

# CLASSIFYING CREDIT CARD RECEIVABLES UNDER THE U.C.C.: PLAYING WITH INSTRUMENTS?

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## INTRODUCTION

The gods are just, and of our pleasant vices  
Make instruments to plague us.<sup>1</sup>

Credit card transactions have, in the past several years, become one of the predominant payment methods for American consumers, generating billions of dollars in outstanding receivables. Some of these receivables are used as collateral for loans to those merchants who accept payment by credit card, while others back certain securities issued by credit card banks.

In spite of their prevalence, neither the cards themselves nor the receivables they help create are expressly mentioned in the Uniform Commercial Code. Although federal law does govern some aspects of credit card transactions, most notably the rights of cardholders, much of the remaining operation of credit cards is left to the auspices of state commercial law, which is generally silent. This silence is particularly troubling in Article Nine, which provides different perfection methods for different types of collateral. Although no court has yet determined the proper Article Nine classification of and perfection method for credit card receivables, the issue is one upon which attorneys and other commercial law experts do differ. Because the issue is also one upon which billions of dollars may be won or lost, the present level of uncertainty is simply too great.

This article attempts to sift through the uncertainty on this issue by examining the contracts that underlie credit card transactions, the relevant provisions and policies of the Uniform Commercial Code, and the few helpful judicial decisions. It concludes that while prevailing interpretations of the relevant Code provisions suggest that the receivables are instruments, policy considerations require that they be deemed accounts or general intangibles.

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1. W. SHAKESPEARE, KING LEAR, Act V, Scene 3.

### *The First Scenario — Receivables Held by the Merchant*

The need to classify credit card receivables can arise in several ways, distinguished largely by who owns the receivables in question: the merchant who honored the credit card; the entity who issued the credit card; or some third-party intermediary or assignee. Because the transactions by which an issuer acquires its receivables raise slightly different concerns and require slightly different analysis, they will be discussed separately.

To illustrate what is perhaps the most likely scenario, assume that a hypothetical Beacon Airlines ("Beacon") operates a fleet of twenty commuter aircraft with which it transports cargo and passengers between several medium-sized midwestern cities. Like many small businesses, Beacon has numerous creditors. Many of these creditors are suppliers to whom Beacon owes an unsecured debt for fuel, spare parts, and other materials provided on a regular basis. One creditor is a bank (the "Bank") which financed Beacon's initial start-up and subsequent expansion and which, in connection with this financing, took a security interest in Beacon's aircraft, equipment, and accounts. The Bank perfected its security interest in Beacon's airplanes by filing the appropriate documents with the FAA Aircraft Registry in Oklahoma City,<sup>2</sup> and perfected its interest in the remaining collateral by filing a properly executed financing statement in the appropriate state office.

Shortly after its initial start-up, Beacon contracted with another bank (the "Credit Card Bank")<sup>3</sup> to participate in the MasterCard and Visa systems and contracted with American Express to honor that organization's series of cards. Since that time, Beacon has accepted payment from its customers via cash, check, and each of these major credit cards. At a time when some money remains due to Beacon on credit card receivables in its possession and others undergoing processing by American Express and the Credit Card Bank,<sup>4</sup> Beacon's financial situation worsens. In response, Beacon seeks protection from its creditors by filing a petition for relief under Chapter 11 of the United States Bankruptcy Code.

If we assume, as often occurs, that the resale value of the Bank's tangible collateral — Beacon's aircraft and equipment — fails to equal the total outstanding indebtedness Beacon owes to the Bank, the Bank will look to its remaining collateral: Beacon's accounts.<sup>5</sup> The portion of Beacon's receivables resulting from credit card transactions is difficult to predict. Nevertheless, some rather impressive statistics exist on the use of credit cards in this

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2. Federal law has established a central office — the FAA Aircraft Registry — for recording all conveyances which affect title to or any interest in civil aircraft. A security interest in such aircraft can be perfected only by recording the appropriate documents with that office. See 49 U.S.C. §§ 1301(20), 1403 (1982).

3. If the creditor Bank also processed Beacon's credit card receivables, then it would have possession of almost all the outstanding receivables on any given day. See *infra* text accompanying notes 48, 52. In such a case, even if the receivables were held to be instruments, the Bank's security interest would be perfected by such possession, and there would be little reason to determine the proper Article Nine classification of Beacon's credit card receivables.

4. See *infra* notes 43-54 and accompanying text on the processing of such receivables.

5. Because Beacon's receivables come from its provision of services, they will not be proceeds of inventory or other tangible collateral, in which the Bank could have a continuously perfected security interest for a limited time. See U.C.C. § 9-306(1), (3) (1989).

country.<sup>6</sup> In 1988, 108 million cardholders owned 879 million credit cards and used them in 8.8 billion domestic transactions.<sup>7</sup> Bank cards, consisting primarily of Visa and MasterCard, and travel and entertainment cards ("T&E cards"), such as American Express, Diners Club, and Carte Blanche, numbered over 217 million and combined for 3.5 billion merchant purchases and cash advances.<sup>8</sup> The transactions on such cards totalled over \$291 billion<sup>9</sup> and comprised over twelve percent of all retail sales in the United States.<sup>10</sup> Thus, on any given day, hundreds of millions of dollars in freshly generated credit card receivables are in the hands of merchants, such as Beacon, and these credit card receivables are likely to make up a sizable percentage of these merchants' total receivables.<sup>11</sup> Accordingly, the Bank will likely be very interested in

6. One in every eight American adults owns an American Express card, three in every ten own a MasterCard, and over forty-five percent own a Visa. 430 THE NILSON REPORT 3 (1988). American Express is accepted at 1.4 million retail outlets in the United States and by over seventy-seven percent of the Nation's 192 largest retailers. Visa and MasterCard are accepted at 2.8 million retail outlets in the United States and by almost six million worldwide. 475 THE NILSON REPORT 1, 2 (1990); 420 THE NILSON REPORT 4 (1988); 436 THE NILSON REPORT 3 (1988). The outstanding debt on travel & entertainment cards and bank cards exceeds \$133 billion of the total \$727 billion consumer installment debt in the United States. 475 THE NILSON REPORT at 1, 5. Even some state governments now authorize the use of credit cards to pay local taxes, VA. CODE § 58.1-3013 (1988), court costs and fines, e.g., ILL. REV. STAT. ch. 25, para. 27.3b (1986); ILL. REV. STAT. ch. 38, para. 1005-9-1(c) (1984); ME. REV. STAT. tit. 14, § 3147 (1987); TEX. LOCAL GOV'T CODE ANN. § 132.002 (Vernon 1987); W. VA. CODE §§ 8-10-2a(a), 50-3-2a(a) (1988), tuition at state universities and community colleges, FLA. STAT. §§ 240.289, 240.319(g) (1989), and motor vehicle registration fees, CAL. VEH. CODE § 9558.5 (1988). In addition, quasi-governmental groups, such as the California State Bar, now accept credit card payment of annual membership fees, albeit some impose a surcharge for credit card use. Cf. 15 U.S.C. § 1666f(a)(2) (1982) (which, prior to sunseting in February, 1984, prohibited imposition of a surcharge on payment by credit card but permitted discounts for payment in cash); CAL. CIV. CODE § 1748.1(a) (1985) & FLA. STAT. § 501.0117(1) (1987) (both adopting the rule of old § 1666f(a)(2)) (the Illinois, Maine, Texas, and Virginia statutes cited above permit the state or local agency or official involved to impose a surcharge for the use of the credit card).

7. 458 THE NILSON REPORT 1, 3, 4-5 (1989). By the end of 1989, the number of cards had increased to 956 million, including some 233 million bank and T&E cards. 477 THE NILSON REPORT 1, 3 (1990). The Nilson Report is a semi-monthly newsletter which serves as the credit industry's primary source for news, statistics, and market trends.

8. 458 THE NILSON REPORT at 4-5. See also 477 THE NILSON REPORT at 3 (for some 1989 figures).

9. 458 THE NILSON REPORT at 4-5.

10. 400 THE NILSON REPORT at 1, 2-3 (1987) (based on 1986 figures). See also 477 THE NILSON REPORT 1 (1990) (third-party cards generated over thirteen percent of department store sales in 1989).

11. Credit cards as a whole, including store cards, combine for over sixty-eight percent of all retail sales, 400 THE NILSON REPORT at 3 (1987), and over seventy-four percent of retail sales at department stores. 439 THE NILSON REPORT at 1 (1988). Presumably, the portion of sales effected by Visa, MasterCard, and American Express cards with an airline such as Beacon, which issues no credit card of its own and whose average transaction amount is likely to be significantly higher than that of retail department stores, will likely be significantly above the thirteen percent average for such cards at department stores. For instance, 62.42 percent of all 1988 ticket sales by airline travel agents in the United States were effected by credit card, almost all of which by Visa, MasterCard, and American Express (the cards of individual airlines and air travel plans apparently produce only a small portion of ticketed sales). AREA SETTLEMENT PLAN SALES AND DOCUMENT STATISTICS — MONTH AND YEAR TO DATE, AIRLINES REPORTING CORPORATION (Dec. 1988). Overall, 68.5 percent of all 1988 airline ticket sales in the United States were effected by credit card, with 73.1 percent of these on American Express, Visa, and MasterCard (an additional 14.9 percent were on Diners Club and Discover). 449 THE NILSON REPORT 1, 5 (1989).

obtaining Beacon's credit card receivables and the Bankruptcy Court may be asked to determine whether the Bank has a perfected security interest in the money owed by Credit Card Bank and American Express to Beacon.<sup>12</sup>

### *The Basic Issue*

Under Article Nine of the Uniform Commercial Code, a creditor must perfect a security interest in order to render that interest generally effective against both other creditors of the debtor and subsequent purchasers of the collateral.<sup>13</sup> For most types of collateral, the creditor may perfect by either properly filing a financing statement which adequately describes both the debtor and the collateral or by taking physical possession of the collateral.<sup>14</sup> For certain types of collateral, however, Article Nine restricts perfection to only one of these alternative methods. For example, a creditor may perfect a security interest in accounts or general intangibles only by filing a financing statement.<sup>15</sup> Conversely, a creditor may generally perfect a security interest in instruments only by taking possession.<sup>16</sup> Accordingly, it is essential for a creditor wishing to perfect a security interest in a merchant's credit card receivables to ascertain whether the receivables constitute accounts, general intangibles, or instruments.<sup>17</sup>

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12. This precise issue arose in at least one bankruptcy proceeding, but the parties settled their dispute before the court ruled on the matter. *See Pacific Express, Inc., v. Bank of Am.*, No. 284-0505, *In re Pacific Express, Inc.*, No. 284-00394 (Bankr. E.D. Cal. filed Oct. 31, 1984).

13. U.C.C. § 9-201 (1989). *Compare* U.C.C. § 9-301 (1989) (governing the priority of unperfected security interests).

14. *See* U.C.C. §§ 9-302, 9-305 (1989). *See also* U.C.C. § 9-304 comment 1 (1989).

15. *See* U.C.C. § 9-305 & comment 1 (1989). *See also* U.C.C. § 9-304 comment 1 (1989).

Filing is also required when accounts are sold. *See* U.C.C. §§ 9-102(1)(b), 9-104(f), 9-105(1)(m) (1989). *See also* U.C.C. § 9-102 comment 2 (1989) ("The buyer [of an account] then is treated as a second party, and his interest as a security interest.").

16. U.C.C. § 9-304(1) & comment 1 (1989). Perfection of a security interest in instruments can occur without possession under special circumstances and for a limited period of time. *See* U.C.C. § 9-304(4), (5) (1989). Neither of these exceptions applies to a security interest in credit card receivables. Perfection of a security interest in instruments without possession is also possible when the instruments are proceeds of other collateral in which the secured creditor maintained a perfected interest. U.C.C. § 9-306(3) (1989). However, perfection in this manner lapses after ten days unless the instruments constitute cash proceeds or the secured party takes possession of them. *See* U.C.C. § 9-306(3)(b), (c) (1989). Credit card receivables do not appear to qualify as cash proceeds. *See* U.C.C. § 9-306(1) (1989).

17. No other classification is possible. The only remaining type of collateral consisting of an intangible asset is chattel paper, which is defined as "a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods." U.C.C. § 9-105(1)(b) (1989). No security interest or lease collateralizes credit card receivables. This is true even for so called "secured cards."

