NEVADA'S FAILURE TO SECURE ITS FUTURE: AN ANALYSIS OF THE OMISSION OF U.C.C. § 9-318(a) AND ITS EFFECT ON ASSET SECURITIZATION

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I. INTRODUCTION

Nevada enacted U.C.C. Revised Article 9 on July 1, 2001.[1] However, unlike the other forty-nine states, Nevada failed to adopt U.C.C. § 9-318(a), which was designed to prevent extensive litigation over asset securitization.[2] While asset securitization has not yet been heavily litigated, the drafters of Revised Article 9 anticipated a proliferation of litigation involving asset securitization.[3] Article 9 was revised to provide certainty in asset securitization and to avoid this anticipated litigation.[4] Nevada's failure to adopt all of Revised Article 9 will continue the uncertainty regarding asset securitization.[5]

Securitization is the most rapidly growing segment of United States credit markets and is increasingly becoming a major part of foreign credit markets.[6] Asset backed securities have grown from $1 billion in 1985 to $185 billion in 1999.[7] There are approximately $2.5 trillion asset backed securities currently outstanding.[8]

Securitization allows a company that is in need of liquid assets to secure money without obtaining a traditional financing loan.[9] Securitization begins with a company, called the originator, selling its assets[10] to a separate company, called a special purpose vehicle (SPV).[11] The SPV then issues securities,

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1 *See* NEV. REV. STAT. 104.9101-.9709 (2001).

2 *See id.*

3 Lois R. Lupica, *Revised Article 9, Securitization Transactions and the Bankruptcy Dynamic*, 9 AM. BANKR. INST. L. REV. 287, 293-94 (2001).

4 *Id.* at 300.

5 *See* discussion *infra* Part VIII.

6 Steven L. Schwarcz, *The Impact on Securitization of Revised UCC Article 9*, 74 CHI.-KENT L. REV. 947, 947 (1999).

7 Lupica, *supra* note 3, at 291.

8 *Id.*

9 Joseph C. Shenker & Anthony J. Colletta, *Asset Securitization: Evolution, Current Issues and New Frontiers*, 69 TEX. L. REV. 1369, 1376-77 (1991).

10 *See infra* notes 41-44 and accompanying text for more detail regarding the types of assets that are commonly involved in securitizations.

11 Schwarcz, *supra* note 6, at 947-48.

backed by the SPV purchased assets, to investors.[12] The SPV makes a good investment because the SPV is specially created for such transactions and only holds the assets, and not the debts, of the originator.[13] Additionally, the SPV is a good investment because when it buys the assets from the originator the assets are removed from the originator's estate.[14] This means that, if the originator files for bankruptcy, those assets will not be included in the bankruptcy estate.[15] However, in 1993, the Tenth Circuit released a controversial decision that, at least within the Tenth Circuit, placed such assets within the control of the bankruptcy estate.[16]

Section 9-318(a) of Revised Article 9 was designed, in part, to avoid the result reached in the Tenth Circuit, and to assure that SPV's could purchase assets without risking bankruptcy by the originating company. This note analyzes the effect of Nevada's omission of § 9-318(a) on securitization transactions. To accomplish this, Part II explains a typical securitization transaction. Part III demonstrates the benefits of securitization as a financing tool, while Part IV looks at its disadvantages. In Part V, this note examines the relationship between securitization and Article 9 by analyzing the Tenth Circuit's controversial decision and the efforts of Revised Article 9 to eliminate the uncertainty created by the Tenth Circuit. Part VI looks at Nevada's failure to adopt U.C.C. § 9-318(a), while Part VII explains why U.C.C. § 9-318(a) was not adopted in Nevada. Finally, Part VIII explains the impact that Nevada's failure to adopt U.C.C. § 9-318(a) may have on asset securitization.

II. A Typical Securitization Transaction

A typical securitization involves an originator that has a significant pool of payment obligations.[17] To obtain capital through the ordinary course of business, the originator must either wait for payment on its accounts receivables or attempt to secure a traditional loan secured by these assets.

Securitization provides an alternative means for raising capital. Investors may be interested in investing in the company because of the company's accounts receivables. However, investors may be deterred by the originator's debts and the possibility of bankruptcy since the investors could lose their money if the originator files bankruptcy. To deal with investors' insecurities an SPV is created.[18] Rather than investing directly in the originator (and risk the originator filing for bankruptcy), the SPV buys the originator's accounts receivables in a true sale.[19] The SPV is created with only the assets purchased from the originator.[20] Investors then buy securities in the SPV, backed by the assets

[12] *Id.* at 948.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 950.
[16] *See infra* notes 85-126 and accompanying text.
[17] Shenker & Colletta, *supra* note 9, at 1376-77.
[18] David Gray Carlson, *The Rotten Foundations of Securitizations*, 39 Wm. & Mary L. Rev. 1055, 1056 (1998).
[19] *Id.* at 1055-56.
[20] *Id.* at 1056.

bought from the originator.[21] The originator is paid with the money received from the investors,[22] and the investors are paid out of the money that is collected on the assets.[23] The process of creating an SPV to purchase assets from an originator and allowing investors to invest without the risk of bankruptcy is securitization.

The key to securitization is effectuating a true sale to a bankruptcy remote company, such as an SPV. When the transfer of assets is a true sale, the originator does not retain an interest in the assets, and the assets are not part of the bankruptcy estate if the originator files for bankruptcy.[24] Courts typically determine whether a transfer is a true sale or the creation of a security interest.[25] In making this decision, courts weigh a variety of factors, including the parties' intent, whether the originator retained a residual interest in the assets, whether the purchaser paid fair market value for the assets, and whether the originator and the SPV have recourse against one other.[26] After examining these factors, the court uses its discretion to determine whether the transaction is a true sale or merely the creation of a security interest.[27]

Even if a true sale is accomplished, a securitization is only effective to a bankruptcy remote company. Bankruptcy remoteness is achieved by removing all incentives to filing for bankruptcy.[28] Different methods are used to make an SPV bankruptcy remote.[29] For example, the activities of the SPV could be limited to only owning the transferred assets.[30] This means the SPV cannot engage in any other activities and the SPV has no creditors.[31] Another way in which an SPV is made bankruptcy remote is by requiring the SPV to have the unanimous consent of its board before filing for bankruptcy.[32] This effectively shields the SPV from bankruptcy since the board usually consists of the investors, and it is assumed the investors will not give their consent.[33]

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[21] Schwarcz, *supra* note 6, at 948.

[22] *Id.*

[23] *Id.*

[24] Lois R. Lupica, *Circumvention of the Bankruptcy Process: The Statutory Institutionalization of Securitization*, 33 CONN. L. REV. 199, 213-14 (2000).

[25] *Id.* at 213.

[26] *Id.* at 213-14.

[27] *Id.*

[28] Ellisa Opstbaum Habbart & Andrew G. Kerber, *Getting the Right Fit*, BUS. L. TODAY, Nov.-Dec. 2001, at 33, 36.

