contract to be binding and that such assent must “be as to all the terms of the contract and some terms are considered indispensable . . . and among these are price, time and place.” The court also pointed out that all contracts for the sale of goods in excess of \$500 must be in writing under S.C. Code Ann. § 36-2-201(1). In this case, it was impossible to grant summary judgment because the facts were disputed by the parties—Williams-Garrett had no recollection of the transaction and no written contract was produced. Without proof of the existence of a contract, it was impossible for the court to determine the availability of the UCC remedies; therefore summary judgment was denied.

2. Federal Tax Liens Enforceable Against Subsequent Transferees

In United States v. Taylor, 2000 WL 1683007 (D.S.C. Sept. 27, 2000), both Hugh and Betty Taylor failed to file federal income tax returns for at least two years each. Notices of Federal Tax Liens were filed in the RMC for Greenville County. In 1992, the federal tax liens attached to all property and rights to property possessed by the Taylors. The Taylors had purchased real property located on Jug Factory Road in Greenville County in 1988 secured by a mortgage in favor of the United States Department of Agriculture Farm Service Agency. In March 1993, after the tax lien had attached, the Taylors conveyed this property to their daughter who later conveyed it to her brother in September 1993 who then conveyed it back to Hugh Taylor in July 1998, making Hugh the current owner. However, the court concluded that the United States was entitled to enforce its lien against the real property on Jug Factory Road based on the rule of law that a federal tax lien attaches to all property acquired after the date of assessment. In addition, the transfer of the Taylor’s property after attachment of the lien does not affect the enforceability of the lien and such lien “arises on the date of assessment and continues in effect against all subsequent transferees.”

C. **South Carolina Supreme Court**

1. Champerty Abolished

In Osprey, Inc. v. Cabana Limited Partnership, 532 S.E.2d 269 (S.C. 2000), the Supreme Court held that the common law doctrine of champerty is no longer recognized as a defense to breach of contract claims. In the case at bar, Cabana was involved in federal litigation with Greyhound and after two years, the litigation costs had surpassed \$100,000. Cabana’s attorney asked Osprey for a \$50,000 loan to help pay for the ongoing litigation expenses and promised in return to pay Osprey all proceeds received from a verdict or settlement in excess of \$50,000, up to a maximum of \$150,000. However, when the federal case was settled Cabana did not give any of the \$650,000 proceeds to Osprey in violation of the loan agreement. Osprey then filed suit to enforce the loan documents. The issue before the Court was whether South Carolina recognized champerty and, if so, does champerty remain a viable defense to the enforcement of the loan agreement between Osprey and Cabana.

The Court defined champerty as “a bargain by a person with a plaintiff or a defendant for a portion of the matter involved in a suit in the event of a successful termination of the action, which the person undertakes to maintain or carry on at his own expense. . . . A champertor is one who purchases an interest in the outcome of a case in which he has no interest otherwise. A champertous agreement is unlawful and void where the rule of champerty is recognized, and the tainted agreement is unenforceable.” Following the reasoning of the Court of Appeals, the Court abolished champerty as a defense in South Carolina, reasoning that there are other well-developed principles of law that can more effectively prevent the filing of frivolous lawsuits than could the outdated doctrine of champerty. For example, the Court pointed to the Rules of Professional Conduct as well as the doctrines of unconscionability, duress, good faith, and fair dealing. While champerty is not a defense, the Court noted that such agreements are not automatically enforceable as written and instructed that courts must be “guided by an analysis of what is fair and reasonable under the circumstances.”

