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## Impact of U.C.C. Article Nine on Revenue Bond Investments

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## IMPACT OF U.C.C. ARTICLE NINE ON REVENUE BOND INVESTMENTS

Among a plethora of variations which compromise the "uniformity" of the Uniform Commercial Code<sup>1</sup> are a number of recent amendments by state legislatures to exclude certain public securities from the scope of Article Nine.<sup>2</sup> Such initiatives may well suggest to other lawmakers the wisdom of exploring the possible impact of Article Nine on their own public securities and encourage even more widespread amendatory legislation.<sup>3</sup>

The source of the potential difficulties envisioned by those states which have enacted exclusionary amendments is the comprehensiveness of the Article Nine "security interest," which is defined as "an interest in personal property . . . which secures payment or performance of an obligation." The concept includes "any interest of a buyer of accounts, chattel paper, or contract rights which is subject to Article Nine."<sup>4</sup> The scope of Article Nine itself is presented in the following terms :

(1) Except as otherwise provided . . . this Article applies so far as concerns any personal property and fixtures within the jurisdiction of this state (a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures, including goods, documents, instruments, general intangibles, chattel paper, accounts or contract rights.<sup>5</sup>

As Professor Gilmore has noted, "all 'transactions . . . intended to create a security interest,' as subdivision (1) puts it or 'all security interests created by contract,' in the subsection (2) version, are brought under one roof. . . ." As a consequence, "if the 'transaction' is one 'intended to create a security interest' " it necessarily must result in "an Article Nine security interest, subject to Article Nine rules, the Article Nine metaphysics and, most importantly, the Article Nine filing

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1. UNIFORM COMMERCIAL CODE § 1-102(1)(c) states that the purpose of the Code is "to make uniform the law among the various jurisdictions."

2. See notes 32 and 46 *infra*.

3. The fact that the possible subjection of public securities to Article Nine rules has not been litigated and thus remains problematic should not induce legislative indifference to the potential difficulties, for "[courts] have recognized the policy embodied in an act as applicable in reason to subject matter which was not expressly included in the language of the Act." UNIFORM COMMERCIAL CODE § 1-102, Comment 1.

4. UNIFORM COMMERCIAL CODE § 1-201 (37).

5. UNIFORM COMMERCIAL CODE § 9-102.

systems.”<sup>6</sup> Noting that Article Nine is “a statute drafted to regulate [only] certain well-known or institutionalized types of financing transactions,” Gilmore concludes, “It is fair enough to say that a transaction which sets out to be one of those types should conform to the Article Nine rules or fall by the wayside.”<sup>7</sup>

The consequences of falling by the wayside include the subordination of a security interest which does not conform to Article Nine rules to the rights of certain third persons, including lien creditors.<sup>8</sup> It is therefore incumbent upon those responsible for the administration of certain public securities to determine whether such securities may fairly be considered to be included within Article Nine.

The specific focus of this note is on the impact of Article Nine on revenue bond investments with special reference to Indiana issues. Such bonds are defined as

the special obligations of political subdivisions, municipal and public corporations which are payable solely from the revenues of an income-producing public project or system and issued for the purpose of financing the acquisition, construction, extension or improvement of such project or system.<sup>9</sup>

The use of revenue bond financing enjoys popularity as a means of circumventing Section one of Article thirteen of the Indiana Constitution, which prohibits political or municipal corporations from becoming indebted in an amount in excess of two per cent of the taxable property within the corporation, since it does not commit the general revenues of the corporation.<sup>10</sup> Authority to issue revenue bonds is given by the

6. G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* 296 (1965). Professor Gilmore was a member of the subcommittee of the Permanent Editorial Board to consider Article Nine. The use of the term “metaphysics” to describe the more abstruse provisions of Article Nine is especially apt in view of the uncertainties which lie in the yet unexplored frontiers of the revamped law of secured transactions.

7. *Id.* 336-37.

8. UNIFORM COMMERCIAL CODE § 9-301. See especially § 9-301(1)(b) which subordinates an unperfected security interest to the claims of lien creditors. The term “perfected” is used to describe a security interest which cannot be defeated in insolvency proceedings or in general by creditors. A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. *Id.* § 9-303.

