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Security Transfers by Secured Parties

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WHILE no Uniform Commercial Code section specifically so provides, the Code clearly contemplates transfer by secured parties of their interest arising under security agreements,[1] and these transfers commonly occur. Yet the legal ramifications of such transfers are to a large extent unknown because of the silence of the Code and the absence of both reported decisions and secondary authorities.[2] This article will examine one type of transfer by secured parties—transfers by secured parties to secure payment of an indebtedness.

I. TRANSFERS OF BOTH NOTE AND SECURITY AGREEMENT

A. *Rights of Transferee*

Generally in making such a transfer the secured party will transfer both the note and the security agreement. Where the transfer takes this form, the transferee has two security interests: (1) An interest in the property subject to the security agreement; and (2) an interest in the note and security agreement themselves. The latter is commonly called "chattel paper." Chattel paper is simply a writing which contains both a promise to pay and either a security interest in or lease of goods.[3] Often the promise to pay and the grant of the security interest will be in separate writings. In such instances, the writings taken together constitute "chattel paper."

(1) Transferee's Rights in the Collateral

As to his security interest in the collateral of the original security agreement, the transferee is protected by section 9-302(2) of the Code

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1 *See* UNIFORM COMMERCIAL CODE §§ 9-207(2)(e), 9-302(2), 9-405; 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 42.10, at 1155 (1965); Storke, *Article 9 of the Uniform Commercial Code and Colorado Security Law*, 37 COLO. L. REV. 11, 22 (1964).

2 The principal discussions of transfers by secured parties appear in 2 G. GILMORE, *supra* note 1, at § 42.10 and Coogan, Kripke & Weiss, *The Outer Fringes of Article 9: Subordination Agreements, Security Interests in Money and Deposits, Negative Pledge Clauses, and Participation Agreements*, 79 HARV. L. REV. 229, 266-74 (1965). As has been observed, "[i]t is all but impossible to discuss ambiguous areas in the present article 9 without finding that Mr. Coogan and Professor Gilmore, like Kilroy, have been there before." Kripke, *Suggestions for Clarifying Article 9: Intangibles, Proceeds and Priorities*, 41 N.Y.U.L. REV. 687, 690 (1966).

3 Levie, *Security Interest in Chattel Paper*, 78 YALE L.J. 935 (1969); *see* UNIFORM COMMERCIAL CODE § 9-105(1)(6).

from the mortgagor's creditors as long as the transferor's security interest is perfected. Section 9-302(2) provides:

> If a secured party assigns a perfected security interest, no filing under this Article is required in order to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

Nevertheless, it is advisable for the transferee to file an assignment of security interest as provided in section 9-405(2).[4]

Note that section 9-302(2) only speaks to "creditors of . . . the original debtor." It affords no protection from creditors of the transferring secured party. Thus, where *S* transfers the note and security agreement of *D* to *T*, and *T*, relying on section 9-302(2), does not cause a 9-405 assignment to be filed, the rights of the creditors of *S* are superior to those of *T*. Furthermore, *T*'s protection from the creditors of *D* is at best imperfect. While section 9-302(2) seems to make this perfection against the original debtor's creditors permanent, apparently it is not. The transferor secured party can file a termination statement under section 9-404(1).[5] The filing of such a statement results in the removal of the financing statement from the files. Since the rationale underlying the Code's system of perfection by filing a financing statement is that such filing affords sufficient notice to all creditors,[6] it would seem that, upon removal of the financing state-

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[4] UNIFORM COMMERCIAL CODE § 9-405(2) provides in relevant part as follows:

> A secured party may assign of record all or part of his rights under a financing statement by the filing of a separate written statement of assignment signed by the secured party of record and setting forth the name of the secured party of record and the debtor, the file number and the date of filing of the financing statement and the name and address of the assignee and containing a description of the collateral assigned. A copy of the assignment is sufficient as a separate statement if it complies with the preceding sentence. . . .

[5] UNIFORM COMMERCIAL CODE § 9-404(1) provides in relevant part as follows:

> Whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party must on written demand by the debtor send the debtor a statement that he no longer claims a security interest under the financing statement, which shall be identified by file number. A termination statement signed by a person other than the secured party of record must include or be accompanied by the assignment or a statement by the secured party of record that he has assigned the security interest to the signer of the termination statement. . . .

