

**Practical Pointers for Revised Article 9:
Desirable Changes to Security Documents,
Financing Statements and Legal Opinions after
June 30, 2001**

*Carolyn Zander Alford
King & Spalding
April 27, 2001*

**Practical Pointers for Revised Article 9:
Desirable Changes to Security Documents,
Financing Statements and Legal Opinions after June 30, 2001**

*Carolyn Zander Alford
King & Spalding
April 27, 2001*

In two months time, Revised Article 9 will be upon us, effective in Georgia and many other states. Are you ready for that first secured transaction that closes after June 30? This presentation provides suggestions for modifying the security agreement and financing statement, for rethinking where to search and file financing statements and for updating the legal opinion. These suggestions are applicable to transactions (other than consumer transactions) that close on or after July 1, 2001 in which one or more lenders make a loan to a borrower secured by all personal property of such borrower.

A. Hypothetical Transaction.

To provide some context for our practice pointers, assume that the following transaction is pending:

A syndicate of lenders (the "Lenders") led by North Carolina Bank as Agent for the Lenders (the "Agent") has agreed to extend a revolving credit facility and term loan to XYZ Corporation, a Georgia corporation (the "Borrower"). The Borrower maintains all of its assets and operations in North Carolina. The Borrower has one subsidiary, ABC Partnership, a Georgia general partnership (the "Guarantor") that maintains all of its assets and operations in North Carolina; the Guarantor will be guarantying the obligations of the Borrower. The Borrower and the Guarantor maintain their deposit accounts with Best Rates Around Bank.

The Borrower will execute a credit agreement governing the revolving credit facility and term loan (the "Credit Agreement"), and the Guarantor will execute a guaranty agreement to guarantee the obligations of the Borrower under the Credit Agreement (the "Guaranty"). The loans to the Borrower and the guaranty of the Guarantor will be secured by all personal property of the Borrower and the Guarantor, and the Borrower and the Guarantor will execute a security agreement to grant a lien in

such personal property to the Agent (the “Security Agreement”). Appropriate financing statements will need to be filed in the transaction (the “Financing Statements”).

B. Modifying the Security Agreement

1. Description of Collateral

The description of the collateral in which a security interest is granted under the Security Agreement should be expanded to take full advantage of the new scope of Revised Article 9. Under Revised Article 9 as adopted in the State of Georgia (“Revised Article 9”), a description of collateral is sufficient if it reasonably identifies the collateral, including by a type of collateral defined under the Uniform Commercial Code as in effect in the State of Georgia (the “UCC”), except with respect to commercial tort claims.¹ The Security Agreement could be revised to have the following granting language:

Each of the Borrower and the Guarantor grants a security interest to the Agent for the benefit of the Lenders in all of its right, title and interest, whether now existing or hereafter acquired, in all of its accounts (including without limitation health-care receivables), chattel paper (whether tangible or electronic), deposit accounts, documents, general intangibles (including without limitation payment intangibles and software), goods (including without limitation inventory, equipment, fixtures and accessions), instruments (including without limitation promissory notes), investment property, letter-of-credit rights, letters of credit, money, supporting obligations, as-extracted collateral, timber to be cut and all proceeds and products of the foregoing, in each case as such terms are defined under the Uniform Commercial Code as in effect in the State of Georgia from time to time. In addition, the Borrower hereby grants a security interest to the Agent for the benefit of the Lenders in all of its claims against [describe commercial tort claims in reasonable detail]. All of the foregoing property of the Borrower and the Guarantor shall be referred to as the “Collateral”.

General intangibles are now a “catchall” category for all personal property not otherwise enumerated as a separate type of collateral under the UCC.² Goods include inventory, farm

¹ Section 9-108. All Section references in this presentation refer to Sections of Revised Article 9 as adopted in the State of Georgia at O.C.G.A. § 11-9-101 et. al.

² Section 9-102(a)(42).

products, consumer goods and equipment³, with equipment being a residual category for all goods that are not inventory, farm products or consumer goods.⁴ Goods also include any software embedded in goods.

Revised Article 9 permits a secured party to take a security interest in commercial tort claims in existence at the time of the authentication of the security agreement but the description of the commercial tort claim must be more detailed than just “all commercial tort claims”.⁵ The Official Comments to Section 9-108 contained in the Official Text of Revised Article 9, 2000 Revision, of the Uniform Commercial Code promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws or a version thereof (“Uniform Revised Article 9”) provide the following example as a sufficient description: “all tort claims arising out of the explosion of debtor’s factory”. The comments also point out that it is not necessary to specify the exact amount of the claim, the theory on which the claim may be based or the identity of the tortfeasor.

Revised Article 9 also provides that collateral is reasonably identified when identified by specific listing, category, quantity, computational or allocational formula and any other method of identify if the collateral is objectively determinable.⁶

2. Representations and Warranties.

With the new regime for perfecting security interests, the representations and warranties contained in the Security Agreement should be updated accordingly. The form of the Security Agreement should address the following facts:

³ Section 9-102(a)(44).

⁴ Section 9-102(a)(33).

⁵ Section 9-108(e).

(1) The Borrower is a corporation organized under the laws of the State of Georgia. The Borrower's mailing address is _____ and its organizational identification number is _____.

(2) The Guarantor is a general partnership with its chief executive office located in the State of North Carolina.⁷ The Borrower's mailing address is _____ and its organizational identification number is _____.⁸

(3). "XYZ Corporation" is the correct legal name of the Borrower indicated on the public record of the Borrower's jurisdiction of organization which shows the Borrower to be organized. "ABC Partnership" is the correct legal name of the Guarantor.

(4). Schedule A correctly sets forth all names and tradenames that the Borrower and the Guarantor have used within the last five years.

