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Robert S. Summers
Cornell Law School, rss25@cornell.edu

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SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE

ROBERT S. SUMMERS*

INTRODUCTION

THIS article will be largely expository rather than critical; the aim will be to explain, in terms that should be useful to the practitioner, the provisions of article 9 of the UNIFORM COMMERCIAL CODE[1] on secured transactions.[2] Unlike the other major articles in the code,

* Assistant Professor of Law, University of Oregon.

The author is especially indebted to Clifford Zollinger, Esq., of Portland, Oregon, who read earlier drafts of this article and made helpful suggestions.

[1] On June 2, 1961, Oregon enacted (with one major change) the 1958 version of the UNIFORM COMMERCIAL CODE. The official text of the code as adopted in Oregon is at present to be found in ch. 726, Or. Laws 1961, vol. 2, the whole of which is devoted to the code. Since the code does not become effective in Oregon until September 1, 1963, it will not be compiled in the OREGON REVISED STATUTES until the 1963 replacement parts are published. All references in this article to the code as adopted in Oregon are therefore to Or. Laws 1961.

The code has now been adopted in eighteen states: Alaska, Arkansas, Connecticut, Georgia, Illinois, Kentucky, Massachusetts, Michigan, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, and Wyoming. For a discussion of the New York enactment, see Penney, *New York Revisits the Code: Some Variations in the New York Enactment of the Uniform Commercial Code*, 62 COLUM. L. REV. 992 (1962).

[2] Numerous articles have been written on article 9. Among the most valuable are: Coogan, *The Lazy Lawyer's Guide to Secured Transactions Under the Code*, 60 MICH. L. REV. 685 (1962); Coogan, *Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien,"* 72 HARV. L. REV. 838 (1959); Coogan, *Security Interests in Fixtures Under the Uniform Commercial Code*, 75 HARV. L. REV. 1319 (1962); Note, *Selected Priority Problems in Secured Financing Under the Uniform Commercial Code*, 68 YALE L.J. 751 (1959); Kripke, *Modernization of Concepts Under Article 9 of the Uniform Commercial Code*, 15 BUS. LAW. 645 (1960); Birnbaum, *Article 9—A Restatement and Revision of Chattel Security*, 1952 WIS. L. REV. 348. An exhaustive comparison of article 9 with the law of a particular state is to be found in Note, *California Chattel Security and Article 9 of the Uniform Commercial Code*, 8 U.C.L.A.L. REV. 812 (1961). For a thorough treatment of article 9 as it affects long-term financing, see Coogan and Bok, *The Impact of Article 9 of the Uniform Commercial Code on the Corporate Indenture*, 69 YALE L.J. 203 (1959). See also SPIVACK, SECURED TRANSACTIONS (UNDER THE COMMERCIAL CODE) (1962), published by the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association.

Practitioners certainly should acquire the booklet by Spivack, *supra*, and UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE (1962), published by the Edward Thompson Co., Brooklyn, N.Y. All subscribers to the OREGON REVISED STATUTES have received OREGON'S UNIFORM COMMERCIAL CODE published in 1962

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which are largely restatements of prior uniform acts,[3] article 9 is a genuine synthesis of much that is old and much that is new. The unitary security device is probably the most novel feature of article 9. Heretofore in Oregon, several bodies of statutory and case law have occupied the field of personal-property security: the law of chattel mortgages, the law of conditional sales, the law governing accounts-receivable financing, the Uniform Trust Receipts Act, and the law of pledge. For these various bodies of law governing the use of diverse security devices, article 9 substitutes one body of law and one security device. Terms such as "mortgagee," "pledgee," "conditional sale," and "trust receipt" do not appear in article 9. Instead, the code's unitary security device[4] is built around only four basic terms: "secured party," "debtor," "collateral," and "security interest."[5]

In general, under article 9, the parties to a secured transaction are free to define their rights and liabilities as they choose. The major exceptions to this are to be found in the provisions governing default procedures.[6]

Article 9 was constructed primarily from precode concepts familiar to today's lawyer. Frequently these concepts are expressed in article 9

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by the Legislative Counsel Committee of the Oregon State Legislature. ANDERSON, UNIFORM COMMERCIAL CODE, a two-volume work on the code, has recently been published by the Lawyers Cooperative Publishing Co.

For a discussion of case law under article 9, see Del Duca, *Commercial Code Litigation: 2: Commercial Paper; Bank Deposits and Collections; Bulk Transfers; Documents of Title; Secured Transactions*, 66 DICK. L. REV. 39, 56 (1961).

[3] Article 2 on sales is based on the Uniform Sales Act, adopted in Oregon in 1919. Article 3 on commercial paper is based on the Uniform Negotiable Instruments Law, adopted in Oregon in 1899.

[4] The transition to the uniform security device is reminiscent of those reforms in the law of procedure effected by the widespread substitution of the unitary form of action for the old common-law forms of action. Some of the reasons for these parallel developments are also similar. One of the aims of the draftsmen of article 9 was to eliminate the occasion for litigating the boundary between the chattel mortgage and the conditional sale. See, generally, Kripke, *Modernization of Concepts Under Article 9 of the Uniform Commercial Code*, 15 BUS. LAW. 645 (1960). Compare Dudley v. Dickie, 281 F.2d 360 (9th Cir. 1960).

[5] In general, "secured party" means "a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts, contract rights or chattel paper have been sold." Or. Laws 1961, ch. 726, sec. 79.1050(1) (i).

In general, "debtor" means "the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts, contract rights, or chattel paper." Sec. 79.1050(1) (d).

"Collateral" means "the property subject to a security interest, and includes accounts, contract rights and chattel paper which have been sold." Sec. 79.1050(1) (c).

In general, "security interest" means "an interest in personal property or fixtures which secures payment or performance of an obligation." Sec. 71.2010(37).

[6] See sec. 79.5010(3). See also secs. 79.2060(1), .3180, .3110, .5050(1). See, generally, Coogan, *Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien,"* 72 HARV. L. REV. 838, 846 (1959).

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in new terminology. Thus, the pledge becomes a "security interest in collateral in possession of the secured party."[7] The conditional sale becomes a "purchase money security interest" in "goods."[8] Transfers of conditional-sales contracts become transfers of "chattel paper."[9] The chattel mortgage becomes a "security interest" in "goods."[10] Trust receipts used to finance purchases of inventory become "purchase money security interests" in "inventory."[11]

In addition to terminological innovations, article 9 makes important changes in Oregon law of a more substantive character. Thus, under the code, *central* filing is generally required to perfect a security interest.[12] Moreover, the code's filing requirement generally extends to the perfection of security interests in accounts receivable and security interests created by what has heretofore been known as a conditional-sale contract.[13] The elaborate system of priority rules embodied in article 9 has no counterpart in prior Oregon law.[14] Article 9 sets forth a detailed set of rules governing pledge transactions.[15] These and other changes will be discussed herein.

In spite of its novelty, the lawyer should find article 9 easy to use. The article is divided into five parts, headed: (1) "Short Title, Applicability and Definitions," (2) "Validity of Security Agreement and Rights of Parties Thereto," (3) "Rights of Third Parties; Perfected and Unperfected Security Interests; Rules of Priority," (4) "Filing," and (5) "Default." Section numbers in article 9 correspond to the foregoing parts: the first digit following "9" (the article reference number) refers to the part. Thus, "section 9-501" refers to a section within the part entitled "Default." This numbering system will be adopted in the OREGON REVISED STATUTES except that a "7" will appear before "9" (the article reference number) and an "0" will appear after what would otherwise

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[7] Sec. 79.3020(1)(a).

