

OBTAINING AND ENFORCING A SECURITY INTEREST IN LOCAL CURRENCY UNDER ARTICLE 9 OF THE UCC

ABSTRACT

Community currency is known by many names including complementary currency, alternative currency, and parallel currency. Community currency operates alongside an official or national currency (e.g., dollars or euros) with the purpose of circulating within a small geographic area to facilitate the sale of goods and services. In other words, community currency refers to a privatized form of currency that is not backed by a government entity. With the increased use of community currency, it has the potential to serve as collateral for a security interest under the Article 9 of the Uniform Commercial Code. Although there are several types of community currency, this article will focus on obtaining and enforcing a security interest in local currency. After analyzing local currency under the UCC in its current form, this comment will offer several suggestions to better handle a security interest in local currency under the UCC.

INTRODUCTION

Every year, people and organizations exchange billions of goods not with United States dollars, euros, or other government-issued currency, but rather with an alternative and privatized form of currency called community currency.¹ Community currency is known by many names, including complementary currency, alternative currency, and parallel currency.² Community currency operates alongside an official or national currency (e.g., dollars or euros) with the purpose of circulating within a small geographic area to

1. THE DOLLARIZATION DEBATE 255 (Dominick Salvatore et al. eds., 2003).

2. Arnaud Michel & Marek Hudon, *Community Currencies and Sustainable Development: A Systematic Review*, 116 *ECOLOGICAL ECON.* 160, 160 (2015). *But see* Jérôme Blanc, *Classifying “CCs”: Community, Complementary and Local Currencies’ Types and Generations*, 15 *INT’L J. COMMUNITY CURRENCY RES.* 4, 4 (2011) (noting that these terms are often used differently among researchers).

facilitate the “exchange[] of goods and services without bearing interest.”³ In other words, community currency refers to a privatized form of currency that is not backed by a government entity.⁴

There are four main categories of community currency, but this comment will focus on local currency.⁵ Local currency is “a medium of exchange other than national currency to obtain goods and services” that is used in a small geographic area such as a region, town, or city.⁶

Based on the number of local currencies being developed and their increasing popularity, local currency has the potential to play a larger role in the economy.⁷ Furthermore, local currency (and community currency in general) has “potential for overcoming some of the problems with conventional money, as well as for building communities and reinvigorating local economies.”⁸ Thus, local currency may have the potential to serve as collateral for a security interest under Article 9 of the Uniform Commercial Code (“UCC”).⁹ Adequately obtaining a security interest in local currency allows

3. Michel & Hudon, *supra* note 2, at 160 (citation omitted).

4. See Boyd Cohen, *The Rise of Alternative Currencies in Post-Capitalism*, 54 J. MGMT. STUD. 739, 740 (2017); Mark S. Peacock, *Complementary Currencies: History, Theory, Prospects*, 29 LOC. ECON. 708, 709 (2014).

5. For an explanation of the different types of community currency, see *infra* Part II.B.

6. Lewis D. Solomon, *Reflections on the Future of Business Organizations*, 20 CARDOZO L. REV. 1213, 1230 (1999); see, e.g., CALGARY DOLLARS, <https://www.calgarydollars.ca/> [<https://perma.cc/8X8Q-B2N4>] (last visited Dec. 1, 2018); *What Are Berkshares?*, BERKSHARES INC., http://www.berkshares.org/what_are_berkshares [<https://perma.cc/9N8T-J6DM>] (last visited Dec. 1, 2018) (describing the use of local currency in the Berkshire region of Massachusetts); Paul Glover, *Creating Community Economics with Local Currency*, ITHACA HOURS, <https://www.ithacahours.com/> [<https://perma.cc/7M7W-39DZ>] (last visited Dec. 1, 2018).

7. See Marie Fare & Pepita Ould Ahmed, *Complementary Currency Systems and Their Ability to Support Economic and Social Change*, 48 DEV. & CHANGE 847, 847 (2017) (stating that local currencies are rapidly developing); Peter Ferrara, *Rethinking Money: The Rise of Hayek's Private Competing Currencies*, FORBES (Mar. 1, 2013, 10:03 AM), <https://www.forbes.com/sites/peterferrara/2013/03/01/rethinking-money-the-rise-of-hayeks-private-competing-currencies/> [<https://perma.cc/C7KW-RFA8>]; Katie Gilbert, *Why Local Currencies Could Be on the Rise in the U.S.—and Why It Matters*, FORBES (Sept. 22, 2014, 10:00 AM), <https://forbes.com/sites/katiegilbert/2014/09/22/why-local-currencies-could-be-on-the-rise-in-the-u-s-and-why-it-matters/> [<https://perma.cc/9CNN-ZR35>].

8. Gill Seyfang, *Money That Makes a Change: Community Currencies, North and South*, 9 GENDER & DEV. 60, 67 (2001). Problems with conventional money include that it leaves the local community and contributes to social inequality. *Id.* at 62–63.

9. See U.C.C. § 1-201(b)(35) (AM. LAW INST. & UNIF. LAW COMM'N 2017) (defining a “security interest” as “an interest in personal property or fixtures which secures payment or performance of an obligation”).

the lender to use local currency as collateral in the event that the debtor defaults on a loan.¹⁰

Due to the increased popularity of local currencies and their growing potential to play a larger role in the economy, this comment analyzes whether Article 9 of the UCC permits obtaining and enforcing a security interest in local currency. More specifically, this comment will focus on local currency in a tangible form as opposed to cryptocurrency, or local currency that is based on an electronic system.¹¹ Although the UCC adequately handles a security interest in local currency, there are several improvements that could be made when considering how the UCC allows a security interest to be obtained in other types of collateral as well as considerations relating to local currency's policy goals. Such improvements include classifying local currency as money instead of a general intangible, and thus enabling a security interest in local currency to be attached and perfected by possession.¹² Based on the research performed by the author, it appears that this is the first time a law review comment has contemplated local currency serving as collateral in a security interest under Article 9.

Part I of this comment will discuss the history of community currency and local currency in its many shapes and forms. It will discuss BerkShares, a local paper currency in the Berkshire region of Massachusetts, which will serve as the primary example of local currency throughout this comment. Part II will provide a general overview of the process of obtaining a security interest under Article 9 of the UCC. It will then analyze this process as to how it applies to local currency. Part III will suggest improvements that could be made under Article 9 to better address the issues with obtaining a security interest in local currency as well as suggestions relating to the underlying goals and principles of local currency. This comment concludes that although Article 9 adequately handles obtaining a security interest in local currency, there are several improvements that could be made to Article 9 that would

10. *See id.* § 9-601 cmt. 2 (“The rights of a secured party to enforce its security interest in collateral after the debtor’s default are an important feature of a secured transaction.”).

11. *See, e.g., What Are BerkShares?, supra* note 6; *Frequently Asked Questions*, BITCOIN, <https://bitcoin.org/en/faq> [<https://perma.cc/62TC-W6ES>] (last visited Dec. 1, 2018) (providing an example of cryptocurrency); *What Is the Brixton Pound?*, BRIXTON POUND, <http://brixtonpound.org/what> [<https://perma.cc/GV85-G5NL>] (last visited Dec. 1, 2018) (providing an example of electronic local currency).

12. *See infra* Part III.A.

allow for a more simplified and uniform process in obtaining a security interest in local currency.

I. HISTORY OF LOCAL CURRENCY

This part begins by discussing the history of community currency, including the different types of community currency and then moves on to discuss modern local currency. In its discussion of modern local currency, this part focuses its attention on the two most prominent examples of local currency, Ithaca Hours and BerkShares. Lastly, this part briefly discusses the legality and prospects of local currency.