These representations will determine where the Lenders should file their Financing Statements, as well as where they should to search to find other financing statements of record against the Borrower and the Guarantor. In addition, these representations will provide the Lenders with the appropriate information to complete the Financing Statements accurately (although representations are no substitute for actually obtaining and reviewing the certified articles of incorporation of the Borrower and the partnership agreement of the Guarantor to verify the accuracy of the name of the Borrower and the Guarantor).

(5) Schedule A also correctly sets forth the chief executive offices of the Borrower and the Guarantor over the last five years and all other locations in which tangible assets of the Borrower and the Guarantor (including inventory, equipment, books and records) have been located in the last five years.

Under Revised Article 9, the Lenders do not need to track the location of the assets of the Borrower or the Guarantor in order to perfect the Agent's liens in those assets. However, until July 1, 2006 (and later in those jurisdictions in which Revised Article 9 will not be effective by

⁶ Section 9-108(b).

⁷ If the Guarantor has only one place of business, "chief executive office" should be replaced with "sole place of business".

July 1, 2001), the Lenders must continue to search in the jurisdictions that they now search under existing Article 9 to find UCC financing statements of record that will have priority over the Agent's security interest. When Revised Article 9 has been in effect for five full years, continuation statements or "in lieu" financing statements will have been filed under the Revised Article 9 filing system; until then, liens filed under existing Article 9 in counties and states where the assets of the Borrower and the Guarantor are located will have priority. This representation provides the Lenders the information they need in order to determine where those assets are located.

Furthermore, if the Borrower or the Guarantor maintains its chief executive office or the location of any of its tangible assets in jurisdictions that have not adopted Revised Article 9, this representation will continue to be important to identify these locations so that the Lenders can file financing statements in these jurisdictions. The choice-of-law disputes between states operating under the existing Article 9 and those that have adopted Revised Article 9 will be complicated and problematic, but should be avoided if the Lenders file in all possible relevant jurisdictions.

Because the Guarantor is a partnership and not a registered organization, it will continue to be important even under Revised Article 9 to require the Guarantor to represent and warrant as to the location of its sole place of business, or if it has more than one place of business, its chief executive office, both at present and during the last five years.

(6) Schedule B sets forth the name of each bank at which the Borrower and the Guarantor maintain deposit accounts, the state of incorporation of such bank and the account numbers for each deposit account. Schedule C sets forth all letters of credit under which the Borrower or the Guarantor is named as beneficiary, including the name of the issuing bank and the letter of credit number. The Agent has a duly perfected first

⁸ Revised Article 9 as adopted in Georgia does not require the organizational number of the debtor be provided on the financing statement, although other states do require this number.

priority security interest in all deposit accounts and letter-of-credit rights of the Borrower and the Guarantor.

Revised Article 9 now includes deposit accounts and letter-of-credit rights within its scope, and the Lenders, who may not have previously taken liens on deposit accounts and letter-of-credit rights, may want to include this type of collateral in their security agreements. This representation provides the Lenders with the appropriate information to obtain control over the deposit accounts and the letters-of-credit. The second sentence of this representation is designed to elicit the agreement of the Borrower and the Guarantor that the Agent has taken the appropriate steps to obtain such control.

(7) Schedule D sets forth all third parties (“Bailees”) with possession of any inventory and equipment of the Borrower and the Guarantor, including the name and address of such Bailee, a description of the inventory and equipment in such Bailee’s possession and the location of such inventory and equipment. Each Bailee has acknowledged that it holds possession of the inventory and equipment of the Borrower or Guarantor, as the case may be, for the Agent’s benefit, and the Agent has a first priority perfected security interest in such inventory and equipment.

Although the Agent’s lien in the inventory and equipment of the Borrower and Guarantor may be perfected by filing a financing statement, the Lenders should be concerned about the priority of the Agent’s lien and whether any third party has or might claim priority based on perfection by possession of the inventory and equipment. Any Bailee with possession of the inventory and equipment of the Borrower or the Guarantor, such as a third-party processor or a warehouseman, is one such potential third party that might claim a lien for any payments that the Borrower or the Guarantor fails to pay the Bailee in exchange for the Bailee’s services. In addition, the Bailee may have agreed to hold possession of the inventory and equipment of the Borrower or the Guarantor on behalf of another secured party. To protect against this risk, the Lenders should obtain the Bailee’s representation that it is not holding possession of the inventory or equipment for any third party and the Bailee’s agreement that it waives (or

subordinates) any lien in the inventory and equipment in favor of the Bailee, that it will hold possession of the inventory and equipment for the benefit of the Agent and that it will not enter into a similar agreement with any third party, without the consent of the Agent.

Note that under Revised Article 9, notice to the Bailee of the Agent's security interest in the goods in the Bailee's possession is no longer sufficient to perfect the security interest in such goods; the Bailee's acknowledgment of the Agent's security interest is now required.

3. Covenants

In order to maintain the perfection and priority that the Lenders think they have achieved at closing, the Security Agreement should included the following covenants:

(1) The Borrower shall not merge or consolidate into, or transfer of any of the Collateral to, any other Person without the prior written consent of the Lenders.

(2) The Guarantor shall not change the location of its chief executive office unless it has given the Agent thirty days' prior written notice thereof and executed or authorized, at the request of the Agent, such additional financing statements to be filed in such jurisdictions as the Agent may deem necessary or desirable in its sole discretion.

(3) Neither the Borrower nor the Guarantor shall change its name unless it has given the Agent thirty days' prior written notice thereof and executed or authorized, at the request of the Agent, such additional financing statements to be filed in such jurisdictions as the Agent may deem necessary or desirable in its sole discretion.

