

### **Final Report of the Consumer Issues Subgroup**

**To:** Ed Smith and Steve Harris, Chair and Reporter, Committee on the UCC and Emerging Technologies

**From:** Bill Henning, Chair, Consumer Issues Subgroup

**Date:** February 25, 2021

The Consumer Issues Subgroup has developed the following recommendations for the full committee to consider.

1. The Subgroup recommends that the committee consider limits on the use of remote disablement in order to protect the health and safety of debtors and other individuals. There are many possible ways of achieving this goal but the Subgroup recommends that the committee consider the approach set forth in Appendix 1, which is in redline to show the changes to the current text and comments and which contains explanatory margin comments.
2. The Subgroup recommends that the committee consider whether the definition or the comments need to be updated to recognize that what is conspicuous in a high-tech environment might be different for consumers than for businesses. The Subgroup takes no position on whether the goal can be accomplished by a comment change alone or whether a change to the text of the definition is also necessary but we agree that the suggestions in Appendix 2 reflect the core of what the Subgroup hopes to accomplish.

A member of the Subgroup submitted the following suggestion, which the main committee may wish to consider: A contract term required to be conspicuous should not be enforceable unless initialed. This is particularly important in an electronic document and the software should not permit signature/acceptance of the entire document unless the conspicuous provisions have been initialed.

3. The Subgroup recommends that the committee consider several issues related to virtual currency but takes no position with regard to the ultimate decision:
  - The committee should consider whether to exclude from the scope of Article 9 security interests in virtual currency in consumer transactions, or exclude security interests in accounts containing virtual currency in consumer transactions (as Section 9-109(d)(13) does for deposit accounts in consumer transactions).
  - If the committee does not create an exclusion, it should consider whether a security agreement should be allowed to describe by type virtual currency or accounts containing virtual currency in consumer transactions (as Section 9-108(e) does for consumer goods, a security entitlement, a securities account, or a commodity contract).
4. The Subgroup is concerned that through willful misconduct or a design flaw, more than one person might claim to be the transferee of an electronic instrument. The maker might be unaware of the problem and pay the first apparently qualified person to request payment. How can the maker determine if a party claiming to be the "person in control" is indeed the proper person to

pay? The Subgroup is aware that the main committee is already considering loss allocation rules that protect account debtors from the risk of duplicate payment and understands that the committee will also address the issue in the context of electronic instruments. The Subgroup wishes to express its support for that effort.

A member of the Subgroup suggests that the issue is equally significant in the context of accounts arising from consumer transactions and recommends that the main committee consider excluding such accounts from the application of Sections 12-104(f) and (g), 12-106, and 9-107A.

5. The Subgroup considered issues relating to the mobile deposit of checks and a customer's duties under Section 4-406. It was advised that these issues are already under consideration by the Payment Issues Subgroup wish to express its support for that effort. The specific concerns of the Consumer Issues Subgroup are reproduced here as an information item for the Payment Issues Subgroup.

- *Issues arising from mobile deposit of checks.* The Subgroup discussed two scenarios that may arise from the practice of depositing a check by scanning it on a computer or smart phone. In the first scenario, a check is deposited twice (first remotely, and later in paper form). This opens up the possibility that the drawer may have to pay twice. In the second scenario, the remote depositor destroys the paper check but the image for some reason never reaches the depositor's bank. The Subgroup recommends that UCC be revised to protect the drawer in the first scenario and the depositor in the second scenario.
- *Customer's duties under Section 4-406.* Section 4-406 addresses a customer's duty to report an unauthorized signature or alteration of an item shown on a statement within a reasonable time and the consequences of failing to do so. Customers are now able to view their transactions online and the Subgroup recommends that we consider the impact of this on the customer's duties. For examples, should the information be deemed to be "available" to a customer that does not use online banking, and how does immediate online access to transactions affect the "reasonable time" requirement?

## APPENDIX 1

### SECTION 9-602. WAIVER AND VARIANCE OF RIGHTS AND DUTIES.

Except as otherwise provided in Section 9-624, to the extent that they give rights to a debtor or obligor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in the following listed sections:

\* \* \*

(6) Section 9-609(a)(3) to the extent it precludes disposition of consumer goods on a debtor's premises.

(7) Section 9-609(b)(2) to the extent that it imposes upon a secured party that takes possession of or disables collateral without judicial process the duty to do so without breaching breach of the peace or endangering the health or safety of any individual;

[Renumber subsequent paragraphs]

**Commented [WHH1]:** This change was made to create a parallel sentence structure. The phrase "breaching the peace" is not new – it is used in current 9-603(b).

### SECTION 9-603. AGREEMENT ON STANDARDS CONCERNING RIGHTS AND DUTIES.

(a) **[Agreed standards.]** The parties may determine by agreement the standards measuring the fulfillment of the rights of a debtor or obligor and the duties of a secured party under a rule stated in Section 9-602 if the standards are not manifestly unreasonable.

