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How Not to Amend a Uniform Act: California's Misleading U.C.C. Article 9 Fixture Provisions

Mark S. Scarberry

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HOW NOT TO AMEND A UNIFORM ACT: CALIFORNIA'S MISLEADING U.C.C. ARTICLE 9 FIXTURE PROVISIONS

*Mark S. Scarberry**

I.	INTRODUCTION	682
II.	CALIFORNIA'S ADOPTION OF ITS ARTICLE 9 FIXTURE PROVISIONS	685
III.	CALIFORNIA'S SUBTLE AND MISLEADING CHANGES IN THE LIGHT OF THE LEGISLATIVE HISTORY	687
	<i>A. The Deletion of All References to Perfection as a Result of Fixture Filing</i>	687
	<i>B. The Addition of Subsection 9401(7)</i>	690
IV.	CALIFORNIA VIOLATED A SIMPLE RULE: UNIFORM ACTS SHOULD NOT BE AMENDED IN SUBTLE WAYS	694
V.	THE DEMONSTRABLE NEED FOR A FURTHER AMENDMENT OF THE CALIFORNIA FIXTURE PROVISIONS	695
	<i>A. Commentators Who Have Been Misled</i>	695
	<i>B. The Likely Result—Real Losses for Secured Parties</i>	699
VI.	HOW THE CALIFORNIA VERSION SHOULD BE AMENDED ..	701
	<i>A. Why California Does Not Permit Perfection by Fixture Filing</i>	702
	1. California's first and second reasons, which are applicable in any state	702
	2. California's third and fourth reasons, which apply with peculiar force in California	706
	<i>a. the third and fourth reasons</i>	706
	<i>b. why the third and fourth reasons have particular strength in California: herein of the California changes to the readily removable fixture priority rules</i>	709
	i the readily removable fixture priority rules under the Official Text	709
	ii the California change in the readily	

* Mark S. Scarberry, A.B. Occidental College, J.D. University of California, Los Angeles; Associate Professor, Pepperdine University School of Law.

removable fixture rules and the rationale for the change.....	711
iii why California's change in the readily removable fixture priority rules gives particular strength to the third and fourth reasons	712
B. <i>How the California Version Should Be Amended—The Choices</i>	714
APPENDIX 1	720
APPENDIX 2	731

I. INTRODUCTION

Under the Official Text of the Uniform Commercial Code,¹ the making of a fixture filing² in the real estate records perfects a security interest in fixtures.³ That is one of the basic concepts of the fixture provisions of U.C.C. Article 9.⁴ Under the Official Text a filing in the chattel records (for example, in the Secretary of State's office) is not needed to perfect a security interest in fixtures.⁵

1. References to the Uniform Commercial Code ("U.C.C.") are to the 1987 Official Text. With regard to fixtures, and for all purposes of this article, the 1972, 1978 and 1987 Official Texts are identical. All three incorporate the extensive 1972 amendments to the 1962 version of the Official Text, including the extensive fixture amendments.

2. As the U.C.C. defines it, a fixture filing is "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 conforming to the requirements of subsection 5 of Section 9-402." U.C.C. § 9-313(1)(b) (1987). Section 9-402(5) includes requirements designed to ensure that fixture filings will be accessible and useful to those who perform real estate records searches. *See id.* § 9-402(5).

3. *See* R. HENSON, HANDBOOK ON SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 8-3, at 308 (2d ed. 1979); Scarberry, *Fixtures In Bankruptcy*, 16 CAP. U.L. REV. 403, 441-43 (1987).

4. Under the 1962 Official Text, the financing statement *had* to be filed in the real property records to perfect a security interest in fixtures; a chattel records filing was ineffective to perfect the security interest. U.C.C. § 9-401(1) (1962) (all three alternatives); 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 30.5, at 818 (1965); Kripke, *Fixtures Under the Uniform Commercial Code*, 64 COLUM. L. REV. 44, 55 (1964); Scarberry, *supra* note 3, at 403-05. The 1972 revisions to the Official Text *permit* perfection of a security interest in fixtures by a filing in the chattel records, but such a filing does not give the same priority advantages as a fixture filing. *See* Scarberry, *supra* note 3, at 441-44. One of the drafters of the 1972 revisions called the perfection attained by way of a chattel records filing "a sort of a bastard kind of perfection." *A Second Look at the Amendments to Article 9 of the Uniform Commercial Code: A Panel*, 29 BUS. LAW. 973, 984 (1974) [hereinafter *Panel: A Second Look*] (comment by the late Peter Coogan, Esq.).

The 1972 innovation was in giving some limited effect to a chattel records filing on a fixture. It was a "given" that a real estate records filing, a fixture filing, was the usual and better way to perfect a security interest in fixtures.

5. U.C.C. § 9-401 comment 2 (1987) ("Note that there is no requirement for an addi-

California changed that basic concept. *In California the making of a fixture filing does not perfect a security interest in fixtures.*⁶ If the secured party perfects the security interest by making a chattel records filing, then an additional fixture filing will provide some priority advantages to the secured party,⁷ but the fixture filing itself does not perfect the security interest.

