Grading Guides for Past Examinations in Secured Transactions and Commercial Paper
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This document contains grading guides for the examinations in Secured Transactions and Commercial Paper that were given on the following dates:

May 4, 2017
December 15, 2015
April 30, 2015
Grading Guide for Final Examination In
SECURED TRANSACTIONS & COMMERCIAL PAPER
(Course No. 6281-10; 4 credits)
Professor Gregory E. Maggs

This grading guide provides suggested answers to the final examination questions. In many cases, the suggested answers contain more detail than could reasonably be expected of actual answers written under examination conditions. Accordingly, actual answers could receive full or partial credit even if they did not completely match the suggested answers. A few students lost points for exceeding the 4500-word length limitation.

The examination was worth a total of 180 points. Grades were awarded in accordance with the Law School's mandatory grading guidelines for large classes. The following histogram shows the distribution of scores:

PROBLEM I.

[Max. points: 7 for A & B, 6 for C & D]

Sale

promise to buy vehicle

The Sams ----------> Creswell
<---------- Automotive
promise to sell vehicle

Loan

PTO Oupac $x
/s/ The Sams

The Sams ----------> Oupac, Inc.
<---------- promise to lend $14,309.54
& deliver money to Creswell

A. Did the trial court err in finding there was no failure of consideration as to the promissory note?

No. The trial court did not err. "Failure of consideration" means that the consideration that was promised was not provided. In this case, the consideration for the note that the Sams issued to Oupac was Oupac's return promise to lend the purchase price of the car (i.e., $14,309.54) and to pay the loan money to Cresswell. There was no "failure of the consideration" because Oupac performed its side of the bargain. Cf. § 3-303(b) (recognizing the defense of failure of consideration by saying: "If an instrument is issued for a promise of performance, the issuer has a defense to the extent performance of the promise is due and the promise has not been performed."); Kaw Valley v. Riddle (Riddle raised the defense of "failure of consideration" because he never received the equipment for which he issued a note).

Note: "Lack of consideration" is different from "failure of consideration." Lack of consideration means that nothing was promised or given to the maker in exchange for the note. Lack of consideration is also a defense. See 3-303(b) ("The drawer or maker of an instrument has a defense if the instrument is issued without consideration.").

B. Why might Oupac's lack of affiliation with Creswell Automotive matter?

Because Oupac is not "affiliated" with Creswell, the Sams cannot assert against Oupac any claims or defenses that they may have against Creswell. If Oupac were "affiliated" with Creswell, and if the Sams are consumers, then the Federal Trade Commission's Holder in Due Course Regulation (FTC HIDC Regulation) would have made it an unfair trade practice for Creswell to accept the loan money unless the note contained the following legend:

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED WITH THE PROCEEDS HEREOF.

See 16 C.F.R. § 433.2(b) (requirement of legend in non-seller financing sales); § 433.1(d)(2) (definition of "affiliated"); Casebook, p. 692. This legend would have subjected Oupac to any claims that the Sams have against Creswell based on the defective car. The Sams therefore might not have had to pay the note.

Note: Some answers suggested if Oupac and Creswell were closely connected, Oupac could not claim the status of a holder in due course.
See Unico v. Owen. But the holder in due course doctrine is inapplicable in this non-seller financing case. Cresswell did not negotiate the note to Oupac; on the contrary, Oupac took the note directly from the Sams.

C. Does the merger doctrine preclude the Sams from bringing any claims against Creswell Automotive or Oupac?

No. The merger doctrine says that when a negotiable instrument is taken for an underlying obligation, the underlying obligation is merged into the instrument. As a result of the merger, only the holder of the instrument can enforce the instrument, and no one can enforce the underlying obligation. Casebook, p. 647. The Sams did not take a negotiable instrument from Creswell or Oupac; on the contrary. The merger doctrine therefore does not limit them from bringing claims against Creswell or Oupac.

D. Would the Sams have had more protection if they had borrowed the purchase price from Creswell and issued a note to Creswell promising to repay the amount borrowed?

Yes, the Sams would have more protection. Under the actual facts, because Oupac is not affiliated with Creswell, the Sams cannot assert any defense to payment of their note to Oupac. But if the Sams had issued their note to Creswell and Creswell had attempted to enforce the note, Creswell would be subject to their claim in recoupment for the defects in the car. § 3-305(a)(3). True, Creswell might have negotiated the note to a holder in due course. But if the Sams are consumers, then the FTC HIDC regulation would have required their note to contain a legend saying:

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS ... WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS ... OBTAINED PURSUANT HERETO.

See 16 C.F.R. § 433.2(a) (legend required in seller financing sale). With this legend, even if Creswell had negotiated the note to a holder in due course, the Sams could still assert their claims in recoupment against the holder in due course.

PROBLEM II.

[Max. points: 7 for A & B, 6 for C & D]

A. Does Citibank have any liability?

Citibank is not liable as the drawer of the cashier's check because the check was unauthorized. § 3-412 (obligation of drawer); § 3-403(1) (effect of unauthorized signatures).
Citibank is also not accountable for the check as the payor bank because Citibank returned the check before its midnight deadline. § 4-302(1)(a). Citibank received the check on July 8. Its midnight deadline was therefore July 9 at midnight. Citibank returned the check by sending it to the Federal Reserve Bank. Because the Federal Reserve Bank received the check on July 9, Citibank must have returned it on either July 8 or July 9.

Citibank is liable to First Financial for failing to provide timely notice of dishonor. Under regulation CC, if a paying bank determines not to pay a check in the amount of $2,500 or more, it shall provide notice of nonpayment to the depositary bank by 4:00 p.m. on the second business day following the banking day on which the check was presented. 12 C.F.R. § 229.33(a). The facts say that Citibank (the paying bank) sent the notice to Chase (the intermediary bank), not to First Financial (the depositary bank). Nothing in the facts indicates that First Financial authorized Citibank to notify Chase instead of First Financial.

Citibank also may be liable to First Financial for failing to return the check to Chase in an expeditious manner as required by Regulation CC, 12 U.S.C. § 229.30(a). Under this regulation, a paying bank "may send a returned check to the depositary bank, or to any other bank agreeing to handle the returned check expeditiously." The facts suggest that Citibank returned the check to Chase (via the Federal Reserve Bank) and not to First Financial. In addition the facts indicate that "Chase had no agreement with First Financial to handle returned checks expeditiously on First Financial's behalf."

For violations of Regulation CC, Citibank would be liable to First Financial for the amount of loss caused. § 229.38(a). This loss might include any amounts First Financial cannot recover from McDonald that it could have recovered if Citibank had complied with the regulation.

B. What rights does First Financial have against McDonald?

First Financial, as the depositary bank, may revoke the settlement given by it to McDonald for the check, may charge back the amount of any credit to McDonald's account, and if there are insufficient funds in the account for a full recovery, may obtain a refund from McDonald. § 4-214(a). First Financial has this right because First Financial did not receive a final settlement for the check given that Citibank returned the check before its midnight deadline. First Financial also has a claim against McDonald for breach of the transfer warranty that all signatures are authentic and authorized. § 3-416(a)(2). McDonald violated this warranty because Citibank's purported signature as the drawer of the check was unauthorized. In addition, First Financial could enforce the check against McDonald if McDonald indorsed it. § 3-415(a).

C. What liability might Accurate Manufactured Products Group have?

Accurate Manufactured Products Group (AMPG) is identified as the remitter of the check. As the remitter, AMPG presumably negotiated the check to McDonald by transferring possession of it to him. § 3-201(a). If AMPG received consideration from McDonald, then AMPG would have made transfer warranties to McDonald. § 3-416(a). It would have breached the transfer warranty that all of the signatures on the check were authentic and authorized because Citibank's purported signature as the drawer of the check was unauthorized. § 3-416(a)(2). AMPG would be liable for any damage caused to McDonald, which would include whatever consideration he provided for the cashier's check.

AMPG probably did not make transfer warranties to anyone else, such as First Financial or Chase. As a remitter, AMPG was not required to indorse the check in order to negotiate it to McDonald, § 3-201(a), and it therefore
presumably did not indorse the check. Warranties extend to subsequent transferees only if the transferor indorses the check. § 3-416(a).

Note: If AMPG was also involved in the forgery, then AMPG could face additional liability. For example, if AMPG forged the check, it would be liable as the drawer because the unauthorized signature of Citibank would be effective as AMPG's signature. § 3-403(a). But the problem does not indicate that AMPG had any role in creating the unauthorized check.

D. When did First Financial have a duty to give McDonald credit for the check?

First Financial had to give McDonald $200 by the start of the first business day after the check was deposited, see 12 C.F.R. § 229.10(c)(1)(vii) and Dodd-Frank Act; $5000 credit by the start of the second business day, see id. § 229.12(b) (limit of credit to $5000 for large checks); and had to give credit for the rest of the check (i.e., $298,750 - $5000) within a reasonable time, id. § 229.13(h) (reasonable time for amount above $5000). But the duty to give credit for the check would cease when the check was dishonored.

Note: This check was not an actual cashier's check because the signature on behalf of Citibank was unauthorized. As a result it was just a local check subject to the rules for checks for large amounts. If the check had been an actual cashier's check, First Financial would have had a duty to give McDonald credit for the first $5000 by the start of the next business day after the check was deposited. 12 C.F.R. § 229.10(c)(1)(v).

