

Summary of Contents

Volume 1

TABLE OF CONTENTS

1	Structuring the Credit Facility; Some Regulatory Considerations	1-1
2	Conditions Precedent	2-1
3	Special Types of Collateral	3-1
4	Representations and Warranties	4-1
5	Affirmative Covenants	5-1
6	Negative Covenants	6-1
7	Financial Statements and Covenants	7-1
8	Events of Default and Remedies	8-1
9	Provisions Affecting the Lender's Exposure Beyond the Loan Documents	9-1
10	Money Market Pricing—London Interbank Offered Rate and Certificate of Deposit Pricing	10-1
11	Agented or Syndicated Credits	11-1
12	Drafting the Participation Agreement	12-1
13	Guaranties and Other Credit Supports	13-1
14	Standardized Terms	14-1
15	Subordination Agreements	15-1
16	The Letter of Credit and Reimbursement Agreement	16-1
17	Asset-Based Loans	17-1
18	Drafting the Security Agreement	18-1
19	Step-by-Step Guide to Perfection and Priority	19-1
20	Transactions at the Margins of Article 9: Documents of Title, Fixtures, Patents, Trademarks, and Copyrights	20-1
21	Real Estate Mezzanine Financing	21-1
22	Dealing With the Tax Lien	22-1
23	Default: Enforcement and Remedies	23-1
24	Thirty-Nine "Fixes" to UCC Article 9	24-1

25	Amendments to Article 9 of the UCC Affecting the Filing System	25-1
26	Case Law Guidance for Practitioners	26-1

Volume 2

APPENDIX I	Revolving Credit Agreement	<i>[available only on CD]</i>
APPENDIX II	Term Loan Agreement	<i>[available only on CD]</i>
APPENDIX III	Revolving Credit and Term Loan Agreement	<i>[available only on CD]</i>
APPENDIX IV	Revolving Credit and Term Loan Agreement—Prime, LIBOR, and CD Pricing	<i>[available only on CD]</i>
APPENDIX V	Agented Revolving Credit and Term Loan Agreement—Prime, LIBOR, and CD Pricing	<i>[available only on CD]</i>
APPENDIX VI	Master Participation Agreement	A-199
APPENDIX VII	Guaranty and Comfort Letter	A-209
APPENDIX VIII	Confidentiality Agreement	A-219
APPENDIX IX	Security Agreement, Pledge, and Assignment Covering Equipment, Inventory, Accounts, Stock, Debt Instruments, and Contracts for Single Bank Credit Agreements	A-223
APPENDIX X	Security Agreement, Pledge, and Assignment Covering Equipment, Inventory, Accounts, Stock, Debt Instruments, and Contracts for Agented Revolving Credit Agreements	A-247
APPENDIX XI	Opinion Letter (Long Form, Secured Transaction)	A-271
APPENDIX XII	Illustrative Opinion of Counsel to the Borrower	A-281
APPENDIX XIII	Line Letter (Secured and Guaranteed, to Be Used With Demand Note)	A-293
APPENDIX XIV	Demand Note (for Fixed or Floating Rate Demand Loans)	A-299
APPENDIX XV	Intercreditor Agreement	A-307
APPENDIX XVI	Opinion Letter	A-317
APPENDIX XVII	Sample UCC-9 Insurance Policy	A-323

SUMMARY OF CONTENTS

ix

APPENDIX XVIII	Debtor-in-Possession Revolving Credit Agreement	A-341
APPENDIX XIX	Issuer's Letter Confirming Account Party's (Applicant's) Waiver of Subrogation Rights	A-401
APPENDIX XX	Issuer's Letter Confirming Its Purchase of Account Party's (Applicant's) Subrogation Rights	A-403
APPENDIX XXI	Attorney's Opinion to Be Rendered Under the ABA Legal Accord	A-405
APPENDIX XXII	Annotated Attorney's Opinion to Be Rendered Under the ABA Legal Accord	A-411
APPENDIX XXIII	Security Agreement for a Collateral Pool	A-421
APPENDIX XXIV	Issuer's Letter Recognizing Beneficiary's Assignment of Proceeds of Letter of Credit	A-441
APPENDIX XXV	Single Lender Commitment Letter	A-443
APPENDIX XXVI	Cash Collateral Account Letter	A-451
APPENDIX XXVII	Workout Letter Agreement	A-453
APPENDIX XXVIII	Subordination Agreement	A-459
APPENDIX XXIX	Revolving Credit and Term Loan Agreement	A-467
APPENDIX XXX	Sale and Assignment Agreements (for Loan Participation)	A-613
APPENDIX XXXI	Loan and Security Agreement for Asset-Based Loan	A-629
APPENDIX XXXII	Security Agreement	A-707
APPENDIX XXXIII	Perfection Certificate	A-725
APPENDIX XXXIV	Account Control Agreement—Affiliated Brokers/Creditors	A-731
APPENDIX XXXV	Securities Account Control Agreement— Retail Customer	A-737
APPENDIX XXXVI	New York State Law Revision Commission 2001 Report on Proposed Revised Article 9	A-747
APPENDIX XXXVII	Deposit Account Control Agreement	A-933
APPENDIX XXXVIII	Revised Uniform Commercial Code Article 7 With Comments	A-939
APPENDIX XXXIX	IRS Form 8821: Tax Information Authorization	A-1085

SUMMARY OF CONTENTS

APPENDIX XL	Credit and Guaranty Agreement	A-1091
APPENDIX XLI	Collateral Agreement	<i>[available only on CD]</i>
APPENDIX XLII	Patent Security Agreement	<i>[available only on CD]</i>
APPENDIX XLIII	Model LLC Pledge Agreement	<i>[available only on CD]</i>
Index		Index-1

Table of Contents

Volume 1

1 Structuring the Credit Facility; Some Regulatory Considerations

¶ 1.01	Introduction	1-1
¶ 1.02	Types of Credit Facilities	1-1
[1]	Line of Credit	1-2
[2]	Revolving Credit	1-5
[a]	Annual Cleanup	1-7
[b]	Reduction of Commitment	1-8
[3]	Term Loan	1-9
[4]	Revolving Credit Into a Term Loan	1-10
[5]	Evergreen Facility	1-11
¶ 1.03	Notice and Manner of Borrowing	1-11
¶ 1.04	Evidence of a Loan	1-12
[1]	Notes	1-20
[a]	Revolving Credit Note	1-21
[b]	Revolving Credit Grid Note	1-22
[c]	Term Note	1-24
[d]	One Note or Two	1-25
[2]	Proving the Amount	1-26
¶ 1.05	Interest, Fees, and Expenses	1-27
[1]	Interest	1-29
[a]	Floating Rate Interest	1-29
[b]	Fixed Rate Interest	1-33
[2]	Fees	1-33
[a]	Commitment Fee	1-33
[b]	Facility Fee	1-34
[c]	Closing Fee	1-35
[d]	Balance Shortfall Fee	1-36
[3]	Legal Fees and Expenses	1-40
¶ 1.06	Payments and Prepayments	1-42
[1]	Repayment of Revolving Credit Loans	1-43
[a]	Separate Note for Each Loan	1-43
[b]	Grid Note	1-43
[c]	Bank Records	1-44
[2]	Repayment of a Term Loan	1-44
[3]	Repayment of a Term Loan Following a Revolving Credit	1-45
[4]	Optional Prepayment	1-45
[5]	Mandatory Prepayment	1-46
[6]	Mechanics of Payment	1-47

¶ 1.07	Use of Proceeds	1-48
	[1] Money-Laundering Laws	1-48
	[2] Margin Stock	1-50
	[3] Consumer Transactions	1-51
	[4] Wire Transfers	1-53
¶ 1.08	The Commitment and the Commitment Letter	1-54.4
	[1] Introduction	1-54.4
	[2] Lending Limits	1-54.4
	[a] General Limits	1-54.5
	[b] Calculating Limits	1-56
	[i] Binding commitments and participation agreements	1-58
	[ii] Combining loans to several borrowers	1-59
	[3] Loans to Affiliates	1-60
	[4] Consequence of Regulatory Disapproval	1-61
	[5] Other Lenders	1-62
	[6] Change in Circumstances	1-63
	[7] Indemnification	1-64
	[8] Loan Documentation	1-65
	[9] Legal Fees	1-67
	[10] Assignment	1-68
	[11] Motivating Transactions	1-68
	[12] Termination	1-68

2 Conditions Precedent

¶ 2.01	Introduction	2-1
	[1] Definition and Purpose of Conditions Precedent	2-1
	[2] Selection	2-1
¶ 2.02	Single Loan	2-2
	[1] Introduction	2-2
	[2] The Note	2-3
	[3] Evidence of All Corporate Action	2-3
	[4] Incumbency and Signature Certificate	2-5
	[5] Opinion of Counsel	2-6
	[a] Opinion of Counsel to the Borrower (“Third-Party Opinion”)	2-6
	[i] Purpose of opinion	2-6
	[ii] Who renders the opinion?	2-7
	[iii] Contents of the opinion	2-8
	[iv] What does the opinion mean?	2-11
	[v] Who may rely on the opinion?	2-14
	[b] Other Opinions	2-15
	[6] Alternative to the Opinion: UCC 9 Insurance Policy	2-16
	[a] Introduction	2-16
	[b] Background	2-16
	[c] Insured Risks	2-17
	[d] Coverage of the UCC 9 Policy Compared to Legal Opinion	2-18

	[e] Implications for the Lender	2-22
	[f] Implications for Borrowers	2-23
	[g] Implications for Lender's Counsel	2-23
	[h] The Abbreviated Opinion	2-24
	[7] Waiver and Consent	2-25
	[8] Governmental Approval	2-26
	[9] Third-Party Agreements	2-26
	[10] Collateral Documentation	2-28
	[a] General Provision	2-28
	[b] Security Agreement	2-29
	[11] Legal Fees	2-30
¶ 2.03	Several Loans	2-30
	[1] Representations and Warranties	2-31
	[2] Events of Default	2-31
	[3] Other Approvals, Opinions, or Documents	2-32
	[4] Officer's Certificate	2-32
3	Special Types of Collateral	
¶ 3.01	Introduction	3-1
¶ 3.02	Deposit Accounts	3-1
	[1] Current Requirements and Pre-Revision Practice	3-1
	[2] State Solutions	3-7
	[3] Other Solutions Under Pre-Revision Article 9	3-7
	[a] Notification	3-7
	[b] Creating a Certificate of Deposit	3-7
	[c] The Pledge Agreement	3-11
	[d] Tracing Proceeds	3-11
	[4] Treatment in Current Article 9	3-12
	[a] Deposit Accounts as Original Collateral	3-12
	[b] Which Accounts May Serve as Collateral?	3-12
	[c] Identifying the Accounts in the Security Agreement	3-15
	[d] Perfecting a Security Interest	3-17
	[e] Current Issues	3-20
	[5] The American Bar Association's Model Deposit Account Control Agreement	3-21
	[a] Introduction	3-21
	[b] Waiver of the Bank's Right of Setoff	3-22
	[c] Indemnification	3-22
	[d] The Bank's Right to Terminate the Debtor's Account	3-23
	[e] After the Deposit Account Is Terminated	3-24
¶ 3.03	Letters of Credit	3-24
	[1] Assignment of Proceeds vs. Drawing Rights	3-24
	[2] Treatment Under Current Articles 5 and 9	3-26
	[a] Transfer of the Letter of Credit	3-26
	[b] Assignment of Proceeds	3-27