Unfortunately, California changed the basic concept by making very subtle changes to Article 9's Official Text.⁸ The subtlety of the changes makes them misleading and indefensible.⁹ There is a very real possibility that secured creditors will fail to understand that the making of a fixture filing does not perfect a security interest in fixtures in California; the resulting loss is likely to be costly to the secured creditors.¹⁰

The California version does not explicitly state that fixture filing does not perfect a security interest in fixtures. Only a review of the legislative history makes it clear that California intended to make a basic change in the meaning of the Official Text.¹¹ However, the legislative history has not been readily accessible; neither of the California annotated codes even mentions the existence of the legislative history,¹² and it has, until now, been published only as part of the California Assembly Journal.¹³

Thus, a reader of the California version is likely to believe mistakenly that a fixture filing will perfect a security interest in fixtures in California. If the reader sees a need to consult secondary sources, she is likely to have her mistaken view confirmed,¹⁴ although there are a few secondary sources that might correct the reader's mistake.¹⁵

However, the reader may see no need to consult secondary sources at all on this point. California law specifically provides in a new, separate

tional filing with the chattel records." See also, *In re Galvin*, 39 Bankr. 1016 (Bankr. D.N.D. 1984) (security interest in fixture was perfected and therefore unavoidable in bankruptcy where only fixture filing had been made).

6. See *infra* notes 35-62 and accompanying text.

7. See *infra* notes 38-39, 118 and 124 and accompanying text.

8. See *infra* notes 36-79 and accompanying text. The text of the relevant California fixture provisions, showing the changes made from the Official Text, appears as Appendix 1 to this article.

9. See *infra* notes 85-99 and accompanying text.

10. See *infra* notes 101-03 and accompanying text.

11. See *infra* notes 34-79 and accompanying text.

12. See CAL. COM. CODE (West Supp. 1990); CAL. COM. CODE (Deering 1986 & Supp. 1990).

13. 11 CAL. ASSEMBLY J. 19431 (Aug. 30, 1980). See *infra* note 27 and accompanying text.

14. See *infra* notes 85-98 and accompanying text.

15. See *infra* note 99.

subsection¹⁶ that the "proper place to file a financing statement filed as a fixture filing is in the office where a mortgage on the real estate would be recorded."¹⁷ For most readers that would end the inquiry. Only the very careful reader might note an omission: the California language says that the real estate records office is the "proper place to file," but it does not say that it is the proper place to file *in order to perfect a security interest*. As discussed below,¹⁸ even the very careful reader is likely to think the omission is merely the result of an elliptical expression rather than that it is indicative of a basic change in the Official Text's fixture provisions.

The reader will come to the text of the California version with the assumption that fixture filings do perfect security interests, because that is true under the Official Text. That makes it very unlikely that California's subtle omission and the related subtle changes that California made¹⁹ will successfully communicate to the reader that a chattel records filing is needed. In fact, prominent commentators within and outside of California appear to have been misled by California's subtle changes.²⁰ Both editions of the annotated California codes reprint, with apparent approval, the Official Text Comment to section 9-401,²¹ which indicates that a fixture filing is sufficient to perfect a security interest and that a chattel records filing is not needed.²² Neither edition of the annotated California codes—neither West nor Deering—even mentions the existence of the legislative history.

California must amend its fixture provisions. The amendment should at least make it clear that fixture filing does not result in perfection.²³ It would be better, however, if the amendment brought the California version closer to the Official Text.²⁴ The only persuasive reason for not permitting fixture filing to perfect security interests in California is to preserve the effectiveness of the change California made to the priority rules for security interests in certain "readily removable" fixtures.²⁵ Therefore, California should permit fixture filing to perfect security inter-

16. The California version refers to subsections of individual sections as "subdivisions," even though the individual sections are still called sections. See Appendix 1 to this article.

17. CAL. COM. CODE § 9401(7) (West Supp. 1990).

18. See *infra* notes 65-67 and accompanying text.

19. See *infra* notes 38-49 and accompanying text.

20. See *infra* notes 85-97 and accompanying text for a discussion of commentators who have been misled.

21. CAL. COM. CODE § 9401 comments (West Supp. 1990 & Deering 1986).

22. *Id.* comment 2.

23. See *infra* note 104 and accompanying text.

24. See *infra* notes 164-77 and accompanying text.

25. See *infra* notes 143-63 and accompanying text.

ests in fixtures except for security interests in those readily removable fixtures.²⁶

Additionally, the legislative history that makes clear the meaning of the misleading changes should be made more readily available. Therefore, the *California State Bar Committee Report* which explains the California changes is reprinted as Appendix 2 to this article.²⁷ (Because the *State Bar Committee Report* contains a section-by-section commentary on the California fixture provisions, it should have value beyond the issues dealt with in this article.)

Finally, we should learn a simple rule from California's mistake. A state must not make a substantive change in the meaning of a uniform act by making subtle changes in the official text of the act; substantive changes in meaning must be accomplished by changes in the text that make it obvious that a substantive change in meaning is intended.²⁸

II. CALIFORNIA'S ADOPTION OF ITS ARTICLE 9 FIXTURE PROVISIONS

When California adopted the Uniform Commercial Code in 1963, it refused to adopt most of the U.C.C. Article 9 fixture provisions.²⁹ Partly in response to California's refusal,³⁰ the fixture provisions of the Official Text were substantially amended in 1972 (along with other provisions of Article 9) by the co-sponsors of the Code, the American Law Institute and the National Conference of Commissioners on Uniform State Laws.³¹ In 1974, when California adopted the other 1972 amendments

26. See *infra* notes 164-77 and accompanying text.

27. UNIFORM COMMERCIAL CODE COMMITTEE OF THE BUSINESS LAW SECTION OF THE STATE BAR OF CALIFORNIA, FINAL REPORT OF THE UNIFORM COMMERCIAL CODE COMMITTEE ON SECTION 9-313 OF THE UNIFORM COMMERCIAL CODE (Jan. 25, 1980), reprinted in 11 CAL. ASSEMBLY J. 19431 (Aug. 30, 1980), and Appendix 2 to this article [hereinafter cited as STATE BAR COMMITTEE REPORT in footnotes and referenced in text as *State Bar Committee Report*]. The Comments to the fixture provisions appear as Appendix A to the *State Bar Committee Report*. To avoid confusion, citations to the *Report* are made by reference to the page at which the cited language appears in the California Assembly Journal and to the page at which the cited language appears in Appendix 2 after this article, without specific reference to Appendix A.