A. *The Beginnings of Community Currency*

Although most people have never heard of community currency, it is not a new development.¹³ Community currencies came into existence in the nineteenth and early twentieth centuries, but since the 1980s, they have increased in popularity and occurrence.¹⁴ Community currencies have been developed by a broad range of people and organizations, including groups of individuals, local authorities, and nongovernmental organizations.¹⁵ In recent years, community currencies have increased in popularity and attracted attention in several fields of research.¹⁶

Historically, community currencies seem to surface during times of emergency, war, or economic depression.¹⁷ For example, during the Panic of 1907 and the Great Depression, local currencies made resurgences but disappeared when the economic crises ended.¹⁸

B. *Modern Community Currency*

For the past thirty years, the world has experienced its largest wave of development of community currencies.¹⁹ While the number

13. Fare & Ahmed, *supra* note 7, at 847.

14. *Id.*

15. *Id.*

16. *Id.* at 847–48.

17. *Id.* at 849.

18. Loren Gatch, *The Modern Local Currency Movement in the United States and Canada*, 264 PAPER MONEY 426, 426 (2009).

19. Fare & Ahmed, *supra* note 7, at 850.

of community currencies that have been developed since the 1980s is disputed, it is estimated that 3500 to 4500 community currencies have been developed in more than fifty countries.²⁰

Although there are many ways to classify community currency, this comment will use the categorization method developed by Gill Seyfang and Noel Longhurst, which categorizes the types of community currency primarily by their objectives.²¹ Under this method, there are four types of community currency: (1) service credits, (2) mutual exchange currencies, (3) barter markets, and (4) local currencies.²²

Service credits, such as TimeBanks, focus on a time-based currency unit which allows participants in this system to “earn a time credit for each hour spent helping someone, regardless of the service provided.”²³ The second type of community currency is mutual exchange currency (“MEC”).²⁴ “[These] currencies are created by the act of spending: one person’s credit equals another’s debit to the system, accounts always sum to zero and both the value and utility of the currency is maintained by trust in other members to meet their commitments (as ‘debts’ are known).”²⁵ The third type of community currency is barter markets, which are “a hybrid of local currency and mutual exchange, comprising a new infrastructure to enable people to exchange goods and services within a limited site-specific event without the need for mainstream currency.”²⁶ In this system, participants join a club and are issued local currency to spend at local markets.²⁷ The currency cannot be converted to national currency.²⁸

20. *Id.* (citation omitted).

21. Gill Seyfang & Noel Longhurst, *Growing Green Money? Mapping Community Currencies for Sustainable Development*, 86 *ECOLOGICAL ECON.* 65, 69 (2013).

22. *Id.* But see Blanc, *supra* note 2, at 4 (explaining that there is no standard classification system for community currencies among researchers).

23. Seyfang & Longhurst, *supra* note 21, at 69 (explaining that this type of community currency generally focuses on “build[ing] social capital, inclusion and cohesion.”); see also *What Is Timebanking?*, TIMEBANKS USA, <https://timebanks.org/what-is-timebanking/> [<https://perma.cc/95UT-C7Z3>] (last visited Dec. 1, 2018) (explaining the basics of timebanking).

24. *Id.* (explaining that the goals of MECs usually are to “provide access to additional liquidity and interest-free credit, and to encourage import substitution.”).

25. *Id.*

26. *Id.*

27. *Id.*

28. Michel & Hudon, *supra* note 2, at 162; Seyfang & Longhurst, *supra* note 21, at 71.

The final type of community currency and the focus of this comment is local currencies, such as Ithaca Hours and BerkShares, which are “geographically-bounded, paper-based ‘backed’ community currencies.”²⁹ Local currencies are sometimes pegged to a national currency, meaning that they are kept at a set level or value, and are often “backed by a national currency.”³⁰ Local currency often can be converted back to the national currency.³¹ The primary purpose of local currency is to have members of the community buy locally to ensure that money stays within the community.³² As of 2013, there are 243 local currencies that have been developed in six countries, and as a result, cities and regions have “issued local currency notes to circulate within a geographically bounded region, increasing the local economic multiplier and supporting local businesses.”³³ Local currencies “are intended to complement the national currency, increasing the velocity of local exchanges but not supplanting national currency or inter-regional trade.”³⁴

C. *Modern Local Currency*

Although historically local currencies tended to come into existence during times of economic hardship, modern local currencies tend to appear during periods of economic stability and prosperity.³⁵ Why modern local currencies have come into existence can be summarized by the following reasons:

1. Local currency keeps money circulating in communities, instead of it draining away in the form of corporate profits and other payments to distant financial centers.
2. Local currency fosters community self-reliance and solidarity, by promoting the exchange of goods and services only within the limited circuit of local currency circulation.
3. Local currency encourages diversity as something culturally and socially valuable in itself. Instead of consuming the standard wares

29. Seyfang & Longhurst, *supra* note 21, at 70; *see, e.g.*, Glover, *supra* note 6; *What Are BerkShares?*, *supra* note 6.

30. Seon Mi Kim et al., *The Conditions and Strategies for Success of Local Currency Movements*, 31 *LOC. ECON.* 344, 345 (2016).

31. Seyfang & Longhurst, *supra* note 21, at 71.

32. *See* Adam Chodorow, *Bitcoin and the Definition of Foreign Currency*, 19 *FLA. TAX REV.* 365, 389–90 (2016); Cohen, *supra* note 4, at 741–42; *see also* Glover, *supra* note 6 (describing the use of local currency in Ithaca, New York).

33. Seyfang & Longhurst, *supra* note 21, at 70–71; *see also* Gatch, *supra* note 18, at 435–40 (listing of local currencies in the United States).

34. Seyfang & Longhurst, *supra* note 21, at 71.

35. Gatch, *supra* note 18, at 426.

purveyed by national chain-stores, users of local currency will instead patronize local producers of goods and services.

4. Local currency serves ideals of equity and social justice, first by recognizing certain services that are undervalued in terms of conventional money (child and elder care, for example), in second by encouraging a more egalitarian pricing of different goods and services.

5. Local currency is ecologically friendly, since it is not based on debt.³⁶

1. The First Wave of Modern Local Currency: Ithaca Hours

The modern local currency movement has experienced two waves, starting with the founding of Ithaca Hours (“Hours”) in 1991.³⁷ Hours is a local paper currency in Ithaca, New York, that has issued over \$110,000 in its own local currency since 1991.³⁸

The assigned value of the Hour is set at \$10 per Hour.³⁹ This valuation is tied to the suggested minimum wage.⁴⁰ The Hour’s assigned value also “provides a benchmark for how providers will price their goods and services.”⁴¹ Given these features, Hours has (until recently) been a well-functioning, yet restricted, local currency.⁴²

The administration of Hours is quite simple. In exchange for signing up, each business is given an initial supply of Hours, and each business is free to spend those at any other business that participates in the Hours system or accepts Hours on some basis.⁴³ Due to this freedom, “the supply of Hours is designed to grow with the increasing number of participants.”⁴⁴ Hours is more than a bar-

36. *Id.* at 426–27.

37. *Id.* at 426.

38. *Id.*; Glover, *supra* note 6.

39. *Id.* Because the Hour is not backed by the dollar, the Hour may not serve as the best collateral for a security interest.

40. Gatch, *supra* note 18, at 428.

41. *Id.*

42. *Id.*; see Faith Meckley, *New Local Currency Offers Ithaca Another Alternative*, ITHACAN (Apr. 15, 2015), <https://theithacan.org/news/new-local-currency-offers-ithaca-another-alternative-currency/> [<https://perma.cc/B2PQ-76QD>] (explaining that the use of Ithaca Hours has decreased in the past several years because since the founder “stepped away from the management of Ithaca HOURS and left Ithaca in the early 2000s, HOURS has lacked a highly energized member dedicated to making HOURS thrive”).

