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CREDITOR PROCESS AGAINST NEGOTIABLE NOTES: THE CASE FOR A NEW UCC § 3-420

Judgment creditors often must resort to judicial process to enforce money judgments against recalcitrant debtors.¹ Difficult questions arise when the creditor seeks to recover a judgment against a debtor's property that is in the form of a debt owed to the debtor evidenced by a negotiable promissory note.² The following hypothetical illustrates the particular problems and policy considerations affecting creditor process against negotiable notes.

Credit Company (Credit Co.) obtains a valid judgment against David Debtor. Prior to such judgment and in an unrelated transaction, Debtor received a negotiable promissory note from Mary Maker for valid consideration. Credit Co. and Maker are unaware that Debtor intends to negotiate the note to Tom Transferee for fair consideration. (Transferee is unaware of Debtor's relationship to Credit Co.) Credit Co. seeks satisfaction of its judgment against Debtor from Debtor's non-exempt assets, which are limited to the negotiable note received from Maker.

The conflicting interests of the parties in this illustration expose the competing policy considerations arising when a creditor seeks to enforce a judgment against a debtor's negotiable notes. First, Credit Co., like all creditors, seeks prompt and full payment of all just debts. Second, Maker, a third party to the debtor-creditor

1. See *infra* notes 6-31 and accompanying text. This Note will focus solely on postjudgment collection procedures, specifically execution and garnishment. To avoid adding further complexity to an already confused topic, discussion of provisional or prejudgment remedies such as attachment has been omitted. The prejudgment and postjudgment policy considerations, however, are quite similar and most of this Note's discussion of policy conflicts also applies to a discussion of prejudgment remedies. For a discussion of the constitutional issues raised by prejudgment remedies, see Phillips, *Revolution and Counterrevolution: The Supreme Court on Creditors' Remedies*, 3 *FORDHAM URB. L.J.* 1 (1974); Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 *VA. L. REV.* 807 (1975).

2. The courts have recognized this particularly troublesome issue for many years. For example, in *Bassett v. Garthwaite*, 22 *Tex.* 230 (1859), the court stated: "There are few subjects . . . that present to the courts more embarrassing questions than the general subject of the liability of makers of mercantile paper, as garnishees of the payee of such paper." *Id.* at 233.

conflict, wishes to avoid harassment; as the maker of the note, she wants to be free of conflicting claims and potential double liability. Third, if Transferee purchases Maker's note from Debtor, he expects assurance that the transaction will be protected, and that he may further negotiate the note if he desires. Transferee expects that circumstances unknown to him will not disturb his commercial activity. Moreover, the policies of negotiability require that the completed transaction be protected so that parties are encouraged to use commercial paper in buying, selling, and investing.³

This Note will examine the procedures by which a judgment creditor may satisfy a money judgment from a debt evidenced by a negotiable note and the policies involved in applying these procedures.⁴ The problem is complex and confusing because of diverse judicial responses to historical changes in the nature and use of promissory notes.⁵ In surveying the various state and analagous Uniform Commercial Code approaches to the problem, this Note will identify and discuss important policies of commercial and debtor-creditor law. Finally, this Note will conclude that statutory authority permitting the physical seizure of such instruments provides the proper treatment of creditors' rights against negotiable notes. The adoption of a new provision in the Uniform Commercial Code authorizing such treatment of notes would accommodate effectively the competing policies involved, end the incongruity within the Uniform Commercial Code, and unify divergent state approaches to the problem.

JUDGMENT ENFORCEMENT

The rendition of a money judgment converts plaintiff and defendant, respectively, to creditor and debtor.⁶ When the debtor fails

3. See *infra* notes 55-65 and accompanying text.

4. This Note will focus primarily on negotiable promissory notes. A discussion of three-party paper, checks, and drafts is omitted. The resolution of the policy conflicts regarding creditor process against negotiable notes, however, applies generally to other negotiable instruments. For a treatment of creditor process of drafts and other forms of commercial paper, see CAL. CIV. PROC. CODE § 488.520 (West 1979); IND. CODE ANN. § 7-36-3 (Burns 1973).

5. See generally C. NORTON, HANDBOOK OF THE LAW OF BILLS AND NOTES § 1 (4th ed. 1914); J. OGDEN, LAW OF NEGOTIABLE INSTRUMENTS §§ 9-24 (4th ed. 1938).

6. Note, *Enforcing Money Judgments Against Personal Property in Virginia*, 21 WM. & MARY L. REV. 731, 732 (1980).

to satisfy this judgment promptly, the creditor may resort to judicial collection processes to enforce the judgment against the debtor's property. Depending upon the debtor's financial position, the enforcement of a money judgment may be simple or very complicated.⁷

Every state provides post-judgment process, subject to some restrictions⁸ and exemptions,⁹ whereby a creditor may reach the debtor's real and personal property to enforce a money judgment. This process generally is known as execution.¹⁰ The creditor requests the court to issue a writ of execution, or *feri facias*,¹¹ to reach the debtor's personal property.¹² This writ directs the sheriff to levy upon property of the debtor specified by the creditor.¹³

7. One commentator suggests that due to the availability of credit and the ease with which a consensual lien may be secured on chattels, creditors often have trouble finding unencumbered personal property from which to collect a money judgment. *See Dugan, Creditors' Postjudgment Remedies* (pt. 1), 25 ALA. L. REV. 175, 198 (1972).

8. Some states require creditors to exhaust a debtor's personal estate before reaching any real property of the debtor. *See, e.g., ARIZ. REV. STAT. ANN. § 12-1553(1)* (1982); *MICH. COMP. LAWS ANN. § 600.6004* (1968).

9. All states provide some exemptions from execution for both personalty and realty. The personal property exemption often is referred to as the "Poor Debtor's" exemption, *see, e.g., VA. CODE § 34-26* (Supp. 1982). The real property exemption commonly is referred to as the "Homestead Exemption," *see, e.g., TENN. CODE ANN. § 26-2-301* (1980); *MONT. CODE ANN. § 70-32-201* (1982). Typically, exempt personal property includes wearing apparel, kitchen utensils, family bibles, farm animals, and tools of one's trade. *See MO. ANN. STAT. §§ 513.430-435* (Vernon 1952 & Supp. 1982); *N.Y. CIV. PRAC. LAW § 5205* (McKinney 1978 & Supp. 1982). Generally, state legislatures believe that the exempt property constitutes the necessities of life. *See generally Vukowich, Debtors' Exemption Rights*, 62 GEO. L.J. 779, 785-88 (1974) (discussing policies underlying exemption statutes).

10. Stated generally, execution "is process authorizing the seizure and appropriation of the property of a defendant for the satisfaction of a judgment against him." *Lambert v. Powers*, 36 Iowa 18, 20 (1872). *See generally S. RIESENFELD, CREDITORS' REMEDIES AND DEBTORS' PROTECTION 2-176* (3rd ed. 1979).

11. The modern trend is to use the term "writ of execution," although some states still use the latin term "writ of *feri facias*." *See, e.g., PA. STAT. ANN. tit. 12, § 2311* (Purdon 1967); *VA. CODE § 8.01-474* (1977). For a discussion of other common law writs once available to creditors, *see Riesenfeld, Collection of Money Judgments in American Law — A Historical Inventory and Prospectus*, 42 IOWA L. REV. 155 (1957); Note, *supra* note 6, at 733.

12. Creditors may reach real property also, usually by execution, although the proper process varies in some states. *See, e.g., VA. CODE § 8.01-462* (1977) (judgment lien is enforced by creditor's bill in equity in Virginia). Process against real property is subject to restrictions and exemptions. The "Homestead Exemption" typically exempts a certain dollar amount of a debtor's equity in real estate. *See generally supra* note 6.

13. To help prevent a return *nulla bona* (literally, no goods) because of the sheriff's reluc-

Normally, the sheriff performs the levy by seizure, the taking of the debtor's property into the sheriff's possession.¹⁴ At the time of levy, the creditor obtains a lien on the levied property.¹⁵ The debtor's property then is sold at public auction or execution sale, and the proceeds are used to satisfy the creditor's judgment, with any residue being returned to the debtor.¹⁶

If the debtor's property is in the possession of a third party or consists of a debt owed to the debtor by a third party, the creditor may reach such property through a writ of garnishment.¹⁷ In a garnishment proceeding, the creditor files an affidavit asserting that the third party holds property of the debtor. The court then issues a writ of garnishment directing the third party (garnishee) to deliver the property or to pay the debt into the court or to the creditor (garnishor).¹⁸ The garnishee may respond to the writ by stating

tance to seize the debtor's property, the creditor should specify for the sheriff the property to be levied upon. Some states provide statutory authority allowing judgment creditors to make such specifications. *See, e.g.*, ILL. ANN. STAT. ch. 77, § 11 (Smith-Hurd 1966). Other states, however, permit the debtor to select the property against which the sheriff will levy. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-1562(b) (1982).

14. In most states, some form of "constructive possession" constitutes a valid levy if the property is of a size or quality not easily reduced to manual possession. *See* CAL. CIV. PROC. CODE §§ 488.360c to .688 (West 1979); MINN. STAT. ANN. §§ 550.13 to .17 (1947 & 1982 Supp.); *Crisman v. Dorsey*, 12 Colo. 567, 21 P. 920 (1889); *Johnson v. Walker*, 23 Neb. 736, 37 N.W. 639 (1888) (constructive possession does not constitute effective levy if actual seizure is possible).

15. Some states date a creditor's lien from the time the writ of execution is delivered to the sheriff. *See, e.g.*, ARK. STAT. ANN. § 30-116 (1979); D.C. CODE ANN. § 15-307 (1981); VA. CODE § 38-4-8 (1966). Apparently, a lien created by delivery of the writ is an inchoate lien which becomes a specific and perfected lien only upon levy. *See* S. RIESENFELD, *supra* note 10, at 161 n.3. Tennessee continues to date a creditor's execution lien on debtor's chattels from *teste*, the date of issuance of the writ. *See* TENN. CODE ANN. § 26-1-109 (1980). Finally, in three states, a valid judgment creates a judgment lien (as opposed to an execution lien) upon the debtor's chattels at the time the judgment is entered or recorded. *See* ALA. CODE § 6-9-211 (1975); GA. CODE ANN. § 9-12-80 (1982); MISS. CODE ANN. § 11-7-191 (1972).

