A CASE FOR CLARITY: INDICATION OF COLLATERAL

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Abstract

This article reviews different critiques of scholars and practitioners on the correctness of the Seventh and First Circuit Court of Appeals opinions in First Midwest Bank v. Reinbold, 938 F. 3d. 866, 100 U.C.C. Rep. Serv. 2d (7th Cir. 2019) cert. denied, 140 S. Ct. 1125, 206 L. Ed. 2d 189 (2020) and Financial Oversight & Management Board for Puerto Rico v. Andalusian Global Designate Activity Co., 914 F. 3d 694 (1st Cir. 2019), cert. denied, 140 S. Ct. 47, 205 L. Ed. 2d 29 (2019). These two decisions address the question as to whether an incorporation by reference to an unattached security agreement satisfies the "indication of collateral" requirement for a financing statement under section 9-502(a)(3) of Article 9 of the Uniform Commercial Code. Considering the fundamental importance of filing a financing statement to perfect a security interest under Article 9 of the Code, the conflicts and ambiguities raised in these commentaries warrant a clarification by the Commission on Uniform Commercial Laws. This article suggests that such a clarification can be effectively addressed through the issuance of a Commentary by the Commission of Uniform Laws' Permanent Editorial Board for the UCC.

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I. Introduction

The 2001 revisions to Article 9 of the Uniform Commercial Code (the "Code") included a number of improvements and efficiencies to the filing system under the Code.[1] Some of these improvements and efficiencies relate to the contents of the financing statement and what information is necessary for the filing to be considered "sufficient" under the Code.[2] There are three essential requirements for the content in the financing statement to be sufficient, as stipulated under section 9-502(a) of the Code. They include: (1) the "name of the debtor," (2) the "name of the secured party or a representative" of the secured party, and (3) that it "indicates the collateral covered by the financing statement."[3]

The Code includes specific provisions that describe how the financing statement sufficiently provides "the name of the debtor and secured party" under section 9-503,[4] and when information provided in the financing statement "sufficiently indicates the collateral" under

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[1] *See* U.C.C. § 9 (AM. L. INST. & UNIF. L. COMM'N (2010)).

[2] *Id*.

[3] § 9-502(a) of the Uniform Commercial Code ("Code"), which stipulates the contents of the financing statement, provides that "a financing statement is sufficient only if it: (1) provides the name of the debtor; (2) provides the name of the secured party or a representative of the secured party; and (3) indicates the collateral covered by the financing statement." *Id.* § 9-502(a). This represented a change from the prior version of this provision under former § 9-402(1). While the former version of this section, also required that the financing statement list the name of the debtor, the name of the secured party or its representative, it required "a statement indicating the types, or describing the items of collateral." *Id.* § 9-402 (1990).

[4] § 9-503 of the Code addresses ways to sufficiently provide names for the debtor and secured party. *Id.* § 9-503.

section 9-504.[5] It is this third requirement—that the financing statement sufficiently "indicates the collateral"—that is the focus of this article.

Section 9-504 describes two methods in which the financing statement can sufficiently indicate the collateral.[6] One method allows the use of very broad and non-specific language such as "all assets or all personal property" pursuant to subsection (2) of 9-504, known as a supergeneric indication of collateral.[7] The second method permits the filing creditor to use any of the more specific descriptions of collateral that are listed under section 9-108 of the Code, which explains the sufficiency of the description of collateral in the security agreement.[8]

The Official Comment to section 9-504 describes both methods for meeting the "indication of collateral" requirement as "two safe harbors."[9] The rationale for the inclusion of a "supergeneric" description as being sufficient for the financing statement is pragmatic: "Debtors sometimes create a security interest in all, or substantially all, of their assets. To accommodate this practice, paragraph (2) expands the class of sufficient collateral references to embrace "an indication that the financing statement covers all assets or all personal property."[10] This permitted method of indicating the collateral in the financing statement is not only practical for the broad security interest but makes it very easy for a filing creditor to meet the indication of collateral requirement of section 9-502.[11] The use of the

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[5] § 9-504 of the Code addresses the sufficiency of the indication of collateral in the financing statement. *Id.* § 9-504 ("A financing statement sufficiently indicates the collateral that it covers if the financing statement provides: (1) a description of the collateral pursuant to Section 9-108; or (2) an indication that the financing statement covers all assets or all personal property.").

[6] *Id*.

[7] *Id.* § 9-504(2).

[8] *Id.* § 9-504(1).

[9] *Id.* § 9-504 cmt. 2 ("This section provides two safe harbors. Under paragraph (1), a "description" of the collateral (as the term is explained in Section 9-108) suffices as an indication for purposes of the sufficiency of a financing statement.").

[10] *Id*.

[11] Some of the benefits of using the supergeneric description is to allow the filing to perfect any security interests between the debtor and secured creditor in collateral that may not be covered in the original security agreement but covered in a subsequent security agreement. By using the supergeneric description, the secured creditor is not required to file a new financing

"supergeneric" language in the financing statement is also sufficient to indicate collateral in the financing statement even if the security interest is narrow, although the filing's effectiveness in terms of perfection is limited to the collateral actually described in the security agreement.[12]

In cases where the actual security interest in collateral as described in the security agreement is limited and narrow, the safe harbor rule of subsection (1) of 9-504 permits the filing creditor to use that very same description of collateral in the security agreement, pursuant to section 9-108, as a sufficient indication of collateral for the financing statement.[13] Accordingly, it would generally follow that a filing creditor's use of this method to indicate collateral in the financing statement would be easy to satisfy by simply duplicating the more specific descriptions of collateral in a security agreement that "reasonably identify" collateral in the security agreement under section 108(b). The list of "examples" of descriptions that "reasonably identifies the collateral" under section 108(b) is not an exclusive list; however, the sufficiency of any description under section 108(b) must be one that "reasonably identifies what is described."[14] The list of descriptions that reasonably identify collateral includes: "(1) specific listing; (2) category; (3) . . . a type of collateral defined in the Uniform Commercial Code; (4) quantity; (5) computational or allocation formula or procedure: or (6) . . . *any method, if the identity of the collateral is objectively determinable*."[15]

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statement to cover a new type of collateral or to amend the original financing statement to include the new collateral. *See id.* Moreover, a supergeneric description will continue the perfection of the security interest in any proceeds of the original collateral pursuant to section 9-315(d)(3) of the Code. *See id.* § 9-315 cmt. 5, ex. 2.

[12] Comment 2 of section 9-504 states, "[o]f course, regardless of its breadth, a financing statement has no effect with respect to property indicated but to which a security interest has not attached." *Id.* § 9-504 cmt. 2. *See also id.* § 9-510 cmt. 2, ex. 1, on the extent of the effectiveness of an overbroad financing statement in perfecting a security interest in the collateral.

[13] As stated in comment 2 to 9-504, "This section provides two safe harbors . . . a 'description' of the collateral (as the term is explained in Section 9-108) suffices as an indication for purposes of the sufficiency of a financing statement." *Id.* § 9-504 cmt. 2.

[14] *Id.* § 9-108(a)–(b). ("Except as otherwise provided in subsections (c), (d), and (e), a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.").

[15] *Id.* § 9-108(b)(1)–(6) (emphasis added).

The first five examples of ways to sufficiently describe collateral under section 9-108(b) are clear and straight forward. However, the example described in subsection (b)(6) is less clear. It operates as somewhat of a catchall by stating that a description reasonably identifies the collateral by using "any other method, if the identity of the collateral is objectively determinable."[16] A financing statement that did not use the specifically listed examples for describing collateral under section 108(b)(1)-(5) and instead only incorporated by reference an unattached security agreement, identified by date and title, presented a question for the Seventh Circuit Court of Appeals, in *First Midwest Bank v. Reinbold* (*In re 180 Equipment, LLC*),[17] as to whether this would be a sufficient indication of collateral in the financing statement under subsection (1) of 9-504 on the grounds that the "identity of the collateral is objectively determinable" pursuant to section 9-108(b)(6).[18] The prior year, the First Circuit Court of Appeals also considered the sufficiency of a financing statement with an indication of collateral by means of an incorporation by reference to an unattached security agreement in *Financial Oversight & Management Board for Puerto Rico v. Andalusian Global Designated Activity Company (In re Financial Oversight and Management Board)*.[19]

In both cases, the Supreme Court denied petitions for certiorari.[20] The two decisions are factually distinct and have generated conflicting commentaries on whether incorporation by reference to an unattached security agreement is a sufficient indication of collateral in a financing statement. Because the indication of collateral in the financing statement is an essential requirement pursuant to sections 9-502 and 9-504 of the Code, it is very important to finally clarify whether an "incorporation by reference" to an unattached security agreement is a sufficient method to indicate collateral in the financing

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[16] *Id.* § 9-108(b)(6).
[17] 938 F.3d. 866 (7th Cir. 2019) *cert. denied*, 140 S. Ct. 1125 (2020).
[18] *Id*. at 871.
[19] 914 F. 3d 694, 710 (1st Cir. 2019), *cert. denied*, 140 S. Ct. 47 (2019). ("Our holding of an insufficient collateral description depends heavily on the facts, where a) the collateral is not described, even by type(s), in the 2008 Financing Statements or attachments; b) the 2008 Financing Statements do not tell interested parties where to find the referenced document (the Resolution) which contains the fuller collateral description; and c) the Resolution is not at the UCC filing office.").
[20] *See In re* Fin. Oversight & Mgmt. Bd. For P.R., 140 S. Ct. 47, 47 (2019); *see also* Reinbold v. First Midwest Bank, 140 S. Ct. 1125, 1125 (2020).

statement. This article will explore: (1) the two circuit court of appeals decisions on this question, (2) the conflicting commentaries about the significance of these decisions on the question, and (3) suggest a possible clarification of this important question through the issuance of a Commentary by the Permanent Editorial Board of the UCC.