PROBLEM III.

[Max. points: 7 for A & B, 6 for C & D]

Checks Deposited in the Assistant's Account at Wells Fargo

<table>
<thead>
<tr>
<th>Unauthorized</th>
<th>Indorsement in name</th>
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</thead>
<tbody>
<tr>
<td>PNC</td>
<td>drawer's of fictitious/nominal</td>
</tr>
<tr>
<td>PTO xxxxx</td>
<td>/s/ Silver - signature - payee</td>
</tr>
<tr>
<td></td>
<td>xxxxx - checks</td>
</tr>
</tbody>
</table>

Assistant -------------------------> Wells  ---> Intermed. ---> PNC  ---->
Silver  <-------------------------  Fargo <---  Bank <---  <---
                     credit  credit  debit  debit

A. Did Wells Fargo breach any warranty to PNC?

Wells Fargo made the presentment warranties in § 4-208(a) to PNC, but did not breach any of them. The facts do not suggest that the checks were altered or that Wells Fargo had knowledge (as opposed to notice) that the purported signature of Silver was unauthorized. § 4-208(a)(2) & (3). Wells Fargo did not breach the presentment warranty that it was entitled to enforce the checks because Wells Fargo was entitled to enforce the checks against Silver's assistant. The assistant's signatures as the drawer were effective as her own signature, § 3-403(a), and her signatures as the indorsers were effective because she made the checks payable to herself or to fictitious payees. § 3-404(b). (Some of the checks that she made payable to her friends and creditors also may have been deposited in Wells Fargo by the payees. These checks would have authorized indorsements provided that her friends and creditors indorsed them.)
Wells Fargo did not make transfer warranties to PNC because transfer warranties are not made to a payor bank when a check is presented for payment. Silver has alleged that Wells Fargo breached a warranty by presenting "highly irregular checks" but there is no such warranty.

B. On what grounds might the PNC argue that it has a right to charge Silver's account for these checks?

The bank could charge Silver's account for a check if the check was properly payable; a check is properly payable if it is authorized. § 4-401(a). Although the assistant signed Silver's name, PNC might argue that Silver is precluded from asserting these checks were unauthorized (1) because Silver's negligence in failing to secure his checkbook substantially contributed to the making of the unauthorized signatures, § 3-406(a); (2) because Silver delayed in reporting unauthorized checks by the same wrongdoer, § 4-406(d)(2); and (3) because the one-year limitation period for reporting unauthorized checks has expired, § 4-406(f).

C. If PNC had dishonored one of the checks that the Assistant had made payable to a fictitious payee, could Wells Fargo enforce the check against Silver?

Yes. Wells Fargo could enforce the check against Silver if (1) Wells Fargo is a person entitled to enforce; (2) Silver is either the drawer of the check or precluded from denying that he is the drawer; and (3) Silver cannot assert a defense to payment against Wells Fargo, either (a) because he does not have a defense or (b) because Wells Fargo is a holder in due course.

Wells Fargo is a person entitled to enforce the check. As explained above, an indorsement in the name of a fictitious or nominal payee is effective to negotiate a check. § 3-404(b). Wells Fargo is therefore a holder of the check, § 1-201(b)(21)(A), and a holder is entitled to enforce. § 3-301(i).

Silver will argue that Wells Fargo cannot enforce the checks against him because he was not the drawer. But if Silver's negligence substantially contributed to the making of the unauthorized drawer's signature -- as discussed in Part B above -- then Silver would be precluded from asserting that his signature was unauthorized. § 3-406(a). (Silver could make Wells Fargo share the loss if Wells Fargo was also negligent in taking the checks given that they were so irregular. § 3-406(b).)

Silver may assert the defense that the check was not issued for consideration because he did not receive anything for it. Wells Fargo will first respond that this defense is invalid because his assistant received consideration. Wells Fargo also will contend that it is not subject to the defense because it is a holder in due course. It will assert that it took the check in good faith, for value, and without notice of any problems. But Silver may argue that Wells Fargo cannot be a holder in due course if the check was so irregular as to call in to question its authenticity. § 3-302(a)(1). (Silver also may assert that the depositary bank did not act in good faith in giving credit for the check, see Maine Federal Credit Union, although this theory is controversial.)

D. What steps should Silver take to prevent, detect, and reduce losses from this type of fraud?

Silver should take greater care to secure his checkbook. Silver should review his bank statement every month, either by himself or by hiring a trustworthy person who does not have access to the checks. § 4-406(b). Relying on a person who has access to his checks to review the bank statements is not safe. See, e.g., Espresso Roma v. Bank of America. If Silver notices
that PNC has paid an unauthorized check, he should notify PNC promptly. § 4-406(c).
Silver also might ask PNC if it offers a "positive pay" service through which he could independently inform PNC which checks are authorized. See Casebook, p. 899.

In addition to these steps, Silver should be more careful in hiring and monitoring his assistants. Silver also might buy a fidelity bond or fidelity insurance to cover his assistants. See Casebook, p. 928; § 3-405 cmt. 1.

PROBLEM IV.

[Max. points: 7 for A & B, 6 for C & D]

<table>
<thead>
<tr>
<th>security interest</th>
<th>security interest</th>
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<tbody>
<tr>
<td>PTM</td>
<td>Maxus</td>
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<tr>
<td>Technologies Inc.</td>
<td>GE Capital</td>
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</tbody>
</table>

A. Why might a missing "h" render the financing statement seriously misleading?

A financing statement is seriously misleading if it "fails sufficiently to provide the name of the debtor in accordance with Section 9-503(a)." § 9-506(b). Under § 9-503(a)(1), the name of a corporation is the name registered with the state. In this case, the registered name was "PTM Technologies, Inc." not "PTM Tecnologies, Inc."

An exception is that a financing statement is not seriously misleading if a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, would disclose the financing statement. § 9-506(b). In this case, if someone entered the correct name "PTM Technologies, Inc." the search might not disclose a financing statement under the name "PTM Tecnologies, Inc."

B. Does a seriously misleading financing statement necessarily prevent perfection of a security interest?

No. The security interest might be perfected by a method other than filing. Some security interests are perfected automatically. § 9-309. Others are perfected by possession or control. §§ 9-313 & 9-314. Still others are perfected by notation on a certificate of title. § 9-310. In addition, a secured party can file an amended financing statement that is not seriously misleading by providing the correct name of the debtor. § 9-512(d).

C. If PTM had defaulted under the security agreement before declaring bankruptcy, how would filing for bankruptcy affect Maxus and PTM's rights?

If PTM had defaulted before bankruptcy, Maxus and PTM could enforce their security interests even if they were not perfected. They would have all of the rights in part 6 of UCC art. 9. For example, they could have repossessed and sold the collateral to cover their claims. After bankruptcy, any unperfected security interests are subordinated to the rights of the trustee as a hypothetical lien creditor. See 11 U.S.C. § 544(a) (the "strong arm" clause). The secured creditors then effectively lose their rights to the collateral. They must share equally with unsecured creditors.

D. What advice would you have given Maxus and GE Capital in this transaction?
Advice to both Maxus and GE Capital: To verify that Maxus's security interests were perfected by filing, Maxus and GE Capital should have taken the very simple step of searching the UCC filing system for "PTM Technologies, Inc.," the correct name of the debtor. In most jurisdictions, searching is free and takes just seconds on the internet. If the search did not discover a financing statement, they could have filed a new, correct financing statement.

But searching the UCC filing statement is not enough. Maxus and GE Capital also should have checked to make sure that PTM actually had possession of the collateral. If PTM did not have possession of the collateral, the collateral might not actually exist or the person in possession of the collateral might have priority, having perfected by possession.

Advice to GE Capital: GE Capital should amend the financing statement to indicate its status as the new secured party. GE Capital also should review the security agreements that Maxus assigned to it so that it would understand the agreements, including what constitutes a default by PTM.

PROBLEM V.

[Max. points: 7 for A & B, 6 for C & D]

1st Source Bank

Security agreement: tractors and trailers, accounts, and proceeds from the agreed-upon collateral

Financing statement: specified tractors/and or trailers, and "all proceeds thereof"

Wilson Bank & Trust, Pinnacle Bank, and TransCapital & Leasing, Inc.

Security agreement: "all accounts receivable now outstanding or hereafter arising."

Financing statement: "all accounts receivable now outstanding or hereafter arising"

A. Who has priority in Debtors' accounts receivable?

If 1st Source Bank had a perfected security interest in the tractors and trailers, 1st Source Bank would have priority over Wilson Bank & Trust, Pinnacle Bank, and TransCapital & Leasing ("Wilson et al.") in the accounts arising from the lease of the tractors and trailers based on the following reasoning:

1. The accounts arising from leases of the tractors and trailers are proceeds because proceeds include "whatever is acquired upon the . . . lease . . . of collateral." § 9-102(a)(64)(A).

2. 1st Source Bank has a security interest in these accounts because "a security interest attaches to any identifiable proceeds of collateral." § 9-315(a)(2).