In most jurisdictions, no lien on intangibles of the debtor is created until notice of levy or a garnishment summons is served on the judgment debtor's debtor, although a few states date a lien on intangibles from delivery of the writ to the sheriff. *See, e.g.*, VA. CODE § 8.01-501 (1977). *See generally* S. RIESENFELD, *supra* note 10, at 160-61, 221-22.

16. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.6004 (1968).

17. Garnishment commonly is referred to as "trustee process" in the New England states, except in Connecticut where garnishment is called "foreign attachment." *See* CONN. GEN. STAT. ANN. § 52-329 (Supp. 1982). *See also* MASS. GEN. LAWS ANN. ch. 246, § 1 (Supp. 1982). *See generally* S. RIESENFELD, *supra* note 10, at 253-61.

18. Absent a statute to the contrary, the principal debtor (judgment creditor's debtor) is

that the property or debt does not exist and thus avoid an adverse judgment in garnishment. If the third party does not make such a response, then the creditor obtains a lien on the property in the garnishee's possession¹⁹ dating from the time the garnishee is summoned.²⁰ The creditor realizes on the lien by receiving payment from the third party of the debt owed to the debtor, or from the proceeds of a sale of the property belonging to the debtor.²¹

States also provide creditors with mechanisms for dealing with particularly uncooperative debtors. Through the use of supplemental proceedings,²² the creditor may examine the debtor to discover the location of hidden assets.²³ Supplemental proceedings vary among states but often include: the issuance of injunctions to prevent the debtor from transferring property out of his possession;²⁴

not a party to the garnishment proceeding, unless he intervenes or is interpleaded. S. RIESENFELD, *supra* note 10, at 244 n.1. In Virginia, although supplementary to and in aid of execution, garnishment is an independent civil action rather than a summary process. *See* Note, *supra* note 6, at 797.

19. A court will not order a garnishee to make payments when the garnishee denies the indebtedness. Moreover, a garnishee is discharged if he answers under oath in an affidavit that he is not indebted to the garnishing creditor's debtor. *See, e.g.,* ARIZ. REV. STAT. ANN. § 12-1581(A) (1982). States, however, provide creditors with remedies against garnishees who wrongfully conceal assets. *See, e.g.,* ALA. CODE §§ 6-6-455, -456 (1975); KAN. STAT. ANN. § 60-721 (1976).

20. *See supra* note 15.

21. *See* S. RIESENFELD, *supra* note 10, at 253-61.

22. Supplemental proceedings involve in personam orders, whereas the enforcement of money judgments usually proceeds in rem. Because these procedures involve in personam orders, they are considered extraordinary relief and thus are granted only when a creditor's remedies at law are inadequate. This Note does not discuss supplemental proceedings at length. Although these proceedings are available to creditors, they are disfavored generally because they are equitable in nature. Equitable remedies deprive the defendant debtor of a jury trial. Additionally, the in personam orders involved in supplemental proceedings challenge the court's integrity because they are enforced through the court's contempt power.

Therefore, unless the legal alternatives of execution and garnishment will not satisfy the judgment, resort should not be made to supplemental proceedings. Use of one such proceeding, debtor's interrogatories, to discover assets cannot be avoided if the creditor is unfamiliar with the debtor. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES §§ 2.5, .6, .8, .9 (1973); Cook, *Powers of Courts of Equity*, 15 COLUM. L. REV. 37-54, 106-41, 228-52 (1915); Rendleman, *Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346 (1981).

23. In Virginia, this supplemental proceeding is called interrogatory procedure. VA. CODE § 8.01-506 (1977). *See also* Note, *supra* note 6, at 768-70.

24. *See, e.g.,* CONN. GEN. STAT. ANN. § 52-341 (West 1960); MICH. CT. RULES 738.4(3) (West 1981).

the assignment of debtor's rights to the creditor;²⁵ the appointment of receivers;²⁶ and the sequestration or sale of the debtor's property.²⁷

The law of fraudulent conveyances affords further protection to creditors by preventing debtors from frustrating execution procedures by concealing assets or by transferring property to third parties, often relatives or friends. The law of fraudulent conveyances exists in some form in every jurisdiction,²⁸ and profoundly affects the rights of debtors, creditors, and transferees.²⁹ The law of fraudulent conveyances, however, will not upset a transfer to a third party when the transferee pays fair consideration without knowledge of the debtor's attempt to frustrate the collection process.³⁰

This brief introduction to the post-judgment creditor process reveals the complexity of the problem posed by the above hypothetical, in which a creditor seeks to satisfy his judgment from a debt owing to the debtor in the form of negotiable note. Several challenging legal questions are raised, including: how a judgment creditor may reach a debt in negotiable form owed to a judgment debtor; whether a judgment creditor may physically seize and sell the note, or whether the creditor must resort to garnishing the maker; and whether the judgment creditor may void a transfer by the judgment debtor to a third-party transferee as fraudulent. The treatment afforded a creditor seeking to satisfy a money judgment from a debt evidenced by a negotiable promissory note varies

25. See, e.g., VA. CODE § 8.01-507 (1977).

26. See, e.g., WYO. STAT. § 1-33-101 (1977).

27. See *Kieffer v. Ehler*, 18 Pa. 388 (1852).

28. The Uniform Fraudulent Conveyance Act permits creditors to upset conveyances made without fair consideration by persons who are insolvent at the time of conveyance, who become insolvent or undercapitalized because of the conveyance, or intend to defraud creditors. UNIF. FRAUD. CONVEY. ACT §§ 4-7 (1918). Under the Uniform Fraudulent Conveyance Act and in most jurisdictions, a creditor has two basic choices: he may have the conveyance set aside and then proceed to levy and sale, or he may have a levy and sale in disregard of the conveyance and leave it to the purchaser to assert his title by means of an action for ejectment or quiet title in the case of realty, or by means of an action in replevin in the case of chattels. S. RIESENFELD, *supra* note 10, at 387 n.2.

29. A good faith transferee of debtor's property is protected if the transferee has paid fair consideration. In such a case, the conveyance is not upset as fraudulent because the debtor's balance sheet is unaffected when transferee pays fair consideration. See UNIF. FRAUD. CONVEY. ACT § 3.

30. See UNIF. FRAUD. CONVEY. ACT §§ 3, 7; U.C.C. §§ 3-302, -305.

greatly from state to state, with various states placing a different emphasis on protecting the divergent interests involved.

DEVELOPMENT OF CREDITOR'S RIGHTS AGAINST COMMERCIAL PAPER

Execution at Common Law

At common law, a creditor could perfect a levy pursuant to a writ of *feri facias* only if the sheriff physically seized the debtor's property.³¹ Intangible property, such as equitable interests and choses in action, could not be subjected to execution because they lacked a physical existence³² and thus were incapable of manual delivery.³³ Consequently, notes, which are choses in action, could not be seized at common law and were regarded by courts as immune from execution.³⁴

The common law approach is circular in its reasoning because it ignores the commercial and practical realities underlying the use of negotiable notes. Notes themselves are tangible and capable of manual delivery in that they are "perceptible to the touch."³⁵ As early as 1818, an English court stated that a negotiable chose in action was not intangible property, but constituted a chattel bound up in a negotiable instrument.³⁶

Despite the early English characterization of a note as tangible property, most states enacted execution and enforcement of money judgment provisions that codified common law conceptions of notes as intangible property not subject to seizure.³⁷ Moreover, statutes that conflict with this common law notion have been con-

31. See, e.g., *Ex rel. Mather v. Carnes*, 551 S.W.2d 272, 282 (Mo. App. 1977).

32. See, e.g., *Van Ness v. Hyatt*, 38 U.S. (13 Pet.) 294 (1889) (equitable interest of redemption); *Acme Harvesting Machine Co. v. Hinkley*, 23 S.D. 509, 122 N.W. 482 (1909) (judgment is a chose in action).

33. See, e.g., *McBride v. Fallon*, 65 Cal. 301, 4 P. 17 (1884).

34. See *supra* note 32 and accompanying text.

35. See, e.g., *H.D. & J.K. Crosswell Inc. v. Jones*, 52 F. Supp. 880, 883 (E.D.S.C. 1931), *rev'd on other grounds*, 60 F.2d 827 (4th Cir. 1932); *Lay v. Aetna Ins. Co.*, 599 S.W.2d 684, 686 (Tex. Civ. App. 1980). See generally BLACK'S LAW DICTIONARY 726, 1305-06 (rev. 5th ed. 1979) (defining "intangible property," "tangible," and "tangible property").

36. See *M'Neillage v. Holloway*, 1 B. & Ald. 218, 106 Eng. Rep. 80 (1818).

37. See, e.g., MASS. GEN. LAWS ANN. ch. 235, § 31 (West 1959): "All property which by common law is liable to be taken on execution, may be taken and sold thereon, except as otherwise expressly provided." See also UTAH R. Civ. P. 64C(e)(3) (1953).

strued narrowly.³⁸ The common law approach to the levying on and seizure of negotiable promissory notes still prevails when the execution statutes are silent on the nature of these notes.³⁹ A majority of jurisdictions follow the common law⁴⁰ through express statutory enactments, judicial precedent,⁴¹ or an absence of any contrary law.⁴²

38. See, e.g., *John Julian Constr. Co. v. Monarch Builders, Inc.*, 306 A.2d 29 (Del. Super. 1973), *aff'd*, 324 A.2d 208 (Del. 1974).

39. See *infra* note 42.

40. See *infra* notes 41 & 42.

41. Alabama: ALA. CODE § 6-9-40(2) (1977); *Peavy Lumber Co. v. Murchison*, 272 Ala. 251, 130 So. 2d 338 (1961); *Lowremore v. Barry*, 19 Ala. 130 (1851). See also *Cottingham v. Greely-Barham Grocery Co.*, 137 Ala. 149, 34 So. 956 (1903).

Arizona: *Cagle v. Butcher*, 118 Ariz. 122, 575 P.2d 321 (1978); *Hill v. Favour*, 52 Ariz. 561, 84 P.2d 575 (1938). But see ARIZ. REV. STAT. ANN. §§ 12-1558(B), -1559(2) (1982).

