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Comments on Certain Proposed Amendments to Article 9 of the Uniform Commercial Code

Charles M. Levenberg

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I. INTRODUCTION

In the nine years since the promulgation of the 1962 version of the *Uniform Commercial Code*, Article 9, dealing with secured transactions in personal property, has probably been the most criticized and the least uniform[1] of the Code's 10 articles. This is probably because that Article, more than any other, has been woven mostly from new threads, thereby creating many new terms of art. The criticism surrounding Article 9 led to the appointment of a Review Committee in 1966 to study the Article in depth and recommend amendments. The Committee published its proposed amendments on February 1, 1970 in its *Preliminary Draft No. 2*,[2] and revised those proposals in a *Final Report* published April 25, 1971.[3] The Committee has recommended amendments in 12 areas of Article 9: filing problems, default, conflict of laws, scope questions, motor vehicles and related perfection problems, oil, gas and minerals, crops and farm products, timber, fixtures, intangibles, proceeds and priorities.

This article will treat only the first four subjects—filing problems, default, conflict of laws and scope questions. The author has sought to include those areas relevant to a large number

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** Mr. Levenberg is associated with the firm of Oppenheimer, Brown, Wolff, Leach & Foster, St. Paul, Minnesota.

1. The Permanent Editorial Board of the UNIFORM COMMERCIAL CODE reported that as of 1966, 47 of the 54 sections of Article 9 had been nonuniformly amended. PERMANENT EDITORIAL BOARD OF THE UNIFORM COMMERCIAL CODE, REPORT No. 3 at x (1966). [Hereinafter, the UNIFORM COMMERCIAL CODE will be cited as UCC.]

2. REVIEW COMMITTEE FOR ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE, PRELIMINARY DRAFT No. 2 (1970) [hereinafter cited as PRELIMINARY DRAFT No. 2].

3. REVIEW COMMITTEE FOR ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE, FINAL REPORT (1971) [hereinafter cited as FINAL REPORT]. All references in the text to "proposed" revisions, unless otherwise indicated, refer to the FINAL REPORT. All other textual references are to the present version of the UCC.

of secured transactions rather than those relating only to secured transactions involving certain kinds of collateral. Thus the proposed amendments dealing with timber, motor vehicles, crops, farm products, oil, gas and minerals were excluded. The subjects of priorities, proceeds, intangibles and fixtures, while applicable to many secured transactions, have been excluded because they seemed glamorous enough to the commentators to have evoked a healthy amount of literature which has discerned most of the problems addressed by the Review Committee and anticipated a good number of the Committee's proposed solutions.[4] The topics discussed in this article have not received the benefit of such attention even though they are relevant to many secured transactions.

II. FILING PROCEDURES

Although the Committee has suggested some substantive changes in the area of filing procedures, the bulk of its proposed amendments attempt to clarify ambiguities in the present filing provisions.[5]

A. Fixture Filings

The present Code provision on the filing of financing state-

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4. The following articles are representative of the literature dealing with issues involving priorities: Coogan & Gordon, *The Effect of the Uniform Commercial Code Upon Receivables Financing—Some Answers and Some Unresolved Problems*, 76 Harv. L. Rev. 1529 (1963); Folsenfeld, *Knowledge as a Factor in Determining Priorities under the Uniform Commercial Code*, 42 N.Y.U.L. Rev. 246 (1967); Meek, *Secured Transactions Under the Uniform Commercial Code*, 18 Ark. L. Rev. 30 (1964); Smith, *Article Nine: Secured Transactions—Perfection and Priorities*, 44 N. Car. L. Rev. 753 (1966). For discussions of issues involving proceeds, *see* Gillombardo, *The Treatment of Uniform Commercial Code Proceeds in Bankruptcy—Proposed Redraft of Section 9-306*, 38 U. Cin. L. Rev. 1 (1969); Henson, *"Proceeds" Under the Code*, 65 Colum. L. Rev. 232 (1965); Kennedy, *Secured Interests in the Proceeds of Sale of Collateral*, 14 Rutgers L. Rev. 531 (1960). For general discussions of intangibles, *see* Coogan, *Intangibles as Collateral Under the Code*, 77 Harv. L. Rev. 997 (1964); Gilmore, *The Assignee of Contract Rights and His Precarious Security*, 74 Yale L.J. 217 (1964); Kripke, *Classification of and Filings as to Intangibles*, 41 N.Y.U.L. Rev. 687 (1966). For discussions of fixtures, *see* Coogan, *Security Interests in Fixtures Under the Uniform Commercial Code*, 75 Harv. L. Rev. 1319 (1962); Coogan, *Uniformity in Fixtures*, 113 U. Pa. L. Rev. 1186 (1965); Drier, *The Uniform Commercial Code and the Law of Fixtures*, 86 N.J.L.J. 61 (1963); Hanson, *Fixtures: Commentary on Proposed Changes in Article 9*, 52 Marq. L. Rev. 179 (1969); Kennedy, *Security Interests in Fixtures*, 14 Rutgers L. Rev. 536 (1960); Comment, *Proposed Section 9-103: The Road to Mandalay*, 32 U. Pitt. L. Rev. 47 (1970).

5. UCC §§ 9-401 to 9-407.

ments within a given state, Section 9-401(1), gives each state three alternative approaches from which to select. Under each approach the number of filings required and the offices where they are to be made turn upon the type or nature of the collateral.[6] However, where the collateral is "goods which at the time the security interest attaches are or are to become fixtures," all three alternate forms of Section 9-401(1) require that a single filing be made in the "office where a mortgage on the real estate would be filed or recorded."[7] The Committee does not propose to alter this rule. It does, however, create a new term—"fixture filing"—which is defined as

> the filing in the office where a mortgage on the real estate would be filed or recorded of a financing statement covering goods which are or are to become fixtures and which conforms to the requirements of subsection (5) and Section 9-402.[8]

Proposed Section 9-402(5) provides that a financing statement filed as a fixture filing (where the debtor is not a "transmitting utility")

> must show that it covers this type of collateral, must recite that it is to be filed [for record] in the real estate records, and the financing statement must contain a description of the real estate [sufficient if it were contained in a mortgage of the real estate to give constructive notice of the mortgage under the law of this state].[9]

The Committee explains that its creation and definition of the term "fixture filing" and its requirements regarding the content of financing statements covering such filings are designed

> to emphasize a point that was intended but not clearly set forth in the existing Code—that when a filing is intended to give [a security interest in fixtures] priority advantages . . . against real estate interests, the filing must be for record in the real estate records and indexed therein, so that it will be found in a real estate search . . . .[10]

No doubt it was this same intention which caused the drafters of the current three alternative forms of Section 9-401(1) to require all financing statements for security interests in fixtures to be

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6. UCC § 9-401(1) is perhaps the least uniform section of Article 9; the three alternative filing systems envisioned by the drafters have become in reality a host of varying filing rules.

7. As note 6 *supra* suggests, there are several non-uniform provisions regarding the manner of filing for security interests in fixtures. California, for example, requires fixture filings to be made in the office of the Secretary of State. CAL. COMM. CODE § 9401 (West Supp. 1971).

8. FINAL REPORT, *supra* note 3, at § 9-313(1)(b).

9. Bracketed language is optional.

10. PRELIMINARY DRAFT No. 2, *supra* note 2, at 10.

filed in the office where a mortgage on the real estate would be filed or recorded.

As previously mentioned, the Committee's proposal does not change this general rule, but it does provide an exception in the case of "transmitting utilities," which are defined as

> any person primarily engaged in the railroad, street railway or trolly bus business, the electric or electronics communications transmission business, the transmission or the production and transmission of electricity, steam, gas or water, or the provision of sewer service.[11]

Under proposed Section 9-401(5) a secured party taking a security interest in the fixtures or any other collateral of a "transmitting utility" would make its filing in the office of the Secretary of State rather than in the offices where mortgages on the real estate would be filed or recorded. The Committee explains this exception as resting on the fact that "transmitting utilities" often have property throughout the state and this property is often encumbered with combined real estate and chattel indentures. This filing exception allows the secured party to avoid the onerous requirement of Section 9-401(1) of filing in each county where fixtures are located. However, only in jurisdictions which have central (rather than county) filing requirements for real estate mortgages will this exception achieve its purpose of eliminating multiple county filings for security interests in the fixtures of transmitting utilities. If the jurisdiction requires local county filings for real estate mortgages, a secured party under a combined real estate and chattel indenture granted by a transmitting utility still must file copies of the indenture in every county where the utility has real estate, notwithstanding the Committee's proposed exception to the local fixture filing requirement of Article 9. The Committee should therefore recommend that enacting jurisdictions change from local to central real estate mortgage filing, at least in the case of transmitting utilities.

One might ask if the Committee would have been wise to make the new exception a general rule and eliminate local real estate filings entirely for all security interests in fixtures. The wisdom of such a suggestion turns upon the extent to which debtors in fact have fixtures in several counties and the degree to which central fixture filings would impede the purpose of local filings—*i.e.*, to place the existence of the security interest in fixtures upon the real estate record and thereby give notice to prospective purchasers and mortgagees of the realty. Once it were

11. FINAL REPORT, *supra* note 3, at § 9-105(1)(n).

known that all security interests in fixtures are recorded at the office of the Secretary of State, no prospective purchaser or mortgagee of realty could complain of lack of notice. The question thus becomes which burden it is most desirable to avoid—forcing secured parties to file their security interests in fixtures in several counties, or requiring that a check of the central filing system in the Secretary of State's office be made for every real estate transaction? With the problem phrased in this fashion, perhaps the Committee was wise in limiting the central filing of security interests in fixtures to a small class of debtors. However, if in the future the excepted class (now limited to "transmitting utilities") should be expanded so as to make it unclear which classes of debtors will have security interests in their fixtures filed centrally rather than locally, a notice problem could be created and parties to realty transactions might be forced to check the central filing system in every case.[12]

One other proposed change in filing rules for fixtures worthy of mention is the proposed new subsection (6) of Section 9-402. It allows a party with a security interest in fixtures to record the mortgage of the real estate in lieu of filing a standard financing statement if the content of the mortgage meets certain requirements. It should be emphasized that proposed Section 9-402(6) does not *require* that the mortgage be filed as a financing statement nor, apparently, that it be indexed with financing statements, but rather that *recording* of the mortgage is effective as a *filed* financing statement.[13]

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12. The fact that the draftsmen of Article 9 have refused to provide a uniform definition of "fixtures" and instead refer to state law definitions also weighs in favor of a central filing location for security interests in fixtures. The problem is most acute in multi-state transactions where it is often quite difficult to determine whether any given collateral is or is not a fixture. For example, the Digit Corporation sells the Acme Company four computers which are installed in four Acme buildings in four different states. The computers might very well be fixtures in some of the states but personalty in others. If Digit is in error in its classification of the collateral under state law as either a fixture or a non-fixture, it may well file in the wrong office, which could invalidate its security interest. *See, e.g., In re* Corrugated Box Corp., 249 F. Supp. 56 (D.N.J. 1966). This harsh result has been avoided by cautious secured parties by filing for both fixtures and personalty where there is any doubt. However, the draftsmen have created several serious pitfalls for less cautious secured parties by (1) allowing the definition of fixtures to turn on state law, which is often metaphysical and always non-uniform, and (2) by requiring a different filing location for fixtures than for other collateral, with filing in the wrong office resulting in an unperfected and therefore extremely vulnerable security interest.