(4) Each of the Borrower and Guarantor shall, at any time and from time to time, whether or not the Official Text of Revised Article 9, 2000 Revision, of the Uniform Commercial Code promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws or a version thereof ("Uniform Revised Article 9") has been adopted in any particular jurisdiction, take such steps as the Agent may reasonably request for the Agent (i) to obtain an acknowledgment, in form and substance reasonably satisfactory to the Agent, of any bailee having possession of any of the Collateral, stating that the bailee holds possession of such Collateral on behalf of the Agent, (ii) to obtain "control" of any investment property, deposit accounts, letter-of-credit rights, or electronic chattel paper (as such terms are defined by Revised Article 9 with corresponding provisions thereof defining what constitutes "control" for such items of Collateral), with any agreements establishing control to be in form and substance reasonably satisfactory to the Agent, and (iii) otherwise to insure the continued perfection

and priority of the Agent's security interest in any of the Collateral and of the preservation of its rights therein, whether in anticipation of or following the effectiveness of Revised Article 9 in any jurisdiction. If the Borrower or the Guarantor shall at any time, whether or not Uniform Revised Article 9 has been adopted in any particular jurisdiction, acquire a "commercial tort claim" (as such term is defined in Revised Article 9) [with a claim for damages in excess of \$1,000,000], the Borrower or the Guarantor, as the case may be, shall promptly notify the Agent thereof in a writing, providing a reasonable description and summary thereof, and shall execute a supplement to this Security Agreement in substantially the form of Schedule A granting a security interest in such commercial tort claim to the Agent for the benefit of the Lenders.

4. Events of Default

Under Revised Article 9, filings offices are to accept financing statements without a signature by the Borrower or the Guarantor, and amendments and terminations without a signature of the Agent. The ability to file without signature may give Lenders concern about unauthorized amendments and terminations to their Financing Statements.⁹ Revised Article 9 provides that amendments and terminations may only be filed by a person that is authorized by the Agent, as the secured party of record, except that the Borrower and the Guarantor are entitled to file termination statements not authorized by the Agent if the Agent has failed to honor its obligation to file or send termination statements to the Borrower or the Guarantor in accordance with Section 9-513(a) or (c).¹⁰ Amendments and terminations filed without the Agent's authorization are ineffective.¹¹

⁹ Under existing Article 9, an unauthorized amendment or termination statement could be filed if the debtor forges the signature of the secured party on the amendment or termination statement. The Lenders' concern, perhaps to be proven unfounded in practice, is that without the signature requirement, fraudulent amendments and terminations will be more likely to occur.

¹⁰ Section 9-509(d).

¹¹ Section 9-510(a). Because terminations are ineffective unless authorized, how will the Lenders be comfortable that termination statements that appear of record without a secured party's signature are authorized? If the Lenders are refinancing an existing lender, it is relatively easy to verify the existing lender's authorization through a payoff letter or similar document, but what about lenders further back in the chain? Should the Lenders contact the former secured parties to confirm that they authorized the termination statements being filed? A representation

In addition, any person has the ability to file correction statements to the secured party's financing statements, although correction statements have no effect under Revised Article 9.¹²

Although ineffective, unauthorized amendments and terminations and correction statements will cloud the UCC records and will make the Lenders uncomfortable. In addition to the remedies that the Lenders will have under Revised Article 9 and otherwise at law for unauthorized filings, the Lenders should consider including adding contractual remedies, by including the following as an Event of Default:

“any amendment to or termination of a financing statement naming the Borrower or the Guarantor as debtor and the Agent as secured party, or any correction statement with respect thereto, is filed in any jurisdiction by any party other than the Agent or its counsel without the prior written consent of the Agent;

5. Authorization to File Financing Statements

By authenticating (executing and delivering) the Security Agreement, the Borrower and the Guarantor will automatically be deemed to have authorized the Agent to file a financing statement covering the Collateral.¹³ In order to authorize a financing statement with a “supergeneric” description, the Borrower and the Guarantor should specifically authorize the Agent in the Security Agreement to file the Financing Statements. A sample authorization provision is:

Each of the Borrower and the Guarantor hereby authorizes the Agent, its counsel or its representative, at any time and from time to time, to file financing statements and amendments that describe the collateral covered by such financing statements as “all assets of the Borrower/Guarantor”, “all personal property of the Borrower/Guarantor” or words of similar effect, in such jurisdictions as the Agent may deem necessary or desirable in order to perfect the security interests granted by the Borrower and the Guarantor under this Security Agreement.

from the Borrower that all termination statements of record were properly authorized by secured parties is probably in order, although perhaps not sufficient without further diligence.

¹² Section 9-518.

¹³ Section 9-509.

If the Agent wants to file the Financing Statements before closing, it should obtain this authorization from the Borrower and the Guarantor in the commitment letter or a separate authorization letter. If for any reason the Financing Statements are filed without the appropriate authorization, the Borrower and the Guarantor may ratify their authorization after the filings have been made.

C. Updating the UCC Financing Statement

1. New National Form

Revised Article 9 expressly provides that filing offices may not reject a financing statement submitted on the national form promulgated under Uniform Revised Article 9.¹⁴ The ability to use one form in all states that have adopted Revised Article 9 (hopefully to be all states in the near future) will save secured parties and their counsel the cost of maintaining supplies of forms from different jurisdictions, and will contribute to the efficient preparation of UCC financing statements.

2. Description of Collateral

Although a description of collateral that reasonably identifies the Collateral is required in the Security Agreement, Revised Article 9 provides that a description of collateral in a financing statement is sufficient if it simply indicates that the financing statement covers all assets or all personal property.¹⁵ Because the Agent is taking a lien on all or substantially all of the personal property of the Borrower and the Guarantor, it should consider using the “supergeneric”

¹⁴ O.C.G.A. § 11-9-521(a).