28. See *infra* notes 80-82 and accompanying text.

29. Calif. Uniform Commercial Code Act, ch. 819, 1963 Cal. Stat. 1849; see also Note, *Uniform Commercial Code Section 9-313: Time for Adoption in California*, 27 HASTINGS L.J. 235, 236 (1975) [hereinafter Note, *Section 9-313: Time for Adoption*]; Note, *Article 9 and Fixtures: A Real Fix With No Perfect Solution*, 17 LOY. L.A.L. REV. 977, 980-95 (1984) [hereinafter Note, *Fixtures: A Real Fix*].

30. See U.C.C. § 9-313, Reasons for 1972 Change (1972) ("In some states, such as California and Iowa, Section 9-313 simply was not enacted.").

31. See generally Ayer, *The New Article 9 and the California Commercial Code*, 21 UCLA L. REV. 937 (1974); Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477 (1973).

to the Official Text, California did not adopt the new fixture provisions.³²

Finally, in 1980, California seemed to adopt the essence of the 1972 Official Text fixture provisions.³³ "Seemed" is the appropriate word. California made subtle, misleading changes in the Official Text—changes which appear to be minor stylistic changes, but which were intended to change one of the most basic concepts in the 1972 Official Text's fixture provisions. California's changes were intended to change the concept that the making of a fixture filing perfects a security interest in fixtures.

California's changes to the Official Text were made as the direct result of the 1980 *State Bar Committee Report*.³⁴ The *Report* shows that the apparently minor stylistic changes were in fact intended to change the Official Text so that a fixture filing would not perfect a security interest in fixtures in California. As the *State Bar Committee Report* Comment on section 9313 puts it:

[T]he Committee's proposal requires both perfection (ordinarily by filing) as well as a fixture filing. . . . To repeat, the filing of a fixture filing will *not* result in "perfection" under the Committee's proposal. The effect of the perfection requirement is that an unperfected security interest will not qualify for priority under Section 9313(4), even if a fixture filing has been filed.³⁵

Unfortunately, the State Bar Committee did not propose language that

32. Act of Sept. 23, 1974, ch. 997, 1974 Cal. Stat. 2108. See also Note, *Section 9-313: Time for Adoption*, *supra* note 29, at 239; Note, *Fixtures: A Real Fix*, *supra* note 29, at 990-91.

33. See Act of Sept. 27, 1980, ch. 1156, 1980 Cal. Stat. 3856. The text of the relevant California fixture provisions, showing the changes made to the Official Text, appears as Appendix 1 to this article.

34. The *State Bar Committee Report*, *supra* note 27, proposed adoption of the California fixture provisions, which were then adopted almost *verbatim* by California. Act of Sept. 27, 1980, ch. 1156, 1980 Cal. Stat. 3856. In its only substantive change to the *State Bar Committee Report's* recommendation, California adopted the Official Text's phrase "factory or office machines" in section 9313(4)(c) rather than the broader term "equipment." (Due to amendments made after 1980, none of which are relevant to this article, the text of the California provisions is no longer identical to the text adopted in 1980 as a result of the State Bar Committee's proposal. See Appendix 1 to this article.) In a letter to the Speaker of the Assembly, Assemblyman John T. Knox, the author of the fixtures bill, Cal. A.B. 3367 (1980), stated that the bill was the result of the *State Bar Committee Report*. Letter from Assemblyman John T. Knox to Speaker of the Assembly, Leo T. McCarthy (Aug. 27, 1980), *reprinted* in 11 CAL. ASSEMBLY J. 19430 (Aug. 30, 1980). He also noted that the *State Bar Committee Report* contains section-by-section "Comments" that "explain reasons for changes in the law and the effect of the new provisions." *Id.* Because he believed the "Comments" would be "a useful interpretive tool," he requested that the *State Bar Committee Report* be reprinted in the Assembly Daily Journal. *Id.*

35. STATE BAR COMMITTEE REPORT, *supra* note 27, *reprinted* in CAL. ASSEMBLY J., at 19443-44, and Appendix 2, *infra*, at 748 (Comment 1(a) to section 9313) (emphasis in original).

would make clear that fixture filing does not result in perfection. The changes to the Official Text that were intended to carry out the Committee's scheme are very subtle.

III. CALIFORNIA'S SUBTLE AND MISLEADING CHANGES IN THE LIGHT OF THE LEGISLATIVE HISTORY

California made two kinds of subtle changes to the Official Text to accomplish the result that fixture filings do not perfect security interests in fixtures. Nowhere in California's version is there any affirmative statement that fixture filing does not result in perfection. The conclusion that it does not can only be reached inferentially from the California version, with the aid of the *State Bar Committee Report*, by (1) noting a pattern that all Official Text language which refers to perfection as a result of fixture filing was replaced with neutral (or repetitive) language,³⁶ and (2) noting that California Commercial Code section 9401(7) says only that the real property records are the "proper place" to file a fixture filing, rather than the "proper place to file *in order to perfect a security interest*."³⁷

A. *The Deletion of All References to Perfection as a Result of Fixture Filing*

California deleted all references to perfection as a consequence of fixture filing. This explains the changes to Official Text section 9-313 which otherwise appear to be merely stylistic. The Official Text of section 9-313(4)(a) and (b) requires that a "perfected security interest" be "perfected by fixture filing" to qualify for priority.³⁸ Note that the Official Text thus, somewhat redundantly, twice requires that the security interest be perfected. The California version, on the other hand, requires that the security interest be a "perfected security interest" and that "a fixture filing covering the fixtures is filed."³⁹ California's substitute language does not carry the implication of the Official Text that fixture filing perfects the security interest; it is neutral language on that point. However, the lawyer or businessperson is likely to think this was merely a stylistic change, perhaps designed to eliminate the redundant reference to perfection. She is not likely to assume that California's change to neutral language signals a basic change in Article 9's fixture provisions.