See generally 1 H. BIRNBAUM, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 12.10 (1954).

[6] *See* National Cash Register Co. v. Firestone & Co., 346 Mass. 255, 260-61, 191 N.E.2d 471, 474 (1963); UNIFORM COMMERCIAL CODE § 9-402(1), Comment 2. *See generally* Ruud,

ment from the files, the transferee is no longer protected against the creditors of the original debtor. Thus, to maximize protection not only against creditors of the original debtor but also against those of his transferor, the transferee should file an assignment of security interest under section 9-405(2).

(2) Transferee's Rights in the Chattel Paper

As to the security interest in the chattel paper, perfection is necessary for protection against the transferor's creditors and assignees. Perfection may be achieved either by possession[7] or by filing.[8] However, perfection by possession is preferable since the rights of a secured party who perfected by filing are subordinate to those of a purchaser of chattel paper "who gives new value and takes possession of it in the ordinary course of his business and without knowledge that the specific paper . . . is subject to a security interest . . . ."[9] Comment 2 to section 9-308 suggests that the nonpossessory lender may avoid this danger by stamping the chattel paper with a legend indicating that he has taken a security interest in it.[10] This, however, is at best an imperfect method of protection. In most instances of chattel paper financing, it will not be practical for each piece of paper to be brought to the secured party for stamping.[11] Thus, the secured party often must rely on the debtor to perform this task; and the debtor may fail intentionally or through inadvertence to properly stamp the paper.

The Perfection of Security Interests Under Article 9 of the Uniform Commercial Code—How? When? Where? How Often?, 44 TEXAS L. REV. 724, 729-33 (1966).

7 UNIFORM COMMERCIAL CODE § 9-305; *see* Wiseman & King, *Perfection, Filing and Forms Under Article 9 of the Uniform Commercial Code*, 9 WAYNE L. REV. 580, 600-09 (1963).

8 UNIFORM COMMERCIAL CODE § 9-304(1); *see* Wiseman & King, *supra* note 7, at 609-18.

9 UNIFORM COMMERCIAL CODE § 9-308; *see, e.g.*, W. DAVENPORT & R. HENSON, SECURED TRANSACTIONS 68 (1966); Coogan, *Public Notice Under the Uniform Commercial Code and Other Recent Chattel Security Laws, Including "Notice Filing"*, 47 IOWA L. REV. 289, 309-11 (1962). *But cf.* Levie, *supra* note 3, at 952.

10 In Burchett v. Allied Concord Financial Corp., 74 N.M. 575, 578, 396 P.2d 186, 188 (1964), the court stated:

> Although fully realizing that the official comments appearing as part of the Uniform Commercial Code are not direct authority for the construction to be placed upon a section of the code, nevertheless they are persuasive and represent the opinion of the National Conference of Commissioners on Uniform State Laws and the American Law Institute. The purpose of the comments is to explain the provisions of the code itself, in an effort to promote uniformity of interpretation.

See Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597.

11 Chattel paper is usually generated by a manufacturer or dealer pursuant to a plan of financing. Levie, *supra* note 3, at 935.

B. *Effect on Secured Party*

Both logic and the basic framework of the Code seem to indicate that transfer by a secured party of both the note and security agreement terminates all his rights, duties and interests thereunder. However, *Norton v. National Bank of Commerce*,[12] the only reported case that has directly considered the effect of a transfer of both the note and security agreement on the secured party, seems to reach a contrary result. There, defendant automobile dealer by written assignment executed to the plaintiff bank a promissory note and conditional sales contract received in the sale of a used car. Defendant agreed in the assignment to repurchase the contract, if the automobile buyer defaulted in his obligation. The buyer subsequently defaulted after two monthly payments, and plaintiff repossessed the automobile, notifying the buyer by letter that it had done so. Fifteen days later, without notice to either the buyer or defendant, plaintiff sold the automobile by private sale to one of its customers for $75, thereby leaving an unpaid balance of $277.88 due on the debt. Plaintiff instituted legal proceedings against the defendant alone to recover the deficiency. Defendant contended *inter alia* that plaintiff failed to give him notice of the proposed sale and that such failure discharged his entire liability. The Arkansas supreme court upheld this contention. The court based its decision on the conclusion that defendant was a debtor within the meaning of section 9-504(3) of the Code. This section provides in part:

> Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification . . . shall be sent by the secured party to the *debtor*, and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement . . . .[13]

As the car constituted consumer goods,[14] the defendant was not entitled to notice by reason of being a secured party. Where the collateral is nonperishable consumer goods, a debtor is the only party entitled to notice.