5. Installment Sales Contract Falls Under Article 9

In Brockbank v. Best Capital Corp., 534 S.E.2d 688 (S.C. 2000), Brockbank sued Best Capital after Best Capital repossessed Brockbank’s mobile home and sold it without notifying Brockbank of the sale as required in Article 9 of the UCC. Best Capital admitted it never sent a notice to Brockbank and claimed that Article 9 of the UCC did not apply to the installment sales contract for the mobile home because no security interest was created by the Sale of Manufactured Home Agreement (the “Agreement”). The Supreme Court held that the Agreement constituted a conditional sales contract and provisions such as the requirement that Brockbank surrender the home to Best Capital upon default, the requirement that Best Capital be named as loss payee in the fire insurance policy, and the requirement that Best Capital must give its written permission before Brockbank could assign his interest in the home, evidenced the parties’ intent to create a security interest in the mobile home.

Once the Court determined Article 9 applied to the Agreement, it found that Best Capital had violated S.C. Code Ann. § 36-9-504(3) which required reasonable notification of the sale to be given to Brockbank in writing. Citing Crane v. Citicorp Nat’l Servs., Inc., 437 S.E.2d 50 (S.C. 1993), the court stated, “The purpose of the notice is to allow the debtor to discharge the debt and redeem the collateral, produce another purchaser, or see that the sale is conducted in a commercially reasonable manner.” Furthermore, the Court held that Best Capital was not excused from Article 9’s notice requirements even if it believed Brockbank abandoned the home or voluntarily surrendered same. “Abandonment or voluntary surrender of the collateral by debtor to the creditor does not waive the debtor’s right to notice of resale of the collateral, and the statutory notice provision may not be waived or varied except in writing after default.”

6. Creditor’s Prior Perfected Security Interest Trumps Landlord’s Distress Lien

In J.M. Smith Corp. v. Wingard, 535 S.E.2d 131 (S.C. 2000), the Wingards operated a pharmacy on premises leased from respondent landlord (the “Landlord”), while Petitioner had a perfected security interest in all of the pharmacy’s inventory, proceeds, accounts, files, fixtures, and equipment securing a \$64,056.72 debt. When the Wingards filed bankruptcy, the lease was terminated with \$12,000 owed in back rent. Landlord levied for distress and seized property subject

to Petitioner's security interest to collect this back rent. However, Petitioner claimed its security interest was senior to the landlord's distress lien.

The Supreme Court reversed the Court of Appeals and held that a secured party's prior perfected security interest has priority over a landlord's distress lien. This holding was based on S.C. Code Ann. § 36-9-301(1)(b) and (3) which grants a secured party who perfects its security interest *before a creditor acquires a lien* upon the collateral by "attachment, levy, or the like" priority over a lien creditor. Furthermore, a landlord does not become a lien creditor until it levies for distress. Burnett v. Boukedes, 125 S.E.2d 10 (1962). In addition, the Court noted that § 27-39-260, which subordinated fully perfected nonpurchase money security interests to distress liens, had been repealed in 1988 and thus the State Legislature had made its intent very clear that UCC priority rules were to replace such statute. Thus, Petitioner's perfected security interest was determined to have priority over the landlord's lien.

D. South Carolina Court of Appeals

1. Attorneys Fees Governed by Promissory Note

In West v. Gladney, 533 S.E.2d 334 (S.C. Ct. App. 2000), West sold shares of stock to Gladney in consideration of \$150,000 cash and a promissory note for \$525,000. The note included a provision for the awarding of attorneys' fees of not less than 15% should the note be subject to collection by legal proceedings, which amount was to be added to the amount due on the note. When Gladney defaulted on the note, West sued him and the trial court granted West summary judgment and \$50,000 as "reasonable" attorneys' fees. West appealed the amount of the fees allowed, claiming that the note's provisions should determine the amount of the fees. The Court of Appeals reaffirmed the rule in South Carolina that "[w]hen a note provides for attorneys' fees at a specific rate in the event collection becomes necessary, the amount of attorneys' fees is governed by the contract." See Dedes v. Strickland, 414 S.E.2d 134 (S.C. 1992); Nationsbank v. Scott Farm, 465 S.E.2d 98 (S.C. Ct. App. 1995).