[8] Secs. 79.1070, .1090.

[9] Secs. 79.1050(1)(b), .3080.

[10] Secs. 71.2010(37), .1090.

[11] Secs. 79.1070, .1090(4).

[12] Secs. 79.3020, .4010.

[13] Under existing Oregon law, filing of a security interest under a conditional-sale contract is not required, Pelton Water Wheel Co. v. Oregon Iron Co., 87 Or. 248, 170 Pac. 317 (1918), unless the goods sold are "thereafter so attached to real estate as to become a fixture thereto," OR. REV. STAT. sec. 76.010 (1961). Nor is filing required to perfect a security interest in accounts receivable under present Oregon law. OR. REV. STAT. secs. 80.010, .020 (1961). See, generally, Coblens, *Assignment of Accounts Receivable as Security—The Situation in Oregon*, 29 OR. L. REV. 214 (1950); Craig, *Accounts Receivable Financing: Transition from Variety to Uniform Commercial Code*, 42 B.U.L. REV. 187 (1962).

[14] For an extended discussion of these rules, see especially Coogan, *Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien,"* 72 HARV. L. REV. 838 (1959) and Note, *Selected Priority Problems in Secured Financing Under the Uniform Commercial Code*, 68 YALE L.J. 751 (1959).

[15] Sec. 79.2070. These rules codify much of the common law of pledge.

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be the last digit in the code's numbering system. Thus, "sec. 9-501" will appear as "OR. REV. STAT. sec. 79.5010."[16] Such ease of cross reference is fortunate for the practitioner, for he will often want to consult the extensive comments on code sections prepared by the draftsmen of the code, which will not be reproduced in the OREGON REVISED STATUTES.[17] The practitioner will find the comments on section 79.1020 especially valuable. While most sections of article 9 apply to a security interest without regard to the nature of the collateral, some sections state special rules governing particular types of collateral. The comments on section 79.1020 include a comprehensive index of such sections. The comments on many sections in article 9 also include important cross references to other sections in the article.

BASIC FEATURES OF ARTICLE 9

Scope; Definitions of Collateral. In general, article 9 applies to all security interests in personal property and fixtures and to sales of accounts, contract rights, and chattel paper whether or not intended for security.[18] Except as provided in section 79.3100, article 9 does not apply to statutory liens, and, except as provided in section 79.3130 dealing with fixtures, article 9 does not apply to security interests in realty; however, if, for example, a note secured by real estate is pledged to secure a loan to the holder of the note, article 9 does apply.[19] Article 9 does not apply to the transfer of claims to compensation, rights represented by a judgment, tort claims, rights in a policy of insurance, rights of setoff, or rights in a deposit, savings, passbook, or like account.[20] Certain transactions in accounts, contract rights, and chattel paper are also excluded from the operation of article 9.[21] Finally, article 9 does not apply to an equipment trust covering railway rolling stock or to transactions governed by Federal statute "to the extent that such statute governs the

[16] See OREGON'S UNIFORM COMMERCIAL CODE, published in 1962 by the Legislative Counsel Committee of the Oregon State Legislature.

[17] The comments may be found in UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE (1962) and in OREGON'S UNIFORM COMMERCIAL CODE, *supra* note 16. See, generally, Braucher, *Legislative History of the Uniform Commercial Code,* 58 COLUM. L. REV. 798 (1958); Braucher, *The 1956 Revision of the Uniform Commercial Code,* 2 VILL. L. REV. 3 (1956). See also Note, *Pennsylvania—1959 Session—Amendments to Article 9 of the Uniform Commercial Code,* 5 VILL. L. REV. 465 (1960).

[18] Sec. 79.1020. Under the code, a bill of sale absolute on its face may be shown to be for security. See UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE sec. 9-203, comment 4 (1962). Compare Stotts v. Johnson, 192 Or. 403, 234 P.2d 1059 (1951).

[19] Sec. 79.1020(3); UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE sec. 9-102, comment 4 (1962). A recent case under the code involving a landlord's lien is In the Matter of Einhorn Brothers, Inc., 171 F. Supp. 655 (E.D. Pa. 1959).

[20] Secs. 79.1040(4), (7), (8), (9), (11).

[21] Sec. 79.1040(6).

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rights of parties to and third parties affected by transactions in particular types of property."[22]

Section 79.1130 states that a security interest arising solely under article 2 on sales is generally subject to article 9, but that, so long as the debtor does not lawfully acquire possession of the goods, (1) no security agreement is necessary to make the security interest enforceable, (2) no filing is required to perfect the security interest, and (3) the rights of the secured party on default are governed by article 2 on sales.[23]

To what extent will article 9 apply when the secured transaction has contacts with states other than Oregon? Fortunately, the answer to this question can be found in the code itself; article 9 includes its own set of conflict-of-laws rules that are set forth in section 79.1030.[24]

Section 79.2010 states that article 9 does not repeal statutes regulating rates of interest and does not repeal Oregon's Motor Vehicle Retail Instalment Sale Act.[25] Moreover, section 79.2030(2) states that the provisions of such regulatory legislation control to the extent of any conflict between them and article 9.

Article 9 embodies an elaborate scheme of definitions of different types of collateral. Accounts, contract rights, general intangibles, documents, instruments, chattel paper, goods, and proceeds are all carefully defined. What is the significance of these definitions? While, in general, one set of rules governs the creation, perfection, and enforcement of security interests under article 9, there are some exceptions to this, and these exceptions are frequently based on differences in the character of the collateral. Thus, while filing and possession are generally optional methods of perfecting a security interest, when the collateral consists of negotiable instruments, the secured party must take possession of them to perfect a security interest therein.[26] Also, to determine where to file to perfect a security interest, the secured party must consult the definitions. Thus, central filing is not required if the collateral consists of consumer goods;[27] and, when the collateral is a fixture, the secured party must file in the office where a mortgage on the realty concerned

[22] Secs. 79.1040(5), (1).

[23] See, generally, Hogan, *The Marriage of Sales to Chattel Security in the Uniform Commercial Code: Massachusetts Variety*, 38 B.U.L. REV. 571 (1958); Hawkland, *The Relative Rights of Lien Creditors and Defrauded Sellers—Amending the Uniform Commercial Code to Conform to the Kravitz Case*, 67 COM. L.J. 86 (1962).

[24] See Industrial Packaging Products v. Fort Pitt Packaging Int'l, 399 Pa. 643, 161 A.2d 19 (1960); Atlas Credit Corp. v. Dolbow, 193 Pa. Super. 649, 146 A.2d 704 (1960); Casterline v. General Motors Acceptance Corp., 195 Pa. Super. 344, 171 A.2d 813 (1961).

[25] See OR. REV. STAT. chs. 82, 83, 725 (1961). *Cf.* First Nat'l Bank v. Horwatt, 192 Pa. Super. 581, 162 A.2d 60 (1960).

[26] Sec. 79.4010(1)(a).

[27] Sec. 79.4010(1)(a).