3. 1st Source Bank's security interest in these accounts was automatically perfected because "[a] security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected." § 9-315(c). (Even without the automatic perfection, the financing statement covering "all proceeds" arguably would cover the accounts arising from leasing the equipment, but some courts disagree with this analysis.)
4. 1st Source Bank's security interest did not become unperfected after 20 days because all of the elements for the exception in § 9-315(d)(1) are satisfied: (A) a filed financing statement covers the original collateral (i.e., the tractors and trailers); (B) the proceeds (i.e., the accounts) are collateral in which a security interest may be perfected by filing in the office in which the financing statement has been filed; and (C) the proceeds are not acquired with cash proceeds (i.e., they were acquired from leasing the original collateral).

5. Although Wilson et al. also have a perfected security interest in the accounts, 1st Source has priority under the first-to-file-or-perfect rule in § 9-322(a)(1), because 1st Source filed its financing statement covering the tractors and trailers before Wilson et al. filed their financing statements covering accounts.

Wilson Bank et al. have priority over 1st Source Bank in any accounts receivable that are not proceeds from leasing the tractors and trailers. Although Wilson Bank has a security interest in these accounts under its security agreement with Debtors, this security interest was not perfected because 1st Source Bank's financing statement did not indicate accounts.

B. Suppose Debtors had sold the tractors and trailers to raise funds to pay off their loans. Would 1st Source's security interest, perfection, and priority continue:

1. in the tractors and trailers after their sale?

1st Source's security interest, perfection, and priority would continue in the tractors and trailers, see § 9-315(a)(1), unless 1st Source authorized Debtors to sell free of the security interest, see id., or unless the sales were in the ordinary course of business, see § 9-320(a). 1st Source might have authorized the sale free of the security interest if the purpose was to repay 1st Source's loans. It is not clear whether the sale would be in the ordinary course of business unless Debtors were in the "business of selling goods of that kind." § 1-209(b)(9). The facts suggest that they were in the business of leasing tractors and trailers, but not necessarily selling them.

2. in accounts arising from the sale?

Yes. Accounts arising from the sale of the tractors and trailers would be proceeds, § 9-102(a)(64)(A), and the same rules regarding continuation of the security interest, perfection, and priority that were discussed in the answer to question A above would apply.

3. in chattel paper arising from the sale if Debtors sold the chattel paper to a third party?

No, assuming that 1st Source Bank authorized the sale of the chattel paper. Chattel paper arising from the sale of the tractors and trailers would be proceeds, § 9-102(a)(64)(A), and the same rules regarding continuation of the security interest, perfection, and priority discussed in the answer to question A above generally would apply. But 1st Source most likely would authorize the sale of the chattel paper free of its security interest, § 9-315(a)(1), so that Debtors would have funds to repay 1st Source. (And even if 1st Source did not authorize Debtors to sell the chattel paper, a buyer "in good faith, in the ordinary course of the purchaser's business, and without knowledge that the purchase violates the rights of the secured party" would have priority over 1st Source's security interest. § 9-330(b).)

Note: The inventory exception for chattel paper in § 9-330(a) might apply if the tractors and trailers are inventory. But it appears that
Debtors were in the business of leasing the equipment rather than selling it.

**PROBLEM VI.**

[Max. points: 7 for A, 6 for B, C, & D]

- sec. int. &
- sales contract

Dealer ----------> Bank

| /
| | $$
| |
| boat & | sec. int. &
| trailer | sales contract

Debtor

A. Did the bank ever have a perfected security interest in the boat?

The answer depends on whether Kansas has a statute (outside the UCC) that requires the kind of boat that The Debtor bought to be indicated on a certificate of title. § 9-311(a)(2). All states require some kinds of boats to have a certificate of title (e.g., large motor boats), but some states exempt certain classes of boats (e.g., canoes). The problem does not indicate what the Kansas statute says or what kind of boat The Debtor bought.

If The Debtor bought a boat that could only be perfected by a notation on a certificate of title, then the bank would not have a perfected security interest because the facts indicate that the bank's security interest was noted on the certificate of title to the trailer but not the boat.

Note: The automatic perfection of a purchase-money security interest in consumer goods does not apply to consumer goods that must be perfected by notation on a certificate of title. § 9-309(a) (automatic perfection except for consumer goods subject to a statute in § 9-311(a)).

B. Would noting the lien on the Oklahoma certificate of title have perfected the security interest in the boat if the boat should have had a certificate of title issued by Kansas?

Yes. The local law of the jurisdiction under whose certificate of title the goods are covered governs perfection. § 9-303(c). It does not matter which state issues the certificate of title. Section 9-303(c) "applies to goods covered by a certificate of title, even if there is no other relationship between the jurisdiction under whose certificate of title the goods are covered and the goods or the debtor." § 9-303(a). See also id. cmt. 1; Meeks v. Mercedes-Benz Corp.

C. If the Debtor had not declared bankruptcy, and the government had imposed a federal tax lien on the boat, would the federal tax lien have priority over the bank's security interest?

The text of revised article 9 indicates that the answer is no. A UCC security interest defeats a federal tax lien only if, at the time the tax lien arises, three requirements are met. See 16 U.S.C. § 6323(a),(h); Casebook, p. 248. First, the security interest must be in existing collateral (i.e., not after acquired property). This requirement is met because the bank has a security interest in the boat. Second, the security interest must secure funds already advanced (i.e., not future advances). This requirement is met because the Dealer extended the credit for buying the boat. Third, the security interest must be protected against a judgment lien. A security
interest can be protected against a judgment lien in two circumstances. One circumstance is that the security interest is perfected. § 9-317(a)(2)(A).
In this case, the security interest was not perfected because it was not recorded on a certificate of title. § 9-311(a)(2). The other circumstance is that "one of the conditions specified in Section 9-203(b)(3) is met and a financing statement covering the collateral is filed." § 9-317(a)(2)(B). One of the requirements in § 9-203(b)(3) is that the parties have signed a security interest. In this case, the parties have signed a security agreement giving Bank a security interest in the boat and the Bank filed a financing statement identifying the boat as collateral.

Note: Full credit was given to anyone who addressed the language of § 9-317(a)(2)(B), regardless of the conclusion reached about its application. The answer above is controversial because Pre-revision U.C.C. art. 9 cases say that a judgment lien takes priority over a security interest which has not been noted on a certificate of title even though a financing statement has been filed. See, e.g., Westenhoefer v. Navistar Fin. Corp., 155 B.R. 7, 8 (Bankr. E.D.Ky. 1993) ("Where a creditor has properly filed a financing statement but the clerk has failed to note the lien on the certificate of title, the lien is unperfected and the trustee in bankruptcy, as a judgment lien creditor, prevails over the unperfected lien creditor.").

D. If a lender had a perfected security interest in the Dealer's inventory, who would have priority in the contract that the Dealer assigned to the Bank?

The Bank would have priority over the lender. The contract would be for chattel paper. § 9-102(a)(11). Although the contract would be proceeds of the inventory, § 9-102(a)(64)(A), and the lender therefore would have a security interest in the contract, § 9-315(a)(2), the Bank would have priority in the contract under the special rule concerning the assignment of chattel paper. § 9-330(a) ("A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed merely as proceeds of inventory . . . .").

PROBLEM VII.
[Max. points: 7 for A, 6 for B, C, & D]

promise to sell
meat products
Mago -------> Genita
(beneficiary) <------- (Applicant)
/
promise |
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to pay
letter of credit
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application
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Mago (the beneficiary) and Genita (the applicant) both would have claims against LHB (the issuer) for wrongful dishonor. § 5-111(a) (claim of beneficiary for wrongful dishonor); § 5-111(b) (claim of applicant for wrongful dishonor). Mago could recover the amount of the letter of credit, plus incidental damages (like communication costs), and attorney's fees, less any damages actually avoided (which appear to be none because Genita has not paid). It is difficult to see how Genita would be injured by LHB's dishonor of the letter of credit, but perhaps it suffered some incidental damages also. In addition, under the independence principle, Mago would have a claim against Genita for breach of contract because Genita did not pay the invoices. § 5-103(d).

C. What steps could LHB have taken to avoid a dispute?

LHB actually did take one important step to avoid a dispute: LHB informed Mago of exactly why it was dishonoring the presentation and what Mago needed to present. LHB complied with § 5-108(b)(3) in this regard. Mago should have made a conforming presentation before the letter of credit expired.

LHB could have taken two additional steps to avoid a dispute. First, LHB could have refused to issue the letter of credit until the application expressed the documents to be presented in a clearer manner (i.e., specified whether the bills of lading needed to be signed). Second, once Mago presented the unsigned bills of lading, LHB could have asked Genita to waive any discrepancy. § 5-108 & cmt. 2, ¶4.

D. What advice would you have given Mago when Mago, Genita, and LHB were setting up and executing the transaction?

When setting up the transaction, Mago should have understood what documents Mago would have to present in order to obtain payment under the letter of credit. If it was unclear whether the bills of lading had to be signed, Mago should have asked.

Mago also should have insisted that the letter of credit require presentation only of documents that Mago could easily produce. In this case, it was not wise for Mago to agree to produce signed bills of lading if Mago would have difficulty obtaining them. Given that the parties agreed to use a standby letter of credit, Mago should have pushed for only requiring an affidavit attesting that Mago had shipped conforming goods, that Mago had sent Genita invoices, and that Genita had not paid the invoices when they were due. Mago would have had no difficulty producing such an affidavit.

Mago should have immediately addressed the discrepancy that was identified by LHB. Rather than re-presenting the unsigned bills of lading or presenting telexes, Mago should have done what was necessary to obtain and present the signed bills of lading before the letter of credit expired.