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12 240 Ark. 143, 398 S.W.2d 538 (1966).

13 UNIFORM COMMERCIAL CODE § 9-504(3) (emphasis added).

14 *See* National Shawmut Bank v. Jones, 108 N.H. 386, 236 A.2d 484 (1967); Mallicoat v. Volunteer Fin. & Loan Corp., 57 Tenn. App. 106, 415 S.W.2d 347 (1966); UNIFORM COMMERCIAL CODE § 9-109(1).

The court, in finding the defendant to be a debtor, stated:

> [Defendant] was directly affected by the sale of the Oldsmobile; the amount obtained in that sale fixed his pecuniary liability. In simple fairness he should have had notice—a requirement entailing no real inconvenience or hardship to the bank.[15]

It is difficult to argue with the court's statement about fairness. Nevertheless, arguments can and have been made (by the Permanent Editorial Board of the Uniform Commercial Code among others)[16] that the defendant was not a debtor as to the automobile.[17]

The Code's treatment of the term "'debtor" is somewhat confusing. Section 9-105(d) provides that " 'Debtor' means the person who owes payment or other performance of the obligation secured . . . and includes the seller of . . . chattel paper."[18] Debtor, however, is a relative term and is meaningless unless related either to the transaction out of which the debt arose or to the collateral which secures the debt. There is no denying that in *Norton* the defendant was a debtor within the broad meaning of the Code because he sold chattel paper. However, when section 9-504 provides that a debtor is entitled to notice upon the sale of the collateral, it must be understood to mean that only the debtor whose debt is secured by the collateral to be sold is

15 Norton v. National Bank of Commerce, 240 Ark. 143, 148, 398 S.W.2d 538, 541 (1966).

16 *Id.* at 147-48, 398 S.W.2d at 541.

17 Aside from the court's plea to fundamental fairness, its rationale for classifying the defendant as a debtor is not convincing. The court stated that defendant was a debtor because he owed "other performance of the obligation," within the meaning of section 9-105(d). Defendant, however, had no duty to perform the automobile buyer's obligation. Defendant's only duty was to purchase the chattel paper from the plaintiff, if the automobile buyer defaulted. Certainly this cannot be construed as performance of the buyer's obligation.

The *Norton* court might well have reached its goal of fairness without facing the question whether defendant was a "debtor." Undisputed evidence indicated that plaintiff's uniform custom had been to give defendant an opportunity to repurchase his contract and that previously defendant had never failed to do so when asked. *See* Brief for Harry Meek as Amicus Curiae at 8-9, Norton v. National Bank of Commerce, 240 Ark. 143, 398 S.W.2d 538 (1966). According to UNIFORM COMMERCIAL CODE § 2-202(a) and Comment 2 thereunder, a course of dealing or usage or trade that explains or supplements a contract is considered competent evidence of the party's intent and can become part of the contract.

18 UNIFORM COMMERCIAL CODE § 9-105(l)(d). The Code definition is also confusing in that it encompasses not only the party owing the indebtedness but also the party giving the security where the two parties are not identical. The Code's definition of debtor is criticized in Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185, 198-99 (1967).

entitled to notice. Thus in *Norton* the automobile buyer was the only debtor entitled to notice upon sale of the Oldsmobile. A transferor secured party should not be regarded as a debtor of the obligation transferred.

II. Transfer of Only the Note

The transfer is not always of both the security agreement and the note.[19] A secured party may transfer or assign only the note, retaining the security agreement. The effect of such a transaction is far from clear. This practice brings to mind the observation of Lord Devlin:

> Businessmen have always given a lot of work to lawyers for they do not bother much about the agreements they make until something goes wrong. This habit of mind distresses the lawyers. They look upon the bits of paper which the litigants produce with as much enthusiasm as a doctor surveys a row of patent medicine bottles out of which his patient has been dosing himself.[20]