	[c] Assignment vs. Automatic Perfection.....	3-28
	[d] Priority Issues	3-29
	[e] Priority of the Holder of the Draft.....	3-30
	[i] General rule	3-30
	[ii] Effect on purchaser of draft: Fraud and injunctions.....	3-31
	[iii] Other consequences	3-32
¶ 3.04	Accounts Receivable, Chattel Paper, Payment Intangibles, and Promissory Notes	3-34
	[1] Treatment in Current Article 9	3-34
	[2] What Does the Article 9 Convention Mean?	3-35
¶ 3.05	Loans Secured by Securities.....	3-41
	[1] Introduction	3-41
	[2] Current Article 8: Terminology and Concepts.....	3-43
	[a] Practices Prior to Current Article 8	3-45
	[b] Perfection by “Control”	3-46
	[3] Perfection and Priority.....	3-48
	[4] Certificated and Uncertificated Securities	3-50
	[5] Pledges of Treasury Securities.....	3-51
	[a] Calculating Risk-Based Capital Requirements	3-55
	[6] Complying With Regulation U: “Purpose” and “Special Purpose” Credits	3-56
	[7] Remedies on Default	3-59
¶ 3.06	Commercial Tort Claims	3-66
¶ 3.07	Health-Care-Insurance Receivables.....	3-67
	[1] Perfection of Interests in Health-Care-Insurance Receivables.....	3-68
¶ 3.08	Software Licenses.....	3-69
¶ 3.09	Loans and Notes	3-70
	[1] Automatic Perfection.....	3-70
	[2] Perfection by Filing or Possession.....	3-72
	[3] Priority Rules.....	3-73
	[4] Corporate Notes as Securities	3-75
	[a] <i>Highland Capital v. Schneider</i>	3-75
	[b] The Court’s Decision	3-76
	[c] Implications of the Decision for Secured Parties	3-76.3
	[i] Article 8 is exclusive.....	3-76.3
	[ii] Sale is not Article 9 transaction	3-76.4
	[iii] There is no automatic perfection.....	3-76.4
	[iv] Transfer restrictions are enforceable	3-76.4
	[v] For perfection by filing, collateral description must include securities	3-76.5
	[vi] Perfection by possession	3-76.5
	[vii] Choice of law rules are now important	3-76.5
	[viii] What if there is only one note?	3-76.6
	[ix] Can transactions be structured to achieve the desired result?	3-76.6

TABLE OF CONTENTS

xv

[x] Notes of other “issuers” 3-76.7

[d] Implications of Decision for the Holder 3-76.7

 [i] Warranty that instrument will be paid 3-76.7

 [ii] What if the writing is lost? 3-76.7

¶ 3.10 Electronic Collateral 3-76.8

 [1] Electronic Chattel Paper Under Revised Article 9 3-76.8

 [2] Transferable Records Under the Electronic Transactions Act 3-76.9

 [3] Transferable Records Under E-Sign Act 3-78

¶ 3.11 Proceeds as Original Collateral 3-79

 [1] Advantages for the Secured Lender 3-79

 [2] Arguments That Proceeds Cannot Be Assigned Separately from
 the Collateral 3-80

 [3] Cases Approving Separate Assignment 3-81

 [a] Distribution Rights 3-81

 [b] Sale of Leases 3-82

 [i] Can Lease Proceeds Be Brought Within Article 9? 3-83

 [ii] A Simpler Solution 3-84

 [4] *In Re Commercial Money Center, Inc.* 3-85

 [5] Structuring and Drafting Considerations 3-91

¶ 3.12 The New York State Cooperative Interest 3-91

 [1] Distinguishing the Owner’s Interest from the Coop’s Interest 3-91

 [2] The Lender’s Interest 3-93

 [3] The Lender’s Duties as an Article 9 Secured Party 3-94

 [4] Some Considerations for the Lender 3-94

 [5] Unjustified Refusal to File 3-95

4 Representations and Warranties

¶ 4.01 Introduction 4-1

 [1] Definition and Purpose of Representations and Warranties 4-1

 [a] Assumptions Affirmed 4-1

 [b] Additional Information 4-2

 [c] Borrower’s Consistency 4-3

 [d] Bank’s Good Faith 4-3

 [e] Discharge in Bankruptcy 4-3

 [f] Closing Conditions 4-5

 [2] Verification 4-6

 [3] When Given 4-6

 [4] Breach 4-6

 [5] Limitations 4-7

 [a] Materiality Limitation 4-7

 [b] Knowledge Limitation 4-9

¶ 4.02 Introductory Clause 4-9

¶ 4.03 Incorporation, Good Standing, and Due Qualification 4-10

 [1] Basic Provision 4-10

TABLE OF CONTENTS

	[2] Limitations on Qualification in Foreign Jurisdictions	4-12
	[a] Specified States	4-12
	[b] Ownership of Property or Operation of an Office	4-13
	[c] Effects of Failure to Qualify	4-13
¶ 4.04	Corporate Power and Authority	4-14
	[1] Basic Provision	4-14
	[a] Authority to Borrow	4-14
	[b] Corporate Action	4-14
	[c] Required Approvals	4-15
	[2] Alternative Provision	4-15
¶ 4.05	Legally Enforceable Agreement	4-17
	[1] Basic Provision	4-17
	[2] Bankruptcy Limitation	4-18
¶ 4.06	Financial Statements	4-18
	[1] Basic Provision	4-18
	[a] Financial Statements Covered	4-19
	[b] Consistent Application of Generally Accepted Accounting Principles	4-20
	[c] Fair Presentation	4-20
	[d] “Take-Down” Clause	4-21
	[e] Relationship to Other Representations and Warranties	4-22
	[2] Material Liability	4-23
	[3] Additional and Specified Information	4-23
¶ 4.07	Labor Disputes and Acts of God	4-25
¶ 4.08	Other Agreements	4-25
¶ 4.09	Litigation	4-27
	[1] Basic Provision	4-27
	[2] Limitations and Exceptions	4-28
	[a] Exception for Outstanding Litigation	4-28
	[b] Limitation to Knowledge of the Borrower	4-29
	[c] Limitation to Proceedings Outstanding on Date of Loan Agreement	4-29
	[d] Limitation to Proceedings in Excess of a Specified Amount Not Covered by Insurance	4-30
	[e] Limitation to Proceedings to Which the Borrower Is a Party	4-30
	[f] Limitation Based on Judgment of the Borrower	4-31
	[3] No Defaults on Outstanding Judgments or Orders	4-31
¶ 4.10	Ownership and Liens	4-32
¶ 4.11	Subsidiaries and Ownership of Stock	4-33
¶ 4.12	Employee Retirement Income Security Act	4-34
	[1] Basic Provision	4-34
	[2] Supplemental Provision	4-37

TABLE OF CONTENTS

xvii

¶ 4.13	Operation of Business.....	4-37
	[1] Basic Provision.....	4-37
	[2] Limitations and Exceptions	4-37
	[a] Limitation to Known Conflicts	4-38
	[b] Exception for Lack of Licenses, Patents, Franchises Not Affecting Business	4-38
¶ 4.14	Taxes	4-39
	[1] Basic Provision.....	4-39
	[2] Audited Tax Liability	4-39
	[3] Exception for Contested Taxes.....	4-40
	[4] Exceptions for Amounts Not Material	4-40
¶ 4.15	Debt.....	4-40
¶ 4.16	Pari Passu Status.....	4-41
¶ 4.17	Key Agreements	4-42
¶ 4.18	Investment Company Act of 1940.....	4-43
¶ 4.19	Foreign Assets Control Regulations	4-43
¶ 4.20	Provisions for Secured Lenders	4-44

5 Affirmative Covenants

¶ 5.01	Introduction.....	5-1
	[1] Definition of Covenants.....	5-1
	[2] Purpose.....	5-1
	[a] Guidelines.....	5-1
	[b] Relationship to Representations and Warranties.....	5-2
	[c] Information Gathering.....	5-2
	[d] Breach of Covenant.....	5-3
	[3] Selection.....	5-3
	[4] Reporting Requirements.....	5-4
	[a] Purpose	5-4
	[b] Selection	5-4
	[5] Financial Statement Reporting Requirements.....	5-5
¶ 5.02	Introductory Clause	5-6
¶ 5.03	Corporate Existence and Due Qualification.....	5-7
	[1] Basic Provision.....	5-7
	[2] Exceptions to and Limitations on Corporate Existence	5-8
	[a] Permitted Mergers or Consolidations.....	5-9
	[b] Permitted Dissolutions of Subsidiaries.....	5-9
	[3] Exceptions to and Limitations on Due Qualification.....	5-10
	[a] Specified States.....	5-11
	[b] Property Ownership	5-11
	[c] Material Adverse Effect.....	5-12

¶ 5.04	Maintenance of Records	5-12
¶ 5.05	Maintenance of Properties	5-13
	[1] Basic Provision	5-13
	[2] Limitation	5-14
¶ 5.06	Conduct of Business	5-14
	[1] Basic Provision	5-14
	[2] Exception	5-15
¶ 5.07	Maintenance of Insurance	5-16
	[1] Basic Provision	5-16
	[a] Coverage	5-18
	[b] Specified Insurance	5-18
	[c] Notice of Cancellation	5-19
	[2] Key Man Insurance	5-19
	[3] Self-Insurance	5-20
¶ 5.08	Compliance With Laws	5-21
	[1] Basic Provision	5-21
	[2] Exceptions and Limitations	5-22
	[a] All Material Respects	5-22
	[b] Contest in Good Faith and by Appropriate Proceedings	5-23
	[c] No Material Adverse Effect	5-23
¶ 5.09	Inspection	5-24
	[1] Basic Provision	5-24
	[2] Exceptions and Limitations	5-25
	[a] Reasonable Notice and Security Regulations	5-25
	[b] Discussion With Accountants	5-25
	[c] Confidentiality	5-26
¶ 5.10	Compliance With Agreements	5-31
¶ 5.11	Payment Obligations	5-32
¶ 5.12	Financial Statement Reporting Requirements	5-32
	[1] Quarterly Financial Statements	5-32
	[2] Annual Financial Statements	5-33
	[3] Proposed Timing Changes	5-35
	[4] Management Letters	5-35
¶ 5.13	Notice of Litigation or Regulatory Proceedings	5-36
¶ 5.14	Event of Default	5-36
¶ 5.15	Information Related to the Employee Retirement Income Security Act of 1974	5-38
¶ 5.16	Information Provided to Other Creditors	5-38
¶ 5.17	Information Provided to Stockholders, the Securities and Exchange Commission, and National Securities Exchanges	5-39