13. FINAL REPORT, *supra* note 3, § 9-402(6) reads:

B. DURATION OF EFFECTIVENESS OF FINANCING STATEMENTS

Under the current version of Section 9-403(2) a properly filed financing statement remains effective for five years unless it states an earlier expiration date. Because of this factor most attorneys advise secured party clients not to state a maturity date. Stating a maturity date is undesirable from the secured party's point of view because he would prefer the security interest to remain perfected at least a few months beyond the scheduled maturity of the underlying obligation in case the debtor is delinquent.

The Committee proposes to amend Section 9-403(2) so as to make all financing statements effective for five years with the

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> If (a) goods are or are to become fixtures related to the real estate described in a mortgage of the real estate, (b) the goods are described in the mortgage by item or type, (c) the mortgage complies with the requirements for a financing statement in this section, and (d) the mortgage is duly recorded, the mortgage is effective from the date of recording as a financing statement filed as a fixture filing. No fee with reference to the financing statement is required other than the regular recording and satisfaction fees with respect to the mortgage.

Two basic changes in the general filing rules were necessary to make the mortgage alternative possible. First, the requirement that the secured party sign the financing statement is eliminated. FINAL REPORT, *supra* note 3, § 9-402(1). This formality served no purpose. Second, an exception to the general rule of proposed Section 9-403(2), that a financing statement is effective for five years, is made for mortgages effective as fixture financing statements. FINAL REPORT, *supra* note 3, § 9-403(6). Professor Homer Kripke, Associate Reporter of the Review Committee, explains his view of these adjustments as follows:

> We have facilitated the possibility of using a real estate mortgage as a fixture financing statement. It took two basic changes in the filing rules to make that possible. The real estate mortgage, when used as a financing statement was not suitable to this five-year continuation requirement, for many real estate parties are not used to it. We, therefore, provide that when the real estate mortgage is used as a financing statement, its effectiveness is good so long as it is effective as a real estate mortgage.
>
> The other point was that real estate mortgages are customarily signed only by the mortgagor, not by the mortgagee. If we set out to authorize the use of a real estate mortgage as a financing statement, many parties would have a defective filing because the mortgagee had omitted to sign.
>
> So for this reason primarily, but also for the reason that no pre-Code practice contemplated that the secured party would sign a security agreement, and the Code requirement that the secured party sign the financing statement had resulted in faulty filings in some cases because it was foreign to people's practice—we have provided that hereafter a financing statement need be signed only by the debtor, not by the secured person.

A Look at the Work of the Article 9 Review Committee—A Panel Discussion, 26 THE BUSINESS LAWYER 307, 311 (1970).

only exceptions being mortgages filed for security interests in fixtures[14] and security interests in the collateral of a "transmitting utility."[15] The Committee rejects, with the two previously stated exceptions, the frequent suggestion that a financing statemen should be effective for the duration of the underlying transaction and that the present requirement of filing a continuation statement where the underlying transaction exceeds five years is an unnecessary burden upon secured parties. It does this on the ground that a uniform five year period of effectiveness promotes ease of administration and handling of the financing statements.[16]

Perhaps this rejected suggestion deserves more consideration, particularly in view of the fact that a security interest becomes unperfected when the effectiveness of the financing statement expires unless a continuation statement has been filed.[17] The Committee's argument that a filing officer who arranges his filings by years can clear the filings of any year automatically after five years loses its force when it is recognized that all financing statements are indexed alphabetically under the names of the debtors rather than in the chronological order in which they were filed.[18] If all financing statements were allowed to state their own durations, the fact that some would exceed five years would pose no more administrative problems in regard to clearing expired statements than does the current system of allowing some filings to state durations of less than five years.[19] Since all the

14. *See* note 13 *supra* and accompanying text. The proposed revision of Section 9-403 would make real estate mortgages filed to perfect security interests in fixtures under proposed Section 9-402(6) effective until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real estate.

15. Financing statements covering the collateral of transmitting utilities would be effective until a termination statement is filed. FINAL REPORT, *supra* note 3, at § 9-403(6).

16. FINAL REPORT, *supra* note 3, at 243-44.

17. *See* text accompanying notes 20-23 *infra*.

18. In fact, both the current version and the proposed amended version of Section 9-403(4) require that the financing statements be indexed according to the names of the debtors. The Committee's remark that "searchers would have to go back to the effective date of the Code if there could be valid long-term filings" (PRELIMINARY DRAFT No. 2, *supra* note 2, at 49) is a misconception of how the filing system actually works in practice. All a searcher need do is look up the debtor in the alphabetical filing index in order to locate all effective financing statements filed against that debtor regardless of the time filed.

19. The Committee's statement that under the present filing provisions the files are "self-clearing" because of "uniform" five year durations, *except* for continued financing statements and those stating shorter durations, (PRELIMINARY DRAFT No. 2, *supra* note 2, at 49) is an illusion probably not shared by many filing officers.

statements filed in the same year are not indexed together, but rather are indexed alphabetically by debtors' names, the filing officer must necessarily use a good deal of effort in clearing expired statements even if they have uniform five year durations. If the only policy underlying limiting the durations of filings to five years is the consideration of administrative ease, which is illusory, then longer durations should be allowed, particularly in view of the consequences of a lapsed financing statement.

C. CONSEQUENCES OF LAPSED FINANCING STATEMENTS

As noted previously, the present version of Section 9-403(2), as well as the proposed version, with two minor exceptions, prohibits a financing statement from being effective for longer than five years. Since some transactions underlying security interests require longer payment obligations and because some security interests are intended to be open ended lines of secured credit containing future advance clauses, secured parties often have to file continuation statements under Section 9-403(3) to retain perfected status beyond five years.

The Committee's proposed version of Section 9-403(2) retains the rule of the present version which provides that the effectiveness of a financing statement lapses upon its maturity date unless a continuation statement is filed in accordance with subsection (3) of that section, and like the current version, the proposed version also provides that the security interest becomes unperfected upon a lapse.[20] However, the Committee does not believe the present versions of the relevant Code sections make explicit the consequences of loss of perfection due to lapse of the effectiveness of a financing statement. In this respect it is presently provided in Comment 3 to Section 9-403 that when a security interest becomes unperfected due to the lapse of a filing

> the interest of the secured party is subject to defeat by those persons who take priority over an unperfected security interest (see Section 9-301), and under Section 9-312(5) the holder of a perfected conflicting security interest is such a person even though before the lapse the conflicting interest was junior.

The Committee ratifies the results dictated by Comment 3 and "proposes in Sections 9-103(3) and 9-403(2) to make clear that

20. However, the proposed version of Section 9-403(2), unlike the present version, provides that lapse of the financing statement does not result in unperfection where the security interest is one that can be perfected without filing. FINAL REPORT, *supra* note 3, at § 9-403(2). UCC § 9-302(1) lists the security interests which may be perfected without filing.

after the lapse all formerly junior security interests have priority over the lapsed security interest."[21]

A final amendment to subsection (2) of Section 9-403 provides that a financing statement does not lapse during a bankruptcy or other insolvency proceeding. A security interest perfected by filing which exists at the time insolvency proceedings are commenced by or against the debtor will remain perfected for a period of 60 days after the termination of the insolvency proceedings or until expiration of the five year period, whichever occurs later. The apparent intended effect of this change is that the bankruptcy trustee will not be able to defeat security interests whose financing statements lapse during proceedings under Section 70(e) of the Bankruptcy Act[22] on the grounds that the security interest is voidable by some actual creditor of the debtor due to expiration of the financing statement after commencement of the bankruptcy proceeding. However, it is an elementary rule of bankruptcy law that the filing of a bankruptcy petition by or against a debtor operates as a freeze upon priorities as they exist on the date of filing.

No case has been found holding that a security interest perfected at the time a bankruptcy petition is filed is defeated by either the trustee or a junior secured creditor if the perfection lapses during the bankruptcy proceeding, and thus the Committee's provision in subsection (2) of proposed Section 9-403 that a financing statement does not lapse during a bankruptcy or other insolvency proceeding is based either on the incorrect assumption that a security interest which lapses after a bankruptcy petition

21. PRELIMINARY DRAFT No. 2, *supra* note 2, at 50. This decision is reflected in the FINAL REPORT, *supra* note 3, at 244-45, where the words "purchasers—i.e., buyers and secured parties" are substituted for "all formerly junior security interests." UCC § 9-103(3) deals with loss of perfection due to failure of the secured party to file a financing statement in a state to which collateral has been moved after the security interest has been perfected in another state. A secured party has a four month grace period following the movement of the collateral in which to file in the second state. Failure to do so results in a lapse of perfection. For a discussion of the Committee's proposed revision of section 9-103, *see* text accompanying notes 36-75 *infra*. It should be noted that on October 16, 1970, Mr. Justice Braucher of the Massachusetts Supreme Judicial Court, formerly Professor at the Harvard Law School and Reporter for the Review Committee, distributed a revised version of UCC § 9-103 [hereinafter cited as *Braucher Draft*]. This version presumably superseded the version printed in PRELIMINARY DRAFT No. 2, *supra* note 2. For the text of this revision, *see* note 36 *infra*. Justice Braucher's draft was, in turn, superseded by the draft contained in the FINAL REPORT, *supra* note 3.

22. 11 U.S.C. § 110(e) (1971).

has been filed is vulnerable, or on the belief that perhaps such vulnerability may occur under the insolvency proceedings of some states. If it is assumed that such a security interest is vulnerable upon a lapse of perfection after either a bankruptcy or state insolvency petition has been filed, the Committee's proposal to save the priority of the senior secured party in such circumstances seems inconsistent with the present rule of Section 9-403 (which the Committee explicitly approves and retains) that senior secured parties whose financing statements lapse become subordinate to the perfected security interests of juniors.[23]

Preservation of the senior's priority in spite of the expiration of his financing statement is acutely important in the bankruptcy or insolvency situation because the secured party with priority will be able to look to the collateral for satisfaction of the debtor's obligation to him, whereas a junior secured party in most instances will end up as a general creditor and will be extremely fortunate to get 10 per cent of his claim from the pro rata distribution of the debtor's estate. It would seem therefore that the Committee's proposal to limit the effectiveness of financing statements to five years and to grant priority (except in bankruptcy and insolvency proceedings) to perfected juniors over seniors whose filings have lapsed is pure folly. First, the Committee's reason for limiting the effectiveness of financing statements to five years—*i.e.*, ease of administration—is an illusion. Second, even if the limited duration of effectiveness did result in easier administration, does attainment of this goal justify the harsh consequences of loss of the senior's priority upon lapse? Finally, if there is some other policy reason behind giving perfected juniors priority over seniors who have become unperfected because of lapsed filings, why should this policy be abandoned in the bankruptcy-insolvency context where it is probably most important to juniors?