[29] Stephen H. Case & Kurt M. Hoffman, *Secured Claims & Structured Financial Products in Bankruptcy Cases*, 826 PRAC. L. INST. 47, 59 (Oct.-Nov. 2001).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* It is not always possible to protect an SPV from bankruptcy. The unanimous consent provision does not affect the ability of creditors to file an involuntary Chapter 11 bankruptcy petition. Additionally, an originator may even collude with its creditors in an attempt to facilitate the filing of an involuntary bankruptcy petition. For example, in *In re Kingston Square Ass'n*, 214 B.R. 713 (S.D.N.Y. 1997), a debtor allegedly colluded with its creditors and convinced the creditors to file an involuntary bankruptcy against the debtor. The debtor was precluded from filing its own bankruptcy by a clause in its bylaws requiring the debtor to obtain unanimous consent before filing bankruptcy. *Id.* The Bankruptcy Court found that the debtor nevertheless was entitled to bankruptcy relief. *Id.*

When a true sale to a bankruptcy remote company is possible, investors are drawn to investing in the SPV. In making the decision whether to invest in the SPV, investors analyze the value of the assets. Investors do not give consideration to the originator's financial condition because the originator no longer owns the assets.[34] Many times, investors rely on credit rating agencies that rate the likelihood of repayment on the accounts.[35] The credit rating agencies consider the bankruptcy remoteness of the SPV,[36] the likelihood of collection, and the worthiness of the assets.[37] If a rating is high, the investment is considered to be a low risk.[38] For securities backed by a pool of mortgages, the credit rating agencies evaluate the "risk based on a statistical analysis of the cash flow generated by the pool, rather than the market value of the collateral or the issuer's own unsecured rating."[39] The rating reflects the worthiness of the investment.[40]

A securitization can involve many types of assets.[41] Generally, securitizations happen in multi-million dollar deals and involve income producing assets that are pooled together in a large, homogeneous group.[42] The best assets for securitization are those that have "standardized terms, delinquency and loss experience that can support an actuarial analysis of expected losses, and uniform underwriting standards and servicing procedures satisfactory to rating agencies and investors."[43] Assets such as individual commercial real property may be ideal for securitization.[44]

Generally, the originator continues to service the assets after the sale to the SPV, meaning the originator remains in control of the assets and proceeds with collection efforts.[45] The originator and SPV enter into a contract providing for servicing for which the originator receives a fee.[46] Payments are made to the originator without the payor realizing the account was sold to an SPV.[47] Then the originator forwards the payments to the SPV so it can pay its investors.[48]

Securitization allows the originator to transform its assets into tradable securities.[49] Through securitization the risks of investing are reduced or reallocated.[50] Securitization allows the originator to obtain financing from a broader capital market, thereby allowing for financing when traditional financing is not possible.[51]

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34 Schwarcz, *supra* note 6, at 948.
35 Shenker & Colletta, *supra* note 9, at 1401.
36 Habbart & Kerber, *supra* note 28, at 36.
37 Shenker & Colletta, *supra* note 9, at 1401.
38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.* at 1377.
42 *Id.* at 1376-77.
43 *Id.* at 1377.
44 *Id.*
45 Carlson, *supra* note 18, at 1091-92.
46 *Id.*
47 *Id.*
48 *Id.* at 1092.
49 Shenker & Colletta, *supra* note 9, at 1374.
50 *Id.*
51 *Id.* at 1375.

III. Benefits of Securitization

Many people believe that asset securitization plays an essential and beneficial role in the financial market today:[52]

> Securitization has been a boon to virtually every participant in the capital markets, including: banks and other financial institutions looking for alternative sources of funds and fee income; borrowers seeking to lower their cost of funds by broadening their access to the capital markets; investment bankers generating income by underwriting, making markets in, and trading asset-backed securities; and investors preferring highly rated securities with greater protection from downgrading than traditional debt and often with greater yields than securities of comparable credit quality.[53]

Securitization also provides many benefits to originators. For example, asset securitization benefits an originator by allowing it to liquidate its assets.[54] A conventional loan is often not available to the originator, not because the assets are uncertain, but because the business may not be sufficiently stable.[55] By eliminating the risk of bankruptcy, asset securitization removes the stability of the originator from the equation and allows the originator to obtain financing based only upon its assets.[56] Asset securitization also benefits the owner of illiquid assets by allowing it to obtain multiple investors, thereby increasing the amount of money available for a deal.[57] Additionally, asset securitization benefits originators because it allows an originator to receive money from the SPV earlier than the originator would have had it kept the assets.[58] An originator may also be paid a servicing fee for the maintenance of the assets if the assets remain in the originator's control.[59] Finally, securitization is beneficial to originators because it allows an originator to reduce the borrowing costs it would incur with traditional loan financing.[60]

Securitization is especially beneficial for investors. With securitization, an investor is able to engage in low-risk investing.[61] When a credit rating is

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52 *Compare id. and* Schwarcz, *supra* note 6, at 947 *with* Carlson, *supra* note 18, at 1055.

53 Shenker & Colletta, *supra* note 9, at 1372.

54 Carlson, *supra* note 18, at 1056.

55 Schwarcz, *supra* note 6, at 948. However, in situations where a conventional loan would be available, originators and investors may prefer a securitization transaction for several reasons. First, securitization prevents the assets from being included in the bankruptcy estate. G. Ray Warner, *Asset Securitization Under Revised Art. 9*, Am. Bankr. Inst. J., Sept. 19, 2000, at 16. If the assets were included in the estate, the investors would have altered rights and less certainty. Second, securitization allows an investor to invest "indirectly in assets in which they could not invest directly because of legal impediments or because the transaction seized was too large." Shenker & Colletta, *supra* note 9, at 1383 (citations omitted). Finally, securitization may be preferred to gaining a first priority security interest because it allows the originator to obtain financing on more "advantageous terms through lower interest rates or off-balance sheet structures." Steven L. Schwarcz, *The Parts are Greater Than the Whole: How Securitization of Divisible Interests Can Revolutionize Structured Finance and Open the Capital Markets to Middle-Market Companies*, 1993 Colum. Bus. L. Rev. 139, 140 (1993) (citations omitted).

56 *See generally* Schwarcz, *supra* note 55.

57 Shenker & Colletta, *supra* note 9, at 1403.

58 *Id.* at 1395.

59 *Id. See supra* notes 45-48 and accompanying text.

60 Shenker & Colletta, *supra* note 9, at 1395.

61 *Id.* at 1393.

applied to assets, the rating reflects the risk of investing in these assets.[62] This allows an investor to be secure in the value of the investment.[63] Securitization allows an investor to assess the value of the investment itself rather than the qualities of the originator.[64]

IV. Disadvantages of Securitization

Although securitization has its proponents in the financial and legal community, others caution against its use. Since securitization has expanded greatly in recent years, its critics warn that the negative aspects of securitization have not yet caught up and that the disadvantages of securitization will be exacerbated by the rapid growth of the market.