The *State Bar Committee Report's* Comment to section 9313 ex-

36. See *infra* notes 38-49 and accompanying text.

37. CAL. COM. CODE § 9401(7) (West Supp. 1990).

38. U.C.C. § 9-313(4)(a), (b) (1987).

39. CAL. COM. CODE § 9313(4)(a), (b) (West Supp. 1990).

plains that these changes were made to remove any implication that fixture filing perfects security interests in fixtures. The Comment states that the Committee intended to prevent fixture filings from perfecting security interests and then states:

To accomplish this purpose, all references to "perfection" as a consequence of fixture filing have been deleted from the Committee's proposal. In the context of Sections 9313(4)(a) and (b), the phrase "a fixture filing covering the fixtures is filed" has been inserted in lieu of "the security interest is perfected by a fixture filing." See also proposed Sections 9302(1)(d), 9401(5), 9401(7), 9402(2) and 9403(2) and Comments thereto.⁴⁰

As the Comment indicates, California also changed Official Text sections 9-401(5), 9-402(2) and 9-403(2) to remove any implication that a fixture filing results in perfection.⁴¹ The change in section 9-401(5)—the addition of the word "also"—will not alert any reader to the need for a chattel record filing in cases not involving transmitting utilities.⁴² The changes in sections 9-402(2) and 9-403(2)⁴³ might arouse the suspicions of a reasonable reader. The changes consist of seemingly repetitive language added to sections 9402(2) and 9403(2).

The reference in section 9402(2) to financing statements "filed to perfect a security interest in or as a fixture filing covering" the collateral⁴⁴ would be oddly repetitive if fixture filing results in perfection; that might lead a reader to question whether fixture filing perfects a security interest in fixtures in California. However, even under the Official Text a secured party could file a financing statement for purposes other than to perfect a security interest; if the secured party has already made a chattel records filing, the security interest is perfected, but the secured party may still wish to file a fixture filing to obtain the added priority protection that

40. STATE BAR COMMITTEE REPORT, *supra* note 27, reprinted in CAL. ASSEMBLY J., at 19443, and Appendix 2, *infra*, at 747-48 (Comment 1(a) to section 9313).

41. See Appendix 1 to this article for a comparison of the Official Text and the California version of those sections.

42. See Appendix 1 to this article for a comparison of the Official Text and the California version of section 9-401(5). Apparently the word "also" was added because the Secretary of State's office filing on transmitting utilities is not *only* a fixture filing (which, under the State Bar Committee's scheme, would not perfect the security interest), but also serves the function of the normal chattel records filing, which perfects the security interest. The addition of the word "also" fits with the *State Bar Committee Report's* scheme, but it is not at all likely to alert anyone to the need (in cases not involving transmitting utilities) for a chattel records filing.

43. CAL. COM. CODE §§ 9402(2), 9403(2) (West Supp. 1990). See Appendix 1 to this article for the text of these sections and for the changes California made in the Official Text.

44. CAL. COM. CODE § 9402(2) (West Supp. 1990).

a fixture filing provides under section 9-313.⁴⁵

The lengthy repetition in section 9403(2) of the rules governing the effect of insolvency proceedings and the effect of lapse of financing statements seems odd if fixture filings result in perfection—the insolvency proceedings rule and the lapse rule are stated once concerning the effect of insolvency proceedings or lapse upon *perfection*, and again concerning the effect of insolvency proceedings or lapse upon the “*effectiveness*” of *fixture filings*.⁴⁶ However, this is not inconsistent with the Official Text scheme under which either fixture filing or chattel records filing perfects security interests in fixtures. For example, under the Official Text a secured party who made both a chattel records filing and a fixture filing might file a continuation statement to continue the effectiveness of the chattel records filing and forget to file a continuation statement in the real property records to continue the effectiveness of the fixture filing. In such a case the effectiveness of the fixture filing would cease on its lapse even though the security interest remained perfected by the chattel records filing.⁴⁷ The repetitive California language could be seen as merely making clear that this loss of effectiveness on lapse has retroactive effect just as does a loss of perfection on lapse.⁴⁸ Thus the repetitive language in California Commercial Code section 9403(2) would be consistent with the Official Text approach under which fixture filing perfects security interests in fixtures.

Further, sections 9402(2) and 9403(2) deal with situations that may occur long after the security interest is taken, such as a name change by the debtor or the lapse of the financing statement at the end of its five year period of effectiveness.⁴⁹ It is unlikely that a secured party will review those provisions with great care when first taking a security interest, and, therefore, the secured party is not likely to suspect at that time that a chattel records filing is necessary.

45. See Scarberry, *supra* note 3, at 443-44. “The advantage of perfection by *fixture filing* is that the security interest is much more likely to have priority against real estate claimants such as purchasers and mortgagees than if a fixture filing is not made.” *Id.* at 444.

46. CAL. COM. CODE § 9403(2) (West Supp. 1990).

47. U.C.C. § 9-403(2) (“The *effectiveness* of a filed financing statement lapses on the expiration of the five year period unless a continuation statement is filed prior to the lapse.”) (emphasis added).