D. Transfer of Collateral, Debtor's Change of Name, and Proper Name Under Which to File

One question left unanswered by present filing provisions is whether a secured party is under a duty to refile where he knows of or has consented to the debtor's transfer of the collateral. Proposed Section 9-402(7) provides that "a filed financing statement remains effective with respect to collateral transferred by the debtor even though the secured party knows of or consents to the

23. *See* text accompanying note 21 *supra*.

transfer" and does not require a refiling where the debtor transfers collateral.

The main virtue of such a rule is that it eliminates the burden of policing collateral, which in most instances is impractical. Its major vice is that where Smith purchases collateral from Jones which is subject to the security interest of Factor, a lendor who searches the recorded financing statements will find no filing against Jones covering this property and may be misled into extending credit upon encumbered collateral.

This problem is somewhat minimized by the fact that both the present and proposed versions of Section 9-306(2) provide that where the secured party authorizes his debtor to sell the collateral the buyer takes free of the security interest; the secured party loses his security interest in the collateral and instead gains a security interest in the identifiable proceeds of the sale. Thus if Jones was authorized by Factor to sell to Smith, neither Smith, a subsequent creditor of Smith's taking a security interst in the collateral after the sale, a purchaser from Smith nor a levying creditor of Smith need fear pre-sale security interests created by Jones. It seems anomalous that proposed Section 9-402(7) provides that a security interest remains effective without refiling even though the secured party "consents" to the transfer of the collateral, while Section 9-306(2) provides that a secured party who "authorizes" his debtor to sell the collateral loses his security interest. It must be noted, however, that except in the case of inventory transactions, most secured parties explicitly prohibit their debtors from selling collateral until the underlying obligation is satisfied. The problem is minimized still further in most instances of unauthorized sales of collateral because Sections 9-307 through 9-309 provide that generally the purchaser takes free of security interests created by his seller, even if the sale was unauthorized, so long as the purchaser buys in the ordinary course of business and does not have actual knowledge that the sale is in violation of the terms of his transferor's security agreement.[24]

24. UCC § 9-307, Comment 2, points out that the definition of "buyer in ordinary course" contained in UCC § 1-209(9) limits the application of UCC § 9-307(1) to inventory. UCC § 9-301(2) extends some protection to buyers of consumer goods and farm equipment as to security interests created by their sellers. UCC § 9-308 protects persons who purchase chattel paper or nonnegotiable instruments in the ordinary course of their own business. UCC § 9-309 protects holders in due course (by due negotiation) and bona fide purchases of negotiable instruments and documents of title. The only purchaser granted no protection as to security interests created by his seller is a purchaser of equipment.

With the exception of security interests in equipment, in actual practice a secured party generally would be rather naive to believe that his security interest in the collateral would be likely to survive a sale by his debtor, irrespective of authorization.[25] Since refiling in the event of a sale of the collateral by the debtor is unlikely to provide retention of priority for the secured party and since the subsequent security interest of a creditor of the purchaser is unlikely to be subject to security interests created by the purchaser's transferor, there would be little to be gained by forcing secured parties to refile where their debtors sell collateral. The only person likely to be harmed by this rule is a secured creditor of equipment which was subject to a prior security interest created by the debtor's transferor. Perhaps it would be wise and fair to require only secured parties with security interests in equipment to refile under the name of a party who purchases the equipment from the secured party's original debtor.

A refiling problem similar to that where the debtor transfers the collateral arises when the debtor changes his name. The Committee's solution is found in proposed section 9-402(7):

> Where the debtor so changes his name or in the case of an organization its name, identity or corporate structure that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless a new appropriate financing statement is filed before the expiration of that time.

Changes of debtors' names create notice problems because security interests in the property of the debtor acquired before the change of name will be filed under the debtor's previous name. Potential creditors might thereby be misled into extending credit on the basis of a debtor's assets already subject to a security interest filed under a previous name. Proposed Section 9-402(7) does nothing to remedy the situation where collateral is acquired by the debtor prior to four months after its change of name. For example, assume that as of January 1 all of the personal property of the Ace Company is subject to security interests. On January 2, Ace changes its name to the Zanzibar Corporation. Subsequent searchers will find filed under the name Zanzibar only security interests in property acquired by it after April. Under this rule potential creditors must check for filings under all previous names of a debtor. Whether this

25. *See, e.g.*, Hempstead Bank v. Andy's Car Rental System, 3 U.C.C. Rep. Serv. 962 (N.Y. Sup. Ct. 1966). *Cf.* O. M. Scott Credit Corp. v. Apax, Inc., 97 R.I. 442, 198 A.2d 673 (1964).

is preferable to requiring existing secured parties to file a name-changing financing statement as to all collateral regardless of the debtor's date of acquisition depends upon whether the question is viewed from the position of existing secured parties or of potential creditors. In most instances, existing secured parties are, through their continual dealings with their debtors, in a better position to find out if a debtor has changed its name.

Another filing ambiguity the Committee hopes to resolve is the problem arising where the debtor is a partnership or an individual using a trade name. The Committee proposes in its version of Section 9-402(7) that a filing be made against a partnership in the name by which it is known and against an individual by his individual name. Neither the names of partners nor a trade name for individuals or partnerships need be shown.[26] Thus, the use of trade names would not be either required or prohibited. This hardly appears to solve the confusion caused by the use of trade names.

III. DEFAULT PROVISIONS

The Committee has proposed some rather specific amendments to Part 5 of Article 9,[27] which deals with the remedies and duties of the debtor and secured party upon default. The Code does not define "default," but rather leaves that problem to the security agreement. Hence, the provisions of Part 5 do not come into play until after a default, as defined by the security agreement, has occurred.

Section 9-501(1) provides the secured party with three sets of cumulative remedies upon default: (1) those granted in the provisions of the Code [hereinafter "code remedies"]; (2) any foreclosure procedures available under state non-code law [hereinafter "non-code remedies"]; and (3) those created by the security agreement [hereinafter "agreement remedies"]. Section 9-501(3) limits the power of the parties to alter or waive certain of the secured party's duties and the debtor's rights upon default provided by the Code provisions in Article 9, Part 5, and thereby places limitations upon agreement remedies. The alternative

26. FINAL REPORT, *supra* note 3, at 245. Proposed Section 9-402(7) reads as follows:

> A financing statement sufficiently shows the name of the debtor if it gives his individual or partnership or corporate name, whether or not it adds other trade names or the names of partners.

27. UCC §§ 9-501 to 9-507.

code remedies granted the secured party by Part 5 of Article 9 are to repossess the collateral[28] and either keep it in satisfaction of the outstanding debt under Section 9-505(2) or to dispose of the collateral (either on the debtor's premises or elsewhere) in accordance with the rules of Section 9-504.[29]

As presently constituted, Section 9-505 (2) requires a secured party intending to keep the collateral in satisfaction of the obligation to notify in writing the debtor, any other parties having security interests in the collateral who have properly filed financing statements under the debtor's name, and any other persons known by the secured party to have security interests in the collateral.[30] If he receives a written objection to this proposal within 30 days after the receipt of notification by any of the notified parties, or if any other secured party objects in writing within 30 days after the secured party obtained possession of the collateral, the secured party in possession must dispose of the collateral pursuant to Section 9-504. The obvious purpose of the notice and objection procedures of Section 9-502 (2) is to allow junior secured parties (as well as debtors) to object to the senior secured party's retention where the value of the collateral exceeds the amount of the senior's claim against the debtor. The present provision gives both the debtor and junior secured

28. UCC § 9-503 allows the secured party to take possession of the collateral upon default "unless otherwise agreed". This may be done without judicial process, but only if it can be accomplished without a "breach of the peace". Some courts have interpreted this phrase broadly, requiring the secured party to use the judicial process to repossess collateral whenever the defaulting debtor objects to a private repossession. *See* Morris v. First Nat'l Bank, 21 Ohio St. 2d 25, 7 U.C.C. Rep. Serv. 131 (1970); Stone Machinery Co. v. Kessler, 1 Wash. App. 750, 7 U.C.C. Rep. Serv. 135 (1970). *But cf.* Harris Truck & Trailer Sales v. Foote, 436 S.W.2d 460 (Tenn. App. 1968). A secured party in possession after default, whether by judicial process or voluntary surrender of the collateral, must abide by UCC § 9-207 with regard to care and custody of the collateral.

29. UCC § 9-502 also gives the secured party, upon default, the right to "take control of any proceeds to which he is entitled under Section 9-306," and if the secured party has a security interest in the debtor's accounts, chattel paper, contract rights or general intangibles he may collect them up to the amount of the outstanding indebtedness with any surplus required to go to the debtor. The debtor is also liable for any deficiency unless otherwise agreed. It should also be noted that UCC § 9-501(3) (a) prohibits the debtor from waiving his rights to surplus proceeds resulting from the collection of accounts under UCC § 9-502 or a disposition of collateral under UCC § 9-504.

30. Where the collateral is consumer goods a secured party intending either to retain the collateral in satisfaction of the debt or sell it need notify only the debtor and not junior secured parties. *See* UCC §§ 9-504(3), 9-505(1).

parties effective procedures to prevent a senior secured party from pocketing any amount by which the value of the collateral exceeds his claim.

The Committee has proposed amending Section 9-505(2) to reduce the waiting period from 30 to 21 days and to have that period commence from the day the secured party in possession sends notice rather than the day notice is received, thereby eliminating the uncertainty as to when parties actually received notification and when the waiting period begins to run. Both of these amendments make good sense in view of the general purpose of Section 9-505(2) to encourage the satisfaction of obligations and thereby eliminate the deficiencies which so often result from dispositions of collateral. A 21 day waiting period commencing from the date notice is sent probably makes the retention-satisfaction remedy of Section 9-505(2) more attractive to secured parties by eliminating uncertainty as to when the waiting period begins and ends and by shortening the waiting period.

The Committee also proposes to amend Sections 9-501(3) and 9-505(2) to allow the debtor to waive in writing, after (but not before) default, his right to notice of the intention of the secured party in possession to retain the collateral in satisfaction of the obligation under Section 9-505(2). This makes good sense in the case of most defaulting commercial debtors who should be competent to waive the notice if they acquiesce in the secured party's proposal. However, it is questionable whether consumer debtors as well should be allowed to waive notice of the secured party's proposal to retain the collateral. Many consumers may not understand the waiver document and may sign it because the secured party is willing to forego the remaining obligation in favor of retaining the collateral which the secured party probably believes is more valuable than the remaining obligation.