¹⁵ Section 9-504.

description of the Collateral on the Financing Statements and simply indicate that the Financing Statements cover all personal property of the Borrower or the Guarantor, as the case may be. The short “supergeneric” description of the Collateral will eliminate the need for attaching a lengthy exhibit describing the collateral to the Financing Statement, reducing the cost of filing the Financing Statement. Furthermore, pre-filing will be much easier, since the negotiation of the collateral description can be saved for the Security Agreement.

If the Lenders are not yet willing to part from the long-form description of collateral, or if the Lenders were not taking a lien in all personal property of the Borrower and the Guarantor, the description of the collateral on the Financing Statement is sufficient if it reasonably identifies the Collateral, the same standard that applies to the description of collateral in the Security Agreement.¹⁶ For example, identification of the collateral by a type of collateral defined under the UCC reasonably identifies the collateral and is therefore a sufficient description for the Financing Statement.

3. No signatures required

Under Revised Article 9, the Borrower and the Guarantor do not have to sign the Financing Statements as long as they have authorized the filing of the Financing Statements in the Security Agreement or in a separate writing.

4. Get the Name of the Debtor Right.

Revised Article 9 squarely places the responsibility on the Lenders for listing the name of the Borrower and the Guarantor correctly on its financing statements. The Financing Statement

¹⁶ Section 9-504

sufficiently provides the name of the Borrower, as a registered organization, only if it provides the name of the Borrower indicated on the public record of the Borrower's jurisdiction of organization which shows the Borrower have been organized.¹⁷ The Financing Statement is considered seriously misleading if the name of the Borrower is incorrect and a search of the UCC records under the correct name of the Borrower would not reveal the Financing Statement.¹⁸

A financing statement listing a tradename of the Borrower as the name of the debtor is not sufficient to perfect a security interest against the Borrower.¹⁹

5. Other Information

A financing statement is effective if it contains the name of the debtor, the name of the secured party and an indication of the collateral covered by the financing statement.²⁰ Notice that the address of the debtor and secured party and the tax identification number are not requirements to the effectiveness of the financing statement. Failure to include the addresses, and for states other than Georgia, organizational identification number is grounds for having a financing statement rejected by the filing office, however, so it is important to include this information as well.²¹ If a financing statement manages to get filed without this information, however, it is nonetheless effective.

When the secured party is accepting a security interest in an agent capacity, the financing statement does not have to identify that capacity to be effective. The Financing Statements will

¹⁷ Section 9-503(a)(1)

¹⁸ Section 9-506

¹⁹ Section 9-502

²⁰ Section 9-502

²¹ 9-516(b)

be sufficient even if the secured party is listed as North Carolina Bank, rather than North Carolina Bank, as Agent.²²

D. Rethinking Where to Search and Where to File

1. Where to Search

As of July 1, 2001, the Lenders should always search the UCC records in the appropriate filing offices in the jurisdiction where the Borrower and the Guarantor are deemed located in order to find competing liens against these parties. Because the Borrower is a registered organization, the Lenders should search the UCC records in the State of Georgia, the jurisdiction in which the debtor is organized. Because the Guarantor is an organization other than a registered organization, the Lenders should search the UCC records in the State of North Carolina, the jurisdiction in which the Guarantor has its sole place of business, or if it has more than one place of business, the chief executive office of the Guarantor. If the Collateral includes as-extracted collateral, timber to be cut or goods that are or are to become fixtures, the Lenders should search the records where a mortgage would be filed in the jurisdiction in which these types of collateral are located.

The Lenders should continue to search for UCC financing statements in the locations that they now search under existing Article 9, until at least July 1, 2006 (when continuation statements or ‘in lieu’ financing statements will be filed for all existing deals) or in jurisdictions that have not adopted Revised Article 9 effective as of July 1, 2001, five years after the date of enactment in those jurisdictions. Because the Borrower has its chief executive office and all tangible assets in North Carolina, and liens perfected prior to July 1, 2006 by filing will remain

²² Section 9-503(d)

perfected after Revised Article 9 takes effect, the Lenders should search the office of the Secretary of State and the counties in which the Borrower's chief executive office and other locations can be found. However, no UCC lien searches would need to be ordered in Georgia with respect to the Guarantor.

2. What Name to Search

Revised Article 9 makes it clear that financing statements naming the debtor by a tradename are not sufficient to perfect a security interest, so there is no legal reason to search tradenames. However, the Lenders may continue to search under tradenames out of precaution to avoid a dispute arising later with a third party who filed against the tradename of the Borrower.

3. Where to File

Financing statements should be filed in the location where the debtor is deemed located under Revised Article 9 in order to perfect a security interest in all personal property of the debtor that can be perfected by filing, except that with respect to goods that are or are to become fixtures, timber to be cut or as-extracted collateral, financing statements should be filed in the real estate records of the jurisdiction where these fixtures, timber or as-extracted collateral are located.²³ It is no longer necessary to file in the jurisdictions where the tangible assets of the Borrower or the Guarantor are located. In the Hypothetical Transaction, the Agent should file Financing Statements naming the Borrower as debtor in the appropriate filing offices in the State of Georgia and naming the Guarantor as debtor in the appropriate filing offices in the State of

²³ Section 9-301

North Carolina. It is unnecessary to file against the Guarantor in Georgia and, except with respect to fixtures, timber to be cut and as-extracted collateral located in North Carolina, against the Borrower in North Carolina.

The appropriate filing offices in Georgia have not changed under Revised Article 9; generally, financing statements in Georgia can be filed with the clerk of superior court of any county in the State and will be effective state-wide. This is a departure from Uniform Revised Article 9 which contemplates filing all financing statements in a central office, such as the office of the secretary of state.