Secured cards arose in an effort to sidestep the limits Congress placed on the deductibility of personal interest expense as part of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986) (the interest limitations are codified at I.R.C. § 163). The cardholder's payment obligation on such cards is secured by the cardholder's principal residence. Interest on such cards remains deductible. *See* I.R.C. § 163(h)(3)(C) (1986); T.D. 8191, 1988-21 I.R.B. 16, 17, 53 Fed. Reg. 12000, 12001 (1988). However, a residence will generally not constitute goods. *See* U.C.C. § 9-105(1)(h) (1989) (defining "goods" so as to exclude realty); *In re S.O.A.W. Enters., Inc.*, 32 Bankr. 279 (Bankr. W.D. Tex. 1983). *See also In re Staff Mortgage & Inv. Corp.*, 625 F.2d 281 (9th Cir. 1980); *In re Atlantic Mortgage Corp.*, 69

Article Nine defines an instrument as:

a negotiable instrument (defined in section 3-104), or a certificated security (defined in section 8-102) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment.<sup>18</sup>

It defines an account as "any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance."<sup>19</sup> And it defines a general intangible in a catch-all provision as "any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, and money."<sup>20</sup> Thus, collateral constituting one or more instruments will not constitute an account or general intangible.<sup>21</sup> Similarly, collateral constituting an account will not constitute a general intangible.

From the outset it is clear that credit card receivables do not qualify as instruments under either of the first two clauses of the instrument definition. They are not negotiable instruments because they lack the "magic words" of negotiability: they fail to state that they are payable to the order of the mer-

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Bankr. 321 (Bankr. E.D. Mich. 1987) (both treating collateral packages of notes secured by deeds of trust as instruments, not chattel paper); Clark, *U.C.C. Survey: Secured Transactions*, 43 BUS. LAW. 1425, 1425-27 (1988) (discussing *Atlantic Mortgage*).

If a cardholder's principal residence were a mobile home or house boat, the security interest would be one in goods for the purpose of Article Nine, see *Nicholson v. Schramm*, 164 Ind. App. 598, 330 N.E.2d 785 (1975), yet the interest deduction would still be allowed. See I.R.C. § 163(h)(4)(A) (1986) (defining "qualified residence" in reference to I.R.C. § 1034); Treas. Reg. § 1.1034-1(c)(3)(i) (as amended in 1979) (defining "residence" to include a houseboat or house trailer); Priv. Ltr. Ruls. 8337050 (June 14, 1983), 8015017 (Jan. 18, 1980) (both applying section 1034 to a yacht); *Lokan v. Commissioner*, T.C. Memo 1979-380, 39 T.C.M. (CCH) 168 (1979) (trailer qualified as residence for purpose of section 1034); I.R.C. § 44(c)(1) (1983) (repealed) (expressly including mobile homes in defining principal residence in reference to section 1034). Even if the collateralized residence did qualify as one or more goods, however, the credit card receivables would still not be chattel paper because the security interest is not attached to the receivables. The security interest remains with the issuing bank; the merchant and merchant bank never have security for the cardholder's payment obligation. Thus, the writings generated from a credit card purchase do not evidence both a monetary obligation and a security interest.

18. U.C.C. § 9-105(1)(i) (1989).

19. U.C.C. § 9-106 (1989).

20. U.C.C. § 9-106 (1989). Examples of general intangibles include: unearned royalties, *Morrison v. Helms*, 28 U.C.C. Rep. Serv. (Callaghan) 172 (Tenn. Ct. App. 1979); the right to a lawsuit recovery, *Board of County Comm'rs v. Berkeley Village*, 40 Colo. App. 431, 580 P.2d 1251 (1978); an employer's reversionary interest in an overfunded employee defined benefit plan, *In re Northwest Acceptance Corp.*, 93 Bankr. 243, 250 (Bankr. D. Or. 1988); the right to a tax refund, e.g., *In re American Home Furnishings Corp.*, 48 Bankr. 905 (Bankr. D. Wash. 1985); various state licenses, e.g., *In re Pike*, 62 Bankr. 765 (W.D. Mich. 1986) (liquor license); First Pa. Bank v. Wildwood Clam Co., 535 F. Supp. 266 (E.D. Pa. 1982) (clamming license); a seat on the Chicago Mercantile Exchange, *In re Horne*, 17 Bankr. 427 (N.D. Ill. 1982) (dicta); tickets to a sporting event, *Klingner v. Pocono Int'l Raceway, Inc.*, 289 Pa. Super. 484, 433 A.2d 1357 (1981); and goodwill, *In re Hofstee*, 88 Bankr. 308 (Bankr. E.D. Wash. 1988).

21. See *In re Clover Leaf Dairy*, 79 Bankr. 499, 502 (Bankr. M.D. Fla. 1987) ("Having concluded that the Certificates are 'instruments,' it is clear that the Certificates cannot possibly be classified as general intangibles.").

chant or to the bearer.<sup>22</sup> They are not certificated securities for similarly obvious reasons.<sup>23</sup> Accordingly, the relevant question becomes whether such a receivable is "any other writing which evidences a right to the payment of money . . . and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment." To explore this question, it is essential to understand of how credit cards operate in the modern

22. See U.C.C. §§ 3-104(1)(d), 3-110 (1989). See also *First United Bank v. Philmont Corp.*, 533 So. 2d 449, 453 (Miss. 1988); *Lincoln First Bank v. Carlson*, 103 Misc. 2d 467, 426 N.Y.S.2d 433 (1980) (both noting that credit card slips are not negotiable instruments). The proposed amendments to Article Three may change this result. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, DRAFT AMENDMENTS TO UNIFORM COMMERCIAL CODE ARTICLE 3 (October 1, 1989) [hereinafter DRAFT AMENDMENTS] § 3-110(a)(iii) (defining "payable to order" by incorporating in part the Article Nine definition of instrument). But see U.C.C. §§ 3.307, 3.403, 3.404 (1974) (which abrogate the holder-in-due-course doctrine in consumer credit transactions).

They may fail to be negotiable for an additional reason. Many credit card contracts between issuers and cardholders call for interest at a variable rate. To be negotiable, however, an instrument must call for the payment of a "sum certain." U.C.C. §§ 3-104(1)(b), 3-106 (1989). The Official Comment makes clear that an instrument requiring interest payments at "the current rate," or any other rate the computation of which requires reference to something other than the instrument itself, fails to constitute a sum certain. U.C.C. § 3-106 comment 1 (1989). See also *Doyle v. Trinity Sav. & Loan Ass'n*, 869 F.2d 558 (10th Cir. 1989); *National Union Fire Ins. Co. v. Alexander*, 728 F. Supp. 192 (S.D.N.Y. 1989); *Northern Trust Co. v. E.T. Clancey Export Corp.*, 612 F. Supp. 712 (N.D. Ill. 1985); *Army Nat'l Bank v. Equity Developers, Inc.*, 245 Kan. 3, 774 P.2d 919 (1989); *Centerre Bank v. Campbell*, 744 S.W.2d 490 (Mo. App. 1988); *Taylor v. Roeder*, 234 Va. 99, 360 S.E.2d 191 (1987); *Farmers Production Credit Ass'n v. Arena*, 145 Vt. 20, 481 A.2d 1064 (1984); *A. Alport & Son, Inc. v. Hotel Evans, Inc.*, 65 Misc. 2d 374, 317 N.Y.S.2d 937 (Sup. Ct. 1970); *Brazos River Auth. v. Cass*, 405 S.W.2d 689 (Tex. 1966). But see *National Union Fire Ins. Co. v. Tegtmeier*, 673 F. Supp. 1269 (S.D.N.Y. 1987) (concluding that an instrument charging fixed rate interest before default but variable rate interest after default was negotiable); *Klehm v. Grecian Chalet, Ltd.*, 164 Ill. App. 3d 610, 518 N.E.2d 187 (1988) (instrument with interest rate based on prime was negotiable); *Tillman, Variable Interest Rates, Negotiability, and the Sum Certain Requirement*, 22 U.C.C. L.J. 36 (suggesting that proper Code analysis should render variable rate instruments negotiable). Compare *National Union Fire Ins. Co. v. Alexander*, 728 F. Supp. 192 (S.D.N.Y. 1989); *Woodhouse, Drake & Carey, Ltd. v. Anderson*, 61 Misc. 2d 951, 307 N.Y.S.2d 113 (Sup. Ct. 1970); *Universal C.I.T. Credit Corp. v. Ingle*, 347 Mass. 119, 196 N.E.2d 847 (1964) (all holding that an instrument calling for interest at the "highest legal rate" or the judgment rate can be negotiable), *Kleiner v. First Nat'l Bank*, 581 F. Supp. 955 (N.D. Ga. 1984); *Bank of Maine v. Weisberger*, 477 A.2d 741 (Me. 1984); *Hosford v. Automatic Control Sys., Inc.*, 14 Ohio App. 3d 118, 470 N.E.2d 263 (1984); *General Elec. Credit Corp. v. Richman*, 338 N.W.2d 814 (N.D. 1983); *McIntosh v. McLendon*, 162 Ga. App. 220, 290 S.E.2d 157 (1982) (all holding or suggesting that variable rate instruments are enforceable), and DRAFT AMENDMENTS, *supra*, at § 3-112(b) (permitting variable rate instruments to be negotiable). Several states have already modified their versions of U.C.C. § 3-106 to expressly permit variable rate instruments to be negotiable. See, e.g., IOWA CODE ANN. § 554.3106(f) (West Supp. 1990); LA. REV. STAT. ANN. § 10:3-106(1)(a) (West 1983 & Supp. 1990); N.D. CENT. CODE § 41-03-06(f), (g) (1989); TENN. CODE ANN. § 47-3-106(1)(f), (g) (1989); W. VA. CODE § 46-3-106(f), (g), (h) (1989).

The flaw in this additional argument is, of course, that the interest runs not to the holder of the credit card receivable, but to the issuing bank upon nonpayment after the initial billing cycle. Thus, the interest can better be said to accrue on the contract between the cardholder and the issuer rather than on the receivable itself.

23. The receivables appear to lack at least two of the three requirements of a certificated security in § 8-102(1)(a) (1989). They are not issued in bearer or registered form, see U.C.C. § 8-102(1)(d), (e), nor are they commonly exchanged in securities markets or otherwise recognized as a medium for investment, see U.C.C. § 8-102 comment 2 (1989).

world. Thus, we digress to review the origin and operation of the major credit card systems.

### *Paper, Plastic, and Electronic Bits*

Credit cards originated in the 1920's, when large department stores and oil companies distributed them to preferred customers as a means of identification.<sup>24</sup> Following World War II, these cards became embossed devices that allowed the salesperson to make an impression of the card and account number on a transaction slip. Then, as now, the information from these slips was used to generate a monthly bill for each customer.<sup>25</sup> Even today, such two-party cards, so called because they involve only the card-issuing merchant and the card-holding customer, comprise well over half of the credit cards outstanding in this country.<sup>26</sup>

In the 1950's, Diners Club, American Express, and Carte Blanche became the first large-scale three-party cards. These cards, which still comprise the bulk of the T&E cards, were issued chiefly to affluent businessmen and businesswomen who paid an annual fee of between \$5 and \$20. The merchants who agreed to honor the cards were primarily hotels, restaurants, airlines, and car rental chains which received a discounted payment — originally about ninety-three percent of the transaction amount — on the charges submitted to the issuer for collection.<sup>27</sup> Although the availability of these cards and the number of merchants honoring them has increased greatly in the intervening years, their operation remains largely unchanged. In most transactions, the customer presents the card to the merchant at the point of sale, the merchant uses the card to generate an embossed receipt, and the parties consummate the sale with a transfer of goods or services. One copy of the receipt is given to the cardholder, one is retained by the merchant, and the original is presented by the merchant to the issuer in exchange for a discounted payment. The issuer then periodically bills the customer for the full amount and bears all risk of the cardholder's nonpayment.

Banks entered the credit card arena in the late 1950's, when Bank of America launched what ultimately became the Visa system.<sup>28</sup> Today, the Visa and MasterCard systems each involve some 5,200 member financial institutions<sup>29</sup> and operate in substantially the same manner.<sup>30</sup> Under both

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24. D. BAKER & R. BRANDEL, *THE LAW OF ELECTRONIC FUND TRANSFER SYSTEMS*, ¶ 1.02[3] (2d ed. 1988).

25. *Id.* at ¶ 23.02[1].

26. Of the 956 million credit cards outstanding in 1989, *see supra* notes 6-7 and accompanying text, 455 million were issued by department and specialty retail stores, such as Sears and Montgomery Ward, 122 million by oil companies, 109 million by telephone companies, and 11 million by other retail suppliers of goods and services, such as airlines, automobile rental chains, hotels, motels, restaurants, and clubs. 477 THE NILSON REPORT at 3.