43. Meckley, *supra* note 42.

44. *Id.*

ter system because the Hour is designed to and does “circulate independently of the original participants.”⁴⁵

Providers of goods and services that are willing to accept the local currency as payment rather than official money are central to the success of local currency schemes.⁴⁶ Without businesses’ participation, Hours cannot reinforce trading among the local community.⁴⁷ For many years, the founders of Hours used the *HOUR Town* publication, which was distributed in a local newspaper, to inform people of what businesses accepted Hours.⁴⁸ Now, the directory can be found online.⁴⁹

Since its founding in 1991, dozens of communities have adopted the Hours model.⁵⁰ However, most of these local currencies ceased to exist after a relatively short period of time.⁵¹ These communities, like Ithaca, tend to be college towns or towns with liberal affiliations.⁵² Examples of local currencies that have used the Hours model include Berkeley Regional Exchange and Development, Greenback, Eco, and Ontario Hours.⁵³ For all of these examples and more, “the dollar valuation of time-based currencies never implied an actual exchange rate; instead, users were supposed to orient themselves towards that rate when they bid or offered using the currency.”⁵⁴ Thus, a lender that secured a security interest in a local currency based on the Ithaca Hours model would have a difficult time finding value in it because this type of local currency cannot be freely converted into dollars.⁵⁵ In fact, “[d]uring recessions and down markets, local businesses are less likely to accept

45. *Id.*

46. Gatch, *supra* note 18, at 427.

47. *See id.*

48. *Id.* at 428.

49. *Id.*

50. Ed Collom, *Motivations and Differential Participation in a Community Currency System: The Dynamics Within a Local Social Movement Organization*, 26 SOC. F. 144, 147 (2011); Gatch, *supra* note 18, at 428, 435–40.

51. Collom, *supra* note 50, at 147 (explaining that local currencies following the Hours model only survive 20.7% of the time); Gatch, *supra* note 18, at 435–40.

52. Gatch, *supra* note 18, at 428, 430.

53. *Id.* at 430.

54. *Id.*

55. Vincent D’Agostino, *Crunchy Currency*, AM. CONSERVATIVE (Nov. 10, 2011), <https://www.theamericanconservative.com/articles/crunchy-currency/> [<https://perma.cc/FU2E-6CM6>]; *New Age Town in U.S. Embraces Dollar Alternative*, CHINA DAILY (June 21, 2007, 12:52 AM), http://www.chinadaily.com.cn/world/2007-06/21/content_898734.htm [<https://perma.cc/5VQ5-UXQJ>].

local currencies as their creditors may not accept them.”⁵⁶ Due to the fact that Hours are not freely convertible into national currency, a different model, in which the local currency is backed by national currency and is freely convertible, is better served as collateral for a security interest.⁵⁷ In this situation, even lenders who are not users of the local currency would be able to find value in it. The local currency, the BerkShare, is an example of this system.⁵⁸

2. Second Wave of Local Currencies: BerkShares

Although there have always been local currencies that were pegged to and backed by national currency, “the introduction of Toronto Dollars . . . in 1998 followed by BerkShares in 2005 . . . heralded a shift in the design of local currencies towards a more flexible and pragmatic acceptance of financial links outside of local currency communities.”⁵⁹ This comment will use BerkShares as its primary example.

Founded in 2006, the BerkShare is a local currency that circulates in the Berkshire region of Massachusetts.⁶⁰ Since 2005, there have been 3.3 million BerkShares issued.⁶¹ Furthermore, it is estimated that, on average, a BerkShare gets circulated four times before being exchanged for United States dollars at a bank.⁶² Of the “12 to 15 million in trade in BerkShares . . . [it is estimated that] about 135,000 stay out in circulation at any one time.”⁶³ Currently, the four participating banks are trying to find a way to make loans in BerkShares.⁶⁴

56. *Ithaca Hours*, INVESTOPEDIA, <https://www.investopedia.com/terms/i/ithaca-hours.asp> [<https://perma.cc/9QPE-8GZR>]; see also LIETAER & DUNNE, RETHINKING MONEY, HOW NEW CURRENCIES TURN SECURITY INTERESTS INTO PROSPERITY 163 (2013) (noting that the Alternatives Federal Credit Union accepts Hours).

57. D’Agostino, *supra* note 55; *New Age Town in U.S. Embraces Dollar Alternative*, *supra* note 55.

58. *How It Works*, BERKSHARES INC., http://www.berkshares.org/how_to_spend [<https://perma.cc/JBC2-9TLX>] (last visited Dec. 1, 2018).

59. Gatch, *supra* note 18, at 432. This quote states that BerkShares was founded in 2005, but the author later correctly states that it was founded in 2006.

60. *Id.*

61. Ferrara, *supra* note 7.

62. LIETAER & DUNNE, *supra* note 56, at 89–90.

63. *Id.* at 90.

64. *Id.* at 91.

Over 400 locally owned businesses accept BerkShares as payment.⁶⁵ These businesses range from restaurants to jewelers to healthcare services.⁶⁶ However, some of these businesses place limitations on their acceptance of BerkShares.⁶⁷ For example, some merchants will only accept BerkShares for services but not in exchange for goods because they cannot buy inventory with BerkShares.⁶⁸

BerkShares, and other local currencies like it, “are essentially consumer incentive programs.”⁶⁹ If a person wants to use BerkShares, he simply buys BerkShares with United States dollars at ninety-five percent of their face value at a participating bank.⁷⁰ For example, if the buyer wanted to purchase 100 BerkShares, he would have to spend \$95.⁷¹ So essentially, the buyer is receiving a five percent discount.⁷² Furthermore, the bank keeps the United States dollars on deposit, so people can exchange BerkShares for dollars at any time.⁷³

When a buyer uses BerkShares at one of the businesses that accepts them, the merchant can use them to purchase items himself, give change to customers, partially pay an employee’s wages, or simply go to one of the sixteen branch offices of four local banks to exchange them for dollars.⁷⁴ This is the key reason why local currencies using the BerkShare model would serve as better collateral for a security interest than local currencies based on the Hours model; creditors would be able to accept BerkShares as collateral with confidence because they are easily exchanged for United States dollars.⁷⁵

65. *Id.*; see *Where to Spend BerkShares*, BERKSHARES INC., <http://berkshares.org/business/search> [<https://perma.cc/78FR-398A>] (last visited Dec. 1, 2018).

66. *Where to Spend BerkShares*, *supra* note 65.

67. Steve Cocheo, *Spare a “BerkShare”?*, BANKING EXCHANGE (Mar. 6, 2017, 3:07 PM), <http://www.bankingexchange.com/news-feed/item/6742-spare-a-berkshare> [<https://perma.cc/ZGX2-S49C>].

68. *Id.*

69. Gatch, *supra* note 18, at 432.

70. *How It Works*, *supra* note 58.

71. *Id.*

72. *Id.*

73. *Id.*

74. LIETAER & DUNNE, *supra* note 62, at 89–90; *What Are BerkShares?*, *supra* note 6.

75. See Gatch, *supra* note 18, at 434.

BerkShares have many advantages over Hours. First, BerkShares' value is pegged to the United States dollar, and thus can always be redeemed for nearly all of its face value.⁷⁶ This instills confidence in its users and the merchants (as well as creditors) that accept it.⁷⁷ Second, BerkShares incentivize people to use them because of the slight discount, and merchants are encouraged to accept them because the discount drives users of BerkShares to their local businesses.⁷⁸ Third, BerkShares "avoid the problem of feeble circulation that has bedeviled 'Hours' programs. Accepted across the economic spectrum and not just by alternative economic niches, they require less work to keep them going. Excess supply [of BerkShares] can always be converted to standard funds and thus removed from circulation."⁷⁹ Lastly, BerkShares do not "require the alternative institutional development that Hours programs have needed to survive."⁸⁰

But BerkShares are not without their disadvantages. For one, the Berkshare model does not create any strong commitment to "ecological sensibility or commitment to green values" beyond buying locally.⁸¹ Furthermore, "[t]he social inclusiveness of [BerkShares and other local currencies like it] is limited since they are no more accessible to the poor than the official moneys on which they are based, with the minor exception of exchange rate discounts."⁸² However, the BerkShare model has still continued to thrive despite these issues, and new local currencies continue to be developed using the BerkShare model.⁸³

Despite its disadvantages, this comment focuses on BerkShares as the model local currency because it is most friendly to lenders, who would be the parties most likely taking security interests in local currency. This is because BerkShares can be freely converted

76. *Id.*

77. *Id.*; see Douglas Rushkoff, *Reimagining Money*, ATLANTIC (Mar. 7, 2016), <https://www.theatlantic.com/business/archive/2016/03/douglas-rushkoff-reimagining-money/472335/> [<https://perma.cc/HW5R-WB2C>].