9. Zwerner, *Indiana Municipal Revenue Bond Financing*, 12 IND. L.J. 266 n.1 (1937). This definition was so constructed to exclude “any reference to revenue bonds in the sense of general obligations, special taxing district obligations, short-term bonds, notes, special assessments or warrants issued in anticipation of general or other ordinary revenues.”

10. *Letz Mfg. Co. v. Public Service Commission of Indiana*, 210 Ind. 467, 4 N.E.2d 194 (1936). However, “the scheme in nowise involves an evasion of the spirit or purpose of the constitutional provision.” *Edwards v. Housing Authority of City of Muncie*, 215 Ind. 330, 338, 19 N.E.2d 741, 745 (1939).

Indiana legislature on an *ad hoc* basis,<sup>11</sup> and "the rights and remedies of the bondholders are to be determined from the terms of the bonds and of the ordinance [implementing] the issue."<sup>12</sup> Legislation authorizing a bond issue typically provides that such bonds shall be payable from and secured by a lien upon the revenues of the income-producing enterprise.<sup>13</sup> In some cases, the secured party is granted a statutory mortgage lien upon the facilities of the enterprise.<sup>14</sup> With few exceptions, the authorizing statute sets interest limits, restricts the maturity period, provides that the bonds shall be payable only from specified revenues, recites that the bonds shall not constitute an indebtedness of the municipality and grants to the bonds the qualities of negotiable instruments.<sup>15</sup>

The statutes providing authority for the issuance of revenue bonds generally provide that the bond shall be secured by a lien on the revenues of the utility or authority. Under prior law this lien was secure against most rival claimants by reason of the Indiana rule that priority in time is priority in right.<sup>16</sup> If, however, the security interest created by the authorizing statutes is within Article Nine, and unless the security interest can be perfected in accordance with section 9-402, the bondholder's prior lien will be subordinated to certain third parties.<sup>17</sup> Thus, the effect of Article Nine may be to negate the abundant remedies afforded the bondholder by the authorizing statutes and the prior law,<sup>18</sup> thus upsetting the expectations of bondholders who had relied on the

11. The specific question of whether a political or municipal corporation could issue such bonds in an exercise of its recognized inherent discretionary powers does not appear to have arisen and, as far as can be determined, such bonds have never been issued in this state without express statutory authority. Zwerner, *supra* note 9, at 274.

12. 21 IND. L. ENCY. *Municipal Corporations* §560 (1959). By general rule, the enactment implementing the bond issue, if not incompatible with the authorization statute or the bond itself, is part of the contract between the issuing authority and the purchaser. *Summey v. City of Ames*, 251 Ia. 1199, 104 N.W.2d 617 (1960).

13. See, e.g., IND. ANN. STAT. § 48-4314 (Burns Supp. 1968); and §§ 48-5319, 48-5337, 48-5357, 48-5440, 48-7119, 48-7301, 48-8434 and 48-8477 (Burns 1963 Repl.).

14. See, e.g., IND. ANN. STAT. §§ 28-5717 (Burns 1948 Repl.) and 28-5723 (Burns Supp. 1969); 48-7301 and 48-8435 (Burns 1963 Repl.).

15. See, e.g., IND. ANN. STAT. §§ 48-5319, 48-5328, 48-5357, 48-5440, 48-8434 and 48-8477 (Burns 1963 Repl.).

16. 18 IND. L. ENCY. *Liens* § 5 (1959).