In reality, many of these cards are issued by finance subsidiaries or other entities related to the merchant which accepts them. Compare U.C.C.C. § 1.301(39)(a) (1974) (defining "seller credit card" to include cards issued to permit the purchase of goods or services from "persons related to the card issuer").

27. D. BAKER & R. BRANDEL, *supra* note 24, at ¶ 1.02[3].

28. *Id.* at ¶¶ 1.02[3], 23.02[1]. Bank cards usable on the local level date back to the late 1940's. See R. HOUGHTON, *CREDIT CARD ASSET BACKED SECURITIES* 27 (1987).

29. 475 THE NILSON REPORT 1, 2 (1990). The issuers of the Visa and MasterCard credit cards include commercial banks, mutual savings banks, savings & loans, and credit

systems, member institutions issue the cards to cardholders ("issuing bank" or "issuer"), often for a fee,<sup>31</sup> and contract with merchants willing to accept one or both cards ("merchant bank").<sup>32</sup> As with the three-party T&E cards, in exchange for an immediate credit to its account (and the resulting shift of the risk of nonpayment),<sup>33</sup> the merchant agrees to accept a discounted payment upon presentation of the charge slip to the merchant bank. Unlike the three-party cards, unless a single bank happens to be both the merchant bank and the issuing bank for a particular transaction, the merchant bank must then transfer the charge receipt or other charge information to the issuing bank before the cardholder can be billed, creating a four-party transaction. Both the merchant bank and the issuing bank have a profit motive in these transactions, since the merchant discount is effectively divided between the two.<sup>34</sup>

Originally, credit card charges in four-party transactions were cleared manually, and the charge slips were returned to the customer with the issuing bank's bill.<sup>35</sup> By the mid 1970's however, the clearing of charges became automated and the actual slip, if any, was retained by the merchant bank. Since then, the information necessary for the merchant bank to receive payment and for the issuing bank to bill the cardholder has been sent electronically from the

unions. For convenience, such issuers will be referred to as banks, and both Visa and MasterCard will be referred to as bank cards.

30. D. BAKER & R. BRANDEL, *supra* note 24, at ¶¶ 1.02[3], 23.02[1]-[4].

31. This fee constitutes payment for the many services available to cardholders in connection with their bank cards, and does not constitute an interest charge under state usury laws. *Key v. Worthen Bank & Trust Co.*, 260 Ark. 725, 543 S.W.2d 496 (1976).

32. Most members act now as both issuers and merchant banks, *cf.* *National Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592, 595 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986) (noting that in 1983, only fourteen percent of the Visa members acted in both capacities), or subcontract with other banks to act in one capacity or the other, *see Suburban Nat'l Bank v. Transamerica Ins. Co.*, 438 N.W.2d 119, 120 (Minn. Ct. App. 1989).

Few merchants accept one of the cards but not the other. D. BAKER & R. BRANDEL, *supra* note 24, at ¶ 23.02[3].

33. Payment to the merchant is usually effected by crediting the merchant's credit card account at the merchant bank. *See Suburban Nat'l Bank*, 438 N.W.2d at 120; B. CLARK, *THE LAW OF BANK DEPOSITS, COLLECTIONS AND CREDIT CARDS* ¶ 11.02[4][b] (3d ed. 1990). Although the merchant-merchant bank contracts are not standardized, telephone interview with Stanton Koppel, Counsel, Visa International, Inc. (Nov. 29, 1988), most such contracts treat this initial payment as provisional, by providing for a lengthy charge-back period for charges improperly processed by the merchant or disputed by the cardholder. *See infra* note 50 and accompanying text. *See also In re Twenty-Four Hour Nautilus Swim & Fitness Center, Inc.*, 81 Bankr. 71, 72 n.1 (D. Colo. 1987) (quoting Visa Operating Regulations as providing a 120-day charge-back period between the issuing bank and merchant bank). A cardholder's rights against the issuing bank are governed by federal law. *See infra* note 40 and accompanying text.

Nonpayment by the cardholder is not grounds for charging back against the merchant's account. *See National Bancard Corp.*, 779 F.2d at 595 ("All risk of loss resulting from nonpayment, default or any other reason falls solely on the issuer bank.").

34. *See National Bancard Corp.*, 779 F.2d at 595. *See also* 445 THE NILSON REPORT 7 (1989) (containing a brief narrative of the *National Bancard* dispute); 435 THE NILSON REPORT 1, 6-7 (1988) (comparing Visa and MasterCard interchange fees).

While the risk of loss from cardholder nonpayment is with the issuer, the risk of loss from a merchant's fraudulent presentation of a charge item is borne by the merchant bank. *See Suburban Nat'l Bank v. Transamerica Ins. Co.*, 438 N.W.2d 119 (Minn. Ct. App. 1989).

35. D. BAKER & R. BRANDEL, *supra* note 24, at ¶¶ 22.01[5], 23.02[1]. This arrangement is known as "country-club billing."

merchant bank to the issuer.<sup>36</sup> This electronic clearing house arrangement is effected by numerous competing private entities.<sup>37</sup> But, as at least two courts have noted, the processing of bank card charges generally resembles the check collection process, and is particularly similar to instances when a bank's honoring of checks creates an overdraft, thereby transferring the risk of nonpayment from the payee to the bank.<sup>38</sup>

### *Card Contracts*

All credit cards are issued pursuant to a contract between the issuer and the cardholder.<sup>39</sup> These contracts are governed extensively by federal law<sup>40</sup> and for the most part, vary only with respect to the fees and interest rates charged.<sup>41</sup> Three- and four-party cards also involve contracts between the issuer and the merchants who honor the card. These contracts govern the procedures that the merchant must follow to consummate a credit card transaction with a cardholder and to obtain payment from the issuer or merchant bank.

Although the required procedures occasionally vary,<sup>42</sup> merchant-issuer contracts typically require the merchant to do the following: imprint the sales slip with the embossed legends on the card and the merchant's imprinter plate;

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36. *Id.* at ¶¶ 22.01[5], 23.02[4]; *National Bancard Corp.*, 779 F.2d at 594; Declaration of Gary Walker in Support of Proof of Claim of Bank of America 3 (June 27, 1984) (filed in *In re Pacific Express, Inc.*, No. 284-00394 (Bankr. E.D. Cal. filed Oct. 31, 1984)). But see *Peterson v. Wells Fargo Bank*, 556 F. Supp. 1100, 1109 (N.D. Cal. 1981) (describing clearing house procedures as one in which paper is transferred to the issuer).

37. See 430 THE NILSON REPORT at 1, 6-7 (1988). See also *National Bancard Corp.*, 779 F.2d at 594-96.

38. *Peterson*, 556 F. Supp. at 1110 n.18; *In re United Sciences of America, Inc.*, 84 Bankr. 79, 80 (Bankr. N.D. Tex. 1988).

39. Actually, issuing a card does not by itself create a contract. Rather, such issuance is merely an offer to extend credit, which creates a separate contract upon each use. *Garber v. Harris Trust & Sav. Bank*, 104 Ill. App. 3d 675, 432 N.E.2d 1309 (1982) (mutuality of obligation was lacking upon mere issuance because the card was terminable and the terms of its use were modifiable at the will of the issuer).

40. See 15 U.S.C. §§ 1601-1693r (1988); 12 C.F.R. §§ 226.1-226.30 (1990); Fischer, Lampinen & McEnaney, *Consumer Credit: An Overview of New Credit and Charge Card Disclosure Requirements*, 23 U.C.C. L.J. 3 (1990). See also Uniform Consumer Credit Code (now enacted in Colorado, Idaho, Indiana, Iowa, Kansas, Maine, Oklahoma, South Carolina, Utah, Wisconsin, and Wyoming); Alabama Credit Card Act, 1988 Ala. Acts 85 (codified at ALA. CODE §§ 5-20-2 to -20-10); Song-Beverly Credit Card Act of 1971, CAL. CIV. CODE §§ 1747-1748.11 (1990). A sample cardholder-issuer contract can be obtained from almost any issuing bank in the Visa or MasterCard system.

41. The one major difference in these contracts emanates from the distinction between credit cards and charge cards. Credit cards, such as most bank cards, permit the cardholder to pay over time, imposing an interest charge on the outstanding balance. Charge cards, such as American Express, require the cardholder to pay in full each month. For the purposes of this Article, this distinction is largely irrelevant and the term "credit cards" includes charge cards.

Other differences involve the use of certain cardholder incentives. The short-lived Choice card, which has now been subsumed by Visa, was first marketed on the basis that cardholders whose transaction volume exceeded a certain yearly minimum would receive a rebate of one-half percent of their total charges. Many airlines now have bank cards tied to their frequent flyer programs, so that for each dollar charged and paid the cardholder earns one extra frequent flyer mile. Other promotional incentives also exist. See *Colorado Nat'l Bank v. Harrison*, No. 87-C-10723 (N.D. Ill. June 9, 1988) (LEXIS, Genfed library, Dist file; WESTLAW, Allfeds library) (concerning the bank's "Premium Bucks" program).

42. See *supra* note 33.

fill in the date, a description of the goods or services sold, and the amount of the transaction, including applicable taxes; and obtain the cardholder's signature.<sup>43</sup> The contracts also usually require the merchant to obtain the merchant bank's authorization prior to honoring a card if the transaction exceeds a certain amount, the cardholder will not be signing the sales slip, the merchant plans to delay presentment, or some suspicious circumstance exists.<sup>44</sup>

For transactions effected by telephone or mail order, the merchant must generally complete a sales slip in substantially the same manner, substituting the notation T/O or M/O on the signature line in place of the cardholder's signature.<sup>45</sup> However, some merchant banks prefer to eliminate all the paper in such transactions and merely require the merchant to transmit the necessary information electronically.<sup>46</sup> In either case, the contract will likely impose liability on the merchant for the amount of any sales slip generated by telephone or mail "that proves uncollectible for any reason."<sup>47</sup>

43. See the following excerpt from the standard agreement used by a major California bank to enroll merchants in the Visa system [hereinafter STANDARD AGREEMENT]. A copy of the STANDARD AGREEMENT is on file with the editorial office of the Law Review or can be obtained from the author. The grammatical and punctuation errors, inconsistencies, stylistic problems, and substantive defects in this sample agreement are all in the original.

C. Completing the Sales Slip. Member shall complete the sales slip as follows:

1. The sales slip shall be imprinted with the embossed legends on the Card and imprinter plate issued to Member. If a Member imprinter plate has not been issued to Member, Member shall type or print Member's name and address on the sales slip.

2. Member shall fill in the appropriate spaces on the slip, including (a) the name and location of Member and a brief description of goods or services sold, in sufficient detail to identify the transaction, (b) the price thereof, including any applicable taxes, and (c) the date the Cardholder signed the sales slip or the date the space provided for the Cardholder's signature was otherwise completed.

\* \* \*

4. Member shall then require the Cardholder to sign the sales slip and compare the signatures on the sales slip and the signature panel of the Card. If either identification is uncertain or Member otherwise questions the validity of the Card, Member shall contact the Bank's authorization center for instructions alerting center to Member's suspicions using appropriate procedure.

STANDARD AGREEMENT, *supra*, at II.C. See also B. CLARK, *supra* note 33, at ¶ 11.02[4][b] (describing contracts between merchants and merchant banks). The merchant must use a sales slip furnished by the merchant bank or one which otherwise satisfies certain format specifications of the merchant bank. STANDARD AGREEMENT, *supra*, at I.E.

44. See STANDARD AGREEMENT, *supra* note 43, at II.D.

45. See *id.* at II.G.3. See also 475 THE NILSON REPORT 1, 6 (1990) (indicating that of the three billion domestic transactions on bank cards in 1989, over 2.8 billion required a merchant sales slip, the remainder being cash advances and electronic debits).

46. Telephone interview with Stanton Koppel, Counsel, Visa International, Inc. (Nov. 29, 1988). See also Colorado Nat'l Bank v. Harrison, No. 87-C-10723 (N.D. Ill. June 9, 1988) (LEXIS, Genfed library, Dist file; WESTLAW, Allfeds library) (credit card transaction data encoded on a "merchant tape" and then sent to bank).

47. See STANDARD AGREEMENT, *supra* note 43, at II.G.3. It remains unclear whether this liability includes the amount of the discount (*i.e.*, the merchant bank's profit) and whether it extends to amounts which the issuer cannot collect (*e.g.*, from an insolvent or delinquent cardholder) in addition to amounts which the merchant bank cannot collect (from the issuing bank — for instance, if the cardholder disputes the transaction).