A. *Transferee's Rights as to Note*

If the transfer of the note is absolute, then the transferee's rights as to the note would be those of a holder under Article 3.[21] If, however, the transfer was to secure an obligation of the transferor, the perfection sections of Article 9 are also relevant: a promissory note comes within the Code's collateral classification of "instrument."[22] Section 9-304 is the only Code provision that speaks to the matter of perfection of security interests in instruments. Paragraph one thereof provides that, subject to two specific exceptions, "[a] security interest in instruments (other than instruments which constitute part of chattel paper) can be perfected only by the secured party's taking possession . . . ."[23] The parenthetical phrase is somewhat confusing in the context of a note-only transfer. The note is part of chattel paper in the sense that, coupled with the security agreement, it "evidence[s] both a monetary obligation and a security interest in . . . specific goods."[24] There is, however, no means specified in the Code for perfecting an instrument which is part of chattel paper. Thus, it

19 *See* Levie, *supra* note 3, at 935. *But cf.* 2 G. Gilmore, *supra* note 1, at 1156 n.5.

20 P. Devlin, Samples of Lawmaking 5 (1962).

21 *See* Note, *The Concept of Holder in Due Course in Article III of the Uniform Commercial Code*, 68 Colum. L. Rev. 1573 (1968).

22 Uniform Commercial Code § 9-105(g). *But cf.* Mellinkoff, *supra* note 18, at 194-95.

23 Uniform Commercial Code § 9-304(1).

24 Uniform Commercial Code § 9-105(b).

would seem that either the parenthetical in section 9-304(1) is applicable only to transfers of both the note and the security agreement, or it is not possible to perfect a security interest in a note which is part of chattel paper. An examination of the effect of a note-only transfer on the security reveals a third possibility.

B. *Transferee's Right to Security*

No Code provision or comment deals with the effect on the security of a note-only transfer. Furthermore, there is considerable division of opinion as to the method by which unforeseen gaps in the Code should be filled. On the one hand, Dean Hawkland considers the Uniform Commercial Code a "Code" in the continental sense. He has stated:

> The U.C.C. is sufficiently pre-emptive and comprehensive to meet the test of a true code. It takes as its set the rules which are needed to build the basic framework to control the flow of goods from producer to ultimate consumer. This set, traditionally recognized in most civil law countries as being sufficiently inclusive to be codified, seems broad enough to prevent its policies from being defeated by requiring too much dependence on outside, relevant law.[25]

Professor Kripke, on the other hand, has taken the position that:

> . . . the express statutory injunctions to give effect to all of the nonstatutory influences for growth are so strong that continental codification is a misleading analogy. The draftsmen did not intend that the solution to problems within the ambit of the Code must be found in the confines of the statute.[26]

The express statutory injunction Kripke refers to is section 1-103, which provides:

> Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel,

25 Hawkland, *Article 9 Methodology*, 9 WAYNE L. REV. 531, 534 (1963); *accord*, Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 330 (1951); Vold, *Construing the Uniform Commercial Code: Its Own Twin Keys: Uniformity and Growth*, 50 CORNELL L.Q. 49, 62-66 (1964).

26 Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 U. ILL. L.F. 321, 331; *cf.* B. CARDOZO, *The Growth of the Law*, in SELECTED WRITINGS 186 (M. Hall ed. 1947).

> fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

Thus it becomes necessary to look to pre-Code law.

Under pre-Code law governing chattel mortgages, a transfer of the mortgage note alone effects a transfer of both the note and the mortgage with it.[27] The rationale for this rule is that a mortgage is a mere incident of the debt it secures, and thus an assignment of the debt carries the mortgage with it.[28] Several prominent Code commentators have advocated application of this rule to transfers of notes governed by the Uniform Commercial Code.[29]

Section 1-103 affords both a statutory basis for this view and a ground for questioning it. As the section permits reference to principles of general law to supplement the Code, it would seem that reference could be made to mortgage law to resolve the problems arising from the secured party transferring only the note. It must be remembered, however, that at "general law" the mortgage was but one form of personal property security. Other popular security devices were the pledge and the conditional sales contract. As to the former, the effect of a note-only transfer mirrored that of the chattel mortgage;[30] as to the latter, however, the courts were divided as to the effect of the transfer of the note only where it was secured by a conditional sales contract.