Mago also should have contacted Genita and asked Genita to waive the discrepancy.

If Mago was worried about whether Genita would pay for the goods, or LHB would not pay the letter of credit, Mago might have structured the transaction so that it did not ship and invoice all four installments before receiving any payment. Mago also might have decided to sell to Genita only for cash, thus avoiding the risk of non-payment by both Genita and LHB.
Grading Guide for Final Examination In

SECURED TRANSACTIONS & COMMERCIAL PAPER

(Course No. 6281-10; 4 credits)

Professor Gregory E. Maggs

In Problems I-V, questions A and B were worth 7 points, and questions C and D were worth 6 points. In Problems VI-VII, question A was worth 7 points, and questions B, C, and D were worth 6 points.

PROBLEM I.

PTO McKee                                      returned

HGE         McKee                             unpaid

Houston   -----> McKee -----> RR Maloan -----> Houston    -----> RR Maloan

Gold     <-----                                Gold      <-----

Exchange  watch                                Exchange's

Bank

A. What arguments should RR Maloan make in its lawsuit against Houston Gold Exchange?

RR Maloan should make three arguments. First, Houston Gold Exchange, as the drawer of the check, is liable on the check because the check was dishonored by the drawee, Houston Gold Exchange's bank. § 3-414(b). Second, RR Maloan is entitled to enforce the check under § 3-301(i) as a holder. RR Maloan is a holder because the check was issued to McKee, and McKee negotiated the check to RR Maloan. § 3-201(a); § 1-201(21)(b). Third, although Houston Gold Exchange may have a claim in recoupment for breach of warranty against McKee because the Rolex watch was not genuine, RR Maloan is not subject to this claim in recoupment because RR Maloan is a holder in due course. § 3-305(a)(3),(b). From the facts, it appears that RR Maloan is a holder in due course because it took the check in good faith, for value, and without notice of the claim in recoupment (or other problems). § 3-302(a)(2).

B. Does RR Maloan have any rights against McKee or Houston Gold Exchange's bank?

RR Maloan would have a claim against McKee based on McKee's indorsement of the check (unless McKee indorsed the check without recourse) because an indorser is liable on a check if it is dishonored. § 3-415(a).

RR Maloan also may have a claim against McKee for breach of the transfer warranty that no one could assert a claim in recoupment against McKee. § 3-416(a)(4). As noted above, Houston Gold Exchange may have a claim in recoupment against McKee for breach of the warranty that the watch was a Rolex. But if RR Maloan is a holder in due course, and is not subject to Houston Gold Exchange's defense, then RR Maloan likely will not have suffered any damages from this breach of transfer warranty. § 3-416(b).

RR Maloan has no rights against Houston Gold Exchange's bank. As the drawee, the bank had no duty to the holder to pay the check. § 3-408.

C. What rights, if any, would Houston Gold Exchange's bank have if it had paid the check?
Houston Gold Exchange's bank could revoke the payment if it returned the check by its midnight deadline. § 4-215(a)(2).

If Houston Gold Exchange's bank did not return the check by its midnight deadline, the bank would not have a right to charge Houston Gold Exchange's account because the check was not properly payable given the stop payment order (assuming the stop payment order was received in time for the bank to act). § 4-401(a); § 4-403(a). But upon payment, the bank would be subrogated to RR Maloan's rights against the drawer, and therefore could enforce the check against Houston Gold Exchange. See § 4-403 cmt. 7. And if RR Maloan is a holder in due course, then the bank would be subrogated to the rights of a holder in due course against the drawer, § 4-407(1), and Houston Gold Exchange could not assert its apparent claim in recoupment against RR Maloan, § 3-305(b).

Houston Gold Exchange's bank could recover from RR Maloan or McKee under a theory of restitution for mistaken payment under § 3-418(a)(i), unless the Price v. Neal exception in 3-418(c) applies. The Price v. Neal exception probably applies to RR Maloan, which appears to have taken the check in good faith and for value. But the Price v. Neal exception would not apply to McKee if McKee did not act in good faith in selling the watch.

D. Houston Gold Exchange attempted to protect itself by issuing a post-dated check and then a stop payment order. How effective were these measures? Were there better options?

Stopping payment on a check may have protected Houston Gold Exchange in a typical transaction in which all of these conditions are met: (1) the payee does not negotiate the check to a holder in due course but instead deposits the check directly into his or her bank; (2) Houston Gold Exchange stops payment before the check is presented to the payor bank; and (3) the payor bank dishonors and returns the check before the payee withdraws any credit given by the depositary bank. In such cases, although the payee (in this case McKee) would have a right to enforce the returned check against Houston Gold Exchange, § 3-414(b), Houston Gold Exchange could assert any defense or claim in recoupment that it might have, § 3-305(b). (Note: Under § 4-401(c), a bank may pay a post-dated check before the date on the check unless the customer notified the bank of the postdating.)

But stopping payment was not effective in this case because it could not prevent a holder in due course such as RR Maloan from enforcing the check. A better method would be for Houston Gold Exchange not to issue a check until it knows that there will be no defenses. For example, perhaps Houston Gold Exchange could have inspected the purported Rolex watch carefully before paying for it. Paying with a negotiable instrument is like paying with cash if the negotiable instrument is negotiated to a holder in due course.

PROBLEM II.

PTO Merchants Banks
$400,000
/s/ David
/s/ Elizabeth

A. If David had answered the complaint, but did not deny the authenticity of his signature or raise any defense, what evidence would Merchants Bank need to present at trial to prevail against him on the note?

The only evidence that Merchant's Bank would need to present would be the note itself. Under § 3-308(a), the validity of the signatures on the note would be admitted because they were not specifically denied. Under § 3-
308(b), because the validity of the signatures is admitted and there is no defense, Merchants Bank would only have to show that it was entitled to enforce the note. Producing the note would prove that Merchant's Bank was a holder because it would show that Merchant's Bank is in possession of the note and that the note is payable to it. § 1-201(b)(21). As a holder, Merchant's Bank would be entitled to enforce the note. § 3-301(i). (Note: This question is very similar to Prob. (1), pp. 649-650.)

B. **How should Merchants Bank respond to Elizabeth's arguments?**

In response to Elizabeth's argument that she signed the note only "to give a security interest in her and David's residence" but not to incur liability for paying the note, Merchants Bank should argue that Elizabeth signed the note in the same capacity as Michael, that she is therefore a co-maker of the note, and that as a co-maker she is jointly and severally liable on the note. § 3-412(a), § 3-116(a).

In response to Elizabeth's argument that she did not receive consideration, Merchants Bank should make alternative arguments depending on whether Elizabeth is an accommodation co-maker or an ordinary co-maker (see next question). If Elizabeth is an accommodation co-maker because she did not receive a direct benefit from the loan, then lack of consideration is not a defense. Although an ordinary maker of an instrument has a defense if the instrument is issued without consideration, § 3-303(b), an accommodation party cannot raise this defense, § 3-419(b). On the other hand, if Elizabeth is not an accommodation maker then by the definition of accommodation maker in § 3-419(a), she received a direct benefit from the loan, which would be consideration for promising to pay. (Note: The holder in due course doctrine would not strip away a defense of lack of consideration because (a) Merchants Bank would have notice of this defense and (b) the doctrine in any event only strips away defenses "against a person other than the holder," § 3-305(b).)

C. **If Elizabeth pays Merchants Bank, what rights will she have?**

Elizabeth's rights depend on whether she is an accommodation co-maker or an ordinary co-maker. A co-maker who does not receive a direct benefit from the loan is an accommodation co-maker. § 3-419(a). The facts suggest that Elizabeth did not receive a direct benefit from the loan because it was a business loan to David and Merchants Bank reviewed David's financial information in making the loan. But more information would be necessary to say for sure whether she received a direct benefit. If Elizabeth is an accommodation co-maker because she did not receive a direct benefit from the loan, she will have a right to reimbursement from Michael. § 3-419(f). In addition, she will be subrogated to Merchants Bank's rights to the collateral. § 3-419 cmt. 5. If she is an ordinary co-maker and not an accommodation co-maker, then she will have only a right to contribution from David. § 3-116(b).

D. **How, if at all, would the rights of the parties be different if Elizabeth had written the words "for accommodation" or "without recourse" next to her signature?**

If Elizabeth had written the words "for accommodation" next to her signature, the words would create a presumption that she is an accommodation party. § 3-419(c). But as explained above, the facts already suggest that she is an accommodation party, with or without those words, because she did not receive a direct benefit from the loan. § 3-419(a).

If Elizabeth had written the words "without recourse" next to her signature, then she would not have personal liability on the note. § 3-415(b). Merchants Bank could still exercise its rights against the collateral--the residence that she co-owned with David--but it could not
recover from her for any deficiency. (Note: Non-recourse loans secured by real estate are not uncommon.)

PROBLEM III.

A. Under what circumstances, if any, would First American Bank have had a right to charge First Aid Corporation's account?