Securitization has a major impact on third parties who are not part of the transaction.[65] As one commentator has argued, "[u]nfortunately, the impact of [securitization] will be felt not merely by the parties consenting to the securitization transaction, but by all the participants in the credit markets, as well as all those affected by a securitizing firm's business."[66] Generally, unsecured creditors, like tort claimants, suppliers, trade creditors, consumers with warranty claims, and employees with wage claims, suffer in bankruptcy.[67] Generally, these types of creditors do not anticipate their debtors filing for bankruptcy so they do not, or cannot, make adjustments to accommodate for this contingency.[68] When the bankruptcy estate is insolvent, unsecured creditors do not receive the full value of their claims.[69] This problem is aggravated when a debtor goes into bankruptcy after a securitization.[70] If a securitization is effective as a true sale, the assets are not included in the bankruptcy estate,[71] leaving even less to unsecured creditors.[72] Unsecured creditors, unlike large financiers, are not as capable of dealing with such a financial loss.[73] These creditors are more vulnerable to the cash flow shock a bankruptcy causes.[74]

Another problem with securitization is it will likely prevent an originator who gets into financial trouble from reorganizing.[75] Although the originator generally receives a lump some of money immediately after the securitization,

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62 *Id.* at 1401.
63 *Id.*
64 *Id.*
65 Lupica, *supra* note 24, at 232-36.
66 *Id.* at 201.
67 *Id.* at 235.
68 *Id.* at 232-33.
69 *Id.*
70 *Id.* at 235.
71 David J. Kaufmann, Jordan Yarett, Brian L. Schorr & Curtis S. Gimson, *Securitization: An Overlooked Financing Vehicles for Franchisors*, 20 Franchise L.J. 161, 197 (Spring 2001).
72 Lupica, *supra* note 24, at 235.
73 *Id.*
74 *Id.* For further discussion regarding the impact of securitization on unsecured creditors, *see* G. Ray Warner, *The Anti-Bankruptcy Act: Revised Article 9 and Bankruptcy*, 9 Am. Bankr. Inst. L. Rev. 3, 9-15 (2001).
75 *Id.* at 236.

it gives up in return some of its primary assets.[76] If the originator does not own the sold assets, and the assets are not available in bankruptcy, the originator is unlikely to have the assets necessary to effectuate reorganization.[77] Thus, the originator is forced to liquidate. In liquidation, the business fails, and employees, suppliers, trade creditors, and customers lose an opportunity to continue a potentially profitable relationship with the originator.[78]

Although securitization has its critics, it is a practice that continues to grow and provide a viable avenue of obtaining liquid assets.

V. Article 9 and Securitization

Revised Article 9 is expected to bring asset securitization transactions completely within its scope, even though securitization was partially governed by Former Article 9.[79] Former Article 9 covered "the sale of accounts and chattel paper in addition to governing the security interests on all personal property."[80] The sale of general intangibles or instruments was not covered by Former Article 9, but was covered by the common law of assignments.[81] Under Former Article 9 it was assumed that a sale of assets to an SPV extinguished all rights the originator had in the assets, thus removing the assets from the bankruptcy estate.[82] However, in *Octagon Gas Systems, Inc. v. Rimmer*,[83] the Tenth Circuit found that assets sold to an SPV were part of the bankruptcy estate. *Octagon Gas* brought into doubt what was thought to be obvious: that a seller of assets does not retain an interest in the assets sold.[84]

A. *Octagon Gas Systems, Inc. v. Rimmer*[85]

Octagon Gas "set off an international fire storm of rage and indignation."[86] In *Octagon Gas*, the Tenth Circuit, in a 2-1 decision, found that, even though accounts were sold, Former Article 9 caused the accounts to be subject to the bankruptcy estate of Poll Gas, Inc. (Poll).[87]

The facts in *Octagon Gas* are relatively simple. Poll gathered and sold gas in Oklahoma.[88] As part of its business, Poll owned and operated a gas gathering system.[89] Amcole Energy Corporation (Amcole) owned ten percent of Poll's stock.[90] The remaining stock was divided among four other stockhold-

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[76] *Id.*
[77] Lupica, *supra* note 3, at 290-91.
[78] *Id.* at 314.
[79] Schwarcz, *supra* note 6, at 949.
[80] Carlson, *supra* note 18, at 1058.
[81] *Id.*
[82] *Id.*
[83] 995 F.2d 948 (1993).
[84] Carlson, *supra* note 18, at 1058.
[85] 995 F.2d 948.
[86] Carlson, *supra* note 18, at 1059.
[87] *Octagon Gas*, 995 F.2d at 948.
[88] *Id.* at 951.
[89] *Id.*
[90] *Id.*

ers.[91] In 1976, Amcole entered into an agreement with the other stockholders to purchase their shares in Poll, whereby Amcole would becomes Poll's sole shareholder.[92] In exchange, the other stockholders received a proportionate overriding royalty interest in the proceeds received by Amcole from gas sold through the gas gathering system.[93]

In 1982, Poll assigned to SINA 79/80 Limited (SINA) an overriding royalty interest in the gross proceeds derived from the gas gathering system.[94] Rimmer, an investor, received half of its overriding royalty interest from the 1976 deal[95] and the other half from the 1982 deal.[96] "In 1982 and 1984, Rimmer purchased, from the original assignees, a portion of the 'overriding royalty interests' created by the 1976 Agreement and the 1982 Assignment."[97] In 1987 Rimmer, Amcole, and Poll executed an Assignment of Overriding Royalty Interest.[98] The agreement provided that Rimmer owned a five percent perpetual overriding royalty interest on all proceeds payable to Poll under the gas gathering system.[99]

Poll paid Rimmer five percent of its proceeds from the sale of the gas until Poll filed for Chapter 11 Bankruptcy in 1988.[100] The bankruptcy trustee continued to pay Rimmer during the pendency of the bankruptcy.[101]

Under the bankruptcy plan, which was confirmed in 1990, the gas gathering system was conveyed to Norwest Bank Minnesota (Norwest) in satisfaction of its secured claim.[102] The conveyance to Norwest was to be "free and clear of liens, claims, interests, and encumbrances."[103] Subsequently, Norwest conveyed the gas gathering system to Octagon Gas Systems, Inc. (Octagon).[104] Octagon refused to recognize any interest held by Rimmer and discontinued Rimmer's payments.[105]

A creditor of Rimmer, Bonnet Resources Corporation, brought the action, alleging it was secured by Rimmer's interest in the gas sale proceeds.[106] Rimmer successfully intervened in the action.[107] The bankruptcy court determined that Rimmer held a five percent interest in the proceeds that was not affected by the bankruptcy plan.[108] The court held that Rimmer's interest was (1) a partial interest, (2) was a good, and (3) amounted to a proportionate ownership

[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Octagon Gas*, 995 F.2d at 951.
[96] *Id.* at 952.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*

right.[109] Therefore, the bankruptcy court held that Rimmer's interest was not property of the bankruptcy estate and was not affected by the plan and subsequent sale of the gas gathering system to Octagon.[110]