Arkansas: *Field v. Lawson*, 5 Ark. 376 (1842).

Connecticut: *Grosvenor v. Farmers and Mechanics Bank*, 13 Conn. 104 (1839); *Fitch v. Waite*, 5 Conn. 117 (1823).

Florida: *General Guaranty Ins. Co. v. DaCosta*, 190 So. 2d 211 (Fla. Dist. Ct. App. 1966); *Harris v. Smith*, 7 So. 2d 343 (Fla. 1942).

Georgia: GA. CODE ANN. § 9-13-57 (1982); *Kilgore v. Buice*, 229 Ga. 445, 192 S.E.2d 256 (1972); *Harvey v. Wright*, 80 Ga. App. 232, 55 S.E.2d 835 (1949).

Illinois: *Crawford v. Schmitz*, 139 Ill. App. 564, 29 N.E. 40 (1891).

Maine: *Smith v. Kennebec & P.R. Co.*, 45 Me. 547 (1858).

Maryland: *Cf. Harford Bank of Bel Air v. Harve de Grace Banking & Trust Co.*, 165 Md. 454, 169 A. 315 (1933) (choses in action not subject to execution).

Massachusetts: MASS. GEN. LAWS ANN. ch. 235, § 31 (West 1959); *Jordan v. Lavin*, 319 Mass. 362, 66 N.E.2d 41 (1946); *Perry v. Coates*, 9 Mass. 537 (1813); *Marine Fire and Marine Ins. Co. v. Weeks*, 7 Mass. 438 (1811).

Michigan: *Jenson v. Oceana Circuit Judge*, 194 Mich. 405, 160 N.W. 620 (1916).

New Hampshire: *N.H.I.F. Co. v. Platt*, 5 N.H. 193 (1830); *Spencer v. Blaisdell*, 4 N.H. 198 (1827).

Pennsylvania: *Rhoads v. Megonigal*, 2 Pa. 39 (1845). But see PA. R. CIV. P. 3108, 3109 (1982); *Brennan v. Pittston Brewing Corp.*, 344 Pa. 495, 26 A.2d 334 (1942).

Rhode Island: R.I. GEN. LAWS § 9-26-4(11) (Supp. 1982); *Oakdale Mfg. Co. v. Clarke*, 29 R.I. 192, 69 A. 681 (1908).

Tennessee: *Moore v. Pillow*, 22 Tenn. (3 Hum.) 448 (1842).

Texas: *Price v. Brady*, 21 Tex. 614 (1858).

Utah: UTAH R. CIV. P. 64C(e)(3), (6) (1953).

Vermont: VT. STAT. ANN. tit. 12, §§ 2731, 2740 (1973); *Morse v. Stevens*, 95 Vt. 465, 115 A. 697 (1922).

42. The following states appear to lack any statute or precedent changing the common law approach to creditor process of negotiable notes: Alaska, Delaware, Hawaii (see *Ferry v. Murata*, 26 Haw. 699 (1923) (choses in action not subject to execution)), Kansas, Maryland (see *Harford Bank of Bel Air v. Harve de Grace Banking & Trust Co.*, 165 Md. 454, 169 A. 315 (1933) (choses in action not subject to execution)), Nebraska, Nevada, New Mexico, Ohio, Oklahoma, South Carolina, Virginia, and Wyoming.

Garnishment

As courts of equity began to recognize the transfer of contract rights and other intangibles, and as these legal interests became sources of wealth, creditors, dissatisfied with the strict and circular common law approach,⁴³ demanded access to these intangibles.⁴⁴ In states following the common law approach to execution against notes,⁴⁵ statutory garnishment became the means by which a creditor could reach commercially valuable yet intangible assets, including debts evidenced by notes.⁴⁶ Pursuant to a writ of garnishment, a court orders the judgment debtor's debtor (the garnishee) to pay the debt owed to the judgment debtor into the court or to the judgment creditor (the garnishor) directly.⁴⁷

Levy by Notice

While some states employed garnishment statutes to afford creditors access to intangible property owned by judgment debtors,⁴⁸ other states alleviated the creditor's burden under the restrictive common law rules by adopting a new form of levy.⁴⁹ Unlike the common law, under which levy occurred only upon physical seizure of the property, these states authorized levy by notice alone for assets incapable of manual delivery.⁵⁰

43. See *supra* note 35 and accompanying text.

44. See S. RIESENFELD, *supra* note 10, at 215-18.

45. See Riesenfeld, *supra* note 11, at 155; Riesenfeld, *Enforcement of Money Judgments in Early American History*, 71 MICH. L. REV. 691 (1973).

46. Many courts stated that garnishment was the proper way to reach a debtor's asset in the form of a debt evidenced by a note. See, e.g., *Cagle v. Butcher*, 118 Ariz. 122, 575 P.2d 321 (1978).

47. For a discussion of garnishment generally, see *supra* notes 17-21 and accompanying text.

48. See *supra* notes 17-21 and accompanying text.

49. See, e.g., ARIZ. REV. STAT. ANN. § 12-1559(2) (Supp. 1977); IDAHO CODE § 8-506(5) (1979). Typically, "levy" means seizure, and some statutes provide that "'levy' . . . shall be construed to mean the actual seizure of property by the officer charged with the execution of the writ." MO. ANN. STAT. § 513.010 (Vernon 1949). Levy by notice may be available in addition to garnishment in some states. See S. RIESENFELD, *supra* note 10, at 217 nn.10 & 11. Levy by notice originally developed to give creditors access to corporate stock held by debtors. See Annot., 1 A.L.R. 653 (1919).

50. See, e.g., ARIZ. REV. STAT. ANN. § 12-1559(2) (1982). *But see* *Hill v. Favour*, 52 Ariz. 561, 84 P.2d 575 (1938). Cf. IDAHO CODE §§ 8-506(5), 11-201 (1979); KAN. STAT. ANN. §§ 60-706, -2401(e) (1976); MONT. CODE ANN. § 27-18-405 (1979); VA. CODE § 8.01-501 (1977).

In states allowing levy by notice, a creditor may levy against a promissory note by having notice served on the party indebted to the judgment debtor, for example, the maker of the note. The process is essentially equivalent to garnishment,⁵¹ but does not require the sheriff to seize the note from the debtor.⁵² Levy by notice also differs from garnishment in that the former provides creditors access to the debtor's valuable but intangible assets through the existing execution process by extending the writ of *fiery facias* to reach intangibles such as promissory notes, whereas garnishment provides a procedure supplemental to or in aid of execution.⁵³

Protecting Negotiability

Garnishment and levy provide some relief to creditors frustrated by common law constraints on execution. Although these procedural innovations promote the policy of allowing creditors to collect just debts, they conflict with the concomitant policies underlying the law of negotiable instruments.⁵⁴

The Uniform Negotiable Instruments Law,⁵⁵ now superseded by the Uniform Commercial Code, codified a significant body of case law establishing negotiability as inherently valuable to commercial transactions.⁵⁶ The primary purpose underlying the development of the law of negotiable instruments was to promote the efficient

(statutes construable as levy by notice statutes).

51. See generally S. RIESENFELD, *supra* note 10, at 229-78; J. ROOD, *LAW OF GARNISHMENT* (1896).

52. Typically, when debtor's property is in the hands of a third party, the sheriff will seize the property or order it delivered to the court. See *supra* notes 17-21 and accompanying text.

53. See generally S. RIESENFELD, *supra* note 10, at 229-78.

54. If a promissory note is not negotiable, the policy conflicts exposed by the introductory hypothetical do not exist. A transferee of a non-negotiable note takes the note subject to all prior attachment and execution liens; therefore, a creditor's remedy against a non-negotiable note could not be defeated by a transfer to an innocent transferee. See *Heimes v. Heimes*, 24 N.W.2d 335 (S.D. 1946). Moreover, a transferee must take a negotiable instrument to be a holder in due course. U.C.C. § 3-302. Thus, creditors seeking satisfaction of a negotiable note must contend with the policies of negotiability. See *infra* note 58 and accompanying text. For a pre-U.C.C. discussion of negotiability and creditors' rights, see 30 MINN. L. REV. 616 (1945).

55. The text of the Uniform Negotiable Instruments Law is reproduced in J. OGDEN, *supra* note 4. See U.C.C. § 3-101, Draftsmen's Comment.

56. See 1 T. PARSONS, *LAW OF PROMISSORY NOTES AND BILLS OF EXCHANGE* 274-80 (1863); S. WILLISTON, *NEGOTIABLE INSTRUMENTS* 14-15 (1931).

exchange of resources in the market.⁵⁷ Several policies promote this goal, including protecting the integrity of the marketplace and inducing parties to rely on commercial paper, such as negotiable notes, in buying, selling, and investing.⁵⁸ Article 3 of the Uniform Commercial Code sets forth specific rules defining the elements of negotiability.⁵⁹ Additionally, article 3 provides rules for the transfer of negotiable instruments⁶⁰ and protects certain parties who take these instruments.⁶¹ The rules facilitate commerce by increasing certainty in the use of commercial paper.

The statutory authority allowing a transferee to take a negotiable note free of claims and most defenses of prior holders is essential in furthering the policies of negotiability. Thus, article 3 sets out the holder in due course doctrine which protects transferees taking negotiable notes in good faith, for value, and without notice of deficiencies in the instrument.⁶² The long-standing protection of transferees meeting these requirements has been critical in encouraging the expanded use of commercial paper.⁶³

In addition to enforcing the instrument in his own name, a holder in due course also may further negotiate the instrument and pass to the transferee the protections accorded a holder in due course.⁶⁴ The ability to take an instrument free of other claims, therefore, is a central policy of negotiability.

The policies of negotiability, however, create significant conflicts in states following common law execution, garnishment, or levy by

57. *Peacock v. Rhodes*, 2 Doug. 633, 99 Eng. Rep. 402 (K.B. 1781); *Price v. Neal*, 3 Burr. 1354, 97 Eng. Rep. 871 (K.B. 1762); *Miller v. Race*, 1 Burr. 452, 97 Eng. Rep. 398 (K.B. 1758).