TABLE OF CONTENTS

xix

¶ 5.18 Requests for Additional Information 5-40

¶ 5.19 Certificate of No Default 5-40

¶ 5.20 Accountant’s Certificate Regarding Events of Default 5-41

6 Negative Covenants

¶ 6.01 Introduction 6-1

 [1] Definition and Use 6-1

 [2] Bank Control 6-1

¶ 6.02 Introductory Clause 6-2

¶ 6.03 Negative Pledge 6-3

 [1] Basic Provision 6-3

 [a] Liens and Encumbrances 6-3

 [b] General and Secured Creditors 6-5

 [i] Enforcing the covenant 6-6

 [ii] Suing for breach 6-6

 [iii] Officer’s certification 6-7

 [iv] Monitoring filings 6-7

 [v] Filing the covenant 6-7

 [c] Subsidiaries 6-9

 [d] Restricted Debt 6-9

 [2] Exceptions and Limitations 6-9

 [a] Existing and Specified Liens 6-10

 [i] Prohibition on liens to secure refinanced obligations 6-12

 [ii] Permitted liens to secure refinanced obligations 6-12

 [b] Liens Granted to the Bank 6-12

 [c] Taxes 6-13

 [d] Mechanics’ Liens 6-13

 [e] Workers’ Compensation and Similar Legislation 6-14

 [f] Deposits or Pledges Made in the Ordinary Course of Business 6-14

 [g] Purchase-Money Security Interests 6-14

 [i] Exception 6-14

 [ii] Limitations 6-15

 [h] Judgment Liens 6-17

 [i] Easements 6-17

 [j] Liens Granted by a Subsidiary to Borrower or Another Subsidiary 6-18

 [k] Bankers’ Acceptances and Letters of Credit 6-18

 [l] Renewals and Extensions 6-19

 [m] Basket Exception 6-19

 [3] In Other Agreements 6-19

¶ 6.04 Restriction on Debt 6-20

 [1] Basic Provision 6-20

 [a] Definition of “Debt” 6-21

 [b] Purpose of the Covenant 6-27

TABLE OF CONTENTS

	[c] Relationship to Other Covenants.....	6-27
	[d] Subsidiary Debt.....	6-28
[2]	Exceptions.....	6-29
	[a] Debt Under the Loan Agreement.....	6-29
	[b] Specified Debt.....	6-29
	[c] Debt Listed on a Schedule and Existing Debt.....	6-30
	[d] Subordinated Debt.....	6-30
	[e] Intercompany Debt.....	6-31
	[f] Trade Debt.....	6-32
	[g] Letters of Credit.....	6-33
	[h] Acceptance Facilities.....	6-34
	[i] Debt Secured by Purchase-Money Liens.....	6-34
	[j] Debt Otherwise Permitted Under the Loan Agreement.....	6-34
	[k] Short-Term Debt.....	6-35
	[l] Debt-to-Equity Ratio or the “Leverage Test”.....	6-35
¶ 6.05	Mergers, Consolidations, and the Purchase and Sale of Assets (“Fundamental Change”).....	6-36
	[1] Basic Provision.....	6-36
	[2] Exceptions.....	6-38
	[a] Merger of Subsidiary Into Borrower.....	6-39
	[b] Merger or Consolidation of Subsidiary Into Another Subsidiary... ..	6-40
	[c] Borrower or Subsidiary of the Surviving Corporation.....	6-40
	[d] Acceptable Successor Corporation.....	6-41
¶ 6.06	Leases.....	6-42
	[1] Basic Provision.....	6-42
	[2] Exceptions.....	6-43
	[a] Capital Leases.....	6-43
	[b] Existing Leases.....	6-43
	[c] Total Lease Obligations.....	6-44
	[d] Intercompany Leases.....	6-44
¶ 6.07	Sales and Leasebacks.....	6-45
¶ 6.08	Dividends.....	6-45
	[1] Basic Provision.....	6-45
	[2] Exceptions.....	6-47
	[a] Dividends Payable Solely in Common Stock.....	6-48
	[b] Repurchase of Shares With Proceeds of Issuance of Additional Shares.....	6-48
	[c] Dividend Payments on Preferred Stock.....	6-49
	[d] Dividend Payments Out of Net Income.....	6-50
	[e] Net Income Formula.....	6-51
¶ 6.09	Sale of Assets.....	6-52
	[1] Basic Provision.....	6-52
	[2] Exceptions.....	6-53
	[a] Sales of Inventory in the Ordinary Course of Business.....	6-53
	[b] Disposition of Obsolete Assets.....	6-54

TABLE OF CONTENTS

xxi

	[c] Transfers Between Borrower and Subsidiaries	6-54
	[d] Basket Exception	6-55
	[e] Exception for Receivables	6-55
¶ 6.10	Investments.....	6-56
	[1] Basic Provision.....	6-56
	[2] Exceptions	6-56
	[a] Treasury Bonds and Commercial Paper.....	6-57
	[b] Loans Among Borrower and Subsidiaries.....	6-57
	[c] Investments in Existing Subsidiaries.....	6-58
	[d] Investments Received in Payment of an Obligation.....	6-58
	[e] Investments From Proceeds of Stock Issuance	6-59
	[f] Basket Exception	6-59
¶ 6.11	Guaranties.....	6-60
	[1] Basic Provision.....	6-60
	[2] Exceptions	6-62
	[a] Endorsements.....	6-62
	[b] Existing Guaranties	6-63
	[c] Obligations of the Borrower or a Subsidiary.....	6-63
	[d] Basket Exception	6-64
¶ 6.12	Transactions With Affiliates.....	6-64
	[1] Basic Provision.....	6-64
	[2] Exception for Ordinary Course of Business and Fair Consideration	6-66
	[3] Exception for Salaries.....	6-66
¶ 6.13	Recapitalization of Borrower.....	6-67
¶ 6.14	Waiver Right to File Corruption Statement	6-67

7 Financial Statements and Covenants

¶ 7.01	Financial Statements.....	7-1
	[1] Purpose and Types.....	7-1
	[a] Balance Sheet.....	7-1
	[b] Income Statement.....	7-3
	[c] Statement of Stockholder’s Equity.....	7-4
	[d] Statement of Change in Financial Position	7-4
	[e] Notes to Financial Statements	7-5
	[2] Financial Statements of Related Corporations.....	7-6
	[a] Consolidated Financial Statements	7-6
	[b] Combined Financial Statements.....	7-7
	[c] Differences Between Legal and Accounting Treatments	7-7
	[3] Generally Accepted Accounting Principles	7-8
	[4] Preparation of Financial Statements	7-10
	[5] Auditor’s Report.....	7-11
	[a] Compilation	7-11
	[b] Review	7-11
	[c] Audit	7-12

¶ 7.02	Financial Covenants	7-12
	[1] Definition and Purpose	7-12
	[a] Guidelines	7-13
	[b] Representation and Warranty	7-13
	[c] Information Gathering	7-14
	[d] Breach of Covenant	7-14
	[2] Limitations	7-14
	[3] Types	7-15
	[4] Use	7-16
	[5] Selection	7-17
	[6] Drafting	7-17
¶ 7.03	Financial Covenants—Provisions and Definitions	7-18
	[1] Working Capital	7-18
	[a] Definition of Current Assets	7-20
	[b] Definition of Current Liabilities	7-21
	[2] Tangible Net Worth	7-22
	[3] Capital Expenditures	7-23
	[4] Current Ratio	7-24
	[5] Quick Asset Ratio	7-24
	[6] Leverage Ratio	7-25
	[7] Maintenance of Operating Accounts	7-26

8 Events of Default and Remedies

¶ 8.01	Introduction	8-1
	[1] Bank’s Knowledge and Effect of Default	8-2
	[2] Grace or Cure Periods	8-2
	[3] Parent, Subsidiary, or Affiliate	8-4
	[4] Drafting Considerations	8-4
	[a] Mandatory Prepayments	8-4
	[b] Covenants	8-4
¶ 8.02	Introductory Clause	8-5
¶ 8.03	Failure to Pay Principal, Interest, or Fees	8-5
	[1] Basic Provision	8-5
	[2] Grace Period	8-6
¶ 8.04	Breach of a Representation or Warranty	8-7
	[1] Basic Provision	8-7
	[2] Alternative Provision	8-9
¶ 8.05	Breach of a Covenant	8-9
	[1] Basic Provision	8-9
	[2] Grace Period	8-11
	[3] Other Agreements	8-12
¶ 8.06	Cross-Default	8-12
	[1] Basic Provision	8-12

TABLE OF CONTENTS

xxiii

[2] Alternative Provision.....	8-14
¶ 8.07 Bankruptcy and Reorganization	8-15
¶ 8.08 Monetary Judgments	8-18
¶ 8.09 Employee Retirement Income Security Act	8-18
¶ 8.10 Security Agreements	8-19
¶ 8.11 Support Agreements	8-20
¶ 8.12 Ownership	8-22
¶ 8.13 Key Man.....	8-22
¶ 8.14 General Insecurity	8-23
¶ 8.15 Other Events.....	8-23
[1] Foreign Loans.....	8-23
¶ 8.16 Remedies.....	8-24
[1] Acceleration.....	8-24
[2] Setoff.....	8-26
[3] Remedies Cumulative.....	8-28
[4] Revocation of Acceleration	8-28
¶ 8.17 Other Lender Options	8-29
[1] The Right to Cure	8-29
[2] Mandatory Prepayment.....	8-29
[3] Repricing	8-30
[4] The “Put”.....	8-31
[5] Workout and the Workout Letter Agreement	8-32

9 Provisions Affecting the Lender’s Exposure Beyond the Loan Documents

¶ 9.01 Introduction.....	9-1
¶ 9.02 Causes of Action	9-1
¶ 9.03 Implications for the Drafter and the Litigator.....	9-3
[1] Recent Decisions	9-3
[2] Statutory and Common Law Defenses to Lender Liability.....	9-5
[a] State Statutes Barring Oral Commitments	9-5
[i] Statutory variations	9-6
[ii] Commercial and consumer transactions	9-8
[b] Misrepresentation and Fraud Claims Under State Statutes	9-9
[i] “Structuring” the loan to avoid lending limits.....	9-10
[ii] Negligent misrepresentation and fraud.....	9-12
[iii] Promises to forbear	9-12
[iv] Lender’s active wrongdoing.....	9-13
[v] Common law survives statute of frauds	9-14
[c] Promissory Estoppel Exception	9-14

	[i]	Promissory estoppel and part performance.....	9-15
	[ii]	Statute as shield for fraud.....	9-16
[d]		Promises of Credit and Promises About Credit.....	9-16
[e]		Contracts Not to Be Performed Within One Year.....	9-17
	[i]	Estoppel avoids statute.....	9-19
	[ii]	Circumstantial evidence supports agreement.....	9-20
	[iii]	Bank’s interest in conflict with borrower’s.....	9-21
[f]		Promises Involving an Interest in Land.....	9-23
	[i]	Illegality of loan as defense.....	9-25
	[ii]	Borrower knowledge of illegality.....	9-26
[g]		<i>D’Oench, Duhme</i> Requirements.....	9-27
	[i]	Guidelines liberalize the doctrine.....	9-28.1
	[ii]	Files, books, and records.....	9-29
	[iii]	Retroactive application.....	9-29
	[iv]	<i>D’Oench, Duhme</i> before FIRREA.....	9-30
	[v]	Harmonizing the bank’s records.....	9-32
[h]		Absence of Key Terms.....	9-33
	[i]	Duration of asserted agreement.....	9-34
	[ii]	Key terms omitted.....	9-36
[i]		Lack of Justifiable Reliance.....	9-36
	[i]	Course of dealing.....	9-37
	[ii]	Circumstances of transaction and the reasonable borrower.....	9-37
[j]		Duty to Mitigate.....	9-39
	[i]	Lender’s new term.....	9-39
	[ii]	“Substantial term” test.....	9-40
	[iii]	Consequential damages.....	9-41
¶ 9.04		The Demand Note.....	9-41
¶ 9.05		Defensive Drafting.....	9-50
	[1]	In Terrorum Provisions.....	9-50
	[2]	Avoiding Conflicting Provisions.....	9-51
	[3]	Dispute Resolution.....	9-52
	[4]	Disclaimers.....	9-52
	[5]	The Commitment Letter.....	9-54
	[6]	Waiver.....	9-55
	[7]	Integration.....	9-56
	[8]	Jury Trial Waiver.....	9-57
10		Money Market Pricing—London Interbank Offered Rate and Certificate of Deposit Pricing	
¶ 10.01		Introduction.....	10-1
	[1]	Prime Rate Pricing.....	10-1
	[2]	Money Market Pricing.....	10-2
	[3]	Comparison of Prime Rate Pricing and Money Market Pricing.....	10-5
	[4]	Match Funding of Money Market-Priced Loans.....	10-5