Merchants are generally given three days within which to deposit a sales slip, properly endorsed if necessary, with the merchant bank.<sup>48</sup> Upon delivery, the merchant bank provisionally credits the merchant's account for the face amount of each transaction, minus the appropriate discount.<sup>49</sup> The merchant bank usually has a lengthy period to reverse any transaction involving an illegible slip, a breach of a presentment warranty, an impropriety in processing, or a dispute by the cardholder.<sup>50</sup> It also has the right to place a freeze on the merchant's credit card account while investigating any questionable or unusual account activity.<sup>51</sup>

Among other things, these contracts also prohibit the merchant from processing the sales slips of any other seller and give the merchant bank the sole right to receive payment on the drafts presented to it for processing.<sup>52</sup> Moreover, they generally permit termination at the will of either party and prohibit assignment without consent.<sup>53</sup>

Four-party bank cards require additional contracts between each bank and one or more clearing houses and contracts between the merchant banks and issuing banks (likely to take the form of the Visa or MasterCard Rules and Regulations). These contracts generally constitute confidential, proprietary information,<sup>54</sup> and accordingly cannot be quoted here. Fortunately, they have little impact upon the Article Nine issue discussed here.

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48. See *id.* at II.H.1., 3.

49. See *id.* at III.A.2.

50.

B. Rejected Drafts (Credit Memoranda). Bank shall have the right to collect from or pay to Member or to chargeback to or to credit to Member's Account the full amount of any sales draft (or credit memorandum) which:

1. Bank is unable to present to, or which is rejected by, the processor because of illegibility.

2. Is returned by card issuer either because of illegibility or because such draft or credit memorandum fails to conform to any of the requirements set forth in Section I hereof; provided, however, that Bank may collect from Member or by chargeback to Member's Account.

3. Which within one hundred and eighty (180) calendar days (or such time as may be applicable to card issuers and groups affiliated with the issuance of Cards) after payment (credit) therefor by the card issuer is returned because:

\* \* \*

(c) Member has, with respect to such draft, breached its warranty as set forth in Section I.L. above; or

\* \* \*

(g) The transactions, or any part of them, evidenced by such draft (credit memorandum) are disputed by the purchaser. . . .

(h) The sales slip is not signed with the same name as is embossed on the Card.

*Id.* at III.B.

51. See *id.* at III.D.

52. See *id.* at I.E., IV.A.

53. See *id.* at IV.H., I. The prohibition on submission of other seller's slips, the prohibition on assignment, and the right to terminate at will give the bank some protection against fly-by-night organizations gaining extended access to the credit card system.

54. Indeed, banks normally do not even let the merchants with whom they contract examine the Visa or MasterCard Rules, even though the merchant's contracts may reference such Rules. *In re Standard Fin. Management Corp.*, 94 Bankr. 231, 236 (Bankr. D. Mass. 1988).

## ARTICLE NINE ANALYSIS

*General Policy Considerations*

With this background into credit card contracts and operation, we now return to the central inquiry: are credit card receivables writings which evidence the right to the payment of money and of a type which in the ordinary course of business is transferred by delivery with any necessary indorsement.<sup>55</sup> It seems apparent that such receivables do evidence a right to the payment of money and therefore satisfy the first half of this definition. Indeed, they appear to evidence no rights other than the right to receive payment in money.<sup>56</sup> The mere fact that payment of such a receivable is likely to be discounted from the face amount would not seem to alter this conclusion.<sup>57</sup>

The difficult question centers on the latter half of the definition: whether such receivables are of a type which is in ordinary course of business transferred by delivery. It remains somewhat unclear whether this phrase requires merely that transfers of writings, however infrequent, customarily be effected through delivery, or whether it alternatively or additionally requires that the writings be of a type which is transferred frequently.

The weight of authority seems to be that transfer by delivery — not frequency of transfers — is the main focus of this statutory language. In other words, delivery of the writing must generally be necessary to transfer the right to payment which the writing represents.<sup>58</sup> As one commentator put it, the Article Nine classification should depend on how professionals who deal with such writings handle them. If such professionals attach importance to possession of the writing, then the law should do the same.<sup>59</sup> This is merely a way of restating the traditional maxim that the right to collect must be bound to the writing. If the right to payment exists independent of the writing, it cannot be

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55. See *supra* text accompanying notes 18-23.

56. Courts have apparently concluded — without much reasoning or policy analysis — that writings which evidence more than a mere promise to pay in money cannot constitute instruments. See, e.g., *In re George*, 85 Bankr. 133, 145 (Bankr. D. Kan. 1988) (involving payment-in-kind ("PIK") certificates redeemable in money or commodities); *In re Padgett*, 49 Bankr. 212, 214 (Bankr. W.D. Ky. 1985) (involving PIK contracts payable in soybeans or money); *Levine v. Pascal*, 94 Ill. App. 2d 43, 56-57, 236 N.E.2d 425, 431 (1968) (involving a land trust agreement which entitled the holder to a "power of direction" over the property as well as to the payment of money). See also *In re Blankinship-Cooper, Inc.*, 43 Bankr. 231 (Bankr. N.D. Tex. 1984); *Lee v. Cox*, 18 U.C.C. Rep. Serv. 807 (M.D. Tenn. 1976) (both involving horse registration certificates). Perhaps this results from incorporating into the Article Nine analysis the Article Three rule which prohibits a negotiable instrument from containing any promise, order, obligation, or power other than a promise to pay a sum certain. See U.C.C. § 3-104(1)(b) (1989).

57. It might, however, affect whether such receivables represent the right to collect a "sum certain," a requirement of negotiability, particularly since the amount of discount varies for different merchants. See U.C.C. §§ 3-104(1)(b), 3-107 (1989), discussed *supra* note 22.

58. Of course, even negotiable instruments, which clearly constitute instruments for the purpose of Article Nine and are transferred by delivery, can be collected upon if the writing is lost and evidence of its existence and unavailability is presented. Thus, the absence of delivery in extreme circumstances should not affect a writing's characterization.

59. Harris, *Non-negotiable Certificates of Deposit: An Article 9 Problem*, 29 UCLA L. REV. 330, 372-76 (1981). See also *In re Coral Petroleum, Inc.*, 50 Bankr. 830, 838 (Bankr. S.D. Tex. 1985) (citing the Harris article approvingly for this point).

an instrument,<sup>60</sup> but if possession of the writing alone entitles the holder to receive payment, the writing is an instrument.<sup>61</sup>

When, interpreted in this manner, the rationale for having different perfection mechanisms for accounts and instruments becomes evident. If the transfer of a particular right to money is generally effected through delivery of a writing, a secured creditor must obtain possession of that writing to prevent future — and possibly fraudulent — deliveries and transfers of the right. Although filing a financing statement with respect to such collateral might provide notice to the world, it would undermine the ease and operation of the normal transfer-by-delivery process. Moreover, if collection of a right to money requires delivery of a writing to the obligor,<sup>62</sup> possession of the writing by a secured creditor is often essential to prevent the obligor from discharging its obligation by paying the debtor upon presentment.<sup>63</sup>

On the other hand, for rights which are transferred other than by delivery, such as accounts and general intangibles, neither of these concerns applies. While such rights may be referenced in one or more writings, such as a sales or service contract, an order confirmation, a simple bill, or the seller's books and records, they exist independent of such writing and may readily be sued upon separately. Indeed, because such rights may be evidenced in multiple writings, possession of any one writing is not only unnecessary to prevent future, and perhaps fraudulent, transfers, it is insufficient.<sup>64</sup>

Hence, the thrust of section 9-105(1)(i) appears to be that transfer by delivery and collection by presentment is what makes an instrument out of a writing which evidences the right to the payment of money. Even though a specific writing expressly restricts or prohibits transfers to third parties, if it is of a type for which delivery to the obligor is customarily required for collec-

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60. *In re Transport Clearings-Midwest, Inc.*, 26 Bankr. 282 (Bankr. W.D. Mo. 1982), cited approvingly for this point in *United States v. Air Florida, Inc.*, No. 85-3130, slip op. at 3-4 (S.D. Fla. April 16, 1986).

61. *In re Holiday Interval, Inc.*, 94 Bankr. 594, 600 (Bankr. W.D. Mo. 1988).

62. Technically, presentment to a drawee is not required. A cause of action against a drawee generally accrues without demand. U.C.C. § 3-122(1) (1989). However, presentment to the drawee is generally required before secondary parties, such as the drawer or any indorser, may be charged with the obligation to pay. U.C.C. § 3-501(1) (1989).

63. An issuer can generally discharge its liability on a nonnegotiable Article Three instrument — such as a CD, *see* U.C.C. § 3-104(2)(c) (1989); *Hospital of St. Raphael v. New Haven Sav. Bank*, 205 Conn. 604, 610, 534 A.2d 1189, 1193 (1987) (CD equals Article Three instrument) — by paying the holder, even though the issuer knows of another's claim to the instrument. U.C.C. § 3-603(1) (1989); Harris, *supra* note 59, at 379-80.

Although it remains unresolved whether the current version of Article Three applies to credit card receivables, *see* U.C.C. §§ 3-102, 3-104, 3-805 (1989), *see also* cases cited *infra* note 83 (all treating credit card receivables as Article Four "items"), the proposed amendments to Article Three apparently import the Article Nine definition of instrument, and might therefore subject credit card receivables to the bulk of Article Three if such receivables constitute Article Nine instruments. DRAFT AMENDMENTS, *supra* note 22, at §§ 3-104(a), 3-110(a)(iii).

64. For example, a purchaser (or creditor) could take possession of a seller's (debtor's) books and records in an effort to perfect a transfer of (security interest in) certain accounts receivable, but such action does not prevent the seller (debtor), who may have a second or even a third set of books, from proffering them to other unsuspecting purchasers or creditors.

tion, possession of the paper is necessary for the secured creditor to be truly secure.<sup>65</sup>

The difficulty with classifying credit card receivables is that they seem to possess some, but not all, of the attributes of instruments. Specifically, while the right to payment on a credit card receivable often requires presentment of a writing — at least when a writing exists<sup>66</sup> — presentation of the writing will not alone be sufficient to entitle the holder to payment.<sup>67</sup> To obtain payment, the holder must also have some contractual relationship with one or more members of the credit card system: a member bank for Visa or MasterCard; American Express itself for Optima or the American Express card. Without such a relationship, no one will honor a credit card slip presented for payment.<sup>68</sup> Even when a writing does exist, bank card slips are not always transferred to the issuing bank; the merchant or the merchant bank may retain them and electronically transmit the information necessary to obtain payment and bill the cardholder.<sup>69</sup> This truncation of the collection procedure suggests that the right to collect is not intrinsically bound to the writing.<sup>70</sup> In short, presentment of the writings representing credit card receivables is sometimes

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65. See *In re Coral Petroleum*, 50 Bankr. 830, 837-38 (Bankr. S.D. Tex. 1985) (involving a promissory note with restrictions on transfer); *General Elec. Co. v. M & C Mfg., Inc.*, 283 Ark. 110, 671 S.W.2d 189 (1984) (involving nontransferable CDs); *Citizens Nat'l Bank v. Bornstein*, 374 So. 2d 6, 9-10 (Fla. 1979) (involving a CD assignable only with consent of the issuer). See also *First Nat'l Bank v. Lone Star Life Ins. Co.*, 524 S.W.2d 525, 529-30 (Tex. Civ. App.), writ of error refused, 529 S.W.2d 67 (Tex. 1975) (noting that payment on the CD in issue required presentation, yet also noting that it was transferable before classifying it as an instrument); *In re Clover Leaf Dairy*, 79 Bankr. 499 (Bankr. M.D. Fla. 1987) (concluding that two Article Eight securities — one of which contained restrictions on transfer — were instruments under Article Nine). But see *Prudential-Bache Sec., Inc. v. Bartow County Bank*, 187 Ga. App. 530, 530-31, 370 S.E.2d 751, 752 (1988) (nontransferability precludes classification as an instrument); *Franke v. Third Nat'l Bank*, 31 Ohio App. 3d 189 n.1, 509 N.E.2d 955, 957 n.1 (1986) (transferability impliedly necessary).