48. U.C.C. § 9-403(2) expressly states that loss of *perfection* on lapse is retroactive; the security interest is then “deemed to have been unperfected as against a person who became a purchaser or lien creditor before lapse.” *Id.* If there is still an effective chattel records filing, but the fixture filing lapses, the question arises as to whether the lapse of the fixture filing has retroactive effect; that is, whether real estate interests that prior to lapse were junior to the security interest under section 9-313(4)(a) or (4)(b) become senior after the fixture filing lapses.

49. CAL. COM. CODE §§ 9402(2), 9403(2) (West Supp. 1990).

B. *The Addition of Subsection 9401(7)*

Pursuant to the State Bar Committee's scheme, California also created a new subsection in section 9401 which provides that fixture filings must be made in the real estate records.⁵⁰ The new subsection states: "(7) The proper place to file a financing statement filed as a fixture filing is in the office where a mortgage on the real estate would be recorded."⁵¹ The critical point to note is that subsection (7) does not say that the real estate records office is the proper place to file *in order to perfect a security interest* in fixtures. Subsection (7) speaks of the proper place to file, but not explicitly of the proper place to file *in order to perfect a security interest*.

To a reader familiar with the Official Text, the omission of the italicized phrase is unlikely to raise any suspicions. Financing statements filed under the Official Text are always filed in order to perfect a security interest, unless the security interest is already perfected in some other way.⁵² The reader will very likely believe the phrase was omitted because the drafter knew the reader would understand that the fixture filing is filed in order to perfect the security interest.

With hindsight one can understand why the State Bar Committee recommended creation of a separate subsection (7). Official Text section 9-401(1) governs the place of filing of financing statements filed on various types of collateral.⁵³ It would have seemed natural to include the substance of the new subsection (7) in section 9401(1)(b), California's version of Official Text section 9-401(1)(b). That would have conformed to the Official Text, which provides in section 9-401(1)(b) that the proper place to file a fixture filing is the real estate records.⁵⁴ Both in the California version and in the Official Text, subsection (1)(b) lists cases in which filings are to be made in the real property records: timber to be cut, minerals, and certain accounts arising from sale of minerals at the wellhead or minehead.⁵⁵ The Official Text, of course, also includes cases in which a fixture filing is made on goods that are or are to become fixtures.⁵⁶

50. STATE BAR COMMITTEE REPORT, *supra* note 27, reprinted in CAL. ASSEMBLY J., at 19446, and Appendix 2, *infra*, at 751.

51. CAL. COM. CODE § 9401(7) (West Supp. 1990).

52. Scarberry, *supra* note 3, at 443-44.

53. U.C.C. § 9-401(1) (1987).

54. *Id.* § 9-401(1)(b) (Second and Third Alternatives); *id.* § 9-401(1)(a) (First Alternative).

55. CAL. COM. CODE § 9401(1)(b) (West Supp. 1990); U.C.C. § 9-401(1)(b) (1987) (Second and Third Alternatives); *id.* § 9-401(1)(a) (First Alternative).

56. U.C.C. § 9-401(1)(b) (1987) (Second and Third Alternatives); *id.* § 9-401(1)(a) (First Alternative). At the time the Committee was writing, California still had not adopted the

However, the *State Bar Committee Report* could not recommend that the place of fixture filing be set forth in section 9401(1)(b). Like Official Text section 9-401(1)(b), California's section 9401(1)(b) begins with the following language: "The proper place to file *in order to perfect* a security interest is"⁵⁷ To propose that section 9401(1)(b) state that fixture filings must be made in the real property records would have created statutory language expressly stating that fixture filings are made to *perfect* security interests in fixtures, a result contrary to the Committee's scheme.

The *State Bar Committee Report's* Comment to section 9401(7) confirms that the separate subsection (7) was created specifically because fixture filing is not intended to result in perfection under the California scheme. It confirms that the Committee intended the burden of the basic change to be carried by the omission of the phrase "in order to perfect a security interest" from subsection (7). Note the Committee's emphasis on the verb "*perfect*" in the following unedited quote from the Comment to section 9401(7):

Compare Section 9-401(1)(b) of the 1972 Official Text, which provides in part that "[t]he proper place to file in order to *perfect* a security interest . . . when the financing statement is filed as a fixture filing . . . [is] in the office where a mortgage on the real estate would be . . . recorded." (Emphasis added). Since a fixture filing does not result in "perfection" of a security interest under proposed Section 9313, it is recommended that present Section 9401(1)(b) not be amended to conform to the Official Text, and that Section 9401(7) be added instead.⁵⁸

The *State Bar Committee Report* emphasizes what California's section 9401(7) does *not* say—section 9401(7) does *not* say that the real estate records are the proper place to file in order to *perfect* the security interest, but only that the real estate records are the proper place to file a fixture filing. The separate section 9401(7) was added specifically because the phrase "in order to perfect a security interest" (which appears in section 9401(1)) could be omitted from it. The Committee intended this omission to signal the reader that fixture filing does not result in perfection.

Article 9 fixture provisions, *see supra* notes 29-33 and accompanying text, so there was no reference in California's section 9401(1)(b) to fixtures or to fixture filings.

57. CAL. COM. CODE § 9401(1) (West Supp. 1990) (emphasis added); U.C.C. § 9-401(1) (1987) (emphasis added).

58. STATE BAR COMMITTEE REPORT, *supra* note 27, reprinted in CAL. ASSEMBLY J., at 19446, and Appendix 2, *infra*, at 752 (Comment 2 to section 9401). The entire quote is exactly as it appears in the *State Bar Committee Report*.

The State Bar Committee should not have relied on this subtle omission to carry the burden of a basic change in the fixture provisions, but that is exactly what the Committee did. Perhaps the Committee members were too familiar with the issue to see that the subtle omission would be misleading, but it certainly is.