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would be filed or recorded.[28] The definitions of collateral are important in various other connections; e.g., in determining priorities[29] and in determining applicable conflict-of-law rules.[30]

The definitions of the various forms of collateral set forth in article 9 are as follows:

"Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper.[31]

"Contract right" means any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper.[32]

"General intangibles" means any personal property (including things in action) other than goods, accounts, contract rights, chattel paper, documents and instruments.[33]

"Document" means document of title as defined in section 71.2010.[34]

"Instrument" means a negotiable instrument as defined in section 73.1040, or a security as defined in section 78.1020 or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment.[35]

"Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper.[36]

"Goods" includes all things which are movable at the time the security interest attaches or which are fixtures, but does not include money, documents, instruments, accounts, chattel paper, general intangibles, contract rights and other things in action. "Goods" also include the unborn young of animals and growing crops.[37]

"Proceeds" includes whatever is received when collateral or proceeds is sold, exchanged, collected or otherwise disposed of. The term also includes the account arising when the right to payment is earned under a contract right. Money, checks and the like are "cash proceeds." All other proceeds are "noncash proceeds."[38]

The foregoing terms have their defined meanings throughout article 9 "unless the context otherwise requires."[39] Observe that "general intan-

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[28] Sec. 79.4010(1)(b).

[29] Secs. 79.3010, .3120.

[30] Sec. 79.1030.

[31] Sec. 79.1060(1).

[32] Sec. 79.1060(2). See United States for Use of Greer v. G. P. Fleetwood & Co., 165 F. Supp. 723 (W.D. Pa. 1958). See Note, *Contract Rights as Commercial Security: Present and Future Intangibles*, 67 YALE L.J. 847 (1958).

[33] Sec. 79.1060(3).

[34] Sec. 79.1050(e).

[35] Sec. 79.1050(g).

[36] Sec. 79.1050(b).

[37] Sec. 79.1050(f).

[38] Sec. 79.3060(1). "Proceeds" of collateral should be distinguished from "products" of collateral. The latter term is not defined in the code. In some situations, the wise lender will acquire a security interest in products of the collateral as well as in the collateral itself. See, for example, sec. 79.3150. "Farm products" is defined in the code. See sec. 79.1090(3).

[39] Secs. 79.1050, .1060.

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gibles" is a catchall term: it refers to miscellaneous contract rights and other intangible personalty such as goodwill, copyrights, and patents.[40] Accounts are distinguished from contract rights in that an account is earned while a contract right is not earned. Neither an account nor a contract right is evidenced by an instrument or chattel paper. Unlike "document" and "instrument," "chattel paper" is basically a new term. Chattel paper can have a dual significance: it can evidence a security interest in some other type of collateral, e.g., goods, and at the same time itself constitute collateral when transferred or assigned to a third party. Under the code, the transfer of a note and conditional-sale contract by a car dealer to a finance company ordinarily becomes a transfer of "chattel paper."

In article 9, "goods" is subdivided into four classes:

> "Consumer goods" if they are used or bought for use primarily for personal, family or household purposes.[41]
>
> "Equipment" if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a nonprofit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods.[42]
>
> "Farm products" if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool clip, maple syrup, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing, or other farming operations. If goods are farm products they are neither equipment nor inventory.[43]
>
> "Inventory" if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has so furnished them, or if they are raw materials, work in process or materials used or consumed in a business. Inventory of a person is not to be classified as his equipment.[44]

Observe that these classifications are based on the purposes for which the goods are used. This means that the same collateral might, at different times, be classified differently. Thus, a car would be inventory to a dealer holding it for sale, equipment to a farmer using it on the farm, and a consumer good to one using it for personal or family purposes. Suppose the dealer also sometimes uses the car to run errands; would it be equipment or inventory? The official comments state that the primary use controls;[45] thus, the car would be inventory.

"Proceeds" is derivative collateral. Such collateral comes into being only upon disposal of "collateral or proceeds."[46] For example, accounts

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[40] Sec. 79.1060(3) and UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE sec. 9-106, comment (1962).

[41] Sec. 79.1090(1).

[42] Sec. 79.1090(2).

[43] Sec. 79.1090(3).

[44] Sec. 79.1090(4).

[45] Sec. 79.1090 and UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE sec. 9-109, comment 2 (1962).

[46] Sec. 79.3060(1).

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and chattel paper received upon the sale of inventory constitute "proceeds." If such accounts or chattel paper are resold, what is received also constitutes "proceeds." Thus, under article 9, it is possible for a secured party to have a right to the "proceeds of proceeds." Observe also that accounts and chattel paper may in a particular case be original collateral rather than "proceeds." The secured party may create a security interest in accounts or chattel paper as such rather than as "proceeds" of the disposition of other collateral.

Creating a Security Interest. A secured party creates a security interest when (1) he consummates an agreement providing therefor, (2) he gives "value" to the debtor (section 71.2010[44] defines value), and (3) the debtor acquires rights in the collateral. Not until these three events concur, does the security interest come into being.[47] Under the code, when these three events concur, the security interest is said to "attach."[48] Generally, "attachment" of the security interest is synonymous with "creation" of the security interest.[49]

To illustrate the creation of a security interest under article 9, assume that *D*, a farmer, must borrow funds to finance the costs of planting and harvesting his crops. On March 1, three weeks before the crops are planted, *D* and *S*, a lender, sign an agreement providing that *S* will have a security interest in *D's* crops. On the same date, *S* advances $3,000 to *D*. Does *S* have a security interest in *D's* crops? No. *S's* security interest cannot come into being until *D* acquires rights in the collateral, i.e., the crops, and this cannot occur under the code until *D* plants the crops.[50] Section 79.2040(2) states that the debtor has *no* rights in crops until they are planted, in the young of livestock until they are conceived, in fish until caught, in oil, gas, or minerals until extracted, in timber until cut, in a contract right until the contract has been made, or in an account until it comes into existence.

Under article 9, the debtor can effectively agree in advance that his lender's loan will be secured by property that the debtor will later acquire, except when the property to be acquired consists of certain crops and consumer goods[51] and, if the Legislature does not repeal section 79.2040(4)(c), except when such property is inventory.[52] Under such

[47] Sec. 79.2040(1). See also sec. 79.2010.

[48] Sec. 79.2040(1) and UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE sec. 9-204, comment 1 (1962). See also comment 1 on sec. 9-303.

[49] See SPIVACK, SECURED TRANSACTIONS (UNDER THE UNIFORM COMMERCIAL CODE) 33 (1962), cited note 2 *supra*.

[50] Sec. 79.2040(2)(a). Compare United States Nat'l Bank v. Wright, 131 Or. 518, 283 Pac. 1 (1929).

[51] Secs. 79.2040(4)(a), (b).

[52] Sec. 79.2040(4)(c). See Summers, *Should Oregon Adopt the Uniform Commercial Code Concept of the "Floating Lien"?*, 41 OR. L. REV. 182 (1962). See, generally, Gordon, *The Security Interest in Inventory Under Article 9 of the Uniform Commercial Code and the Preference Problem*, 62 COLUM. L. REV. 49 (1962).