Most of these cases dealt with certificates of deposit. There is little doubt that a non-negotiable but freely transferable CD does constitute an Article Nine instrument. See *Smith v. Mark Twain Nat'l Bank*, 805 F.2d 278, 285-86 (8th Cir. 1986); *In re Dawson*, 52 Bankr. 444, 447 (Bankr. N.D. Ala. 1984); *Herren v. Birmingham Trust Nat'l Bank*, 10 Bankr. 252 (Bankr. N.D. Ala. 1981); *Republican Valley Bank v. Security State Bank*, 229 Neb. 339, 343, 426 N.W.2d 529, 532 (1988); *Wightman v. American Nat'l Bank*, 610 P.2d 1001, 1004 (Wyo. 1980); *Old S. Life Ins. Co. v. Bank of N.C.*, 36 N.C. App. 18, 27, 244 S.E.2d 264, 269 (1978); *Southview Corp v. Kleberg First Nat'l Bank*, 512 S.W.2d 817 (Tex. Civ. App. 1974). See also *Harris*, *supra* note 59, at 370-76.

66. See *infra* note 131 and accompanying text.

67. See *supra* notes 60-61 and accompanying text.

68. See STANDARD AGREEMENT, *supra* note 43, at I.E., II.A.6. (prohibiting merchants from processing third-party charges).

69. See *supra* notes 36, 46 and accompanying text.

70. While the Federal Reserve now permits truncation at the institution of first deposit in the collection of checks, see 53 Fed. Reg. 19490, 19493-95 (1988); see also 12 U.S.C. § 4008(b)(2) (1988) (instructing the Federal Reserve to consider requiring truncation); D. BAKER & R. BRANDEL, *supra* note 24, at ¶¶ 1.03[1], 2.02[2][b] (discussing various types of truncation), since checks are negotiable instruments under Article Three, and thus qualify as Article Nine instruments under the first part of the § 9-105(1)(i) definition, truncation will not affect their Article Nine classification.

required, but is insufficient to obtain payment, and transfer of such writings — by delivery or otherwise — is usually not permitted.<sup>71</sup>

Given these facts, the two reasons for classifying a writing as an instrument, and thus requiring possession to perfect a security interest in it, appear not to apply to credit card receivables. First, while possession of an instrument is often necessary to prevent additional and perhaps fraudulent transfers of the writing (and the right to payment which it represents), the receivables are not transferable. Indeed, no one without a contractual relationship with someone in the clearinghouse procedure can hope to collect by mere presentment of the written slip. Second, while the obligor on a receivable may be able to discharge its obligation despite knowing that someone other than the presenter has a claim to it,<sup>72</sup> the mechanism by which payment is made — at least on bank cards — undermines the ability of the debtor to use this fact to defraud secured creditors.

Even when merchants do present written bank card slips for payment, the merchant bank makes only a provisional settlement to the merchant's deposit account.<sup>73</sup> Most credit card processing contracts between merchants and merchant banks restrict the merchant's right to withdraw the provisional settlement for quite some time, usually at least 120 days. If a creditor had a security interest in the credit slips redeemed for payment, that interest would extend to the deposit account as proceeds of the credit card slip.<sup>74</sup> The merchant would then have little ability to use the funds for some other purpose. Thus, even assuming that concerns over the obligor's ability to discharge its obligation in circumstances detrimental to the secured creditor is what prompts courts to treat nontransferable writings as instruments, such concerns do not apply to the classification of credit card receivables.

### *Court Interpretations of Credit Card Receivables*

Unfortunately, courts rarely employ this level of analysis and have not yet determined how the mechanics of the credit card systems affects the legal question of how to classify the receivables under Article Nine.<sup>75</sup> Moreover, the few interesting comments and decisions concerning credit cards that courts have

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71. See *Sherman v. First City Bank*, 99 Bankr. 333, 336-37 (N.D. Tex. 1989) (concluding that during the collection procedure bank card slips are not "transferred" within the meaning of Bankruptcy Code § 553(a)(2)).

Since the U.C.C. definition focuses on transfers, not collection, credit card receivables would appear not to be "of a type" which falls within the statutory definition. Compare cases cited *supra* note 65, (involving nontransferable notes and CDs, which might still be "of a type" which is transferable by delivery) with credit card receivables, which are not transferable to anyone outside the collection process.

72. See *supra* note 63.

73. See *supra* note 33.

74. While Article Nine does not permit a deposit account to be the original collateral of a secured creditor, it does permit a security interest to continue in such an account if the account contains proceeds of other collateral. U.C.C. § 9-104(l). However, the creditor's interest may be severely limited if the debtor becomes insolvent. See U.C.C. § 9-306(4) (1989).

75. Despite the language used in the definition of instruments in U.C.C. § 9-105(1)(i), see *supra* text accompanying note 18, which seems to call for a factual determination, most courts consider the proper classification of collateral under Article Nine to be a legal issue. E.g., *In re Coral Petroleum*, 50 Bankr. 830, 837 (Bankr. S.D. Tex. 1985); *First Nat'l Bank v. Lone*

made appear somewhat contradictory. First, in two pre-Code cases under California law, the courts involved concluded that Diners Club receivables were "accounts" under that state's commercial law.<sup>76</sup> At that time, California law provided that an assignment of accounts was not effective against the assignor's creditors unless notice of the assignment was properly filed with the appropriate county filing officer.<sup>77</sup> However, because the law contained no definition of and made no provision for a nonnegotiable instrument,<sup>78</sup> the courts perceived the receivables' classification as accounts as determinative of whether notice was required. If the receivables were not accounts, then a bona fide assignee of them would lose to a prior assignee who failed to notify anyone other than the obligor of its interest in the receivables.<sup>79</sup> Faced with this choice — a choice quite unlike that involved in the U.C.C. classification, where either notice by filing or notice through possession is required to perfect an interest in the receivables<sup>80</sup> — the Ninth Circuit concluded that to permit the receivables to be assigned without notice so as to defeat other creditors "would prostitute the purpose" of the California Civil Code.<sup>81</sup> The California Court of Appeals apparently agreed, albeit in less forceful terms.<sup>82</sup>

More recently, four courts have analyzed a merchant bank's right to charge back a bankrupt merchant's credit card account for failed credit card

Star Life Ins. Co., 524 S.W.2d 525, 533, (Tex. Civ. App.), *writ of error refused*, 529 S.W.2d 67 (Tex. 1975).

76. *Pingree v. Sulmeyer*, 315 F.2d 422 (9th Cir. 1963); *Continental Bank v. Blethen*, 7 Cal. App. 3d 178, 86 Cal. Rptr. 485 (1970).

77. CAL. CIV. CODE §§ 3018, 3019 (repealed by 1953 Cal. Stat. ch. 819, § 2, by which California adopted the U.C.C.) (text available in Appendix to CAL. COM. CODE (West 1990)). See also Project, *California Chattel Security and Article Nine of the Uniform Commercial Code*, 8 UCLA L. Rev. 806, 883 n.510 (1961).

78. California law defined "accounts" as:

a debt, due or to become due, arising out of the sale, storage, transportation, care, repair, processing, manufacture or other improvement of tangible personal property, or arising out of a contract therefor, or arising out of the rendition of personal services which in the regular course of business will result in an open book account; provided, however, that "account" does not include:

(a) Any debt evidenced by or arising under a . . . note, [or] bill of exchange. . . .

CAL. CIV. CODE § 3017(1) (repealed). It required both a "bill of exchange" and a "promissory note" to contain the magic words of negotiability — "to order of" or "to bearer" — and treated both as negotiable. CAL. CIV. CODE §§ 3207, 3265 (repealed). See also CAL. CIV. CODE § 3266 (repealed) (providing that "note" means a promissory note).

79. CAL. CIV. CODE § 955.1 (repealed). This provision stated, in part:

[T]he transfer of any right to payment, not constituting an account as defined in section 3017 of this code and not constituting a negotiable instrument, shall be deemed perfected as against third persons upon there being executed and delivered to the transferee an assignment thereof in writing; provided, however, that as between bona fide assignees of the same right for value without notice, the assignee first giving notice thereof to the obligor in writing shall have priority. . .

80. See *Superior Fin. Corp. v. Haskell*, 556 F. Supp. 199, 201 n.3 (S.D.N.Y. 1983) ("The U.C.C. distinction between the types of collateral perfected by filing, as opposed to those perfected by possession is sensibly conceived. The object of the distinction is to insure notice to potential lenders that the collateral is already encumbered.").

81. *Pingree*, 315 F.2d at 424.

82. *Blethen*, 7 Cal. App. 3d at 182, 86 Cal. Rptr. at 487.

charges under Article Four of the Uniform Commercial Code.<sup>83</sup> In doing so, all four courts expressly or impliedly treated the credit card receivables as "items" under section 4-104.<sup>84</sup> Because this provision defines an item to mean "any instrument for the payment of money even though it is not negotiable,"<sup>85</sup> the courts have impliedly characterized credit card receivables as instruments.<sup>86</sup> Indeed, two were quite express about this, concluding that the receivables were "items" because they were "instruments."<sup>87</sup>

The problem with using these statements to assist in the Article Nine analysis is that the definition of "item," and therefore of "instrument," in Article Four is used for a completely different purpose than the definition of "instrument" in Article Nine. The Article Four focus is not, as it is in Article Nine, on how the rights represented by the writing are customarily transferred,<sup>88</sup> but on whether the writing is one processed by a bank in such a manner that the rights and duties of Article Four warrant application. Moreover, to effectuate this different purpose, courts have interpreted the Article Four definition very broadly and extended it to include writings that clearly would not qualify as Article Nine instruments.<sup>89</sup> Thus, these cases do not impliedly hold that credit card receivables constitute Article Nine instruments.

Of more direct authority on the Article Nine classification issue is the recent decision of the Minnesota Court of Appeals in *Suburban National Bank v. Transamerica Insurance Company*.<sup>90</sup> In that case, a merchant bank in the Visa/MasterCard system sued its insurer for failing to reimburse it for losses sustained when a customer presented invalid credit card slips for payment. The insurance contract excluded from coverage "the purchase, discounting or other acquisition of false or genuine accounts, invoices, notes, agreements or

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83. *In re Standard Fin. Management Corp.*, 94 Bankr. 231 (Bankr. D. Mass. 1988); *In re United Sciences of Am., Inc.*, 84 Bankr. 79 (Bankr. N.D. Tex. 1988), *aff'd sub nom. Sherman v. First City Bank*, 99 Bankr. 333 (N.D. Tex. 1989); *In re Twenty-Four Hour Nautilus Swim & Fitness Center, Inc.*, 81 Bankr. 71 (D. Colo. 1987); *First United Bank v. Philmont Corp.*, 533 So. 2d 449 (Miss. 1988).

84. *See Standard Fin. Management*, 94 Bankr. at 234; *Philmont Corp.*, 533 So. 2d at 453 (both doing so expressly). The other two courts, by focusing on the bank's rights under U.C.C. § 4-212 (dealing with the provisional settlement of an "item"), impliedly treated the receivables as items. *See United Sciences*, 84 Bankr. at 81-82; *Twenty-Four Hour Nautilus*, 81 Bankr. at 72-73.

85. U.C.C. § 4-104(1)(g) (1989).

86. *Cf. Hospital of St. Raphael v. New Haven Sav. Bank*, 205 Conn. 604, 610, 534 A.2d 1189, 1193 (1987) (using Article Three definition of "instrument" to interpret scope of Article Four definition of "item").

87. *Standard Fin. Management*, 94 Bankr. at 234 ("A credit slip is an instrument for payment"); *Philmont Corp.*, 533 So. 2d at 453 ("The sales slips are non-negotiable instruments evidencing the payment of money.").

88. *See supra* notes 55-65 and accompanying text.

89. *See Houston Contracting Co. v. Chase Manhattan Bank*, 539 F. Supp. 247, 249 n.2 (S.D.N.Y. 1982) (suggesting that an unsigned telex instruction constitutes an item); *Burnette v. First Citizens Bank & Trust Co.*, 48 N.C. App. 585, 269 S.E.2d 317 (1980); *Coleman v. Brotherhood State Bank*, 3 Kan. App. 2d 162, 592 P.2d 103 (1979) (both holding that a withdrawal slip constitutes an item). Neither of these writings appears to be a right to the payment of money which is of a type transferred by delivery in the ordinary course of business, as is required by U.C.C. § 9-105(1)(i).

90. 438 N.W.2d 119 (Minn. Ct. App. 1989).