II. Indication of Collateral by Reference: Sufficient or Not?

A. *In re 180 Equipment, LLC*, 938 F. 3d. 866, 67 Bankr. Ct. Dec (CRR) 177, 100 U.C.C. rep. Serv. 2d 37 (7th Cir. 2019) *cert. denied*, 140 S.Ct. 1125 (2020)

In re 180 Equipment, LLC involved an interlocutory appeal to the Seventh Circuit Court of Appeals from a lower bankruptcy court ruling that a reference to an unfiled security agreement, without any additional description of the collateral, in the financing statement was not a sufficient indication of collateral as required by section 9-502 of the Illinois Uniform Commercial Code to effectively perfect the secured creditor's security interest.[21] On appeal, the Seventh Circuit Court reversed and remanded the Bankruptcy Court's decision based

[21] First Midwest Bank v. Reinbold, 591 B.R. 353 (Bankr. C.D. Ill. 2018). The Court stated: "[T]o fulfill the purpose of the notice filing system, a financing statement must stand on the description of collateral contained within the four corners of the filed document, including any filed attachments. Given that the description of collateral in a financing statement cannot, for purposes of perfection, be corrected or expanded upon by reference to the underlying security agreement, the same policy dictates that the collateral description may not be supplied in its entirety by reference to the assets described in an unfiled security agreement." *Id*. at 363; The effectiveness of the financing statement filed by First Midwest to perfect its security interest was raised in the Chapter 7 bankruptcy proceeding of 180 Equipment, LLC, by the trustee in bankruptcy seeking to avoid the claim of First Midwest in the collateral of 180 Equipment to secure its $7.6 million loan pursuant to section 544 of the Bankruptcy Code. The trustee claimed that First Midwest's security interest was not perfected because the description of collateral in the financing statement only referred to the security agreement and did not include a copy of the actual security agreement with the financing statement. Thus, the trustee argued that this incorporation by reference was insufficient to provide a description that "reasonably identified" the collateral as required under section 9-108 of Article 9. *Id*. at 358.

on a "plain and ordinary reading of the Illinois statute and how courts typically treat financing statements."[22]

The debtor, 180 Equipment, obtained a business loan from secured creditor, First Midwest Bank, and granted it a security interest in various business assets specifically described in the security agreement in 26 categories, including Article 9 collateral categories "accounts, cash, equipment, instruments, goods, inventory, and all proceeds of any assets."[23] There was no dispute regarding the adequacy of this description of collateral in the security agreement in meeting the reasonable identification standard of section 9-108.[24] However, the financing statement's "indication of collateral" requirement of section 9-502, as prescribed under section 9-504, did not include the language used in the security agreement, but simply referenced the security agreement's description of collateral as "All Collateral described in First Amended and Restated Security agreement dated March 9, 2015 between Debtor and Secured Party."[25] In its ruling in favor of the Trustee, the Bankruptcy Court stated that this description of the collateral in the financing statement failed to give third parties a "particularized kind of notice that is required of the financing statement as the starting point for further inquiry."[26]

In its *de novo* review of the question on appeal, the Seventh Circuit Court reviewed the Illinois courts' interpretive construct, which begins with the "plain and ordinary meaning" of the statute where the language is "clear and unambiguous."[27] The Court focused

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[22] *In re* 180 Equipment, LLC, 938 F.3d at 868 ("The bankruptcy court ruled that a financing statement fails to perfect a security interest unless it ''contains'' a separate and additional description of the collateral. Given the plain and ordinary meaning of the Illinois statute, and how courts typically treat financing statements, we disagree and reverse.").

[23] *Id*. at 869 ("These were described in twenty-six listed categories of collateral, such as accounts, cash, equipment, instruments, goods, inventory, and all proceeds of any assets.").

[24] *Id*. at 874 ("The approach of these courts to financing statements supports the conclusion that incorporation by reference is permissible in Illinois as ''any other method'' under § 9-108, so long as the identity of the collateral is objectively determinable. That requirement is met here by the security agreement's detailed list of the collateral.").

[25] *In re* 180 Equipment, LLC, 591 B.R. at 355.

[26] *Id*. at 363.

[27] The Court cites the Illinois Supreme Court case, *People v. Perez*, 18 N.E. 3d 41, 44 (Ill. 2014), on its application of the plain and ordinary meaning

on section 9-504 (1) describing what an "indication of collateral" means under the Code, as required under section 9-502,[28] and the relevance of section 9-108 in describing the various ways to adequately describe collateral in the security agreement.[29] The Court noted that if the financing statement fails to meet the indication of collateral requirement of section 9-502 as prescribed under section 9-504(1), by not meeting the "description of collateral" requirement under 9-108, then it is not effective to perfect the security interest asserted by the creditor in the bankruptcy proceeding.[30] The Court framed the issue before it as whether the Code "requires that the four corners of the financing statement include a specific description of the secured collateral (either by type, category, quantity, etc.), or if incorporating such a description by reference to a security agreement sufficiently 'indicates' the collateral."[31]

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standard: "A court must view the statute as a whole, construing words and phrases in light of other relevant statutory provision and not in isolation. Each word, clause, and sentence of a statute must be given a reasonable meaning, if possible and should not be rendered superfluous." In re 180 Equipment, LCC, 938 F. 3d. at 870.

[28] *Id.* at 870 ("According to § 9-504, ''[a] financing statement sufficiently indicates the collateral that it covers if the financing statement provides: (1) a description of the collateral pursuant to Section 9-108; or (2) an indication that the financing statement covers all assets or all personal property.").

[29] *Id*. at 870-71 ("Section 9-108 further explains that a description of the secured property does not need to be specific but must 'reasonably identif[y]' what is described. Section 9-108 gives six distinct methods by which a description of collateral reasonably identifies the secured property: (1) specific listing; (2) category; (3) type; (4) quantity; (5) mathematical computation or allocation; or (6) ''*any other method, if the identity of the collateral is objectively determinable.*").

[30] *Id.* at 871. ("But if a financing statement fails these basic requirements, the lender's interests are subject to avoidance under § 544(a) of the Bankruptcy Code.").

[31] *Id.* at 872-73 ("[T]he financing statement provides notice of an underlying security interest, while the security agreement creates and specifically defines that interest."). The court reviewed several decisions from the Seven Circuit on the question as to whether a financing statement needs a specific description in its identification of collateral or whether it is sufficient to include a reference to the description of a security agreement. In a 2016 decision, the court cited *Liebzeit v. Intercity State Bank, FSB* (*In re Blanchard*), 819 F.3d 981, 988 (7th Cir. 2016) in finding that the purpose of the filing system is to provide public notice that a security interest exists in

The Court pointed out that the pre-revision version of section 9-502, formerly section 9-402, required that the financing statement "contain a statement indicating the types, or describing the items, of collateral;" whereas revised section 9-502 requires *only* that the financing statement "indicate collateral," a lesser requirement from the pre-2001 version.[32] It then cited Official Comment 2 to section 9-502 for the point it makes that the Article 9 filing system's purpose is only to put others on "notice" and "indicates merely that a person may have a security interest in the collateral indicated."[33] It further notes that this is different from the purpose of the security agreement, which requires the description of collateral to be discernable in the security agreement.[34] Under the lesser requirement of notice only for the financing statement, searching third parties are expected to make a "[f]urther inquiry from the parties concerned . . . to disclose the complete state of affairs."[35]

Based on its analysis of Illinois bankruptcy court cases addressing the sufficiency of indicating collateral through an incorporation by reference of a security agreement, the Court concluded that incorporation by reference is sufficient in Illinois under subsection (6) of 9-108(b), permitting a description of collateral under "any other method" when the identity of the collateral is objectively determinable from the financing statement.[36] In its review of several decisions from the Southern, Central and Northern district bankruptcy courts in Illinois, it stated that each of the district bankruptcy courts recognized: (1) the different purposes of the security agreement and (2) "noted that

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the property of debtors and that the interested public may need to make a further inquiry to determine the extent of the security interest as provided in the security agreement. It also cited *Helms v. Certified Packaging Corp.,* 551 F.3d 675 (7th Cir. 2008) on the point that the financing statement is an abbreviated notice of the security interest not requiring a more detailed description of the collateral as needed in the security agreement.

[32] "In 2001, the Illinois version of the UCC was revised to no longer require that the financing statement ''contain'' a description of the collateral; after revision the statement must only ''indicate'' collateral. Under the revisions, ''[a]n indication may satisfy the requirements of Section 9-502(a), even if it would not have satisfied the requirements of former Section 9-402(1)." *Id*. at 871.

[33] *Id*. (quoting U.C.C. § 9-502 cmt. 2).