Under the Committee's subtle approach, only section 9401(1) states the proper place to file *to perfect* a security interest;⁵⁹ section 9401(7) merely states the proper place to file.⁶⁰ Thus, a filing must be made in the place specified by section 9401(1) to perfect a security interest in fixtures. Section 9401(1) does not specify the real property records as the place to file for fixtures. Rather, under the California version, the local county personal property records office is the correct place to file on fixtures that are consumer goods,⁶¹ and in all other cases the Secretary of State's office is the correct place to file to perfect a security interest in fixtures.⁶²

The problem is that the subtle omission is not likely to alert even a knowledgeable reader that fixture filings do not perfect security interests in fixtures. A person who reads section 9401 without the benefit of the legislative history will probably think it was very helpful of the California Legislature to provide a separate subsection (7) stating the proper place to file a fixture filing. The Official Text of section 9-401 requires the reader to wade through a lengthy subsection (1) to find that the proper place is the office where a mortgage on the real estate would be filed;⁶³ the California version says that separately in subsection (7).⁶⁴

The ordinary reader probably will not even notice that section 9401(1) speaks of the "proper place to file *in order to perfect a security interest*,"⁶⁵ but that section 9401(7) speaks only of the "proper place to file" a fixture filing.⁶⁶ Even if the reader notes the difference, he is not likely to conclude that a fixture filing in "the proper place" under section 9401(7) is not made "in order to perfect" the security interest. Rather, he is likely to think it is an elliptical construction. Section 9401(1) has already made the obvious point that the proper place to file is the place you file in order to perfect the security interest.⁶⁷ It would not be sur-

59. CAL. COM. CODE § 9401(1) (West Supp. 1990).

60. *Id.* § 9401(7).

61. *Id.* § 9401(1)(a).

62. *Id.* § 9401(1)(c).

63. U.C.C. § 9-401(1) (1987).

64. CAL. COM. CODE § 9401(7) (West Supp. 1990).

65. *Id.* § 9401(1) (emphasis added).

66. *Id.* § 9401(7).

67. *Id.* § 9401(1).

prising if the California drafter left out the phrase "in order to perfect the security interest" in section 9401(7), knowing that it would be understood that a filing in "the proper place" perfects a security interest. The reader may also think the phrase was left out because the language of 9401(7) would have been awkward if it had been inserted.

In fact, but for the unequivocal legislative history, the author would make a strong argument that fixture filings *do* perfect security interests in California.⁶⁸ After all, the making of a fixture filing is one type of filing of a financing statement. The California definition of fixture filing is: "the *filing* in the office where a mortgage on the real estate would be recorded *of a financing statement* covering goods which are or are to become fixtures . . ." ⁶⁹ Since the making of a fixture filing is the filing of a financing statement, the question would be whether the filing of a financing statement perfects a security interest in fixtures.

California's section 9303,⁷⁰ which conforms to Official Text section 9-303,⁷¹ provides that a security interest is a "perfected" security interest in an item when (1) the security interest has attached to the item, and (2) the secured party has taken the applicable steps, if any, that are specified in sections 9302, 9304, 9305 and 9306.⁷² Section 9302(1) provides that "[a] financing statement must be filed to perfect all security interests except the following," and a list follows of cases in which filing is not needed.⁷³ No other provision in sections 9302, 9304, 9305 or 9306 requires any other step to be taken to perfect a security interest in fixtures.⁷⁴ Therefore, if a secured party properly files a financing statement, the security interest should be perfected, because all of the required steps will have been taken.

Pursuant to section 9401(7), the proper place to file a fixture filing is the real estate records.⁷⁵ Thus, the making of a fixture filing in the real

68. A student Note concludes from an analysis merely of the language of section 9401 that "the only possible construction of section 9401 in California" is that a chattel records filing must be made to perfect a security interest in fixtures and that a fixture filing "never perfects the security interest." Note, *Fixtures: A Real Fix*, *supra* note 29, at 998-99 (footnotes omitted). This is *not* the only possible construction.

69. CAL. COM. CODE § 9313(1)(b) (West Supp. 1990) (emphasis added).

70. *Id.* § 9303.

71. U.C.C. § 9-303 (1987).

72. California did not make any relevant change in any of these sections. Compare CAL. COM. CODE §§ 9302, 9304, 9305 and 9306 (West Supp. 1990) with U.C.C. §§ 9-302, 9-304, 9-305 and 9-306 (1987).

73. CAL. COM. CODE § 9302(1) (West Supp. 1990).

74. Section 9305 *permits* perfection of a security interest in "goods," which includes fixtures, *id.* § 9105(1)(h), by the secured party taking possession of the goods, but of course it does not require the secured party to do that. *Id.* § 9305.

75. *Id.* § 9401(7).

estate records is the filing of a financing statement in the proper place. It would appear to follow that the making of the fixture filing would perfect the security interest in the fixtures.

The California version even adds a sentence to the Official Text providing that fixture filings give constructive notice of security interests in fixtures to real estate claimants.⁷⁶ A reader would naturally assume that at least real estate claimants who take their interests with such notice would be subordinate to the secured party who made the fixture filing. This constructive notice provision is a further indication, albeit misleading, that fixture filing perfects security interests in fixtures. Only perfected security interests prevail over real estate claimants under section 9313(4);⁷⁷ therefore, if a fixture filing is sufficient to allow a secured party to prevail over later real estate claimants, as the added sentence leads one to assume, the fixture filing must perfect the security interest.

Of course the legislative history shows that California did not intend to allow fixture filing to perfect security interests in fixtures.⁷⁸ In fact, it shows that if the security interest is not perfected, the fixture filing is worthless; it does not even allow the secured party to prevail over real estate claimants, such as mortgagees, who took their interests with constructive notice of the security interest.⁷⁹ That such a strong argument can be constructed from the language of California's version for the proposition that fixture filings do perfect security interests shows how inapt the California version's language is. The reader who does not know about the legislative history is likely to be misled.