Evidences of Debt.”<sup>91</sup> In affirming the trial court’s summary judgment in favor of the insurance company, the court first concluded that the credit card slips were “agreements” within the meaning of the insurance contract.<sup>92</sup> It then concluded, as an alternative holding, that the credit card slips also were “Evidences of Debt.” In doing so, the court appeared to base its conclusion on the fact that the slips qualified as Article Nine instruments under the section 9-105(1)(i) of the Minnesota Commercial Code.<sup>93</sup>

Yet even this case, the only one of those just mentioned which cites to section 9-105 at all, fails to really analyze whether credit card receivables do, or should, fall within the code definition of instruments. Similarly, the only commentators to express an opinion on this issue — such as Barkley Clark, stating in a footnote that credit card receivables are general intangibles, not instruments — have also failed to supply analytical support for their varying conclusions.<sup>94</sup> To provide greater guidance on this issue, we must examine cases dealing with other types of writings.

### *Court Interpretations of Instruments*

Court interpretations of the section 9-105(1)(i) definition of instruments present little analysis of the conclusions reached. Thus, while courts have concluded that money qualifies as an instrument,<sup>95</sup> and have similarly concluded that corporate debentures are instruments both because they are certificated securities and because they are writings which evidence a right to payment in money and are customarily transferred by delivery,<sup>96</sup> they have done so in summary fashion.<sup>97</sup>

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91. *Id.* at 121.

92. *Id.* at 121-22.

93. *Id.* at 122. See also *Ratner v. Central Nat’l Bank*, 414 So. 2d 210, 211 (Fla. Dist. Ct. App. 1982) (describing Mastercharge slips as “sales drafts”); U.C.C. § 3-104 (1989) (defining “drafts” as a type of negotiable instrument).

94. B. CLARK, *supra* note 33, at ¶ 11.10 n.184. See also East & Byerly, *Continuous Perfection of Security Interests in Proceeds of Credit Sales of Inventory*, 1 COLUM. BUS. L. REV. 115, 132-33 (1986) (concluding that credit card receivables are accounts); R. HOUGHTON, *supra* note 28, at 7 (a First Boston offering memorandum stating that credit card receivables held by the issuer constitute “accounts” or “general intangibles,” and thus possession is not necessary to perfect a security interest in them). But see *Davenport, Bank Credit Cards and the Uniform Commercial Code*, 85 BANKING L.J. 941, 971-72 (1968) (concluding that credit card slips are Article Nine instruments, but doing so at a time when all slips were processed back to the issuer).

95. *In re Atlanta Times, Inc.*, 3 U.C.C. Rep. 893, 901 (N.D. Ga. Ref.), *rev. denied*, 259 F. Supp. 820 (N.D. Ga. 1966), *aff’d sub nom. Sanders v. Commercial Credit Corp.*, 398 F.2d 988 (5th Cir. 1968). See also *Commercial Discount Credit Corp. v. Milwaukee Western Bank*, 61 Wis. 2d 671, 683, 214 N.W.2d 33, 39 (1974) (noting without disagreement defendant’s contention that money is an instrument).

96. *Allegaert v. Chemical Bank*, 657 F.2d 495, 506-07 (2d Cir. 1980). Most courts rely on the debenture’s status as Article Eight certificated securities in concluding that they qualify as instruments. See *In re Glass*, 692 F.2d 55 (8th Cir. 1982); *In re H.J. Otten Co.*, 8 Bankr. 781 (W.D.N.Y. 1981); *In re Crabtree*, 48 Bankr. 528 (Bankr. E.D. Tenn. 1985); *In re Bird Eng’g, Inc.*, 47 Bankr. 193 (Bankr. D. Neb. 1985); *Traverse v. Liberty Bank & Trust Co.*, 5 U.C.C. Rep. Serv. 535 (Mass. Super. Ct. 1967).

Certificated corporate stock also qualifies as an instrument. See, e.g., *In re Copeland*, 531 F.2d 1195 (3d Cir. 1976); *In re Jay*, 8 Bankr. 774 (M.D. Fla. 1981); *Fidelity Bank & Trust Co. v. Production Metals Corp.*, 366 F. Supp. 613 (E.D. Pa. 1973); *In re Swedenborg*, 55 Bankr. 820 (Bankr. N.D. Ohio 1985); *In re Kontaratos*, 10 Bankr. 956 (Bankr. D. Me. 1981);

Indeed, courts occasionally use so little analysis in classifying collateral that they reach highly questionable results. Perhaps the chief example of this is the Supreme Court of Mississippi's decision in *International Harvester Company v. Peoples Bank & Trust Company*.<sup>98</sup> That case involved a sales contract drafted by Walden Corporation — in triplicate — whereby it agreed to manufacture and sell to International Harvester two truck bodies for approximately \$12,000.<sup>99</sup> Walden then pledged the contract to Peoples Bank as security for a loan needed to fulfill the contract, and Harvester agreed to make payment on the contract jointly to Walden and Peoples Bank.<sup>100</sup> Peoples Bank filed no financing statement but did take possession of the contract.

Walden went out of business before it completed the second truck body but after performing about \$10,000 worth of work on the contract. Before Harvester's duty to make partial payment matured, the Internal Revenue Service served it with a notice of levy for Walden's unpaid taxes.<sup>101</sup> Without informing the IRS of Walden's pledge of the contract or Peoples Bank of the IRS's notice of levy, Harvester paid the IRS the \$10,000 it owed on its contract with Walden. Peoples Bank then sued Harvester for that amount.

The court concluded that Harvester had improperly paid the IRS because Peoples Bank had priority in the funds Harvester owed on the contract with Walden. In doing so, the court concluded that Peoples Bank had perfected its security interest by possession since the signed and delivered contract constituted an instrument under Article Nine.<sup>102</sup> Without really discussing the issue, the court simply asserted that the contract "most assuredly was of a type which in the ordinary course of business *could be* transferred by delivery with any necessary assignment."<sup>103</sup>

No other court — before or since — has concluded that a signed and delivered contract qualifies as an instrument. More significantly, the Mississippi court failed to consider whether such contracts *are* transferred by delivery, and gave no reason for why it departed from the language of the Code

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*In re Milam*, 4 Bankr. 621 (Bankr. M.D. Ga. 1980); *In re Mathews*, 25 U.C.C. Rep. Serv. 305 (Bankr. E.D. Va. 1978), *rev'd on other grounds*, 475 F. Supp. 37 (E.D. Va. 1979); *In re Sportsland, Inc.*, 17 U.C.C. Rep. Serv. 1333 (Bankr. D. Mass. 1975); *United Indep. Ins. Agencies, Inc. v. Bank of Honolulu*, 6 Haw. App. 222, 718 P.2d 1097 (1986); *Lamb Bros., Inc. v. First State Bank*, 285 Or. 39, 589 P.2d 1094 (1979); *Kruse, Kruse & Miklosko, Inc. v. Beedy*, 170 Ind. App. 373, 353 N.E.2d 514 (1976). Uncertificated stock does not. *Heinicke Instruments Co. v. Republic Corp.*, 543 F.2d 700, 702 (9th Cir. 1976).

Other Article Eight certificated securities constitute Article Nine instruments. *See, e.g.*, *Superior Fin. Corp. v. Haskell*, 556 F. Supp. 199 (S.D.N.Y. 1983) (apartment co-op stock); *In re Clover Leaf Dairy*, 79 Bankr. 499 (Bankr. M.D. Fla. 1987) (dairy certificate); *In re Weber*, 29 U.C.C. Rep. Serv. 690 (Bankr. W.D.N.Y. 1980) (milk co-op certificate).

97. *See also Farnum v. C.J. Merrill, Inc.*, 264 A.2d 150, 154 (Me. 1970) (concluding without any analysis that a purchase order for a piece of custom machinery was not an instrument).

98. 402 So. 2d 856 (Miss. 1981).

99. *Id.* at 857.

100. *Id.* at 858-59. The court appeared to conclude that the assignment to Peoples Bank was an outright assignment, not one merely for security, but later assumed for the purpose of its Article Nine analysis that the assignment was one for security only. *Id.* at 864.

101. *Id.* at 859.

102. *Id.* at 865.

103. *Id.* (emphasis added).

definition.<sup>104</sup> In fact, it seems unlikely that such a contract is the type of writing which is customarily transferred by delivery. Similarly, presentment of a written contract is generally unnecessary to collect once performance has been rendered. Thus, the court's summary conclusion appears unfounded.

Only two courts have employed any significant analysis when presented with an Article Nine instrument classification problem. The first of these cases — decided by the Bankruptcy Court for the Western District of Missouri — confronted the Article Nine classification of certain freight bills.<sup>105</sup> The debtor in the case was a carrier which issued freight bills that reflected its obligation to transport and deliver certain goods. The bills, issued on multiple-copy form sets interleaved with carbons, were unsigned by the parties involved in the transaction, failed to contain any promise to pay for the services provided, and basically just represented the right of the carrier to bill for the services provided.<sup>106</sup> However, when the carrier did bill the customer for payment, it routinely attached the freight bill.<sup>107</sup>

In concluding that the freight bills were not Article Nine instruments, the court placed great emphasis on several facts. First, the court concluded that the freight bills did not constitute evidence, in themselves, of a right to the payment of money because that right could not be transferred merely by transferring the writing; notification of the obligor was also necessary.<sup>108</sup> Moreover, so the court concluded, in a suit brought to collect a freight bill it would be insufficient to prove the mere existence and possession of the freight bill; evidence of performance would also be required.<sup>109</sup>

Second, the court was concerned that since multiple copies of the bills were issued, several persons might be able to claim the amount due if possession alone sufficiently established the right to payment. The court apparently dismissed the argument that the top copy was usually marked and easily identifiable as the original.<sup>110</sup> Finally, the court concluded that to be an instrument, a writing must be signed by the persons obligated.<sup>111</sup> Because the freight bills lacked all "of these fundamental properties of an instrument," the court held they were accounts.<sup>112</sup>

The other significant decision dealing with Article Nine instruments occurred in the Air Florida bankruptcy reorganization.<sup>113</sup> Air Florida, along with most other major airlines, was a party to an interline agreement by which any participating airline could issue tickets and receive payment for passage on another carrier. Usually, this occurs when a passenger arranges, as part of a round-trip, to fly one leg on the airline issuing the ticket and the other leg on

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104. It similarly failed to consider whether issuance of the contract in triplicate affected its status as an instrument. Compare *In re Transport Clearings-Midwest, Inc.*, 26 Bankr. 282, 286 & n.6 (Bankr. W.D. Mo. 1982), discussed *infra* at text accompanying note 110.

105. *In re Transport Clearings-Midwest, Inc.*, 26 Bankr. 282 (Bankr. W.D. Mo. 1982).

106. *Id.* at 284-85.

107. *Id.* at 285 n.4 (quoting the bankruptcy trustee's proposed findings of fact).

108. *Id.* at 286.

109. *Id.* at 286 n.8.

110. *Id.* at 286 & n.6.

111. *Id.* at 286 & n.7.

112. *Id.* at 286.

another carrier. Once the passenger exchanges the ticket for passage on the nonissuing carrier, the nonissuer may redeem the ticket by presenting it to the issuing airline through a clearinghouse and reconciliation procedure. The nonissuing airline must actually present the ticket to the issuer to obtain payment, although occasionally the nonissuer must also demonstrate that the flight involved was actually flown.<sup>114</sup>

The Bankruptcy Court concluded that the interline tickets in Air Florida's possession (representing money owed to Air Florida from other airlines which issued the tickets) were accounts, not instruments, under Article Nine.<sup>115</sup> Relying in part on *Transport Clearings*, the court based its conclusion largely on three points: (1) that the tickets were not assignable; (2) that airline tickets were not "securities" under certain federal criminal statutes; and (3) that a contrary ruling would require a creditor seeking to perfect a security interest in such items to "take possession of all the ticket stock of Air Florida," which would be impossible and would stop airline receivables financings dead in their tracks.<sup>116</sup>

The writings in both of these cases are somewhat distinguishable from credit card receivables in that they represented more than the right to payment in money. The freight bills represented the obligation of the issuer to transport goods and the interline tickets represented the obligation of the nonissuing airline<sup>117</sup> to carry the ticketholder on its flight. Although neither court relied on this fact, since the writings evidenced more than a right to payment, they arguably could not qualify as instruments.<sup>118</sup> This is not true of credit card receivables. Nevertheless, both cases do provide analysis which is relevant to the classification of credit card receivables.

First, credit card slips, like the freight bills in *Transport Clearings*, are issued on multiple-copy form sets. Although each copy in a set is clearly identified in the margin as the original, the customer's copy, or the merchant's copy, that sort of identification apparently did not impress the *Transport Clearings* court. On the other hand, the court appeared troubled by the multiple copies primarily because various members of the industry used different forms, some of which did not clearly identify the original as such.<sup>119</sup> That

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113. *In re Air Florida System, Inc.*, 49 Bankr. 321 (Bankr. S.D. Fla. 1985), *aff'd sub nom.* United States v. Air Florida, Inc., No. 85-3130, slip op. (S.D. Fla. April 16, 1986).