17. See note 8 *supra*.

18. See text accompanying note 16 *supra* and note 36 *infra*. In addition to the remedies expressly assured the bondholder, other methods of protecting his interest were afforded by prior law. While he apparently could not seek attachment of the funds of the income-producing enterprise prior to obtaining a judgment, [IND. ANN. STAT. § 3-501 (Burns 1968 Repl.)] he conceivably could assert an adverse claim against the bank deposits of the enterprise [IND. ANN. STAT. § 18-2001 (Burns 1968 Supp.)]. Had he pursued his claim to judgment, the bondholder, as a judgment creditor, could have reached both money in possession of the debtor and money of the debtor in a bank by proceedings supplementary to execution. *Cf. Baker v. State ex. rel. Mills*, 109 Ind. 47, 9 N.E. 711 (1887), *D.L. Adams Co. v. Federal Glass Co.*, 180 Ind. 576, 103 N.E. 414 (1913).

continued viability of the pre-Code law by subjecting investments worth millions of dollars to unanticipated risks.<sup>19</sup> Since even a remote prospect of such consequences would greatly undermine confidence in an essential and popular method of public financing, the urgency of resolving the question becomes apparent.

Those state legislatures which have troubled to exclude such public securities from the coverage of Article Nine evidently have concluded that the article perhaps may be construed to embrace such securities.<sup>20</sup> Giving broad sweep to the language of the article, the argument for inclusion may begin with the premise that security interest means an interest in personal property which secures payment or performance of an obligation.<sup>21</sup> Since personal property includes everything that is subject to ownership not coming under the denomination of realty,<sup>22</sup> the revenues of a public enterprise may be termed personal property. Since revenue bonds are secured by an interest in personal property—the revenues of the enterprise—which secures payment or performance of an obligation, they fall within the general denomination of “security interest.” The argument for including such securities within Article Nine is completed by reference to Gilmore’s contention that any security interest created in the course of institutionalized types of financing is *ipso facto* under Article Nine.<sup>23</sup> Some commentators, however, have seemed to require that the security interest be in a specific category of collateral specified in section 9-102 despite the fact that the use of the prefacing term “including” would suggest that the list is not exhaustive. Since the nature of the collateral has relevance to the method of perfecting the security interest,<sup>24</sup> the attempt to read the section 9-102 list as exhaustive is far from a

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19. Some indication of the dimensions of the problem can be seen in the fact that, as of December 31, 1966, Indiana Toll Road Commission revenue bonds outstanding totalled some 250 million dollars, and total Indiana revenue bonds outstanding probably total twice that figure. MOODY'S MUNICIPAL & GOVERNMENT MANUAL 847 *et seq.* (F. St. Clair ed. Feb. 1968). Whatever continued viability there is in the doctrine of sovereign immunity poses no bar to suits against the income-producing enterprises whose revenues secure such bonds, for they are considered public corporate entities separate from the state as a sovereign corporate entity. *Indiana State Toll Bridge Comm'n v. Minor*, 236 Ind. 193, 139 N.E.2d 445 (1957).

20. The argument for including the securities within Article Nine is not predicated upon the *intention* of the drafters or the legislature to so embrace them. Rather, it is based on statutory language which, through its breadth, creates a plausible cause for their inclusion. See note 3 *infra*.

Little indication appears as to the extent to which exclusionary legislation was prompted by belief that coverage could reasonably be inferred from the language of the Code rather than by a desire to remove all uncertainty however remote. See note 32 *infra*.

21. UNIFORM COMMERCIAL CODE § 1-201 (37).

22. J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 9 (1962).

23. See text accompanying note 6 *supra*.

24. UNIFORM COMMERCIAL CODE § 9-102, Comment.

harmless error.

Reading the list of section 9-102 collateral as exhaustive has forced Peter Coogan,<sup>25</sup> in discussing the applicability of Article Nine to revenue bond financing, to assume that the original collateral is money<sup>26</sup> and that if section 9-102 is construed literally there may be a security interest in money. Although deposit accounts are specifically excluded from Article Nine<sup>27</sup> and money is excluded from the definition of "goods" in section 9-102, Article Nine applies to all personal property within the jurisdiction of the state. Of the remaining categories of collateral the only possibilities are "instruments" and "general intangibles."<sup>28</sup> He concludes that money may be considered an "instrument":

Both a negotiable instrument and the 'other writings' referred to [in the section 9-105(1)(g)] definition must be writings payable in money. At least some forms of paper money are writings that may themselves be payable in money, and, with some stretching, the word 'writings' can cover coins . . . . Admittedly there are problems, but if money must be forced into one Article Nine category, the category that most nearly carries out the purposes of Article Nine is instruments.<sup>29</sup>