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an agreement, the security interest in after-acquired property comes into being when the debtor acquires it.[53] Such a security agreement, when the collateral consists of accounts or inventory, is said to create a "floating lien"; the lien "floats over" existing and after-acquired property of the debtor.[54]

Section 79.2050, contrary to the infamous case of *Benedict v. Ratner*,[55] allows the debtor to retain almost complete control over the collateral subject to the floating lien. The gist of the floating lien is that collateral to be acquired in the future may be used to secure present advances. The code also allows the converse: the use of presently owned property to secure advances to be made in the future.[56]

Must the security agreement be in writing and, if so, what must the writing contain? To create a security interest, the parties must, unless the collateral is in the possession of the secured party, reduce their security agreement to writing.[57] The agreement must include a description of the collateral, and "any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described."[58] When the security interest covers crops, or oil, gas, or minerals to be extracted, or timber to be cut, the security agreement must include a "description of the land concerned."[59]

There is no requirement that the agreement be acknowledged; formalities of execution are reduced to a minimum. The debtor must only sign the agreement.[60] However, if the secured party wants the security agreement also to serve as the document to be filed for the purpose of perfecting his security interest, the agreement must generally be signed by both parties,[61] include an address of the secured party from which information concerning the security interest may be obtained, include a mailing address of the debtor, and include a description of the realty concerned if the security interest covers goods that are or will become fixtures.[62]

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[53] Sec. 79.2040(1). See also Coogan, *Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien,"* 72 HARV. L. REV. 838, 867-68 (1959).

[54] See Coogan, *supra* note 53, at 838, 839. The validity of floating liens in bankruptcy is beyond the scope of this paper. See Gordon, *supra* note 52.

[55] 268 U.S. 353 (1925). See Harris v. Schnitzer, 146 Or. 391, 27 P.2d 1010 (1934).

[56] Sec. 79.2040(5). Compare Rutherford v. Eyre & Co., 174 Or. 162, 148 P.2d 530 (1944).

[57] Sec. 79.2030.

[58] Sec. 79.1100. Compare Immel v. Albany Iron Works, 127 Or. 118, 271 Pac. 53 (1928); Cook v. Van Buskirk, 127 Or. 206, 271 Pac. 728 (1928).

[59] Sec. 79.2030(1)(b).

[60] Sec. 79.2030(1)(b). Where the debtor and the owner of collateral are different, both should sign. Sec. 79.1050(1)(d).

[61] Sec. 79.4020(1). Sec. 79.4020(2) sets forth exceptions to this.

[62] Sec. 79.4020(1).

Must anything in addition be done if the secured party wishes to create a security interest not only in certain collateral but also in the proceeds of any disposition of such collateral by the debtor? Under section 79.3060(2), the secured party, by establishing a security interest in the original collateral, automatically gets a security interest only in *identifiable* proceeds. Thus, it would appear that, to establish a pro rata security interest in nonidentifiable proceeds, the secured party must provide therefor in the security agreement.[63] Section 79.2030(1)(b) states that, in describing proceeds, the word "proceeds" is sufficient without further description.

Perfecting a Security Interest. Section 79.3030(1) describes "perfection" as follows:

> A security interest is perfected when it has attached and when all the applicable steps required for perfection have been taken. Such steps are specified in sections 79.3020, 79.3040, 79.3050 and 79.3060. If such steps are taken before the security interest attaches, it is perfected at the time when it attaches.

In general, creation (i.e., "attachment") of the security interest gives the secured party rights in the collateral against the debtor, while perfection of the security interest gives the secured party rights in the collateral against third parties.[64] Unlike the rules governing creation of the security interest, which are uniform for all types of collateral, the rules governing perfection of security interests tend to vary with the nature of the collateral. Insofar as it is possible to generalize, it can be said that, to perfect a security interest in most types of collateral, the secured party must either take possession of the collateral or file a financing statement covering the collateral.[65]

Section 79.3020 provides that, under the code, filing is required to perfect *all* security interests except (1) security interests perfected by possession, (2) security interests temporarily perfected under sections 79.3040 and 79.3060, (3) assignments of accounts or contract rights that are not a significant part of the outstanding accounts or contract rights of the debtor, and (4) security interests of a collecting bank under section 74.2080, or that arise under article 2 on sales, or that are perfected pursuant to Federal or state statute requiring central filing of security interests. In addition, neither filing nor possession is required to perfect purchase-money security interests in consumer goods and farm equipment having a purchase price not in excess of $2,500, unless such goods or equipment are fixtures or motor vehicles, in which event filing is required.[66]

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[63] Sec. 79.3060(2).

[64] There are some exceptions to this. The holder of an unperfected security interest has some rights against some third parties. *Cf.* text at note 160 *infra.*

[65] Sec. 79.3020.

[66] Secs. 79.3020(2)(c), (d), (3).

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The Oregon version of article 9 provides that no security interest in any motor vehicle is perfected against any person until the secured party or his successor or assignee has filed a financing statement with the Department of Motor Vehicles.[67]

In those instances in which neither filing nor possession is required to perfect a security interest, creation, i.e., "attachment," of the security interest is generally equivalent to perfection. Thus, it may be said that, under article 9, there are three methods of perfection: filing, possession, and "attachment."[68] Filing and possession are generally optional methods, but there are important exceptions to this. When the collateral consists of accounts, contract rights, or general intangibles, there is ordinarily nothing to possess; accordingly, filing is required to perfect a security interest in such collateral.[69] Although it is possible to perfect a security interest in chattel paper or nonnegotiable instruments by filing,[70] the secured party should instead either take possession of such collateral or mark it appropriately, for under section 79.3080 a purchaser of such collateral who gives new value therefor and takes possession of the collateral in the ordinary course of his business, without knowledge that the collateral is subject to a security interest, has priority over a party with a security interest therein perfected by filing. Similarly, although it is possible to perfect a security interest in negotiable documents of title or securities by filing,[71] the secured party should instead take possession of such collateral or mark it appropriately, for under section 79.3090 a person to whom a negotiable document of title has been duly negotiated or a bona fide purchaser of a security has priority over a party with a security interest therein perfected by filing.

Possession is not an optional method of perfecting a security interest in instruments. Section 79.3040(1) provides that a secured party must take possession of instruments to perfect a security interest therein. However, under section 79.3040(1) possession is not required (though desirable) with respect to instruments that constitute a part of chattel paper,[72] and under sections 79.3040(4) and (5) a security interest in instruments can be temporarily perfected without possession for a period of twenty-one days.

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[67] Secs. 79.3020(3) and 402, and OR. REV. STAT. secs. 481.110 and .410 (1961). See Lincoln Bank & Trust Co. v. Queenan, 344 S.W.2d 383 (Ky. 1961), 60 MICH. L. REV. 242 (1961). See, generally, Note, *Security Interests in Motor Vehicles Under the U.C.C.: A New Chassis for Certificate of Title Legislation*, 70 YALE L.J. 995 (1961). Article 9 will probably be amended by the Legislature to empower the Department of Motor Vehicles to prescribe standard forms for general use. See note 74 *infra*.

[68] See SPIVACK, SECURED TRANSACTIONS (UNDER THE UNIFORM COMMERCIAL CODE) 77-78 (1962), cited note 2 *supra*.

[69] Secs. 79.3020, .3050.

[70] Sec. 79.3020.

[71] Sec. 79.3020.

[72] Possession is desirable because otherwise a transferee may acquire a superior interest in the collateral. Sec. 79.3080.

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If the secured party has determined to perfect by filing, when can he effectively file? Under article 9 he is allowed to file before or after the security agreement is consummated. Moreover, a single filing with respect to a general type of collateral covers all subsequent agreements relating to such collateral, whether or not the debtor owns the collateral at the time of the filing.[73]

What must be filed and where? A "financing statement" must be filed. Section 79.4020 prescribes the contents thereof and also sets forth a model form. This financing statement must generally be signed by both parties, must give a mailing address of the debtor and an address of the secured party from which information concerning the security interest may be obtained, and must indicate the types of collateral involved.[74] When the financing statement covers crops growing or to be grown or goods that are or will be fixtures, the statement must also include a description of the real estate concerned. Section 79.4020(1) states that "a copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by both parties."