2. Consent for Purposes of Mechanics' Liens

In F&D Elec. Contractors, Inc. v. Powder Coaters, Inc., 537 S.E.2d 285 (S.C. Ct. App. 2000), the South Carolina Court of Appeals discussed the requisite element of consent under the mechanic's lien statute which permits a laborer to obtain a lien upon a building when the laborer performs the work "by virtue an agreement with, or consent of, the owner of the building." S.C. Code Ann. § 29-5-10 (Law. Co-op. 1991). In this case, F&D performed electrical work for Powder Coaters (the "Tenant"), who leased a portion of a building from BG Holding Company (the "Owner"). When Tenant failed to pay for the work, F&D sought to foreclose on a mechanic's lien against the Owner's building. Owner contended that F&D was not entitled to a mechanic's lien because the Owner had not furnished the necessary consent required by § 29-5-10(a). While no case law exists in the State construing the mechanic's lien consent requirement in a landlord-tenant context, the court considered supreme court case law construing the consent requirement of § 29-5-10(a) and concluded that "consent in the landlord-tenant context requires more than the lessor's mere recognition that the lessee will improve the leased property or acknowledgment of the lessee's selection of the laborer to perform the improvement. To subject the owner's property to a mechanic's lien when the owner merely acknowledges the lessee's selection of a contractor effectively subjects the owner's property to a lien for 'acquiescing in a state of things already in existence,' which the supreme court has repeatedly deemed insufficient to constitute the consent required under section 29-5-10."

The court found that there was no evidence in the record that Owner consented to Tenant's contract with F&D and that the Owner's mere recognition that Tenant would be improving the property and acknowledgment of Tenant's selection of the contractor did not establish the requisite consent under § 29-5-10.

3. Equitable Interest Exists in Installment Sales Contract

In Lewis v. Premium Inv. Corp., 535 S.E.2d 139 (S.C. Ct. App. 2000), the Court of Appeals held that a purchaser under an installment contract possesses an equitable interest in the property purchased as well as an ancillary redemption right which may prevent forfeiture or foreclosure. In 1976, Lewis entered into an installment sales contract to buy land from Premium Investment Corporation ("Premium"), which contract gave Premium the right to keep all amounts previously paid by Lewis as rent in the event of a default by Lewis. Lewis moved a mobile home onto the property and made all of his monthly payments until July 1988. In October 1989, Premium mailed Lewis a notice of cancellation for nonpayment requesting that Lewis remove his personal property from the land. Lewis contacted Premium in 1992 in an effort to resume his payments to Premium but Premium never responded. Lewis then sent a check to Premium in 1996 in an attempt to settle the debt. When Lewis still did not receive any response from Premium, Lewis brought an action for specific performance under the contract, and Premium counterclaimed alleging that upon Lewis' default the contract had been terminated and that the property was subject to strict forfeiture because Lewis never possessed an equitable interest in the land .

Looking to a North Carolina case with similar facts wherein the NC court recognized an equitable interest of the installment sales contract vendee and compared such vendee's rights to that of a mortgagor which allowed the vendee to redeem his interest under the contract to prevent

forfeiture, the Court of Appeals reversed the lower court's ruling and remanded for the master to enforce Premium's right to seek forfeiture or foreclosure *subject to* Lewis' right of redemption.

7. Notice of Cancellation Required to be Given to Loss Payee

In Auto Now Acceptance Corp. v. Catawba Ins. Co., 537 S.E.2d 553 (S.C. Ct. App. 2000), the South Carolina Court of Appeals adjudicated a case involving a cancellation of auto insurance by a premium service company, which company properly notified the insureds of its intent to cancel the insurance due to nonpayment of premiums but failed to notify the loss payee. In this case, the purchase price of a Maxima was financed by Auto Now Acceptance Corporation ("Auto Now"), which required that the purchasers maintain auto insurance and list Auto Now as the loss payee. The purchasers obtained the insurance from Catawba and financed the purchase of same through a premium service company. When the purchasers failed to pay their insurance premiums, the premium finance company canceled the policy after notifying the insureds. Auto Now was never informed of the policy cancellation. Two months later, the Maxima was destroyed in a fire. When Auto Now sought reimbursement under the insurance policy for the \$3,500 value of the car, Catawba refused to pay asserting the insurance contract was not in effect at the time of the fire. Auto Now brought this action alleging it was not properly notified of the cancellation.