**(b) [Agreed standards inapplicable to breach of peace.]** Subsection (a) does not apply to the duty under Section 9-609 to refrain from breaching the peace.

**Commented [WHH2]:** A policy decision that we need to make is whether parties should be permitted to agree on procedures in the case of endangerment, as by providing immediate instructions to the debtor or a person designated by the debtor on how to operate the collateral until the danger has passed.

### SECTION 9-609. SECURED PARTY'S RIGHT TO TAKE POSSESSION AFTER DEFAULT.

(a) **[Possession; rendering equipment unusable; disposition on debtor's premises.]** After default, a secured party:

(1) may take possession of the collateral; ~~and~~

(2) without removal from a debtor's premises, may render equipment unusable;

(3) may remotely disable collateral wherever located; and

(4) may and dispose of collateral goods other than consumer goods on a debtor's premises under Section 9-610.

(b) **[Judicial and nonjudicial process.]** A secured party may proceed under subsection (a):

(1) pursuant to judicial process; or

(2) without judicial process, if it proceeds without breaching breach of the peace, and if proceeding under subsection (a)(3) without endangering the health or safety of any individual.

(c) **[Assembly of collateral.]** If so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties.

**Commented [WHH3]:** We need to make a policy decision here. Under current law a secured party can render "equipment" unusable but can dispose of "collateral" on the debtor's premises. Current Comment 6 suggests that the drafters had in mind only a disposition of equipment but the language is broader. There are three ways we can handle this: 1) leave the provision as is since no change is necessitated by emerging technologies; 2) limit disposition on a debtor's premises to equipment; or 3) permit disposition of goods (not all collateral) on a debtor's premises, in which case we probably should exclude consumer goods. The current draft takes the third approach and makes the preclusion with regard to consumer goods nonwaivable under 9-602. For an example of other goods that might be disposed of in this manner, see the proposed revision to Comment 6 below.

### Official Comment

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3. Judicial Process; Breach of Peace. Subsection (b) permits a secured party to proceed under this section without judicial process if it does so “without ~~breaching~~~~breach of~~ the peace.” Although former Section 9-503 placed the same condition on a secured party’s right to take possession of collateral, subsection (b) extends the condition to the rights provided in subsections (a)(2) ~~and (a)(3) as well~~. The section also permits a secured party to disable collateral remotely as long as this does not endanger the health or safety of an individual. The prohibition on endangerment applies only to subsection (a)(3).

Like former Section 9-503, this section does not define or explain the conduct that will constitute a breach of the peace, leaving that matter for continuing development by the courts. The same is true for conduct that endangers the health or safety of an individual. In considering whether a secured party has ~~breached~~~~engaged in a breach of~~ the peace ~~or endangered the health or safety of an individual~~, however, courts should hold the secured party responsible for the actions of others taken on the secured party’s behalf, including independent contractors engaged by the secured party to take possession of or remotely disable collateral.

This section does not authorize a secured party who repossesses without judicial process to utilize the assistance of a law-enforcement officer. A number of cases have held that a repossessing secured party’s use of a law-enforcement officer without benefit of judicial process constituted a failure to comply with former Section 9-503.

4. Damages for Breach of Peace. Concerning damages that may be recovered based on a secured party’s breach of the peace in connection with taking possession of collateral, see Section 9-625, Comment 3.

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6. Secured Party’s Right to Disable Equipment on Debtor’s Premises and Dispose of ~~Goods~~~~Equipment~~ on Debtor’s Premises. In the case of some collateral, such as heavy equipment, the physical removal from the debtor’s plant and the storage of the collateral pending disposition may be impractical or unduly expensive. This section follows former Section 9-503 by providing that, in lieu of removal, the secured party may render equipment unusable or may dispose of ~~it~~~~collateral~~ on the debtor’s premises. It also permits the disposition of other goods other than consumer goods on a debtor’s premises, for example a disposition sale of a crop harvested by a farmer and stored in a silo on the farm. Unlike former Section 9-503, ~~however~~, this section explicitly conditions these rights on the debtor’s default. Of course, this section does not validate unreasonable action by a secured party. Under Section 9-610, all aspects of a disposition must be commercially reasonable.

**Commented [WHH4]:** This needs to be revised, along with the corresponding comment to 9-625.

7. Remote Disablement of Collateral. In some circumstances, a secured party may be able to disable collateral remotely, such as by withholding an activation code or electronically deactivating the collateral. While the prohibition on breaching the peace applies to remote disablement, that prohibition is concerned principally with the effect of conduct occurring in close proximity to the collateral, the debtor, or third parties. Remote disablement involves no physical contact with the collateral, and the secured party's actions in disabling the collateral might occur far away from the debtor and any third party potentially affected thereby. Nevertheless, remote disablement of collateral could potentially endanger the health or safety of an individual debtor or another individual. For example, disabling a vehicle while it is in a remote or dangerous location or disabling a refrigerator containing a perishable medicine or organ could create a danger to health or safety. A secured party is not authorized under this section to disable collateral in a way that creates such a danger, regardless of whether any injury occurs.