Problems are also created by the Committee's proposal to amend Section 9-505(2) to shrink the class of persons entitled to receive notice of the intention of the secured party in possession to retain the collateral in satisfaction of the obligation. It will be recalled that the present version of Section 9-505(2) requires the secured party in possession to give written notice of his intention to the debtor and all secured parties having security interests in the collateral who have properly filed financing statements or who are known to the secured party in possession.[31] Under the Committee's proposed amendment to Section 9-505(2) the secured

31. *See* text accompanying note 30 *supra*.

party in possession need notify only the debtor, if the debtor has not waived such notice after default, and those parties who, in writing, inform the secured party of their claimed interests in the collateral *before* he has sent notice to the debtor or has secured the debtor's waiver thereof. Thus under the proposed amendment the secured party in possession is not required to notify even junior secured parties of record unless they manage to inform him of their claimed interest in the collateral before he notifies the debtor or secures a waiver of such notice. Only those junior secured parties who beat this irrational time limit—*i.e.*, one that is set by the actions of the secured party in possession—will be "entitled to notice" under the proposed version of Section 9-505 (2) and will thereby have power to object within the 21 day period. The fact that the Committee gives only those parties entitled to notice under its proposed version of Section 9-505(2) the power to object to retention of the collateral makes the attempt by the Committee to reduce the class of persons entitled to notice of a proposed retention devastating.

The Committee supports its reduced notice obligation by stating that the current requirement to notify all other secured parties on record or known to the secured party in possession

> put[s] on the secured party [in possession] the necessity of searching the record in every case and of keeping a record of every telephone call by a person claiming an interest, and determining whether such a person is entitled to notice. In the Committee's opinion, this burden is simply not justified in the light of the few cases in which there will be junior security interests on file and even fewer cases in which there will be an equity for the junior party to be protected.[32]

It is questionable whether such cases are as unusual as the Committee seems to believe. Where the debtor has little bargaining power at the time of the advance, the secured party often takes a security interest in collateral far exceeding the amount of the debt. Furthermore, with the common use of the after-acquired property clause the value of the collateral securing the debt often increases considerably. Where the senior secured party has substantially over-secured himself and has not covered any future advances in the security agreement, subsequent creditors may very well make limited advances, taking junior security interests. This is particularly true where a subsequent creditor is unable to gain the priority status of a purchase money security interest.[33]

32. FINAL REPORT, *supra* note 3, at 248.
33. *See* UCC §§ 9-107, 9-312(3) (4).

Even if the Committee is correct in stating that junior security interests with equity in the collateral over and above the claim of the senior secured party will be quite rare, it does not make sense to allow the senior easily to deprive juniors of their right to object to the senior's retention of the collateral. Juniors would be left to the mercy of the debtor to protect them from the senior's usurpation of the amount by which the value of the collateral exceeds the claim of the senior secured party. In attempting to make the retention-satisfaction remedy of Section 9-505(2) more attractive, the Committee has created an enticement for senior secured parties to deal sharply with juniors where the collateral is worth more than the obligation secured by the senior's security interest. Even if the Committee is correct in claiming that the obligation currently placed upon senior secured parties to notify unrecorded junior secured parties of which they have knowledge is too great a burden, it would still seem an error not to require seniors to notify juniors on record. Otherwise, juniors on record must police the collateral, which is an absurd requirement in most instances, particularly in view of the fact that the senior can easily obtain the names of recorded juniors by checking the financing statements on file. Finally, even if the junior polices the collateral this does not assure him of the right to notice and therefore the opportunity to object to a senior's proposal to retain the collateral unless he manages to inform the senior of his claimed interest in the collateral prior to the senior's having notified the debtor or secured waiver of such notice from the debtor.

If proposed Section 9-505(2) is not to provide an opportunity for sharp dealing by unscrupulous seniors to the detriment of juniors wherever the collateral is more valuable than the senior's claim, it must require seniors to give notice of their intention to retain the collateral to all recorded juniors, providing these juniors with a fair opportunity to object. At a minimum, it should also give all parties with security interests in the collateral standing to object to the proposed retention regardless of whether they are entitled to notice of the retention under Section 9-505(2). A senior should not be able to cut off a junior's right to notice and standing to object merely by giving the debtor notice before the junior is able to inform the senior of his claimed interest in the collateral. If the proposed version of Section 9-505(2) is enacted, advances of credit under junior security interests will be too hazardous to be extended unless a junior deprived of his right to object is permitted to attack the retention on legal grounds outside of the Code after expiration of the waiting period. Such a collateral remedy, if open to juniors, would create more uncertainty about the retention-satisfaction remedy in the minds of seniors than presently exists under the current version of the statute. In trying to strike a balance between encouraging the use of the retention-satisfaction remedy of Section 9-505(2) and the protection of junior security interests in the collateral, the Committee has proposed notice procedures that permit seniors to seriously harm juniors unless their common debtor acts to protect the junior by refusing to waive notice and objecting after notice is received. The Committee's amendment would force juniors who believe they have an equity beyond the claim of the senior secured party to police the collateral. The proposed notice amendment would strip juniors of their right to object to a senior's retention of the collateral where the senior so desires. It is debatable whether junior securied parties with equity in the collateral will be as uncommon as the Committee appears to assume. Even if such juniors are rare, they deserve better protection of their rights; if they do not receive better protection, secondary lines of credit will become unavailable. It is unwise to treat juniors, however rare they might be, so shabbily, thereby discouraging the availability of secondary lines of credit merely to allow seniors who propose to retain the collateral to avoid the simple requirement of searching the financing statements filed under the defaulting debtor's name and sending notice to holders of recorded junior security interests in the collateral.

The retention-satisfaction remedy could be made just as attractive to seniors without unduly jeopardizing the interests of juniors if Section 9-505(2) were amended to read as follows:

> In any other case involving consumer goods or any other collateral a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor, if he has not signed after default a statement renouncing or modifying his rights under this subsection, and to any other party who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state. In the case of consumer goods no notice other than to the debtor need be given. If the secured party in possession receives objection in writing from any person entitled to receive notification within 21 days after the notice was sent, or from any party with an unrecorded security interest in the collateral within 21 days after the secured party took possession of the collateral, the secured party in possession must dispose of the collateral as required by Section 9-504. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation.

This proposal retains the advantages of allowing the secured party in possession to obtain the debtor's waiver of notice after default (although, in the author's opinion, consumer debtors should not be allowed to waive such notice) and cuts the waiting period to 21 days, measured from the date notice is sent rather than received. It also relieves the senior secured party of having to determine which, if any, unrecorded secured parties are entitled to notification, thereby relieving him of the need to keep records of informal communications concerning the collateral. This proposal would also protect the rights of recorded juniors to receive notice and object to the proposed retention in order to protect whatever equity they have in the collateral. Unrecorded juniors, while not given the right to automatic notice, would still have standing to object to the retention within 21 days after the senior gained possession of the collateral. In most instances the senior in possession could check the recorded financing statements and mail appropriate notices in one day; if this is done on the same day he repossesses the collateral a uniform 21 day waiting period as against all parties with a right to object is created. A senior who knows that the value of the collateral exceeds the amount of his claim and who believes the defaulting debtor will be indifferent to his proposal to retain the collateral in satisfaction of the obligation will not, under the author's proposed version of Section 9-505(2), be tempted to deprive juniors of notice of his intention and the power to object and force a disposition of the collateral. Juniors would not be forced to either police the collateral or fear sharp dealing by seniors that would deprive them of their interest in the collateral. Potential juniors would not be discouraged by the retention remedy from extending credit on the basis of subordinate security interests.

The Committee has proposed amendments to Section 9-504(3) —dealing with the sale or other disposition of collateral upon default—which are similar to those proposed for Section 9-505(2). In its present form, Section 9-504(3), with exceptions, requires a secured party seeking to sell or otherwise dispose of collateral to give "reasonable notification"[34] of the time and place of any public sale or of the time after which any private sale or other intended disposition is to be made to the debtor and, except in the case of consumer goods, to all other secured parties having se-

34. UCC § 9-504, Comment 5, states:
"Reasonable notification" is not defined in this Article; at a minimum it must be sent in such time that persons entitled to receive it will have sufficient time to take part in the sale or other disposition if they so desire.

curity interests in the collateral who either have properly filed a financing statement or who are known to the secured party.

The Committee proposes to allow debtors to waive notice of sale after default. With the possible exception of consumer debtors this is reasonable. However, as it does with Section 9-505(2), the Committee also proposes to require reasonable notice of sale under Section 9-504(3) only to those junior secured parties who inform the senior of a claimed interest in the collateral prior to the time the senior notifies the debtor or secures a waiver of notice from him.[35] This limitation upon the parties entitled to notice allows senior secured parties to deprive juniors of notice at will. This result, however, is less objectionable in a Section 9-504(3) sale than it is in the context of a Section 9-505(2) retention because of the differing consequences for juniors and the different purposes served by notice to them in the two instances. Where a senior proposes to retain the collateral in satisfaction of the debtor's obligation, notice to juniors is intended to provide an opportunity to object and force a sale, thereby preventing seniors from pocketing a junior's claimed equity in the collateral. Retention by a senior under Section 9-505(2) destroys the security interests of juniors in the collateral, allowing seniors to keep any amount by which the value of the collateral exceeds their claims. Notice to juniors serves a different purpose where the senior proposes to sell or otherwise dispose of the collateral under Section 9-504. Here notice allows a junior to attend the sale or other disposition of the collateral, and Section 9-504(1)(c) assures him of receiving any sale proceeds in excess of the senior's claim if he makes written demand before the proceeds are otherwise distributed.

If the Committee's version of Section 9-504(3) is enacted, the worst possible result would be that a senior aware of the excess value of the collateral over his claim would deprive juniors of their right to notice of sale by giving prompt notice to the debtor or securing a waiver from the debtor before any juniors can qualify for notice. A senior who keeps the fact of default and sale secret from juniors deprives them of their right to demand surplus proceeds under Section 9-504(1)(c). This problem is minimized by the fact that where the common debtor defaults on one obligation secured by certain collateral it is possible that he will also have defaulted on other obligations secured by the same collateral and knowledge of this should put juniors on guard as to the whereabouts of the collateral. However, if these defaults on

35. *See* text accompanying note 32 *supra*.

several obligations secured by the same collateral are not simultaneous (*e.g.*, the obligation to the senior secured party calls for monthly payments while obligation to the junior requires semi-annual payments), the junior probably will not discover the fact of sale by the senior soon enough to make a demand for excess proceeds under Section 9-504(1)(c). The wisdom of exposing recorded juniors to the potential harm created by narrowing the class entitled to notice under Section 9-504(3) is questionable since its only apparent purpose is to relieve seniors of the slight inconvenience of notifying recorded juniors of an intended sale —a burden that is most logical under a "notice system" of recording the existence of security interests in personal property.