[34] *Id*. at 872 (citing *Helms,* 551 F.3d at 680).

[35] *Id*. at 871 (quoting U.C.C. § 9-502 cmt. 2).

[36] *Id*. at 874.

incorporation by reference is an available method for describing collateral."[37] The Court held: [I]ncorporation by reference is permissible in Illinois as 'any other method' under section 9-108, so long as the identity of the collateral is objectively determinable. That requirement is met here by the security agreement's detailed list of the collateral. The financing statement covers: 'All Collateral described in First Amended and Restate Security agreement dated March 9, 2015 between Debtor and Secured Party.' There is no dispute that the financing statement names (as terms defined earlier in the document' both the debtor (180 Equipment) and the secured party (First Midwest). The statement has not lapsed and included the date and precise title of the underlying document.[38]

The "indication of collateral" requirement, it held, was satisfied here through the detailed list of the collateral in the unattached security agreement and through the fact that the reference to the unattached security agreement in the financing statement included the date and precise title of the security agreement, enabling the searcher to discern which security agreement was being referenced to "disclose the complete state of affairs."[39]

B. In re Financial Oversight and Management Board for Puerto Rico v. Andalusian Global Designated Activity Company, 914 F.3d 694, (1st Cir. 2019), cert. denied, 140 S. Ct. 47 (2019)

In re Financial Oversight and Management Board involved an appeal before the First Circuit Court of Appeals from a lower district court decision over the effectiveness and sufficiency of a financing statement filed by bondholders to perfect a security interest in collateral of the Employee Retirement System of the Government of the Commonwealth of Puerto Rico in 2008.[40] The perfected status of the bondholders' security interest was subsequently contested by

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[37] *Id.* at 874.
[38] *Id.*
[39] *Id*.
[40] The Bondholders purchased bonds issued by the Employee Retirement System of the Government of the Commonwealth of Puerto Rico. The purchased bonds were secured by "property belonging or owed to the System" more specifically described in a separate document entitled "Pension Funding Bond Resolution." The property securing the bond value was estimated at $2.9 billion. 914 F.3d 694 at 702–03.

the Financial Oversight and Management Board for Puerto Rico (Oversight Board).[41] Pursuant to authority granted to it by Congress, the Oversight Board challenged the perfected status of the bondholders by asserting the same avoidance powers that a Trustee in Bankruptcy has under section 544(a) of the Bankruptcy Code.[42] The lower District Court granted the Oversight Board's summary judgment, finding the bondholders' secured claim was ineffective because its 2008 financing statements did not adequately indicate the collateral as required under the version of Article 9 in effect in 2008.[43]

In its *de novo* review of the summary judgment, the First Circuit Court reversed the District Court decision, holding that while the 2008 Financing Statements insufficiently described the collateral through an incorporation by reference to an unattached Resolution that described the collateral, the ineffective financing statements were later cured by amendments to the Financing Statements filed in 2015 and 2016, which included the actual Resolution that described the collateral in detail.[44] It is important to note that the version of Article 9

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[41] *Id*. at 707 (providing context that, in 2016, the Oversight Board had been given oversight by the United States Congress to "craft a method to achieve fiscal responsibility and access to the capital markets for the Commonwealth [of Puerto Rico]").

[42] *Id*.

[43] *In re* Fin. Oversight and Mgmt. Bd. for P.R., 590 B.R. 577, 589–92 (D.P.R. 2018) Another basis for finding the secured claim to be unperfected was that the debtor's name had changed, and bondholders did not file an amendment to reflect the change in the debtor's name as required under section 9-507 of Article 9.

[44] *In re* Fin. Oversight & Mgmt. Bd. for P.R., 914 F.3d at 714. The Court described the differences in the indication of collateral between the initial filed financing statements in 2008 and the subsequent amendments as follows:

> The 2008 Financing Statements described the collateral as "[t]he pledged property described in the Security Agreement attached as Exhibit A hereto and by reference made a part thereof." The Security Agreement, Exhibit A, was attached to each of the 2008 Financing Statements as filed but, as said, did not itself describe the "Pledged Property" except as it purported to do by reference to an unattached other document. That is, the Resolution, which contained the full definition of "Pledged Property" and other key terms, was not attached. The 2008 Financing Statements do not otherwise describe or define the "pledged Property" (meaning the collateral). In short, the documents filed with the P. R. Department of State described the collateral only by stating that it is was "Pledged Property" described in a document that

applied in this case was the pre-2001 version of the Code, which described the indication of collateral requirement for a financing statement to include "a statement indicating types, or describing items, of collateral."[45]

Accordingly, the First Circuit Court agreed with the District Court's finding that, because the 2008 financing statements only referenced property described in the Resolution without attaching a copy of it to the filed financing statements, any searcher of the financing statements would not be able to find a description of the collateral in the financing statements:

> Our holding of an insufficient collateral description depends heavily on the facts, where a) the collateral is not described, even by type(s), in the 2008 Financing Statements or attachments; b) the 2008 Financing Statements do not tell interested parties where to find the reference document (the Resolution) which contains the fuller collateral description; and c) the Resolution is not at the UCC filing office.[46]

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could only be found somewhere outside the P.R. Department of State." . . . On or about December 17, 2015, and January 16, 2016, the four Financing Statement Amendments were filed. The filings all used a standard "Financing Statement Amendment Form" provided by the P.R. Department of State. *The Financing Statement Amendments describe the collateral as "[t]he Pledged Property and all proceeds thereof and all after-acquired as described more fully in Exhibit A attached hereto and incorporated by reference." Unlike the 2008 Financing Statements, Exhibit A contained a full definition of "Pledged Property" drawn from the Resolution*. *Id.* at 705 (emphasis added).

[45] The Commonwealth of Puerto Rico had adopted the revised version of Article 9 in 2012. The pre-2001 version was applied to the facts of this case for not only determining the effectiveness of the initial 2008 Financing Statements but also for determining the effectiveness of the 2015 and 2016 Financing Statement Amendments. This was done due to the fact that the duration of the initial financing statement under its pre-2001 version of Article 9 was 10 years. The subsequent financing statement amendments made in 2015 and 2016 were timely and the provisions in effect at the time of the 2008 original filing were applied to determine the effectiveness of the amendments. While the 2012 revision of Article 9 shortened the duration to 5 years, it was not retroactively applied in cases where the financing statements had been filed prior to the 2012 revisions. *Id.* at 712–13.

[46] *Id*. at 710.

It also stated that the deficiencies in the 2008 Financing Statements undercut the goals of the filing system to provide fair notice to third parties and the public, and thus made the filing ineffective.[47] The Court explained that:

> [T]he 2008 Financing Statements do not describe even the type(s) of collateral; instead, they describe the collateral only by reference to an extrinsic document located outside the UCC filing office, and that document's location is not listed in the financing statement. This at best gives an interested party notice about an interest in some undescribed collateral, but does not adequately specify what collateral is encumbered. That is, an interested party knowing nothing more than this does not have "actual knowledge" and has not "received a notice, see P.R. Laws Ann. tit. 19 section 451(25)(a)-(b) (2008), of the collateral at issue . . . The UCC filing requirements are clear . . . It would not have been difficult whatsoever for the 2008 Financing Statement to provide proper notice. The Resolution could simply have been attached to these filings, as the Security Agreement was. Instead, as they stand the 2008 Financing Statements would leave a reasonable creditor or interested party with doubts as to the collateral at issue. We do not interpret the former UCC provision in any way contrary to its purposes, above all notice, and so the description of collateral in the 2008 Financing Statements was insufficient.[48]

However, because the subsequently filed 2015 and 2016 Financing Statement Amendments to the 2008 Financing Statements included an attached exhibit that described the collateral, the 2008 Financing Statements' insufficiency was effectively cured.[49] In finding that the timely

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[47] *Id.* at 711–12.

[48] *Id.* at 711-712.

[49] "'[T]he Pledged Property and all proceeds thereof and all after acquired property as described more fully in Exhibit A attached hereto and incorporated by reference.' Exhibit A, in turn, contained a detailed definition of "Pledged Property." Each of the relevant capitalized terms in the definition

filed amendments to the financing statements cured the deficiencies of the 2008 Financing Statements, the court held that the financing statements were effective before the creation of the Oversight Board and its authority to avoid an unperfected secured claim, holding that the Bondholders' security interest was valid and not subject to avoidance.[50]

III. Commentaries on In re I80 Equipment, LLC and In re Financial Oversight and Management Board

The reaction to these two Circuit Court of Appeals decisions on the sufficiency of a financing statement's indication of collateral by means of an incorporation by reference to an unattached document prompted a range of reactions from various commentators. The different reactions vary from the view that the decisions presented a conflict between the Circuit Courts,[51] to the opinion that the cases decided by the two Circuit Courts are distinct and do not present conflicting interpretations of the law.[52]

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of "Pledged Property" – "Revenues," "Funds," "Accounts," "Subaccounts," "Fiscal Agent," "Debt Service Reserve Account," and "Resolution" – is also defined in Exhibit A. The definition of "Pledged Property" satisfied one of the "examples of reasonable identification by provided a "[s]pecific listing "of the Collateral . . . It therefore suffices as a description of collateral." *Id.* at 714.