There is a potential for overlap between subsections (a)(2) and (a)(3) but a secured party's conduct will fall under only one of those provisions. Subsection (a)(2) covers only non-remote disablement and applies only to equipment whereas subsection (a)(3) covers only remote disablement and extends to other types of collateral. A secured party that remotely disables equipment located on a debtor's premises is proceeding under subsection (a)(3).

87. Debtor's Agreement to Assemble Collateral. This section follows former Section 9-503 also by validating a debtor's agreement to assemble collateral and make it available to a secured party at a place that the secured party designates. Similar to the treatment of agreements to permit collection prior to default under Section 9-607 and former 9-502, however, this section validates these agreements whether or not they are conditioned on the debtor's default. For example, a debtor might agree to make available to a secured party, from time to time, any instruments or negotiable documents that the debtor receives on account of collateral. A court should not infer from this section's validation that a debtor's agreement to assemble and make available collateral would not be enforceable under other applicable law.

89. Agreed Standards. Subject to the limitation imposed by Section 9-603(b), this section's provisions concerning agreements to assemble and make available collateral and a secured party's right to disable equipment and dispose of collateral on a debtor's premises are likely topics for agreement on standards as contemplated by Section 9-603.

**Commented [WHH5]:** This will need to be modified if we permit the parties to agree on standards related to remote disablement.

## APPENDIX 2

### SECTION 1-201. GENERAL DEFINITIONS.

(b) Subject to definitions contained in other articles of [the Uniform Commercial Code] that apply to particular articles or parts thereof:

\* \* \*

(10) “Conspicuous”, with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is “conspicuous” or not is a decision for the court. Conspicuous terms include the following:

(A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

(B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

#### Official Comments

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10. “Conspicuous.” Derived from former Section 1-201(10). This definition states the general standard that to be conspicuous a term ought to be noticed by a reasonable person against which it is to operate. What a reasonable person ought to notice may vary depending upon the market in which a transaction occurs. For example, a merchant with respect to goods of the kind that wishes to disclaim the implied warranty of merchantability may sell to business buyers, consumer buyers, or both, and even within those broad markets there might be buyers who can be expected to have greater and lesser levels of sophistication. When a business uses the same standard form documents in transactions both with other businesses and with consumers, a term in the documents might be conspicuous to other businesses (because it is so presented that a reasonable business person against whom it is to operate ought to have noticed it) but not be conspicuous to consumers (because it is not the case that a reasonable consumer against whom it is to operate ought to have noticed it). Concerns over conspicuousness are particularly acute in online transactions.

Requiring that a term be conspicuous blends a notice function (the term ought to be noticed) and a planning function (giving guidance to the party relying on the term regarding how that result can be achieved).

Whether a term is conspicuous is an issue for the court. Subparagraphs (A) and (B) set out several methods for making a term conspicuous. ~~Requiring that a term be conspicuous blends a notice function (the term ought to be noticed) and a planning function (giving guidance to the party relying on the term regarding how that result can be achieved).~~ Although these paragraphs indicate some of the methods for making a term attention-calling, the test is whether attention can reasonably be expected to be called to it. The statutory language should not be construed to permit a result that is inconsistent with that test.

**Commented [WHH6]:** The committee should consider deleting paragraphs (A) and (B) and discussing particular methods of achieving conspicuousness in the comments. This would permit a more fulsome discussion of conspicuousness in an online environment. Such a discussion might differentiate between transactions involving a consumer (defined in Article 1) and a merchant (we might have to import the definition of merchant from Article 2).

If we follow this approach, the comments might make the point that the harder a person has to work to access a non-obvious term the less likely it is that the term is conspicuous with respect to that person. For example, there might be a difference between a situation in which a person can discover a term by clicking a single link and a situation in which the term can only be discovered by clicking more than one link.

Even if a term can be accessed by clicking a single link the comments might use the following example: “A disclaimer of implied warranties might not be conspicuous vis-à-vis a consumer if the only link to it says ‘Terms and Conditions’ and does not also mention ‘Disclaimer of Implied Warranties.’”

A discussion of the online environment might note that how words are displayed on a user’s screen depends on the user’s equipment and display settings and is not within the sole control of the party drafting the language. For example, a term that is seen easily when displayed on a 24-inch monitor may not be so noticeable when displayed on a cell phone. This is different from the paper environment, where the person supplying the form chooses how the relevant terms are displayed.

**Commented [WHH7]:** If we retain paragraphs (A) and (B), we might want to clarify whether they are safe harbors. This might require a textual change.