In general, a bank can charge its customer's account only for a check that is properly payable. § 4-401(a). Because the two checks in this problem were forged, and thus were unauthorized, First American Bank would have a right to charge First Aid Corp.'s account only if it could show an exception to the properly payable rule. § 4-401(a). The facts as stated are insufficient to establish the applicability of any exception, but possible exceptions would include: (1) negligence by First Aid Corp. that substantially contributed to the making of the forgery, § 3-406(a); reporting delay by First Aid Corp. that caused a provable loss, § 4-406(d)(1); (3) reporting delay by the First Aid Corp. where First Aid Corp. delayed more than a reasonable time after receiving its statement showing the first forgery by the same wrongdoer, § 4-406(d)(2); and (4) delay beyond one year before reporting the forgery, § 4-406(f), or a shorter deadline imposed by the contract between First Aid Corp. and First American Bank.

B. Under what circumstances, if any, could First American Bank recover from RBS Citizens Bank?

The payor bank generally bears the risk of loss from forged checks. But First American Bank could recover from RBS Citizens Bank under a theory of breach of presentment warranty if RBS Citizens Bank knew that the drawer's signature was forged (which seems unlikely). § 4-208(a)(3). And First American Bank could recover from RBS Citizens Bank under a theory of restitution if RBS Citizens Bank did not act in good faith (which also seems unlikely). A payor bank that pays a check by mistake can recover in restitution under § 3-418(a) unless the Price v. Neal exception in § 3-418(c) applies. The Price v. Neal exception does not apply if the depositary bank does not act in good faith. Id.

Note: First American Bank also could recover from RBS Citizens Bank if it had returned the checks before its midnight deadline, § 4-301(a), but First American Bank apparently did not do that in this case.

C. Did RBS Citizens Bank need permission to destroy the original checks and present electronic copies? Did it lose any rights by doing so?

RBS Citizens Bank did not need permission to destroy the original checks. Even if the checks had to be returned, RBS Citizens could create a substitute check. Section 5003(a) of the Check 21 Act says no permission is necessary to create and use a substitute check.

But RBS Citizens Bank did need permission to present the check electronically. § 4-110(a). But if RBS Citizens Bank did not receive permission, it could present a substitute check. Check 21 Act § 5003(b).
RBS Citizens Bank did not lose any rights by destroying the original checks because a substitute check can be used for all purposes. Check 21 Act § 5003(b).

D. What advice would you give Goodson about potential risks in these two transactions and how to avoid them?

Goodson may not have incurred a loss in this case because the loss for forged checks usually falls on the payor bank. But Goodson faced a risk that First America Bank would dishonor and return the checks and that RBS Citizens Bank would revoke any credit to his account under § 4-214(a). Revoking the credit could cause Goodson to suffer a loss if he had already sent the money to Anderson and could not get it back.

Goodson could avoid the risk that First American Bank would dishonor the checks by determining whether the checks were properly payable and whether First Aid Corp. had enough money in its account to pay the check. To determine whether the checks were properly payable, Goodson should have called First American Bank to ask whether it actually had issued the checks to Anderson and by requiring Anderson to prove he was in fact the intended payee. He could also ask First American Bank whether First Aid Corp. had a sufficient balance to clear the checks.

Goodson could avoid a loss if RBS Citizens Bank revoked the credit from his account by not forwarding the money to Anderson until the checks had been finally paid. (Note: Writing "without recourse" on the checks would not prevent RBS Citizens Bank from revoking credit.)

Anderson's story sounds a lot like other fraudulent scams involving complex stories by foreigners for why they need assistance with checks and bank accounts. It might be better to avoid all risks and all hassles if something goes wrong by just not getting involved.

PROBLEM IV.

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Partnership
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A. How did the transfer of the tractor and loader to the Partnership affect Agricredit's rights?

The transfer of the tractor most likely did not diminish Agricredit's security interest in the tractor. Unless an exception applies, the buyer of goods takes the goods subject to any security interest in the goods. § 9-315(a)(1). It seems unlikely that any exception would apply in this case. The Partnership would have notice of the security interest if the security interest was indicated on a certificate of title, which the state probably requires for tractors and loaders, § 9-311(a)(2). In addition, the Partnership presumably did not buy the tractor and loader in the ordinary course unless Odette is in the business of selling such equipment.

Transfer of the tractor and loader to the Partnership was a default under the security agreement. Under § 9-601(a), this default gave Agricredit
whatever rights were provided in the security agreement and all the rights identified in part 6 of UCC art. 9, including the rights to proceed judicially or to take possession of the property.

B. Why might Agricredit have decided to seek a writ of execution and have the sheriff seize the tractor and the loader instead of privately taking possession of them?

Agricredit may have been worried that it could not take possession of the tractor and loader without a breach of the peace, § 9-609(b), and would have faced liability if it caused a breach of the peace, see Williams v. Ford Motor Credit. In addition, if the sheriff damaged the Partnership’s property when repossessing the goods, then Agricredit would not be liable. See Major’s Furniture v. Castle Credit.

C. For what business purpose might Jack Shields Sales and Service have assigned the sales contract to Agricredit?

Jack Shields Sales might have preferred to have the immediate cash from selling the sales contract to Agricredit than to have periodic payments from Odette. Jack Shield Sales may have needed the immediate cash to buy additional inventory and to pay its operating expenses. Agricredit might have purchased the sales contract at a discount (i.e., for less than the what Odette promised to pay) and therefore would make a profit in the transaction. See, e.g., Co-Mac v. Riddle.

D. What advice would you have given the Partnership when it was contemplating acquiring the tractor and loader?

The Partnership should have determined whether the tractor and loader were subject to a security interest. In most states, tractors and farm vehicles are subject to certificate of title statutes. § 9-311(a)(2). In those states, any security interests would be identified on the certificate. If the Partnership still wanted to purchase the items, it should have contacted Agricredit to obtain permission. If the tractor and the loader were not covered by a certificate of title, the Partnership should have checked financing statements in the state in which Odette lives, § 9-301(1), and previously lived within the past four months, § 9-316(f)(2).

PROBLEM V.

security interest in accounts
Hunt Tractor -----------------> CNH
<----------------- loan

security interest in pledged stock
Pogano ------------------> Commonwealth
<--------------------- Bank
line of credit
& loan
$825,347
check
KYDOT --------> Hunt "---------> Commonwealth
Tractor "--------> Bank
credit
to pay off
bank loans
A. Why would Pagano pledge his own property as collateral for a loan to Hunt Tractor?

If a lender believes that a small business is not sufficiently creditworthy for a loan, the lender may ask the owner of the small business to guarantee the loan or provide collateral for a loan. One example is Madison Capital v. S & S Salvage. In this case, Commonwealth Bank may have thought that Hunt Tractor was not creditworthy because Hunt Tractor had already given a security interest in most of its assets to CNH.

Pagano might be willing to pledge his own property as collateral for a loan to Hunt Tractor because he is the co-owner of the business. If the loan will benefit Hunt Tractor, then it indirectly will benefit him as well. He may have information which causes him to believe that the business is more creditworthy than Commonwealth Bank thinks that it is.

B. Assume Hunt Tractor gave Commonwealth Bank a security interest in its checking account when it obtained the Bank Loans. What would determine who had priority in the $825,347.00 deposited into the account?

The first-to-file-or-perfect rule in § 9-322(b)(1) would determine who had priority in the deposit. If CNH had filed a financing statement covering either the inventory or the proceeds of the inventory before the check was deposited, then CNH would have a perfected security interest in the check. § 9-315(c). This perfection would continue into the bank account because the bank account would be cash proceeds. § 9-315(d)(2); § 9-102(a)(9).

On the other hand, if CNH had not filed a financing statement, Commonwealth Bank would have priority when the check was deposited. Commonwealth's security interest would be perfected by its control over the deposit account. § 9-314(a); § 9-104(a)(1).

C. What interest, if any, does CNH have in the backhoes that were sold to KYDOT?

Absent an agreement to the contrary CNH would not have any interest in the backhoes after they were sold to KYDOT. Under § 9-320(a), a buyer in ordinary course of business--as KYDOT apparently was in this case--takes free of a security interest created by the buyer's seller (i.e., Hunt Tractor), even if the security interest is perfected and the buyer knows of its existence. Otherwise, no one would buy goods from a merchant if the merchant had financed its inventory.

D. What advice would you have given CNH in drafting the security agreement with Hunt Tractor?

The problem here is that Hunt Tractor misused the proceeds from the sale of inventory to pay back a loan to Commonwealth Bank rather than to repay CNH's loan. Pagano may have caused Hunt Tractor to take this action because Commonwealth Bank could have foreclosed on the stock that Pagano had pledged as collateral and Pagano did not want that to happen. CNH may be protected, as described above, because of its security interest in the proceeds from the sale of the backhoes. But CNH could have given itself even more protection by specifying in the security agreement that it would be a default for Hunt Tractor (1) to incur any other indebtedness without permission; (2) to pay off any other indebtedness without permission; or (3) to use the proceeds from the sale of inventory other than in specified ways. These clauses or similar ones might have dissuaded Hunt Tractor and Pagano from acting as they did.

PROBLEM VI.
A. What arguments might Eclipse and Action make in support of their respective claims of priority in this case?

Eclipse (the inventory lender) and Action (the chattel paper purchaser) each claim priority in the 1700 trailers that were sold to Snowbear but that were still in Integrity's possession at the time of default.

**Eclipse's arguments:** If the trailers were still inventory (i.e., if title to them had not passed to Snowbear), then Eclipse will argue that it had priority over them because the security agreement did not give Action a security interest in inventory. Alternatively, if title to the trailers had passed to Snowbear, Eclipse will argue that it has priority because its original security interest in the trailers persisted notwithstanding the sale. Although a buyer in the ordinary course generally takes goods free of any security interest, § 9-320(a), this rule does not apply when the seller retains possession, § 9-320(e).