"Section 9-309, read imaginatively," he declares, "answers most questions as to the rights of holders, and conflicts are held to a vanishing point" because of perfection by possession.<sup>30</sup>

Coogan's analysis, however, would appear to create as many conflicts as it resolves. A bondholder, faced with the prospect of competing claims, probably would not be comforted to learn that his security interest

25. P. COOGAN, W. HOGAN & D. VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 23.09 (1963). Mr. Coogan served as a member of the Permanent Editorial Board to consider Article Nine.

26. Under current financing patterns, governmental units and other entities issue bonds that do not commit their general credit, but are payable from, and secured by, toll revenues, water department revenues, college tuitions, dormitory rents, and so forth. Lawyers wrestling with these forms of financing have called attention to uncertainties about whether Article Nine covers money and deposits as collateral and, if so, what rules apply to the perfection of security interests therein.

*Id.*, at 2338.

27. UNIFORM COMMERCIAL CODE § 9-104(k).

28. Every effort must be made to avoid calling money a general intangible, since one bizarre result of this classification would be that a secured party could perfect a security interest in money simply by filing a financing statement. Nobody could deal with money without making a search in the appropriate Code filing office.

P. COOGAN, *supra* note 25, § 23.09, at 2389.

29. *Id.* at 2389-90.

30. *Id.* at 2390. See UNIFORM COMMERCIAL CODE § 9-304, which requires a security interest in instruments to be perfected only by possession.

in the revenues of a public enterprise could be perfected only through possession. Unless the debtor could be considered to hold the revenues for the bondholder under a constructive trust theory, the security interest would remain unperfected and the revenues would remain subject to competing claims of a non-consensual character until they were actually paid to the bondholder.<sup>31</sup> Faced with such a prospect, those interested in protecting the bondholder's interest would appear to have no alternative but to urge the total exclusion of revenue bonds from the coverage of Article Nine.<sup>32</sup>

However, an alternative to total exclusion appears if the characterization of the original collateral in revenue bond financing as money is defeated. An indication that such a characterization is erroneous arises from the fact that Article Nine seems to comprehend a distinction between the collateral and that which will satisfy the obligation while, under Coogan's analysis, that which satisfies the obligation and the collateral itself are identical. Article Nine contains no language which envisions such a unity, and the textbook examples of Article Nine applicability clearly suppose a requisite duality.<sup>33</sup> Indeed, the types of collateral enumerated in section 9-102 are obviously something distinct from that

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31. A trust-fund doctrine has been imposed on municipalities which issue special assessment bonds. The municipality becomes a trustee of funds resulting from collection under special assessments and is charged with all attending fiduciary duties. *Sampson v. Village of Stickney*, 30 Ill. App. 2d 13,173 N.E.2d 577 (1961), *rev'd on other grounds* 24 Ill. 2d 134, 180 N.E.2d 457 (1962). The trust theory would afford some protection to the bondholder if he were found to have a security interest which need not be perfected by filing since the "trustee" would have possession. Perhaps more significantly, it would serve the same purpose if the bondholder were considered not to possess an Article Nine security interest at all. It is not necessary to rely exclusively on the *constructive* trust, since some revenue bond schemes either explicitly provide for a trust or specify that the agreement shall be construed to create a trust. *Highland, Ind. Ordinance 447*, Dec. 19, 1960; *Indiana State Toll Bridge Comm'n to American Fletcher National Bank & Trust Co., Trust Agreement*, January 1, 1965.

32. Such a course has been followed by those states enacting amendments to section 9-104. The California enactment is representative:

[This Article does not apply]

(1) To any security interest created by the state, any county, city and county, city, municipal corporation, public district, public authority, or any subdivision.