TABLE OF CONTENTS

xxv

[5] The Money Markets—London Interbank Market and Certificate of Deposit Market.....	10-6
¶ 10.02 London Interbank Offered Rate.....	10-7
[1] Introduction.....	10-7
[2] Definition.....	10-7
[3] Eurocurrency Reserve Requirement.....	10-9
[4] London Interbank Offered Rate Formula.....	10-10
¶ 10.03 Certificate of Deposit Rate.....	10-11
[1] Introduction.....	10-11
[2] Certificate of Deposit Base Rate.....	10-11
[3] Certificate of Deposit Reserve Requirement.....	10-13
[4] Assessment Rate for Federal Deposit Insurance Corporation Insurance.....	10-13
[5] Certificate of Deposit Rate Formula.....	10-14
¶ 10.04 Mechanics of Money Market Pricing.....	10-16
[1] Introduction.....	10-16
[2] Definitions.....	10-16
[a] Business Day.....	10-16
[b] Certificate of Deposit Loan.....	10-17
[c] Dollars.....	10-17
[d] Interest Period.....	10-17
[e] Lending Office.....	10-20
[f] LIBOR Loan.....	10-21
[g] Prime Loan.....	10-21
[h] Regulation D.....	10-21
[3] Provisions of the Loan Agreement.....	10-22
[a] Revolving Credit.....	10-22
[b] Term Loan.....	10-23
[c] Notice and Manner of Borrowing.....	10-23
[d] Conversions and Renewals.....	10-25
[e] Evidence of Loan.....	10-27
[f] Interest.....	10-29
[g] Payments and Prepayments.....	10-32
[i] Repayment of revolving credit loans.....	10-32
[ii] Repayment of a term loan following a revolving credit....	10-33
[iii] Optional prepayments.....	10-34
¶ 10.05 Risks of Money Market Pricing.....	10-35
[1] Introduction.....	10-35
[2] Illegality Clause.....	10-35
[3] Disaster Clause.....	10-37
[4] Increased Costs.....	10-38
[a] Taxation, Reserves, and Other Contingencies.....	10-38
[b] Risk-Based Capital.....	10-40
[5] Funding Loss Indemnification.....	10-41
[6] Repricing Mechanisms.....	10-42

¶ 10.06	Multicurrency Loans	10-44
	[1] Introduction	10-44
	[2] Business Day	10-46
	[3] Currencies.....	10-47
	[4] Transition to the Euro	10-48
	[5] The Year	10-49
	[6] Setting the Rate	10-50
	[7] Restrictions	10-51
	[8] Exchange Rate or Equivalent Amount.....	10-52
	[9] Revaluation.....	10-54
	[10] Risks of Multicurrency Loans	10-54
	[a] Illegality	10-54
	[b] Disaster	10-55
	[c] Increased Costs	10-57
	[d] Liquidation of Contracts	10-57
	[11] Multilender Considerations	10-58
	[a] The Principal Lender and Its Funding Banks	10-58
	[b] Multilender Multicurrency Loans	10-59

11 Agented or Syndicated Credits

¶ 11.01	Introduction	11-1
¶ 11.02	Reasons for Syndicated Loans.....	11-2
¶ 11.03	Role and Function of the Agent.....	11-3
	[1] Before Execution of the Loan Agreement	11-3
	[2] After Execution of the Loan Agreement.....	11-4
¶ 11.04	Relationship of the Parties in a Syndicated Credit.....	11-5
	[1] Borrower and Each Bank.....	11-5
	[2] Borrower and Agent	11-5
	[3] Agent and Banks in Syndicate.....	11-6
	[4] Banks in Syndicate With Each Other	11-6
¶ 11.05	Problem Areas for Syndicated Members	11-7
	[1] Pricing Risk.....	11-7
	[2] Credit Risk.....	11-7
	[3] Relationship Risk	11-11
¶ 11.06	Problem Areas for Agent Banks	11-11
	[1] Fiduciary Duty to Member Banks	11-11
	[2] Conflicts of Interest	11-12
	[3] Agented Credit as Security	11-13
¶ 11.07	Provisions	11-16
	[1] Authorization and Action	11-17
	[2] Liability of Agent	11-18
	[3] Rights of Agent as a Bank	11-21
	[4] Independent Credit Decisions.....	11-22

TABLE OF CONTENTS

xxvii

[5] Indemnification	11-22
[6] Successor Agent	11-24
[7] Sharing of Payments.....	11-25
[8] Definitions.....	11-26
[a] Base Rate; Prime Rate.....	11-27
[b] Federal Funds Rate	11-27
[c] Eurocurrency Rate; London Interbank Offered Rate (LIBOR)	11-28
[i] Establishing the rate.....	11-28
[ii] Adjusting the rate.....	11-28
[d] Applicable Rate or Applicable Margin	11-29
[e] Majority or Required Banks.....	11-30
[i] Collective decision making.....	11-30
[ii] Determining the majority	11-31
[iii] Exceptions for borrower bankruptcy	11-31
[f] Eligible Assignees.....	11-32
[9] Revolving Credit	11-32
[10] Reduction of Commitment	11-34
[a] Voluntary	11-34
[b] Mandatory.....	11-35
[11] Increase in Commitment.....	11-35
[12] Term Loan	11-35
[13] Swingline Loan.....	11-36
[14] Notice and Manner of Borrowing.....	11-36
[15] Evidence of Indebtedness	11-37
[16] Nonreceipt of Funds by Agent; Agent’s Clawback	11-38
[17] Illegality Clause.....	11-39
[18] Inability to Determine Rate	11-41
[19] Increased Costs.....	11-42
[a] Taxation, Reserves, and Other Contingencies.....	11-42
[b] Risk-Based Capital.....	11-43
[20] Tax Gross-Up	11-44
[21] Funding Loss	11-44
[22] Amendments.....	11-45
[23] Counterparts	11-46
[24] Electronic Communications and Assignments	11-47
[a] Electronic Communications	11-47
[b] Electronic Assignments.....	11-48

12 Drafting the Participation Agreement

¶ 12.01 Identifying Objectives	12-1
¶ 12.02 Necessity for Written Agreement	12-1
[1] Satisfying the Statute of Frauds.....	12-2
[2] Defeating the Interest of the Federal Deposit Insurance Corporation.....	12-3
[3] Other Reasons.....	12-4
[a] Risk Participations	12-4
[b] Qualified Financial Contracts	12-4

[c]	Lending Limits.....	12-4
[d]	Regulatory Requirements.....	12-5
[4]	Memorializing the Agreement.....	12-6
[5]	Master Participation Agreements.....	12-7
[a]	Negotiating Participations Under a Master Agreement.....	12-7
[b]	Participation Certificates.....	12-8
¶ 12.03	Contract Formation: Sample Provisions.....	12-9
¶ 12.04	Nature of Relationship Between Lead Bank and Participant.....	12-10
[1]	Lead Bank’s Objectives.....	12-10
[2]	Participant’s Objectives.....	12-14
[3]	Recharacterization as a Security.....	12-16
[4]	Recharacterization as a Loan.....	12-20
[5]	Imputing a Fiduciary Relationship.....	12-23
¶ 12.05	Payment by Participant.....	12-26
[1]	Unconditional Payment Obligation.....	12-26
[2]	Increase or Reduction in Lead Bank’s Commitment.....	12-32
[3]	Participation in a Letter of Credit.....	12-33
¶ 12.06	Lead Bank’s Payments to Participant.....	12-36
[1]	Calculating the Amount.....	12-36
[2]	Applying Payments and Setoffs.....	12-38
[3]	Fees, Default Interest, Costs, and Expenses.....	12-40
[a]	Commitment Fee, Default Interest, and Facility Fee.....	12-40
[b]	Costs Associated With Maintaining Capital.....	12-42
[c]	Reimbursement for Increased Costs and Breakage.....	12-42
[4]	Payment Mechanism.....	12-45
[5]	Reclaiming Funds Paid to Participant.....	12-45
[6]	Subordination by Lead or Participant.....	12-47
¶ 12.07	Representations and Warranties.....	12-50
[1]	Participant’s Representation of Independent Credit Analysis.....	12-50
[2]	Lead Bank’s Exclusion of Warranties.....	12-57
[3]	Seller’s Warranties.....	12-58
[4]	Participant’s Representation of Authority.....	12-58
¶ 12.08	Provision and Use of Information.....	12-59
[1]	Lead Bank’s Obligation to Provide Information Generally.....	12-59
[2]	Information Regarding Defaults.....	12-61
[3]	Participant’s Obligation Not to Disclose Information Provided.....	12-62
[4]	Participant’s Obligation Not to Use Information Provided.....	12-63
[5]	Right to Disclose Participation.....	12-63
[6]	Disclosed Participation.....	12-65
¶ 12.09	Standard of Care.....	12-66
¶ 12.10	Powers and Authority of Lead Bank.....	12-72
[1]	Protection for Participant.....	12-75
[2]	Obligation to Enforce Underlying Loan Agreement.....	12-86

TABLE OF CONTENTS

xxix

[a]	Reasons for Lead Bank Nonenforcement.....	12-88
[b]	What Should Be Done?.....	12-89
¶ 12.11	Dispute Resolution	12-89
[1]	Notice, Consultation, and Consent Provisions.....	12-89
[2]	Buy-Back Provisions.....	12-92
[3]	Enforcement by Participant	12-94
[4]	Voting Provisions.....	12-94
[5]	Staged Decision Making.....	12-97
[6]	Bankruptcy Considerations.....	12-98
[7]	Insolvency of Lead Bank.....	12-100
¶ 12.12	Sharing Expenses.....	12-102
[1]	Exceptions to Reimbursement Obligation	12-107
[2]	Liability for Environmental Damage.....	12-107
[3]	Survival of Reimbursement Obligation	12-108
[4]	Collection Costs Not Implied	12-108
[5]	Attorney Fees	12-109
¶ 12.13	Sharing Setoffs	12-109
¶ 12.14	Boilerplate Provisions	12-111
[1]	Participant’s Transfer Rights.....	12-111
[a]	Subparticipation.....	12-112
[b]	Transfer.....	12-113
[2]	Notices.....	12-113
[3]	Integration and Modification	12-114
[4]	Choice of Law	12-116
[5]	Saving Clause.....	12-117
[6]	Termination.....	12-117
[7]	Survival	12-118
[8]	Disclaimer of Third-Party Beneficiary Rights.....	12-119
¶ 12.15	Providing for the <i>D’oench, Duhme</i> Doctrine.....	12-119
¶ 12.16	The Participation Certificate.....	12-121
¶ 12.17	Referencing the Participation in the Loan Agreement.....	12-123
¶ 12.18	The Borrower’s Perspective	12-124
¶ 12.19	Accounting Considerations.....	12-125
[1]	The Risk of Repudiation.....	12-125
[2]	No Recourse Requirement.....	12-126
[3]	Adequacy of Consideration	12-126
[4]	Prior Transfers Vitiating	12-126
[5]	FASB 140 and the Attorney’s Opinion.....	12-126
[a]	What Is a Participating Interest?	12-126
[b]	“Isolation” and the True Sale Opinion	12-128
[c]	The Side Agreement	12-129
[d]	The Transferee’s Right to Pledge the Participation.....	12-130