[50] *Id.* at 719–21 ("Because we determine that the Bondholders satisfied Article 9's perfection requirements before the passage of PROMESA on June 30, 2016, we do not consider whether PROMESA would allow retroactive avoidance of unperfected liens.").

[51] Bruce A. Markell, *The Road to Perdition: 180 Equipment, Woodbridge and Liddle Pave the Way,* 39 BANKR. L. LETTER 1, (2019); Kathleen DiSanto, *When Less Is Not More: Sufficient Identification of Collateral In Financing Statements*, 39 AM. BANKR. INST. J. 32 (May 2020); Stephen Brodie, *Collateral Descriptions in Financing Statements: A Private Bank Perspective* 49 UCC L. J. (May 2021); Daniel R. Kubiak, *If Seventh Circuit "Got It Right," Standard Regarding "Indication" of Collateral Needs a Tune-up*, 39 AM. BANKR. INST. J. 14,14 (Nov. 2020); Adam C. Ballinger & George H. Singer, *UCC Financing Statements: The Search for Certainty in Collateral Descriptions*, 30 J. BANKR. L. & PRAC. (June 2021).

[52] William J. McKenna, Charles J. Tabb & Matthew J. Stockl, *The Sky Isn't Falling: Why the Seventh Circuit Got It right in 180 Equipment LLC,* 39 AM. BANKR. INST. J. 34, *66 (May 2020) ("The court did not address Financial Oversight because it is not applicable to 180 Equipment. The reason is that

A. Commentaries Finding the Circuit Courts' Decisions in Conflict

Writing one of the earliest reactions to *In re 180 Equipment, LLC*, Bruce Markell in his article, *The Road to Perdition: 180 Equipment, Woodbridge and Liddle Pay the Way*,[53] described the Seventh Circuit Court's decision as an "interpretive disaster." Markell was critical of the Court's analysis in its focus on section 9-502 in context with other related provisions of the UCC, noting that the various sections of the Code do not stand in "isolation from others."[54] In particular, he felt the Court's analysis fell short in considering section 9-502(a)(3) in relation to the related provisions of section 9-504(1) and 9-108.

By finding the indication of collateral to be adequate by merely signaling where an unattached security agreement containing the description of collateral could be found, Markell thought the Court had essentially erased the description of collateral requirement from the financing statement.[55] Markell commented on the consequence of this ruling for searching third parties to mean that they would receive no information from the financing statement about the collateral securing the loan and would only be getting the identification of the secured party, which would effectively nullify any purpose of an "indication of collateral" requirement in the financing statement under section 9-502(a)(3).[56]

In his critique, Markell states the Seventh Circuit Court's failure to focus on section 9-502 in context with sections 9-504(1) and 9-108, did not give due attention to the fact that section 9-108 does not use the word "indicates" but requires a description of collateral in a security agreement that "reasonably identifies" the collateral by a

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Financial Oversight was decided under the pre-revision version of Article 9, while 180 Equipment was decided under the post-revision version").

[53] Markell, *supra* note 51.

[54] *Id*.

[55] *Id.* at 3 ("It essentially erases the financing statement description requirement from the statute. Instead of disclosing the nature of their collateral, lenders can now legitimately claim valid perfection in collateral by simply accurately describing private agreements—while simultaneously withholding all information about the contents of those agreements.").

[56] *Id*. at 3 ("As such, the indication requirement is neutered; if *180* is followed, searchers of UCC filings will receive no information about what types of collateral a lender claims. Searchers will just receive information about a party possibly claiming a security interest.").

method that is "objectively determinable."[57] That is, if the method for indicating the collateral is to satisfy the reasonable identification of collateral required under section 9-108, pursuant to section 9-504(1), there needs to be a reasonable description of the collateral enabling searchers to find out what that collateral is:

> Put another way, nothing in Article 9 allows a secured creditor to indicate collateral unless the indication is of "all assets." If the authorized description contains fewer than all assets, it has to comply with Section 9-108, which does not use the verb "to indicate." Instead, Section 9-108 requires reasonable identification, which in the context of disclosure--the function of a financing statement--requires a searcher be able to learn which assets the secured party may claim as collateral.[58]

Markell also criticized the Seventh Circuit Court in its failure to address the First Circuit Court decision in *In re Financial Oversight and Management Board*, finding that the financing statement must contain a description of collateral "indicating the types or describing the items of collateral."[59] In not doing so, he asserts that the Court failed to recognize the Code's goal and purpose for uniformity in the law among the various jurisdictions.[60] Markell criticized the Seventh Circuit Court for not explaining how the 2001 revision of 9-502 applied in *In re 180 Equipment, LLC* differed from pre-revised version of section 9-402 in *In re Financial Oversight and Management Board*:

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[57] As the author explains:

> At bottom, the Seventh Circuit's erroneous construction of the financing statement requirement is based on a deeply flawed reading of Article 9. It confuses the roles of various sections. The court looked to Section 9-502 and its use of "indicate," and then gave "indicate" its so-called plain meaning. But structurally, Section 9-504 defines what "indicates" in Section 502 means: (1) a description satisfying Section 9-108 or (2) an indication the financing statement is against "all assets. By ignoring the structure of the UCC as a code, the court mistakenly focused on one of its parts in isolation." *Id.* at 5.

[58] *Id.* at 5–6.

[59] *Id*. at 4.

[60] *Id*. ("The UCC is a connected series of statutes with an overall goal and purpose. Each section does not stand in isolation from the others; they form a cohesive whole. In addition, although a state statute, it is not untethered to other states' interpretation.").

> [U]nless you want to argue that "indicating the types . . . of collateral" is different in a meaningful way from "indicates the collateral covered by the financing statement" which is the wording in the current statute, the case is highly relevant, and should have been discussed.
>
> But the difference is not meaningful. The verb "to indicate" is the same in both cases; the only difference is the direct object: "types of collateral" versus "collateral." In *180*, the financing statement indicated neither. It indicated, if anything, a document, and only a document. No collateral was mentioned in the words used on filed financing statement. There was only a reference to a document which no user of the filing system could verify was the same at all relevant times. If the First Circuit believed that a reference to a document not publicly available did not "indicate" a type of collateral, a simple reference to the same document doesn't "indicate" collateral either. It just refers to a bunch of papers, stapled and likely signed. Simple English.[61]

In her article entitled, *When Less is Not More: Sufficient Identification of Collateral In Financing Statements*,[62] Kathleen DiSanto read the two Circuit Court decisions as reaching "very different conclusions" on collateral descriptions in financing statements that only used an incorporation by reference.[63] She stated that the First Circuit Court's decision in *In re Financial Oversight and Management Board* held that a reference to "pledged property" described in an unattached security agreement was an insufficient indication of collateral, and the Seventh Circuit Court's decision, *In re 180 Equipment*, issued nine months later, "reached the exact opposite conclusion," and had notably

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[61] *Id.* at 4–5.

[62] *See* DiSanto, *supra* note 51.

[63] *Id*. at 32 ("Skimping on collateral descriptions might come at a cost, depending on the jurisdiction, as evidence by recent decisions from two courts of appeals that reached very different conclusions in analyzing the issue.").

"failed to acknowledge the circuit split or even mention, let alone discuss the First Circuit's ruling."[64] DiSanto stated that both Circuit Courts were applying sections 9-502, 9-504 and 9-108 of the revised Code in their analysis.[65]

Following her summary of the two decisions and an acknowledgment of the U.S. Supreme Court's denial of a petition for certiorari to on the question *In re 180 Equipment*, DiSanto reaffirmed her opinion that the decisions represented a split between the two Circuit Courts.[66] Based on her view that the decisions represented a "circuit split" on the question of the sufficiency of using an incorporation by reference to an unattached document, without a more specific description of collateral in the financing statement, she recommended that going forward, filing secured creditors should:

> [E]rr on the side of caution. Ideally, even if arguably not required by the UCC, practitioners should continue to include more robust descriptions of collateral in financing statements or attach the security agree-

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[64] *Id.*

[65] *Id.* DiSanto stated:

The First and Seventh Circuit's analyses turn on several provisions of the UCC, which govern the sufficiency of collateral descriptions in the financing agreements. Pursuant to § 9-502 of the UCC, a financing statement is sufficient if it "(1) provides the name of the debtor; (2) provides the name of the secured party or a representative of the secured party; and (3) indicates the collateral covered by the financing statement."

Section 9-504 also addresses the sufficiency of a financing statement. Under § 9-504 of the UCC, the financing statement must provide "a description of the collateral pursuant to Section 9-108" or "an indication that the financing statement covers all assets or all personal property." In turn, § 9-108(a) provided that a description of collateral is sufficient "whether or not it is specific, if it reasonably identifies what is described." Pursuant to § 9-108(b), a description reasonably identifies the collateral if it identifies the collateral in one of six ways: (1) specific listing; (2) category; (3) type of collateral defined in the UCC; (4) quantity; (5) computational or allocational formula or procedure; and (6) "any other method, if the identity of collateral is objectively determinable."

[66] *Id*. at 64 ("Given the circuit split (the U.S. Supreme Court denied *certiorari* of *the 180 Equipment LLC* appeal and provides some clarity on the issue), a savvy professional will err on the side of caution.").