114. Brief for Appellant at 8, United States v. Air Florida, Inc., No. 85-3130 (S.D. Fla.). The author feels obliged to mention that he was one of the principal authors of the cited brief, and thus is essentially citing himself. Since, however, the reference is to a factual point, not a legal argument or conclusion, the reader's indulgence is requested.

115. 49 Bankr. at 325.

116. *Id.* On appeal, the District Court affirmed. It appeared persuaded by two points: (1) presentment of the ticket to the issuing airline was not always necessary for payment; and (2) possession alone did not entitle the holder to payment, evidence that the flight was actually flown was occasionally required. United States v. Air Florida, Inc., No. 85-3130, slip op. at 3-4 (S.D. Fla. April 16, 1986). Actually, this first point was contrary to evidence uncontradicted at trial. Reply Brief for Appellant at 6, United States v. Air Florida, Inc., No. 85-3130 (S.D. Fla.).

117. This obligation arises out of the Interline Agreement, which makes each participating airline the agent of the others with respect to interline tickets. See 49 Bankr. at 324.

118. See *supra* note 56 and accompanying text.

119. *Transport Clearings*, 26 Bankr. at 285 n.4, 286 n.6.

should not be a problem with credit card slips.<sup>120</sup> Moreover, the whole clearinghouse and reconciliation procedure for credit card receivables would probably prevent anyone from using one or more of the extra copies to obtain duplicate payment.

On the other hand, by requiring Article Nine instruments to bear the signature of the obligor, the *Transport Clearings* court added a new and significant impediment to the classification of credit card receivables as instruments. Although section 9-105(1)(i) itself does not require writings to be signed by the obligor in order to qualify as instruments, Article Three does require that a writing be signed by the maker or drawer in order to be negotiable,<sup>121</sup> and this requirement appears to make sense in the Article Nine context as well. It is difficult to imagine how a writing can be essential to a transaction, and how the right to payment can be inextricably bound to it, if the writing is not signed by or on behalf of the person whom it purports to bind.

Assuming a signature is required for a writing to be an instrument, the first question in the credit card context becomes whose signature? The *Transport Clearings* court spoke of the obligor's signature, but the credit card issuer does not sign the credit slip and it is the issuer, not the cardholder, who is truly bound to pay the merchant or intermediary. Yet even the *Transport Clearings* court appeared to recognize that a signature of the obligor is not required in all cases. For instance, an ordinary check does not bear the signature of the obligor bank. The court seemed to believe that a writing in the form of an order could have legal efficacy and therefore qualify as an instrument as long as "it bears a sign or indicia of the obligor's granting of authority for its issuance."<sup>122</sup>

The trouble remains that the issuer generally does nothing with or to a credit card slip at the time of sale. At most, since the credit card number identifies both the cardholder and the card issuer,<sup>123</sup> use of the card to emboss the card number on the credit slip evidences who is intended to be bound by the slip. Whether this qualifies as either a signature or as some other indicia of the obligor's authority is difficult to say. The Uniform Commercial Code provides that a signature "includes any symbol executed or adopted by a party with present intention to authenticate a writing."<sup>124</sup> The Official Comment to this section explains that such authentication

may be printed, stamped or written; it may be by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. No catalog of possible authentications can be complete and the court must use

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120. *But cf.* 471 THE NILSON REPORT 2 (1990) (describing the four most common types of forms used by the credit card industry).

121. U.C.C. § 3-104(1)(a) (1989). *See also In re George*, 85 Bankr. 133, 145 (Bankr. D. Kan. 1988) (using Article Three definitions to color the interpretation of what constitutes an Article Nine instrument).

122. *Transport Clearings*, 26 Bankr. at 286 n.7.

123. All American Express cards begin with a 3; Visa cards begin with a 4; and MasterCard's begin with a 5. In most bank cards systems, the first set of numbers on each card identifies the issuing bank.

124. U.C.C. § 1-201(39) (1989).

common sense and commercial experience in passing upon these matters.<sup>125</sup>

Courts confronted with signature questions have adopted the broad spirit of the Code definition. At least two courts have concluded that a money order issued by a bank with its name preprinted on top was a signed instrument.<sup>126</sup> Similarly, a preprinted company name above a signature line on a check has been held to constitute a sufficient signature.<sup>127</sup> Nevertheless, the question always comes down to whether there was a present intention to authenticate the writing.<sup>128</sup> Since the card issuer has no "present intention" at the time of any specific credit card transaction, the signature requirement can be met only if the cardholder's signature — perhaps through some agency theory<sup>129</sup> — be sufficient to authenticate the writing on behalf of the issuer.<sup>130</sup> However, in credit card transactions effected over the telephone or through the mails, there is no signature by the cardholder. Thus, even under an agency theory, a signature is lacking.

The Code does not define "sign or indicia of the obligor's granting authority," the phrase used by the *Transport Clearings* court. Presumably, no present intention requirement exists for such a sign or indicia, because none would exist for a bank check and the court used the phrase to describe when a check has legal efficacy. Nevertheless, in credit card transactions effected over the telephone or through the mails, there may be no writing at all.<sup>131</sup>

Thus, even if most credit card receivables were classified as instruments, some or all of the receivables generated from telephone or mail orders would not be instruments. This dichotomy itself might not present a serious problem. A creditor wishing to perfect an interest in credit card receivables would merely need to file a financing statement to cover that portion of the receivables that failed to qualify as instruments and thus constituted either

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125. U.C.C. § 1-201 comment 39 (1989).

126. *Sequoyah State Bank v. Union Nat'l Bank*, 274 Ark. 1, 4, 621 S.W.2d 683, 684 (1981); *Mirabile v. Udoh*, 92 Misc. 2d 168, 171, 399 N.Y.S.2d 869, 871 (N.Y. Civ. Ct. 1977).

127. *Mayes v. State*, 264 Ark. 283, 292, 571 S.W.2d 420, 426 (1978). A signature may also be typewritten, e.g., *In re Bufkin Bros., Inc.*, 757 F.2d 1573 (5th Cir. 1985), or made by a rubber stamp, *Alpine State Bank v. The Ohio Casualty Ins. Co.*, 733 F. Supp. 60 (N.D. Ill. 1990) (both involving writings other than instruments).

128. See U.C.C. § 1-201(39) (1989); *Kroeze v. Chloride Group, Ltd.*, 572 F.2d 1099 (5th Cir. 1978).

129. An agency relationship can be used to generate a valid signature under § 1-201(39). E.g., *NCR Corp. v. Robert A. McNeil Corp.*, 746 P.2d 1361 (Colo. Ct. App. 1987).

130. For transactions in excess of a certain base amount, the merchant may be required to telephone or otherwise electronically request authorization for the transaction from the issuer or from some agent of the issuer (such as the merchant bank). See STANDARD AGREEMENT, *supra* note 43, at II.D. While such authorization may evidence the issuer's present intention to be bound, it would be strange if the merchant's notation of that authorization on the credit card slip could qualify as the necessary signature. See *infra* note 131.

131. See *supra* notes 45-46 and accompanying text. Although the merchant often fills out a written slip for such transactions, use of an agency theory to attribute the merchant's activity to the issuer would make little sense. First, the issuer often has no contractual relation to the merchant, at least in bank card transactions. Second, using an agency theory to execute a valid signature on a financing statement, see *supra* note 129, does little offense to the purpose of the signature requirement since a financing statement's only function is to provide notice. Using an

accounts or general intangibles. Still, the idea that some credit card receivables might be instruments and some not is not very comforting, and such a conclusion would do little to advance the Code's goals of simplicity and certainty in financing arrangements.<sup>132</sup>

This brings us back to the *Air Florida* court's concern that classifying interline tickets as instruments would effectively halt airline receivables financings since it would require the impossible from a creditor seeking to perfect a security interest in such items: possession of all the debtor's ticket stock. While the court's conclusion about taking possession of *all* ticket stock was probably unfounded,<sup>133</sup> its concern about how its classification would affect commerce was not.

The Code itself says that its purpose is to "simplify, clarify and modernize the law governing commercial transactions,"<sup>134</sup> and that it "should be

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agency theory to validate the obligor's signature on an instrument is quite different, at least where the agent is the obligee.

132. One of the purposes of Article Nine is to end the fragmentation of treatment of the various types of secured transactions. *Chase Manhattan Bank v. Narelli*, 93 Misc.2d 78, 87, 401 N.Y.S.2d 404, 410 (Sup. Ct. 1977). See also U.C.C. § 9-101 comment 1, quoted in *Maxl Sales Co. v. Critiques, Inc.*, 796 F.2d 1293, 1296 (10th Cir. 1986) ("The aim of this Article is to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty. . . . The scheme of the Article is to make distinctions, where distinctions are necessary, along functional rather than formal lines."). A logical, although not necessary, corollary to this is to avoid the fragmentation of types of collateral and perfection methods, since such fragmentation would essentially make similar transactions dissimilar.

133. The court's actual reasoning went as follows:

It should be noted that if *Air Florida's* argument were found to be persuasive, it would have been impossible for [the creditors] to perfect their security interest in the proceeds of airline tickets. Under U.C.C. § 9-304, a security interest in instruments can only be perfected by the secured party's taking possession of the instrument. This would mean that [the creditors] would have had to take possession of all of the ticket stock of *Air Florida*, which would be impossible. Clearly, any bank or lender financing an airline would be unable to "perfect" its security interest if tickets are instruments, and since the bulk of airline revenues are generated by the sale of airline tickets, airline financings would stop dead in their tracks.

*Air Florida*, 49 Bankr. at 325. The problem with this analysis is twofold. First, *Air Florida's* arguments extended only to interline tickets. For *Air Florida* to have a receivable in such tickets, they would, by definition, have to be issued on another carrier's stock, not *Air Florida's* stock. Since such tickets would not become instruments until negotiated for passage on *Air Florida* (before that time the ticket represented more than a right to money, it represented the obligation of *Air Florida* to transport the passenger), perfection by a creditor would simply require the routine transfer of these interline tickets to the creditor. Brief for Appellant at 10, *United States v. Air Florida, Inc.*, No. 85-3130 (S.D. Fla.).

Second, because *Air Florida's* arguments applied only to interline tickets, the court's discussion about perfecting a security interest in the proceeds of airline tickets was largely unfounded. Ordinary airline tickets are generally prepaid and thus represent no right to the payment of money and cannot be instruments. If prepaid with cash, then no money is owed at all, and the ticket merely represents the customer's contractual right to passage. If prepaid by check, the right to payment is bound up not in the ticket, but in the check, which is an instrument under both Articles Three and Nine. If prepaid by credit card, then the right to payment is associated with the credit card receivable, again not with the ticket. There is simply no reason for the creditor to seek possession of all of a carrier's ticket stock. Reply Brief for Appellant at 5 & n.2, *United States v. Air Florida, Inc.*, No. 85-3130 (S.D. Fla.).

134. U.C.C. § 1-102(2)(a) (1989).

construed in accordance with its underlying purposes and policies."<sup>135</sup> As one court put it, "[t]he Code's general purpose is to create a precise guide for commercial transactions under which businessmen may predict with confidence the results of their dealings."<sup>136</sup> In short, the Code was drafted to facilitate commercial transactions and freedom of contract. Rulings which frustrate the parties' intent, unnecessarily restrict freedom of contract, or inhibit commercial activity are contrary to the purpose behind the Uniform Commercial Code.<sup>137</sup>

Returning to the hypothetical scenario involving Beacon Airlines, if credit card receivables were classified as instruments, and the Bank were required to take possession of the receivables (or at least those in point-of-sale transactions for which a signed writing exists) in order to perfect its security interest, perfection would be impractical and the Bank would likely not have agreed to this financing arrangement in the first place. The *Air Florida* court's concern about stopping airline financings dead in their tracks might well be realized.

Given the uncertain fit of credit card receivables into the instrument classification, the doubtful propriety of so classifying any writing which must be collected through a clearing-house procedure to which the creditor may have no access, and the strong likelihood that at least some receivables — those generated by telephone or mail order — cannot reasonably fall within the classification anyway, the counter-policy result of classifying credit card receivables as instruments should tip the balance against such a conclusion.<sup>138</sup>

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135. U.C.C. § 1-102 comment 1 (1989).