58. To encourage commerce by permitting negotiable instruments to circulate as if they were money, courts generally protect good faith purchasers and transferees who pay valid consideration. See generally Gilmore, *Commercial Doctrine of Good Faith Purchase*, 63 *YALE L.J.* 1057 (1954).

59. U.C.C. §§ 3-104 to -118.

60. *Id.* § 3-202.

61. *Id.* §§ 3-305, -306.

62. The Uniform Commercial Code defines a holder in due course as a holder who takes the instrument for value, in good faith, and without notice that it is overdue or has been dishonored or of any defense against or claim by any person. U.C.C. § 3-302(1). See generally J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* §§ 14-1 to -10 (1980).

63. See, e.g., W. OPPENHEIMER, *SELOVER ON NEGOTIABLE INSTRUMENTS* § 169 (2d ed. 1912) (cases cited).

64. U.C.C. §§ 3-201, -301.

notice of negotiable notes. In particular, these approaches to creditor process of notes potentially expose makers of negotiable notes to multiple liability. The problem of liability for double payment on a note is illustrated in *Knisely v. Evans*.⁶⁵ In *Knisely*, the maker of the note originally made the note payable to Arnold, the payee.⁶⁶ Arnold subsequently negotiated the note to Evans, the transferee.⁶⁷ Following this transfer, Arnold became indebted to Hummel & Bros., the creditor.⁶⁸ In a separate action against Arnold, Hummel & Bros. served Knisely, the maker of the note, with a writ of garnishment, believing that he was indebted to Arnold.⁶⁹ Unaware of the transfer of the note from Arnold to Evans, Knisely acknowledged his indebtedness to Arnold.⁷⁰ The court ordered Knisely to pay into court an amount on the indebtedness that would satisfy Hummel & Bros.' claim against Arnold, and Knisely complied.⁷¹

Following this garnishment suit, Evans, the transferee of the note, initiated a suit against Knisely, the maker, to collect on the note. The trial court credited Knisely with the amount paid to Hummel & Bros. in garnishment in the prior action.⁷² On appeal, however, the appellate court reversed and held Knisely liable for the entire amount of the note.⁷³ The Supreme Court of Ohio affirmed this determination, stating that the maker's error as to whom he was indebted would not prejudice the transferee's rights.⁷⁴ After the transfer from Arnold to Evans and at the time of garnishment, Evans, and not Arnold, was the payee of the note. Therefore "payment by Knisely to Hummel & Bros. would have constituted no defense to an action instituted on the note by the

65. 34 Ohio St. 158 (1877). For other cases recognizing the maker's dilemma, see *Stone v. Dean*, 5 N.H. 502 (1831); *Willis v. Heath*, 75 Tex. 124 (1889); *Gunn v. Manthov*, 138 Wash. 96, 244 P. 133 (1926). See generally C. DRAKE, *SUITS BY ATTACHMENT* §§ 233-234 (1885).

66. 34 Ohio St. at 158.

67. *Id.*

68. *Id.*

69. *Id.* at 160.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 161-62.

payee himself."⁷⁵ Knisely was liable to Evans for the full amount of the note and, therefore, was required to pay twice: once in garnishment and once on the note.

The decision in *Knisely* demonstrates that, prior to the Uniform Negotiable Instruments Law and the Uniform Commercial Code, courts protected the rights of good faith purchasers of commercial paper.⁷⁶ More importantly, *Knisely* illustrates that the problem raised by the introductory hypothetical poses more than a mere academic exercise. A recent decision under the Uniform Commercial Code illustrates that this problem of reconciling the competing policies of protecting creditors and negotiability persists.

In *Bricks Unlimited, Inc. v. Agee*,⁷⁷ a judgment creditor garnished a debt evidenced by a negotiable note payable to and in the possession of the judgment debtor.⁷⁸ In response to the writ of garnishment, the maker of the note admitted his indebtedness.⁷⁹ Following the garnishment but before the note became due, the judgment debtor pledged the note to a bank as collateral for a loan.⁸⁰ After the note reached maturity, both the garnishing creditor and the bank claimed interests in the note and its proceeds.⁸¹ The United States District Court for the Southern District of Mississippi held that the pledgee bank, as a holder in due course, took priority over the judgment creditor.⁸² The United States Court of Appeals for the Fifth Circuit affirmed.⁸³ Thus, despite prudent action by the judgment creditor, his collection efforts were frustrated.

The decision in *Bricks Unlimited* also illustrates the harassment and potential double liability to which makers of negotiable notes are exposed in a majority of jurisdictions.⁸⁴ If the maker of the

75. *Id.* at 163.

76. See *supra* note 56. For the text of and commentary on the Uniform Negotiable Instruments Law, see W. OPPENHEIMER, *supra* note 63.

77. 672 F.2d 1255 (5th Cir. 1982).

78. *Id.* at 1257.

79. *Id.*

80. *Id.*

81. *Id.* at 1257-58.

82. *Id.* at 1259.

83. *Id.* at 1260.

84. A maker may be exposed to double liability when the applicable state continues to follow common law execution rules, see *supra* notes 41 & 42, and has no protective statute,

note in *Bricks Unlimited* did not know that the debtor had pledged the note as security, she would have paid the judgment creditor pursuant to a judgment against her in garnishment. Notwithstanding this payment, she would have been subjected to a second obligation to pay on the note when the bank, as a holder in due course, sought satisfaction of its claim on the note.⁸⁵ *Knisely* and *Bricks Unlimited* thus demonstrate the need for procedures that better accommodate creditors' need to satisfy judgments while protecting negotiability and treating fairly makers of negotiable notes.

Makers Excepted from Garnishee Liability

Recognizing the dilemma illustrated by *Knisely* and *Bricks Unlimited*, many states concluded that the maker of a negotiable note "cannot be charged as garnishee of the payee except upon a showing which will clearly protect him against the holder."⁸⁶ This principle attempts to accommodate the competing interests in protecting negotiability and permitting creditors to collect just debts while preventing the undue harassment of third parties.

To understand the maker's situation, a distinction must be made between garnishing a note before it is due and garnishing a note that is overdue. Presumably, garnishment of a negotiable note after it is due is permitted because usually such a note may not be taken by a holder in due course.⁸⁷ If the subsequent transferee or holder has notice that the note is overdue, he will not qualify as a holder in due course.⁸⁸ A maker will not be liable to a subsequent

see *infra* note 104, or has a protective statute that inadequately protects makers, see *infra* note 91.

85. See U.C.C. § 3-305.

86. *West v. Baker*, 109 Ariz. 415, 417, 510 P.2d 731, 733 (1973). The Uniform Commercial Code protects makers from excessive liability on a note by providing them with a discharge on the instrument when they pay a holder. Moreover, makers need not make payments for having made an instrument unless they receive a discharge or are indemnified and payment is enjoined. See U.C.C. § 3-603. Garnishment rules, however, do not incorporate § 3-603. Typically, when a maker pays pursuant to a garnishment summons, he is not paying a holder and therefore, he will not be discharged on the note. Thus, a maker of a negotiable note always should check to see who is in possession of the note. If anyone other than the original payee is in possession, the maker should refuse to pay on the note in garnishment.

87. See *supra* notes 62-64 and accompanying text.

88. Comment 1 to U.C.C. § 3-302 makes clear that the mere fact that an instrument is overdue will not prevent the taker from being a holder in due course unless he has notice that the instrument is overdue. Section 3-304(3) defines when a purchaser will have notice

holder who is not a holder in due course if the maker has paid pursuant to a writ of garnishment.⁸⁹ A maker can defeat a transferee who took after maturity in a suit on the note by setting up payment in garnishment as a defense.⁹⁰ Thus, the maker is protected from double liability.

To protect the maker/garnishee from double liability on notes transferred before they were due, many states formulated a rule prohibiting garnishment of a note before it became due.⁹¹ Courts

that an instrument is overdue.

89. For a discussion of garnishment process generally, see *supra* notes 17-21 and accompanying text.

90. A holder who is not a holder in due course takes an instrument subject to all defenses of the maker. See U.C.C. § 3-306(b); *Security Pacific Nat'l Bank v. Chess*, 58 Cal. App. 3d 555, 129 Cal. Rptr. 852 (1976). Pre-U.C.C. cases are consistent with § 3-306(b). See, e.g., *Culver v. Parish*, 21 Conn. 408 (1851) (transferee who took after maturity took subject to all other prior interests in the note, specifically the judgment creditor's lien perfected by noticing the debtor/holder). If such a note is taken by a holder in due course, the policies of negotiability require that the completed transaction and the transferee's interests be protected. See *J. WHITE & R. SUMMERS, supra* note 62, §§ 14-1 to -10. See also *Wood v. Bodwell*, 29 Mass. (12 Pick. 268) 272 (1831); *Lanese v. Duff*, 24 Ohio App. 494, 156 N.E. 461 (1927); *Kimbrough v. Hornsby*, 113 Tenn. 605, 84 S.W. 613 (1905).

91. Arizona: ARIZ. REV. STAT. ANN. § 12-1571(A)(1)(b) (1982); *West v. Baker*, 109 Ariz. 415, 510 P.2d 731 (1973).

Arkansas: *W.A. Smith & Bro. v. Spinnenweber & Peters*, 114 Ark. 384, 170 S.W. 84 (1914) (note must be overdue and in hands of original payee).

Colorado: COLO. R. CIV. PRO. 103(q) (1973); *Citizens Bank v. First National Bank*, 66 Colo. 426, 182 P. 12 (1919). *But see* COLO. R. CIV. PRO. 103 (Supp. 1982) (deletion of subsection (q)).

Florida: *Hollopeter & Post, Inc. v. Saenz*, 133 Fla. 279, 182 So. 906 (1938); *Huot, Kelly & Co. v. Ely, Candee & Wilder*, 17 Fla. 775 (1880) (maker protected from garnishee liability unless maker gains possession of the note).

Georgia: *Mims v. West*, 38 Ga. 18 (1868).

Hawaii: HAWAII REV. STAT. § 652-10 (1976).

Idaho: *Everson v. Atlas Tire Co.*, 73 Idaho 91, 245 P.2d 773 (1952).