IV. CALIFORNIA VIOLATED A SIMPLE RULE: UNIFORM ACTS SHOULD NOT BE AMENDED IN SUBTLE WAYS

States must follow a simple rule when amending uniform acts like the Uniform Commercial Code. *A state must not make a substantive change in the meaning of a uniform act by making subtle changes in the official text of the act; substantive changes in meaning must be accomplished by changes in the text that make the legislature's intent obvious.* There should be no chance that a reader familiar with the uniform act would fail to notice the changes in the language or conclude that they were merely stylistic. This rule must be followed to preserve the utility

76. *Id.* § 9403(7).

77. *Id.* § 9313(4).

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

79. STATE BAR COMMITTEE REPORT, *supra* note 27, reprinted in CAL. ASSEMBLY J., at 19444, and Appendix 2, *infra*, at 748 (Comment 1(a) to proposed section 9313).

of uniform acts and to avoid misleading people who are familiar with the official text of the acts.

This rule applies with particular force when a state changes a basic concept of a uniform act. People who are familiar with the official text of the uniform act will assume that the basic concepts have not been changed unless the change is obvious. California's violation of this simple rule with regard to changing a basic concept is therefore doubly unfortunate—not only did California make a *subtle* change to a uniform act,⁸⁰ California made a *subtle, basic* change.⁸¹

The California changes in the Official Text do not make it obvious that a basic change in the meaning of the Official Text was made. A reader of the California version who needs to know how to perfect a security interest in fixtures is not likely to suspect that a substantive change was intended.⁸² Presumably our statutes are not drafted to be puzzles. The California statute should contain a clear, positive statement that fixture filings do not perfect security interests, if that is to remain the law.

V. THE DEMONSTRABLE NEED FOR A FURTHER AMENDMENT OF THE CALIFORNIA FIXTURE PROVISIONS

There is a practical need for California to amend its Commercial Code to eliminate the trap that its subtle and misleading text has created. There is a very real possibility that secured creditors will fail to understand that the making of a fixture filing in California does not perfect a security interest in fixtures. The California version's subtle changes have in fact misled knowledgeable and respected commentators, both within and outside of California.⁸³ Furthermore, the evidence is strong that secured parties are likely to make only fixture filings in some cases, with costly results.⁸⁴

A. Commentators Who Have Been Misled

The best example of a commentator who appears to have been misled is Professor Ray Henson. Professor Henson is one of the foremost commentators on the U.C.C. and specifically on Article 9. Among his many honors and achievements, Professor Henson has written a

80. See *supra* notes 36-79 and accompanying text.

81. See *supra* notes 1-4 and 32-62 and accompanying text.

82. See *supra* notes 36-79 and accompanying text.

83. See *infra* notes 85-99 and accompanying text.

84. See *infra* notes 100-03 and accompanying text.

respected handbook on Article 9,⁸⁵ was the first to raise one of the most important issues that required revision of the 1962 Official Text of Article 9,⁸⁶ and served on the Article 9 Review Committee which was largely responsible for the fixture provisions which appear in the present Official Text.⁸⁷ If California's subtle changes can mislead Professor Henson, then they can mislead anyone.

In his California Code Forms book on Article 9, Professor Henson effectively states that a fixture filing in the real estate records will perfect a security interest, provided that the collateral is in fact a fixture. He writes:

Because the fixture cases here, as well as in other states, are mostly old and more attuned to a different era, it may not be possible to say with certainty whether some kinds of goods attached to real estate will pass with a conveyance of the land. *In many cases the simplest solution is to file twice: once in the office where a real property mortgage on the land would be recorded . . . and once in the regular Code files in the Secretary of State's office, if the goods are not owned by a consumer . . .*⁸⁸

Henson implies that where the goods are certain to be considered fixtures, a secured party need not make a chattel records filing in the Secretary of State's office; the fixture filing in the real property records would be sufficient. This implication is not correct in California—a chattel records filing is needed even if the secured party can say with certainty that the goods are fixtures.⁸⁹

A second example is provided by the remarkable California legal writer, Bernard Witkin, Esq. Mr. Witkin's multi-volume *Summary of California Law*⁹⁰ is probably used and cited by California lawyers and judges more than any other single secondary source. The *Summary* gives four categories for determining where to file a financing statement: "(a) Consumer Goods, . . . (b) Crops, Timber To Be Cut, Minerals, Or Ac-

85. R. HENSON, *supra* note 3.

86. Henson, "Proceeds" *Under the Uniform Commercial Code*, 65 COLUM. L. REV. 232, 239 (1965); see also J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 24-4, at 1135 (3d ed. 1988, student ed.); *A Look at the Work of the Article 9 Review Committee: A Panel Discussion*, 26 BUS. LAW. 307, 321 (1970) (comment by Professor Kripke).

87. Permanent Editorial Board for the Uniform Commercial Code, Review Committee for Article 9 of the Uniform Commercial Code, Preliminary Draft No. 1 (Nov. 20, 1968) at v, reprinted at 52 MARQ. L. REV. 197 (1968), 24 BUS. LAW. 341 (1969) [hereinafter *Preliminary Draft No. 1*].