¶ 12.20	Perfection Issues.....	12-131
[1]	Perfection Against the Debtor	12-131
[2]	Perfection Against the Lead.....	12-132
Exhibit 12.1:	Treatment by the Federal Deposit Insurance Corporation as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection With a Securitization or Participation.....	12-135

13 Guaranties and Other Credit Supports

¶ 13.01	Introduction.....	13-1
¶ 13.02	Reasons for a Guaranty.....	13-2
¶ 13.03	Capacity of the Guarantor.....	13-5
¶ 13.04	Benefits of a Guaranty.....	13-6
¶ 13.05	Alternatives to the Guaranty.....	13-7
[1]	Introduction	13-7
[2]	Standby Letters of Credit and Independent Undertakings	13-8
[a]	Structure.....	13-8
[b]	Bank's Authority to Issue	13-9
[c]	Bankruptcy Considerations	13-12
[3]	Bank Guarantees.....	13-18
[a]	Authority to Issue Guarantees.....	13-18
[b]	The Right of Subrogation.....	13-20
[4]	Comfort Letter.....	13-28
[5]	Hypothecation Agreement.....	13-30
[6]	"Put"	13-31
[7]	Two-Party Nonbank Letter of Credit Used as a Guaranty	13-32
¶ 13.06	Interpreting the Guaranty.....	13-35
[1]	Introduction	13-35
[2]	Guaranties of Payment and Collection	13-36
[3]	Absolute and Conditional Guaranties	13-37
[4]	Revocable and Irrevocable Guaranties	13-38
[5]	General and Special Guaranties.....	13-38
[6]	Continuing Guaranties.....	13-38
[7]	Guaranties Limited in Amount.....	13-39
¶ 13.07	Defenses to Enforcement of Guaranties	13-39
[1]	Introduction	13-39
[2]	Common-Law Defenses	13-39
[3]	Bankruptcy	13-42
[a]	Introductory Note.....	13-42
[b]	Borrower's Insolvency.....	13-43
[c]	Guarantor's Insolvency	13-46
[i]	Introduction.....	13-46

TABLE OF CONTENTS

xxxi

[ii]	Downstream guaranty	13-47
[iii]	Upstream or cross-stream guaranty.....	13-48
[iv]	Structuring considerations.....	13-49
[4]	Uniform Commercial Code	13-50
[5]	Statute of Limitations (“Stale” Guaranty).....	13-51
[6]	Statute of Frauds.....	13-51
[7]	The Spouse’s Defense: ECOA.....	13-52
[8]	Tort Claims and Defenses.....	13-53
[a]	Good Faith and Fair Dealing.....	13-53
[b]	Drafting Considerations	13-56
[c]	Fraud in the Inducement and Misrepresentation	13-57
[9]	Guarantor’s Use of Borrower’s Claims and Defenses	13-64
¶ 13.08	Provisions	13-66
[1]	Definitions	13-67
[2]	Scope of Guaranty	13-68
[a]	Unlimited Guaranty	13-68
[b]	Specific Financing	13-70
[c]	Limited Amount.....	13-70
[3]	Security.....	13-72
[4]	Reinstatement	13-73
[5]	Waiver	13-75
[6]	Consent.....	13-76
[7]	Absolute Guaranty.....	13-79
[8]	Subrogation	13-80
[9]	Expenses.....	13-81
[10]	Termination	13-83
[11]	Assignment.....	13-84
[12]	Security Interest in Guarantee	13-84
[13]	Remedies	13-84
[14]	Third-Party Beneficiary Rights.....	13-86
¶ 13.09	Independent Guaranty	13-87

14 Standardized Terms

¶ 14.01	Purpose and Use of Standardized Terms	14-1
¶ 14.02	Integration	14-2
¶ 14.03	No Waiver, No Amendments	14-2
¶ 14.04	Notices.....	14-4
¶ 14.05	Assignment.....	14-6
[1]	By Borrower	14-6
[2]	By Bank.....	14-6
[a]	Eligible Assignees.....	14-8
[b]	Proportionate Assignment.....	14-8
[c]	Upon Borrower’s Demand	14-9

[d]	Assignee's Affirmation	14-10
[e]	Surrender of Notes	14-11
[f]	Assignment of Loans and Notes Under Revised Article 9	14-12
¶ 14.06	Clauses Relating To Foreign Borrowers	14-13
[1]	Tax "Gross Up"	14-13
[2]	Judgment Currency	14-14
[3]	Waiver of Sovereign Immunity	14-15
¶ 14.07	Consent to Immunity	14-18
¶ 14.08	Governing Law	14-24
¶ 14.09	Construction	14-28
¶ 14.10	Admissibility of Photocopies and Records	14-29
¶ 14.11	Authorization to File the Financing Statement	14-30
[1]	The Lender's Perspective	14-30
[2]	The Borrower's Perspective	14-31

15 Subordination Agreements

¶ 15.01	Purpose	15-1
¶ 15.02	Enforcement in Bankruptcy	15-2
[1]	General Considerations	15-2
[2]	As Executory Contracts	15-3
[3]	In Bank Insolvency	15-4
¶ 15.03	Theories of Enforceability	15-6
[1]	Equitable Theories and Contract Rights	15-6
[2]	Contract Defenses	15-8
[3]	Equitable Subordination	15-11
[4]	Subordination as Security Agreement	15-13
[a]	General Interpretation	15-13
[b]	Recasting the Agreement	15-14
[c]	The Double Insolvency Problem	15-14
¶ 15.04	Provisions	15-16
[1]	Recitals	15-16
[2]	Complete and Contingent Subordination	15-18
[a]	Forbearance	15-18
[b]	Turn-Over Obligation	15-20
[3]	Scope	15-20
[4]	The Junior Creditor's Rights and Obligations	15-22
[a]	The Collateral	15-22
[b]	The Debt	15-26
[i]	Prohibition against transfer	15-26
[ii]	Prohibition against modification	15-27
[iii]	Prohibition against further subordination	15-29

[iv]	Prohibition against exercise of the right of subrogation....	15-30
[v]	Filing proof of claim	15-31
[vi]	Commencement of bankruptcy proceedings	15-34
[vii]	Remedies.....	15-35
[5]	Cross Default.....	15-35
[6]	Suretyship Defenses	15-36
[7]	Notices.....	15-38
[8]	Reinstatement	15-38
[9]	Assignment.....	15-39

16 The Letter of Credit and Reimbursement Agreement

¶ 16.01	Letter of Credit, Application, and Agreement	16-1
[1]	The Letter of Credit	16-1
[2]	The Application	16-1
[3]	The Reimbursement Agreement	16-2
¶ 16.02	Governing Law and Forum.....	16-5
[1]	Exculpatory Provisions and Revised Article 5	16-5
[2]	Revised Article 5 and UCP 500 [®]	16-7
[3]	Pre-Revision Jurisdictions	16-10
[4]	The New York Nonuniform Amendment	16-10
[5]	Choice of Forum.....	16-11
[a]	Under Revised Article 5.....	16-11
[b]	Under Pre-Revision Article 5.....	16-12
[c]	Practical Problems	16-13
¶ 16.03	The Application, the Agreement, and the Letter of Credit.....	16-13
¶ 16.04	The Applicant's Payments to the Bank.....	16-14
[1]	The Reimbursement Obligation.....	16-14
[2]	Indemnity	16-14
[3]	Fees and Costs	16-17
[a]	Routine Fees	16-17
[b]	Fees for Recognition of Successors of a Beneficiary	16-17
[c]	Fees for Recognition of Assignee of Proceeds	16-18
[4]	Payments and Late Payments	16-19
¶ 16.05	Limitation on Liability	16-21
[1]	Specific Disclaimers	16-21
[2]	Strict or Substantial Compliance	16-22
[3]	Claim of Forgery or Fraud.....	16-23
[4]	Force Majeure.....	16-24
[5]	Damages for Bank's Action or Inaction	16-24
[a]	Consequential Damages.....	16-24
[b]	Mitigation of Damages.....	16-26
[c]	Liquidated Damages	16-27

¶ 16.06 Bank Discretion in Certain Cases	16-28
¶ 16.07 Applicant Responsibility	16-30
¶ 16.08 Representations, Warranties, Covenants, Security Interests, Remedies, and Events of Default	16-31
[1] General Provisions.....	16-31
[2] Violation of Law	16-32
[3] Issuer’s Right of Subrogation	16-33
¶ 16.09 Notices.....	16-34
¶ 16.10 Waiver of Jury Trial	16-34
¶ 16.11 Issuer’s Security Interest in Documents	16-36
17 Asset-Based Loans	
¶ 17.01 General Considerations.....	17-1
¶ 17.02 Definition of “Accounts”	17-2
[1] UCC Definitions.....	17-2
[2] Definition in Credit Agreement.....	17-2
¶ 17.03 Eligible Accounts	17-3
[1] Past-Due Accounts	17-4
[2] Sales Not in the Ordinary Course of Business.....	17-4
[3] Consignment Sales	17-4
[4] Sales to Affiliates	17-5
[5] Accounts Subject to the Right of Setoff	17-5
[6] Disputed Claims	17-6
[7] Returns	17-6
[8] Sales to Foreign Buyers.....	17-6
[9] Concentrations.....	17-6
[10] Sales to the United States or a Government Entity	17-7
[11] Uncollectible Accounts.....	17-7
[12] Fraudulent Accounts.....	17-7
[13] Catchall Exclusions	17-8
¶ 17.04 Definition of Inventory.....	17-8
[1] Caps.....	17-8
[2] Definitions of “Inventory” and “Eligible Inventory”	17-8
[3] Exclusions From Eligible Inventory	17-9
[a] Unfinished Goods	17-9
[b] Packaging and Shipping Materials.....	17-9
[c] Inventory Not Subject to a Landlord’s Waiver	17-10
[d] Inventory Subject to a Patent, License, Trademark, or Trade Name.....	17-11
[e] Goods Returned by the Borrower.....	17-12
[f] Inventory Subject to Government Requirements	17-12

TABLE OF CONTENTS

xxxv

[g]	Goods on Consignment.....	17-13
[h]	Goods Not Subject to Lender’s Lien or Subject to Liens of Others	17-13
[i]	Statutory liens	17-13
[ii]	The purchase-money-security-interest lender	17-13
[iii]	The intercreditor agreement	17-14
[i]	Goods Not Owned Outright by the Borrower	17-15
¶ 17.05	The Borrowing Base.....	17-15
[1]	The Problem of Seasonal Sales.....	17-15
[2]	Overadvances	17-16
[a]	Inadvertent Overadvances.....	17-16
[b]	Definition of “Occurrence”.....	17-17
¶ 17.06	Location of Collateral and Borrower Under Former Article 9.....	17-17
[1]	Accounts and Mobile Goods Under Former Article 9	17-17
[2]	Inventory Under Former Article 9.....	17-18
[a]	The Last Act Rule	17-18
[b]	Change of Location.....	17-18
[c]	The Borrower’s Representations and Covenants.....	17-19
[3]	Accounts and Inventory Under Current Article 9	17-19
[a]	Possessory Security Interests	17-19
[b]	Goods and Accounts	17-20
[c]	“Location” of Debtor	17-20
[d]	Benefits of Current Article 9 Rule	17-20
[e]	Risks of Current Article 9 Rule.....	17-21
[i]	Determining the correct name.....	17-21
[ii]	Fraudulent reincorporation.....	17-21
[iii]	Loss of perfection	17-21
[f]	The Lender’s Protections	17-22
¶ 17.07	Controlling and Monitoring the Collateral	17-23
[1]	Payments From Account Debtors	17-23
[a]	The Lockbox	17-23
[b]	Negotiable Instruments	17-23
[c]	Notification to Account Debtors	17-24
[2]	Inventory	17-24
[a]	Storage With Warehouseman.....	17-24
[i]	Perfecting the lender’s security interest in negotiable documents	17-24
[ii]	Priority rules	17-25
[iii]	Control of collateral	17-26
[b]	Reports.....	17-26
[3]	Accounts.....	17-27
[4]	Inspection	17-27