The Tenth Circuit held Rimmer had an interest in the gas sale proceeds, and Article 9 was applicable to Rimmer's interest.[111] This determination placed Rimmer's interest in the bankruptcy estate, meaning he needed to have perfected his security interest in order to have priority over Octagon's other creditors.[112] The parties all agreed Rimmer's interest in the proceeds was an account under U.C.C. Article 9.[113] However, Rimmer argued that, even if his interest was an account under Article 9, he owned the interest, not Poll;[114] therefore, the interest should not have been included in the bankruptcy estate.[115]

The Tenth Circuit agreed with the parties and held Rimmer held an interest in an account, which is within the purview of Article 9.[116] The court declared, "[t]he impact of applying Article 9 to Rimmer's account is that Article 9's treatment of accounts sold as collateral would place Rimmer's account within the property of Poll's bankruptcy estate."[117] The assignment of the account to Rimmer did not effectuate a transfer to Rimmer of all property interests in the account and did not remove the account from the reach of the bankruptcy trustee.[118]

The dissent stated that "[t]o apply the 'account' definition is to reverse the completed 1976 sale and revest the interest in Poll."[119] The dissent would find that Rimmer had paid several hundred thousand dollars to buy the interest and the application of Article 9 divested him of the interest.[120] The dissent concluded that the "UCC by fiat cannot change the consequences and legal nature of a transaction contrary to the intent of the parties."[121]

Octagon Gas established, at least in the Tenth Circuit, that a buyer of an account was really only obtaining a security interest in the collateral.[122] The affect of this was that an account could not be sold, making securitization of such assets difficult or impossible.[123]

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109 *Id.*
110 *Id.*
111 *Id.* at 952-58.
112 *Id.* at 955. The Tenth Circuit did not decide whether Rimmer had perfected his security interest, but stated that the bankruptcy court must make determinations regarding Rimmer's priority in the bankruptcy estate. *Id.* at 957-58.
113 *Id* at 954. The definition of "account" under Former Article 9 was "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." U.C.C. § 9-106 (1999).
114 *Octagon Gas*, 995 F.2d at 954.
115 *Id.*
116 *Id.* at 954-55.
117 *Id.* at 955.
118 *Id.*
119 *Id.* at 960 (Seth, J., dissenting).
120 *Id.*
121 *Id.*
122 Warner, *supra* note 55, at 16.
123 *Id.*

Octagon Gas was denounced in the financial press and legal journals.[124] In response to the decision, the Permanent Editorial Board of the U.C.C. issued a commentary stating *Octagon Gas* is incorrect.[125] Additionally, Comment 2 to Former U.C.C. § 9-102 was amended to clarify the interpretation of the section.[126] Nevertheless, in the Tenth Circuit, *Octagon Gas* remained the law until Revised Article 9 was adopted.

B. *Revised Article 9 and the Death of Octagon Gas*

Revised Article 9 "is intended to drive the final nail into the Octagon coffin."[127] The scope of Article 9 is expanded to bring more transactions within its purview.[128] In order to completely eliminate *Octagon Gas* and to support securitizations, Revised Article 9 includes several new provisions.[129]

First, the definitions of Article 9 have been expanded to include a greater number of assets and collateral.[130] Former Article 9 covered the sales of accounts and chattel paper because their financing was often accomplished by selling the accounts at a discount, making it difficult to distinguish between sales and financing transactions.[131] Revised Article 9 expands the definition of accounts[132] and chattel paper[133] to include a broader array of assets.[134] Addi-

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124 *See* Carlson, *supra* note 18, at 1059; Warner, *supra* note 55, at 16; Thomas E. Plank, *When a Sale of Accounts Is Not a Sale: A Critique of Octagon Gas*, 48 Consumer Fin. L.Q. Rep. 45 (1994); Note, Nikiforos Mathews, *Circuit Court Erie Errors and the District Court's Dilemma: From* Roto-Lith *and the Mirror Image Rule to* Octagon Gas *and Asset Securitization*, 17 Cardozo L. Rev. 739, 740-41 (1996).

125 PEB Commentary No. 14, Transfer of Accounts or Chattel Paper (1994).

126 U.C.C. § 9-102 cmt. 2 (1999).

127 Schwarcz, *supra* note 6, at 952.

128 Warner, *supra* note 55, at 16.

129 *See* U.C.C. § 9-318 (2001); U.C.C. § 9-102 (2001); U.C.C. § 401 (2001).

130 Warner, *supra* note 55, at 16.

131 *Id.*

132 See *supra* note 113 for the definition of "account" under Former Article 9. Under Revised Article 9,

> [a]ccount, except as used in 'account for,' means a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be to incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a vessel under a charter or other contract, (vii) arising out of the use of a credit or charge card or information contained on or for use with the card, or (viii) as winnings in a lottery or other game of chance operated or sponsored by a State, governmental unit of a State, or person licensed or authorized to operate the game by a State or governmental unit of a State. The term includes health-care-insurance receivables. The term does not include (i) rights to payment evidenced by chattel paper, (ii) commercial tort claims, (iii) deposit accounts, (iv) rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card.

U.C.C. § 9-102(a)(2) (2001). Under this expanded definition of accounts, more objects of securitization are brought within the purview of Article 9. "The securitization of payment streams that arise from the sale, lease, license, assignment or other disposal of tangible or intangible assets . . . including credit card receivables, lottery receivables, equipment, aircraft, public utility receivables, insurance receivables . . . all will be governed by Revised Article 9." Lupica, *supra* note 3, at 287.

133 Former Article 9 stated that chattel paper:

tionally, Revised Article 9 adds two new classes of assets to the types of sales subject to Article 9:[135] payment intangibles[136] and promissory notes.[137] This expansion brings most securitization transactions within the scope of Article 9.[138]

Second, Article 9 expanded its scope to expressly overrule *Octagon Gas.* Revised Article 9 clarifies that, unlike the result achieved in *Octagon Gas*, a sale of assets is possible if the parties intend the transaction to be a sale.[139] This is facilitated through multiple sections of Revised Article 9. Most sales, such as an assignment for the purpose of collection only, are excluded from the scope of Revised Article 9.[140] However, Article 9 does not prevent "the transfer of full and complete ownership of an account, chattel paper, an instrument, or a payment intangible in a transaction of sale."[141] Revised Article 9 perfection and priority rules apply to sales transactions and other transactions that create a security interest.[142]

Finally, Article 9 was expanded to ensure that a purchaser of assets will not suffer the fate of *Octagon Gas.* U.C.C. § 9-318(a) states, "A debtor that has sold an account, chattel paper, payment intangible, or promissory note does not retain a legal or equitable interest in the collateral sold."[143] The comment to U.C.C. § 9-318 states that this section "makes explicit what was implicit, but

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> means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods, but a charter or other contract involving the use or hire of a vessel is not chattel paper. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of such instruments, the group of writings taken together constitutes chattel paper.