Catawba argued that it did not have to notify Auto Now, as loss payee and mortgagee, because under the insurance contract it was required to give "the same advance notice of cancellation to the loss payee as we give to the named insured." Thus Catawba argued that because it did not have to notify the insureds (because the premium insurance company had already notified the insureds), Catawba argued that the provisions of the contract relieved Catawba from any duty to notify the loss payee. In addition, Catawba argued that the regulations governing premium service companies (see 25A S.C. Code Regs. 69-13(V)(B)(3)(1976)) relieved it from any further notice to the loss payee/mortgagee because the insured had already received the required notice.

However, the court did not believe the regulation was intended to, nor did it literally purport to, affect the rights of a mortgagee. In fact, § 38-39-90 sets out the manner in which a premium service company may cancel an insurance policy, and subsection (d) supports the position that the rights of a mortgagee to notice under a loss payable clause are not affected by the statutes or regulations governing premium service companies. Therefore, the court ordered Catawba to pay Auto Now the \$3,500 as reimbursement for its security interest in the Maxima.

8. Purchase Money Note Found an Obligation of the Partnership

In Kuznik v. Bees Ferry Assocs., 538 S.E.2d 15 (S.C. Ct. App. 2000), Kuznik sold a tract of land to Hoffman and the newly formed real estate partnership, Bees Ferry Associates (the “Partnership”), in November 1988. The Partnership, which was formed solely for the purpose of developing and eventually leasing or selling this land, signed a seven-year purchase money mortgage and Hoffman personally guaranteed the note and mortgage in the event the Partnership defaulted. The Partnership made payments on the note through October 1996 by requiring annual capital calls to be paid by the capital partners. When the Partnership no longer found the land to be of benefit to them, they voted to discontinue the payments on the note at a meeting in which Hoffman was not present. After giving the Partnership an opportunity to cure the default (which the Partnership refused), Kuznik sought foreclosure of his mortgage as well as a deficiency judgment against Hoffman individually, as guarantor of the note. Hoffman in turn sued the Partnership and the individual partners under various causes of action, including breach of fiduciary duty and breach of the partnership agreement.

The Court of Appeals concluded that the non-recourse purchase money note was an obligation of the Partnership. In its discussion of the non-recourse status of the note, the court stated, “[t]he note was nonrecourse to the partners and the Partnership. While this may have removed the economic incentive for the Partnership to make the payments, it did not remove the contractual obligation.” The court held that the Partners had breached their fiduciary duty to Hoffman, the guarantor partner, by defaulting on their payments on the note and allowing the property to be taken in forfeiture. While the Partnership had authority to “dispose” of property under the partnership agreement, permitting assets to be sold in foreclosure was not a contemplated means of disposal considering that the sole purpose of the Partnership was to acquire, hold, develop, and sell the land, the Partnership’s primary asset. The court also found that the partners breached the partnership agreement because they failed to pay their required capital call payments. Finally, the court held that the capital call partners owed Hoffman a duty of good faith and the highest loyalty which they violated by defaulting on the loans and placing the entire burden of their payment on Hoffman. While the court determined that the business judgment rule *may* apply in the partnership context, it found that such rule was not applicable in this case to protect the partners because the partners had engaged in self-dealing by placing their interests above those of Hoffman.