IV. CONFLICT OF LAWS

To understand and evaluate the Committtee's conflict of laws proposals, the present provisions will be outlined, the problems created assessed, and the Committee's proposals considered to determine whether they adequately deal with those problems.[36]

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36. As mentioned in note 21 *supra*, the *Braucher Draft* superseded the version of Section 9-103 (dealing with conflict of laws) printed in PRELIMINARY DRAFT No. 2, *supra* note 2, and was superseded by the version contained in the FINAL REPORT, *supra* note 3. The only significant changes made in the final draft of Section 9-103 were in subsection (1). Subsection (1) of the *Braucher Draft* read as follows:

(1) *Documents, instruments and ordinary goods.*

(a) This subsection applies to documents and instruments and to goods other than those covered by a certificate of title described in subsection (2), mobile goods described in subsection (3), and minerals described in subsection (5).

(b) Except as otherwise provided in this subsection, perfection and the effect of perfection or non-perfection of a security interest in collateral are governed by the law (including the conflict of laws rules) of the jurisdiction where the collateral is when a conflicting claim arises.

(c) If the parties to a transaction creating a purchase money security interest in goods in one jurisdiction understand at the time that the security interest attaches that the goods will be kept in another jurisdiction, then the law of the other jurisdiction governs the perfection and the effect of perfection or non-perfection of the security interest from the time it attaches until ten days after the debtor receives possession of the goods and thereafter if the goods are taken to the other jurisdiction before the end of the ten day period.

(d) When collateral is brought into and kept in this state while a security interest therein is perfected under the law of the jurisdiction from which the collateral was removed,

(i) if action is required by Part 3 of this Article to perfect the security interest and the action is not taken before the expiration of the period of perfection in the other jurisdiction or the end of four months af-

In the context of multi-state secured transactions, the following are among the most important problems encompassed by the term "conflict of laws": (1) the extent to which the parties to a secured transaction within the scope of Article 9 are free to select the law that will govern their transaction; (2) if a filing is necessary to perfect a security interest, the state in which it should be made; (3) which state's laws should determine the validity of the security interest; (4) which state's laws should determine if perfection has been accomplished; and (5) which state's laws should determine the effect of perfection or nonperfection in a controversy between the secured party and some third party other than the debtor claiming an interest in the collateral?

A. FREEDOM OF THE PARTIES TO CHOOSE APPLICABLE LAW

Under the present versions of Sections 9-102 and 9-103 the determination of which state's law will govern a secured transaction turns primarily upon the nature of the collateral. Section 9-102 provides that where the collateral is goods (other than "mobile goods," whose use normally involves interstate movement, and personal property covered by a certificate of title), instruments, documents of title or chattel paper, the law of the state where the collateral is located applies.[37] Section 9-103 provides

> ter the collateral is brought into this state, whichever period first expires, the security interest becomes unperfected at the end of that period and is deemed to have been unperfected as against a person who became a purchaser after removal;
> (ii) otherwise the security interest continues perfected for the same period as if the collateral had not been removed;
> (iii) for the purpose of priority over a buyer of consumer goods (subsection (2) of Section 9-307), the period of the effectiveness of a filing in the jurisdiction from which the collateral is removed is governed by the rules with respect to perfection in subparagraphs (i) and (ii).

While the *Braucher Draft* is now moot, it deserves discussion because it is indicative of the Committee's thinking on what is perhaps the most difficult and complex part of Article 9.

37. UCC § 9-102 fails to state explicitly which state's law applies when the collateral has been located in different states at various times. That is, the present provision leaves open the question—"located at what time?" The possible choices would be the law of the state where the collateral was located at the time of the signing of the security agreement, at the time of the attachment of the security interest, at the time of the perfection of the security interest or at the time a controversy arose as to rights in it.

Professor Gilmore, one of the principle drafters of the current provisions of Article 9, has stated that this silence in UCC § 9-102 "presumably . . . refers to the location of the collateral at the time the differing rules for determining the applicable law in the cases of certain mobile goods and various intangibles which have no "location" except perhaps in some metaphysical sense. These rules will be discussed below.[38]

Our present purpose is to examine the extent to which the parties to a secured transaction under the present provisions of Article 9 are free to select as applicable law that of some state other than the one selected by either Section 9-102 or Section 9-103. Section 1-105 provides the basic choice of law rule for all transactions within the scope of the Code. That Section provides that the law of the forum state shall apply and govern the rights and duties of the parties if the transaction has an "appropriate relation" to the forum state. However, the section also gives the parties to a Code transaction the power to agree that the law of any state to which the transaction has a "reasonable relation" shall apply. This power to select applicable law is limited, in turn, by subsection (2) of Section 1-105 which provides that in Article 9 transactions the law of the state selected by Section 9-102 and 9-103, whichever is applicable, shall govern and "a contrary agreement is effective only to the extent permitted" by those sections.

In determining if the parties to a secured transaction have the power to agree to select as applicable law that of some state other than the one prescribed by Section 9-102 or Section 9-103, we must ask what choice of law agreements would not be "contrary" to those sections. Presumably any choice of law agreement not "contrary" to those sections would not need to be explicitly permitted by them in order to be within the power of the parties to adopt under Section 1-105. As to choice of law agreements that *are* contrary to whichever section (9-102 or 9-103) is applicable, it is necessary to ask whether they are *permitted* by the respective sections. Neither Section 9-102 nor Section 9-103 explicitly permits any choice of law agreements, and it thus appears that an agreement "contrary" to those sections would not be within the power of the parties under Section 1-105. If the parties to a secured transaction are to have any power under the present versions of the relevant Code provisions to select applicable law as to any aspect of their transaction, it must therefore be through an agreement which is not "contrary" to whichever of Sections 9-102 and 9-103 is applicable.

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security interest attaches." 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 318 n.5 (1965).

38. *See* text accompanying notes 65-73 *infra*.

Where the collateral is one of the tangible types subject to Section 9-102 the parties apparently are powerless to choose the law of any state other than the one prescribed by Section 9-102 as applicable to any aspect of the transaction governed by a provision of Article 9. This is because Section 9-102 provides that for all tangible collateral (other than mobile goods and goods covered by a certificate of title) the Article 9 provisions of the enacting state shall apply. An agreement by the parties that the law of some other state should govern any issue subject to a provision of the Article 9 of the prescribed state would be "contrary" to Section 9-102 and outside the power of the parties under Section 1-105. Hence, where the collateral is subject to Section 9-102, the parties are powerless to select the law of any state other than that prescribed by Section 9-102 (*i.e.*, the state where the tangible collateral is located) as the governing law with respect to any aspect of the secured transaction governed by an Article 9 provision of the prescribed state regardless of whether the state they would select has a "reasonable relationship" to the transaction.[39]

In the case of intangible collateral, mobile goods or goods covered by a certificate of title, subject to the choice of law provisions of Section 9-103, the power of the parties to select applicable law—at least as concerns some aspects of the secured transaction—is less clear. Unlike Section 9-102 which simply states that the Article 9 provisions of the state it prescribes "shall apply," Section 9-103 provides that the law of the state it prescribes shall govern the "validity" and "perfection" and "the possibility and effect of proper filing." Recalling that Section 1-105 in effect gives the parties to an Article 9 secured transaction the power to select as applicable law that of any state having a "reasonable relationship" to the transaction so long as that selection agreement is not "contrary" to either Section 9-102 or 9-103, whichever is applicable,[40] it becomes strongly arguable that parties to a secured transaction involving Section 9-103 collateral have the power to make choice of law agreements relating to aspects of their transaction other than validity, perfection and the possibility and effect of proper filing.[41] For example, if Section 9-103 pre-

39. 1 G. GILMORE, *supra* note 37, at 317. *But see* note 42 *infra* and accompanying text.

40. *See* text following note 38 *supra*.

41. Apparently no court has passed on this specific issue. The only related case appears to have correctly held, without extended analysis, that UCC § 9-103 necessarily determines the law applicable to all issues involving the validity and/or perfection of a security inter-

scribed the law of Massachusetts as applicable to issues of validity, perfection and filing, it appears that the parties could agree that the law of New York (assuming the transaction has a "reasonable relation" to New York) shall govern their rights upon default. It is difficult to see how such an agreement would be "contrary" to Section 9-103 since the parties' rights on default cannot reasonably be said to be an issue of validity or perfection of the security interest, nor does it bear upon the need or effect of filing.

In summary, the present conflict of laws provisions of Section 9-102, when read in conjunction with present Section 1-105, prohibit the parties to a secured transaction involving tangible collateral subject to Section 9-102 from selecting the law of some state other than that prescribed by Section 9-102 as the law governing any aspect of the transaction covered by a provision of Article 9 as enacted in the prescribed state.[42] The power of the parties to select governing law where the collateral is subject to Section 9-103 is unclear under the present versions of that Section and Section 1-105.[43] The leading treatise suggests that the parties to such a transaction are powerless to agree upon the law to govern any aspect of the transaction covered by Article 9.[44]

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est in a controversy between the secured party and some third party (other than the debtor) claiming an interest in the collateral. Industrial Packaging Prods. Co. v. Fort Pitt Packaging Int'l, Inc., 399 Pa. 643, 161 A.2d 19 (1960). The court thus left the parties powerless to agree as to the law that will govern any issue covered by UCC § 9-103. The court expressed no opinion as to whether the parties to a secured transaction involving collateral subject to UCC § 9-103 have the power to select applicable law regarding issues other than those enumerated in UCC § 9-103.

Professor Gilmore reaches the broader and more questionable conclusion that UCC § 9-103, like UCC § 9-102, precludes the parties from selecting applicable law on any issue governed by an Article 9 provision of the law of the state prescribed by UCC § 9-103. Professor Gilmore arrives at this conclusion on the dubious assumption that the terms "validity" and "perfection" as used in UCC § 9-103 together embrace all aspects of a secured transaction. 1 G. GILMORE, *supra* note 37, at 320-21.

42. *See* text accompanying note 39 *supra*. The only decided case bearing upon this issue correctly held that the parties were free to select the law to govern any aspect of a secured transaction involving tangible collateral subject to UCC § 9-102 which was not governed by an Article 9 provision of the state prescribed by that section. Thus the parties choice of the law of a state other than that prescribed by UCC § 9-102 was followed by the court on the issue of usury since Article 9 has no usury provisions. Cooper v. Cherokee Village Dev. Co., Inc., 236 Ark. 37, 364 S.W.2d 158 (1963).

43. *See* text accompanying note 41 *supra*.

44. *See* note 41 *supra*.