78. Rushkoff, *supra* note 77.

79. Gatch, *supra* note 18, at 434.

80. *Id.*

81. *Id.*

82. Kristofer Dittmer, *Alternatives to Money-As-Usual in Ecological Economics: A Study of Local Currencies and 100 Percent Reserve Banking* (Sept. 2014) (unpublished Ph.D. dissertation, Universtat Autònoma de Barcelona).

83. Gatch, *supra* note 18, at 434.

to United States dollars and thus a lender does not need to worry about how it will use BerkShares if they had to enforce its security interest.⁸⁴

D. *Legality of Local Currencies in the United States*

1. Federal Government

Local paper currencies are legal under federal law in the United States.⁸⁵ However, the legality of local currency is limited to paper currency (notes) because the federal government does not “permit private coinage.”⁸⁶ Although the U.S. Constitution mandates that the states cannot issue their own coinage, it is silent with regard to private coinage.⁸⁷ Federal statutory law prohibits private coinage regardless of whether the private coinage resembles coins of the United States.⁸⁸ The federal statute prohibiting private coinage does not mention paper currency and no other federal law prohibits local paper currency.⁸⁹ In addition, local currency is subject to income tax.⁹⁰

2. State Government

Although federal law does not prohibit issuing local paper currency, a few states prohibit it at least to some extent.⁹¹ For example, Virginia law prohibits any individual or entity from “[i]ssu[ing] any note, bill, scrip, or other paper or thing with intent that the same be circulated as currency” or “[o]therwise deal, trade, or carry on business as a bank of circulation.”⁹² This statute “appears to permit issuance of discount notes redeemable for goods or services as well as an Ithaca Hours barter-type exchange mechanism.

84. *See How It Works*, *supra* note 58.

85. Chodorow, *supra* note 32, at 389; Lewis D. Solomon, *Local Currency: A Legal and Policy Analysis*, 5 KAN. J.L. & PUB. POL’Y 59, 81–82 (1996).

86. Cocheo, *supra* note 67; *see* 18 U.S.C. § 486 (2012).

87. U.S. CONST. art. 1, § 10, cl. 1.

88. 18 U.S.C. § 486 (2012); *see* Solomon, *supra* note 85, at 82.

89. 18 U.S.C. § 486 (2012); Solomon, *supra* note 85, at 82.

90. Peacock, *supra* note 4, at 718.

91. Solomon, *supra* note 85, at 85–86.

92. VA. CODE ANN. § 6.2-202(A) (2016).

These arrangements arguably are not issued with the intent to circulate as ‘currency.’”⁹³

E. *Prospects of Local Currency*

On the whole, local currencies have proved a tenuous and unstable small-scale experiment, with a documented failure rate “of about eighty percent.”⁹⁴ Generally, this failure can be attributed to the founders behind these local currencies losing interest with time, and a decreased interest and usage of the local currencies in the communities themselves.⁹⁵ For one, local currencies tend to have a “novelty effect” in which people participate in the beginning but their participation begins to wane as time goes on.⁹⁶ This is particularly troublesome because for a local currency to be successful and effective it needs to circulate among the community.⁹⁷

Although local currencies have their challenges, they are not without prospects.⁹⁸ There is still a chance local currency could play a larger role in the economy if a few problems are addressed.⁹⁹ Local currencies face two main challenges—growth and durability.¹⁰⁰ And “[a]s with any other currency, growth and durability depend on the legitimacy conferred on the currency by collective recognition.”¹⁰¹

How can local currency gain legitimacy? It needs to gain society’s confidence.¹⁰² To gain society’s confidence, a local currency must ensure that it functions as “a system of payments that ensures regularity” and meets the needs of users.¹⁰³ To ensure growth, durability, and an increased user base, a local currency needs institutional recognition as well as support from public authorities.¹⁰⁴

93. Solomon, *supra* note 85, at 86.

94. Gatch, *supra* note 18, at 431.

95. *Id.* Some scholars believe that Ithaca Hours survived for so long because of the dedication of its founder and the institutions he created that enabled it to survive for so long. *See id.* at 432.

96. Ed Collom, *Community Currency in the United States: The Social Environments in Which It Emerges and Survives*, 37 ENV'T & PLAN. 1565, 1580 (2005).

97. *Id.*

98. *See* Fare & Ahmed, *supra* note 7, at 863–66.

99. *Id.* at 863–64.

100. *Id.* at 864.

101. *Id.*

102. *Id.* at 864–65.

103. *Id.* at 865.

104. *Id.*

Furthermore, a local currency needs to be accepted as a “means of payment by important providers of goods and services, such as banks and local authorities.”¹⁰⁵ If local currency is able to gain recognition “of [its] social utility” from “both public authorities and economic decision makers . . . [then local currency] will inevitably increase [its] potential influence on the entire socioeconomic system.”¹⁰⁶ Even with these challenges, local currency may be able to serve as a “viable and sustainable alternative” to traditional currency.¹⁰⁷

Given the fact that local currencies have a high failure rate and thus local currencies run the risk of becoming valueless, it most likely follows that lenders would be wary of taking a security interest in local currency. However, BerkShares are somewhat able to counter this risk for lenders because the dollars used to buy BerkShares are kept on deposit at the banks.¹⁰⁸ Therefore, if a lender enforces a security interest in BerkShares it can simply exchange the BerkShares for United States dollars.¹⁰⁹

II. OBTAINING A SECURITY INTEREST IN LOCAL CURRENCY

A “security interest” is “an interest in personal property or fixtures which secures payment or performance of an obligation.”¹¹⁰ It is important to have a security interest because it helps ensure repayment of a debt if the debtor is unable to pay.¹¹¹ This part will first discuss the general requirements for a secured party to obtain a security interest under Article 9 of the UCC, with a particular focus on attachment and the classification of collateral. Second, this general discussion of obtaining a security interest will be applied to local currency. After eliminating the other potentially plausible classifications, this comment concludes that local currency is best classified as a general intangible. Lastly, this part analyzes local currency as a general intangible regarding attachment, perfection, priority, and proceeds.

105. *Id.*

106. *Id.*

107. *Id.* at 866.

108. *See How It Works, supra* note 58.

109. *Id.*

110. U.C.C. § 1-201(b)(35) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

111. *See id.* § 9-601 cmt. 1.

A. *General Overview of How to Obtain a Security Interest*

For a secured party to have a valid and enforceable security interest in the debtor's property (the collateral), there must be attachment, and if more than one secured party has a security interest in the collateral, the secured party trying to enforce the security interest must have perfected its security interest and must have priority in order to collect before the other secured parties.¹¹²

Attachment creates a security interest that is enforceable against the debtor.¹¹³ Without attachment, there can be no security interest and without a security interest, the creditor lacks the additional insurance of repayment that a security interest provides in the event that the debtor defaults.¹¹⁴

There are three requirements for attachment.¹¹⁵ First, the secured party must give value, which is similar to consideration under contract law, but with value having a much lower threshold.¹¹⁶ Second, the debtor must have rights in the collateral.¹¹⁷ Third, there must be authentication.¹¹⁸ For this third requirement, the debtor must "authenticate[] a security agreement that provides a description of the collateral."¹¹⁹ Alternatively, the secured party can take possession of the collateral in some instances.¹²⁰ These

112. *Id.* § 9-102(a)(12) (defining "collateral" as "the property subject to a security interest or agricultural lien"); *id.* § 9-102(a)(28) (defining "debtor" as "a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor"); *id.* § 9-102(a)(73) (defining "secured party" as "a person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding"); *id.* § 9-203(a) (explaining attachment); *id.* § 9-308(a) (explaining perfection); *id.* § 9-322 (explaining priority).

113. *Id.* § 9-203.

114. *Id.* §§ 9-203; -601 cmt. 1.

115. *Id.* § 9-203(b)(1)–(3).