18 Drafting the Security Agreement

¶ 18.01 Why Is a Written Security Agreement Necessary?.....	18-1
¶ 18.02 Identifying the Parties.....	18-1
[1] The Secured Party.....	18-1
[2] The Debtor.....	18-2
[a] The Individual Debtor.....	18-2
[b] The Entity That Is a Registered Organization.....	18-3
¶ 18.03 Recitals and Disclaimers.....	18-3
[1] Extension of Credit.....	18-3
[2] Characterization of Transaction.....	18-4
¶ 18.04 Definition of Uniform Commercial Code.....	18-4
[1] Which Version of the UCC?.....	18-4
[2] Defining the Meaning of Terms Used in Different UCC Articles.....	18-5
¶ 18.05 Description of the Collateral.....	18-5
[1] The Granting Clause.....	18-5
[a] In General.....	18-5
[b] Priority of Security Interest.....	18-6
[c] Proceeds.....	18-6
[2] Improper Collateral Descriptions.....	18-6
[a] Supergeneric Descriptions.....	18-6
[b] Commercial Tort Claims.....	18-6
[c] Consumer Transactions.....	18-7
[3] All Assets.....	18-7
[a] Legal Sufficiency of Description.....	18-7
[b] Proceeds and Supporting Obligations.....	18-8
[c] Books and Records.....	18-8
[4] Expanding Upon the Description of Collateral.....	18-8
[5] Excluded Collateral.....	18-10
[a] Carve-outs from the All Assets Grant.....	18-10
[b] Antiassignment Provisions.....	18-10
[c] Securities.....	18-11
[d] Leased Equipment and PMSI Obligations.....	18-11
[e] Nonreliance Collateral.....	18-11
¶ 18.06 Authorization to File the Financing Statement.....	18-12
[1] “All Assets” Filings.....	18-12
[2] Prefilings.....	18-12
¶ 18.07 Conditions Precedent—First Priority Security Interest for Filing Collateral.....	18-13
¶ 18.08 Representations, Warranties, and Covenants Concerning the Debtor.....	18-14
[1] Representation Concerning Current Debtor Information.....	18-14
[2] Representations Concerning Prior Debtor Information.....	18-15
[a] Prior Debtor Names.....	18-15
[b] Person Previously Acquired by Debtor.....	18-15

[3] Covenant Concerning Prohibition Against Merger or Acquisition.....	18-16
¶ 18.09 Representations, Warranties, and Covenants Concerning Collateral in General.....	18-16
[1] Rights in or Title to the Collateral.....	18-16
[a] The Problem of Revested “Rights in the Collateral”.....	18-16
[b] Representations Concerning the Debtor’s Rights in the Collateral.....	18-17
[2] Liens Against the Collateral.....	18-17
[a] Debtor’s Representation.....	18-17
[b] Source of Collateral.....	18-17
[3] Insuring the Collateral.....	18-18
¶ 18.10 Representations, Warranties, and Covenants Concerning Particular Types of Collateral.....	18-19
[1] Deposit Accounts.....	18-19
[a] Control Requirements.....	18-19
[b] Control Provisions.....	18-19
[2] Investment Property.....	18-20
[a] The Threat of Change of Collateral Type.....	18-20
[i] Addressing the Future “Opt-In”.....	18-20
[ii] Delivery of the Certificate.....	18-21
[iii] The Lock-In.....	18-21
[b] Treatment of Margin Stock.....	18-21
[c] Perfection Requirements.....	18-22
[d] Voting Rights and Distributions.....	18-22
[e] Sale of the Securities After Default.....	18-23
[3] Intellectual Property.....	18-24
[a] In General.....	18-24
[b] Defining the Intellectual Property.....	18-24
[c] Representation as to Debtor’s Rights in the Intellectual Property.....	18-25
[d] Covenants.....	18-25
[e] License to Secured Party.....	18-26
¶ 18.11 Provisions Relating to Default.....	18-26

19 Step-by-Step Guide to Perfection and Priority

¶ 19.01 Introduction.....	19-1
¶ 19.02 Understand the Transaction.....	19-1
[1] Term Sheet.....	19-1
[2] Diagramming the Transaction.....	19-1
¶ 19.03 Identify the Debtor.....	19-2
[1] Definitions.....	19-3
[2] The Account Debtor.....	19-4
[3] True Consignments and Agricultural Liens.....	19-5

¶ 19.04 Identify the Collateral.....	19-5
¶ 19.05 Identify the Collateral That Is Perfected Exclusively Under Article 9	19-6
[1] Property Interests Not Perfected Under Article 9	19-6
[2] Items That May or May Not Fall Under Article 9	19-7
[3] Real Property Interests.....	19-7
[4] Strategy.....	19-8
¶ 19.06 Does the Debtor Have Rights in the Collateral?	19-9
[1] Attachment	19-9
[2] Determining Whether the Debtor Owns the Collateral.....	19-9
¶ 19.07 Generally Ignore Contractual Restrictions on Transfer	19-10
[1] Antiassignment Clauses.....	19-10
[2] Nonuniform Sections of Article 9.....	19-10
[3] Equity Interests.....	19-11
¶ 19.08 Identify the Debtor’s Authentication	19-11
¶ 19.09 Is the Document a Security Agreement?	19-12
¶ 19.10 What Type of Collateral Is It?	19-13
[1] Importance of Correct Categorization	19-13
[2] Article 9 Categories.....	19-13
[a] General Intangibles	19-14
[b] Payment Intangibles.....	19-14
[c] Accounts	19-15
[d] Healthcare-Insurance Receivables	19-15
[e] Chattel Paper.....	19-16
[f] Commercial Tort Claims.....	19-16
[g] Deposit Accounts.....	19-16
[h] Documents	19-17
[i] Goods.....	19-17
[j] Instruments.....	19-18
[k] Investment Property	19-19
[l] Limited Liability Company and Limited Partnership Interests	19-19
[m] Letter of Credit Rights and Letters of Credit.....	19-19
[i] Commercial or documentary credits	19-20
[ii] Standby credits.....	19-20
[iii] Letter of credit terminology	19-20
[3] Other Important Terms	19-21
[a] Entitlement Order.....	19-21
[b] Securities Intermediary	19-21
[c] Money	19-21
[d] As-Extracted Collateral.....	19-21
[4] Identifying the Collateral Type.....	19-21
¶ 19.11 Decide How to Perfect.....	19-23
[1] Collateral Best Perfected by Possession	19-23
[a] Collateral Types	19-23
[b] Tangible Chattel Paper.....	19-24

TABLE OF CONTENTS

xxxix

[c]	Certificated Securities	19-24
[d]	Retaining Possession	19-24
[e]	Back-up Method: Perfection by Filing	19-26
[2]	Collateral Best Perfected by Control	19-26
[a]	Deposit Accounts	19-26
[i]	Debtor as authorized signatory	19-26
[ii]	Control agreement	19-27
[b]	Book-Entry Securities and Security Entitlements	19-28
[c]	Letter of Credit Rights	19-28
[d]	Electronic Chattel Paper	19-29
[3]	Automatically Perfected Security Interests	19-29
[4]	Perfection by Filing	19-30
¶ 19.12	Ensure That the Filing Is Authorized	19-31
¶ 19.13	Determine Where to File for Collateral That Is Not Real-Estate Related	19-32
[1]	Registered Organizations	19-33
[2]	Other Organizations	19-33
[3]	Individuals	19-33
[4]	Foreign Debtors	19-34
[5]	Federal Government	19-34
¶ 19.14	Identify the Debtor’s Correct Name	19-34
¶ 19.15	Identify Other Required Information	19-36
¶ 19.16	Determine Where and How to File for Real-Estate-Related Collateral	19-37
[1]	Types of Collateral	19-37
[2]	Where to File	19-37
[3]	Contents of the Financing Statement	19-37
[4]	Cooperative Apartments in New York State	19-38
¶ 19.17	Search for Previously Filed Financing Statements	19-38
[1]	Determining Proper Jurisdiction Under Former Article 9	19-39
[a]	Accounts, General Intangibles, and Mobile Goods	19-39
[i]	Debtor’s “location”	19-39
[b]	Ordinary (Nonmobile) Goods	19-39
[c]	Goods Covered by a Certificate of Title	19-40
[2]	Special Situations	19-40
[a]	Instruments	19-40
[b]	Deposit Accounts	19-40
[c]	Foreign Debtors	19-40
[d]	Chattel Paper	19-41
[3]	What Searches to Order	19-41
[4]	Special Situations Affecting Searches	19-42
¶ 19.18	Assemble the Search Results	19-43
¶ 19.19	Review Termination Statements	19-45
[1]	Secured Party’s Authorization	19-45
[2]	Debtor Termination	19-46
[3]	Cooperative Apartments in New York State	19-46

¶ 19.20 Review the Financing Statements.....	19-46
¶ 19.21 Follow Up.....	19-47

**20 Transactions at the Margins of Article 9:
Documents of Title, Fixtures, Patents, Trademarks, and Copyrights**

¶ 20.01 Bills of Lading, Warehouse Receipts, and Goods.....	20-1
[1] Introduction.....	20-1
[2] Warehouse Receipts and Bills of Lading.....	20-1
[3] Determining Negotiability.....	20-2
[4] Tangible and Electronic Documents of Title.....	20-3
[a] Suppose the Statutory Requirements Are Not Met?.....	20-5
[b] What if There Is an Error in Converting From One Medium to Another?.....	20-5
[i] The development of freely convertible documents of title.....	20-5
[ii] “Duplicate” documents of title.....	20-7
[iii] Effect of noncompliance with Article 7-105.....	20-7
[iv] Issue of duplicate despite compliance with Article 7-105.....	20-8
[v] Liability of issuer and system operator.....	20-8
[c] Does the Holder Have an Electronic or Tangible Document of Title?.....	20-9
[5] The Warehouse Lien.....	20-10
[a] In General.....	20-10
[b] In Bankruptcy.....	20-11
[6] The Warehouse’s Security Interest.....	20-12
[a] Security Interest for Money Lent and Manufacturing Costs.....	20-12
[b] Security Interest for Usual and Customary Storage Charges.....	20-12
[c] Should the Warehouse Take a Security Interest?.....	20-13
[7] The Carrier’s Lien.....	20-14
[8] The Conflicting Security Interest.....	20-14
[a] Perfecting a Security Interest in the Negotiable Document of Title.....	20-15
[b] Priorities Among Secured Parties Perfected in the Negotiable Document of Title.....	20-16
[c] Secured Party Cut Off by Person to Whom Negotiable Documents Have Been Negotiated.....	20-16
[d] Perfecting a Security Interest in a Nonnegotiable Document of Title.....	20-17
[e] Perfecting a Security Interest in Goods Not Yet Covered by a Document of Title.....	20-18
[f] Purchasers of Fungible Goods.....	20-18
[9] Priorities Between the Secured Party and the Warehouse Lien.....	20-19
[10] Special Rule for Household Goods.....	20-20.1
¶ 20.02 Fixtures.....	20-21