> ment to the financing statement in order to avoid challenges to their security interests based on the adequacy of the "indication" of collateral.[67]

Stephen Brodie, in his article *Collateral Descriptions in Financing Statements: A Private Bank Perspective*, also found the decisions between the two Circuit Courts to be conflicting and leaving the matter an "unsettled area of law."[68] He stated this is particularly problematic for private banks that take very limited security interests in specific assets of "high net worth or ultra-high net worth" individuals or trusts, as opposed to "blanket liens" in all of the property of a debtor corporation or a limited liability company.[69] As he explained, with such private bank loans there is a concern for privacy on the part of the borrowers.[70] Moreover, due to the limited nature of the collateral offered to secure these loans, the use of the supergeneric indication of collateral in the financing statement, as permitted under 9-504(2), is not used.[71] Apparently, privacy is critical if the collateral that is to secure the loan is valuable artwork and the debtor is concerned about a publicly filed financing statement describing infamous artwork.[72]

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[67] *Id*. (emphasis added).
[68] Brodie, *supra* note 51.
[69] *Id*. at 1–2 ("Private banks, however, frequently lend to natural persons or trusts, and blanket liens are rarely appropriate with these kinds of debtors . . . many US banks also offer what are sometimes called "custom credit" or "tailored lending" products to their high net worth or ultra-high net worth clientele.")
[70] *Id.* at 5 ("In view of these privacy considerations, the question for a private bank lender becomes how far it can safely go in not including the details of the artworks it takes as collateral in its publicly filed UCC financing statements.").
[71] As the author explains:
Section 9-504 of the UCC expressly permits a description that simply provides "an indication that the financing statement covers all assets or all personal property." Private banks, however, frequently lend to natural persons or trusts, and blanket liens are rarely appropriate with these kinds of debtors. Additionally, private bank clients are commonly concerned with maximizing privacy, and prefer to put of record in a public filing as little information as possible concerning what they own. Thus, the thought process for a private bank often entails some balancing between the need for certainly as to its lien perfection and maintaining harmony in its client relations. *Id*. at 1.
[72] In describing "private banking" the author states:

Brodie found the Code to be "less than clear" as to whether an incorporation by reference to an unattached security agreement is sufficient[73] and that the two Circuit Court decisions make this even less clear, such that the private bank lender would be concerned about filing a financing statement without a "specific listing" of the collateral.[74] It was his understanding that the Seventh Circuit Court found an incorporation by reference to a security agreement without attaching the referenced security agreement was sufficient in *In re 180 Equipment,* and that in *In re Financial Oversight and Management Board*, the First Circuit Court took the position that if the referenced document is not attached to the financing statement, the filing is insufficient in indication of collateral.[75]

[M]any US banks also offer what are sometimes called "custom credit" or "tailored lending" products to their high net worth or ultra-high net worth clientele. These kinds of loans involve a variety of collateral, including real estate, aircraft, yachts, life insurance policies, equity interest in private companies . . . interests in investment funds, as well as fine art . . . [T]he tension between privacy and legal necessity is most often found in loans secured by artworks, . . . Mortgages on real property, aircraft and maritime vessels, and assignments of life insurance policies, are all governed primarily by laws other than the Uniform Commercial Code. Thus, despite the wide range of "custom credit" private bank transactions, the question of the adequacy of a collateral description in a financing statement, as a practical matter, only arises when there is a pledge of investment fund equity interest or a security interest to be perfected in fine art. *Id.* at 2.

[73] The author writes:

In view of these privacy considerations, the question for a private bank lender becomes how far it can safely go in not including the details of the artworks it takes as collateral in its publicly filed UCC financing statements. In our experience, this means determining whether or not the bank's security interest would be perfected by a collateral description in a filed financing statement which, without attaching the Security Agreement, said something like "Artworks described the Security Agreement between the debtor and the secured party dated . . ." A review of the literal text of the applicable provisions of Article 9 shows the answer to be less than clear. And now two recent judicial decision have drawn different conclusions, effectively confirming that, without a specific listing of collateral, a private bank art lender cannot be certain that its lien will be properly perfected. *Id*. at 5.

[74] *Id*.

[75] *Id.* at 6. The author notes:

In *In re 180 Equipment, LLC*, the Seventh Circuit Court of Appeals was squarely presented with the question of whether the incorporation by

In light of this lack of clarity about the effectiveness of using a description that simply refers to a description in an unattached security agreement, Brodie suggests that private bank lenders needing to perfect an interest in artwork should use "specific listings of artwork collateral in the financing statement" or "attach the security agreement containing the same."[76] He points out that because "artwork" is not an Article 9 category under section 9-108(b)(2), simply indicating the collateral as "artwork" and then referencing an unattached security agreement is risky.[77] Accordingly, he recommends that private bank lenders either list the specific artwork or attach the security agreement to the financing statement to be certain of perfection.[78]While Daniel

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reference of collateral identified in a security agreement (which agreement was not attached to the financing statement) would perfect the lender's security interest . . . the Court decided that the financing statement was valid and sufficiently indicted the collateral through its incorporation by reference of the collateral set forth in the security agreement . . . The First Circuit Court of Appeals took almost the polar opposite position in In re Financial Oversight and Management Board for Puerto Rico . . . The Court ruled that the filed financing statements were ineffective to perfect the security party's security interest because they did not contain a sufficient collateral description."

[76] *Id.* at 6.

[77] *Id*. at 6 ("But 'artworks' is not an Article 9 category such that the description would then fit under Section 9-108(b)(2).").

[78] Writing that:

> It is clear from the 2019 cases cited above, that the law is still evolving on the question of the adequacy of collateral descriptions in financing statements, and that, except perhaps in the Seventh Circuit, allowing a UCC filing to describe collateral by the mere incorporation by reference of an unattached security agreement would mean introducing a material, additional legal uncertainty. As noted above, Section 9-502(a)(3) provides that the collateral description in a financing statement can be sufficient only if it "indicates" the collateral. And it is true that a description that mentions "artworks" but does not list specific pieces, and refers the searcher to an unfiled security agreement for that, would be something of an indication and more likely to pass muster under Section 9-502(a)(3) than the collateral description in question in the First Circuit case. But "artworks" is not an Article 9 category such that the description would then fit under Section 9-108(b)(2). It therefore seems that, under the present state of the law, merely adding the word "artworks" to the collateral description and pointing the searcher to an unfiled agreement for the specifics, would not be free from doubt as to its effectiveness.

R. Kubiak did not compare the two Circuit Court cases in his article entitled, *If Seventh Circuit "Got It Right," Standard Regarding "Indication" of Collateral Needs a Tune-up,*[79] he did question the correctness of the Seventh Circuit Court's ruling in *In re 180Equipment, LLC*, holding that an incorporation by reference to an unattached security agreement in a financing statement was a sufficient indication of collateral under section 9-502(a)(3):

> The ruling eviscerates the notion that a financing statement must provide a description of collateral and effectively endorses a filing system in which all secured creditors include a generic statement in *all* financing statements, such as "All collateral as described in all existing and future security agreements by and between Debtor and Secured Party." Should that occur, identifying the collateral of other secured parties will be rendered more difficult and . . . practically impossible.[80]

Kubiak views the Seventh Circuit Court as relegating all indications of collateral in financing statements to generic descriptions that do not "identify" collateral and ultimately make it impossible for third parties to identify collateral from the filed financing statement.[81]

He notes that the outcome of using the supergeneric description presents several challenges for searching third parties who may need more specific identifications of collateral, such as: (1) the secured creditor who needs to determine whether a "later-in-time" filing enjoys a competing super-priority purchase money security interest in a particular item of collateral it seeks to foreclose on; (2) a junior secured creditor who seeks to determine the extent of collateral held by a senior creditor against collateral it seeks to foreclose on; (3) a tax

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If the loan in question is underwritten with reliance upon a perfected security interest as important credit support, then the recommendation would have to be to require a specific listing of artwork collateral in the financing statement, or to attach the security agreement containing the same. This is not to dismiss the privacy concerns of private bank clients; it is simply the only way to ensure that perfection of the bank's security interest will be a legal certainty. *Id*.

[79] Kubiak, *supra* note 51.

[80] *Id*. at 14.

[81] *Id.* (suggesting that the Court's ruling removes any possibility of identifying collateral through financing statements).

lienholder seeking to determine if lien-hold property is subject to a prior secured interest before seizure of liened property; or (4) an auctioneer or purchaser of a debtor's property who needs to pay off secured claims from sale proceeds or request a termination of the secured creditor's filing after the purchase.[82] Accordingly, Kubiak agrees with commentators who have suggested that the only way these third parties can determine exactly what collateral is actually securing the debt is to: (1) ask the debtor to provide a copy of the security agreement or (2) request a verification of collateral securing the debt through a request to the secured party for a verification under section 9-210.[83] He notes, however, that both options depend on the debtor's and the secured party's cooperation, and for any third party seeking more specific identification of the collateral there is no requirement under Article 9 that the secured party respond to requests for verification by the searching third party, that is, the only mandated response for verification being one from a debtor pursuant to 9-210.[84]

To address this problem for the third party dealing with filings that are generic and do not include an attached security agreement referenced in the financing statement, Kubiak recommends the Code be revised in two ways. He suggests that the indication of collateral requirement be revised to require a description that "reasonably describes the items of collateral," returning to the pre-2001 version of

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[82] *Id* at 15 (providing examples of scenarios in which third parties may run into trouble identifying collateral specifically).