116. *Id.* § 9-203(b)(1) (defining "value" as when "a person gives value for rights if the person acquires them: (1) in return for a binding commitment to extend credit or for the extension of immediately available credit, whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; (2) as security for, or in total or partial satisfaction of, a preexisting claim; (3) by accepting delivery under a preexisting contract for purchase; or (4) in return for any consideration sufficient to support a simple contract").

117. *Id.* § 9-203(b)(2).

118. *Id.* § 9-102(a)(7) (defining "authenticate" to mean "(A) to sign; or (B) with present intent to adopt or accept a record, to attach to or logically associate with the record an electronic sound, symbol, or process"); *id.* § 9-203(b)(3)(A).

119. *Id.* § 9-102(a)(74) (defining "security agreement" as "an agreement that creates or provides for a security interest"); *id.* § 9-203(b)(3)(4).

120. *Id.* § 9-203(b)(3)(B).

requirements do not need to be completed in any particular order.¹²¹

Furthermore, in the security agreement, the collateral must be described in a sufficient and reasonable manner.¹²² At a minimum, the collateral should be described using the categories of personal property provided by the UCC.¹²³ The UCC does not require that the description of the collateral be exact.¹²⁴ Each piece of collateral has only one classification at a time, but the classification of an item can change over time.¹²⁵ If the collateral is classified incorrectly, there will not be a valid security interest because the collateral would not have been sufficiently described.¹²⁶ The way that a piece of collateral is classified determines how it will be treated under Article 9 of the UCC regarding attachment, perfection, and priority.¹²⁷

The classifications of personal property can be divided into goods and nongoods. “Goods” are defined as “all things that are movable when a security interest attaches” which implies that goods are tangible things, not including real property.¹²⁸ The classification of goods has four categories: consumer goods, inventory, farm products, and equipment.¹²⁹

“Nongoods” refers to all the categories of personal property that “goods” does not include.¹³⁰ The categories for nongoods are accounts, instruments, chattel paper, documents, deposit accounts,

121. *See id.* § 9-203(b).

122. *Id.* § 9-108(a).

123. *See id.* § 9-108(b)(2).

124. *Id.* § 9-108 cmt. 2.

125. *Id.* § 9-102 cmt. 4(a).

126. *See id.* § 9-108.

127. Gary D. Spivey, Annotation, *Definition and Treatment of “General Intangibles” Under Revised Article 9 of Uniform Commercial Code*, 33 A.L.R.7th Art. 4, § 2 (2018).

128. U.C.C. § 9-102(a)(44) (AM. LAW INST. & UNIF. LAW COMM’N 2017).

129. *Id.* § 9-102(a)(23) (defining “consumer goods” as “goods that are used or bought for use primarily for personal, family, or household purposes”); *id.* § 9-102(a)(48) (defining “inventory” as goods that are held for sale or lease, or goods that are rapidly used up or consumed in business); *id.* § 9-102(a)(34) (defining “farm products” as means crops, livestock, or “supplies used or produced in a farming operation”); *id.* § 9-102(a)(33) (defining “equipment” as “goods other than inventory, farm products, or consumer goods”); *id.* § 9-102 cmt. 4(a).

130. *Id.* § 9-102(a)(44) (excluding from definition of goods “accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals before extraction”).

investment property, and general intangibles.¹³¹ “Account” is “a right to payment.”¹³² An “[i]nstrument” is “a negotiable instrument [as defined in section 3-104] or any other writing that evidences a right to the payment of a monetary obligation”¹³³ “Chattel paper” is defined as “a record or records that evidence both a monetary obligation and a security interest in specific goods.”¹³⁴ “Document” means a document of title or a receipt such as a warehouse receipt.¹³⁵ “Deposit account” is a “demand, time, savings, passbook, or similar account maintained with a bank.”¹³⁶ “Investment property” is defined as “a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account.”¹³⁷ “General intangibles” is the residual category for nongoods which means that any piece of personal property that does not meet the definition of any of the other enumerated categories is a general intangible.¹³⁸ In addition, collateral can be classified as “money” which means “a medium of exchange currently authorized or adopted by a . . . government.”¹³⁹

Although attachment creates a security interest that is enforceable against the debtor, perfection is needed to ensure that a secured party has the greatest protection that Article 9 provides.¹⁴⁰ Perfection is used by a secured party to assert its rights against a third party that makes a claim to the collateral, if necessary.¹⁴¹ If a secured party has an unperfected security interest, sometimes these third parties, such as those creditors that perfected their security interests, will be able to take the collateral and leave the

131. *Id.*

132. *Id.* § 9-102(a)(2) (explaining that “accounts” “do[] not include (i) rights to payment evidenced by chattel paper or an instrument, (ii) commercial tort claims, (iii) deposit accounts, (iv) investment property”).

133. *Id.* § 9-102(a)(47) (explaining that an “instrument” is a writing that “is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment”); *see also id.* § 3-104(a) (explaining that the definition of instrument “does not include (i) investment property, (ii) letters of credit, or (iii) writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card”).

134. *Id.* § 9-102(a)(11).

135. *Id.* § 9-102(a)(30).

136. *Id.* § 9-102(a)(29) (excluding “investment property or accounts evidenced by an instrument” from the definition of deposit account).

137. *Id.* § 9-102(a)(49).

138. *Id.* § 9-102(a)(42).

139. *Id.* § 1-201(b)(24).

140. 8A LAWRENCE’S ANDERSON ON THE UNIFORM COMMERCIAL CODE § 9-203:249 (3d. ed. 2018).

141. *Id.*

secured party with less than it was otherwise entitled to receive.¹⁴² Therefore, it is important to perfect one's security interest. Furthermore, the method of perfection used depends on the collateral's classification.¹⁴³

B. *Classification of Local Currency*

Based on the definitions of the different classifications for collateral, local currency cannot be classified as any of the goods classifications, or accounts, chattel paper, documents, deposit accounts, or investment property.¹⁴⁴ Therefore, the following discussion will focus on the possibility of local currency being classified as money, instruments, or general intangibles. It is imperative that collateral, in this case, local currency, is correctly classified because the classification determines the methods in which a security interest in local currency can be attached, perfected, and prioritized.¹⁴⁵

1. Money

Although it is tempting to classify local currency as money, that would be incorrect because local currency falls outside of the UCC's definition of "money." While Black's Law Dictionary defines "money" as "[t]he medium of exchange authorized or adopted by a government as part of its currency" or "[a]ssets that can be easily converted to cash," the UCC's definition is narrower.¹⁴⁶ Local currency being used as collateral cannot be classified as money because "money" is defined in the UCC as "a medium of exchange currently authorized or adopted by a . . . government" and local

142. See U.C.C. § 9-322(a)(2) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

143. See *id.* § 9-312.

144. See *id.* § 8-102(a)(15) (defining "security"); *id.* § 8-102 cmt. 15 ("The definition of 'security' has three components. First, there is the subparagraph (i) test that the interest or obligation be fully transferable, in the sense that the issuer either maintains transfer books or the obligation or interest is represented by a certificate in bearer or registered form. Second, there is the subparagraph (ii) test that the interest or obligation be divisible, that is, one of a class or series, as distinguished from individual obligations of the sort governed by ordinary contract law or by Article 3. Third, there is the subparagraph (iii) functional test, which generally turns on whether the interest or obligation is, or is of a type, dealt in or traded on securities markets or securities exchanges."). *But see* LEWIS D. SOLOMON, RETHINKING OUR CENTRALIZED MONETARY SYSTEM: THE CASE FOR A SYSTEM OF LOCAL CURRENCIES 127 (1996) (noting that the use of local currency potentially implicates securities laws, which in turn may make local currency investment property under Article 9).

145. Spivey, *supra* note 127, § 2.

146. *Money*, BLACK'S LAW DICTIONARY (10th ed. 2014).

currency is a privatized currency that is not “authorized or adopted” by a government.¹⁴⁷ Furthermore, the word “authorize” implies something more than the government simply acquiescing to local currency’s existence. “Authorize” can be defined to mean “[t]o give legal authority” or “[t]o formally approve.”¹⁴⁸ Both of these definitions imply that the government must take some affirmative action to “authorize” local currency.