A conditional sale differs from a chattel mortgage in that it involves a matter of title and not of lien.[31] In a conditional sale, possession is delivered to the debtor-buyer, but title and general ownership remain in the secured party-seller pending payment of the purchase price. When full payment is made, both title and general ownership pass to the buyer. Accordingly, in determining the effect of a note-only transfer in a conditional sale context, the focal point is the effect on the title held by the secured party, not on the mortgage lien.

There are three views, each of which has judicial support, as to the effect upon the title to the property of an assignment of a note

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27 *See, e.g.*, Cherno v. Dutch Am. Mercantile Corp., 353 F.2d 147, 151 (2d Cir. 1965); Murrell v. Griswold, 338 P.2d 150, 153 (Okla. 1959).

28 *See, e.g.*, National Live Stock Bank v. First Nat'l Bank, 203 U.S. 296 (1906); G. OSBORNE, MORTGAGES § 224 (1951).

29 Coogan, Kripke & Weiss, *supra* note 2, at 271-73.

30 *See* RESTATEMENT OF SECURITY § 29 (1941).

31 *See* 3 L. JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES §§ 932-76 (6th ed. 1933).

given on a contract of conditional sale. One line of cases takes the position that transfer of the note is an election to enforce payment thereof and consequently an abandonment of the reserved title. The effect of this position is to vest title in the vendee.[32] A second judicial position is that transfer of the note does not disturb the title, that it simply remains in the vendor-secured party.[33] The third view is that transfer of the note automatically transfers the security of the conditional bill of sale and vests the title to the property in the holder of the note.[34]

It seems that the effect of a transfer of a note only, which has been given pursuant to a security agreement, would depend upon (1) whether the security agreement assumed the form of a chattel mortgage or a conditional sales contract; and (2) if the latter, which of the above three views the jurisdiction had adopted. This confusing result runs contrary to at least two of the basic tenets of the Code: uniformity and substance over form.

Section 1-102 of the Code sets out its purposes and policies. According to the Chairman of the Permanent Editorial Board of the Uniform Commercial Code, "the most important of the underlying purposes and policies of the 'Uniform' Commercial Code is . . . 'to make uniform the law among the various jurisdictions.' "[35] Secondly, the official Comment to section 9-101 states in part:

> Under this Article the traditional distinctions among security devices, based largely on form, are not retained . . . .
>
> Under this Article, distinctions based on form . . . are no longer controlling.

Yet, by reference to general principles of law in the instant situation, the law as to the effect of a note-only transfer would vary from jurisdiction to jurisdiction, and distinctions would be based on the form of the transaction. Accordingly, it is submitted that section 1-103 does not permit reference to pre-Code law to determine the effect of a note-only transfer, because such law does not "supplement" the Code's

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32 *See, e.g.*, Bradley v. Cassels, 117 Ga. 517, 43 S.E. 857 (1903); Winton Motor Carriage Co. v. Broadway Auto. Co., 65 Wash. 650, 118 P. 817 (1911).

33 *See, e.g.*, Voges v. Ward, 98 Fla. 304, 123 So. 785 (1929); Ross-Meehan Brake-Shoe Foundry Co. v. Pascagoula Ice Co., 72 Miss. 608, 18 So. 364 (1895).

34 *See, e.g.*, Waterbury Trust Co. v. Weisman, 94 Conn. 210, 108 A. 550 (1919); Zederman v. Thomson, 17 N.M. 56, 121 P. 609 (1912).

35 Schnader, *Why the Commercial Code Should Be "Uniform"*, 20 WASH. & LEE L. REV. 237 (1963).

provisions. Rather, in this instance, these general principles of law have been "displaced by the particular provisions of this Act."[36]

Those who view the UCC as a true Code would advocate looking within the statutory text to determine the effect of a note-only transfer.[37] In this context, one should consider the effect of the perfection sections of the Code on this type of transfer. As has been mentioned above, while chattel paper may be perfected by filing (section 9-304) or possession (section 9-305), section 9-308 problems arise unless the latter method is used.[38] Where, however, only the note is transferred, is perfection by possession possible? In other words, can a security interest in chattel paper be perfected by the secured party's possession of only the note? In a recent law review article, several leading Code authorities answered this inquiry in the affirmative;[39] however, they cited no case law or Code provision to support their view. The Code nowhere defines possession, nor has any reported case meaningfully discussed this concept. Section 9-305 speaks in terms of possession of "the" collateral. This would seem to indicate that physical control is essential to perfection by possession. Such a reading also is consistent with the notice function served by perfection—be it by possession or by filing. Possession of a note would not put third parties on notice that the possessor had a security interest in chattel paper, unless the note referred to and incorporated the security agreement.