[83] *Id*. ("Commentators assert that this is a workable standard because a description of the collateral contained in the security agreement reference in the financing statement can be obtained by simple inquire (e.g., a potential lender can require the debtor to gather pre-existing security agreement before extending credit). These advocates point to UCC § 9-210 (c) and (d), which states: (c) A secured party . . . may comply with a request regarding a list of collateral by sending to the debtor an authenticated record indicating a statement to that effect within 14 days after receipt. (d) A person that receives a request regarding a list of collateral . . . and claimed an interest in the collateral at an earlier time shall comply with the request within 14 days after receipt by sending to the debtor an authenticated record: (1) disclaiming any interest in the collateral; 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.").

[84] *Id.* ("The § 9-210 construct works if a debtor is motivated to obtain a loan or cooperate with a creditor. It does not work when the debtor is uncooperative, or not all secured creditors respond.").

section 9-402 addressing the adequacy of the financing statement contents as it pertains to the identification of collateral.[85] Furthermore, Kubiak suggests that section 9-210 be amended to add third parties such as creditors and purchasers, in addition to debtors, as parties permitted to request a verification of collateral subject to a security interest from a secured creditor who has filed a financing statement.[86]

In *UCC Financing Statements: The Search for Certainty in Collateral Descriptions,*[87] Adam C. Ballinger and George H. Singer, argue *In re 180 Equipment* was "wrongly decided," and that the Seventh Circuit Court decision is in direct conflict with the First Circuit Court decision in *In re Financial Oversight and Management Board*.[88] It is their position that an indication of collateral in a

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[85] *Id*. ("UCC 9-504(a) should be revised to require financing statements to provide a collateral description that 'reasonably describes the items of collateral.'"); *see also* Lisa Lamkin Broome, *SuperGeneric Collateral Descriptions in Financing Statements and Notice Filing*, 46 GONZ. L. REV. 435 (2011). While this article was written long before *In re 180 Equipment, LLC* and *Financial Management Oversight Board* decisions, it is critical of section 9-504(2) permitting the use of supergeneric descriptions in financing statements as a method of indicating collateral in the financing statement. She expressed concern that the supergeneric description would end "meaningful notice as to the scope of the security interest" and incentivize secured parties to use supergeneric descriptions in financing statements even when the security interest is not that broad. She recommended that Code should be amended and revert back to the indication of collateral requirement under pre-revision version of 9-402.

[86] Kubiak, *supra* note 51, at 15 ("[A]s a second, less-desirable option, UCC 9-210 should be revised to provide creditors of and prospective purchasers from a debtor with the procedure described in Official Comment 3 to § 9-210, compelling existing secured parties to provide more detailed information regarding a description of collateral (with 'teeth' if a response is not timely provided).").

[87] Ballinger & Singer, *supra* note 51.

[88] In agreeing with the lower court's finding the authors' noted:

> The bankruptcy court in *In re 180 Equipment, LLC* held that the lender's financing statement describing the collateral solely by referring to the mere existence of security agreement was an insufficient collateral description. A financing statement that fails to contain any description of collateral fails to give the notice required by Article 9. The court reasoned that the primary function of a financing statement—to impart notice to the public as to which assets of a debtor are subject to an encumbrance—is defeated when the instrument itself provides not collateral information whatsoever.

financing statement that does not include a description of the collateral and merely makes a reference to an unattached document "located outside the public filing office" is not identifying the collateral in a manner that is "objectively determinable" from the four corners of the financing statement.[89] They argue further that the collateral description requirement for the financing statement is superfluous if it does not include some description or identification of the collateral and merely makes a reference to an unattached security agreement.[90]

Ballinger and Singer note that in its application of 9-504(1), the Seventh Circuit Court over relied on the term "indicates" in section 9-502(a)(3) and should have focused on the "description of collateral" requirement of section 9-108, which has a more specific description requirement than what is implied by "indicates."[91] They criticize the

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The bankruptcy court ruled that the financing statement must contain a separate description of the collateral within the four corners of the document. Simply attempting to incorporate by reference a description contained in a separate document not attached to the filed financing statement fails to sufficiently indicate the collateral. The referenced document must be attached. The bankruptcy court's decision was consistent with the recent decision of the United States Court of Appeals for the First Circuit in *In re Financial Oversight & Management Board for Puerto Rico*, which similarly concluded that mere reference to an extrinsic document does not provide notice of the collateral at issue. *Id.*

[89] *Id.*

[90] *Id.* ("The Seventh Circuit's reasoning renders the existence of a collateral description component of the financing statement a superfluity. A financing statement that incorporates a security agreement by reference without either describing or identifying the collateral fails to provide any information not already present on the financing statement.").

[91] The authors argued that:

When the debtor has granted the secured party a security interest in fewer than all assets or personal property, Section 9-504(1) reframes sufficiency not in terms of an "indication" but as a "*description* of the collateral pursuant to Section 9-108. According to Merriam-Webster, the word "describe" is defined as "to represent or give an account of in words." When comparing the definition of describe to the Seventh Circuit's opinion that the term indicate, "is to serve as a "signal" that "point[s] out" or "directs attention to..." it is apparent that indicate and describe provide materially different instructions to the secured party under section 9-504. And because section 9-504 uses the term "description" directing parties to employ the more specific section 9-108 to describe collateral, description and not the more general "indication" of 9-502 should be the lens through which section 9-108 is viewed." *Id.*

Court in not using "rigor when deciding whether the extant collateral description fell within the more general category of section 9-108(b)(6)."[92] The trustee's argument that the court needed to employ the interpretive principle of *ejusdem generis*—"where a statute specifically enumerates several classes of persons or things and includes at the end of such enumeration an additional, more general, class of 'other' 'of a like kind' or 'similar to' the specifically enumerated classes of persons or things"—is cited on this point.[93] Accordingly, they argue that an incorporation by reference to an unattached security agreement "does not convey to third parties a level of specificity that is comparable to the specificity used by the drafters of section 9-108(b)(1-5) to which section 9-504(a)[sic] refers."[94]

Given the specificity required of a description of collateral under 9-108, Ballinger and Singer did not think the Seventh Circuit Court needed to look at 9-108(b)(6) to decide the case but could have simply recognized that if a financing statement's indication of collateral is based on 9-504(1) and did not include a description that "reasonably identified any collateral" it was not sufficient:

> [A] financing statement simply incorporating the security agreement by reference but not attaching it does not reasonably identify any collateral. Neither, however, does the incorporation by reference of a security agreement provide the public with an objective identity of the collateral . . . A reasonable identification of the collateral is objectively determinable if the description itself is reasonably not susceptible to multiple interpretations not whether it is "possible" to learn what the identity of the collateral is from an extrinsic document not accessible to the public.[95]

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[92] *Id.* ("And while the Seventh Circuit, finding no ambiguity in the statutory language, employed a plain text analysis, it did not impose the same rigor when deciding whether the extant collateral description fell within the more general category of section 9-108(b)(6).").
[93] *Id*.
[94] *Id*.
[95] *Id.*

Because of this decision, Ballinger and Singer described the consequences of finding an incorporation by reference to an unattached security agreement; that it expands the obligation of searching parties, putting them in the position of having to engage in a "scavenger hunt" to investigate the nature of collateral and requiring them to contact the filing secured party to obtain a copy of the security agreement with no assurance of cooperation.[96] Thus, it impairs the goal of the filing system to include fair notice to others: "An interested party should not be forced to bear the delay, burden and expense of figuring out the extent of a relatively generic collateral description; the notice function of Article 9's public-filing system requires something more."[97]

Finally, the authors offer some thoughts on how to remedy these consequences. One suggestion is that filing secured creditors "carefully describe the collateral within [the financing statement's] four corners."[98] And the second comment suggests that the Code be revised so that that third parties searching financing statements are permitted to request verification of a list of collateral from secured creditors under section 9-210, which as written only allows such requests to be made by a debtor.[99]

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[96] *Id*. ("The financing statement itself must reasonably identify the collateral in a manner that is objectively determinable from the financing statement itself—not vague language that sets in motion a scavenger hunt by which information about the collateral can be obtained from a source extrinsic to the public filing office.").

[97] *Id.*

[98] *Id.* ("An adequate description of collateral matters when it comes to perfecting a security interest by filing a financing statement under the UCC. While minimal notice of a lien interest in collateral by reference to another agreement's collateral description might be sufficient—even it that agreement is not attached to the financing statement—it is still prudent and best practice for lenders to carefully describe the collateral within it four corners.").