U.C.C. § 9-105 (1)(b) (1999). Under Revised Article 9, chattel paper:

> means a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods. In this paragraph, 'monetary obligation' means a monetary obligation secured by the goods or owed under a lease of the goods and includes a monetary obligation with respect to software used in the goods. The term does not include (i) charters or other contracts involving the use or hire of a vessel or (ii) records that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card. If a transaction is evidenced by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper.

U.C.C. § 9-102(a)(11) (2001). Significantly, the expansion of the definition of chattel paper has been further expanded to become media neutral and include electronic chattel paper. Warner, *supra* note 55, at 16.

134 Warner, *supra* note 55, at 16.

135 *Id.*

136 "'Payment intangible' means a general intangible under which the account debtor's principal obligation is a monetary obligation." U.C.C. § 9-102(a)(61) (2001).

137 "'Promissory note' means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgement by a bank that the bank has received for deposit a sum of money or funds." U.C.C. § 9-102(a)(65) (2001).

138 Warner, *supra* note 55, at 16.

139 *See* U.C.C. § 9-109 (2001).

140 U.C.C. § 9-109(d) (2001).

141 U.C.C. § 9-109 cmt. 5 (2001).

142 *Id.*

143 U.C.C. § 9-318(a) (2001).

perfectly obvious, under former Article 9: The fact that a sale of an account or chattel paper gives rise to a 'security interest' does not imply that the seller retains an interest in the property that has been sold."[144]

The principal effect of bringing asset securitization within the scope of Article 9 is that Article 9 perfection and priority rules will determine the priority of the SPV over creditors of the originator and a trustee in a bankruptcy proceeding.[145] Generally, the first to file or perfect determines the priority of conflicting interests.[146] However, a sale of a payment intangible or promissory note will perfect upon attachment.[147] The automatic perfection rules protect securitization in payment intangibles and promissory notes from bankruptcy attacks since the creditors will not have to take additional steps to protect their interests.[148] Nevertheless, in order to avoid arguments regarding whether there was a "true sale," it may be best to file anyway.[149]

These sections of Revised Article 9 work together to protect securitizations and to ensure consistency and predictability throughout the country.[150]

VI. Nevada's Revised Article 9

Nevada adopted Revised Article 9 in its 1999 legislative session through Senate Bill 62.[151] Senate Bill 62 was introduced on January 29, 1999 on behalf of the Nevada Bankers Association.[152] As introduced, Nevada's Revised Article 9 did not include U.C.C. § 9-318(a).[153]

Senate Bill 62 was first heard in the Judiciary Committee of the Senate.[154] Since the omission of U.C.C. § 9-318(a) was made before the bill reached the committee and there is no mention of the omission in the committee minutes, it appears the committee was not aware of the omission.[155] The first hearing for Senate Bill 62 was held on February 4, 1999.[156] Alan Rabkin, from the Nevada Bankers Association, appeared in favor of Senate Bill 62 and provided general information regarding the differences between Former Article 9 and Revised Article 9.[157] The changes that were discussed at the hearing included the entrance of Article 9 into the electronic age, the expansion of the definitions of different types of collateral, and some changes to liens and foreclosures.[158]

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144 U.C.C. § 9-318 cmt. 1 (2001).
145 Warner, *supra* note 55, at 16.
146 U.C.C. § 9-322(a)(1) (2001).
147 U.C.C. § 9-309 (2001).
148 Warner, *supra* note 55, at 17.
149 *Id.*
150 Lupica, *supra* note 3, at 300.
151 S.B. 62, 1999 Leg., 70th Sess. (Nev. 1999), *available at* http:/www.leg.state.nv.us/70th/Reports/history.cfm?ID=1947 (last visited October 10, 2002) [hereinafter Reports].
152 *Id.*
153 *See id. See also* Nev. Rev. Stat. 104.9318 (2001).
154 *Senate Bill 62: Before the Senate Comm. on Judiciary*, 1999 Leg., 70th Sess. (Nev. Feb. 4, 1999), *available at* http:/www.leg.state.nv.us/70th/Minutes/SM-JUD-990204-Meeting%203.html (last visited October 10, 2002) [hereinafter Feb. 4 Hearing].
155 *Id.*
156 *Id.*
157 *Id.*
158 *Id.*

Scott Anderson, a representative from the Nevada Secretary of State's office, also testified.[159] He expressed some concern regarding the implementation and filing procedures in Revised Article 9.[160] Mr. Anderson requested, and the committee agreed, that the Secretary of State should have the opportunity to meet with the Nevada Bankers Association to discuss some potential changes to the proposed bill.[161]

The Senate Judiciary Committee held a second hearing on Senate Bill 62 on February 18, 1999.[162] The Nevada Bankers Association, in conjunction with the Nevada Secretary of State's office, proposed procedural changes to Senate Bill 62.[163] At this hearing, the committee discussed changes in filing procedures and the effective date of July 1, 2001.[164] The committee approved the proposed amendments to Senate Bill 62 and recommended a "do pass" on Senate Bill 62.[165]

Senate Bill 62 was then forwarded to the Assembly Judiciary Committee, which held a hearing on April 23, 1999.[166] Testimony at this hearing stated that, although the bill was extensive, none of the changes were radical.[167] Mr. Rabkin and Frank Daykin, a commissioner for the National Conference of Commissioners on Uniform State Laws, explained to the committee the importance of having uniform laws in the U.C.C.[168] Some general discussion regarding the changes Revised Article 9 would bring followed.[169] The omission of U.C.C. § 9-318(a) was not discussed at this meeting.[170]

The final hearing on Senate Bill 62 was held on April 27, 1999.[171] Prior to this meeting, Mr. Rabkin provided the committee with a summary of the differences between Revised Article 9 and Former Article 9.[172] After little discussion, the Assembly Judiciary Committee recommended a "do pass" on Senate Bill 62.[173]

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159 *Id.*

160 *Id.*

161 *Id.*

162 *Senate Bill 62: Before the Senate Comm. on Judiciary*, 1999 leg., 70th Sess. (Nev. Feb. 18, 1999), *available at* http:/www.leg.state.nv.us/70th/Minutes/SM-JUD-990218-SB%2062,%20Work%20Session.html (last visited October 10, 2002) [hereinafter Feb. 18 Hearing].

163 *Id.*

164 *Id.*

165 *Id.*

166 *See Senate Bill 62: Before the Assembly Comm. on Judiciary*, 1999 leg., 70th Sess. (Nev. Apr. 23, 1999), *available at* http:/www.leg.state.nv.us/70th/Minutes/AM-JUD-990423-FRIDAY'S%20MEETING.html (last visited October 10, 2002) [hereinafter Apr. 23 Hearing].

167 *Id.*

168 *Id.*

169 *Id.*

170 *Id.*

171 *Senate Bill 62: Before the Assembly Comm. on Judiciary*, 1999 leg., 70th Sess. (Nev. Apr. 27, 1999), *available at* http:/www.leg.state.nv.us/70th/Minutes/AM-JUD-990427-TUESDAY%20MEETING.html (last visited October 10, 2002) [hereinafter Apr. 27 Hearing].