III. REVISED ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE

The National Conference of Commissioners on Uniform State Laws (“NCCUSL”) and the American Law Institute (“ALI”) have proposed and agreed upon a revised version of Article 9 (“Revised Article 9”) of the Uniform Commercial Code (the “UCC”). Revised Article 9 is scheduled to be effective July 1, 2001 (the “Effective Date”). As of December 31, 2000, twenty-nine (29) states have enacted Revised Article 9 and it is being introduced in the state legislatures of Missouri and New Jersey in 2001. SB 1408, a bill introduced by Senator Holland in the Spring of 2000 and placed before a subcommittee of Senate Judiciary, included a proposal for the State’s adoption of Revised Article 9. However, the extensive SB 1408 (which also included proposed

revisions to UCC Articles 2A and 8) was introduced near the end of the legislative session and did not have adequate time for consideration; therefore, SB 1408 failed. However, it is expected that a virtually identical bill to SB 1408 will be introduced in the 2001 Legislative Session (the Senate did not permit pre-filing this year). It is also anticipated that the new bill will include modifications to UCC Article 5 (Letters of Credit) to correspond with the provisions of Revised Article 9.

A. Significant Changes in Article 9³

The three primary changes promulgated by Revised Article 9 are (i) centralized filing in the state of the debtor's location with the only local filings occurring in the real estate records for fixtures; (ii) additional categories of collateral and revised definitions of existing collateral categories; and (iii) choice of law rules determined by the state where the debtor is located. With respect to the central filing requirement, the new rule requires a creditor to file its financing statement as follows: (i) file in the central filing office of the state in which the debtor entity is formally registered; (ii) if the debtor entity is not registered in the state, file where the debtor entity has its chief executive office; and (iii) in the case of an individual, file in the central filing office of the state of such individual's principal residence. Compare this to S.C. Code Ann. § 36-9-401(6) which deems the location of a debtor entity to be the state in which it had its chief executive office and for an individual looked first to the debtor's place of business (and if none, to debtor's residence). The centralized filing requirement eliminates the need to file in local offices for farm-related collateral, timber to be cut, minerals, consumer products, etc. which is currently required under S.C. Code Ann. § 36-9-401(1). States such as South Carolina that require local filings for these special types of collateral may choose to maintain filings in such local offices instead of accepting the Revised Article 9 centralized filing requirement wholesale.

Second, Revised Article 9 expands the scope of current Article 9 by increasing the kinds of property in which a security interest can be taken by a creditor. For example, sales of payment intangibles and promissory notes, security interests created by governmental debtors, healthcare insurance receivables, consignments, commercial deposit accounts, and commercial tort claims are included as collateral in Revised Article 9. In addition, there have been changes in definitions from current Article 9 that will result in some collateral being classified differently under Revised Article 9. For example, collateral deemed a "general intangible" under current Article 9 may be classified

³This part of the outline was compiled in part from a two-part article published in the spring and summer of 2000 in The Business Lawyer. See Harry C. Sigman & Edwin E. Smith, Revised U.C.C. Article 9's Transition Rules: Insuring a Soft Landing, 55 BUS. LAW. 1065 (May 2000) and Harry C. Sigman & Edwin E. Smith, Revised U.C.C. Article 9's Transition Rules: Insuring a Soft Landing—Part II, 55 BUS. LAW. 1763 (Aug. 2000).

as an “account” under Revised Article 9 (many payment rights classified as “general intangibles” under current Article 9 are reclassified as “accounts” under Revised Article 9).

The final significant change brought about by Revised Article 9 involves the choice of law rules. In Revised Article 9, the debtor’s location, rather than the location of the collateral, dictates the law to be applied in determining the law governing perfection, effect of perfection, and a creditor’s priority.

B. Transition Rules

Part 7 of Revised Article 9 sets forth the transition rules and unless otherwise provided in Part 7, Revised Article 9 applies on and after the Effective Date to all transactions within its scope including those entered into prior to the Effective Date. Rev. U.C.C. § 9-702(a). The transition rules assume that all jurisdictions will have enacted Revised Article 9 prior to the Effective Date.