**Action's argument:** If Snowbear granted a security interest in the trailers to Integrity when it bought them on credit, and Integrity sold the chattel paper to Action, then Action will argue that it has priority under the rule that the purchaser of chattel paper (i.e., Action) has priority over the inventory financer (i.e., Eclipse) who claims a security interest only as proceeds. § 9-330(a).

B. Why might a subordination agreement have been necessary to make Eclipse's interest in Integrity's accounts subordinate to Action's interest in those accounts?

Ordinarily, the first-to-file-or-perfect rule would determine which of the two secured parties had priority. § 9-322(a)(1). If the parties wanted Action to have priority, a subordination agreement might have been necessary because Eclipse may have been the first to file a financing statement covering the accounts or any proceeds of other collateral in which Eclipse had priority that would be deposited into the accounts.
A likely hypothesis is that (1) Integrity needed to borrow more money to continue to operate; (2) Eclipse did not want to lend any more money; (3) action would not lend money without an subordination agreement because Eclipse already had a security interest in all of Integrity's assets; and (4) Eclipse agreed to the subordination agreement because it feared that Integrity would not be able to continue in business -- and repay any its loans to Eclipse -- without additional financing.

C. Under what circumstances, if any, could Eclipse or Action take possession of trailers in Snowbear's possession?

Eclipse or Action could take possession of the trailers in Snowbear's possession if (1) they had security interests in the trailers and (2) Snowbear defaulted under the security agreement creating the security interests. § 9-609(a)(1).

On one hand, the facts suggest that Eclipse does not have a security interest in the trailers in Snowbear's possession. Under § 9-320(a), a buyer in the ordinary course—which Snowbear appears to be—takes free of a security interest granted by the seller in the goods. Accordingly, Eclipse could not take possession of the trailers in Snowbear's possession.

On the other hand, the facts suggest that Snowbear granted Integrity a security interest in the trailers when it bought them on credit, and that Integrity assigned the security interest to Action. Therefore, Action could take possession of the trailers if Snowbear defaulted.

D. How might Snowbear's actions have caused Integrity's default? How might the lenders have anticipated such a risk and addressed it in their security agreements?

Snowbear's failure to pay for the trailers may have caused Integrity's default by depriving Integrity of the funds it needed to repay its loans. The lenders might have anticipated this risk by requiring, in their security agreements, a review of the credit of buyers with whom Integrity entered major sales contracts. For example, they might have checked to see whether Snowbear could pay for all of the trailers that it ordered from Integrity.

PROBLEM VII.

Korotki
\ | guarantee of
| Reserves's obligations
| /
Sussex promise to build
County roads and drains
Council <----------- Reserves
(beneficiary) \ / (applicant)
letter \ / application
credit \ / WTC
(issuer)

A. On what legal theories might WTC seek to recover from Reserves and Korotki?

Assuming the document is in fact a letter of credit (see question B
below), after WTC honored it by paying Sussex County, WTC acquired a right to reimbursement from Reserves. § 5-108(i). In addition, WTC became subrogated to Sussex County Council's rights against Korotki. § 5-117(a). WTC could recover from Korotki based on Korotki's guarantee. See Ochoco Lumber v. Fibrex.

B. Could WTC pay the $2,216,233.00 only if this amount was in fact reasonable and necessary to complete construction?

The facts do not provide enough of the text of the letter of credit to answer this question definitively.

If the letter of credit (1) made payment dependent on a documentary presentation asserting that "satisfactory performance has not occurred," and (2) said the bank would honor the letter of credit by paying drafts up to $2,216,233, then the actual amount that was reasonable and necessary to complete construction would not matter. The independence principle would make the underlying obligation independent from the letter of credit. § 5-103(d).

But the facts seem to say that WTC is undertaking (1) to pay only if performance is in fact not satisfactory, and (2) to pay only the amount that is actually reasonable and necessary. If this is true, then the "letter of credit" would not meet the definition of a letter of credit in § 5-102(a)(8) because payment would not depend on a documentary presentation. A court might construe the document as an ordinary guaranty. Wichita Eagle v. Pacific Nat’l Bank. Accordingly, only the actual money owed would be due.

C. How might WTC respond to the contention that its request for attorney's fees is unconscionable?

Section 5-111(e) says that "[r]easonable attorney's fees . . . must be awarded to the prevailing party in an action in which a remedy is sought under this article [i.e., article 5, which governs letters of credit]." Under this provision, WTC could recover attorney's fees from Reserve if (1) WTC prevails in an action to obtain reimbursement under § 5-108(i), and (2) the attorney fees are reasonable. But WTC could not recover an unreasonable or unconscionable amount of attorney fees.

Section 5-111(e) would not apply to an action by WTC to enforce Korotki's guarantee because that is not an action under article 5. Likewise, § 5-111(e) would not apply at all if the document in question is not a letter of credit. But it seems unlikely that a contract term providing for attorney's fees in a business transaction is per se unconscionable. Of course, the amount of the fees requested in a particular case could be unconscionable if the amount was too high.

D. Given the letter of credit securing Reserves' obligations, was it reasonable to ask Korotki for a personal guarantee?

Although the guaranty and the letter of credit are redundant in that they both back up Reserve's obligation to pay Sussex County, both Sussex County and WTC have grounds for arguing that asking for the personal guarantee was not unreasonable. WTC may have wanted Korotki to make the guaranty because it was worried that Reserves would lack the funds to reimburse WTC after WTC paid the letter of credit under § 5-108(i), which may have happened here. Sussex County may have wanted Korotki to guaranty Reserve's obligation because Sussex County may have been worried that Reserve would challenge WTC's payment of the letter of credit, which also happened here.
PROBLEM I. (26 points)

PTO PNB
/s/ Griscom Street
/s/ Smith, guarantor

Griscom --------------> GreenPoint --------> PNC ----> FDIC ----> Bank
Street                      Mortgage

A. Must the Bank prove its ownership of the Promissory Note in order to enforce it?

No. The Bank does not have to prove its ownership of the note. The Bank can prove that it is entitled to enforce the note by showing that it is the holder of the note or a non-holder in possession with the rights of a holder. § 3-301(I) & (ii). Neither of these statuses would require the Bank to be the owner of the check. The Bank would be a holder if it was in possession of the instrument and the instrument was payable to the Bank or bearer. § 1-201(a)(21). The Bank would be a non-holder in possession with the rights of a holder if the instrument was transferred directly or indirectly to the Bank by a holder. § 3-203(b). For example, the Bank would be a non-holder in possession with the rights of a holder if PNC was a holder of the note but did not indorse the note when its assets were taken over by the FDIC (which is likely if the assets were transferred in bulk).

B. Under what circumstances, if any, would the Bank take the note free of Smith's asserted defense of unconscionability?

The Bank would take the note free of Smith's asserted defense of unconscionability if (1) unconscionability is an ordinary contract defense and (2) the Bank either (a) is a holder in due course or (b) has the rights of a holder in due course.

Under § 3-305(b), a holder in due course (or person having the rights of a holder in due course) takes an instrument subject to the "real" contract defenses listed in § 3-305(a)(1) but free of the "ordinary" contract defenses listed in § 3-305(a)(2). Unconscionability is not one of the defenses listed in § 3-305(a)(1), and it therefore appears to be an ordinary defense. Our textbook briefly discusses the argument that a holder in due course would take free of the defense of unconscionability on p. 690.

The Bank would be a holder in due course only if it met all of the requirements in § 3-302(a) or took the instrument from someone who met all of those requirements, see § 3-203(b). One of these requirements is that the person must take the instrument without notice of defenses. § 3-302(a)(2)(vi). Smith will argue that the Bank and everyone else who took the note had notice of the "extremely one-sided clauses" that in his view make the note unconscionable because these clauses appear in the note itself. The problem does not provide enough information to determine whether the terms of the note actually are unconscionable or whether the other requirements for holder in due course status are met.
Note: Although there are exceptions to the holder in due course doctrine for consumer transactions, this is not a consumer transaction because a corporation, Griscom Street LLC, made the note.

C. What rights would Smith have if he pays the Note?

The problem says that Smith "guaranteed" the note. A person who signs a note as a "guarantor" is presumed to be an accommodation party. § 3-419(b). As an accommodation party, Smith would have the right to reimbursement from Griscom Street, the accommodated party. § 3-419(e). Smith also would be subrogated to the Bank's right to enforce the mortgage. § 3-419 cmt. 5; Plein v. Lackey. The payment would also discharge Smith's liability on the note. § 3-602(a).

D. If the Bank cannot recover from Smith, who else might be liable to the Bank?

The Bank could recover from Griscom Street as the maker of the note. § 3-412. The Bank could also recover from GreenPoint, PNB, or the FDIC if they indorsed the note. The indorser of a note is liable if the note is dishonored, unless the indorser has signed without recourse (which would be uncommon in the transfer of mortgage notes). § 3-415(a). GreenPoint likely indorsed the note when GreenPoint sold the note to PNB. If the FDIC acquired and sold PNB's assets in bulk, it is possible that neither PNB nor the FDIC indorsed the note.