172 *Id.*

173 *Id.*

Senate Bill 62 passed in both houses.[174] The Senate voted on the bill on March 3, 1999, and it passed seventeen to one.[175] The Assembly voted on the bill on April 29, 1999, and it passed thirty-nine to zero.[176] Governor Guinn of Nevada signed the bill into law on May 11, 1999.[177]

VII. An Explanation for the Omission of U.C.C. § 9-318(a) from Nevada's Revised Article 9

Nevada is the only state that did not adopt U.C.C. § 9-318(a).[178] The omission of U.C.C. § 9-318(a) was not discussed in the committee hearings,[179] and there does not appear to be a clear explanation as to why Nevada failed to adopt this one section of Revised Article 9.

However, there are some possible explanations as to why U.C.C. § 9-318(a) was not included in the Revised Article 9 presented to the Nevada State Legislature. Possibly, the omission of U.C.C. § 9-318(a) was inadvertent. However, the omission could have been deliberate and in reaction to the controversial nature of U.C.C. § 9-318(a).

The Nevada Bankers Association introduced Senate Bill 62 without U.C.C. § 9-318(a) included. It is possible that no one realized U.C.C. § 9-318(a) was omitted from the bill introduced to the Nevada State Legislature.

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[174] Reports, *supra* note 151.

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *See* Ala. Code § 7-9A-318(a) (2001); Alaska Stat. § 45.29.318(a) (Michie 2001); Ariz. Rev. Stat. § 47-9318(a) (2001); Ark. Code Ann. § 4-9-318(a) (Michie 2001); Cal. Com. Code § 9318(a) (West 2001); Colo. Rev. Stat. § 4-9-318(a) (2001); Conn. Gen. Stat. § 42a-9-318(a) (2001); Del. Code. Ann. tit. 6, § 9-318 (2001); D.C. Code Ann. § 28:9-318(a) (2001); Fla. Stat. ch. 679.3181(1) (2001); Ga. Code Ann. § 11-9-318(a) (2001); Haw. Rev. Stat. § 490:9-318(a) (2001); Idaho Code § 28-9-318(a) (Michie 2001); 810 Ill. Comp. Stat. 5/9-318(a) (2001); Ind. Code § 26-1-9.1-318(a) (2001); Iowa Code § 554.9318(1) (2001); 2000 Kan. Sess. Laws 142; Ky. Rev. Stat. Ann. § 355.9-318(1) (Michie 2001); La. Rev. Stat. Ann. § 10:9-318(a) (West 2001); Me. Rev. Stat. Ann. tit. 11, § 9-1318(1) (West 2001); Md. Code Ann., Com. Law I § 9-318(a) (2001); Mass. Gen. Laws ch. 106, § 9-318(a) (2001); Mich. Comp. Laws § 440.9318(1) (2001); Minn. Stat. § 336.9-318(a) (2001); Miss. Code Ann. § 75-9-318(a) (2001); Mo. Rev. Stat. § 400.9-318(a) (2001); Mont. Code Ann. § 30-9A-318(1) (2001); Neb. Rev. Stat. § 9-318(a) (2001); N.H. Rev. Stat. Ann. § 382-A:9-318(a) (2001); N.J. Stat. Ann. § 12A:9-318(a) (2001); N.M. Stat. Ann. §55-9-318(a) (Michie 2001); N.Y. U.C.C. § 9-318(a) (McKinney 2001); N.C. Gen. Stat. § 25-9-318(a) (2001); N.D. Cent. Code § 41-09-38 (2001); Ohio Rev. Code Ann. § 1309.318(A) (West 2001); Okla. Stat. Ann. tit. 12A, §1-9-318(a) (West 2001); 2001 Or. Laws 445; 13 Pa. Cons. Stat. Ann. § 9318(a) (West 2001); R.I. Gen. Laws § 6A-9-318(a) (2001); S.C. Code Ann. § 36-9-318(a) (Law. Co-op 2001); S.D. Codified Laws § 57A-9-318(a) (Michie 2001); Tenn. Code Ann. § 47-9-318(a) (2001); Tex. Bus. & Com. Code Ann. § 9.318(a) (Vernon 2001); Utah Code Ann. § 70A-9a-318(1) (2001); Vt. Stat. Ann. tit. 9A, § 9-318(a) (2001); Va. Code Ann. § 8.9A-318(a) (Michie 2001); Wash. Rev. Code Ann. § 62A.9A-318(a) (West 2001); 2000 W. Va. Acts 272; Wis. Stat. Ann. § 409.318(1) (West 2001); Wyo. Stat. Ann. § 34.1-9-318(a) (Michie 2001).

[179] *See* Feb. 4 Hearing, *supra* note 154; Feb. 18 Hearing, *supra* note 162; Apr. 23 Hearing, *supra* note 166; Apr. 27 Hearing, *supra* note 171.

Considering how large Revised Article 9 is,[180] there is the potential the omission was inadvertent. Nevertheless, the possibility remains that the absence of U.C.C. § 9-318(a) was deliberate.

There are several possible explanations as to why the Nevada Bankers Association would omit U.C.C. § 9-318(a); nonetheless, it is difficult to determine the specific reason why they would do so. Banks are in a unique situation with securitization because they are the one entity that is directly and unavoidably affected, in both negative and positive ways, by securitization.[181] Commercial banks find securitization attractive because it allows them to reduce their required capital holdings while at the same time earning income from origination and service fees.[182] Securitization also provides a bank greater liquidity, "not just in terms of the marketability of assets and liabilities, but also by encouraging a plethora of substitute or alternative investment and borrowing opportunities."[183] However, when securitization is made easier, banks are forced to either participate or lose a significant amount of business to securities firms.[184] Securitization may also make it more difficult for banks because securities firms are not governed by the same stringent regulations as banks.[185]

Another possible explanation for the omission of U.C.C. § 9-318(a) is that it creates a conflict between Article 9 and the Bankruptcy Code.[186] U.C.C. § 9-318(a) allows for the removal of certain assets from a bankruptcy estate. Since the bankruptcy trustees seek to include as many assets in the bankruptcy estate as possible,[187] while U.C.C. § 9-318(a) allows the avoidance of assets being placed in the bankruptcy estate, a clear conflict is created between Revised Article 9 and the Bankruptcy Code.[188] Additionally, creditors of the originator are uniquely disadvantaged when the originator securitizes its assets.[189] Omitting U.C.C. § 9-318(a) relieves some of this competition and loss.[190]

Regardless of why U.C.C. § 9-318(a) was omitted, the impact of its omission will be felt in the business world.

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[180] "[Revised Article 9] contains 80 definitions, 126 provisions and is 298 pages long. Its predecessor, puny by comparison, has 14 definitions, 57 provisions and spans a mere 129 pages." Ingrid Michelsen Hillinger & Michael G. Hillinger, *2001: A Code Odyssey (New Dawn For the Article 9 Secured Creditor)*, 106 COMMERCIAL L.J. 105, 105 (2001).