1. Financing Statements

Because Revised Article 9 adds new collateral categories and changes definitions for other categories, some collateral will be classified differently under Revised Article 9. Financial statements filed prior to the Effective Date must eventually be revised to include the new categories of collateral and to reflect the definitional changes. For financing statements filed prior to the Effective Date, a creditor does not have to immediately amend the collateral indication on the Effective Date but must do so at the time it files either a continuation statement in the ordinary course or the “in lieu initial financing statement” discussed below. Because creditors may or may not choose to amend their financing statements until they are due to lapse, searchers will face uncertainty as to whether or not the collateral descriptions include, or will subsequently be amended to include, the changes made by Revised Article 9. This period of uncertainty will not expire until June 30, 2006.

While creditors do not have a duty to amend their pre-Effective Date financial statements until the filing of a continuation statement in the ordinary course, it is prudent to amend your forms of financing statements now to ensure your security interest is covered under both sets of definitions. For example, a financing statement filed January 26, 2001 under current Article 9 will have a narrower scope than if you amend the statement to include the new categories of collateral from Revised Article 9, and it will likely have incorrect collateral indications because of definitional changes (*i.e.*, if collateral is indicated as a “general intangible” instead of the new term “account”). Also, additional collateral categories such as “instruments” which cannot be perfected by filing under current Article 9, can be perfected by filing under Revised Article 9.

2. Security Agreements

Pre-Effective Date security agreements will be interpreted based on how the definitions and references to Article 9 are stated in such agreements. If a particular security agreement refers to the Article 9 defined terms “as they exist from time to time” or “as may be amended,” then the broader

scope of Revised Article 9 will be deemed to be the parties' intent on and after the Effective Date. However, if there are no references to amendments, then current Article 9 rules and definitions will apply unless and until the security agreement is amended by the parties. Creditors and their advisors may want to amend their security agreements already in place as well as forms to be used in the future prior to the Effective Date to include the additional collateral categories and to refer to both the definitions of collateral "as defined in current Article 9 and as otherwise classified in Revised Article 9" in order to give themselves the broadest scope possible and avoid confusion once the Effective Date arrives.

3. One-Year Grace Period

If a creditor has an enforceable, perfected security interest under the laws of current Article 9 but such interest would not be enforceable or perfected under Revised Article 9, the creditor has one year in which to achieve enforceability and perfection pursuant to Revised Article 9 requirements. For example, if you perfected your security interest in instruments by taking possession of such instruments (as required under current Article 9), and Revised Article 9 becomes effective in your state, then you have one year in which to meet the Revised Article 9 requirements for perfection of instruments which is by filing a financing statement. A creditor cannot rely on its possession of the instrument to perfect its interest after the one-year grace period expires.

The one-year grace period does not apply if the security interest was perfected *by filing* under current Article 9 but which security interest would not be perfected under the new rules of Revised Article 9. For instance, if a SC corporation files its pre-Effective Date financing statement for its security interest in accounts in the NC Secretary of State's Office where the corporation's chief place of business is located, this would *not* perfect the security interest under Revised Article 9's rules, which look to a registered debtor entity's place of organization as the location for filing. In this case, the security interest remains perfected until the lapse of the financing statement in the ordinary course or June 30, 2006, whichever is sooner. At this time, the creditor would need to file an initial financing statement in lieu of a continuation statement (an "In Lieu Initial Financing Statement") in the jurisdiction and office prescribed by Revised Article 9, as discussed below.

4. In Lieu Initial Financing Statements

If the original or even continued financing statement is filed in the incorrect jurisdiction and or office required by Revised Article 9, a regular continuation statement filed upon the lapse of the original financing statement will not suffice to perfect the security interest. The secured party will need to file a new initial financing statement in the correct office and jurisdiction in lieu of the regular or "true" continuation statement— hence the name "In Lieu Initial Financing Statement."