The FDIC made transfer warranties to the Bank if it transferred the note for consideration and did not disclaim the warranties. § 3-416(a). GreenPoint and PNB also would have made transfer warranties that would extend to the Bank if they had indorsed the note, transferred it for consideration, and did not disclaim the warranties. § 3-416(a). One transfer warranty is that the maker cannot assert any defenses against the transferor. § 3-416(a)(4). The FDIC and the other transferors may have breached this warranty if Griscom Street had a valid defense of unconscionability and the transferors are not holders in due course and do not have the rights of a holder in due course.

PROBLEM II. (26 points)

Troy Bank
PTO Cile                      check
$100,000                     misencoded
/s/ Gilley                    as $1000

Gilley ----------> Cile ----> Citizens ----> Federal ----> Troy ----> Gilley
<----    Bank <----  Reserve <----  Bank <---
$1K/99K       $1K/99K       $1K/99K    $1K/563.57

A. Why might Troy Bank have believed that it had a duty to make a final payment of $99,000 even if there were insufficient funds in Gilley's account when the payment was made?

Troy Bank may have believed that it had a duty to make a final payment of $99,000 because a payor bank that does not return a check by its midnight deadline is accountable for the amount of the check. § 4-302(a)(1). Troy Bank missed its midnight deadline for returning the check to Citizens Bank because it never returned the check. The amount of the check was $100,000 because Gilley drew the check for that amount; the error in encoding did not affect the amount of the check. § 4-209 cmt. 2. Because Troy Bank had only paid $1000, it would still owe $99,000.

Note: A separate but closely related question is whether Troy Bank may
have believed that it had a duty to pay the check when it was initially presented. A payor bank is not liable on a check, § 3-408, and is free to revoke a settlement prior to its midnight deadline, § 4-301(a)(1). But Troy Bank might have worried that it would be liable to Gilley for wrongful dishonor if it did not pay the check because the check was properly payable and Gilley had sufficient funds to pay the check. § 4-402(a).

B. What amount may Troy Bank charge against Gilley's account?

Troy Bank may charge $100,000 against Gilley's account. The payor bank may charge its customer for the full amount of a properly payable check, even if this causes an overdraft. § 4-401(a). The full amount is the amount which the drawer authorized -- $100,000 -- not the encoded amount. § 4-209 cmt. 2.

C. On what legal theory might Troy Bank support its claim against Citizens Bank?

Troy Bank would have a claim against Citizens Bank for breach of encoding warranty under § 4-209(a) because Citizens Bank did not properly encode the check. Troy Bank can assert that $98,436.43 is the amount that it lost as a result of the breach, § 4-209(c), because it would have debited Gilley's account while he still had $100,000 if the check had been properly encoded.

D. If Citizens Bank pays the amount claimed by Troy Bank, what rights, if any, will it have against Gilley and Cile?

Citizens Bank will have no rights against Cile. A depositary bank can revoke credit given for a check only if it fails to receive final payment. § 4-214(a). In this case Citizens Bank did receive final payment when Troy Bank paid the full $100,000 for the check. Although Citizens Bank may be liable to Troy Bank for breach of an encoding warranty, nothing in the UCC allows Citizens Bank to pass this liability for its error on to Cile.

If Citizens Bank pays Troy Bank the amount of money that Troy Bank is unable to recover from Gilley, Citizens Bank arguably should be subrogated to Troy Bank's claim against Gilley for the amount of the check under § 4-401(a). But no provision in § 4-209 expressly affords this right.

PROBLEM III. (26 points)

PTO Martha <-- nominal payee
$188,473
/s/ Jay's estate,
by Cochonour,       "Pay Jones & Co.
Executor  Martha" <-- signed by Cochonor
Cochonour --------> Cochonour -------> Jones ----> Dep. ----> Payor ----> Jay's
<------- & Co. ---- Bank ---- Bank ---- Estate

A. What claims might Martha assert?

Martha might assert a claim against Jay's estate for $400,000, which is the amount of her inheritance. The check issued by Cochonour did not suspend this underlying obligation, in whole or in part, because Martha never "took" the check in payment. § 3-310(b).

Martha does not have a claim for conversion against Jay's estate (or against Cochonour) because she never received delivery of the check. § 3-420(a)'s last sentence.

B. What claims might Jay's estate assert?
Jay's estate might assert a claim against Cochonour, outside of the UCC, for misappropriation of the estate funds.

Jay's estate does not appear to have a claim against the payor bank for paying a check that was not properly payable. § 4-401(a). The bank will assert that the check was properly payable for two reasons. First, Cochonour had authority, as the executor of Jay's estate, to issue checks on behalf of the estate. § 3-402(a). Second, the check was made payable to a "nominal payee" because Cochonour evidently did not intend the person identified as the payee -- Martha -- to have any interest in the check. § 3-404(b). As a result, Cochonour's indorsement in the name of Mary was effective in favor of the bank. § 3-404(b)(2).

C. In subsequent litigation, the parties disagreed about whether Jones and Company had a duty "to ask Martha--the payee and purported endorser of the check--about the validity of that instrument." Did Jones and Company have this duty?

Under § 3-404(d), Jones & Company had a duty to exercise ordinary care when taking the check payable to Martha as a nominal payee and would be required to share the loss from the check if it did not exercise ordinary care. Ordinary care requires observance of reasonable commercial standards of fair dealing. § 3-103(a)(9). The parties are likely to dispute whether such standards would require inquiry into the validity of the signature. The estate might argue that the check was for a very large amount, that Jones & Company likely could tell from the signatures on the check that Cochonour was the trustee of the estate, and that it would be highly irregular for the payee of such a large check to sign it back over to the executor. It will assert that in these circumstances, good faith required inquiry. The decision in Maine Family Federal Credit Union v. Sun Life, although not directly on point, supports this argument by suggesting a higher standard for someone taking a check from a fiduciary. Jones & Company might respond that the entire premise of negotiable instrument law is that person taking an instrument has no duty to inquire into the validity of signatures or the nature of the underlying transaction that gave rise to the instrument. As Grant Gilmore wrote: "The stranger who purchased the [negotiable instrument] in the market was entitled to do so without inquiry into the facts of the underlying transaction or of previous transfers of the bill and without being affected by them." Textbook, p. 645. In further support of its position that a person taking an instrument need not conduct an investigation, Jones & Company will also cite the existence of transfer warranties which put the duty on the transferor rather than the transferee, § 3-416(a); the ability of a person to become a holder in due course so long as the person has no notice of irregularities (without an explicit duty to inquire), § 3-302(a); and the general presumption of the validity of signatures, § 3-308(a).

D. Under what circumstances, if any, might the holder in due course doctrine shield any of the parties from the claims of others?

If Jay's estate makes a claim for the check or its proceeds under § 3-306, Jones and Company and the depositary bank may assert that they are holders in due course and took the instrument free of such claims. They are holders, even though Martha did not indorse the check, because Martha was merely a nominal payee. § 3-404(b). In addition, they would be holders in due course if they took the check in good faith, for value, and without notice of claims and defenses. The problem does not provide sufficient facts with respect to these elements.

Note: It probably does not matter that the check was indorsed "pay Jones & Co." An instrument must be payable to order only at the time it is issued, § 3-104(a)(1), and even this requirement is loosened for checks, § 3-104(c).
PROBLEM IV. (26 points)

A. Is Barretts's argument under § 9-203(b)(2) correct?

No. Section 9-203(b) says that a security interest in collateral cannot attach until "the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party." Barretts's argument is that Lucky Moon did not have rights in the cattle because it had not yet paid for the cattle. This argument is wrong for three reasons. First, Lucky Moon has paid for some of the cattle, and therefore presumably owned at least them. Second, whether a buyer has paid for goods does not determine whether a buyer has rights to the collateral or the power to transfer rights. In most cases in which a buyer buys goods on credit, the buyer obtains title to the goods before paying the full price. Third, in this case, we know that Lucky Moon had at least a possessory right to the collateral that it had not paid for.

B. Could Barretts prevail by arguing that it had a perfected security interest in the cattle under § 9-309(2)?

No. Section 9-309(2) says that "[t]he following security interests are perfected when they attach: . . . (2) an assignment of accounts or payment intangibles which does not by itself or in conjunction with other assignments to the same assignee transfer a significant part of the assignor's outstanding accounts or payment intangibles." This argument would fail because the transaction does not involve an assignment of accounts or payment intangibles; it involves a security interest in cattle. Cf. In re Tri-County Materials (assignment of accounts).

C. Would you have advised Barretts not to sell the cattle on credit to Lucky Moon given the apparent security agreement between Bank and Lucky Moon?

The apparent security agreement between the Bank and Lucky Moon is not, by itself, a sufficient reason to refrain from selling cattle on credit to Lucky Moon. Barretts could structure a transaction in which it sold the cattle on credit and had priority over the Bank's security interests by taking a purchase money security interest in the cattle. See 9-324(d). [Note: 9-324(a) is the general rule for PMSIs, while 9-324(d) concerns PMSIs in livestock.]

Other factors, however, might dissuade Barretts from selling the cattle on credit to Lucky Moon. For example, Barretts might worry that there is something wrong with Lucky Moon's business model if Lucky Moon has an outstanding debt of $2 million to the Bank which is secured by a dragnet clause and that it cannot pay. While taking a security interest in the cattle might lessen the risks in lending to Lucky Moon, the risks still might be too great.