E. Getting the Right Agreements with Third Parties.

1. Deposit Accounts

The exclusion of deposit accounts from existing Article 9 never stopped secured lenders from taking liens on deposit accounts, either at their own institutions or with other banks, but it has led to uncertainty about the validity, perfection, priority and enforcement of those liens. Revised Article 9 essentially codifies the practice that has developed with respect to deposit accounts, and provides secured parties and debtors with reliable ground rules with respect to this type of collateral.

Liens in deposit accounts attach just like liens in all other types of collateral. Perfection, on the other hand, can only be obtained if the secured party has “control” over the deposit accounts.²⁴

If the secured party is a bank, it will automatically have a perfected security interest under Revised Article 9 in all deposit accounts maintained by debtors at its institution, without

²⁴ Section 9-104

the authentication of any security agreement and without any further step being required to obtain “control”.²⁵

If the secured party is not a bank, or if the debtor’s deposit accounts are maintained with another bank, the debtor will need to execute a security agreement granting the secured party a security interest in its deposit accounts, and the secured party must find a way to obtain “control” over the accounts. The secured party will have control over the deposit accounts in this instance only if (i) it becomes the customer of the deposit account bank with respect to the accounts (presumably putting the deposit account in the name of the secured party rather than the debtor, which is frequently resisted by the debtor), or (ii) the debtor, the secured party and the deposit account bank enter into an agreement in which the deposit account bank agrees to comply with the instructions of the secured party regarding disposition of the funds in the deposit account without further consent from the debtor.²⁶

In the Hypothetical Transaction, the Borrower and the Guarantor maintain their deposit accounts with Best Rates Around Bank. If the Borrower and the Guarantor moved their deposit accounts to North Carolina Bank, the Agent would automatically have a perfected security interest in the deposit accounts without the authentication of a security agreement and without taking any other steps to obtain control over the accounts. However, if the deposit accounts remain with Best Rates Around Bank, the Agent will need to obtain control over the deposit accounts to perfect its security interest. The Borrower, the Guarantor, Best Rates Around Bank and the Agent could enter into an agreement that provides that Best Rates Around Bank is authorized to disperse the funds in the deposit accounts in accordance with the instructions of the Borrower and the Guarantor unless and until the Agent notifies Best Rates Around Bank in

²⁵ Sections 9-104(a)(1), 9-203(b)(3)(D)

writing that an event of default has occurred under the Credit Agreement, at which time all funds in the deposit accounts must be transferred on a daily basis by Best Rates Around Bank to an appropriate account at North Carolina Bank. Because this arrangement does not require Best Rates Around Bank to obtain any further consent by the Borrower or the Guarantor, it is sufficient to give the Agent control over the deposit accounts at Best Rates Around Bank, and therefore perfect the Agent's lien in the deposit accounts. The right of the Borrower and the Guarantor to direct the disposition of funds from the deposit accounts does not change this result.²⁷

2. Letter of Credit Rights

In order to perfect a security interest in letter-of-credit rights, the secured party must have control over the rights, which it obtains to the extent that the issuer of the letter of credit consents to an assignment of proceeds of the letter of credit under O.C.G.A. § 11-5-114 or other applicable law or practice.²⁸

In the Hypothetical Transaction, if Guaranty Performance Bank has issued a letter of credit to the Borrower on behalf of its customer, the Agent will need Guaranty Performance Bank's consent to the proceeds of the letter of credit being assigned to the Agent in order to obtain control and perfect its lien.

3. Bailee Agreements

²⁶ Section 9-104(a)

²⁷ 9-104(b)

²⁸ Section 9-107

Under current Article 9, a secured party could perfect its security interest in property in the possession of a third-party bailee by notifying the bailee in writing of its security interest. Under Revised Article 9, notice to the bailee is no longer sufficient to perfect the security interest. Instead, the third party in possession must authenticate a record acknowledging that it holds, or will take, possession of the collateral for the secured party's benefit, thus permitting the secured party to perfect its security interest by possession.

If the Borrower or the Guarantor listed any assets as being held by any Bailees in the Security Agreement, the Agent should obtain the Bailee's acknowledgment that it is holding the goods on behalf of the Agent, that it is not holding the goods on any other person's behalf and that it does not have a lien or security interest in the goods, as well as the Bailee's agreement not to agree in the future to hold the goods on behalf of any other person.

F. Changing your Opinion for Revised Article 9

New types of collateral, new ways to perfect security interests, new rules for where to file and new requirements for describing collateral and completing financing statement, not to mention that most of the section references in Article 9 have changed -- plenty of good reasons to pull out your form of opinion and update it for Revised Article 9.

Secured parties should consider requiring opinions on the creation of security interests in all types of collateral covered by Revised Article 9, the perfection of security interests by control in deposit accounts and letter of credit rights, and the secured party's authorization to file the financing statements. Lawyers rendering the opinions should think about the proper assumptions and qualifications applicable to these opinions, as well as the correct assumptions and qualifications under Revised Article 9 for standard opinions in secured transactions.

Exhibit A is a sample legal opinion to be given under Revised Article 9 from the perspective of Georgia local counsel to North Carolina Bank.²⁹ Given the limited role of this counsel in the transaction, a number of assumptions and qualifications will be necessary, which illustrate the analysis under Revised Article 9 involved in these opinions. If the opinions were given by counsel to the Borrower and the Guarantor who were actively involved in representing the parties in the transaction, some of the assumptions would be appropriate to opine on rather than assume.

²⁹ Please note that Exhibit A has been drafted for illustrative purposes only. The facts and circumstances of any actual transaction would necessarily affect the opinion letter, including the opinions appropriate to request and the assumptions and qualifications appropriate to give. No person should rely on this opinion letter as an opinion letter rendered by King & Spalding, or assume that any opinion rendered by King & Spalding under Revised Article 9 would take this form.