Generally, the financing statement must be filed *centrally* in the office of the secretary of state *and*, if the debtor has a place of business in only one county, also in the office of the county clerk of such county.[75] However, where the collateral is consumer goods, farm equipment, farm products, accounts, contract rights, or general intangibles arising from or relating to the sale of farm products by a farmer, central filing is not required; but the secured party must file in the office of the county clerk in the county of the debtor's residence or, if the debtor is not a resident, in the office of the county clerk of the county where the goods are kept.[76] In addition, when the collateral consists of farm products that are crops, the secured party must also file in the office of the county

[73] Secs. 79.3030(1), .4020(1) and UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE sec. 9-402, comment 2 (1962). For the duration of an effective filing, see sec. 79.4030(2). See Industrial Packaging Products v. Fort Pitt Packaging Int'l, 399 Pa. 643, 161 A.2d 19 (1960).

[74] Thus, the financing statement only gives *notice* of the *type* of collateral. See, generally, Coogan, *Public Notice Under the Uniform Commercial Code and Other Recent Chattel Security Laws, Including "Notice Filing,"* 47 IOWA L. REV. 289 (1962); Carter, *The Trust Receipt and the Problem of Recordation or Notice Filing*, 1951 WASH. U.L.Q. 30. It is likely that article 9 will be amended at the coming legislative session to empower the secretary of state to prescribe for general use such standard forms of financing statements, continuation statements, statements of assignment, statements of release, and termination statements as conform to the provisions of article 9. Another amendment may be passed specifically to allow the Department of Motor Vehicles to prescribe not only the form but also the content of the financing-statement form to be used to perfect a security interest in motor vehicles.

[75] Sec. 79.4010(1)(c). See In the Matter of Luckenbill, 156 F. Supp. 129 (E.D. Pa. 1957).

[76] Sec. 79.4010(1)(a). Under present Oregon law, central filing is generally not required. See OR. REV. STAT. sec. 86.350 (1961).

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clerk in the county where the land on which the crops are growing or will be grown is located.[77] When the collateral consists of goods that, at the time the security interest attaches, are or will become fixtures, the secured party is required to file only in the office where a mortgage on the real estate concerned would be filed or recorded.[78]

Presentation for filing of a financing statement and tender of a filing fee ($1.00) or acceptance of the statement by the filing officer constitutes filing.[79] Thus, failure of the filing officer to fulfill his duties is not a risk that the secured party bears. A financing statement that substantially complies with the requirements of section 79.4020 is effective even though it contains minor errors that are not seriously misleading.[80] A filing made in good faith in an improper place or not in all required places is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of article 9 and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such statement.[81]

Obviously, perfection by filing a financing statement will be the most common method of perfection under the code. Perfection through possession is both costly and cumbersome with respect to many types of collateral. Indeed, one writer has remarked that, "if possession were the only . . . [method of perfection], substantially all financing of manufacturers would cease and all installment buying by consumers would come to an end."[82] However, under the code, lenders will undoubtedly choose to continue to perfect security interests in some types of collateral, e.g., tangible valuables, by taking possession of such collateral. Also, under section 79.3040(1) a security interest in instruments (other than instruments that constitute part of chattel paper) can be perfected "only by the secured party's taking possession" thereof.

The code does not define "possession"; accordingly, pertinent decided cases will continue to serve as a guide after the code becomes effective.[83] When a third party is in possession of goods, perfection of a security interest therein by taking possession of the goods occurs when the third party receives notice of the secured party's interest in the goods.[84] However, if the third party has issued a negotiable document therefor, a security interest in the goods can be perfected only by perfecting a

[77] Sec. 79.4010(1)(c).

[78] Sec. 79.4010(1)(b).

[79] Sec. 79.4030(1).

[80] Sec. 79.4020(5).

[81] Sec. 79.4010(2).

[82] SPIVACK, SECURED TRANSACTIONS (UNDER THE UNIFORM COMMERCIAL CODE) 78-79 (1962), cited note 2 *supra*.

[83] See Citizens' Inv. Co. v. Starr Piano Co., 128 Or. 1, 273 Pac. 387 (1928); Schumann v. Bank of Calif., 114 Or. 336, 233 Pac. 860 (1925); E. B. Dean and Co. v. Lowham, 7 Or. 422 (1879). See also the last sentence of sec. 79.2050.

[84] Sec. 79.3040(3).

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security interest in the document; i.e., by taking possession of the document or by filing.[85]

The foregoing rules govern the perfection of a security interest in original collateral. Are there any special rules with respect to the perfection of a security interest in proceeds? Yes. A secured party has a perfected security interest in proceeds: (1) when such an interest is claimed in the filed financing statement covering the original collateral, (2) for ten days after the debtor's receipt of the proceeds whether or not the interest was claimed in the financing statement, and (3) upon filing within the aforesaid ten-day period if an interest in the proceeds was not claimed in the original financing statement.[86]

Duration of Effective Filing; Assignment. A filed financing statement is generally effective for five years; however, if the statement names a maturity date of five years or less, the filing is effective until such maturity date and for sixty days thereafter.[87] To prevent lapse, with the result that the security interest becomes unperfected, the secured party may file a "continuation statement" within six months before and sixty days after a stated maturity date of five years or less.[88] If the statement does not name a maturity date, the secured party may file his continuation statement within six months prior to the expiration of the five-year period.[89] The continuation statement must be signed by the secured party, must identify the original financing statement by file number, and must state that the original statement is still effective.[90] The fee for filing a continuation statement is $1.00,[91] and there is no limitation on the number of successive continuation statements that the secured party may file.[92]

The debtor can terminate a filing by filing a "termination statement" signed by the secured party in which the latter states that he no longer claims a security interest under the financing statement.[93] When the debtor has paid his debt and the secured party is not committed to make further loans, the debtor becomes entitled to demand that the secured party sign a termination statement.[94] If the secured party fails to do this within ten days after proper demand, he becomes liable to the debtor for $100 and, in addition, for any loss incurred by the debtor because of such failure.[95] Short of terminating a filed financing statement, a debtor

[85] Sec. 79.3040(2). Compare Adamson v. Frazier, 40 Or. 273, 67 Pac. 300 (1901).
[86] Sec. 79.3060(3).
[87] Sec. 79.4030(2).
[88] Sec. 79.4030(3).
[89] Sec. 79.4030(3).
[90] Sec. 79.4030(3).
[91] Sec. 79.4030(5).
[92] Sec. 79.4030(3).
[93] Sec. 79.4040(1).
[94] Sec. 79.4040(1).
[95] Sec. 79.4040(1).