Furthermore, although the comments to the UCC state that the definition of “money” is not limited to legal tender, local currency still does not qualify as money because local currency is such an unusual currency that it could not have been contemplated when formulating the definition of “money.”¹⁴⁹ A prior version of the UCC rejected the idea that anything accepted as currency within a community constituted money under the UCC.¹⁵⁰

2. Instruments

Based on the definitional requirement of a negotiable instrument that there must be a promise or an order, local currency cannot be classified as a negotiable instrument. As previously mentioned, an instrument is a “negotiable instrument, or any other writing,” which means the form of an instrument’s writing must comply with Article 3 of the UCC.¹⁵¹ The general categories of instruments are drafts and notes.¹⁵²

To determine if local currency is an instrument, we must look at what is required of a negotiable instrument. A “negotiable instrument” is “an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order,” as long as the negotiable instrument:

147. U.C.C. § 1-201(b)(24) (AM. LAW INST. & UNIF. LAW COMM’N 2017).

148. *Authorize*, BLACK’S LAW DICTIONARY (10th ed. 2014).

149. U.C.C. § 1-201 cmt. 24 (AM. LAW INST. & UNIF. LAW COMM’N 2017).

150. U.C.C. § 3-107 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM’N 1978) (“[The UCC] rejects . . . the contention sometimes advanced that ‘money’ includes any medium of exchange current and accepted in the particular community whether it be gold dust, beaver pelts, or cigarettes in occupied Germany. Such unusual ‘currency’ is necessarily of uncertain and fluctuating value . . .”).

151. U.C.C. § 9-102(a)(47) (AM. LAW INST. & UNIF. LAW COMM’N 2017).

152. *Id.* § 3-104 cmt. 4 (defining a “draft” as “an instrument that is an order” and a “note” as “an instrument that is a promise”).

- (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
- (2) is payable on demand or at a definite time; and
- (3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.¹⁵³

To be a negotiable instrument, the writing must contain a promise or an order to pay money.¹⁵⁴ A “promise” is “a written undertaking to pay money signed by the person undertaking to pay” while an “order” is “a written instruction to pay money signed by the person giving the instruction.”¹⁵⁵ As evidenced by these definitions, both a promise and an order need to be signed by the person giving the order or making the promise.¹⁵⁶

However, with BerkShares, there is no order or promise.¹⁵⁷ For a merchant to secure the full payment, all she needs is a sufficient amount of BerkShares.¹⁵⁸ Once the BerkShares are transferred that is the end of the transaction.¹⁵⁹ Because BerkShares contain no promise or order, they do not comply with Article 3.¹⁶⁰ Therefore, BerkShares are not instruments.

3. General Intangibles

Since all of the other classifications have been exhausted, local currency is a general intangible. “General intangibles” is the residual category for nongoods.¹⁶¹ Therefore, a piece of collateral is a general intangible if it does not fall into any of the other categories.¹⁶² The definition of a “general intangible” includes payment

153. *Id.* § 3-104(a).

154. *Id.*

155. *Id.* § 3-103(a)(8), (12).

156. *Id.*

157. *See How It Works*, *supra* note 58.

158. *See id.*

159. *See id.*

160. *See* U.C.C. § 3-104(a) (AM. LAW INST. & UNIF. LAW COMM'N 2017); *How It Works*, *supra* note 58; *see also Featured Artists*, BERKSHARES INC., <http://www.berkshares.org/artists> [<https://perma.cc/9N5P-KXZ4>] (last visited Dec. 1, 2018) (demonstrating that, like a United States dollar, there is no place to write in an order or a promise on a BerkShare).

161. U.C.C. § 9-102(a)(42) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

162. *See id.*

intangibles and software.¹⁶³ Since local paper currency does not fall into the other categories of collateral, it is a general intangible.¹⁶⁴

When determining whether collateral is a general intangible, one must ensure that the collateral is actually personal property.¹⁶⁵ To be a general intangible, the collateral must be personal property because Article 9 only governs personal property or fixtures unless otherwise excluded.¹⁶⁶ Article 9 does not define personal property. To determine if local currency is personal property, we have to turn to case law.¹⁶⁷

While there is no caselaw on local currency being used as collateral for a security interest, the use of virtual currency as collateral is analogous. Virtual currency is another type of alternative currency and is generally considered by scholars to be a general intangible.¹⁶⁸ Local currency can be analogized to virtual currency because both are forms of alternative currency.¹⁶⁹ Furthermore, Black's Law Dictionary defines "personal property" as "[a]ny movable or intangible thing that is subject to ownership and not classified as real property."¹⁷⁰ BerkShares should be classified as personal property of the debtor because the debtor either gets them as payment from a purchase or purchases/exchanges them for United States dollars at a local bank.¹⁷¹

163. *Id.*; *id.* § 9-102(a)(61) (defining a "payment intangible" as "a general intangible under which the account debtor's principal obligation is a monetary obligation"); *id.* § 9-102(a)(76) (defining "software" as "a computer program and any supporting information provided in connection with a transaction relating to the program. The term does not include a computer program that is included in the definition of goods").

164. *See id.*

165. *See* Spivey, *supra* note 127, § 2.

166. U.C.C. § 9-109(a), (c)–(d) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

167. *See id.* § 9-408 cmt. 3.

168. Matthew Frankle, *Financing Bitcoin: The Problem of Actual Delivery*, GREENBERG TRAURIG (Jan. 10, 2018), <https://www.gtlaw.com/en/insights/2018/1/financing-bitcoin-the-problem-of-actual-delivery> [<https://perma.cc/2XSQ-FYF4>].

169. *See* CITY BAR FOR CONTINUING LEGAL EDUC., FROM BITCOIN TO BLOCKCHAIN: HOW LAWS AND REGULATIONS ARE CONFORMING TO AND IMPACTING THE USE OF VIRTUAL CURRENCY (2016).

170. *Personal Property*, BLACKS LAW DICTIONARY (10th ed. 2014).

171. *See How It Works*, *supra* note 58.

Since BerkShares are classified as general intangibles, the following sections on attachment, perfection, and priority will treat BerkShares as general intangibles.

C. *Requirements to Obtain a Security Interest in Local Currency*

1. Attachment of Local Currency

Given that local currency will be classified as a general intangible, local currency's utility as collateral in a security interest can only be ensured through conformance with the requirements of attachment for general intangibles. For attachment of a security interest in a general intangible, the general rule of attachment in section 9-203 of the UCC applies.¹⁷² A security interest attaches when it becomes enforceable, and a security interest becomes enforceable when value is given, the debtor has rights in the general intangible, and there is an authenticated security agreement that describes the collateral.¹⁷³ Although possession can often be used in lieu of an authenticated security agreement, possession cannot be used for BerkShares because general intangibles are not one of the types of collateral that the UCC permits to be attached by possession.¹⁷⁴

2. Perfection of Local Currency

Like with attachment, general intangibles generally use the basic method for perfection.¹⁷⁵ In deciding which provision to apply, local currency must be distinguished between a general intangible and a payment intangible.¹⁷⁶ If it is a general intangible, the general perfecting rules apply, but if it is a payment intangible, the security interest can be automatically perfected if sold.¹⁷⁷

However, BerkShares are not payment intangibles because a "payment intangible" is "a general intangible under which the account debtor's principal obligation is a monetary obligation" such

172. U.C.C. § 9-203(a) (AM. LAW INST. & UNIF. LAW COMM'N 2017); Spivey, *supra* note 127, § 2.

173. *Id.* § 9-203(a)–(b).

174. *Id.* §§ 9-203(b), -313(a).

175. *See id.* § 9-310(a); Spivey, *supra* note 127, § 2.

176. *See* Spivey, *supra* note 127, § 2.

177. *Id.*

as a tax refund.¹⁷⁸ Once the customer gives the BerkShares to the merchant, the transaction is over and the customer does not owe any sort of further monetary obligation to the merchant.¹⁷⁹ Therefore, the general rules for perfecting apply.