Illinois: ILL. ANN. STAT. ch. 62, § 41 (1972); *National Bank of Austin v. First Wisc. Bank of Milwaukee*, 48 Ill. App. 3d 915, 363 N.E.2d 619 (1977); *Wright v. McCarty*, 92 Ill. App. 120 (1901).

Iowa: *Yocum & Rob v. White*, 36 Iowa 288 (1873); *Hughes v. Monty*, 24 Iowa 499 (1868); *Commissioners of Jefferson County v. Fox*, 1 Iowa (Morris 48) 65 (1840).

Massachusetts: MASS. GEN. LAWS ANN. ch. 246, § 32(1) (West Supp. 1982). *But see* *Clark-Wilcox Co. v. Northwest Eng'g Co.*, 314 Mass. 402, 50 N.E.2d 53 (1943).

Michigan: MICH. CT. RULES 738.5(5) (West 1981).

Mississippi: MISS. CODE ANN. § 11-35-35 (1972).

Missouri: MO. ANN. STAT. § 525.030(1) (Vernon Supp. 1982). See also *Weil v. Tyler*, 38 Mo. 558 (1866).

Nebraska: *Fisher v. O'Hanlon*, 93 Neb. 529, 141 N.W. 157 (1913).

reasoned that because the debtor, as the original holder and payee, had no rights against the maker until the note became due, a garnishing creditor also had no rights against the maker until that time.⁹² Additionally, courts stated that once the debtor transferred the note, the creditor had no recourse against the maker because the maker's obligation on the note ran to a party other than the creditor's debtor.⁹³ Most courts and legislatures thus viewed the maker as protected under the rule preventing garnishment while the note is still current.⁹⁴

The fallacy in this approach to the debtor's dilemma is that the maker of the note is not adequately protected when the original payee of the note transfers the note before it is due to a third party without the maker's knowledge.⁹⁵ When the maker is unaware of any transfer of the note, he will answer affirmatively to a post-maturity writ of garnishment if the transferee has not yet demanded payment on the note. This unsuspecting compliance results in an order to pay the garnishing creditor.⁹⁶ The maker

Nevada: NEV. REV. STAT. § 31.390 (1979).

Ohio: *Lanese v. Duff*, 24 Ohio App. 494, 156 N.E. 461 (1927). *But see Secor v. Witter*, 39 Ohio St. 218 (1883) (absolute exception for makers from garnishee liability).

Pennsylvania: *Joseph Melnick Bldg. & Loan Ass'n v. Melnick*, 318 Pa. 120, 178 A. 144 (1935).

Texas: *Bassett v. Garthwaite*, 22 Tex. 230 (1858); *Inglehart v. Moore*, 21 Tex. 501 (1858). *But see Neal v. Kurz*, 26 S.W.2d 478 (Tex. Civ. App. 1930) (absolute exception for makers from garnishee liability).

Utah: UTAH R. CIV. P. 64D(o) (1977).

Virginia: *See Note, supra* note 6, at 839.

Washington: *Gunn v. Manthov*, 138 Wash. 96, 244 P. 133 (1926) (unmature debts evidenced by promissory notes may be garnished only if the note is impounded). *See generally C. DRAKE, supra* note 65, at § 580 (1885); *Rood, supra* note 51.

92. *See, e.g., Edney v. Willis*, 23 Neb. 56, 36 N.W. 300 (1888); *Bassett v. Garthwaite*, 22 Tex. 230 (1858).

93. *See Inglehart v. Moore*, 21 Tex. 501 (1858).

94. *See, e.g., ILL. ANN. STAT. ch. 62, § 41* (Smith-Hurd 1972); *Inglehart v. Moore*, 21 Tex. 501 (1858).

95. *Knisely v. Evans*, 34 Ohio St. 158 (1877), illustrates the problem well. For a discussion of the case, see *supra* notes 65-76 and accompanying text.

Where the maker is aware of a pre-maturity transfer, he will deny any indebtedness to the creditor's debtor. This denial will discharge the maker from any garnishee liability. *See, e.g., ARIZ. REV. STAT. ANN. § 12-1581(A)* (1982). Alternatively, the maker may choose to use an interpleader procedure. *See, e.g., MISS. CODE ANN. § 11-35-41* (1972). *See also Bricks Unlimited, Inc. v. Agee*, 672 F.2d 1255 (5th Cir. 1982), *supra* notes 77-85 and accompanying text.

96. *See supra* notes 20-24 and accompanying text.

thereby risks being required to pay twice. The transferee/holder of the note must be paid because he took before the note became overdue.⁹⁷ If the transferee also takes in good faith, for value, and without notice of the garnishment, he will be a holder in due course and not subject to the maker's defense of prior payment in garnishment.⁹⁸

Some state legislatures and courts have modified the rule permitting garnishment of a debt evidenced by a note once the note becomes due because of the potential hardship resulting from transfers unknown to the maker. A few jurisdictions hold that the maker of a negotiable note will not be charged as a garnishee unless the note is in the maker's possession and control.⁹⁹ Other courts require the garnishing creditor to make an affirmative showing that the note remains in the original payee's (principal debtor's) possession.¹⁰⁰ Other statutory approaches include requiring the original payee to notify the maker of any transfer,¹⁰¹ mandating delivery of the note to the maker or the court prior to garnishment,¹⁰² and enjoining any negotiation of the note.¹⁰³

Some jurisdictions resolve the maker's dilemma by excepting all makers from liability as garnishees for having drawn or made a note.¹⁰⁴ Although this final approach clearly protects the maker's

97. *Lanese v. Duff*, 24 Ohio App. 494, 156 N.E. 461 (1927); *Kimrough v. Hornsby*, 113 Tenn. 605, 64 S.W. 613 (1905).

98. See U.C.C. § 3-305(2). This problem is particularly acute when creditors are permitted to initiate garnishment procedures before the note is due and judgment against the maker/garnishee is suspended until the note reaches maturity. See *supra* notes 77-85 and accompanying text.

99. See, e.g., *Huot, Kelly & Co. v. Ely, Candee & Wilder*, 17 Fla. 775, 782 (1880).

100. See, e.g., *Thompson v. Gainsville Nat'l Bank*, 66 Tex. 156, 18 S.W. 350 (1886).

101. See, e.g., ME. REV. STAT. ANN. tit. 14, § 4155 (1980).

102. See, e.g., *Great W. Fin. Co. v. Hamilton Nat'l Bank*, 76 Colo. 48, 230 P. 115 (1924); *Kieffer v. Ehler*, 18 Pa. 388 (1852).

103. See, e.g., CONN. GEN. STAT. ANN. § 52-341 (1960); MICH. CT. RULES 738.4(3) (West 1981); PA. RULES OF CT. 3118(a)(1) (West 1982).

104. Kansas: KAN. STAT. ANN. § 60-724(1) (1976).

Maine: ME. REV. STAT. ANN. tit. 14, § 2602(1) (1980).

Minnesota: MINN. STAT. ANN. § 571.43 (1947).

New Hampshire: *Stone v. Dean*, 5 N.H. 502 (1831). *But see* N.H. REV. STAT. ANN. § 512:22 (1968).

North Dakota: N.D. CENT. CODE § 32-09-29(1) (1976). *But see id.* § 32-09.1-15 (Supp. 1982).

Ohio: *Secor v. Witter*, 39 Ohio St. 218 (1883). *But see* *Lanese v. Duff*, 24 Ohio App. 494,

interest in avoiding harassment and double liability, creditors in these jurisdictions can reach neither the note nor the debt so evidenced. Creditors' remedies are frustrated where neither execution nor garnishment is available.

These various statutory enactments and judicial pronouncements fail to accommodate effectively the competing policies of negotiation and creditor protection. States that limit garnishment of debts evidenced through negotiable notes to post-maturity processes ignore the *Evans* dilemma created by pre-maturity transfers unknown to the maker. States that prohibit garnishment of persons who make or draw notes or drafts also frustrate creditor collection efforts. Thus, although either delivery of the note to the debtor prior to garnishment or notifying the maker of a transfer can accommodate competing policy considerations, providing for levy of execution by actual seizure is a preferable approach.

Levy by Seizure

The most reasonable approach to the problem of creditor process with respect to negotiable notes is to permit seizure of the

156 N.E. 461 (1927).

Oklahoma: OKLA. STAT. ANN. tit. 12, § 1186 (1961).

Oregon: OR. REV. STAT. § 29.185(5) (1981). *See also* Fishburn v. Londershausen, 50 Or. 363, 92 P. 1060 (1907).

Rhode Island: Oakdale Mfg. Co. v. Clarke, 29 R.I. 192, 69 A. 681 (1908).

South Dakota: S.D. COMP. LAWS ANN. § 21-18-15 (1979); Antelope County State Bank of Oakdale v. Humphrey, 57 S.D. 415, 232 N.W. 913 (1930).

Tennessee: TENN. CODE ANN. § 29-7-105 (1980).

Texas: Neal v. Kurz, 26 S.W.2d 478 (Tex. Civ. App. 1930); Willis v. Heath, 75 Tex. 124, 12 S.W. 971 (1889). *But see* Inglehart v. Moore, 21 Tex. 501 (1858) (permitting garnishment of maker once note has fallen due).

Vermont: Fuller v. Jewett, 37 Vt. 473 (1865). *But see* VT. STAT. ANN. tit. 12, § 3014 (1973).

West Virginia: W. VA. CODE § 38-7-26 (1966) (garnishment permitted only where note returned to maker).

Wisconsin: WIS. STAT. ANN. § 812.19 (1977); Mason v. Noonan, 7 Wis. 510 (1859); Davis v. Paulette, 3 Wis. 269 (1854).