136. *In re Automated Bookbinding Services, Inc.*, 471 F.2d 546, 552 (4th Cir. 1972). See also *Community Bank v. Jones*, 278 Or. 647, 667, 566 P.2d 470, 482, (1977) ("Consistency and predictability in commercial transactions is one of the purposes of the Uniform Code.").

137. *In re Southern Properties, Inc.*, 44 Bankr. 838, 843 (Bankr. E.D. Va. 1984).

138. At least one additional and intricate, but ultimately unpersuasive, argument for classifying certain credit card receivables as accounts can be made using Article Five of the Uniform Commercial Code.

In many ways, credit cards closely resemble revocable letters of credit. See *Manufacturers & Traders Trust Co. v. Lindauer*, 135 Misc. 2d 132, 135-36, 513 N.Y.S.2d 629, 632-33 (Sup. Ct. 1987); *Preston State Bank v. Jordan*, 692 S.W.2d 740, 742 (Tex. Ct. App. 1985); Davenport, *supra* note 94, at 948-49, 963-70; Note, *The Applicability of the Law of Letters of Credit to Modern Bank Card Systems*, 18 U. KAN. L. REV. 871 (1970); Note, *Credit Cards — Civil and Criminal Liability for Unauthorized or Fraudulent Use*, 35 NOTRE DAME L. REV. 225, 226-28 (1960). See also *Colorado Springs Nat'l Bank v. United States*, 505 F.2d 1185 (10th Cir. 1974) (credit card business is the same as the letter-of-credit business for federal income tax purposes). In both cases, the customer is able to acquire goods or services from a third party by presenting the appropriate documentation and thereby effectively substitute the issuer's direct payment obligation for its own. Moreover, the credit card, like the letter of credit, involves at least three independent contracts.

Assuming that credit cards are a form of letter of credit — and the U.C.C. definition of a letter of credit is quite broad, see U.C.C. § 5-103(1)(a) (1989) — then cards issued by banks, but not other cards, will be governed by Article Five. See U.C.C. § 5-102(1) (1989). See also U.C.C. § 1-201(4) (1989) (defining "bank" to mean anyone in the business of banking); *Lichtenstein v. Kidder, Peabody & Co.*, 727 F. Supp. 975, 977-79 (W.D. Pa. 1989) (brokerage house which accepts deposits and permits withdrawals by check is in the business of banking); *Asian Int'l, Ltd. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 435 So. 2d 1058, 1062 (La. Ct. App. 1983) (to same effect). Cf. *Independent Bankers Ass'n v. Smith*, 534 F.2d

### *The Second Scenario — Receivables Held by the Issuer*

The need to classify credit card receivables under Article Nine can arise in a transaction quite different from a collateralized loan to a merchant, such as Beacon Airlines. Even when back in the hands of the issuer, credit card receivables can be and are used as collateral. Specifically, since 1985, issuers of credit cards have used their outstanding receivables to collateralize securities (known as "asset-backed securities") which they then sell in a private sale or through a public offering. These transactions are usually structured in one of two ways: as a sale of the receivables to a trust, using certificates of ownership in the trust; or as a borrowing, using notes collateralized by the receivables.<sup>139</sup>

Under both structures, the issuer usually continues to administer and collect the receivables included in the transaction and is paid for this service. Although the two structures are similar, they are thought to have some very different legal consequences. For instance, the sale structure, unlike the borrowing structure, permits the issuer to remove the receivables from its balance sheet for financial reporting, regulatory accounting, and Regulation D purposes.<sup>140</sup> Nevertheless, because the issuer usually retains much of the risk of loss,<sup>141</sup> and all of the day-to-day control over the receivables, it remains unclear whether the sale structure should be treated as a true sale for

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921, 948 (D.C. Cir. 1976) (giving cash advances on credit cards through use of ATMs is the business of banking for federal banking law purposes).

Article Five provides that:

Even though the credit specifically states that it is nontransferable or nonassignable the beneficiary may before performance of the conditions of the credit assign his right to proceeds. Such an assignment is an assignment of an account under Article 9 on Secured Transactions and is governed by that Article except that

- (a) the assignment is ineffective until the letter of credit or advice of credit is delivered to the assignee which delivery constitutes perfection of a security interest under Article 9;

U.C.C. § 5-116(2) (1989). This provision suggests that granting a security interest in credit card receivables (*i.e.*, assigning them for security) is to be treated as a pledge of accounts under Article Nine, but that possession of the card itself will be necessary to perfect that interest.

It is this possession requirement, as much as anything else, that forces the analogy of credit cards to letters of credit to break down. Obviously, it is in no one's interest to require the merchant to take possession of the cardholder's card and then transfer the card to a creditor with a security interest in receivables. This would be an administrative problem for both the merchant and the creditor and would totally undermine the usefulness of the card from the cardholder's perspective.

Put another way, "a letter of credit appears to be employed generally for a particular transaction, whereas a credit card is employed on multiple financial transactions." *Lindauer*, 135 Misc. 2d at 135, 513 N.Y.S.2d at 632. See also B. CLARK, *supra* note 33, at ¶ 11.02[5] (discussing the differences between credit cards and letters of credit). Because credit cards fit poorly into the old statutory scheme for letters of credit, at least one author has suggested that only some of the rules applicable to letters of credit be applied to credit cards. Davenport, *supra* note 94, at 963. The rule embodied in § 5-116(2) is one rule which should not be applied to credit cards.

139. R. HOUGHTON, *supra* note 28, at 6-9, 16-18.

140. *Id.* at 9; B. CLARK, *supra* note 33, at ¶ 11.10. See also Opinion Letter from Orrick, Herrington & Sutcliffe to Bank of America Nat'l Trust and Sav. Ass'n and First Boston Corporation 2 (March 4, 1987) (involving the BofA \$250,000,000 asset-backed securities discussed by Clark).

141. The vehicles by which the issuer retains this risk vary significantly, from use of certain indemnities and letters of credit to certain pooling arrangements.

commercial law purposes or whether it is more properly characterized as a securitized borrowing.<sup>142</sup> Thus, even in transactions structured as a sale of the receivables, the purchasers of the securities must be concerned with how to perfect an interest in credit card receivables held by the card issuer.

The volume of receivables involved in these transactions is truly staggering. In the first five years that asset-backed securities were issued with credit card receivables as the collateral, over \$34.2 billion in securities were sold using these two structures.<sup>143</sup> Moreover, the amount of securities issued each year continues to greatly increase, so that over \$14.1 billion of this total was issued in 1989 alone.<sup>144</sup> In the first quarter of 1990, an additional \$6.5 billion were sold through public offerings.<sup>145</sup>

If the issuer involved in any of these deals becomes insolvent or if the credit support for any of these transactions should collapse, the securityholders' position may ultimately depend on whether they have a perfected security interest in the receivables.<sup>146</sup> Since none of the securityholders or their agents in these transactions has taken possession of the credit card slips, billions of dollars are riding on the Article Nine classification of the receivables. Fortunately for those law firms and lawyers who render opinions that the securityholders have a perfected security interest in the receivables,<sup>147</sup> reasons in addition to those discussed above support their conclusion.

Unlike receivables held by a merchant, merchant bank, or other intermediary, receivables held by the issuer have nowhere to go in the collection process. To the extent that the issuer still needs to receive payment from the cardholder, the process which effects this no longer involves transfer of the written credit slips — even when they exist<sup>148</sup> — back to the cardholder.<sup>149</sup>

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142. Opinion Letter of Orrick, Herrington & Sutcliffe, *supra* note 140, at 2; Opinion Letter from Morrison & Foerster to First Boston Corporation 7-8 (March 4, 1987) (discussing in the alternative the effects of a sale or loan characterization of the same transaction). Orrick, Herrington & Sutcliffe did render an opinion, after lengthy analysis, that the transaction was a collateralized loan for federal income tax purposes. Opinion Letter of Orrick, Herrington & Sutcliffe, *supra* note 140, at 16-36.

Even when the transaction is treated as a sale, if the receivables constitute accounts, then the buyer must file a financing statement to protect its interests. *See supra* note 15.

143. 464 THE NILSON REPORT 1, 3 (1989)

144. Of these, approximately \$10.5 billion were sold through public offerings and over \$3.6 billion in private sales. *Id.*

145. 472 THE NILSON REPORT 1, 3 (1990).

146. This would certainly be true if the issuer went into bankruptcy. *See* 11 U.S.C. § 544(a) (1988) (giving the bankruptcy trustee the power to avoid unperfected security interests). However, the Financial Institutions Reform, Recovery & Enforcement Act of 1989 provides that the conservator or receiver of an insured depository institution generally takes the assets of the institution subject to "any legally enforceable or perfected security interest" in such assets. Pub. L. No. 101-73, § 212(a), 103 Stat. 183, 222-40 (1989) (codified at 12 U.S.C.A. § 1821(e)(11) (West 1989)) (emphasis added). Although this provision would make more sense and be more consistent with prevailing bankruptcy law if it referenced "legally enforceable and perfected" security interests, its present form suggests that receivers do take subject to unperfected but enforceable security interests.

147. *See* Opinion Letter of Morrison & Foerster, *supra* note 142, at 7 (concluding that the security interest was perfected, without possession).

148. Not only are merchant purchases effected by telephone or mail order likely not to be represented by a writing, but all the receivables resulting from cash advances, whether from the ATM of the issuer or some other bank, will exist solely in electronic media. Cash advances

Thus, not only are the writings not generally transferred by delivery,<sup>150</sup> they are not presented to anyone for payment.

Put another way, the receivables generated by merchant sales have, in a very real sense, already been paid. As already noted, the processing of bank card charges is very similar to the check collection process.<sup>151</sup> To the extent that the credit slip is analogous to a check, then once in the hands of the issuer who has paid the merchant or merchant bank, it is like a check that the drawee bank has paid. Such a check is no longer an instrument; it was a written order directing the bank to make payment, which the bank has now done. There is no right to payment left on such a check. If the bank payment creates an overdraft of the drawer's deposit account, the bank may sue *on the account*, but not on the check itself.

Similarly, money owed to the issuer by the cardholder from using the card is best characterized as a direct obligation on the cardholder agreement, not as an assignment of the obligation originally running to the merchant.<sup>152</sup> As such, the receivable is best characterized as a general intangible.<sup>153</sup>

## CONCLUSION

Billions of dollars will be at stake when courts finally determine how credit card receivables and the little slips of paper which evidence them should be classified under Article Nine of the Uniform Commercial Code. Although such writings appear to meet the literal wording of the Code's definition of "instruments," and at least some commentators have suggested that they are instruments, no persuasive reason exists to classify them as such. They are not transferable, they are generally not presented back to the issuer in the collection process, and creditors usually have no access to the clearinghouse procedure through which they are paid. Classifying them as instruments, and thereby requiring secured creditors to take possession of them in order to perfect their interest, would serve no useful purpose.

Moreover, requiring possession to perfect an interest in credit card receivables would undermine the ability of creditors to perfect their security interests and would effectively prevent them from using credit card receivables as collateral. It would also require creditors and debtors to continuously

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on Visa and MasterCard amounted to 11.99 percent of the total domestic transaction dollar volume in 1989. 475 THE NILSON REPORT 4 (1990).

149. See *supra* notes 35-36 and accompanying text.

150. To the extent that the issuance of asset-backed securities collateralized with credit card receivables represents a transfer of the receivables, it is a transfer not effected by delivery. Indeed, none of these transactions would go forward if delivery were required because the transactions would be too difficult and costly to administer. Moreover, the issuer rarely gets the writing physically returned to it, and thus cannot deliver it to anyone else. See *supra* note 36 and accompanying text.

151. See *supra* note 38 and accompanying text.

152. B. CLARK, *supra* note 33, at ¶ 11.02[5].

153. In the hands of merchants, credit card receivables *may* represent "rights to payment for goods sold or leased or for services rendered," and thus constitute "accounts" under § 9-106. Once the issuer *pays* this account through the collection process, however, it acquires a general intangible right against the cardholder since its extension of credit is not a service that the definition of "accounts" was meant to include. U.C.C. §§ 9-102 comment 2, 9-106 comment 1 (1989). See also B. CLARK, *supra* note 33, at ¶ 11.10 n.184.

distinguish between credit card receivables created in point-of-sale transactions and those arising from telephone and mail orders, for which no writing exists. The Uniform Commercial Code was not intended to so frustrate commercial transactions.

Thus, whether in the hands of the merchants who accept payment by way of credit card, the entity which issued the credit card, or some third-party intermediary or assignee, credit card receivables should be classified as accounts or general intangibles, not instruments.