To adequately serve the notice function of financing statements, the In Lieu Initial Financing Statement must specifically reference the original financing statement and the most recent continuation statement, if any, by filing office, date(s) of filing, and file numbers. The In Lieu Initial Financing Statement must also indicate that the original financing statement is still effective. The In Lieu Initial Financing Statement may be filed *at any time* on or before the scheduled lapse date— there is no need to wait until you are within the 6-month period prior to the lapse date. (Compare

this to “true” continuation statements which must be filed within the 6-month period prior to the scheduled lapse date.)

****NOTE:** Regardless of whether you file a true continuation statement (if filing was in the correct jurisdiction and office as required by Revised Article 9) or an In Lieu Initial Financing Statement, you must amend the collateral categories and definitions per Revised Article 9 at this time to reflect what is intended to be covered by the financing statement based on the meanings of the terms under Revised Article 9.

Finally, the information provided in all financing statements, true continuation statements, and In Lieu Initial Financing Statements, must conform to Rev. U.C.C. § 9-516(b). The additional information not previously required under current Article 9 includes the following: (i) whether the debtor is an individual or an organization; (ii) if the debtor is an organization, the type and jurisdiction of the organization; and (iii) the identification number issued to the organization by the jurisdiction (or if none, state “none”).

5. Pre-Effective Date Filings in Local Offices

Revised Article 9 requires central filing *unless* the financing statement is filed as a fixture filing or covers as-extracted collateral or timber to be cut. Rev. U.C.C. § 9-501. For these latter types of collateral, you will file in the local office where the real estate records are recorded. If the State adopts Revised Article 9, security interests in farm-related products and consumer goods will no longer be filed in the county in which the debtor resides (or if debtor is out of state, the county where the goods are kept), and security interests in crops will no longer be filed in the county where the land is located; instead such interests will be filed at the Secretary of State’s Office. *Cf.* S.C. Code Ann. § 36-9-401.

In order to amend or continue a pre-Effective Date financing statement that was originally filed in a local office that is no longer accepting such filings under Revised Article 9, you follow the same procedure outlined above for an In Lieu Initial Financing Statement. It is also advisable to obtain certified copies of all local filings for your own records in the event that the local office closes up after the enactment of Revised Article 9.

IV. UNIFORM ELECTRONIC TRANSACTIONS ACT⁴

The Uniform Electronic Transactions Act (“UETA”) was approved by NCCUSL in July 1999 at its annual meeting and has been enacted by 23 states as of December 31, 2000, with legislation pending in the District of Columbia and New Jersey for the 2001 legislative session. South Carolina has not yet adopted UETA and it is not likely to be introduced this Spring because of the focus on the UCC revisions. However, with the push towards a paperless society and the cost-effectiveness and ever increasing popularity of electronic commerce, it is likely that the State will adopt UETA in the near future.

UETA allows the use of electronic records and electronic signatures in any transaction except transactions subject to the UCC. Like E-SIGN, the primary objective is to provide a means to effectuate transactions when electronic signatures or records are used and establish the legal equivalence of such electronic records and signatures to paper writings and manually-signed signatures. Unlike E-SIGN however, UETA deals with several additional issues such as attribution (determining whose signature is attached and attributing same to a particular individual), sending and receiving of electronic records, and admissibility of electronic records into evidence. Also, UETA allows a broader array of “transferable records,” applying to all documents which would be either a promissory note under UCC Article 3 or a document of title under UCC Article 7. (Compare this to E-SIGN’s narrower application to promissory notes secured by real property only.)

Finally, note that UETA differs from E-SIGN in several other regards, specifically the consumer protection provisions and powers of state governments. For more information on the details of UETA, the differences between UETA and E-SIGN, and a detailed discussion of the extent E-SIGN preempts UETA, see the article entitled *A Preliminary Analysis of Federal and State Electronic Commerce Laws* written by Patricia Brumfield Fry. This article may be found at the following link to NCCUSL’s web page: www.nccusl.org/uniformact_articles/uniformacts-article-ueta.htm.

⁴See footnote 2 supra. In addition, information on UETA was gleaned from NCCUSL’s web page at www.nccusl.org.