Under the general rule for perfecting, the secured party must file a financing statement with the filing office to record his security interest.¹⁸⁰ The filing office is designated by state law.¹⁸¹ For example, in Virginia, the secured party will file the financing statement at “the office of the State Corporation Commission or any office duly authorized by it.”¹⁸² The required contents of the financing statement are the same for general intangibles as with other types of collateral. The financing statement must include the name of the debtor, the name of the secured party, and a description of the collateral that will be covered by the filing.¹⁸³ Once the financing statement is filed at the appropriate filing office, the security interest in BerkShares is perfected.¹⁸⁴ BerkShares cannot be perfected by possession in lieu of filing a financing statement because they are not “tangible negotiable documents, goods, instruments, money, or tangible chattel paper.”¹⁸⁵ Rather, BerkShares are general intangibles which are nongoods.¹⁸⁶

3. Priority in Local Currency

Issues of priority only arise when more than one secured party has a security interest in the collateral.¹⁸⁷ Generally speaking, priority is determined by when each secured party perfects unless an exception applies.¹⁸⁸ Since there are no exceptions for general intangibles, the generally applicable provisions for priority will apply to local currency.¹⁸⁹ The general priority rule under section 9-322 of the UCC can colloquially be referred to as the “first-to-file-or-

178. U.C.C. § 9-102(a)(61) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

179. *See How It Works*, *supra* note 58.

180. U.C.C. § 9-310(a) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

181. *Id.* § 9-501(a)(2).

182. VA. CODE ANN. § 8.9A-501 (2015).

183. U.C.C. § 9-502(a)(1)–(3) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

184. *See id.* § 9-310(a).

185. *Id.* §§ 9-310(b)(6), -313(a).

186. *Id.* § 9-102(a)(42).

187. *See id.* § 9-322(a).

188. *Id.*

189. *Id.*

perfect rule.”¹⁹⁰ It states that whoever files or perfects first has priority over all other secured parties.¹⁹¹ Therefore, if X files a financing statement to perfect his security interest in Z’s BerkShares on July 1, 2018, and Y files a financing statement to perfect his security interest in Z’s BerkShares on July 5, 2018, X will have priority over Y.¹⁹² Furthermore, a perfected security interest in BerkShares has priority over an unperfected security interest in the same BerkShares regardless of when attachment occurred.¹⁹³

With priority, there is also the issue of secured party versus transferee. For general intangibles, transferees, without exception, take subject to a secured party’s perfected security interest.¹⁹⁴ This means that if a secured party has a perfected security interest in a merchant’s BerkShares and the merchant gives a customer change in the form of BerkShares, the customer would be subject to the secured party’s security interest in the BerkShares.¹⁹⁵

D. *Proceeds from Local Currency*

Even after a secured party has attached and perfected his security interest in the original collateral, there is a concern that the debtor will exchange the original collateral for another piece of property, and there is the question of whether the security interest transfers to this new property. Local currency is no exception to this concern. At least with local currencies using the BerkShare model, handling proceeds will not be an issue because the existing methods under the UCC will sufficiently handle proceeds. “Proceeds” means “whatever [property] is acquired upon the sale, lease, license, exchange, or other disposition of collateral.”¹⁹⁶ Therefore, the issue of proceeds arises when the collateral subject to the security interest is sold or exchanged for another piece of property.¹⁹⁷

When collateral is exchanged or sold in exchange for other property, the secured party’s security interest automatically transfers

190. *Id.* § 9-322(a)(1), -322 cmt. 8.

191. *Id.* § 9-322(a)(1); *id.* § 9-322 cmt. 4 (noting that the “first-to-file-or-perfect-rule” will not always control in certain situations).

192. *See id.* § 9-322.

193. *Id.* § 9-322(a)(2); *see id.* § 9-315.

194. *See id.* § 9-201; *id.* § 9-315 cmt. 2 (providing examples of instances that a transferee will take free of a secured party’s security interest).

195. *Id.* § 9-201.

196. *Id.* § 9-102(a)(64)(A).

197. *See id.* § 9-315(a)(1).

to the identifiable proceeds “unless the secured party authorized the disposition free of the security interest.”¹⁹⁸ For example, if BerkShares served as the collateral for a security interest and they were exchanged for a new television, the television is an identifiable proceed and thus the secured party’s security interest would automatically attach and perfect to the television.¹⁹⁹

Furthermore, the UCC allows the secured party to use whatever method of tracing he would like that is permitted by law including the lowest intermediate balance method.²⁰⁰ As previously explained, BerkShares are backed by the U.S. dollar and can be exchanged for U.S. dollars at any time so there is a possibility that the proceeds will be comingled with nonproceeds.²⁰¹ Suppose that a merchant granted a secured party a security interest in his BerkShares, and then the merchant exchanged the 100 BerkShares for \$95 (proceeds), and then he deposited the \$95 into a bank account with his other \$300 that were never exchanged for BerkShares (nonproceeds). Although the proceeds are comingled with nonproceeds, the tracing method can be used to ensure that the proceeds are identifiable proceeds.²⁰² For the tracing method, imagine the bank account as a barrel with the non-proceeds floating on top of the proceeds, and any time proceeds are deposited into the bank account, the proceeds sink to the bottom. Therefore, every time the merchant makes a withdrawal from the bank account, he is withdrawing the nonproceeds until they are gone.²⁰³ The proceeds from the exchange of the BerkShares are protected like all other types of collateral until the nonproceeds are consumed.²⁰⁴ Thus, using local currency as collateral does not create any new problems in terms of proceeds.

Although Article 9 adequately handles attaching, perfecting, obtaining priority, and addressing the issue of proceeds when the collateral is local currency, there are some improvements that could be made to Article 9 to better handle local currency. The next part suggests changes to Article 9 to better address local currency.

198. *Id.* § 9-315(a)(1)–(2).

199. *See id.* § 9-315(b)(1), -315(d).

200. *Id.* § 9-315(a)(2), -315 cmt. 3.

201. *How It Works*, *supra* note 58.

202. *See* U.C.C. § 9-315(b)(2) (AM. LAW INST. & UNIF. LAW COMM’N 2017).

203. *See* RESTATEMENT (SECOND) OF TR. § 202 cmt. j (AM. LAW INST. 1959).

204. *See id.*

III. POLICY SUGGESTIONS

It is problematic that local currency can only be perfected through filing a financing statement while money can only be perfected by possession. This is troubling because local currency and money perform the same function, and thus local currency should be treated the same way money is treated under Article 9. This part proposes amendments to the UCC to expand the definition of money to encompass local currency or to allow local currency to be perfected by either filing a financing statement or possession.

A. *Local Currency as Money*

Under the UCC, the classification of collateral is often based on how a piece of collateral is being used by the debtor.²⁰⁵ Thus, it is counterintuitive that local currency cannot be categorized as money since local currency performs the same functions (e.g., serving as a medium of exchange) as traditional, government-issued money.²⁰⁶ Since local currency is used as money, it should be treated like money.²⁰⁷ However, the current definition of money prevents this.²⁰⁸

To enable local currency to fall under the definition of “money,” the UCC’s definition of “money” should be expanded to encompass any medium of exchange that functions and looks like traditional money and is accepted within a particular community. This would allow for local currency to be classified as money (rather than a general intangible) and be treated like money under the UCC. It also would allow for local currency to be attached and perfected by possession, which would make it easier for the secured party to enforce his security interest.²⁰⁹ However, to be clear, the new definition would not encompass every possible medium of exchange accepted within a community. For example, some communities may

205. See *In re Midas Coin Co.*, 264 F. Supp. 193, 197 (E.D. Mo. 1967), *aff’d sub nom.* Zuke v. St. Johns Cmty. Bank, 387 F.2d 118 (8th Cir. 1968) (classifying collector coins as a commodity rather than money because the collector coins were being used as inventory); U.C.C. § 9-102 cmt. 4 (AM. LAW INST. & UNIF. LAW COMM’N 2017).

206. See *Sub-National Currencies Struggle to Survive*, ECONOMIST (Jan. 7, 2017), <https://www.economist.com/finance-and-economics/2017/01/07/sub-national-currencies-struggle-to-survive> [<https://perma.cc/7C7Y-ZFGE>].