CAL. COMM. CODE § 9104 (West Supp. 1968). See also ALA. CODE tit. 7A, § 9-104 (1966); ALASKA STAT. § 45.05.696 (Supp. 1968); GA. CODE ANN. § 109A-9-104 (Supp. 1968); R.I. GEN. LAWS ANN. § 6A-9-104 (1956); and WIS. STAT. ANN. § 409.104 (1964). A comment to the California amendment notes

The 1967 amendment to this section adds a new subdivision (1) for the purpose of making it clear that public securities are not included in the transactions referred to in Article nine.

Report of the Advisory Committee, Senate Journal, April 20, 1967, at 1238-39. The California amendment apparently was urged by attorneys who advise underwriters of public securities. Although contending such securities to be outside the scope of Article Nine, the Advisory Committee preferred to preclude the question from litigation. 41 CAL. S.B.J. 792 (1966).

33. J. HONNOLD, SALES AND SALES FINANCING 428-30 (1962).

which will satisfy the obligation. Only the most tortured construction permits Coogan to say that a security interest in an instrument can be satisfied by that very instrument because, inasmuch as money is a writing payable in money, instruments include money.

It imposes far less strain on the language of Article Nine to view money, not as the original collateral, but as proceeds of the original collateral. "Proceeds" is defined to include "whatever is received when collateral or proceeds is sold, exchanged, collected or otherwise disposed of,"<sup>34</sup> while "collateral" itself is defined as "the property subject to a security interest [including] accounts, contract rights and chattel paper which have been sold."<sup>35</sup> It is therefore possible to envision the collateral as changing in its form along a temporal continuum. A "contract right"<sup>36</sup> matures into an "account"<sup>37</sup> which yields "proceeds" in the form of money.<sup>38</sup> An approach more orthodox than Coogan's would characterize the collateral of a revenue bondholder as being represented initially by the contract right arising out of the relationship between the income-producing enterprise and its customers, then by the account receivable on performance by the enterprise, and finally by the cash proceeds collected by the enterprise.<sup>39</sup>

The major hurdle to overcome in thus characterizing the revenue bondholder's security interest is the statutory recital that such bonds are secured solely by the revenues of the enterprise. On its face, such a recital might be construed to mean that the bondholder has no interest until such revenues actually accrue. Closer analysis, however, suggests that such a conclusion appears unfounded, for the authorizing statutes and ordinances also grant the bondholder an interest not confined to *realized* revenues. Statutory provisions requiring the issuing authority to set aside that proportion of potential revenues necessary to satisfy bond obligations and recognizing the right of the bondholder to compel payment preclude the restrictive view that the bondholder has no interest until revenues are

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34. UNIFORM COMMERCIAL CODE § 9-306(1).

35. *Id.* at § 9-105(c).

36. "'Contract right' means any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper." *Id.* § 9-106.

37. "'Account' means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper." *Id.*

38. "Contract rights may be regarded as potential accounts: they become accounts as performance is made under the contract." *Id.* § 9-106, Comment.

39. See note 13 *supra*. Of course, this analysis is only appropriate to those types of income-producing enterprises which maintain accounts with their customers. Absent the "contract right" and "account receivable" aspects, the original collateral admittedly is "money," but as has been demonstrated, a security interest in "money" need not be characterized as a security interest in "instruments" perfectible only by possession.

realized.<sup>40</sup> Thus a more reasonable construction of statutes authorizing revenue bonds is the suggestion that a right in revenues implies a right in antecedent collateral. The consequences of Coogan's analysis thereby can be avoided. If the bondholder's original collateral is in a contract right, then the security interest attaches as soon as the debtor has rights in the collateral.<sup>41</sup> In the case of contract rights, the debtor has rights as soon as the contract has been made.<sup>42</sup> Unlike an interest in instruments, a security interest in a contract right may be perfected by filing a financing statement.<sup>43</sup> Moreover, a perfected security interest in a contract right remains perfected despite the evolution in the form of the collateral along the temporal continuum.<sup>44</sup>

Such an analysis creates an alternative to total exclusion through amendment of section 9-104. If the objection to including such security interests within Article Nine is that the filing requirement is unduly burdensome and the consequences for failing to file unduly harsh, a possible solution would be to exempt them from the filing requirement by an amendment to section 9-302.<sup>45</sup> This alternative also would be appropriate, regardless of the characterization of collateral as altering with the passage of time, if the categories of collateral in section 9-102 are considered merely illustrative and a security interest in the revenues is considered to be included within the general terms of that section. Under such a construction, these security interests would be subject to the filing requirement of Article Nine since they are not expressly exempted by section 9-302.<sup>46</sup>

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40. See IND. ANN. STAT. §§ 48-5313, 48-5321, 48-5334 and 48-8478 (Burns 1963 Repl.); Highland, Ind. Ordinance 447, Dec. 19, 1960.