[99] *Id.* The authors note:

> Section 9-210 of the UCC allows a party to make a "request regarding a list of collateral." . . . This section of the UCC gives the right to request information about the obligation and the collateral encompassed by the filed financing statement to the debtor only. If a debtor is motivated to cooperate, obtaining information about the collateral and other matters can be accomplished relatively quickly. However, where the relationship between the debtor and the secured party is adverse as a result of a default, for instance, things may not be so easy. Both the secured party and the debtor may in such

B. Commentary Finding No Conflict Between the Circuit Courts

In *The Sky Isn't Falling: Why the Seventh Circuit Go It Right in 180 Equipment LLC (The Sky Isn't Falling),* [100] William J. McKenna, Charles J. Tabb, Matthew J. Stockl, took the view that the two decisions did not present an interpretive conflict because the cases were decided under two different versions of Article 9. These authors specifically point out that in *In re Financial Oversight and Management Board*, the First Circuit Court applied section 9-402 of the pre-2001 version of the Code, the version of the Code in effect in Puerto Rico at the time of the initial filing of the financing statement and when subsequent amendments were made to the financing statements.[101] They also note that the indication of collateral requirement under the pre-revision section 9-402 was more specific in describing the indication of collateral by requiring that the financing statement indicate the collateral "by type or describing by the items of collateral."[102]

The authors note that in *In re 180 Equipment, LLC,* the Seventh Circuit Court decided the case under the 2001 revisions of Article 9, and that this revision included safe harbor requirements for meeting the indication of collateral requirements under the financing statement by permitting either the supergeneric description of collateral or by satisfying the requirements for a "reasonably identifiable" description of the collateral pursuant to section 9-108, and in particular under section 9-108(b)(6)'s catch-all permitting any other description that is

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circumstance be unresponsive and refuse to cooperate. Nothing in Article 9 obligates the secured creditors of record to respond to a lender's or purchaser's request for additional information.

[100] McKenna, et al., *supra* note 52, at 66.

[101] *Id*. at 66.

[102] Stating:

[T]he authors disagree that the rulings from the two circuits are in conflict and "not uniform." The Seventh Circuit panel was very much aware of the *Financial Oversight* opinion, which the parties addressed at length in their briefing and at oral argument. The court did not address *Financial Oversight* because it is not applicable to *180 Equipment*. The reason is that *Financial Oversight* was decided under the pre-revision version of Article 9, while *180 Equipment* was decided under the post-revision version. *Id.*

objectively determinable.[103] The authors also note the safe harbor revisions under section 9-504 were designed to broaden the requirements for an indication of collateral and to be "more permissive in the collateral identification than its predecessor [under section 9-402]."[104] They agreed with the Seventh Circuit Court in finding the indication of collateral to be sufficient because "the identification of the bank's collateral was 'made possible' by reference to the specific security agreement of a listed date:"[105]

> If a financing statement incorporates by reference the collateral description from a specifically identified security agreement, subsequent parties have notice that the secured party is claiming a security interest by virtue of the security agreement, and that such interest can be ignored only at their peril. To determine the exact contours of that interest, parties may request a copy of the security agreement from the debtor, a simple inquiry contemplated by Article 9.[106]

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[103] Noting:

In *180 Equipment*, the Seventh Circuit correctly interpreted the revised statute. The revisions to Article 9 changed the collateral identification requirements for financing statement not only by allowing a simple "indication" of collateral to suffice, but also by adding two safe harbors in §9-504. The first is "if the financing statement provides (1) a description of the collateral pursuant to Section 9-108." The second is "(2) an indication that the financing statement covers all assets or all personal property."

Importantly, "[a]n indication may satisfy the requirement of Section 9-502(a), even if it would not have satisfied the requirements under former Section 9-402(1)." Thus, the drafters made it clear that the 2001 amended law was more permissive in collateral identification than its predecessor.

Comment 2 to §9-108 further confirms that the purpose of the test of sufficiency is to "make possible identification of collateral." Therefore, it is sufficient if there is an indication of collateral "by another method" as long as that method is "objectively determinable" under § 9-108(b)(6). Such a method is enough to put a party on notice to make further inquiry about the possible existence of a prior perfected security interest, which is all the drafters of Revised Article 9 demand. The requirement of objective determinability in § 9-108(b)(6) means that such an inquiry should bear accurate, complete and non-manipulable information for the searcher. *Id*. at 66–67.

[104] *Id*. at 66.

[105] *Id*. at 67.

[106] *Id*.

In assessing what the Seventh Circuit Court decision means for practitioners, the authors found the effect to be "limited."[107] That is, where there is an incorporation by reference to a security agreement, a copy of the security agreement "could" be attached when making the filing.[108] However, they believe if a copy is not attached, creditors have been placed on notice of the possibility of the security interest and can make a further inquiry as to the contents of the security interest:

> Even if the security agreement is not attached, subsequent creditors cannot complain if they fail to investigate the extent of a prior security interest, as long as they are on notice of the possibility of that perfected security interest. In the event that a searcher encounters a financing statement that incorporates by referent the collateral description of an unattached security agreement, as in *180 Equipment*, such a searcher is fully on notice that it needs to make inquiry, and thus is fully able to protect itself from unwelcome surprises.[109]

IV. Why a Clarification on the Indication of Collateral and Incorporation by Reference is Necessary from the Uniform Law Commission

The different commentaries and perspectives about the impact of *In re 180 Equipment, LLC* on secured creditors filing financing statements and on how to effectively include an "indication of collateral" in the statement as prescribed under section 9-504(1) suggest a need for some kind of clarification from the UCC Commission about the sufficiency of using an incorporation by reference to an unattached security agreement.[110] Only one commentary, *The Sky Isn't Falling*, viewed *In re 180 Equipment, LLC* to be correct in finding a reference to an unattached, but specifically identified security agreement as sufficient indication of collateral under section 9-504(1) and thus an objectively reasonable identification of collateral, pursuant to section

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[107] *Id*.
[108] *Id*.
[109] *Id*.
[110] *See supra* notes 53–109 and accompanying text.

9-108(b)(6).[111] It was also noted by the authors that the Seventh Circuit Court of Appeals decision in *In re 180 Equipment* was not in conflict with the First Circuit Court of Appeals decision in *In re Financial Oversight and Management Board* because each court was applying different versions of the indication of collateral provision under Article 9.[112] That is, *In re 180 Equipment* applied the revised section 9-504 and *In re Financial Oversight and Management Board* applied the pre-revision section 9-402.[113]

However, the other commentaries summarized herein have either found the Seventh Circuit Court of Appeals decision, *In re 180 Equipment, LLC,* to directly conflict with the First Circuit Court of Appeals decision, *In re Financial Oversight and Management Board,* or viewed the two Circuit Court opinions as creating uncertainty as to

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[111] *See supra* discussion of *The Sky Isn't Falling* at notes 100-109 and accompanying text (explaining "the Seventh Circuit's analysis properly interpreted both the letter and spirit of the perfection requirements of current Article 9, as revised effective 2001").

[112] *See supra* discussion of *The Sky Isn't Falling* at notes 100-109 and accompanying text ("However, the authors disagree that the rulings from the two circuits are in conflict and 'not uniform.' The Seventh Circuit panel was very much aware of the Financial Oversight opinion, which the parties addressed at length in their briefing and at oral argument.").

[113] A contrary view is expressed in *Quinn's UCC Commentaries & Law Digest* Section 9-405(A)(2)(b) (Rev.2d ed) discussing the impact of *In re 180 Equipment, LLC* and *In re Financial Oversight and Management Board*. It notes that the law would allow an incorporation by reference to another document so long as it is attached to the filed financing statement. It looked at the case law on former section 9-402, which held that an incorporation by reference without the attached document not a sufficient method to indicate collateral. It cites cases like in *Matter of H.L. Bennett Co.* 588 F.2d 389, 5 Bankr. Ct. Dec (CRR) 51 (3rd Cir. 1978) and *In re Lynch*, 313 B.R. 798 (Bankr. W.D. Wis. 2004), which apply the pre-revision former section 9-402. However, even recognizing that the Seventh Circuit Court decision in *In re 180 Equipment, LLC*, applied the revised section 9-504(1), which uses any method of description as allowed under revised section 9-108, it advised practitioners seeking to avoid any challenge of an incorporation by reference to a specifically identified security agreement to either "describe the collateral separately in the financing statement or to attach the security agreement to the financing statement!" *See* Thomas M. Quinn, *Quinn's Uniform Commercial Code Commentary and Law Digest* 9-405(A)(2)(b) (Rev. 2d ed. 2023).

the sufficiency of such an incorporation by reference.[114] As noted above, because the indication of collateral is an essential requirement in the financing statement filed by a secured creditor, the sufficiency of using an incorporation by reference to an unattached security agreement as a means of indicating collateral in the financing statement must be clarified for filing secured creditors.

These authors have provided various suggestions on how secured creditors can proceed in making a sufficient indication of collateral under section 9-504(1) in light of the confusion perceived as created by the Seventh Circuit Court decision in *In re 180 Equipment, LLC*. The suggestions offered to practitioners in some of the commentaries include using more specific descriptions of collateral by item; or, if a reference to an existing security agreement is made, the secured creditor should attach that security agreement to the financing statement.[115] Of course another option, while it may not be desirable when the collateral offered to secure the loan is very limited, is to simply use the supergeneric description "all assets or all personal property" as permitted under section 9-504(2).[116]

Because of this perceived uncertainty and the fundamental importance of filing a financing statement under Article 9, the Commissioners of the UCC should weigh in on the question. Even the commentators have made suggestions on ways to clarify the question in the Code. One suggestion is that the "indication of collateral" requirement should be revised to require a description that "reasonably describes the items of collateral," thus, a return to the pre-2001 revision of section 9-402 addressing the financing statement requirement regarding the identification of collateral.[117] Another suggestion is that section 9-210 should be amended to allow third parties such as creditors and purchasers to be able to make a request of a secured party who has filed a financing statement to verify specific

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[114] Markell, *supra* note 51; *see also supra* notes 53-61; DiSanto, *supra* note 51; s*ee also supra* notes 62-67 and accompanying text; Brodie, *supra* note 51; *see also supra* notes 68-78 and accompanying text; Kubiak, *supra* note 51; *see also supra* notes 79-86 and accompanying text; Ballinger & Singer, *supra* note 51; *see also supra* notes 87-99 and accompanying text.