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may be able to obtain and file a statement reciting that the secured party has released his interest in all or a part of any collateral described in a filed financing statement.[96] Such a release must be signed by the secured party, include the names and addresses of the secured party and the debtor, describe the collateral being released, and recite the file number of the financing statement.[97] The fee for filing a termination statement or a release is $1.00.[98]

A secured party can assign of record "all or part of his rights" under a financing statement by signing and filing a statement of assignment describing the collateral assigned and setting forth the names of the secured party of record and the debtor, the file number and the date of filing of the financing statement, and the name and address of the assignee.[99] A copy of the assignment agreement may be filed if it complies with the foregoing requirements, and a secured party can also assign his rights under a filed financing statement simply by appropriate notation thereon.[100] The fee for filing an assignment is $1.00.[101]

Rights and Duties of Secured Party and Debtor; Foreclosure. Under article 9, the rights and duties of a secured party in possession of the collateral are very similar to the rights and duties of a common-law pledgee. Thus, the secured party must use reasonable care to preserve the collateral,[102] and, when the collateral consists of an instrument or chattel paper, such care includes "taking necessary steps to preserve rights against prior parties unless otherwise agreed."[103] Also, unless otherwise agreed, (1) the secured party may repledge the collateral, (2) the debtor must pay reasonable costs of preserving the collateral, including insurance, taxes, and other charges, and (3) the debtor must bear the risk of accidental loss or damage to the extent of any deficiency in any effective insurance coverage.[104] In general, freedom of contract prevails between the two parties to a secured transaction, but there are some significant exceptions to this, especially with regard to default procedures.[105]

Sections 79.2080(1) and (2) state in substance that, whether or not the secured party is in possession of the collateral, he must, upon re-

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[96] Sec. 79.4060.
[97] Sec. 79.4060.
[98] Sec. 79.4040(3).
[99] Sec. 79.4050(2).
[100] Sec. 79.4050(2).
[101] Sec. 79.4050(1).
[102] Sec. 79.2070. Compare Lamm v. Green, 106 Or. 311, 211 Pac. 791 (1922).
[103] Sec. 79.2070.
[104] Secs. 79.2070(2)(a), (b).
[105] Sec. 79.5010(3). See also secs. 79.2060(1), .3180, .3110, .5050(1). See, generally, Coogan, *Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien,"* 72 HARV. L. REV. 838, 846 (1959). Compare Manley Auto Co. v. Jackson, 115 Or. 396, 237 Pac. 982 (1925).

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quest, provide information to the debtor with respect to the amount of debt currently owed and the amount and nature of the collateral securing such debt.[106] To the debtor and his prospective lenders, this is a very important right, for the financing statement is not required to disclose the amount of the debt or the specific amount and nature of collateral.[107] Thus, the only way a prospective lender can effectively require a secured party to disclose such information is by calling upon the debtor to exercise his rights under section 79.2080. If the secured party fails without reasonable excuse to supply the required information, he is liable for any loss caused to the debtor.[108] If the debtor has in good faith sent a statement to the secured party indicating what he believes to be the outstanding indebtedness or collateral securing such indebtedness, and the secured party does not respond within two weeks after receipt by approving or correcting such statement, the secured party can thereafter claim only a security interest as shown in the statement as against persons misled by his failure to respond.[109]

In general, the rules relating to default rights and procedures are the same for all types of collateral. Unless otherwise agreed, the secured party, upon default, may immediately take possession of the collateral.[110] He may also take possession of any proceeds to which he is entitled under section 79.3060, and may require an account debtor or obligor to make payment to him directly.[111] In taking possession, a secured party may proceed "without" judicial process if this can be done without breach of the peace.[112] If the security agreement so provides, the secured party may require the debtor to assemble the collateral and make it available to the secured party at a reasonably convenient place.[113]

Section 79.5010(1) provides that the secured party "may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure." If the secured party chooses to reduce his claim to judgment, the date of the lien of any levy dates back to the date of the perfection of the security interest in the collateral.[114] The secured party may buy at a judicial sale pursuant to execution on the judgment.[115]

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[106] Sec. 79.2080(2) does not require the secured party to correct an itemized list of collateral if he claims a security interest in all collateral of that type owned by the debtor.

[107] Sec. 79.4020.

[108] Sec. 79.2080(2).

[109] Sec. 79.2080(2).

[110] Sec. 79.5030.

[111] Sec. 79.5020(1).

[112] Sec. 79.5030. Compare Lamb v. Woodry, 154 Or. 30, 58 P.2d 1257 (1936).

[113] Sec. 79.5030.

[114] Sec. 79.5010(5). See Matter of Adrian Research and Chemical Co., 269 F.2d 734 (3d Cir. 1959), 1959 DUKE L.J. 640, 107 U. PA. L. REV. 1230 (1959).

[115] Sec. 79.5010(5).

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Section 79.5040 allows the secured party to foreclose simply by selling the collateral. However, he must give the debtor reasonable notice of the time and place of any public sale and reasonable notice of the time after which any private sale may be made.[116] The secured party must also, except in the case of consumer goods, give such notice to any person who has a filed security interest in the collateral or who is known by the secured party to have a security interest in the collateral.[117] However, the secured party may proceed without notifying anyone of a prospective sale if the collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market.[118] The secured party may buy at a public sale, and may also buy at a private sale if the collateral has a recognized market.[119] Generally, the secured party must account to the debtor for any surplus realized from the foreclosure sale, and the debtor remains liable for any deficiency; but, if the debtor has sold accounts, contract rights, or chattel paper to the secured party, the debtor is not, in the absence of a contrary agreement, entitled to any surplus realized on this portion of the collateral, and the secured party is not entitled to any deficiency.[120]

In addition to the alternatives of foreclosure by judgment and execution and foreclosure by sale pursuant to section 79.5040, the secured party may in some cases foreclose by retaining the collateral in satisfaction of the debt.[121] To foreclose in this manner, the secured party must send written notice of his intention to the debtor and (except in the case of consumer goods) to others who have security interests in the collateral and who have either filed with respect thereto or are known to the debtor.[122] If none of the parties so notified duly objects, and if no other secured party duly objects, the secured party may retain the collateral; otherwise, he must dispose of it pursuant to section 79.5040.[123]

In two situations, the secured party must always dispose of the collateral under section 79.5040 within ninety days after taking possession thereof unless, after default, the debtor agrees otherwise.[124] The first of these situations is where the debtor has paid 60 per cent of the cash price of consumer goods in which the lender has a purchase-money security interest.[125] The second situation is where the debtor has paid 60 per cent

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[116] Sec. 79.5040(3).

[117] Sec. 79.5040(3).

[118] Sec. 79.5040(3).

[119] Sec. 79.5040(3).

[120] Sec. 79.5040(2). Compare Ashley & Romelin v. Lance, 88 Or. 109, 171 Pac. 561 (1918); Jackson v. Clackamas Meat Co., 168 Or. 558, 124 P.2d 719 (1942).

[121] Sec. 79.5050(2). Compare Endicott v. Digerness, 103 Or. 555, 205 Pac. 975 (1922).

[122] Sec. 79.5050(2). Compare Davis v. Wood, 200 Or. 602, 268 P.2d 371 (1954).

[123] Sec. 79.5050(2).

[124] Sec. 79.5050(1).