Several legal writers have seized upon the introductory language of the official Comment to section 9-305, the primary perfection by possession provision, to espouse the view that the common law principles for the definition of pledge are applicable to perfection by possession under the Code.[40] To speak in terms of "principles" of the body of case law dealing with what constitutes a pledge is somewhat misleading. At common law, the question of sufficient possession was largely a case by case determination.[41] No pre-Code case expressly considered whether the transfer of possession of a note effects a pledge not only of the note but also of the mortgage securing it. There is,

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36 UNIFORM COMMERCIAL CODE § 1-103.

37 *See* Franklin, *supra* note 25, at 338-39.

38 *See* notes 9-11 and accompanying text *supra*.

39 Coogan, Kripke & Weiss, *supra* note 2, at 271-73.

40 *See, e.g.*, Lee, *Perfection and Priorities Under the Uniform Commercial Code*, 80 BANKING L.J. 473, 492 (1963); Project, *California Chattel Security and Article Nine of the Uniform Commercial Code*, 8 U.C.L.A.L. REV. 806, 850 (1961).

41 L. JONES, COLLATERAL SECURITY AND PLEDGES § 23 (3d ed. 1912); *cf.* Note, *Security Interests Under Pledge Agreements*, 51 YALE L.J. 431, 432 n.4 (1942).

however, a common law doctrine that bears on this issue: delivery must have been as complete as the nature of the property permits.[42]

Since possession of only the note probably will not constitute sufficient possession to perfect a security interest in the chattel paper, it becomes necessary to consider whether the transferee is adequately protected by filing if he does not take possession of the note. There are serious problems inherent in perfecting a security interest in chattel paper by filing. In addition to the possibility already discussed that under section 9-308 a purchaser of chattel paper takes free of any security interest if he bought the paper in the course of his business and without knowledge of the security interest,[43] there is also some likelihood that the note, if negotiable, will be negotiated to a holder in due course. Under section 9-309, a holder in due course takes priority over all earlier security interests—even those perfected by the filing of a financing statement. Furthermore, such a holder, by virtue of the mortgage law doctrine that a transfer of the debt carries with it the mortgage, would have both the debt and the security agreement.

In light of these difficulties in perfecting a security interest in both the note and the security agreement where only the former is transferred, perhaps the transferee should attempt to disclaim the mortgage law doctrine that debt carries with it the mortgage. In other words, perhaps he should seek to have the transfer of the note to him treated as only a transfer of the instrument and not a transfer of the chattel paper. But if the doctrine is read into the Code via section 1-103, can it be disclaimed? The use of the word "shall" in section 1-103 seems to make the supplementation mandatory. While perhaps under section 1-102 the parties could by agreement displace the section 1-103 reference; as a practical matter, such an agreement seems unlikely.

III. Transfer of Security Only

Before determining the effect of a note-only transfer, it is necessary to consider the effect given to the transfer of only the security. The case of *W. W. Kimball Co. v. Mellon*[44] illustrates the need for this inquiry. In that case, there was a written contract for the conditional sale of a piano in connection with which the purchasers gave promissory notes endorsed with a notation concerning both the contract and

42 *See, e.g.*, Gins v. Mauser Plumbing Supply Co., 148 F.2d 974, 977 (2d Cir. 1945); Whiting v. Rubinstein, 7 Wash. 2d 204, 216, 109 P.2d 312, 318 (1941).

43 *See* notes 9-11 and accompanying text *supra*.

44 80 Wis. 133, 48 N.W. 1100 (1891).

the retention of title by the seller. The seller assigned the contract to a corporation and transferred by endorsement the promissory notes to a third party, who had no notice of the transfer of the conditional sale contract. Obviously, in such a situation, both a note-only transfer and a security-only transfer cannot result in a transfer of both the note and security. Equally clear, if a note-only transfer results in a transfer of the security as well, a transfer of the security to another party should have no effect.