[115] *See supra* notes 67, 78, 98 and accompanying text.

[116] See *supra* notes 80-81 and accompanying text.

[117] See *supra* note 85 and accompanying text ("Drawing from former UCC 9-402, UCC 9-504(a) should be revised to require financing statements to provide a collateral description that 'reasonably describes the items of collateral.'"). *See also* Broome, *supra* note 85.

collateral described in a referenced but unattached security agreement.[118]

The commentary, *The Sky Isn't Falling*,[119] provides a better reading of the two Circuit Court cases, finding that the Circuit Courts are not in conflict, noting that each court was applying different versions of the indication of collateral provision under Article 9.[120] That being said, in *In re Equipment, LLC*, the Seventh Circuit Court applied the 2001 revised version of the indication of collateral provision of section 9-504, which permits supergeneric descriptions or a qualifying description of collateral under section 9-108; whereas, the First Circuit Court in *In re Financial Management and Oversight Board* applied the pre-revision section 9-402, which required the indication of collateral in the financing statement to indicate the collateral "by type" or "by the items of collateral."[121]

Because there is nothing in section 9-108 or its Official Comments addressing whether an incorporation by reference to an unattached security agreement would or would not qualify as a reasonable description of collateral under section 9-108(b)(6), some clarification on this question would be helpful. While the Seventh Circuit Court's decision held that the reference to the unattached security agreement including specific identifiers, such as the date and title of the security agreement, qualified as a reasonable description of collateral under 9-108(b)(6) and satisfied the indication of collateral requirement under 9-504(1), other courts that may be asked to address this same question under the current version of the Code could take a different position in light of case law under the pre-2001 version of section 9-402, where an incorporation by reference to the security agreement was often deemed insufficient.[122] As described above, one commentator raised the question of whether the Seventh Circuit Court's reading of section

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[118] *See* Kubiak, *supra* note 51, at 48 ("As a second, less-desirable option, UCC 9-210 should be revised to provide creditors of and prospective purchasers from a debtor with the procedure described in Official Comment 3 to § 9-210, compelling existing secured parties to provide more detailed information regarding a description of collateral (with 'teeth' if a response is not timely provided)."); see also, *supra* note 99 and accompanying text.

[119] McKenna et al., *supra* note 52.

[120] *See supra* notes 100-109.

[121] See *supra* note 102 and accompanying text.

[122] For a discussion of pre-revision case law on the sufficiency of references to security agreement in financing statements, see the discussion by the bankruptcy court in *In re 180 Equipment, LLC,* 591 B.R. 353, 356, 360–61 (Bankr. C.D. Ill. 2018).

9-108(b)(6) was correct because the other methods for providing a reasonable description of collateral under subsections (1-5) of section 9-108(b) anticipate some specificity in the description of the collateral.[123]

If the Commission agrees with the Seventh Circuit Court in *In re 180 Equipment* that an incorporation by reference to an unattached, but specifically identified security agreement is a sufficient method to indicate collateral in the financing statement, it could formalize this in two different ways. One way to do this is to amend section 9-504 so that the methods that filing secured creditors can use to indicate collateral include: (a) descriptions as prescribed under section 9-108(b); (b) the use of a supergeneric description such as "all assets or personal property"; or (c) by referencing a security agreement that is specifically identifiable.[124]

However, because of the inherent difficulties of making changes to a specific section of the Code in a uniform manner, another option is for the Commission's Permanent Editorial Board to issue a PEB Commentary[125], supporting (or rejecting) the Seventh Circuit Court's decision in *In re 180 Equipment, LLC* holding that an incorporation by reference to an unattached security agreement with identifiers such as the date and title of the security agreement satisfies the requirements of section 9-504(1) and 9-108(b)(6). While a PEB

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[123] *See supra* notes 91-97 and accompanying text; *see also* the bankruptcy court decision in *In re 180 Equipment, LLC*, 591 B.R. 353, 358 (Bankr.C.D. Ill. 2018).

[124] The bankruptcy court in *In re 180 Equipment, LLC* held that the reference to the unattached security agreement was insufficient and thus ineffective to perfect First Midwest's security interest. In its conclusion, it opined:

> By authorizing the usage of a supergeneric description in financing statements, the drafters of Revised Article 9 drew a line in the sand at that point for the most general type of collateral description that could be used in order to sufficiently indicate the collateral. *The drafters could have gone one step further by authorizing a mere reference to the underlying security agreement as an acceptable method of identifying the collateral. They did not do so, however, and neither will the Court*. *Id*. at 363–364 (emphasis added).

[125] On March 14, 1987, the Permanent Editorial Board of the UCC adopted a resolution on purposes, standards, and procedures for PEB commentaries to the UCC. It noted that this was different from the Official Comments to the UCC but could be used to "resolve an ambiguity" or to "state a preferred resolution of an issue on which judicial opinion or scholarly writing diverges." *PEB Resolution on Purposes, Standards and Procedures for PEB Commentary to the UCC, (PEB Commentaries) (March 14, 1987).*

Commentary is not a change in the law, it is a means by which the Commission can address ambiguities in a Code provision or address differences in judicial opinions or scholarship on a Code provision.[126] This matter would clearly fit within the description of topics for a PEB Commentary since it has "practical importance"[127] to a secured creditor's perfection of a security interest in a debtor's collateral

[126] For a discussion of the utility of the PEB Commentary as a means of addressing issues that arise under specific Code provisions, *see* Neil Cohen and Barry Zaretsky, *Drafting Commercial Law for the New Millennium: Will the Current Process Suffice*, 26 LOY.L.A.L. REV. 551, 555–557 (1993). *See* Peter A. Alces and David Frisch's article, *Commenting on "Purpose" in the Uniform Commercial Code*, 58 Ohio St. L. J. 419 (1997) The authors note the inherent difficulty of making changes to Code provisions that would be uniformly adopted by all state legislatures, and that the creation of the Permanent Editorial Board and the process by which PEB Commentaries are developed is an effective way to "monitor the Code and the commercial law to assure that the objects of the UCC are not frustrated." That is, fulfilling the purpose of uniformity in commercial laws and to have a Code that is flexible and adaptable to evolving changes in commercial practices pursuant the statement of the purposes and policies of the Code under section 1-102. *Id*. at 455. While neither the Official Comments nor the PEB Commentaries are the law, they are a guiding source for courts and practitioners in interpreting and applying Code provisions. *Id*. at 436-441.

Throughout various sections of Article 9, drafters have included citations of case law to clarify a particular provision's application. This was used often with respect to pre-revision case law to indicate changes intended in the 2001 revisions to the Code. *See, e.g*., U.C.C. § 9-109 cmt. 5,7 ; U.C.C. § 9-313 cmt. 4; U.C.C. § 9-320 cmt. 8; U.C.C. § 9-604 cmt. 3. In the 2010 amendments to the Code, the drafters added a comment to reflect its rejection of a Ninth Circuit Panel Bankruptcy Appellate decision in *In re Commercial Money Center, Inc*., 350 B.R. 465 (9th Cir. Bankr. App. 2006), a post 2001 revision case regarding the ancillary right to payment of collateral and whether an assignment of the right to payment would change the classification of collateral as originated. U.C.C. § 9-102 cmt. 5.

[127] The PEB Resolution states "PEB Commentary may be issued whether or not a perceived issue had been litigated or is in litigation, and whether or not the position taken by the PEB accords with the weight of authority on the issue. The number of topics and topics that are chosen at any given time will be determined by the PEB weighing criteria appropriate under the circumstances, which may include the practical importance of the issue, the absence of other means of other resolution, the time and effort to be involved in the preparation of the PEB Commentary, the extent to which the PEB Commentary is likely to be successful in addressing an issue . . . ." *PEB Commentaries, supra* note 125.

through the filing of a sufficient financing statement and, in particular, meeting the indication of collateral requirement of section 9-502(a)(3), and the related provisions of sections 9-504(1) and 9-108(b)(6).

V. Conclusion

The question of whether an incorporation by reference to an unattached security agreement satisfies the "indication of collateral" requirement for a financing statement under section 9-502(a)(3) of Article 9 of the Uniform Commercial Code is very important for filing secured creditors. This has been a question presented to courts under the pre-2001 version of Article 9 and the current version of Article 9. When considering the fundamental importance of filing a financing statement to perfect a security interest under Article 9 of the Code and the conflicts and ambiguities raised in case law and in commentaries discussing this issue, it becomes clear that it is necessary for the Commission on Uniform Commercial Laws to clarify the question. This article suggests that such a clarification can be effectively addressed through the issuance of a Commentary by the Commission of Uniform Laws' Permanent Editorial Board for the UCC.