Apparently, the following states have neither case law nor statutory protection for makers of negotiable notes who are summoned as garnishees: Alabama, Alaska (maker may protect self by paying debt into court, *see* ALASKA STAT. § 09.40.040 (1973)), California, Delaware, District of Columbia, Indiana, Kentucky, Louisiana, Maryland, Montana, New Jersey, New Mexico, New York, North Carolina, South Carolina, Vermont (*but see* VT. STAT. ANN. tit. 12 § 3014 (1973)), and Wyoming. Many of these states, however, provide for levy by seizure of negotiable notes. *See infra* note 105.

note itself pursuant to a writ of execution. States using this approach repudiated the common law rule that notes are not subject to levy and apply the usual creditor remedy of execution, treating negotiable notes as tangible personal property.¹⁰⁵ These states have either judicial precedent holding that notes fall within the respective statutes that describe property subject to execution,¹⁰⁶ or specific statutory provisions making negotiable notes "capable of manual delivery."¹⁰⁷

Among the statutes governing execution, every state has one

105. California: CAL. CIV. PROC. CODE § 488.320 (West 1979); *Jubelt v. Meyers*, 84 Cal. App. 2d 653, 191 P.2d 460 (1948); *Hulman v. Crumal*, 13 Cal. App. 2d 612, 57 P.2d 179 (1936).

Colorado: *Union Deposit Co. v. Driscoll*, 95 Colo. 140, 33 P.2d 251 (1934); *Great W. Fin. Co. v. Hamilton Nat'l Bank of Denver*, 76 Colo. 48, 230 P. 115 (1924) (dicta) (permitting the sheriff to take possession of a note pursuant to garnishment in aid of execution).

District of Columbia: D.C. CODE ANN. § 15-311, -312 (1981).

Indiana: IND. CODE ANN. § 34-1-36-6 (Burns 1973).

Iowa: IOWA CODE ANN. § 626.21 (West 1950). See *Brenton Bros. v. Dorr*, 213 Iowa 725, 239 N.W. 808 (1931) (discussing policy and citing cases); *Nordyke v. Charlton*, 108 Iowa 414, 79 N.W. 136 (1899).

Louisiana: *Mille's Estate v. Herbert*, 19 La. Ann. 58 (1867); *Miller v. Streedler*, 18 La. Ann. 56 (1866). See LA. CODE CIV. PROC. ANN. arts. 2291-2295 (West 1961).

Minnesota: MINN. STAT. ANN. § 550.10 (1947); *Mower v. Stickney*, 5 Minn. (Gil. 321) 397 (1861).

Mississippi: MISS. CODE ANN. § 13-3-127, -133 (1972).

Missouri: MO. ANN. STAT. § 513.090(4) (Vernon 1952).

Montana: MONT. CODE ANN. § 27-18-404 (1979). See *State ex rel. Coffey v. District Ct. of Fergus County*, 74 Mont. 355, 240 P. 667 (1925).

New Jersey: N.J. STAT. ANN. § 2A: 17-58 (West 1952); N.J.R. Civ. P. 4:60-7(c).

New York: N.Y. CIV. PRAC. LAW § 5201 (McKinney 1978); *Anthony v. Wood*, 96 N.Y. 180 (1884).

North Carolina: N.C. GEN. STAT. § 1-315(5) (1969).

Oregon: OR. REV. STAT. § 23.160 (1981); *Fishburn v. Londershausen*, 50 Or. 363, 92 P. 1060 (1907).

South Dakota: S.D. COMP. LAWS ANN. § 15-18-20 (1967 & Supp. 1982).

Washington: See WASH. REV. CODE ANN. §§ 6.04.060, .100 (1963 & Supp. 1982); *id.* § 7.12.090 (1961); *Woody's Olympia Lumber v. Roney*, 9 Wash. App. 626, 513 P.2d 849 (1973); *Johnson v. Dahlquist*, 130 Wash. 29, 225 P. 817 (1924); *Gordon v. Hillman*, 107 Wash. 490, 182 P. 574 (1919).

West Virginia: W. VA. CODE § 38-4-6 (1966); *Miller v. Cox's Adm'r.*, 9 W. Va. 8 (1876) (chooses in action).

Wisconsin: WIS. STAT. ANN. § 815.25 (West 1977).

106. See, e.g., *Fishburn v. Londershausen*, 50 Or. 363, 92 P. 1060 (1907) (negotiable notes held to be included in statute making debtor's "property" subject to execution).

107. See, e.g., N.Y. CIV. PRAC. LAW § 5201(c)(4) (McKinney 1978); WIS. STAT. ANN. § 815.25 (West 1977).

that attempts to delineate what property is subject to execution.¹⁰⁸ These statutes usually are quite broad. For example, they provide that "all property, real or personal,"¹⁰⁹ or "goods and chattels,"¹¹⁰ or "effects"¹¹¹ of the debtor are subject to execution. Some state courts hold that negotiable promissory notes fall within these statutes.¹¹² In these jurisdictions, the sheriff may levy upon and sell negotiable notes to satisfy a creditor's judgment.

Although such precedents exist in only a few jurisdictions, a fair number of states have enacted statutes that expressly make negotiable notes subject to execution.¹¹³ These statutes typically provide that negotiable notes are "tangible" or "capable of manual delivery."¹¹⁴ This express statutory determination is necessary to overcome the common law rationale that notes, as choses in action, are intangibles not subject to physical seizure or manual delivery.¹¹⁵

The statutes adopted in New York¹¹⁶ and California¹¹⁷ represent a more satisfactory approach to the treatment of creditor rights against negotiable notes, because the reasons for characterizing notes as intangible property incapable of seizure no longer exist.¹¹⁸ Negotiable instruments such as promissory notes presently are bought, sold, and traded readily in commercial markets. Permitting seizure of these notes recognizes the modern uses of commercial paper. The official comments to both the New York and California statutes express a clear legislative intent to change the prior

108. See, e.g., COLO. REV. STAT. § 13-52-102 (1974 & Supp. 1981); ME. REV. STAT. ANN. tit. 14, § 4151 (1980).

109. See, e.g., S.C. CODE ANN. § 15-39-410 (Law. Co-op 1977); S.D. COMP. LAWS ANN. § 15-18-17 (1969); WASH. REV. CODE ANN. § 6.04.060 (1973).

110. See, e.g., NEB. REV. STAT. § 25-1503 (1979); TENN. CODE ANN. § 26-1-104 (1977); VT. STAT. ANN. tit. 12, §§ 2731, 2740 (1973).

111. See DEL. CODE ANN. tit. 10, § 3508 (1974) ("goods, chattels, rights, credits, moneys, effects, lands and tenements" are subject to execution). See also *Price v. Brady*, 21 Tex. 614 (1858); *Moore v. Pillow*, 3 Tenn. (Hum.) 448 (1842).

112. See, e.g., *Fishburn v. Londershausen*, 50 Or. 363, 92 P. 1060 (1907); *Mower v. Stickney*, 5 Minn. (Gil. 321) 397 (1861) (promissory note is within statute authorizing levy on "personal property").

113. See, e.g., CAL. CIV. PROC. CODE § 488.320 (West 1979); MINN. STAT. ANN. § 550.10 (West 1947); N.Y. CIV. PRAC. LAW § 5201(c)(4) (McKinney 1978).

114. See, e.g., N.Y. CIV. PRAC. LAWS § 5201 (McKinney 1978).

115. See *supra* note 33.

116. See *supra* note 114.

117. CAL. CIV. PROC. CODE § 488.320 (West 1979).

118. See Note, 30 MINN. L. REV. 616 (1946).

law characterizing notes as incapable of manual delivery.¹¹⁹ The California statute codifies a previously accepted rule that promissory notes in a defendant's possession represent property capable of manual delivery which may be levied upon by seizure.¹²⁰ Similarly, the comments to the New York provision governing creditors' collection rights explain that negotiable notes are no longer considered intangibles.¹²¹

Besides recognizing the present nature of commercial paper, statutes that permit seizure of negotiable notes effectively accommodate the competing interests involved in negotiation while providing consistency in the creditor process. Applying levy by statutory seizure in the introductory hypothetical results in protecting Maker from double liability, allowing Credit Co. access to Debtor's assets, and providing transactional certainty for Transferee without disturbing the principles of negotiability. If the sheriff is permitted to seize a negotiable note held by Debtor pursuant to a writ of execution, Maker cannot be subjected to undue harassment or double liability, because the seizure prevents a transfer to Transferee or any third party.¹²² Consequently, Transferee cannot become a holder in due course and assert a claim on the note against Maker. Furthermore, Credit Co. receives payment of its just debt from the proceeds of the note at the execution sale. Finally, the negotiable quality of the note is undisturbed. The unusual circumstances surrounding an execution sale preclude the execution buyer of a negotiable note from taking without notice and thereby obtaining holder in due course status (unless the prior holder was a holder in due course).¹²³ The execution buyer, however, may fur-

119. "Law Revision Commission Comment," CAL. CIV. PROC. CODE § 488.320, at 231-32 (West 1979); "Practice Commentaries," N.Y. CIV. PRAC. LAWS § 5201, at 78-79 (McKinney 1978).

120. *Haulman v. Crumal*, 13 Cal. App. 2d 612, 57 P.2d 179 (1936).

121. "Practice Commentaries," N.Y. CIV. PRAC. LAWS § 5201, at 67-69 (McKinney 1978).

122. If the transfer had occurred, the sheriff would find that the debtor was no longer in possession of the note. If the note was the only non-exempt asset of the debtor, the sheriff would return the writ of execution *nulla bona* (no assets found) or execute against the proceeds of the debtor's sale of the note. In either case, the maker is not involved. The maker only becomes involved when the note is due, and then he is liable only to the holder.

123. See U.C.C. § 3-302(3)(a) and the Draftsmen's Comments; *Finance Co. of Am. v. Wilson*, 115 Ga. App. 280, 154 S.E.2d 459 (1967).

ther negotiate the note,¹²⁴ which may be taken by a holder in due course.¹²⁵

The only fair and reasonable resolution of the problems presented by the hypothetical is for every state to statutorily authorize creditors to have a negotiable note seized pursuant to a writ of execution, just as a television or automobile may be so taken. The common law approach to execution of notes followed in a majority of jurisdictions¹²⁶ prevents effective and fair debt collection by creditors. Those common law states that permit garnishment of the debt evidenced by the negotiable note either expose the makers of those notes to double liability or frustrate the expectations of transferees of the notes, thereby hindering the use of commercial paper. Moreover, common law jurisdictions that have enacted measures to protect makers of notes from double liability preclude all creditor process against negotiable notes because neither execution nor garnishment is available. An addition to the Uniform Commercial Code would provide the statutory authority to resolve these policy conflicts while adding uniformity to the laws of the states.