EXHIBIT A

[FORM OF GEORGIA LOCAL COUNSEL OPINION]

July 1, 2001

North Carolina Bank, as Agent
123 Main Street
Charlotte, North Carolina 28888

The Lenders from time to time
parties to the Credit Agreement

Re: Credit Agreement dated as of the date hereof, by and among XYZ Corporation (the "Borrower"), the banks and other lenders from time to time party thereto (the "Lenders") and North Carolina Bank, as Agent for the Lenders (the "Agent").

Ladies and Gentlemen:

We have acted as special Georgia counsel to you in connection with the preparation and negotiation of the Credit Agreement. This opinion is furnished pursuant to Section 4 of the Credit Agreement. Capitalized terms used herein and not otherwise defined shall have the meanings assigned to such terms in the Credit Agreement.

In rendering the opinions set forth herein, we have examined executed copies of the following documents:

- (1) the Credit Agreement;
- (2) the Security Agreement;
- (3) the Blocked Account Agreement, dated as of the date hereof, by and among the Borrower, the Agent and Best Rate Around Bank, a Georgia banking corporation (the "Blocked Account Agreement"); and
- (4) the UCC-1 financing statement naming the Borrower as debtor and the Agent as secured party to be electronically filed in the office of the clerk of superior court for Fulton County, Georgia (the "Financing Statement").

The Credit Agreement, the Security Agreement and the Blocked Account Agreement are collectively referred to as the "Opinion Documents". We have made such investigation of the laws of the State of Georgia as we have deemed necessary or appropriate to enable us to render

the opinions set forth below. We have not examined any documents other than the Opinion Documents nor made any independent investigation of any facts concerning any party to the Opinion Documents.

In rendering the opinions set forth in this letter, we have assumed, with your express permission and without independent verification or investigation, each of the following:

(a) The Borrower is a corporation duly organized and validly existing under the laws of the State of Georgia;

(b) The Opinion Documents have been duly authorized, executed and delivered by all parties thereto, and are valid, binding and enforceable against all parties thereto;

(c) The Borrower has rights in the Collateral, or the power to transfer rights in the Collateral to a secured party;

(d) The description of the Collateral contained in the Security Agreement reasonably identifies such Collateral, except to the extent that the Collateral is described by reference to the types of collateral defined in the Uniform Commercial Code as in effect in the State of Georgia (the "UCC") [, including accounts (including without limitation, healthcare receivables), chattel paper (whether tangible or electronic), deposit accounts, documents, fixtures, general intangibles (including without limitation payment intangibles and software), goods (including without limitation inventory, equipment, fixtures), instruments (including without limitation promissory notes), investment property, letter-of-credit rights, letters of credit, proceeds (including without limitation cash proceeds and non-cash proceeds), and supporting obligations)], other than commercial tort claims.

(e) "XYZ Corporation" is the correct legal name of the Borrower indicated on the public record of the Borrower's jurisdiction of organization which shows the Borrower to have been organized. The correct organizational name of the Agent is "North Carolina Bank". The mailing address of the Borrower is _____, the mailing address of the Agent is 123 Main Street, Charlotte, North Carolina 28888.

Based upon the foregoing and subject to the qualifications stated herein, we are of the opinion that:

1. If the Security Agreement were governed by the laws of the State of Georgia (notwithstanding any choice-of-law provision contained in the Security Agreement to the contrary)¹, the form of the Security Agreement is sufficient to create a security interest in favor

¹ The Security Agreement would likely provide that it is to be governed by and construed in accordance with North Carolina law, rather than Georgia law. To the extent that the choice of

of the Agent in all right, title and interest of the Borrower with respect to the Collateral (as defined in the Security Agreement) to the extent a security interest may be created under Article 9 of the Uniform Commercial Code in effect in the State of Georgia on the date hereof (the “UCC”). Assuming that there is no agreement among the parties to postpone the time of attachment, such security interest has attached to the Collateral.

An alternative formulation of the opinion, appropriate when counsel is opining that the Security Agreement is enforceable, is that the Security Agreement create a security interest enforceable against the Borrower and the Guarantor with respect to the Collateral to the extent that a security interest may be created under Article 9 of the UCC. This version of the opinion should be qualified by the customary exceptions to the enforceability opinion.

Section 9-203(b) provides that a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

- (x) value has been given;*
- (y) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party, and*
- (z) one of the following conditions has been met:*
 - (i) the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest cover timber to be cut, a description of the land concerned;*
 - (ii) the collateral is not a certificated security and is in the possession of the secured party under Section 9-313 pursuant to the debtor’s security agreement;*
 - (iii) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under Section 8-301 pursuant to the debtor’s security agreement; or*
 - (iv) the collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, and the secured party has control under Section 9-104, 9-105, 9-106 or 9-107.*

For purposes of giving this opinion, counsel should (i) determine that value has been given by reviewing the Credit Agreement and Security Agreement (the enforceability of which should be assumed unless counsel is providing that opinion), (ii) make the assumption set forth in clause (c) above, and (iii) confirm that one of the conditions in clause (z) is met. Frequently the first prong in clause (z) will be applicable, in which case counsel should make the assumption in clause (a) above as to the Borrower’s execution and delivery of the Security Agreement (unless counsel is opining on this issue)

law provision is enforceable, this opinion should be appropriately given by North Carolina counsel. However, for purposes of illustrating this opinion, we assume that Georgia law would apply.

and determine that the Security Agreement contains a sufficient description of the Collateral.

Under Section 9-108, the description will be sufficient if it reasonably identifies the collateral. Describing the collateral by type of collateral defined under the UCC is deemed a reasonable identification of the collateral (except with respect to commercial tort claims and certain other types of collateral in consumer transactions). The description is also deemed to reasonably identify the collateral if it does so by specific listing, category quantity, computational or allocation formula or procedure or if the identity of the collateral is objectively determinable (other than by a supergeneric description). Depending on the formulation of the description of collateral, counsel may need to include the assumption set forth in clause (d) above.