[181] *See generally* Stephen J. Cosentino, Note, *Swimming in New Waters – Bank Participation in Securitized Loan Pools*, 65 UMKC L. REV. 543, 546-50 (1997).

[182] *Id.* at 546.

[183] *Id.*at 547.

[184] *Id.* at 546.

[185] *Id.* at 551-59.

[186] Warner, *supra* note 74.

[187] Carlson, *supra* note 18, at 1060.

[188] However, the Bankruptcy Code is currently being revised. "The pending bankruptcy legislation contains language that would exclude assets transferred to an entity in a securitization from the estate." Patrick J. Murphy, *Revised Article 9 in Bankruptcy Cases*, 826 PLI/COMM 331, 336 (2001). This change would eliminate the inconsistencies between the bankruptcy code and Revised Article 9 regarding securitizations.

[189] *See supra* Part IV.

[190] *See* Carlson, *supra* note 18; Warner, *supra* note 55; Murphy, *supra* note 188, for further discussion regarding this competition.

VIII. The Impact of Nevada's Failure to Adopt U.C.C. § 9-318(a)

Nevada's failure to adopt U.C.C. § 9-318(a) significantly impacts Nevada's attempt to encourage businesses to conduct business in Nevada. For the past several years, Nevada has made a concerted effort to be a pro-business state. For example, Nevada attempted to become business friendly through the creation of business courts in 1999.[191] The business courts enable business disputes to be resolved in front of specialized judges on a shorter time frame than would be experienced in the District Courts of Nevada.[192]

Another example of Nevada's pro-business efforts is the passage of Senate Bill 61 in 1999,[193] which allows for the creation of business trusts.[194] Business trusts are increasingly used for asset securitization.[195] A business trust can be organized as bankruptcy and liability remote by placing appropriate safeguards in the certificate of trust.[196] Additionally, the trustee can be a representative of the investors who are purchasing the SPV securities.[197] As one commentator notes:

> The Nevada business trust, with its great flexibility and with statutory provisions allowing its trustees to be protected from fiduciary duty suits, is an advantageous vehicle for structured financings. This flexible and protective vehicle, along with the minimal taxation imposed by Nevada on assets situated in this state, provide an ideal place and an ideal entity for structured financings in the future.[198]

Senate Bill 61 was considered by the Senate Committee of Judiciary, the same committee that heard Senate Bill 62 (Revised Article 9). The testimony on Senate Bill 61 stressed the economic importance of business trusts in bringing more business to Nevada.[199] U.C.C. § 9-318(a) would have worked in conjunction with Senate Bill 62 to facilitate asset securitization. However, this result is not possible, given that U.C.C. § 9-318(a) was omitted from Nevada's Revised Article 9.

The passage of Senate Bill 61, without the adoption of U.C.C. § 9-318(a), leaves the future of asset securitization uncertain. A successful asset securitization requires a true sale to a bankruptcy remote company. Laws facilitating the formation of business trusts help the formation of bankruptcy remote SPV's. The failure to allow a true sale to take place leaves uncertainty in the securitization process. U.C.C. § 9-318(a) would have allowed a true sale to take place and prevent the assets from being placed in the bankruptcy estate.

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191 Robert L. Crowell, *Whassup in the 2001 Legislature*, NEV. LAWYER, Jan. 2001, at 16, 17.

192 *Id.*

193 Codified at NEV. REV. STAT. 88A.010-.930 (2001).

194 John P. Fowler & Garrett Sutton, *Uses of Nevada Business Trusts*, NEV. LAWYER, Jan. 2002, at 12.

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.* at 17.

199 *Senate Bill 61: Before the Senate Comm. on Judiciary*, 1999 Leg., 70th Sess. (Nev. Feb. 3. 1999), *available at* http://www.leg.state.nv.us/70th/Minutes/SM-JUD-990203-Meeting%202.html (last visited October 10, 2002).

However, since Nevada failed to adopt U.C.C. § 9-318(a), businesses will be discouraged from doing business in Nevada because Revised Article 9 states perfection and priority are governed by the laws of the state of organization.[200] Thus, any business that is organized in Nevada will be in a state of uncertainty regarding securitization. When a business cannot be assured its transfer of assets will be treated as a true sale, it may avoid organization under Nevada law, which could cause Nevada to suffer a significant financial loss.

The uncertainty of the success of securitizations in Nevada will not only deter businesses from engaging in transactions here, but will also result in large financial costs to those who take the risk. Rating agencies, which primarily consider whether assets can be protected from the debts of the originator through a true sale, will not value assets in Nevada as high as in other states. This will encourage people to seek investments elsewhere.

The inability of rating agencies to give Nevada assets high ratings also affects those who choose to invest in Nevada. Investors who invest in an SPV in Nevada can either suffer a huge financial loss or a huge windfall on their investment. In *Octagon Gas*, Rimmer lost hundreds of thousands of dollars through the investment.[201] However, a huge windfall could also be recognized due to undervaluation. When the risk of investment is high, and the assets are undervalued, the investors may get higher returns on anything that is paid, resulting in a loss to the originator.

Those who decide to engage in securitizations in Nevada will likely experience large litigation costs as a result of the fact that Nevada law is unclear on whether assets sold to an SPV are part of the bankruptcy estate. If an originator files for bankruptcy and has assets securitized in Nevada, the parties will have to litigate to determine whether the assets should be placed in the bankruptcy estate. This will result in significant costs to both litigants and Nevada.

Nevada courts, in deciding whether assets sold in a securitization are part of the bankruptcy estate, will have several choices of how to treat the omission of U.C.C. § 9-318(a). Courts in the United States have interpreted a state's failure to enact part of a uniform law in many different ways.

Some courts have declared that legislative intent is expressed by what the legislature does say, not by what they could have or might have said.[202] For example, in *In re Chaseley's Foods, Inc.*,[203] the Seventh Circuit declared the Bankruptcy Court erred when it stated that Indiana's failure to adopt an amendment to the U.C.C. in 1972 shed light on the meaning of the effective statute.[204] The Seventh Circuit said that only the language adopted by the legislature may aid in the interpretation of the meaning of the statute.[205]

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[200] U.C.C. § 9-301 (2001); U.C.C. § 9-307(e) (2001).

[201] *See Octagon Gas*, 995 F.2d at 960 (Seth, J., dissenting).

[202] *See* Iowa v. Beach, 630 N.W.2d 598, 600 (Iowa 2001); Washington v. Moses, 37 P.3d 1216 (Wash. 2002).

[203] 726 F.2d 303 (1984).

[204] *Id.* (The 1962 version of the U.C.C was effective in Indiana at the time.).