[125] Sec. 79.5050(1).

of a loan secured by a non-purchase-money security interest in consumer goods.[126] In both of these situations, if the secured party fails to dispose of the collateral as required, he becomes liable in conversion.[127]

After the secured party has disposed of the collateral, entered into a contract for its disposition, or taken the collateral in satisfaction of the debt, the debtor cannot redeem the collateral.[128] The purchaser of collateral at a foreclosure sale acquires all of the debtor's rights in the collateral, and also "takes free of" (1) the secured party's security interest therein and (2) any security interest or lien subordinate thereto, whether or not the secured party has complied with applicable foreclosure procedure.[129]

If the debtor discovers that the secured party is not following applicable foreclosure procedure, he may have the proceedings enjoined on appropriate terms and conditions.[130] If the secured party has already disposed of the collateral without complying with the provisions of article 9, the debtor, secured parties entitled to notice of foreclosure, and other secured parties known to the secured party may recover against him for any losses caused by such noncompliance.[131]

Rights of a Holder of a Perfected Security Interest Against Third Parties. What are the rights of a party with a perfected security interest against a party who has purchased the collateral from the debtor? Against statutory lienors? Against lien creditors? Against secured creditors who also have a security interest in the collateral? The rules that answer these questions are the most complex in article 9. The bankruptcy ramifications of these rules will not be considered in this paper.[132]

In general, one who purchases collateral from the debtor takes subject to any *perfected* security interest therein.[133] To this rule, there are six major exceptions. First, a purchaser cuts off the interest of a secured party who has authorized the debtor to sell the collateral.[134] Second, a buyer in the ordinary course of business (other than a buyer of farm products from a farmer) "takes free of" a perfected security inter-

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[126] Sec. 79.5050(1).

[127] Sec. 79.5050(1).

[128] Sec. 79.5060.

[129] Sec. 79.5040(4). Compare Gordan v. United Finance Corp., 168 Or. 149, 121 P.2d 938 (1942).

[130] Sec. 79.5070(1).

[131] Sec. 79.5070(1). See Atlas Credit Corp. v. Dolbow, 193 Pa. Super. 649, 164 A.2d 704 (1960).

[132] For the effect of article 9 in bankruptcy cases, see Kennedy, *The Trustee in Bankruptcy Under the Uniform Commercial Code: Some Problems Suggested by Articles 2 and 9,* 14 RUTGERS L. REV. 518, 527-49 (1960).

[133] Secs. 79.3060(2), .3010(1), .3120(1).

[134] Sec. 79.3060(2).

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est even though the buyer knows of such interest.[135] Third, one who, for his own use, buys consumer goods or farm equipment (where the original purchase price does not exceed $2,500) "takes free of" a perfected security interest in such collateral if he buys without knowledge thereof, unless, prior to the purchase, the secured party has filed a financing statement covering such goods.[136] Fourth, a purchaser of chattel paper or a nonnegotiable instrument who gives new value therefor and takes possession thereof in the ordinary course of business without knowledge that the specific paper or instrument is subject to a security interest "has priority over" one holding a security interest previously perfected by filing.[137] Fifth, a purchaser of chattel paper who gives new value and takes possession of it in the ordinary course of his business "has priority over" the holder of a security interest in chattel paper that is claimed merely as proceeds of inventory, even though he knows that the chattel paper is subject to the security interest.[138] Sixth, section 79.3090 provides that a holder in due course of a negotiable instrument or a holder to whom a negotiable document of title has been duly negotiated, and a bona fide purchaser of a security (as provided in section 78.3010) "take priority over an earlier security interest even though perfected."

The position of a party with a perfected security interest is inferior to the position of certain statutory lienors. Section 79.3100 provides:

> When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.[139]

A party having a perfected security interest prevails over attaching and execution creditors and over creditors having unperfected security interests.[140]

Who prevails as between two creditors having perfected security interests in the same collateral? In general, the answers to this question are provided by the so-called "first to file" and "first to perfect" rules and by one major exception to the first-to-file rule. The first-to-file rule provides that priority shall be determined

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[135] Sec. 79.3070(1). See Weisel v. McBride, 191 Pa. Super. 411, 156 A.2d 613 (1959); Sterling Acceptance Co. v. Grimes, 194 Pa. Super. 503, 168 A.2d 600 (1961). Compare Ayre v. Hixson, 53 Or. 19, 98 Pac. 515 (1909).

[136] Sec. 79.3070(2).

[137] Sec. 79.3080.

[138] Sec. 79.3080.

[139] See OR. REV. STAT. ch. 87 (1961). *Compare* Yellow Mfg. Acceptance Corp. v. Bristol, 193 Or. 24, 236 P.2d 939 (1951), *with* sec. 79.3100. The tax lien is another type of lien that arises by operation of law. Consideration of the priority of tax liens is beyond the scope of this article. On the Federal tax lien, see Plumb, *Federal Tax Collection and Lien Problems*, 13 TAX L. REV. 247 and 459 (1958).

[140] Sec. 79.3010.

> in the order of filing if both are perfected by filing, regardless of which security interest attached first under subsection (1) of section 79.2040 and whether it attached before or after filing.[141]

Although the first-to-file rule is generally quite straightforward, in one situation it produces a seemingly odd result. Assume that on March 1, *D* tells *S* that he wants to borrow funds to finance his retail appliance business and offers *S* a security interest in his inventory of refrigerators, electric ranges, and automatic washers and dryers. On March 2, before *D* and *S* have signed a security agreement, *S* files a financing statement covering the aforesaid inventory. On March 5, *D*, who has also been negotiating a loan with *P*, signs a security agreement giving *P* a security interest in his inventory of refrigerators, electric ranges, and automatic washers and dryers. On the same day, *P* files a financing statement covering this collateral. On March 10, *S* and *D* complete their negotiations, and *D,* without disclosing his transaction with *P,* signs a security agreement giving *S* the security interest originally contemplated. As between *P* and *S*, *S* has a superior security interest even though his interest did not come into being and therefore was not perfected before March 10 when *S* and *D* reached agreement.[142] *P* could have protected himself against this consequence of the first-to-file rule, however. If he had checked the records, he would have found *S's* financing statement on file. He could then have tried to obtain from *S* a termination statement, or a specific subordination statement, or a release of particular inventory.[143] Also, *P* could have insisted that *D* acquire specific assets with the funds advanced so that *P* would have a "purchase money security interest," an interest that generally takes priority over prior perfected security interests.[144]

The second basic rule for determining priorities between conflicting security interests in the same collateral is sometimes called the "first to perfect" rule,[145] and applies if one or both of the conflicting perfected security interests have not in fact been perfected by filing. The rule provides that priority shall be determined

> in the order of perfection unless both are perfected by filing, regardless of which security interest attached first under subsection (1) of section 79.2040 and, in the case of a filed security interest, whether it attached before or after filing.[146]

Thus, according to this rule, if, in the foregoing hypothetical situations, *P,* instead of filing on March 5, took possession of the inventory on that date, he would have priority.

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[141] Sec. 79.3120(5)(a).

[142] Sec. 79.3120(5)(a). See also sec. 79.3030(1).

[143] See Coogan, *Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien,"* 72 HARV. L. REV. 838, 859-60 (1959).

[144] Sec. 79.3120(3).

[145] See Coogan, *Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien,"* 72 HARV. L. REV. 838, 866 (1959).

[146] Sec. 79.3120(5)(b).

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The purchase-money-security-interest exception to the first-to-file rule, is, in view of its wide application, very important. Section 79.1070 and sections 79.3120(3) and (4) define the phrase "purchase money security interest" and establish the priority of such an interest.

Section 79.1070 provides:

A security interest is a "purchase money security interest" to the extent that it is:

(1) Taken or retained by the seller of the collateral to secure all or part of its price; or

(2) Taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

Observe that, under the foregoing definition, a nonseller may acquire a purchase-money security interest if the debtor uses the loan to purchase collateral.