The pre-Code law on security-only transfers did not vary with the type of security involved. Regardless of whether the instrument transferred was a chattel mortgage or a conditional sales contract, most cases held the transfer to be of no effect.[45] When the transfer was a mere assignment for security, the reasons advanced by the courts in reaching this result corresponded to those set out in the above discussion of the note-only transfer.[46] Where the transfer was absolute, it was struck down as a conversion.

Security under the Uniform Commercial Code takes two separate and distinct forms: security by written agreement and security by possession of the items of collateral. The Code is silent as to the effect of a transfer of security that takes the form of a security agreement. Section 9-302(2) provides for the assignment of a security interest. The term security interest is not, however, identical to a security agreement. As the latter is defined in terms of the former,[47] it is apparent that the draftsmen of the Code did not intend that the terms be used interchangeably. This, however, does not mean that a secured party may not transfer or assign a security agreement but merely that the rights of the transferee would not be governed by section 9-302(2). Thus, the consideration of such a transfer exposes another gap in the coverage of the Code.

Surprisingly, there is a Code provision on transfer by a pledgee. Section 9-207(2)(e) deals with the rights of a secured party to repledge the collateral. It provides: "[T]he secured party may repledge the collateral upon terms which do not impair the debtor's right to redeem it." Implicit in this language is recognition of the proposition that the repledge of the collateral does not effect a transfer of the note

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45 *See, e.g.*, National Bond & Inv. Co. v. Evans, 118 Kan. 656, 658, 236 P. 447, 448 (1925); 2 L. JONES, *supra* note 31, § 505.

46 *See* notes 19-43 and accompanying text *supra*.

47 *See* UNIFORM COMMERCIAL CODE § 9-105(h) which provides that "'[s]ecurity agreement' means an agreement which creates or provides for a security interest."

secured thereby. Otherwise, the limitation on such repledges would to a large extent be mere surplusage. As the debtor could redeem his property by satisfying his obligation directly to the repledgee, no such repledge could "impair the debtor's right to redeem . . . ." Also implicit in the above quoted Code excerpt is the principle that the secured party should not be permitted, by his unilateral acts, to harm the debtor.

Theoretically a security interest in a security agreement is not in and of itself inconsistent with the provisions of the Code. Within the terminology of the Code, the nature of a security agreement as collateral is that of a general intangible: that is, "personal property . . . other than goods, accounts, contract rights, chattel paper, documents and instruments."[48] A security interest in a general intangible can be perfected by filing a financing statement; perfection by possession is not permitted.[49] As a practical matter, however, an assignment of a security agreement is of little value unless it carries with it the note. As has already been indicated, the language of section 9-207(2) indicates that a repledge does not achieve this result. In this regard, there is no reason for distinguishing between possessory and nonpossessory security interests. Furthermore, unless such an assignment carries the note with it, it would be unfair to the debtor to give effect to the assignment. Since there is no protection to the debtor corresponding to that afforded by the limitations in section 9-207(2), such transfers of the security alone should be regarded as having no legal effect.

IV. Conclusion

Despite the absence of specific Code provisions dealing with transfers by secured parties, amendments to the Code are not warranted. Professor Steinheimer has observed:

> At this juncture, the real value of the wealth of written material on the Code . . . lies not in triggering instant amendment of the Code, but rather in focusing the attention of judges and lawyers on potential problems under the Code so that such persons will be better able to handle these problems properly if and when they arise. This complex statute will never be flawless, but constant tinkering could well do more harm than good.

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48 Uniform Commercial Code § 9-106.

49 *See* Uniform Commercial Code § 9-302.

> Most of the defects so far discovered can certainly be handled by intelligent interpretation of the statute as it now stands.[50]

It is submitted that an "intelligent interpretation of the statute as it now stands" would be that the transfer of a note transfers both the note and the security, and that the transfer of security only is of no effect, except as provided in section 9-207(2). This is consistent with present Code provisions, the principles of the Code, and pre-Code law. While such a result will necessitate judicial recognition that possession of the note is also possession of the security agreement given therewith, it seems clearly preferable to the alternatives: that the security interest vanishes when a note-only transfer is made; or that the transferor secured party, although he no longer has the debt, continues to have a security interest in the collateral.

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[50] Steinheimer, *The Uniform Commercial Code Comes of Age*, 65 MICH. L. REV. 1275, 1279 (1967).