THE UNIFORM COMMERCIAL CODE

The passage of the Uniform Commercial Code (Code) in all United States jurisdictions¹²⁷ had a substantial impact on creditors' rights and remedies. Although the Code does not prescribe specifically the means by which creditors may enforce money judgments against their debtors, some provisions significantly affect procedures used to help creditors realize just debts. The Code deals expressly with creditor process of negotiable documents of title and investment securities.¹²⁸ Anomalously, article 3, which

124. See U.C.C. § 3-301.

125. See *supra* note 62 and accompanying text.

126. See *supra* note 42 and accompanying text.

127. Louisiana has enacted a substantial portion of the Uniform Commercial Code, see LA. REV. STAT. ANN. tit. 10 (West Supp. 1982); however, the state has not adopted the U.C.C. as such. See State Correlation Tables volume, U.C.C. REP. SERV. (Callaghan) 191 (1979). See generally Blum, *Notice to Holders in Due Course and Other Bona Fide Purchasers under the U.C.C.*, 22 B.C.L. REV. 203 (1981); Charleton, *Louisiana Civil Law Renaissance: A Bar to Adoption of the U.C.C.?* 18 AM. BUS. L.J. 1 (1981).

128. See U.C.C. § 7-602 (documents of title); U.C.C. § 8-317 (investment securities); U.C.C. REP. SERV. (Callaghan) 7602, 8317 (1964). See generally Kennedy, *The Rights of*

governs the negotiation of commercial paper, contains no provision prescribing creditors' remedies against negotiable promissory notes or negotiable instruments generally.¹²⁹ Absent an article 3 provision governing creditors' rights against negotiable notes, the policy conflicts and collection dilemma previously discussed persist. Moreover, the lack of a uniform approach to creditor process is burdensome to businesses nationwide.¹³⁰

An analysis of the Code's approach to creditors' remedies and negotiable property in light of commercial policy concerns suggests the need for a new article 3 provision governing creditors' rights against commercial paper generally and negotiable promissory notes specifically. Two sections of the Code provide potential models for resolving the policy conflicts surrounding creditor process against negotiable notes: section 7-602, providing for creditors' remedies against negotiable documents of title, and section 8-317, allowing creditors' remedies against investment securities. An examination of these sections reveals that section 8-317 provides the preferable model for creditors' rights against negotiable promissory notes.

Negotiable Documents of Title: Section 7-602

Article 7 of the Code governs negotiable documents of title, which represent title to goods and are an important vehicle for commercial activity. A party in possession of a document of title is entitled to receive, hold, and dispose of the document and the

Levying Creditors Against Negotiable Property Under the Uniform Commercial Code, 31 BUS. LAW. 1517 (1976).

This Note omits a discussion of forms of negotiable commercial paper other than negotiable notes. Negotiable documents of title and negotiable investment securities are negotiable instruments within the article 3 rules; however, sections 7-602 and 8-317 preempt any new Code provision regarding creditor's rights in those negotiable instruments. See U.C.C. §§ 3-103(1), 8-102(1)(c). Therefore, the only form of negotiable instruments that would be covered by a new provision in article 3 that are not discussed are drafts. See *supra* note 4.

129. The only commentators who address this problem note the absence of such a provision in article 3 of the U.C.C. See S. RIESENFELD, *supra* note 10, at 175 n.4; Kennedy, *supra* note 128, at 1530.

130. The express purpose of the U.C.C. is to modernize, simplify, clarify, and unify commercial law. U.C.C. § 1-102. The present state of creditor process against negotiable notes requires businesses that operate nationwide to gain familiarity with the law of 51 jurisdictions.

goods it covers.¹³¹ In negotiable form, documents of title provide a convenient means of transferring legal title to goods without actually transferring the goods.¹³² Section 602 of article 7 provides creditors with remedies against negotiable documents of title. Specifically, section 7-602 states:

[N]o lien attaches by virtue of any judicial process to goods in the possession of a bailee for which a negotiable document of title is outstanding unless the document be first surrendered to the bailee or its negotiation enjoined, and the bailee shall not be compelled to deliver the goods pursuant to process until the document is surrendered to him or impounded by the court.¹³³

As the Draftsmen's Comment explains, the purpose of this provision is "to protect the bailee from the conflicting claims of the document holder and the judgment creditor of the person who deposited the goods."¹³⁴ The bailee's dilemma addressed in section 7-602 is analogous to Maker's potential dilemma described in the introductory hypothetical. Credit Co. may garnish Maker, and Transferee may request that she satisfy the note, thus exposing her to possible double liability on the instrument. In section 7-602, the Code draftsmen addressed the analogous problem with warehouse receipts to protect the bailee from double liability on the warehouse receipt.¹³⁵

Although the creditors' remedies provided in section 7-602 also might be applied to a creditor enforcing a money judgment against a negotiable note, for a number of reasons, section 8-317 represents a more appropriate approach to creditors' rights against commercial paper. The primary reason for using section 8-317 as a model is that seizure of negotiable notes is preferable to enjoining the negotiation, as provided in section 7-602.¹³⁶ Enjoining the debtor from transferring the note only theoretically prevents negotiation to a third party, because injunctive relief assumes the debtor's

131. See generally Riegart, *Documents of Title Under Article 7*, 13 U.C.C. L.J. 105 (1980).

132. See J. WHITE & R. SUMMERS, *supra* note 62, § 20-4.

133. U.C.C. § 7-602 (in pertinent part).

134. U.C.C. § 7-602, Draftsmen's Comment 1. See also Kennedy, *supra* note 128, at 1517-20.

135. See *supra* notes 2-4 and accompanying text.

136. See *supra* text accompanying note 133.

compliance.¹³⁷ Despite the injunction, however, a creditor may be frustrated if a transferee, unaware of the injunction, takes the note from the debtor in good faith and for fair consideration. In this fashion, the transferee becomes a holder in due course and the completed transaction is protected.¹³⁸ As the decisions in *Knisely*¹³⁹ and *Bricks Unlimited*¹⁴⁰ demonstrated, this kind of transfer may cause conflicting claims and double liability for the maker regardless of whether the transfer violates a court order. Thus, patterning new section 3-420 after section 7-602's injunction provision would expose the maker to potential double liability and possibly frustrate the creditors' collection attempts despite due diligence.

As an alternative to an injunction, section 7-602 provides that a creditor may procure a lien against a document of title if the document is surrendered to the bailee.¹⁴¹ In terms of negotiable notes and the introductory hypothetical, this procedure would be similar to having the note returned to the maker.¹⁴² This procedure also would protect the maker in a manner very similar to levy by seizure by immobilizing the instrument and preventing transfers to third parties. Consequently, the maker, as the bailee in 7-602, avoids conflicting claims and double liability.

Despite this protection, section 7-602 is not the model for a new section 3-420. First, negotiable documents of title represent goods as well as commercial paper.¹⁴³ Furthermore, the market for documents of title is considerably smaller than that for negotiable

137. See Rendleman, *supra* note 22, at 357.

138. Comment 2 to § 7-602 makes clear that the drafters contemplated the situation in which the enjoined holder violates the injunction and negotiates the instrument. In such a situation, the innocent purchaser for value will defeat the levying creditor. Thus, this result alone suggests an inadequacy with the remedy: creditors are frustrated in collecting just debts even where they utilize all procedures provided to them by law.

139. 34 Ohio St. 158 (1877). See *supra* notes 65-75 and accompanying text.

140. 672 F.2d 1255 (5th Cir. 1982). See *supra* notes 77-83 and accompanying text.

141. See *supra* note 133 and accompanying text.

142. Some courts have required such a return or surrender to the maker as a prerequisite to garnishing the maker of a negotiable note. See, e.g., *Huot, Kelly & Co. v. Ely, Candee & Wilder*, 17 Fla. 775 (1880); *Gunn v. Manthov*, 138 Wash. 96, 244 P. 133 (1926). See also W. VA. CODE § 38-7-26 (1966). A recent commentator was unable to uncover any case law reported under § 7-602. See Kennedy, *supra* note 128, at 1530.

143. See generally J. WHITE & R. SUMMERS, *supra* note 62, at 782-98.

notes.¹⁴⁴ A rule governing negotiable notes must contemplate consumer transactions as well as sophisticated commercial transactions. Thus, patterning new section 3-420 after section 7-602 may be unwise, especially in light of the alternative offered by section 8-317.

Certified Investment Securities: Section 8-317

Article 8 of the Code governs investment securities. Section 8-317 sets out creditors' rights against investment securities: no attachment or levy upon a certified security or any share or other interest represented thereby which is outstanding is valid until the security is actually seized by the officer making the attachment or levy.¹⁴⁵ The Draftsmen's Comment to the text emphasizes that this provision focuses on the instrument itself on the theory that a valid levy cannot be made unless any possibility of the security finding its way to a transferee is removed.¹⁴⁶ The creditor must immobilize the security itself; if the security is transferred by transferring the certificate, the courts protect the completed transfer and the transferee defeats the creditor's collection effort.¹⁴⁷ Although section 8-317 mentions injunctive relief,¹⁴⁸ the Comment suggests that whenever the debtor possesses the security, levy by seizure is the creditor's proper remedy.¹⁴⁹

Like section 7-602, section 8-317 addresses the same policy concerns presented in the introductory hypothetical by providing creditors with access to the debtor's property without sacrificing the negotiable quality of the securities.¹⁵⁰ If levy against securities

144. See *id.* at 798-813.

145. U.C.C. § 8-317 (in pertinent part).

146. U.C.C. § 8-317, Draftsmen's Comment 1. See also Kennedy, *supra* note 128, at 1520-24.

147. See U.C.C. § 8-302. See also *Prisbrey v. Noble*, 505 F.2d 170 (10th Cir. 1974); *In re Kontaratos*, 10 Bankr. 956 (Me. 1981).

148. U.C.C. § 8-317(6) provides in pertinent part: "A creditor whose debtor is the owner of a security is entitled to aid from the courts of appropriate jurisdiction, by injunction or otherwise, in reaching the security . . ." *Id.*

149. See U.C.C. § 8-317. See also Kennedy, *supra* note 128, at 1520-24.

The Code approach to investment securities is analogous to New York's and California's approaches to creditors' rights against negotiable notes, which require seizure of the note to perfect a levy. See *supra* notes 116-21 and accompanying text.