However, since Section 9-103 by its own terms only prescribes governing law for the purpose of judging the validity and perfection of the security interest as well as the need and effect of filing, and since Section 1-105 gives the parties to an Article 9 transaction the power to make choice of law selections so long as their selection is not "contrary" to Section 9-103, it is arguable that they can select the law to govern aspects of the transaction other than validity, perfection and the need and effect of filing so long as the state whose law they select has a "reasonable relation" to the transaction.

In assessing the impact of the proposed Section 9-103 upon the power of the parties to select governing law, the first noteworthy change is the Committee's deletion of the choice of law language found in the present version of Section 9-102, leaving that section to govern only scope issues (*i.e.*, the types of transactions governed by Article 9), and transplantation of this choice of law rule (for most tangible collateral) to Section 9-103, so that only the latter section contains the choice of law provisions of Article 9. Proposed Section 9-103 thus states choice of law rules for all types of collateral within the scope of Article 9. Our present concern is not with the particular states thereby chosen for any given type of collateral, but rather the effect of this proposal upon the power of the parties to select as applicable the law of some state other than the one prescribed by Section 9-103.

As concerns tangible collateral now subject to the choice of law provision of present Section 9-102, it will be recalled that under that section and the present version of Section 1-105 the parties to a secured transaction involving such collateral are not allowed to select the law of any state other than the one prescribed by present Section 9-102 as the law applicable to any aspect of their transaction which is covered by a provision of the Article 9 of the prescribed state.[45] The proposal appears to create a new choice of law freedom for parties to secured transactions involving tangible collateral. Unlike the present version of Section 9-102, which provides that the Article 9 provisions of the law of the state it prescribes shall apply, the final draft of Section 9-103 appears to make a more limited choice of law prescription by providing that the law of the state it prescribes as applicable shall govern the issues of "perfection and the effect of perfection or nonperfection of a security interest." When pro-

45. *See* text accompanying note 39 *supra*.

posed Section 9-103 is read in conjunction with Section 1-105 as amended by the Committee, it appears that the parties to a secured transaction involving tangible collateral are free to select, as the law applicable to any issues other than "perfection and the effect of perfection or nonperfection," the law of some state other than the one prescribed by the final draft for that type of collateral so long as the state selected bears a reasonable relation to the transaction. Whereas under the present versions of Sections 1-105 and 9-103, the parties to a secured transaction involving collateral covered by present Section 9-103 are arguably free to select the law applicable to any aspects of their transaction other than validity, perfection and the need and effect of filing, under the final draft of Section 9-103 they will be free to select governing law on all issues other than "perfection and the effect of perfection or nonperfection."

The Committee's comments concerning Section 9-103 accompanying *Preliminary Draft No. 2*[46] and the *Final Report*[47] leave it questionable whether the Committee appreciates the extent to which it seems to have broadened the powers of the parties to choose governing law. Considering what a major departure this is, at least where tangible collateral is concerned, the Committee's comments are quite limited. In one statement concerning changes in Section 1-105, the Committee states that

> the general principles of [Section 1-105] should be applicable to the choice of law problems within its scope [and] Section 9-103 continues to govern choice of law questions as to perfection of security interests and the effect of perfection and nonperfection thereof.[48]

In another comment the Committee states that the effect of limiting the Section 9-103 choice of law provision to issues of perfection of a security interest and the effect of perfection and nonperfection thereof "will be to have questions as to the creation and validity of security interests determined according to the conflict of laws rules in Section 1-105."[49] This must mean that the parties have the power to agree to select applicable law regarding issues other than those enumerated in proposed Section 9-103 so long as the state they select has a "reasonable relation" to the transaction.

46. PRELIMINARY DRAFT No. 2, *supra* note 2, at 35-41.
47. FINAL REPORT, *supra* note 3, at 26-33.
48. REVIEW COMMITTEE FOR ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE, PROPOSED FINAL REPORT Pt. II, 1 (1971, unpublished) [hereinafter cited as PROPOSED FINAL REPORT].
49. FINAL REPORT, *supra* note 3, at 230.

Thus the Committee's approach to the problem of the power of the parties to agree upon applicable law is to allow them to do so when the issues will not affect the rights of third parties.[50] Whether a security interest is perfected and the consequences of perfection or nonperfection become important only where a controversy exists between the secured party and some third party claiming an interest in the collateral.

There is no sound reason for prohibiting the parties to a secured transaction from selecting the law applicable to an aspect of their transaction that will not affect the rights of third parties. To the extent that the present versions of Sections 1-105, 9-102 and 9-103 do so unnecessary restraints are placed upon the parties. Similarly, there is no rational basis for the greater choice of law freedom under present Section 9-103 than under the present Section 9-102. All that is really necessary is that third parties contemplating the extension of credit to a debtor be able to independently determine which state's law will govern perfection and its consequences for any given type of collateral so that they may assess the risks of extending credit.[51] If parties entering into secured transactions take advantage of this increased freedom to select governing law, the key question under proposed Section 9-103 as to the extent of their power to do so will be which aspects of a secured transaction deal with "perfection and the effect of perfection or nonperfection of a security interest" and are therefore beyond the power of the parties to select the law to govern them.

One functional guideline that should be drawn here stems

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50. This analysis seems to be substantiated by the Review Committee's comment:

> Article 9 [as amended] does not govern problems of choice of law between the original parties, and . . . this question is governed by the general choice of law provision in Section 1-105.

FINAL REPORT, *supra* note 3, at 25. If it was the Committee's intention to allow the parties to select governing law only as to issues that do not affect the rights of third parties, the Committee probably erred by allowing the parties to select the law to govern the issue of the validity of the security interest. The power of the parties to select the law to govern validity of the security interest could harm third parties only if some state reasonably related to the transaction modifies its code provisions dealing with validity so as to provide less stringent requirements for a valid security interest.

51. UCC § 1-105, Comment 5, explicitly cites this need as the reason for restrictions upon the choice of law prerogatives of the parties to Article 9 secured transactions:

> [P]arties taking a security interest or asked to extend credit which may be subject to a security interest must have sure ways to find out whether and where to file and where to look for possible existing filings.

from the previous observation that the concept of perfection deals only with controversies between the secured party and third parties claiming an interest in the collateral. Thus, in controversies involving only the secured party and the debtor, neither of them should be heard to argue that the choice of law agreement they reached was barred by Section 9-103.[52] However, the rights of third parties should not be allowed to be limited by a choice of law agreement between the debtor and the secured party. This appears to be the aim of proposed Section 9-103 as it interacts with Section 1-105.

B. THE PLACE OF FILING AND THE LAW GOVERNING VALIDITY

One of the first and most important questions a secured party must ask in connection with a multi-state secured transaction is: In which state must he file a financing statement, if filing is required for perfection? One of the major reasons for the complete redrafting of Section 9-103 by the Committee was the failure of the present version of that section to give an explicit answer to that question.[53] Yet, despite this avowed purpose, the Committee has failed to provide an explicit answer in its proposed Section 9-103. A secured party in the multi-state secured transaction would have received no help from Professor Braucher's proposed draft of Section 9-103 as to where he must file because the general choice of law rule of the *Braucher Draft* provided in respect to most tangible collateral that, with exceptions,

> perfection and the effect of perfection or nonperfection of a security interest in collateral are governed by the law (including the conflict of laws rules) of the jurisdiction where the collateral is when a conflicting claim arises.[54]

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52. The Committee supports this view in its comment regarding the proposed changes in Sections 9-102 and 9-103. *See* note 50 *supra*. The issue as to whether the parties should have the power to select the law governing questions concerning the validity of the security interest is a tough one in that the Committee's criterion for determining if the parties should have choice of law selection power (*i.e.*, whether the issue affects the rights of third parties) seems to cut against such power in the case of validity issues, whereas the Committee's own proposals seem to grant such power to the parties. *See* text following note 44 *supra*.

53. The Committee states:

> [N]ow that the Code has been adopted in all states but Louisiana and also adopted in the District of Columbia and the Virgin Islands, the emphasis in the revision [of Section 9-103] has been to make clear where perfection of a security interest must take place rather than on problems of actual conflicts of rules of law.

FINAL REPORT, *supra* note 3, at 25.

54. *See* note 21 *supra*.

As the author pointed out to the Committee before the *Braucher Draft* was abandoned, surely this choice of law rule could not mean that the jurisdiction where the collateral is located when a conflicting claim arises is the jurisdiction in which to file because the secured party would have no way of knowing where the collateral will be if and when such a claim arises.

The final draft of Section 9-103(1)(b) provides a general conflict rule for documents, instruments and most types of goods:

> [P]erfection and the effect of perfection or nonperfection of a security interest in collateral are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected.

Like the *Braucher Draft*, the final draft of Section 9-103 fails to explicitly state a rule as to where filings shall be made, leaving it to assumption or inference that the law of the jurisdiction whose law is prescribed by Section 9-103 as governing "perfection and the effect of perfection or nonperfection" is also the proper jurisdiction in which to file financing statements. There should be no need for this assumption. The failure of the final draft of proposed Section 9-103 to state an explicit rule as to the proper jurisdiction for filing is unfortunate for at least three reasons: (1) if a secured party in a multi-state secured transaction files in the wrong jurisdiction it is likely that his security interest will be unperfected; (2) potential creditors must be able to determine the proper state in which filings are to be made so that they can check for existing filings against the proposed collateral of a potential debtor—if a potential creditor checks filings in the wrong state he is likely to end up with a security interest subordinate to previous ones perfected by filings in the appropriate state; and (3) the decisions as to where to file (or search for existing filings) are usually made by lay credit managers rather than by attorneys. These reasons demonstrate why Section 9-103 should state an explicit rule as to the proper jurisdiction for filing. Such a rule, for each type of collateral, could be stated as follows:

> For a security interest in [type of collateral], the appropriate jurisdiction in which to file, if filing is required for perfection is the jurisdiction where [whatever is appropriate for that type of collateral].

A secured party in a multi-state secured transaction unable to determine from the proposed final draft of Section 9-103(1)(b) where to file to perfect his security interest in one of the types of collateral covered by subsection (1), will receive some help from Comment 1 of proposed Section 9-103, which states that

> filing [is] required in the jurisdiction where the collateral is when the last event [on which is based the assertion that the security interest is perfected] occurs.[55]

For those types of security interests where filing is required for perfection there are five necessary elements or "events" for perfection: (1) an agreement is reached between the debtor and secured party that the security interest shall attach; (2) value is given by the secured party; (3) the debtor obtains rights in the collateral;[56] (4) a security agreement has been signed by the debtor or the secured party has taken possession of the collateral;[57] and (5) a financing statement is filed.[58] These five elements may occur in any order, and under the proposed final draft of Section 9-103, as interpreted by proposed Comment 1, the secured party must file in the state where the collateral is located at the time the last element is accomplished where the security interest is in a type of collateral covered by proposed Section 9-103(1). In the overwhelming majority of secured transactions filing will be the final event and the secured party will simply file in the state where the collateral is located at the time of filing.[59] The law governing validity of the security interest under the Committee's proposals will be selected under the normal choice of law provisions of Section 1-105 with the parties having the power to select as governing this issue the law of any state having a "reasonable relation" to the transaction.[60]

C. THE LAW PRESCRIBED AS GOVERNING PERFECTION AND ITS CONSEQUENCES UNDER THE *Braucher Draft* AND THE *Final Report*

Present Section 9-102 provides the general choice of law rule

55. The Committee, like the drafters of the existing provisions of the Code, has shown an unfortunate propensity to place important substantive provisions which are not explicitly stated in the Code sections themselves in the official comments to the various sections. This practice should be eliminated because none of the jurisdictions that have enacted the Code have also enacted the comments, and the statute books of such jurisdictions, which are often relied upon by busy attorneys not fully familiar with the Code, do not ordinarily include the comments. Certainly the official comments are necessary and often helpful, but they should not change the Code's substantive provisions or add additional substantive rules not contained in the Code.