2. The Agent is authorized to file the Financing Statement. The filing of the Financing Statement with the clerk of superior court in any county in the State of Georgia will duly perfect the security interest in that portion of the Collateral granted under the Security Agreement in which a security interest may be perfected under the UCC by the filing of a financing statement.

This opinion requires counsel to opine (i) that the Agent is authorized to file the Financing Statement, (ii) that the Financing Statement is sufficient, (iii) that the Financing Statement contains the appropriate information to avoid rejection by the filing office, and (iv) that the filing office is the appropriate office for the filing of the UCC.

The Financing Statement is to be filed electronically and is not executed by the Borrower. Will the Agent be authorized to file the Financing Statement? By authenticating or becoming bound as debtor by the Security Agreement, the Borrower automatically is deemed to have authorized the filing of an initial financing statement covering the collateral described in the Security Agreement, and any property that becomes collateral under Section 9-315(a)(2), whether or not the Security Agreement covers proceeds. If the description of collateral in the Financing Statement is “all assets” or “all personal property”, the Security Agreement (or a separate written authorization signed by the Borrower) should contain a separate clear authorization by the Borrower to file the Financing Statement with a supergeneric description.

In order for the Financing Statement to be sufficient, it must provide the name of the debtor and the name of the secured party, as well as indicate the collateral covered by the Financing Statement. Section 9-502. The assumptions in clause (e) above as to the names of the Borrower and the Agent confirm the correct names of these parties. Section 9-503 makes it clear that the Financing Statement will be sufficient even if the secured party is listed simply as North Carolina Bank, rather than North Carolina Bank, as Agent.

Under Section 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 (which must reasonably identify the collateral; see discussion under opinion 1) or (2) an indication that the financing statement covers all assets or all personal property. This opinion can be given with no qualification or assumption if the Financing Statement describes the Collateral as “all assets of the Borrower” or “all personal property of the Borrower”. Otherwise, the opinion should be given with the assumption as to the sufficiency of the description contained in clause (d) above.

What constitutes filing? The communication of the Financing Statement to a clerk of superior court in any county in the State of Georgia by a method or medium of communication authorized by such clerk of superior court and the tendering of the applicable filing fee or the acceptance of the Financing Statement by such clerk of superior court. Section 9-516(a). Filing offices are authorized to refuse to accept financing statements for the reasons set forth in Section 9-516(b), including the following:

- * failure to provide a name for the debtor*
- * failure to identify the last name of any individual debtor*
- * in the case of as-extracted collateral, timber to be cut and goods that are or are to become fixtures, failure to provide a sufficient description of the real property to which such collateral relates*
- * failure to provide a name and mailing address for the secured party of record*
- * failure to provide a mailing address for the debtor, or to indicate whether the debtor is an individual or organization, and if the debtor is an organization, to provide the type of organization for the debtor or the jurisdiction of organization for the debtor*

The filing office must be able to read and decipher the information on the Financing Statement.

The filing offices in Georgia have not changed under Revised Article 9. Generally, the Financing Statements will be effective to perfect the security interests in the Borrower’s Collateral when filed with the clerk of superior court in any county in the State of Georgia, except that filings to perfect a security interest in as-extracted collateral, timber to be cut or goods that are or are to become fixtures (unless owned by a transmitting utility) must be filed in the office designated for the filing or recording of a record of a mortgage on the related real property. Section 9-501.

Revised Article 9 has authorized the use of a national UCC-1 financing statement form and expressly provides that filing offices may not reject a financing statement submitted in that form. If the form of the Financing Statement does not fit within the safe harbor, counsel must either determine whether the Financing Statement is in a form still accepted by filing offices, or decline to opine unless the national form is used. Section 9-521.

Finally, the opinion as drafted would not be appropriately given unless at least some of the Collateral covered by the Financing Statement could be perfected by the filing of a financing statement under the UCC. Note that under Revised Article 9, filing is an acceptable means of perfecting a security interest in such items as commercial tort claims, health-care-insurance receivables, investment property and instruments.

4. The form of the Blocked Account Agreement is sufficient to grant to the Agent a security interest in all deposit accounts maintained by the Borrower with Best Rates Around Bank (the "Deposit Accounts"). Assuming that there is no agreement among the parties to postpone the time of attachment, such security interest has attached to the Deposit Accounts and is duly perfected.

If the Agent has "control" over the Deposit Accounts under Section 9-104 pursuant to the Blocked Account Agreement, such control will fulfill the condition required under Section 9-203(b)(3) for creation of an enforceable security interest, and will also provide the grounds for perfecting such security interest under Section 9-314. In fact, control is the only method for perfecting a security interest in deposit accounts.

Pursuant to Section 9-104, a secured party has control of a deposit account if:

- (x) the secured party is the bank with which the deposit account is maintained;*
- (y) the debtor, the secured party and the bank have agreed in an authenticated record that the bank will comply with the instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; or*
- (z) the secured party becomes the bank's customer with respect to the deposit account.*

In this instance, counsel will need to review the Blocked Account Agreement to be certain that Best Rates Around Bank has agreed to comply with the Agent's instructions directing disposition of the funds in the Deposit Accounts without further consent by the Borrower.

In connection with the opinions set forth above, we call your attention to the following:

(1) Our opinions set forth herein are limited to Article 9 of the UCC, and therefore do not address (i) laws of jurisdictions other than the State of Georgia, or law of the State of Georgia except for Article 9 of the UCC, (ii) collateral of a type not subject to Article 9 of the Georgia UCC, or (iii) what law governs perfection of the security interests granted in the Collateral.