207. See Gilbert, *supra* note 7.

208. See U.C.C. § 1-201(b)(24) (AM. LAW INST. & UNIF. LAW COMM’N 2017).

209. See *id.* §§ 9-203(b)(3)(B), -313(a).

have complex bartering systems where the exchange of goods functions as the medium of exchange. This would not qualify under the proposed definition of “money” because the goods being exchanged are not purported to be like money, and the goods have more of a subjective value as compared to BerkShares, which have an assigned value.²¹⁰

Furthermore, classifying local currency as money would solve the problem of transferees taking subject to a secured party’s security interest. Unless an exception applies, a security interest is effective against a third party (transferee) that receives the collateral.²¹¹ There are no exceptions that protect a transferee of a general intangible that is subject to a perfected security. However, there is an exception for money.²¹² Under section 9-332, a transferee of money takes free of a perfected security interest “unless the transferee acts in collusion with the debtor in violating the rights of the secured party.”²¹³ This is yet another reason to expand the definition of money to include local currency. Without the definition of money being expanded to include local currency, every time a customer receives change in BerkShares the customer would be subject to the secured party’s security interest.²¹⁴

B. Policy Considerations

Recently, the Uniform Law Commission (“ULC”) drafted the Regulation of Virtual-Currency Businesses Act (“Act”).²¹⁵ The ULC chose to draft the Act due to the prominence of virtual currency in today’s world including Bitcoin.²¹⁶ The purpose of the Act is to regulate “virtual-currency business activity” in the world of secured transactions.²¹⁷ The Act states that “[t]he underlying assumption motivating this act is that regulations that are predictable and tailored to virtual-currency businesses will provide assurance to persons using virtual-currency products and services and to providers

210. See U.C.C. § 3-107 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM’N 1978) (stating that “unusual ‘currency’” with “uncertain and fluctuating value” does not fall under the definition of money).

211. U.C.C. §§ 9-201, -315(a)(1) (AM. LAW INST. & UNIF. LAW COMM’N 2017); see e.g., *id.* § 9-317(d).

212. See *id.* § 9-332(a).

213. *Id.*

214. See *id.* §§ 9-201(a)–(b), -315(a)(1).

215. UNIF. REGULATION OF VIRTUAL-CURRENCY BUS. ACT (UNIF. LAW COMM’N 2017).

216. *Id.* at 1.

217. *Id.*

that they will in fairness be regulated like other providers of financial services and products.”²¹⁸ In light of the Act, this part discusses the policy considerations that need to be taken into account when considering how local currency should be regulated in terms of secured transactions.

Since advocates want local currency to stay in the local community, possession (as this comment has previously suggested as a solution) potentially hinders the policy behind local currency.²¹⁹ By enabling local currency to be attached and perfected by possession, the local currency, by default, would be taken out of circulation, at least temporarily. Therefore, to balance practical and policy considerations, potentially the best alternative would be to allow money and local currency to be perfected by possession or by filing a financing statement. This would be in line with what the UCC dictates for other types of collateral.²²⁰

When the drafters amended the UCC in 1972 to allow only perfection in money by possession, they did not expressly provide for why money should be excluded from the general rule of filing a financing statement to accomplish perfection.²²¹ The drafters’ primary reason for only allowing perfection by possession for money was that the 1972 amendment “corrects an inadvertent omission in the 1962 Text, and makes clear that a security interest in money cannot be perfected by filing.”²²² The drafters did not provide any further reasoning, except in a comment to section 9-304, but this reasoning does not adequately support their decision.²²³ Without a better justification for this requirement, there is little or no reason why filing should be barred for money and local currency. In fact, there are many reasons to allow filing for money including “(1) promoting consistency within the UCC, particularly because current inconsistency results in unnecessary discrimination against certain types of debtors and transactions, (2) promoting the policy of fair and public notice of interests in property, and (3) simplifying

218. *Id.*

219. See Chodorow, *supra* note 32, at 389–90; Cohen, *supra* note 4, at 741–42; Glover, *supra* note 6.

220. See U.C.C. §§ 9-203(b)(3)(B), -313(a) (AM. LAW INST. & UNIF. LAW COMM’N 2017).

221. Brian M. McCall, *Money, Money Everywhere but Not a Drop to Secure: A Proposal for Amending the Perfection Rules for Security Interests in Money and Deposit Accounts*, 74 TENN. L. REV. 669, 681 (2007).

222. *Id.* at 679 (quoting U.C.C. § 9-304 app. (AM. LAW INST. & UNIF. LAW COMM’N 1972)).

223. See U.C.C. § 9-304 cmt. (AM. LAW INST. & UNIF. LAW COMM’N 1972); McCall, *supra* note 221, at 679.

the treatment of proceeds of collateral.”²²⁴ Granted, there are some valid concerns for allowing money to be perfected by possession.²²⁵

C. *Should Local Currency Be Used as Collateral?*

When considering the goals and purposes of local currency, it is questionable, at least from a policy standpoint, whether local currency should be used as collateral in a security interest. The purpose of local currency is to support the local economy by spending the currency in that community, rather than giving it to big corporations and banks.²²⁶

In light of this, there remains the question of whether local currency should be used as collateral at all because of local currency’s goal of keeping money within the local economy. The answer is possibly. By using local currency as collateral, it would gain “institutional recognition.”²²⁷ This would serve the interests of local currency well because increased “institutional recognition” brings it more legitimacy and thus more users.²²⁸

Furthermore, to ease some of the concerns of its users and advocates, debtors using local currency as collateral could only obtain loans from small, local banks rather than national banks.²²⁹ This would ensure that if a debtor defaulted on a loan the value of the local currency would stay in the local economy.²³⁰

224. McCall, *supra* note 221, at 684.

225. *Id.* at 700–03 (addressing the objections to allowing money to be perfected by possession).

226. See Chodorow, *supra* note 32, at 389–90; Cohen, *supra* note 4, at 741–42; Glover, *supra* note 6.

227. See Fare & Ahmed, *supra* note 7, at 865.

228. See *id.*

229. See Stacy Mitchell, *Top 5 Reasons to Choose a Community Bank or Credit Union*, INST. LOC. SELF-RELIANCE (June 30, 2010), <https://ilsr.org/top-5-reasons-choose-community-bank-or-credit-union/> [<https://perma.cc/2JEX-8GUV>] (noting that local banks keep money in the community); Stacy Rapacon, *Why a Small Bank Might Be Right for You*, U.S. NEWS (July 24, 2017), <https://money.usnews.com/money/personal-finance/banking-credit/articles/2017-07-24/why-a-small-bank-might-be-right-for-you> [<https://perma.cc/9Y7U-S8C2>] (“[B]anking close to home can help enrich your neighborhood. The money you deposit in your community bank will be reinvested in ways that drive your local economy. . . .”).

230. See Rapacon, *supra* note 229.

CONCLUSION

As this comment has articulated, local currency is a viable option as collateral for a security interest. Although Article 9, in its current form, adequately handles securing a security interest in local currency, several improvements could be made. First, this comment suggests that the definition of “money” be revised to encompass local currency. This revised definition would solve many enforcement problems with local currency serving as collateral because a security interest in local currency could be attached and perfected by possession. Second, it may be best to allow money and local currency to be perfected by filing or possession like the UCC allows for other types of collateral. This would create more uniformity and predictability throughout Article 9. There is also the question of whether local currency should serve as collateral at all in light of its purposes. This comment concludes that local currency serving as collateral could benefit the goals of local currency advocates, because local currency serving as collateral could potentially enhance its legitimacy as an alternative currency and will allow local currency to increase its user base.

*Marina C. Leary **

* J.D. Candidate, 2019, University of Richmond School of Law. B.A., 2014, Virginia Polytechnic Institute and State University. I would like to thank Professor David Frisch for his invaluable guidance and support throughout the writing process. I would also like to thank Jonathan Lazarow and Frances Lazarow for their thoughtful feedback on my comment. Lastly, I would like to thank the *University of Richmond Law Review* staff and editors for their assistance during the publishing process.