56. *See* UCC § 9-204 concerning the first three elements.

57. *See* UCC § 9-203.

58. *See* UCC §§ 9-302(1), 9-303, 9-304, 9-305.

59. *See* text accompanying notes 61-73 *infra* for proper filing procedure for security interests in collateral of types other than those covered by proposed Section 9-103(1).

60. *See* note 50 *supra* and accompanying text.

(subject to the exceptions of present Section 9-103) that the law of the state where the collateral is located shall apply. Obviously, such a rule is unworkable for intangible types of collateral, and Section 9-103 consequently dictates an exception to the general rule for intangibles as well as for certain types of tangible collateral likely to be or actually moved interstate.[61]

The *Braucher Draft* of Section 9-103 retained this "state of location" choice of law rule in subsection (1) for documents, instruments and "ordinary goods," but it provided that the prescribed state is the one where the collateral is located "when a conflicting claim arises." The present version of Section 9-102, on the other hand, fails to provide a time of location for its general choice of law rule.

Proposed Section 9-103 (1) (b) provides:

> [P]erfection and the effect of perfection or non-perfection of a security interest in [documents, instruments and ordinary goods] are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected.

In view of the Committee's stated intention to prohibit the secured party and the debtor from making choice of law selections that may be detrimental to third parties with conflicting interests in the collateral,[62] this choice of law rule seems anomalous. It appears to allow the secured party to delay any of the five steps necessary for perfection when the collateral will be moving through several jurisdictions and to effect the final step of perfection in a jurisdiction which may have non-uniform priority rules favoring the secured party against the claims of various third parties to the collateral. Admittedly, this criticism may be overly technical in that it assumes the existence of non-uniform priority provisions in the code sections of adjoining jurisdictions and an effort on the part of secured parties to make contrived movements of collateral not ordinarily made in the course of typical secured transactions. However, for all practical purposes one who takes a security interest in ordinary

61. Article 9 presently has six classes of intangibles, three of which—documents, instruments and chattel paper—are embodied in pieces of paper and are sometimes referred to as "semi-intangibles". These semi-intangibles are subject to the state of location choice of law rule under UCC § 9-102 just as if they were fully tangible rather than pieces of paper representing relationships and obligations. *See* UCC § 9-103, Comment 2. The Committee proposes to eliminate the term "contract rights" and reduce the number of classes of intangibles to five.

62. *See* note 50 *supra* and accompanying text.

goods, documents or instruments not excepted from the general rule of proposed Section 9-103(1)(b) by either subsections (1)(c) or (1)(d) of that section must keep track of the collateral until the last of the five events necessary for perfection occurs, and then either make sure that perfection is effective under the law of the state where the collateral then is or suffer the consequences of non-perfection as prescribed by the law of that state.

The general choice of law rule of proposed Section 9-103(1) appears to apply to all types of collateral deemed tangible enough to be considered to have a location. There are, however, some exceptions to this general rule for some types of collateral even though they are "tangible" in that sense. One such exception is made in the case of goods covered by a certificate of title issued under a statute requiring indication of a security interest on the certificate as a condition of perfection.[63] This exception is carried over from the present version of Section 9-103(4), which provides that the perfection of a security interest in such collateral is governed by the law of the jurisdiction issuing the certificate. Proposed Section 9-103(2) also provides that the perfection and effect of a security interest in such collateral is governed by the law of the jurisdiction issuing the certificate until four months after the goods are removed from the jurisdiction and thereafter until the goods are registered in another jurisdiction, but not beyond the surrender of the certificate. And it further provides that after the goods are moved interstate and are either registered in another jurisdiction or the original certificate is surrendered (whichever first occurs) the goods become subject to the general choice of law rule of proposed Section 9-103(1) (*i.e.*, the law of the state of location at the time the last step of perfection was accomplished).

The major problems encountered under the present version of Section 9-103(4), dealing with collateral subject to certificates of title, involve the movement of such collateral between states requiring a certificate of title and states not requiring a certificate. Proposed Section 9-103 provides, in effect, that a security interest perfected by notation on a certificate of title will be recognized without limit of duration but perfection will expire if the certificate is surrendered. The Committee justifies this result by stating that the secured party ordinarily holds the certificate and surrender is unlikely to occur without his approval.[64] Where collateral subject to a certificate of title in one

63. FINAL REPORT, *supra* note 3, at § 9-103(2).
64. PROPOSED FINAL REPORT, *supra* note 48, at 18-19.

state is moved to another state without surrender of the original certificate and a certificate from the second state is also obtained, a danger of deception of third parties is created. Proposed Section 9-103(2)(b) provides that in this situation the original certificate ceases to remain operative and apparently perfection and its consequences will thereafter be determined under Section 9-103(1)(d), which grants the secured party a four-month grace period in which to perfect in the second state in order to maintain continuous perfection. However, proposed Section 9-103(2)(d) provides that if goods subject to a security interest are brought into a state, regardless of how that security interest was perfected in the previous state (*i.e.*, by notification of a certificate of title or by normal filing of a financing statement), and the state to which the goods were moved issues a certificate of title for the goods which does not show that the goods are subject to the security interest or may be subject to security interests not shown on the certificate, the security interest is subordinate to the rights of a buyer of the goods who is not in the business of selling goods of that kind to the extent that he gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest.

Another exception to the general choice of law rule for tangible collateral is made in the case of certain mobile goods which have no permanent location. This exception was originally stated in the present version of Section 9-103(2) and is carried over in substance in the proposed Section 9-103(3). That section has also retained the definition of "mobile goods," which includes those "normally used in more than one jurisdiction, such as motor vehicles, trailers, rolling stock . . . and the like . . . ." The distinctive trait of these "mobile goods" is that their *use* ordinarily involves interstate movement. They must be held as equipment or inventory for lease to others to come within this "mobile goods" exception. "Mobile goods" must be distinguished from other types of goods that are normally used at any given time in only one state but which happen to be moved interstate.[65]

65. The *Braucher Draft*, *supra* note 36, like the present version, makes the mobile goods exception to the general choice of law rule for tangibles expressly subordinated to the certificate of title exception so that if mobile goods are subject to a certificate of title statute, the choice of law rule for goods so subject will apply.

Another important point is the fact that mobile goods are defined as those "normally" used in more than one jurisdiction. It is unimportant whether a particular debtor actually uses his mobile goods in only one jurisdiction. If such goods are *normally* used in more than

The present version of Section 9-103(2) provides that the appropriate state in which to file for a security interest in mobile goods is the state where the debtor has his chief place of business and that the law of that state shall govern the validity and perfection of the security interest.[66] Proposed Section 9-103 abandons the phrase "chief place of business" in favor of the "jurisdiction in which the debtor is located." Section 9-103(3)(d) of the final draft defines this new term as follows:

> A debtor shall be deemed located at his place of business, if he has one, at his chief executive office if he has more than one place of business, otherwise at his residence.

The Committee does not explain the purpose of the change from "chief place of business" to "the jurisdiction in which the debtor is located." It does, however, state in the comments to the proposed version of Section 9-103 that, in the case of debtors with multi-state operations, the prescribed state will ordinarily be the one where its chief executive office is located and that

> "Chief executive office" does not mean the place of incorporation; it means the place from which in fact the debtor manages the main part of this [*sic*] business operations.[67]

Conspicuously absent from the present version of Section

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one jurisdiction, the mobile goods choice of law rule applies rather than the general choice of law rule for tangibles, and financing statements must be filed in the state prescribed by the former rule. *See* UCC § 9-103, Comment 4.

66. UCC § 9-103, Comment 3, provides:

> "[C]hief place of business" does not mean the place of incorporation; it means the place from which in fact the debtor manages the main part of his business operations. That is the place where persons dealing with the debtor would normally look for credit information, and is the appropriate place for filing. The term "chief place of business" is not defined in this Section or elsewhere in this Act. Doubt may arise as to which is the "chief place of business" of a multi-state enterprise with decentralized, autonomous regional offices. A secured party in such a case may easily protect himself at no great additional burden by filing in each of several places.

The same comment also provides that if the debtor's chief place of business is moved from one state to another after a security interest has been perfected in the state from which it has been moved, the secured party must refile in the state in which it has been relocated. But the comment fails to provide either a grace or maximum period for such refiling. Nor does it establish the consequences of a failure to refile in such circumstances.

67. FINAL REPORT, *supra* note 3, at 30. The Committee goes on to explain that

> The term "chief executive office" is not defined in this Section or elsewhere in this Act. Doubt may arise as to which is the "chief executive office" of a multi-state enterprise, but it would be rare that there could be more than two possibilities. A secured party in such a case may easily protect himself at no great additional burden by filing in each possible place.

Id.

9-103(2) is a rule concerning the consequences of the debtor moving its chief place of business from the state in which a filing was made to another state. The present version of Section 9-103 leaves it to a comment to provide that refiling is required in the event of the movement of the debtor's chief place of business where a filing was made on the basis of its location.[68] It also fails to dictate timing requirements for such refilings as well as the consequences of failing to refile under these circumstances.[69] Proposed Section 9-103(3)(e) fills this void by providing:

> A security interest perfected under the law of the jurisdiction of the location of the debtor is perfected until the expiration of four months after a change of the debtor's location to another jurisdiction, or until perfection would have ceased by the law of the first jurisdiction, whichever period first expires. Unless perfected in the new jurisdiction before the end of that period, it becomes unperfected thereafter and is deemed to have been unperfected as against a person who became a purchaser after the change.