Sections 79.3120(3) and (4) provide:

(3) A purchase money security interest in inventory collateral has priority over a conflicting security interest in the same collateral if:

(a) The purchase money security interest is perfected at the time the debtor receives possession of the collateral; and

(b) Any secured party whose security interest is known to the holder of the purchase money security interest or who, prior to the date of the filing made by the holder of the purchase money security interest, had filed a financing statement covering the same items or type of inventory, has received notification of the purchase money security interest before the debtor receives possession of the collateral covered by the purchase money security interest; and

(c) Such notification states that the person giving the notice has or expects to acquire a purchase money security interest in inventory of the debtor, describing such inventory by item or type.

(4) A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within 10 days thereafter.

Section 79.3120(3) is especially significant to a party supplying inventory to a debtor who has already subjected his general inventory to a perfected security interest under an agreement that includes an after-acquired-property clause.[147] The perfected security interest of the prior creditor is inferior to the purchase-money security interest of the inventory supplier if the latter has complied with section 79.3120(3).[148]

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[147] It will be recalled that the Oregon Legislature amended the code to provide that no security interest can attach under an after-acquired-property clause to inventory. See Summers, *Should Oregon Adopt the Uniform Commercial Code Concept of the "Floating Lien"?*, 41 OR. L. REV. 182 (1962). If this amendment is not repealed, it will be impossible for a debtor to subject his general inventory to a perfected security interest extending to after-acquired property.

[148] See Summers, *supra* note 147, at 186-87.

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However, the purchase-money priority does not extend to accounts or chattel paper realized from the sale of the inventory;[149] the inventory supplier must rely on his right to unsold inventory that he supplied and and on his right to demand the "proceeds of the proceeds"; that is, cash or other proceeds the debtor realizes when he sells or borrows against the accounts or chattel paper.[150]

Section 79.3120(4) is especially significant to retail sellers of equipment and automobiles.[151] Observe that under this section the seller has a ten-day grace period for filing and that he is not required to notify prior parties.

In the vast majority of cases, the first-to-file rule and the first-to-perfect rule may be applied to determine priorities between conflicting security interests in the same collateral. In article 9, there are, however, several priority rules that should not be thought of as exceptions to the first-to-file and first-to-perfect rules, but that should instead be viewed simply as special priority rules for certain special situations. These rules determine priorities between conflicting interests in certain proceeds, in fixtures, in accessions, and in commingled and processed goods.[152]

Section 79.3060(1) defines "proceeds" as "whatever is received when collateral or proceeds is sold, exchanged, collected or otherwise disposed of." In some circumstances, two or more parties may acquire a security interest in the same proceeds. To illustrate, assume that *S* has a perfected security interest in *D's* inventory and the proceeds thereof. When *D* sells the inventory, *S's* interest therein is divested, but he acquires a security interest in the proceeds. Assume that the proceeds consist of chattel paper; that is, *D* has sold the inventory on an installment-sale contract. If *S* does not take possession of the chattel paper, and *D* resells it to *P*, who will be entitled to the proceeds—*S* or *P*? The second sentence of section 79.3080 states that *P* has priority even though he knows that the chattel paper is subject to a security interest. Assume that *D's* inventory consists of electrical appliances and that *S* has a perfected security interest in the appliances and in the proceeds thereof. *D* sells the appliances to *X* on account and assigns the accounts to *P*. Subsequently *D* repossesses (or accepts as "returns") the appliances sold to *X*. Who will be entitled to them, *P* or *S*? Although section 79.3060(5) gives both *P* and *S* a security interest in the appliances, that section also states that *P's* interest is subordinate to *S's* interest. Section 79.3060(4) sets forth detailed rules governing priorities in proceeds in the event of insolvency.

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[149] Sec. 79.3120(3).

[150] Sec. 79.3060. See Coogan, *Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien,"* 72 HARV. L. REV. 838, 863 (1959).

[151] See Coogan, *supra* note 150, at 861. See also sec. 79.3010(2).

[152] See sec. 79.3120.

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Article 9 does not define "fixtures"; this is left to precode law.[153] If the secured party perfects his interest in the goods before they become fixtures, his interest has priority over the interests of all persons who have acquired, or subsequently acquire, an interest in the real estate.[154] But the security interest of a party who perfects his interest after the goods became fixtures, is subordinate to the interest of a party who previously acquired his interest in the real estate unless the latter consents in writing to the security interest of the former or disclaims an interest in the goods as fixtures.[155]

Goods that are "installed in or affixed to other goods" are called "accessions" in section 79.3140. Conflicts between a person claiming the whole and a person claiming a part as an "accession" are resolved in section 79.3140 according to rules very similar to the rules determining priorities in fixtures. If the secured party perfects his interest in the goods before they become an accession, his interest has priority over the interests of all persons who have acquired, or subsequently acquire, an interest in the whole.[156] But the security interest of a party who perfects his interest after the goods become an accession, is subordinate to the interest of a party who previously acquired an interest in the whole unless the latter consents in writing to the security interest of the former or disclaims an interest in the goods as part of the whole.[157] A secured party having a superior interest in fixtures or in accessions is entitled to remove the collateral from the realty or from the whole, but he must reimburse any encumbrancer or owner who is not the debtor for the cost of repairing "physical injury" caused by such removal.[158]

Under section 79.3150, a party who has a perfected security interest in goods does not lose that interest when the identity of the goods is lost in a "product or mass." Moreover, when "more than one security interest attaches to the product or mass, they rank equally according to the ratio that the cost of the goods to which each interest originally attached bears to the cost of the total product or mass."[159]

Rights of a Holder of an Unperfected Security Interest Against Third Parties. The creation of a security interest gives the secured party rights against the debtor. But, when the secured party does not take further steps to perfect his security interest, his rights against third parties are very limited. Generally, his unperfected security interest is subordinate to the rights of purchasers, statutory lienors, and other

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[153] See, generally, Coogan, *Security Interests in Fixtures Under the Uniform Commercial Code,* 75 HARV. L. REV. 1319 (1962).

[154] Sec. 79.3130.

[155] Sec. 79.3130.

[156] Sec. 79.3140.

[157] Sec. 79.3140.

[158] Secs. 79.3130(5), .3140(4).

[159] Sec. 79.3150(2).

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creditors. Section 79.3010(1)(b) embodies an important exception to this: a person who becomes a "lien creditor" with knowledge of an unperfected security interest takes subject to that interest.[160]

As between conflicting unperfected security interests in the same collateral, the first created has priority.[161]

CONCLUSION

Article 9 does not become effective until September 1, 1963.[162] Moreover, the bill enacting the code provides:

> Transactions validly entered into before ... (September 1, 1963) and the rights, duties and interests flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this Act as though such repeal or amendment had not occurred.[163]

Wise practitioners will, however, become familiar with the provisions of article 9 well in advance of the effective date. They will also be especially careful (1) to revise the forms they are currently using and (2) to determine in what circumstances they must file a financing statement to perfect a security interest. Finally, it appears likely that several amendments to article 9 will be proposed during the coming session of the Legislature. Most of these amendments will probably be relatively insignificant, but there is one that, if passed, will be of immediate importance to the practitioner, for it will allow parties to file financing statements in advance of the effective date of the code. If this amendment is passed, practitioners should, to be on the safe side, take advantage of its provisions.

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[160] Compare Snodgrass v. Wallowa Milling & Grain Co., 111 Or. 402, 227 Pac. 294 (1924).
[161] Sec. 79.3120(5)(c).
[162] Sec. 428.
[163] Sec. 427(2).

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