TABLE OF CONTENTS

xli

[1]	Introduction	20-21
[2]	When Do Goods Become Fixtures?.....	20-22
	[a] The Tripartite Test	20-22
	[b] How Courts Apply the Test.....	20-22
	[c] Determining Intent	20-23
	[d] Dual Filing	20-26
[3]	“Trade Fixtures”	20-26
[4]	General Rule.....	20-27
[5]	Predecessors in Title of the Realty	20-28
	[a] The Mortgage.....	20-29
	[b] The Lease.....	20-29
	[c] How Can These Interests Be Eliminated?.....	20-30
[6]	Judgment and Other Liens	20-31
	[a] The Agricultural and Other Statutory Liens	20-31
	[b] Determining the Priority of Excluded Liens	20-32
	[c] The Trustee in Bankruptcy.....	20-32
[7]	The Purchase Money Security Interest	20-33
[8]	The Construction Mortgage.....	20-34
[9]	Conclusion.....	20-34
¶ 20.03	Security Interests in Intellectual Property: Patents, Trademarks, and Copyrights	20-35
[1]	Introduction	20-35
	[a] Article 9 or Other Law?	20-35
	[b] Description of Collateral	20-36
	[c] “Gap” Periods in Federal Searches	20-36
	[d] Dual Filing May Not Be Not a Solution.....	20-37
[2]	Patents	20-37
	[a] The Preemption Issue.....	20-37
	[b] Recording Conditional Assignments.....	20-38
	[c] Other Search and Filing Issues.....	20-38
[3]	Trademarks.....	20-39
	[a] Preemption and the Statutory Scheme.....	20-39
	[b] Assignments and the In-Gross Doctrine.....	20-40
[4]	Copyrights	20-41
	[a] Introduction.....	20-41
	[b] Registered Copyrights.....	20-41
	[c] Unregistered Copyrights	20-43

21 Real Estate Mezzanine Financing

¶ 21.01	Introduction	21-1
	[1] Debt vs. Equity	21-1
	[2] Commercial Loans vs. Mezzanine Loans	21-2
¶ 21.02	The Structure of a Mezzanine Financing Transaction	21-4
	[1] Variations in Structure.....	21-4
	[2] The Entities	21-4

[3] Multiple Levels of Financing.....	21-4.1
[4] Agreements.....	21-5
¶ 21.03 The Pledge Agreement	21-6
[1] The Granting Clause.....	21-6
[2] Representations and Warranties	21-8
[3] Conversion of Certificated Security to General Intangible (and Vice Versa).....	21-12
[a] Rules for Perfection	21-13
[b] Changes in the Characterization of the Collateral.....	21-14
[4] Affirmative and Negative Covenants	21-15
[5] Voting Rights and Dividends Prior to Default.....	21-19
[6] Lender’s Remedies	21-20
¶ 21.04 Perfection Issues Relating to the Membership Interest or Certificate.....	21-24
[1] Supplemental Filing.....	21-24
[2] Prior Owner.....	21-25
[3] Book Entry Securities.....	21-26
¶ 21.05 Deposit or Securities Account as Additional Collateral.....	21-26
[1] Article 9 Requirements.....	21-26
[2] Cash Management Agreements as Control Agreements.....	21-28
[a] Account Type.....	21-30
[b] Language Establishing Control	21-32
[c] “Reasonable Time” for Compliance With Lender’s Instructions	21-33
[d] Waivers of Bank Rights and Restrictions on Bank Actions	21-33
[e] Other Control Agreements	21-34
[3] Secured Party as Depository Bank.....	21-35
[4] Lender as Bank’s Customer.....	21-35
¶ 21.06 Organizational Requirements	21-36
¶ 21.07 Consents	21-38
22 Dealing With the Tax Lien	
¶ 22.01 Introduction	22-1
¶ 22.02 How Does the Lien Arise?.....	22-1
¶ 22.03 Which Secured Lenders Are Protected Against Unfiled Liens?	22-2
¶ 22.04 Name Searches for UCC Filings and Tax Liens	22-3
¶ 22.05 Where to Search for Federal Tax Liens	22-6
¶ 22.06 Where to Search for State Tax Liens	22-7
¶ 22.07 Length of Filing Period	22-8
¶ 22.08 Miscellaneous Exemptions	22-8
Exhibit 22.1: State Tax Lien Filing Locations.....	22-9

TABLE OF CONTENTS

xliii

¶ 22.09 Exemption for Asset-Based Loans 22-10

¶ 22.10 Exemption for Securities as Collateral 22-11

 [1] Actual Notice..... 22-11

 [2] Application of Exemption to Certificated Interests in
 LPs and LLCs..... 22-12

¶ 22.11 After-Acquired Property..... 22-13

¶ 22.12 Transferred Collateral..... 22-14

¶ 22.13 The Deficiency Judgment..... 22-14

¶ 22.14 Future Advances, After-Acquired Property, and the
 Forty-Five-Day Rule 22-15

¶ 22.15 What Should the Lender Do? 22-16

23 Default: Enforcement and Remedies

¶ 23.01 Introduction 23-1

¶ 23.02 Map Out an Exit Strategy 23-1

¶ 23.03 Consider Limitations on Creditor Action Presented by Other Law 23-2

 [1] Repossessing Equipment or Inventory 23-2

 [a] In General 23-2

 [b] Obtaining Waivers 23-3

 [2] Deposit Accounts..... 23-4

 [3] Intellectual Property 23-4

 [a] The Article 9 Override 23-4

 [b] License Terms That Remain Enforceable 23-5

 [c] Terms That Prohibit or Restrict the Attachment or Creation
 of a Security Interest 23-5

 [d] Embedded Software 23-5

 [4] Limited Liability and Partnership Interests..... 23-6

 [a] Introduction..... 23-6

 [b] Opting in to Article 8 23-6

 [i] The issuer’s initial decision..... 23-6

 [ii] Reversing the initial decision 23-7

 [c] The Secured Party’s Rights if the Organizational Documents
 Are Silent 23-8

 [d] Some Suggested Revisions to Organizational Documents 23-9

 [e] The Article 9 Overrides..... 23-9

 [i] The general override 23-9

 [ii] Does the override apply?..... 23-10

 [iii] State law restrictions 23-10

 [iv] The Delaware statute..... 23-10

 [5] Other Agreements..... 23-11

¶ 23.04 Preparing for Default..... 23-11

[1] Collateral Perfected by Filing	23-11
[2] Collateral Perfected by Possession	23-12
[3] Collateral Perfected by Control	23-12
¶ 23.05 Consider the Effect of a Bankruptcy Filing	23-12
¶ 23.06 When Does Default Occur?	23-13
¶ 23.07 Judicial or Nonjudicial Enforcement?	23-13
[1] Right of Secured Party to Buy in at Sale	23-14
[2] Sale Is Deemed Commercially Reasonable	23-14
[3] Disadvantages of Judicial Foreclosure	23-14
¶ 23.08 Collection by the Secured Party	23-15
[1] Deposit Accounts.....	23-15
[2] Securities Accounts	23-15
[3] Accounts.....	23-16
[a] Collecting From Account Debtors	23-16
[b] Enforcing the Debtor’s Rights Against Third Parties.....	23-16
[c] Collection in a Commercially Reasonable Manner	23-16
¶ 23.09 Strict Foreclosure in Lieu of Sale	23-17
[1] Introduction	23-17
[2] Partial Strict Foreclosure	23-17
[3] Strict Foreclosure	23-18
[a] Partial Versus Strict Foreclosure.....	23-18
[b] Constructive Strict Foreclosure.....	23-18
[4] What Does the Purchaser Receive?	23-19
¶ 23.10 Commercially Reasonable Sale	23-20
[1] Introduction	23-20
[2] Requirements.....	23-20
[3] Preparing the Collateral for Sale.....	23-20
¶ 23.11 Public or Private Sale?.....	23-22
[1] Definition	23-22
[2] When Securities Are Collateral	23-22
¶ 23.12 Right of the Secured Party to Buy In.....	23-23
¶ 23.13 Rights of Junior Creditors and Their Purchasers	23-24
[1] Disposition Rights	23-24
[a] Junior’s Right to Sell Collateral	23-24
[b] Effect of Knowledge and Good Faith on Junior’s Rights.....	23-24
[c] Effect of Sale on Senior’s Security Interest	23-25
[d] Exception for Purchaser of Securities	23-26
[i] Purchaser generally takes free of security interest	23-26
[ii] Meaning of notice	23-26
[iii] Lack of duty to search.....	23-27
[2] Collection of Instruments by Junior Creditor	23-27
[a] Junior’s Collection of Instruments	23-27
[b] New York Standard.....	23-28

TABLE OF CONTENTS

xlv

[c] Facts and Circumstances Test 23-28

¶ 23.14 Notice of Sale 23-29

 [1] Parties to Be Notified 23-29

 [2] Obligors and Secondary Obligors 23-30

 [3] Other Secured Parties 23-30

 [4] Other Rights of Senior Secured Party 23-31

¶ 23.15 Contents of Notice 23-32

 [1] Form of Notification 23-32

 [2] Action for Damages 23-33

¶ 23.16 Timing of Notice 23-34

 [1] Statutory Safe Harbor 23-34

 [2] Specialized Types of Collateral 23-34

¶ 23.17 Right to Redeem Collateral 23-34

¶ 23.18 The Purchaser’s Title After the Sale 23-35

 [1] What Title Does the Purchaser Acquire? 23-35

 [2] Proving Title 23-36

¶ 23.19 Debtor Remedies for Noncompliance 23-36

 [1] In General 23-36

 [2] Remedies of Persons Other Than Debtor 23-37

 [3] Additional Statutory Damages 23-37

 [4] Damages Arising From Accounting Request Noncompliance 23-38

 [5] Damages for Commercially Unreasonable Disposition 23-38

 [6] Was the Disposition Commercially Reasonable? 23-39

24 Thirty-Nine “Fixes” to UCC Article 9

¶ 24.01 Clarification of UCC 9-607 24-1

¶ 24.02 Nonwaivable Prohibition on the Secured Party’s Acquisition of
Collateral at a Private Sale 24-2

¶ 24.03 Prohibition on Purchase of Collateral by an Affiliate of the Secured Party 24-3

¶ 24.04 Consumer Goods Transactions—Revision of Caption 24-3

¶ 24.05 Reference to a Commercially Reasonable Standard for Acceptance of
Collateral 24-4