The *Final Draft* also creates a new exception to the general choice of law rule for tangible collateral in the case of transactions creating purchase money security interests in goods where the parties understand when the security interest attaches that the collateral will be kept in another jurisdiction. Where such an understanding is present, proposed Section 9-103(1)(c) provides that the law of the jurisdiction to which the collateral will be taken governs perfection and its consequences from the time it attaches until 30 days after the debtor receives possession of the goods and thereafter if the goods are taken to the other jurisdiction before the end of the 30-day period. Thus where *X* sells *Y* goods on credit, taking a purchase money security interest therein, and the goods are located in Nevada at the time of the sale but it is understood at the time the security interest attaches that *X* will ship them to *Y*'s Utah plant, *X* can file in Utah to perfect his security interest before the goods are even sent there. As long as the goods reach Utah within 30 days after the debtor receives possession of them the effectiveness of *X*'s filing in that state continues without interruption. The Committee states in its comments that if the collateral is not taken to the second jurisdiction by the thirtieth day of the debtor's possession the exception in Section 9-103(1)(c) ceases to be applicable and thereafter "the law of the jurisdiction where the collateral is

68. UCC § 9-103, Comment 3.

69. UCC § 9-103(3) deals only with refiling upon the removal of collateral (rather than offices) from one jurisdiction to another and expressly excepts mobile goods from its coverage.

controls perfection."[70] This rather awkward exception to the general rule is aimed at allowing the seller in a purchase money security interest transaction to omit filing in the state where the goods were located at the time the security interest attached where it was understood at the time of attachment that the goods would be located in another jurisdiction.

Proposed Section 9-103 adopts, in substance, the rule of the present Section 9-103 requiring the secured party to refile where tangible collateral is moved into one state from another while a security interest is perfected under the law of the jurisdiction from which the collateral was removed. The secured party is given a four month grace period in which to refile in the second state and failure to do so creates a lapse of perfection as against a person who became a purchaser after removal.

In the case of intangible collateral which cannot be said to have a location, the present version of Section 9-103 provides that the law governing the validity and perfection of a security interest in accounts or contract rights and the possibility and effect of filing is that of the jurisdiction in which the office where the assignor-debtor keeps his records concerning such accounts or contract rights is located. In the case of general intangibles, the jurisdiction in which the debtor has his chief place of business is the jurisdiction whose law will govern the issues of validity, perfection and the possibility and effect of filing.

The Committee has abolished the term "contract rights" and incorporated that concept into the definition of "accounts"[71] and has substituted as the governing law that of the state where the assignor-debtor is located.[72] The change from the jurisdiction where the assignor-debtor's office which keeps records concerning

70. FINAL REPORT, *supra* note 3, at 58. Secured parties contemplating purchase money secured transactions would do well to follow the Committee's advice that

> A failure of the collateral to reach the intended destination jurisdiction before the expiration of the 30-day period because of a conflicting claim or otherwise may cause disappointment of expectations that the law of the destination jurisdiction will govern continuously, and caution may dictate filing both in that jurisdiction and in the jurisdiction where the security interest attaches.

FINAL REPORT, *supra* note 3, at § 9-103, Comment 3.

71. *See* FINAL REPORT, *supra* note 3, at § 9-106. Through an apparent oversight the Committee failed to delete the term "contract rights" from Section 1-201(37).

72. The phrase "the jurisdiction in which the debtor is located" is discussed in connection with the choice of law rule for mobile goods in note 67 *supra* and accompanying text.

the accounts to the jurisdiction where the debtor is located (usually its "chief executive office") was prompted by the fact that most parties seeking to search for existing account filings are not likely to know which of the assignor-debtor's offices keep records with respect to its accounts and by the fact that, where the assignor-debtor does so at several locations, the filings for all its various accounts subject to security interests would not be located in the same jurisdiction.

The Committee has changed the governing jurisdiction in the case of general intangibles from the jurisdiction where the debtor's chief place of business is located to the jurisdiction where the debtor is located.[73] Security interests in chattel papers are subject to present Section 9-102, which provides that the law of the jurisdiction where the chattel paper is located shall govern all issues within the scope of the Article 9 provision of that state. The proposed version of Section 9-103(4) provides that the perfection and consequences of perfection of a possessory security interest in chattel paper shall be governed by the rule stated for goods in Section 9-103(1) (*i.e.*, the law of the state where the collateral was located when the last event necessary for perfection was performed), and that the choice of law rules provided in Section 9-103(3) for accounts shall apply to non-possessory security interests in chattel paper (*i.e.*, the law of the jurisdiction in which the debtor is located governs perfection and its consequences).

D. Summary

Proposed Section 9-103 appears to have significantly increased the power of the parties to an Article 9 secured transaction to select the law to govern most aspects of their transaction. The total redrafting of the section was aimed at making the choice of law rules less complicated and more clear. It does not seem that this goal has been accomplished. In fact, if the Committee's purpose in redrafting Section 9-103 was, as it professed, to create "certainty as to where to file in order to perfect security interests,"[74] the revised version must be deemed a

73. Under proposed Section 9-103(3)(e), if the debtor moves his location from one jurisdiction to another, a secured party who filed in the original jurisdiction to perfect a security interest in either mobile goods, accounts or general intangibles must refile in the second jurisdiction within four months after such movement or before his perfection in the first jurisdiction would have lapsed, whichever period first expires.

74. Final Report, *supra* note 3, at 230. *See also* note 47 *supra*.

failure. The primary shortcoming of the proposed version of Section 9-103 is that it fails to state explicitly in which jurisdiction financing statements should be filed where they are required for perfection in a multi-state transaction. One is left to infer that the jurisdiction whose law is prescribed to govern issues of perfection and its consequences is also the jurisdiction in which to file. Also, the general filing rule of Section 9-103(1), applicable to documents, instruments and most types of goods, is overly complex and certain to cause confusion.

The conflicts provision of the final draft of Section 9-103, concerning the proper jurisdiction in which to file in multi-state secured transactions, should be changed to state a rule for every type of collateral. For example, it might state:

> The proper place to file, if filing is required for perfection, is the jurisdiction where [whatever is appropriate for the type of collateral]. Perfection and the effect of perfection or non-perfection of a security interest in [the given type of collateral] shall be governed by the law (including the conflict of laws rules) of the jurisdiction where [whatever is appropriate for the type of collateral].

Such a prototype would give secured parties and potential creditors a clear and explicit rule as to the proper state in which to file (or check for existing filings) for each type of collateral controlled by Article 9. Because of the confusing fashion in which the final draft states the general conflicts rule, its exceptions, which generally aim at requiring the secured party to file in some jurisdiction other than the one in which the collateral was located at the time the final step needed for perfection was accomplished, are also unclear.

V. QUESTIONS OF SCOPE

One aspect of Article 9 that has been substantially free of serious problems is its scope (*i.e.*, the types of transactions to which it applies). The Committee has recommended only three changes regarding the scope of Article 9.

Two of the recommended changes, those dealing with receipts issued by grain dealers and those dealing with railway equipment trusts, will not be discussed. The third suggested change concerns security interests in beneficial interests in trusts and estates. The Committee comments that such beneficial interests

> are typically not commercial collateral, and a requirement of filing with respect thereto seems inappropriate and might act as an entrapment of secured parties who would fail to analyze the

> collateral as a general intangible. It would be possible to exclude this kind of collateral from Article 9 by a provision in Section 9-104, but the Committee recommends leaving this collateral subject to the general rules of security law provided by Article 9 but with an exclusion from filing by a provision in Section 9-302(1).[75]

This comment seems upon initial consideration to make good sense. However, its embodiment in proposed Section 9-302(1)(c) creates some unnecessary confusion by providing that "a security interest created by an assignment of a beneficial interest in a trust or a decedent's estate" is perfected without the filing of a financing statement. The confusion stems from the fact that not all assignments create security interests. Insofar as is here relevant, the term "security interest" is defined in present Section 1-201(37) to mean

> an interest in personal property or fixtures which secures payment or performance of an obligation. . . . The term also includes any interest of a buyer of accounts, chattel paper or contract rights which is subject to Article 9.

Where *X* is a beneficiary under a trust which pays him $100 per month and is in need of a large sum of cash, he may assign his right to receive the trust distributions to Y as consideration for Y's agreement to pay him a certain amount in cash. In such an assignment no security interest is created. Y's interest in the trust distributions would not secure payment or performance of an obligation nor would Y be a buyer of accounts, chattel paper or contract rights. While a beneficiary may grant a security interest in his beneficial interest in a trust or estate to secure payment or performance of an obligation, not all *assignments* of such interests will create security interests. Thus it would seem that the reach of the Code in regard to such transactions could be more clearly stated if proposed Section 9-302(1)(c) were to read "*a security interest* in a beneficial interest in a trust or a decedent's estate."[76]

While the author does not dispute the Committee's decision to

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75. FINAL REPORT, *supra* note 3, at 242.

76. It is worthy of note that UCC § 9-102(1)(b) extends the scope of Article 9 beyond UCC § 9-201(37)'s definition of "security interests" by providing, with exceptions not here relevant, that "this Article applies . . . to any *sale* of accounts, contract rights or chattel paper." [emphasis added]. UCC § 9-102, Comment 2, explains this extension of the scope of Article 9 as follows:

> Commercial financing on the basis of accounts, contract rights and chattel papers is often so conducted that the distinction between a security transfer and a sale is blurred, and a sale of such property is therefore covered by subsection (1)(b) whether intended for security or not, unless excluded by Section 9-103 or Section 9-104.

keep such security interests within the scope of Article 9, the wisdom of allowing perfection without filing is questionable. The present version of Section 9-302 requires the filing of a financing statement to perfect a security interest in a general intangible. Under present Section 9-301(1)(d) a bona fide purchaser of a general intangible prevails over an unperfected security interest therein (*i.e.*, one for which a financing statement has not been filed). The Committee's proposal to allow perfection of this type of general intangible without the filing of a financing statement will destroy the priority of a bona fide purchaser because the security interest will be automatically perfected without filing once it attaches under Section 9-204. When there is no tangible document representing the general intangible subject to a security interest (in this case, a beneficial interest in a trust or estate), allowing perfection without filing creates a trap for potential assignees of such interests because a search of the record will reveal nothing and an assignor is therefore not effectively restricted from making two assignments of the same beneficial interest. The second assignee, while having no way of determining if the assigned interest is encumbered, takes subject to any prior security interests. The Committee feels that the filing requirement in this case "might operate to defeat many assignments" which are "not ordinarily thought of [by secured parties] as subject to this Article."[77] However, by removing the filing requirement the Committee has created an entrapment for bona fide purchasers. The author cannot agree with the Committee's apparent decision that a bona fide purchaser, rather than the secured party, should bear the burden of the secured party's failure to realize that the transaction is within the scope of Article 9.

VI. CONCLUSION

If the four topics discussed herein are fairly representative of the Committee's work, perhaps the *Final Report* should be returned to the drawing board for further consideration by the Committee. In this age of controversial legislative issues the author hopes that state legislators will overcome the understandable temptation to perfunctorily enact the proposed amendments to a rather technical uniform act and will submit the Committee's proposed amendments to close scrutiny.

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77. FINAL REPORT, *supra* note 3, at 84.