41. UNIFORM COMMERCIAL CODE § 9-204(1).

42. *Id.* § 9-204(2) (c).

43. *Id.* § 9-302.

44. *Id.* § 9-306(c).

45. UNIFORM COMMERCIAL CODE § 9-402 sets out the formal requisites of a financing statement, filed by the secured party, necessary to perfect a security interest subject to perfection by filing, consisting primarily of signatures and addresses of both parties and a description of the collateral by type or item. Perhaps the major argument for exempting the bondholder from the filing requirement is the sheer volume of paperwork which would inundate the filing offices were such securities subjected to the filing requirement.

46. Virginia is representative of those states which have elected the alternative of excluding a certain range of security interests in such enterprises:

(5) The filing provisions of this title do not apply to a security interest in property of any description or any interest therein created by a deed of trust or mortgage by a public service corporation . . . but the deed of trust or mortgage shall be recorded and filed in the county or corporation in which such deed of trust or mortgage is required . . . to be recorded.

VA. CODE ANN. § 8.9-302 (Supp. 1968). See also ARIZ. REV. STAT. ANN. § 44-3123 (Supp. 1968), GA. CODE ANN. § 109A-9-302 (Supp. 1968), KY. REV. STAT. § 355.9-302 (Supp. 1968) and MO. ANN. STAT. § 400-9-302 (1965). Since some Indiana statutes authorizing revenue bonds permit the bonds to be secured by mortgages, the Virginia

Thus a rationale exists under the Code for including revenue bonds under the denomination of an Article Nine security interest and, depending upon the characterization of the collateral, for subjecting them to the Article Nine perfection requirement. There are possibilities of excluding such interests from the scope of Article Nine through an amendment to section 9-104, or of exempting them from the burdensome filing requirement by amending section 9-302. A further and necessary inquiry is whether a basis exists under the Code for excluding revenue bonds from either the security interest denomination or the filing requirement. Such an inquiry has relevance in determining whether amendatory legislation is necessary and may provide a judicial rationale for excluding such securities in the interim before such legislation can be enacted, should the issue arise in litigation.<sup>47</sup>

Perhaps the strongest basis for excluding such securities from the operation of Article Nine is the section 9-102 (2) provision: "This Article does not apply to statutory liens except as provided in section 9-310 [on priority of such liens]." However, section 9-102 (2) arguably poses no bar to the inclusion of such bonds within Article Nine. Instead of creating a statutory lien, the terms of the authorizing statutes might be construed only as setting forth a requisite provision of the agreement to be concluded between the contracting parties. Under such an analysis, the lien is not deprived of its consensual character, for it is not the authorizing statute but the agreement which creates the lien. To ascribe to the legislature the broader purpose of creating a statutory lien seems violative of the rule that statutes purporting to create statutory liens in derogation of the common law are to be strictly construed.<sup>48</sup> Furthermore, to hold that the authorizing statute creates a statutory lien violates the provision

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amendment has at least limited relevance to this state. See text accompanying note 14 *supra*. In any event, the exclusionary amendment could be cast in terms appropriate to exclude a security interest of any type created by statute in public securities.

In some cases an amendment to section 9-302 would not be necessary to exempt the security interest from the filing requirement. See G. GILMORE, *supra* note 6, at 549 n.2:

Many states had pre-Code statutes under which certain types of corporate mortgages (frequently the mortgages of public utility corporations) could be perfected by a central filing. In the Connecticut version of 9-302, such pre-Code statutes were expressly preserved and interests subject to them exempted from the Article nine filing provisions. Even without the express reference, such statutes (if not repealed when the Code is enacted) would qualify as 'central filing' statutes under section 9-302 (3) (b).