¶ 24.06 Transition Rules for the 1972 Version of Article 9 24-5

¶ 24.07 Secured Party’s Duty to Provide a Payoff Letter 24-5

¶ 24.08 Persons Taking Free of an Unperfected Security Interest 24-6

¶ 24.09 Meaning of the Term “Authenticate” 24-6

¶ 24.10 Perfecting a Security Interest in a Titled Vehicle 24-7

¶ 24.11 Control over Electronic Chattel Paper	24-8
¶ 24.12 Control of Deposit or Securities Account.....	24-10
¶ 24.13 Highland Capital.....	24-12
¶ 24.14 A Grace Period for Double Debtor Filings.....	24-16
¶ 24.15 Survival of Antiassignment Rights when a Promissory Note or Payment Intangible Is Sold After Default	24-18
¶ 24.16 “Place Holding” Filings for Sales of Payment Intangibles and Promissory Notes	24-20
¶ 24.17 PMSI in Intangibles Associated with Consumer Goods.....	24-21
¶ 24.18 Lapse Date for Transmitting Utilities	24-21
¶ 24.19 Which Organizations Are “Registered Organizations”?.....	24-22
¶ 24.20 What Is the Name of a Business Trust That Is a Registered Organization?	24-23
¶ 24.21 Location of Debtors Whose Chief Executive Office Is in a Non-U.S. Jurisdiction	24-24
¶ 24.22 Location of a National Bank.....	24-24
¶ 24.23 What Is the Exact Legal Name of an Individual?	24-25
¶ 24.24 Who Should Be Able to File a Correction Statement?	24-28
¶ 24.25 Form of Financing Statement	24-29
¶ 24.26 Filing Standards for Electronic Filings.....	24-29
¶ 24.27 The <i>Commercial Money Center</i> Case.....	24-29
¶ 24.28 How Does the Sender “Authenticate” an E-Mail?.....	24-30
¶ 24.29 Is an “Assignment” Different from a “Sale”?.....	24-31
¶ 24.30 Control of a Deposit Account by an Agent.....	24-31
¶ 24.31 Effect of the Intent of the Parties in Contract Interpretation.....	24-32
¶ 24.32 Do the Choice of Law Rules for Foreign Debtors Refer to Collateral Generally?	24-33
¶ 24.33 Changes Relating to Titled Vehicles	24-34
¶ 24.34 What Is “A Financing Statement That Is Effective Solely Under 9-508”?.....	24-35
¶ 24.35 Filing Location for Transmitting Utilities.....	24-36
¶ 24.36 When Is the Assignee of a Security Interest Authorized to Amend the Financing Statement?	24-36
¶ 24.37 When Is a Prefiling Effective?.....	24-37

TABLE OF CONTENTS

xlvii

¶ 24.38 Internet Sales of Collateral 24-38

¶ 24.39 Application of the “Minor Errors” Rule of UCC 9-506 to “In-Lieu”
Financing Statements 24-39

¶ 24.40 Other Issues 24-39

25 Amendments to Article 9 of the UCC Affecting the Filing System

¶ 25.01 Background and Effective Date 25-1

¶ 25.02 What Is the “Exact Legal Name” of an Individual? 25-1

 [1] Alternative Options for States 25-2

 [2] Risks of These New Rules for the Lender 25-3

 [3] Determining the Order of Names 25-3

 [4] Determining the Name if There Is No License 25-4

 [5] Name Changes 25-5

¶ 25.03 The Organization’s Exact Legal Name 25-6

¶ 25.04 Discrepancies Among Various Corporate Records 25-6

¶ 25.05 Business Trusts 25-7

¶ 25.06 Inter Vivos and Testamentary Common Law Trusts 25-7

 [1] Where to File 25-8

 [2] Executors 25-8

 [3] The Settlor or Decedent’s Name 25-9

¶ 25.07 Changes in the Financing Statement 25-9

¶ 25.08 “Correcting” the Records of the Filing Office 25-9

¶ 25.09 Effecting Termination 25-9

¶ 25.10 “Information Statements” That Do Not Terminate the Financing
Statement 25-10

¶ 25.11 The Secured Party’s Information Statement 25-11

26 Case Law Guidance for Practitioners

¶ 26.01 A Cautionary Note 26-1

¶ 26.02 Can a Secured Party Credit Bid in a Cramdown Proceeding? 26-1

 [1] Introduction 26-1

 [a] The Secured Creditor’s Right to Credit Bid 26-1

 [b] The Cramdown Provisions 26-1

 [2] In re Philadelphia Newspapers LLC—The Court’s Decision 26-2

 [a] The Debtor’s Proposed Plan 26-2

 [b] The Majority Decision 26-2

 [3] The Dissenting Opinion 26-3

- [a] What Interests Are Protected? 26-3
 - [i] “True” Market Value 26-3
 - [ii] Does Credit Bidding “Chill the Auction”? 26-3
- [b] Interpreting the Statute 26-4
- [c] Consequences of the Majority Decision 26-4
- [4] The River Road Decision 26-5
 - [a] The Debtors’ Plans 26-5
 - [b] Bankruptcy Sales Do Not Reflect Asset Value 26-5
 - [i] The Indubitable Equivalent 26-5
 - [ii] “True Value” in a Bankruptcy Sale 26-6
 - [c] Protection for Secured Creditors Elsewhere in the Bankruptcy Code 26-6
- ¶ 26.03 Does a PMSI Include Negative Equity? 26-7
 - [1] In re Penrod Concludes That It Does Not 26-7
 - [a] Priority of a PMSI 26-7
 - [b] The Majority Decision 26-7
 - [c] The Court’s Reasoning 26-8
 - [i] What Is a PMSI? 26-8
 - [ii] Price Versus Value 26-8
 - [iii] “Negative Equity” 26-8
 - [d] How Is Negative Equity Created? 26-9
- ¶ 26.04 Who Is the Secured Creditor? 26-10
 - [1] The Granting Clause 26-10
 - [2] The Court’s Decision 26-10
 - [3] Redrafting the Granting Language 26-11
- ¶ 26.05 Is the Collateral Alienable? 26-11
 - [1] Introduction 26-11
 - [2] The Chris-Don Case 26-11
 - [a] The Nontransferable Liquor License 26-11
 - [b] Is the License Article 9 “Property”? 26-12
 - [3] A Secured Creditor Tries Another Approach 26-12
 - [4] “Proceeds” of Inalienable Assets 26-13
 - [a] The Broadcast License 26-13
 - [b] Can Proceeds Be Separately Assigned? 26-13
 - [c] Public Versus Private Rights 26-13
 - [d] Transfer of Private Rights 26-14
 - [5] A Cooperative Apartment in New York 26-14
 - [a] Introduction 26-14
 - [b] The “Terms of Sale” 26-14
 - [c] The Board Approval Requirement 26-15
 - [d] What Did the Successful Bidder Receive? 26-16
 - [6] Implications for Secured Lenders 26-16
- ¶ 26.06 What Is a “Certificate of Deposit”? 26-16
 - [1] Introduction 26-16
 - [2] Deposit Account or Instrument? 26-17
 - [3] Deposit Account or Securities Account? 26-18

TABLE OF CONTENTS

xlix

[a]	Aggregated CDs.....	26-18
[b]	Failure of Perfection in Reciprocal Deposits.....	26-18
[c]	The Court’s Decision	26-19
¶ 26.07	Constructive Strict Foreclosure of Corporate Assets.....	26-19
[1]	Introduction	26-19
[2]	The Loan and Guarantee.....	26-19
[3]	Marshaling of STK’s Assets.....	26-21
¶ 26.08	Is Intellectual Property “Special”?.....	26-21
[1]	Introduction	26-21
[2]	The Settlement Agreement and Default.....	26-22
[3]	The Court’s Analysis.....	26-22
¶ 26.09	Rights in Deposit Accounts After Bankruptcy	26-23
[1]	Introduction	26-23
[2]	The Turnover Request	26-23
[3]	The Trustee Stands in the Debtor’s Shoes	26-24
[4]	The Right to Freeze the Deposit Account.....	26-25
[5]	Implications for Other Secured Lenders.....	26-25
¶ 26.10	Can a Security Interest Ever Revive?.....	26-25
[1]	Introduction	26-25
[2]	The Secured Party’s Terms.....	26-25
[3]	The Security Interest Terminated Upon Conversion	26-26
[4]	The Court Holds the Unauthorized Financing Statement Effective.....	26-27

Volume 2

APPENDIX I	Revolving Credit Agreement	<i>[available only on CD]</i>
APPENDIX II	Term Loan Agreement	<i>[available only on CD]</i>
APPENDIX III	Revolving Credit and Term Loan Agreement	<i>[available only on CD]</i>
APPENDIX IV	Revolving Credit and Term Loan Agreement—Prime, LIBOR, and CD Pricing	<i>[available only on CD]</i>
APPENDIX V	Agented Revolving Credit and Term Loan Agreement—Prime, LIBOR, and CD Pricing	<i>[available only on CD]</i>
APPENDIX VI	Master Participation Agreement	A-199
APPENDIX VII	Guaranty and Comfort Letter	A-209
APPENDIX VIII	Confidentiality Agreement	A-219

APPENDIX IX	Security Agreement, Pledge, and Assignment Covering Equipment, Inventory, Accounts, Stock, Debt Instruments, and Contracts for Single Bank Credit Agreements	A-223
APPENDIX X	Security Agreement, Pledge, and Assignment Covering Equipment, Inventory, Accounts, Stock, Debt Instruments, and Contracts for Agented Revolving Credit Agreements	A-247
APPENDIX XI	Opinion Letter (Long Form, Secured Transaction)	A-271
APPENDIX XII	Illustrative Opinion of Counsel to the Borrower	A-281
APPENDIX XIII	Line Letter (Secured and Guaranteed, to Be Used With Demand Note)	A-293
APPENDIX XIV	Demand Note (for Fixed or Floating Rate Demand Loans)	A-299
APPENDIX XV	Intercreditor Agreement	A-307
APPENDIX XVI	Opinion Letter	A-317
APPENDIX XVII	Sample UCC-9 Insurance Policy	A-323
APPENDIX XVIII	Debtor-in-Possession Revolving Credit Agreement	A-341
APPENDIX XIX	Issuer's Letter Confirming Account Party's (Applicant's) Waiver of Subrogation Rights	A-401
APPENDIX XX	Issuer's Letter Confirming Its Purchase of Account Party's (Applicant's) Subrogation Rights	A-403
APPENDIX XXI	Attorney's Opinion to Be Rendered Under the ABA Legal Accord	A-405
APPENDIX XXII	Annotated Attorney's Opinion to Be Rendered Under the ABA Legal Accord	A-411
APPENDIX XXIII	Security Agreement for a Collateral Pool	A-421
APPENDIX XXIV	Issuer's Letter Recognizing Beneficiary's Assignment of Proceeds of Letter of Credit	A-441
APPENDIX XXV	Single Lender Commitment Letter	A-443
APPENDIX XXVI	Cash Collateral Account Letter	A-451
APPENDIX XXVII	Workout Letter Agreement	A-453
APPENDIX XXVIII	Subordination Agreement	A-459
APPENDIX XXIX	Revolving Credit and Term Loan Agreement	A-467
APPENDIX XXX	Sale and Assignment Agreements (for Loan Participation)	A-613

TABLE OF CONTENTS

li

APPENDIX XXXI	Loan and Security Agreement for Asset-Based Loan	A-629
APPENDIX XXXII	Security Agreement	A-707
APPENDIX XXXIII	Perfection Certificate	A-725
APPENDIX XXXIV	Account Control Agreement—Affiliated Brokers/Creditors	A-731
APPENDIX XXXV	Securities Account Control Agreement—Retail Customer	A-737
APPENDIX XXXVI	New York State Law Revision Commission 2001 Report on Proposed Revised Article 9	A-747
APPENDIX XXXVII	Deposit Account Control Agreement	A-933
APPENDIX XXXVIII	Revised Uniform Commercial Code Article 7 With Comments	A-939
APPENDIX XXXIX	IRS Form 8821: Tax Information Authorization	A-1085
APPENDIX XL	Credit and Guaranty Agreement	A-1091
APPENDIX XLI	Collateral Agreement	<i>[available only on CD]</i>
APPENDIX XLII	Patent Security Agreement	<i>[available only on CD]</i>
APPENDIX XLIII	Model LLC Pledge Agreement	<i>[available only on CD]</i>
Index		Index-1