D. If Lucky Moon sells some of its cattle, what rights will Bank have with respect to the cattle sold and to the proceeds?

The Bank will have a security interest in any identifiable proceeds of the cattle because a security interest in collateral automatically continues into the proceeds of the collateral. § 9-315(a)(2).

As for the a security interest in the cattle, a buyer of collateral takes the collateral subject to a security interest unless the secured party consents or an exception to this general rule applies. § 9-315(a)(1). In the security agreement, the Bank most likely authorized Lucky Moon to sell the
cattle free of the bank's security interest for two reasons. First, the Bank would want Lucky Moon to sell the collateral so that Lucky Moon has enough money to repay the Bank, and buyers would not want to purchase the collateral if it came subject to a security interest. Second, the Bank would be protected by its security interest in the proceeds (as discussed above). If the security agreement does not expressly authorize Lucky Moon to sell the collateral, then the issue is whether an exception applies. Article 9 contains an exception for buyers in the ordinary course, but this exception does not apply to buyers of "farm products," § 9-320(a), a term which includes livestock, § 9-102(a)(34)(b). [Note: Other law outside may provide an exception for the cattle, see 9-320 cmt. 4, but this was not something covered in class.]

PROBLEM V. (26 points)

loan
AmeriCredit ----> Debtors
<----
promise to repay & lien

American Honda Finance

A. Why might the timing of the perfection of AmeriCredit's lien matter?

If AmeriCredit's lien was not perfected prior to the Debtors' filing of a bankruptcy petition, AmeriCredit would effectively have only an unsecured claim in bankruptcy. Bankruptcy Code § 544(a) gives the bankruptcy trustee the status of a hypothetical lien creditor. Section 9-317(a)(2) makes an unperfected security interest subordinate to the rights of a lien creditor. See Casebook, p. 49. In addition, if the Debtors have any actual lien creditors, the timing of the perfection of AmeriCredit's lien could determine whether AmeriCredit has priority over them.

B. If the state statute requiring a security interest in automobiles to be indicated on a certificate of title does not specifically address AmeriCredit's arguments, what UCC provisions might AmeriCredit cite by way of analogy?

There were several possible answers. What was key was to identify a UCC provisions and make good arguments by analogy. Most answers said that AmeriCredit should cite § 9-506(a), which says that minor errors or omissions do not make a filing statement ineffective unless they are seriously misleading and that the name of a debtor is not seriously misleading if it could be found using standard search logic. These answers argued that AmeriCredit could argue, by analogy, that even if the certificate of title listed the wrong name of the lien holder, anyone looking at the certificate of title would know that there was a lien on the vehicle, which is really what potential creditors would be interested in knowing. Other answers analogized what happened here to the failure of the filing office to index a record correctly, which does not affect the perfection of a security interest under § 9-517.

Note: Some answers missed the point of the question by simply citing § 9-311(a)(2), which says that state statutes outside the UCC govern the perfection of security interests in automobiles by indication on a certificate of title. The question was what arguments could be made if such state statutes were silent on the particular issue presented in the case.

C. If Dealer used secured credit from a lender to buy its inventory of cars, what rights, if any, would this lender have against the Debtors?
None. The lender's security interest would not continue in the car because the Debtors bought the car in the ordinary course. § 9-320(a). In addition, the security agreement presumably would give the dealer the right to sell the cars free of the security interest because otherwise no one would buy the cars and the dealer then could not repay the lender.

Note: Many answers went into elaborate detail about the rights that the lender would have against the Dealer, but that was not part of the question.

D. If AmeriCredit does not prevail in its dispute with the Trustee, what rights would AmeriCredit likely have?

As described above, AmeriCredit would have only the rights of an unsecured creditor against the debtors. AmeriCredit would share in whatever non-exempt assets were left in the estate, if any, after the secured creditors satisfied their interests.

AmeriCredit would have a claim, presumably for breach of contract or negligence, against the Dealer for its error in applying for the certificate of title.

PROBLEM VI. (25 points)

A. What would be an example of how a secured party could dispose of collateral other than by selling it?

Section 9-610(a) describes how a secured party may dispose of collateral. One example is that a secured party might dispose of collateral by leasing it. § 9-610(a). For instance, in this case, March might have leased the restaurant equipment to another restaurant, if that would have been commercially reasonable. March would apply the rental payments to the debt and presumably would stop leasing the collateral and return it after the debt was fully paid.

B. Under what circumstances, if any, could a secured party repossess the collateral and not dispose of it?

The secured party could repossess the collateral and then hold onto it while it seeks a judicial remedy, so long as that would be commercially reasonable in the circumstances. Okefenokee Aircraft v. PrimeSouth Bank.

In addition, the secured party could repossess the collateral and not dispose of it in a case of strict foreclosure. § 9-620(a). The debtor, however, would have to agree to the strict foreclosure. § 9-620(a)(1).

Note: Some answers said that the secured party could disable the property. But the secured party does not usually do that if it repossesses the property. Compare § 9-609(a)(1) with § 9-609(a)(2).

C. If Linn had sold some of the equipment covered by the security agreement, what rights would March have?

March would have a security interest in the equipment unless he consented to the sale free of the security interest. A buyer of collateral
takes the collateral subject to a security interest unless an exception applies. § 9-315(a)(1). The exception for sales in the ordinary course of business would not appear to apply because Linn was not in the business of selling his equipment. § 9-320(a). The facts do not suggest any other likely exceptions.

March would also have a security interest in the proceeds of the sale. A security interest in collateral automatically continues into the proceeds from disposition of the collateral. § 9-315(a)(2).

March would also likely have a contract claim for breach of the security agreement and could exercise whatever rights the security agreement gave March upon default. § 9-601(a).

D. Would the UCC filing statement suffice to perfect security interests in fixtures (e.g., ovens) sold to Linn?

Although one would have to look at the description of the collateral in the UCC filing statement to know the answer for sure, the fact that the security interest is in fixtures should not by itself be a problem. Article 9 applies to security interests in both goods and fixtures. § 9-102. Security interests in fixtures may be perfected either by filing a financing statement in the Article 9 records or in the office in which a record of a mortgage on the related real property would be filed. 9-501 & cmt. 4.

PROBLEM VII. (25 points)

merchandise
Benetton Trading --------------> Markowitz
<-----------------
promise to pay

Benetton USA Weiss
(beneficiary) (applicant)
\ /
\ / HSBC
Bank (issuer)

A. Was the letter of credit valid even though Benetton USA did not have to warrant that Markowitz’s corporations owed Benetton USA a debt?

Yes. The only requirement for a letter of credit is that payment must be based on a documentary presentation. § 5-102(a)(10). What these documents say must be presented is left to the parties. There is no requirement that one of the documents must say that the beneficiary is owed a debt. This letter of credit was valid because it was payable upon a documentary presentation. It required HSBC to pay upon presentation of a written demand referencing the letter of credit number and the letter of credit itself.

B. What, if anything, would have prevented Benetton USA from making a baseless demand for payment?

This question does not have a simple answer because the word "prevented" could be read in two different ways. On one hand, nothing would have "prevented" Benetton from making a baseless demand for payment in the sense that if Benetton had wanted to make a baseless demand for payment (i.e., demanded money even if Markowitz owed no money), Benetton could have presented
the documents required by the letter of credit and HSBC could have and likely
would have paid Benetton. This was possible because the documents were not
required to say that Markowitz owed any money.

On the other hand, several factors likely would have "prevented" Benetton, as a practical matter, from making a baseless demand for payment. First, Benetton would worry about the harm to its business reputation. Second, Benetton would worry about criminal liability for fraud. Third, Benetton would worry about civil liability for breach of contract, breach of warranty, and the tort of deceit (or some other tort).

Note: This purely hypothetical question did not ask whether (or assert that) Benetton USA had made a baseless demand for money. It also did not ask how the parties could have restructured the transaction to provide more protection against baseless demands for money.

C. Assuming the letter of credit was valid, what rights do the parties have against each other now?

HSBC has no rights against any party. Upon paying the letter of credit, HSBC had a right to reimbursement from Weiss, which it realized by debiting his account in the full amount of the payment. § 5-108(a)(1).

Weiss might have a contract claim against Markowitz based on whatever they agreed when they entered into this arrangement. This agreement would be independent of the letter of credit. § 5-103(d).

Although Benetton Trading has received payment of $500,000, it would still have a claim against Markowitz under their underlying contract for any deficit remaining of the original debt of approximately $1 million. Under the independence principle, this claim would not be extinguished by issuance of the letter of credit. § 5-103(d).

D. Why might the parties have decided to use a standby letter of credit instead of a commercial letter of credit?

The parties could not use a commercial letter of credit because Markowitz was buying the goods on credit provided by the seller.

In a typical letter of credit transaction, the seller would present documents to the issuing bank upon shipping the goods, the issuer would pay the seller, and then immediately seek reimbursement from the buyer. That would not have worked here because Markowitz needed to sell the goods in order to have money to repay the seller. As a result, the seller agreed to sell the goods on credit to Markowitz and to use a standby letter of credit, not as a means of obtaining payment immediately, but to provide security for repayment of the credit extended.

Note: Some answers described the difference between commercial and standby letters of credit but never explained that Markowitz could not have used a commercial letter of credit because the seller was selling the goods on credit to Markowitz.