Cf. IND. ANN. STAT. § 54-513 (Burns Supp. 1968).

47. The first opportunity for the Indiana General Assembly to act would be the 1971 biennial session, barring a possible special session.

48. 18 IND. L. ENCY. *Liens* § 2 (1959). A statute creating a lien on the revenues of an income-producing public enterprise would derogate the common law by imposing a lien on public property and, under the Coogan analysis, creating a lien on property not *in esse*.

that the rights and remedies of the bondholder are to be determined by the terms of the bonds and the ordinance implementing the issue, for such a provision appears to prevent the authorizing statute itself from dictating those rights and remedies.<sup>49</sup>

Moreover, even if the lien is considered statutory, the exclusion of revenue bonds from the terms of Article Nine by reason of section 9-102 (2) does not necessarily follow, for other sections of Article Nine bear on the question. Section 9-104(c) provides: "[This Article does not apply] to a lien given by statute or other rule of law for services or materials except as provided in section 9-310 on priority of such liens." The section 9-104(c) provision would appear to be surplusage in view of the section 9-102 (2) exclusion. Yet it is an elementary rule of statutory construction that no provision of a statute shall be so construed. More appropriately, the section 9-102 provision should be interpreted as setting forth the broad outlines of the article, subject to the refinement of its general terms in the subsequent sections. Section 9-104(c) can be read as such a refinement on the subject of statutory liens. Under this analysis, it appears that the types of statutory liens excluded are those "for services and materials" commonly denoted "statutory liens," such as mechanics" and materialmen's liens.<sup>50</sup>

The apparent weakness of this argument is that section 9-104(c) may be read as an *extension* of section 9-102 (2) to exclude liens created by "other rule of law," *i.e.*, common law liens. The rejoinder is that section 9-102 (2) by its terms is not an exclusionary provision but rather a broad statement of the policy and scope of the article. Hence it is not unrealistic to look to subsequent sections for a more precise understanding of its terms. Moreover, even if section 9-104(c) is read as an extension of section 9-102 (2) to exclude common law liens, the remaining language of section 9-104(c) would have to be considered surplusage.

This analysis is confirmed by Professor Gilmore, who makes the further explanation that the section 9-102 (2) provision was intended to exclude from the Article Nine security interest denomination only those interests classified as statutory liens under section 67(c) of the Bankruptcy Act. It is clear, he stresses, "that the section 9-102 (2) language does not say what . . . it was meant to mean."<sup>51</sup> So construed,

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49. See text accompanying note 12 *supra*.

50. It may be instructive that an illustrative list of statutory and common law liens recognized in Indiana omits the types of liens under consideration here. IND. ANN. STAT. § 19-9-310, Indiana Comment (Burns 1964 Repl.).

51. What section 9-102(2) says is: 'This Article does not apply to statutory liens. . . .' Section 9-104(c) says that the Article does not apply to 'a lien given by statute or other rule of law for services or materials. . . .' The addition to section 9-102(2) was obviously a hasty improvisation which is somewhat lacking

section 9-102 (2) does not exclude those essentially consensual liens created pursuant to statute. This approach is more in keeping with the purpose of that section, which is "to bring all consensual security interests . . . with the exception of certain types of transactions excluded by section 9-103 and 9-104, under this Article."<sup>52</sup>