(2) We express no opinion as to whether the Collateral exists or the nature or extent of the Borrower's rights in, or title to, the Collateral;

(3) Section 552 of the U.S. Bankruptcy Code limits the extent to which property acquired after the commencement of a proceeding may be subject to a security interest arising from a security agreement entered into by the debtor prior to the commencement of such proceeding;

(4) We express no opinion with respect to the creation, attachment, perfection or enforceability of any security interest in any commercial tort claim arising after the authentication of the Security Agreement;

(5) We express no opinion with respect to the perfection of any security interest in any Collateral consisting of goods that are or are to become fixtures, standing timber to be cut, farm products, consumer goods, as-extracted collateral, or goods covered by certificates of title;

(6) We note that a record communicated to the filing office with tender of the appropriate filing fee, but which the filing office refuses to accept for a reason other than one set forth in O.C.G.A. § 11-9-516(b) is not effective against a purchaser of the Collateral who gives value in reasonable reliance upon the absence of the record from the files;

(7) Under O.C.G.A. § 11-9-515, the perfected security interest of the Agent in the Collateral requires the filing of continuation statements within the period of six (6) months prior to the expiration of five (5) years from the date of filing of the Financing Statement;

(8) Under certain circumstances described in O.C.G.A. § 11-9-315, the perfected security interest in proceeds of the Collateral may cease to continue or become unperfected;

(9) Under certain circumstances described in O.C.G.A. §§ 11-9-317, 11-9-320 and 11-9-321, buyers, lessees and licensees of the Collateral may take the same free and clear of a perfected security interest;

(10) Pursuant to O.C.G.A. § 11-9-507(c), perfection of a security interest in the Collateral will terminate as to any property acquired by the Borrower more than four months after the date the Borrower so changes its name as to make the filed Financing Statement seriously misleading unless an amendment to the Financing Statement which renders the Financing Statement not seriously misleading is filed within four months after the change;

(11) Pursuant to O.C.G.A. § 11-9-316, perfection of a security interest in the Collateral will terminate one year after any transfer of such Collateral by the Borrower to a person that thereby becomes a debtor and is located in another jurisdiction, including without limitation, any merger or consolidation of the Borrower into another Person, unless such security interest becomes perfected under the laws of such other jurisdiction prior to such termination;³⁰

³⁰ If the Borrower were not a registered organization, counsel should add a qualifier that perfection will also terminate four months after any change in the debtor's location to another jurisdiction.

(12) Pursuant to O.C.G.A. § 11-9-316, a security interest in deposit accounts that is perfected under the law of the bank's jurisdiction will terminate upon the expiration of four months after a change of the bank's jurisdiction to another jurisdiction, unless such security interest becomes perfected under the laws of the other jurisdiction prior to such termination;

(13) Pursuant to O.C.G.A. § 11-9-332, a transferee of money or funds from a deposit account takes such money or funds free of a security interest in the deposit account unless the transferee acts in collusion with the Borrower in violating the rights of the secured party;

(14) Pursuant to O.C.G.A. § 11-9-340, a bank with which a deposit account is maintained may exercise any right of recoupment or set-off against a secured party that holds a security interest in the deposit account, unless the secured party has obtained control over the deposit account by becoming the bank's customer with respect to such account and the set-off is based on a claim against the Borrower or unless the bank agrees otherwise in an authenticated record;

(15) We express no opinion as to the creation, attachment, perfection or enforcement of any security interest in any collateral that is subject to an agreement that is or purports to be non-assignable or that may not be assigned under applicable law or regulation, other than collateral consisting of accounts, chattel paper, general intangibles, health-care-insurance receivables, lease agreements and promissory notes to the extent provided in O.C.G.A. §§ 11-9-406, 11-9-407 and 11-9-408;

(16) We express no opinion as to the enforceability, against the government of the United States of America or any state thereof, of any assignment or security interest in any collateral constituting accounts or other claims against the government of the United States of America or any such state (including, without limitation, any accounts arising under the Medicare, Medicaid or CHAMPUS programs or any financial intermediary under any such programs); and

(17) We express no opinion with respect to the priority of any security interest granted in the Collateral or the Deposit Accounts. We note, however, that pursuant to O.C.G.A. § 11-9-517, the failure of a filing office to index a record correctly (including records that have been filed prior to the date of filing of the Financing Statement) does not affect the effectiveness of such filed record.

[To the extent that counsel opines on the enforceability of the Security Agreement and the Blocked Account Agreement, in addition to other appropriate carveouts regarding enforceability, the following may be appropriate:]

(18) We express no opinion regarding the enforceability of any provisions of the Security Agreement or the Blocked Account Agreement, to the extent that they purport to waive

or vary the rules stated in the Sections of the UCC enumerated in O.C.G.A. § 11-9-602, to the extent that such rules give rights to a debtor or obligor and impose duties on a secured party.

(19) We express no opinion regarding the enforceability of provisions that purport to render void and of no effect any transfers of the debtor's rights in the collateral in violation of the terms of the Opinion Documents.

The opinions expressed herein are based upon and are limited to the laws of the State of Georgia and we express no opinion with respect to the laws of any other state or jurisdiction.

Our opinions set forth in this letter are based upon the facts in existence and laws in effect on the date hereof and we expressly disclaim any obligation to update our opinions herein, regardless of whether changes in such facts or laws come to our attention after the delivery hereof.

This opinion is solely for the benefit of the addressees hereof and their successors and permitted assigns in connection with the execution and delivery of the Opinion Documents. This opinion may not be relied upon in any manner by any other person or for any other purpose and may not be disclosed, quoted, filed with a governmental agency or otherwise referred to without our prior written consent.

Very truly yours,