150. See *supra* notes 2-4 and accompanying text. See also *Mazer v. Williams Bros. Co.*, 461 Pa. 587, 337 A.2d 559 (1975) (discussing similarity between policies regarding § 3-302

were permitted through notice alone, a creditor might be defeated if the certificate of security was transferred to a bona fide purchaser.¹⁵¹ Conversely, if the creditors' rights were considered paramount, the marketplace for securities would be undermined because parties could no longer rely on the certificates themselves.

Section 8-317 provides a useful model for drafting new section 3-420 for several reasons. First, the similar historical treatment of investment securities and promissory notes suggests that the law should recognize the commercial qualities of negotiable instruments in the same manner that the law has recognized corporate securities.¹⁵² Second, seizure of a negotiable instrument to perfect one's interest in the instrument would add consistency to the Code.¹⁵³ Third, seizure is the traditional and usual method of execution.¹⁵⁴ Finally, permitting levy by seizure will accommodate the interests of the maker and the transferee while providing the creditor with an effective collection procedure.¹⁵⁵

The common law treated both shares of corporate stock and promissory notes as intangibles.¹⁵⁶ Such intangible rights were personal to an individual and nontransferable.¹⁵⁷ Accordingly, creditors could not reach notes or shares of stock to enforce judgments, through execution or otherwise.¹⁵⁸ As shares became transferable, they became more valuable and creditors demanded access to them.¹⁵⁹ In response, states developed procedures whereby creditors served notice of their interests in these notes upon corporations' headquarters to gain liens against corporate securities.¹⁶⁰ Levy thus was by notice, similar to some state approaches to levy

holders in due course and § 8-302 bona fide purchasers).

151. Even though a levying creditor may gain a lien against the security, a bona fide purchaser will take the security free of the creditor's lien. See U.C.C. § 8-302(3).

152. See *infra* notes 156-64 and accompanying text.

153. See *infra* notes 171-72 and accompanying text.

154. See *supra* note 105 and accompanying text.

155. *Id.*

156. Absent a statute to the contrary, neither corporate stock nor promissory notes were subject to levy and sale on execution. See *Lowmore v. Berry*, 19 Ala. 130 (1851) (promissory notes); *Tow v. Evans*, 194 Ga. 160, 20 S.E.2d 922 (1942) (corporate stock).

157. See S. RIESENFELD, *supra* note 10, at 215-17.

158. See *Partch v. Adams*, 55 Cal. App. 2d 1, 130 P.2d 244 (1942).

159. See S. RIESENFELD, *supra* note 10, at 215.

160. See *Loiseaux, Liability of Corporate Shares to Legal Process*, 1972 DUKE L.J. 947, 949-50.

on negotiable notes.¹⁶¹ The Uniform Stock Transfer Act¹⁶² (USTA) changed the law regarding levy on corporate stock by requiring actual seizure.¹⁶³ Finally, in adopting section 8-317, the drafters of the Code acknowledged the changed quality of share and other investment securities, and followed the USTA approach.¹⁶⁴

Although the historical treatment of promissory notes parallels that of investment securities, the Code and a majority of jurisdictions still do not provide for the seizure of negotiable notes.¹⁶⁵ Various jurisdictions continue to treat negotiable notes as "choses in action"¹⁶⁶ and "intangibles,"¹⁶⁷ thereby exposing creditors and notemakers to the uncertainty suggested in the introductory hypothetical. Because of the present negotiable quality of promissory notes and other forms of commercial paper, the Code should provide and states should adopt a creditor collection process for negotiable notes similar to that existing for investment securities. A new section 3-420 based on the principles of current section 8-317 would constitute the most reasonable approach.

Proposed Section 3-420

A committee currently is examining and suggesting revisions to articles 3, 4, and 8 of the Code.¹⁶⁸ This Note proposes that the committee consider drafting a new section in article 3 that would provide specifically for creditors' rights against negotiable notes and other forms of commercial paper. Modeled after section 8-317, a new section 3-420¹⁶⁹ would permit creditors to seize negotiable instruments and other forms of commercial paper through an ap-

161. See *supra* notes 49-53 and accompanying text.

162. The Uniform Stock Transfer Act was enacted originally by all jurisdictions in the United States and later incorporated substantially in article 8 of the U.C.C. See J. WHITE & R. SUMMERS, *supra* note 62, at 2-4.

163. Uniform Stock Transfer Act §§ 13, 14.

164. See U.C.C. § 8-317 and Draftsmen's Comment; U.C.C. REP. SERV. (Callaghan) ¶ 8317 (1964).

165. See *supra* notes 31-126 and accompanying text.

166. See, e.g., *Maricopa County v. Arizona Lodge*, 52 Ariz. 329, 80 P.2d 955 (1938).

167. See, e.g., *Harris v. Smith*, 150 Fla. 125, 7 So. 2d 343 (1942).

168. The committee is chaired by Robert Haydock, Jr. and is commonly called the "3-4-8" or "348" Committee.

169. Considering the present structure of article 3, the logical place for a creditor's rights provision is after § 3-419, because the 400 series of article 3 governs the rights of parties to commercial paper.

propriate officer of the court. As with section 8-317, seizure of the negotiable instrument would resolve the policy conflicts presented in the introductory hypothetical, because Debtor could not transfer a note to Transferee that had been seized by the sheriff pursuant to execution process.¹⁷⁰

Besides recognizing current commercial realities surrounding the use of negotiable notes, a new section 3-420 would add internal consistency to the Code. First, such a provision would eliminate the incongruity of providing creditors rights against all other forms of negotiable property without recognizing creditors' rights in article 3.¹⁷¹ Additionally, the concept of requiring seizure of a negotiable note to perfect one's interest in that note presently exists in the Code: pursuant to section 9-305, a creditor perfects a security interest in a negotiable note by taking possession of it.¹⁷² Thus, allowing a creditor attempting to enforce a money judgment to perfect rights in a negotiable note by having the sheriff seize it is not an unprecedented addition to the Code, but rather a step toward consistency.

Moreover, the drafting and enactment of a new section 3-420 would help harmonize divergent state approaches to this important issue. The new provision would permit creditors to utilize the ordinary procedures for enforcing judgments, thereby simplifying and unifying state collection practices. Creditors could reach negotiable notes just as they would reach other tangible personal property of the debtor — through execution. In those states presently permitting levy on notes by seizure,¹⁷³ such a new provision would cause little, if any, disruption in existing Code or collection procedures. In the majority of states which follow the common law, new section 3-420 would help remove anachronistic notions concerning notes as intangibles while promoting commercial confidence in promissory

170. When a sheriff seizes a note pursuant to a writ of execution, an innocent transferee or holder in due course is precluded from receiving the note. Thus, the maker is not exposed to claims by both a holder in due course and a garnishing creditor.

171. See *supra* note 129 and accompanying text.

172. U.C.C. § 9-305 provides in pertinent part: "A security interest in letters of credit goods, instruments, negotiable documents or chattel paper may be perfected by the secured party's taking possession of the collateral." *Id.* See *In re Bruce Farley Corp.*, 612 F.2d 1197 (9th Cir. 1980); *In re Staff Mortgage & Investment Corp.*, 550 F.2d 1228 (9th Cir. 1977); *Northwestern Nat'l Bank of Minneapolis v. Shuster*, 307 N.W.2d 767 (Minn. 1981).

173. See *supra* note 104 and accompanying text.

notes and simplifying collection procedures.

Finally, a new section 3-420, modeled after section 8-317, would resolve satisfactorily the competing needs and interests of the various parties identified in the introductory hypothetical. Like levy by seizure statutes and section 8-317 procedures, new section 3-420 would accommodate each of the parties' interests while preserving note negotiability. Credit Co. may have the note owing to Debtor seized. This permits Credit Co. to collect its just debts. Consequently, Maker is neither unduly harassed by an action between Credit Co. and Debtor nor called upon to pay the note more than once. Moreover, Transferee's interest in preserving undisturbed any note transaction is protected because he would never gain possession of the note.

A new section 3-420 levy by seizure statute is not rendered impractical if the note is, in fact, negotiated to Transferee. Assuming that Transferee takes for value, in good faith, and without notice of any deficiencies in the note, Transferee attains holder in due course status and may defeat any other claims to the instrument.¹⁷⁴ Thus, negotiability is preserved. Additionally, Maker may not be subjected to double liability because Debtor cannot obtain possession of the note; the sheriff's attempted seizure of the note would be frustrated and the writ of execution would be returned *nulla bona*.¹⁷⁵ Thereafter, Credit Co. must seek enforcement of its money judgment by other means.¹⁷⁶ Thus, new section 3-420 accommodates the policies of satisfying creditors, protecting third parties from harassment, and assuring the negotiable quality of promissory notes.

CONCLUSION

The desire to clarify and modernize commercial law while promulgating uniform national rules played an important role in

174. See *supra* notes 41-42 and accompanying text.

175. "The name of the return by the sheriff to a writ of execution, when he has not found any goods of the defendant within his jurisdiction on which he could levy." BLACK'S LAW DICTIONARY 962 (rev. 5th ed. 1979).

176. If execution and garnishment procedures prove unsatisfactory, the creditor should examine the particular state statutes to determine what supplemental proceedings are available. For a discussion of when a creditor should resort to supplemental proceedings, see *supra* note 22.

the drafting and adoption of the Uniform Commercial Code.¹⁷⁷ The law governing creditor process of negotiable notes is neither simple, clear, modern, nor uniform. Many states cling to anachronistic notions of notes as "intangibles" and "choses in action." Other jurisdictions struggle with conflicting court rules attempting to satisfy the competing interests and policies involved. Finally, although the Code attempts to modernize and unify the law, a conspicuous absence exists in article 3 regarding creditors' rights against commercial paper. This confusion, inadequacy, and inconsistency may be resolved by adopting a new section 3-420 that provides authority for a sheriff to levy upon negotiable notes and other forms of commercial paper by actual seizure.

BRUCE H. MATSON

177. See U.C.C. § 1-102 and Draftsmen's Comment 1.