Such considerations aside, the interest of the revenue bondholder can be totally excluded from Article Nine if the bondholder is deemed to have an interest in the revenues of the enterprise only when such revenues are realized, the types of collateral specified in section 9-102 are considered exclusive, and the characterization of original collateral in money as "instruments" is found wanting. Despite the reasons for not restricting the bondholder to an interest in accrued revenues, a court which looks no further than the apparent meaning of the authorizing statute easily could reach a contrary result. A basis for considering the section 9-102 categories of collateral as exhaustive can be found in section 9-105, Comment three, which states that all intangible collateral comprehended by the Article consists of the six types enumerated in section 9-102. Even though the subsequent enactment of the Code might not be deemed to incorporate the pre-existent interpretative comments, such comments nevertheless have persuasive authority as extrinsic aids.<sup>53</sup> Finally, the attempt to characterize as instruments the original collateral in money might justifiably prove unsuccessful, especially in view of the demise of the Silver Certificate, which best fits the characterization of money payable in money. Even if the revenue bond cannot thus be excluded from the Article Nine security interest denomination, it may be possible to find a basis under the Code for exempting it from the filing requirement. Section 9-302(1)(e) arguably could provide such a rationale, although the comment suggests that the meaning of the language is not so broad as it appears.<sup>54</sup>

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in elegance. Putting the references in the two sections together, we may read them this way: *the Article does not apply to the liens described in section 9-104(c)*. . . [Emphasis added.]

G. GILMORE, *supra* note 6, at 307-08.

52. UNIFORM COMMERCIAL CODE § 9-102, Comment: Purposes.

53. "The meaning of the statute itself must be found in its text, its definitions, and in appropriate extrinsic aids." UNIFORM COMMERCIAL CODE § 1-102, Comment 2.

54. UNIFORM COMMERCIAL CODE § 9-302 (1) (e) provides that the security interest created in an assignment of accounts or contract rights which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts or contract rights of the assignor need not be perfected by filing. Since the issuing authority must regularly set aside that proportion of its prospective revenues necessary to meet its bond obligations, (thirty per cent in the Highland, Ind. bond issue, Highland, Ind. Ordinance 447, Dec. 19, 1960), it would appear that the number of accounts and contract rights so designated scarcely could be described as insignificant. At any rate, Comment five suggests that the exception is limited to "casual or isolated assignments" and cautions that "any person who regularly takes assignments

In lieu of the positive Code provisions recourse can be made to the negative implications of the relevant statutes. It is arguable that revenue bond financing is not one of those "certain well-known or institutionalized types of financing transactions" comprehended by the Article.<sup>55</sup> The difficulties encountered in including such securities within the terms of the Article, in view of its purported simplicity of application,<sup>56</sup> perhaps suggest that they are alien to the statute. Moreover, provisions that the rights and remedies of the bondholders are to be determined by the terms of the bonds and the authorizing statutes<sup>57</sup> might be construed to exclude the operation of other statutes.

Any or all of the above arguments might be found to constitute a rational basis for excepting revenue bonds from the operation of the Code. At least, a basis might be found for exempting them from the filing requirement. The questions which must be faced, however, are whether the rights of the bondholder are to be subjected to the uncertainties of Article Nine and whether revenue bond financing is to be subjected to such potential burdens. If it is deemed desirable to rescue revenue bonds from the vagaries of Article Nine "metaphysics"<sup>58</sup> altogether, Indiana should follow the lead of those states which have excluded such securities through an amendment to section 9-104. Since the position of the Indiana revenue bondholder would not be enhanced by the Article Nine security interest denomination, as contrasted with his pre-Code status,<sup>59</sup> amendment of section 9-302 should not be considered an appropriate alternative. In any event, the issue is one which commends itself to the most thoughtful legislative scrutiny.

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of any debtor's accounts should file."

A further basis for exempting such securities from the filing requirement is that the notice requirement contemplated by the filing provision is satisfied by the fact that statutory authority is a prerequisite to the issuance of such bonds. However, such a consideration is not specifically recognized as a basis for exemption under section 9-302, and the possibility of such an implied exception has not allayed the misgivings of states enacting amendatory legislation.

55. See text accompanying note 6 *supra*.

56. "The aim of this Article is to provide a simple and unified structure within which the immense variety of present-day financing transactions can go forward with less cost and with greater certainty." UNIFORM COMMERCIAL CODE § 9-101, Comment.

57. See text accompanying note 12 *supra*.

58. See text accompanying note 6 *supra*.

59. See note 18 *supra*. Such enhancement would appear to be the only reason for retaining the security interest denomination while relieving the bondholder from the filing requirement.