[205] *Id.*

On the other hand, other courts have held that language specifically removed or rejected must be considered.[206] In *Transportation Insurance Co. v. El Chico Restaurant, Inc.*,[207] the court determined that when the Georgia Legislature revised Georgia's business laws and adopted the Georgia Business Corporation Code, the deletion of unwanted language from the former law must be given meaning.[208] "We must presume that the Legislature's failure to include the limiting language was a matter of considered choice."[209] This same proposition also found support in *Husted v. Auto-Owner's Insurance Co.*,[210] where the Supreme Court of Michigan stated the courts of Michigan "have repeatedly held that the Legislature's failure to adopt language contained in the uniform act creates a presumption that the corresponding language was considered and rejected."[211]

Nevada's situation is similar to, but not the same as, that of the preceding states. First, Nevada's situation is unique from the situation seen in *Chaseley's Foods* because Nevada does not have another law in effect to govern securitizations. This means the courts will have little direction in deciding whether assets involved in securitizations should be included in a bankruptcy estate. As a result, the issue is not that Nevada lacks a *specific* law, but rather that Nevada does not have a section of a *uniform* law that every other state has adopted. Therefore, it is difficult to conclude that the absence of this law is irrelevant. Nevertheless, if the court assumes the omission was unintentional, it would have to find another way to decide this issue. Second, Nevada's situation may be distinguished from that of *Husted* and *El Chico Restaurant* in that the Nevada Legislature never considered or specifically rejected U.C.C. § 9-318(a). The Legislature did not appear to be aware of the omission of this section from the proposed Revised Article 9. It is unknown if the Legislature would have accepted U.C.C. § 9-318(a) if it had been included in Senate Bill 62. If the courts decide the omission of U.C.C. § 9-318(a) indicates legislative intent to adopt the opposing view, the result of *Octagon Gas* is certain in Nevada. Due to Nevada's unique situation, these methods of interpretation will not prove to be useful.

Some courts have determined that when a state fails to adopt part of a uniform law, it is attempting to retain prior law.[212] Since Nevada has never decided whether assets sold in a securitization should be included in the bankruptcy estate of the originator, the court will have to resort to the law of other states under Former Article 9, which could lead to two different results. First, the courts could maintain "what was implicit, but perfectly obvious, under for-

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[206] *See In re* Jones, 192 B.R. 289, 292 (Bankr. M.D. Ga. 1996); VJC Prod., Inc. v. Kydes, 903 F.Supp. 42, 44 (S.D. Ga. 1995); Wiebenga v. Iowa Dept. of Trans., 530 N.W.2d 732, 735 (Iowa 1995); Leary v. Contributory Ret. Appeal Bd., 657 N.E.2d 224, 227 (Mass. 1995); Parker v. Artery, 889 P.2d 520, 528 (Wyo. 1995); Million v. Indiana, 646 N.E.2d 998, 1002 (Ind. Ct. App. 1995); Johansen v. Johansen, 45 P.3d 520, 523 (Utah Ct. App. 2002).

[207] 524 S.E.2d 486 (Ga. 1999).

[208] *Id.* at 488.

[209] *Id.*

[210] 591 N.W.2d 642, 645 (Mich. 1999).

[211] *Id.* at 645.

[212] *See* North Amer. Co. v. Koerner, 211 S.W.2d 698 (Mo. 1948).

mer Article 9:"[213] when assets are sold, they are no longer subject to the bankruptcy estate. This was the majority view in the United States and was codified in U.C.C. § 9-318(a). If the court takes this approach, then, even though Nevada did not adopt U.C.C.§ 9-318(a), the result would be the same as if Nevada had adopted this section. Second, the courts could adopt the opinion of the Tenth Circuit, as reflected in *Octagon Gas*. If the court finds the reasoning of the Tenth Circuit persuasive, the assets sold would be included in the bankruptcy estate and securitization would not be possible in Nevada.

Another option the court could resort to is common law, an option often pursued where there is a lack of statutory law.[214] Such an approach would return the same results as if Former Article 9 law were still in effect.[215] However, it is possible the courts would find there is other statutory law governing securitization outside of Article 9. For example, the Bankruptcy Code may govern whether assets sold in a securitization are part of the bankruptcy estate.[216] The court could also look to other sections of Article 9 to determine whether the assets should be part of the bankruptcy estate.[217] With the expansion of Revised Article 9, a court could find that, even though U.C.C. § 9-318(a) was not adopted, other sections of Revised Article 9 cover securitization.

The omission of U.C.C. § 9-318(a) from Nevada's Revised Article 9 creates much confusion. Investors will be unable to trust investments in Nevada businesses because it is impossible to determine how the courts will treat the exclusion of U.C.C. § 9-318(a) from Nevada's Revised Article 9.[218] Therefore, businesses face the task of finding ways to obtain liquid assets without resort to securitization.

IX. CONCLUSION

The U.C.C. is designed to establish uniformity in all of the states.[219] "As is customary for uniform laws, this Article is based on the general assumption that all States will have enacted substantially identical versions. While always important, uniformity is essential to the success of this Article."[220] The importance of uniformity in the U.C.C. was recognized during the Nevada State Legislature's hearings on Senate Bill 62, where several references were made to the importance of adopting Revised Article 9 along with the other forty-nine states.[221] When Nevada failed to adopt part of Revised Article 9, especially a section that works in conjunction with other sections and is important to trans-

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213 U.C.C. § 9-318 cmt 2 (2001).
214 NEV. REV. STAT. 1.030 (2001).
215 *See supra* notes 212-13 and accompanying text.
216 *See supra* notes 186-90 and accompanying text.
217 *See* discussion *supra* Part V.B.
218 To add more confusion, the Nevada courts could ignore the legislative history and *Octagon Gas*, and interpret its version of Article 9 as if U.C.C. § 9-318(a) was adopted in its intended form.
219 U.C.C. § 9-701, cmt. (2001).
220 *Id.*
221 *See* Feb. 4 Hearing, *supra* note 154; Feb. 18 Hearing, *supra* note 162; Apr. 23 Hearing, *supra* note 166; Apr. 27 Hearing, *supra* note 171.

actions, uncertainty is cast into an area of legislation that aspires to uniformity and predictability across all of the states.

Nevada's failure to adopt U.C.C. § 9-318(a) will have a significant impact on businesses in the state of Nevada and will likely deter investors from Nevada businesses. Instead of adopting a uniform law, the Nevada Legislature adopted a non-uniform U.C.C. Unfortunately, Nevada's action has a further reaching impact than simply not adopting a law. Since the U.C.C. is to be uniform throughout all of the states, the fact that one state did not adopt a section means that Nevada may now be adopting a view directly contrary to the other states. This is propagating the *Octagon Gas* decision, a decision greatly contested and deplored by the financial and legal communities. The Nevada Legislature should act quickly to bring its U.C.C. into conformity with the rest of the United States and avoid the problems of *Octagon Gas*.[222]

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[222] U.C.C. § 9-318(a) is rumored to be adopted by Nevada as a technical correction in its next legislative session, scheduled to begin in January of 2003. However, even if U.C.C. § 9-318(a) is adopted, the uncertainty created by its omission will continue in the interpretation of asset securitization conducted during the time the section was missing.