88. R. HENSON, WEST'S CALIFORNIA CODE FORMS—COMMERCIAL §§ 9101-End, at 462 (2d ed. 1987).

89. See *supra* notes 59-62 and accompanying text.

90. B. WITKIN, SUMMARY OF CALIFORNIA LAW (9th ed. 1987).

counts Subject To U.C.C. 9103(5), . . . (c) Financing Statement Filed as Fixture Filing, [and] (d) Other Property.”⁹¹ The *Summary* states that the filing of a financing statement filed as a fixture filing is to be made in the office where a mortgage on the real property would be filed, and, in the case of “other property,” filing is to be made with the Secretary of State.⁹² The clear implication is that fixtures are not the “other property” as to which a filing in the Secretary of State’s office is needed. However, unless the fixtures are consumer goods, a filing in the Secretary of State’s office *will* be needed to perfect the security interest.⁹³ California’s subtle changes appear to have misled even Mr. Witkin.

The authors of a respected California real estate treatise provide a third California example. They flatly state: “A security interest in fixtures attached to real property is perfected when a ‘fixture filing’ is recorded in the county where real property is located.”⁹⁴ In another part of their treatise they even cite California Commercial Code section 9401(7) for the proposition that “[u]pon recordation, the fixture filing imposes a perfected security interest in the fixtures.”⁹⁵

Commentators outside of California have also been misled. The learned authors of the Hawklund *Uniform Commercial Code Series* appear to have been misled. In their state variations compilation, they do not note the crucial California amendments to the Official Text at issue here.⁹⁶ Presumably the authors of the Hawklund series believed that these California changes were unimportant, stylistic changes. The authors must not have realized that fixture filings do not perfect security interests in California. The Commerce Clearing House *Secured Transactions Guide* also strongly implies that a fixture filing will perfect a security interest in fixtures in California.⁹⁷

91. 3 *id.*, *Secured Transactions in Personal Property*, § 42, at 468-69.

92. *Id.*

93. See *supra* notes 59-62 and accompanying text.

94. 6 H. MILLER & M. STARR, *CURRENT LAW OF CALIFORNIA REAL ESTATE* § 19:9, at 502 (2d ed. 1989) (footnote omitted).

95. 3 *id.* § 8:151, at 594 (footnote omitted).

96. 9 W. HAWKLAND, R. LORD & C. LEWIS, *UNIFORM COMMERCIAL CODE SERIES* §§ 9-313, at 199, 9-401, at 322 (1986 & Supp. 1989). The crucial California differences from the Official Text are the omission of any reference to fixtures and fixture filings from Official Text section 9-401(1) and the changes in Official Text sections 9-313(4)(a) and (4)(b) that eliminate references to perfection as a result of fixture filing and replace those references with neutral language. See *supra* notes 36-79 and accompanying text. The Hawklund treatise does not show California as having made these changes, although it does show the addition of section 9401(7). W. HAWKLAND, R. LORD & C. LEWIS, *supra*, § 9-401, at 322.

97. 1 *Secured Transactions Guide* (CCH), *California*, ¶ 200, at 10,027 (Sept. 9, 1987) (filings on consumer goods must be made in the county recorder’s office; filings on crops, timber, minerals (and related accounts), and *fixtures* “must be made in the office where a mortgage on

These examples show that even intelligent and knowledgeable people can be misled by the subtlety of the California changes. Moreover, a lawyer or businessperson who does not trust his own reading of the California version is likely to get the wrong information when he turns to the secondary sources,⁹⁸ even though there are a few secondary sources which, without much discussion, give the correct information.⁹⁹

the real estate would be recorded;" and, "[i]n all *other* cases the filing is in the office of the Secretary of State . . ." (emphasis added); *id.* at ¶ 540, at 10,060 (Dec. 19, 1989) (stating that a financing statement must be filed to perfect a security interest in fixtures and explaining that a fixture filing is a filing in the real estate records of a financing statement covering fixtures; no indication that a chattel records filing is needed).

98. Perhaps the worst example is what the lawyer will find in West's or Deering's Annotated California Commercial Code: she will find the Official Comment to section 9-401 reprinted after California Commercial Code section 9401. CAL. COM. CODE § 9401 (West Supp. 1990, Deering 1986 & Supp. 1990). The Official Comment explicitly says that there is no need for a chattel records filing if the secured party makes a fixture filing on fixtures. *Id.* § 9401 comment 2. Even though that is absolutely incorrect in California, neither West's nor Deering's even hints that a chattel records filing is needed, nor is there any reference to the *State Bar Committee Report*. See *supra* notes 12, 21 and accompanying text. The lawyer or businessperson who uses only a California annotated code on this issue will certainly be misled.

In addition to being misled by the Henson, Witkin, Miller & Starr, Hawkland, CCH, West and Deering sources, a lawyer or businessperson could be misled by a widely used California forms manual which clearly implies that fixture filing perfects security interests in fixtures. CAL. FORMS § 13.72, at 576 (Bancroft-Whitney 1977 & Supp. 1989). The main volume contains a chart showing the "place of filing documents to perfect a security interest." *Id.* at 577. The 1989 Supplement states: "By the provisions of UCC § 9401(7) the proper place to file a financing statement filed as a fixture filing is in the office where a mortgage on the real estate would be recorded." *Id.* at 230 (Supp. 1989). No indication is given that a chattel records filing is also needed.

Two Matthew Bender form books include ambiguous statements that could easily lead the reader to believe that fixture filing perfects security interests in fixtures. One of them states that a "[f]ixture filing must be filed to perfect an interest in goods affixed or to be affixed to real estate, for priority over claims of present or future owners of realty . . ." 9 CALIFORNIA LEGAL FORMS—TRANSACTION GUIDE, *Secured Transactions*, § II(A)(4), at 42-42 (Matthew Bender 1989). While fixture filing is needed for priority over most real estate claimants, it does not result in "perfection" in California and is even worthless as against real estate claimants if the security interest is not perfected. See *supra* notes 35, 78-79, *infra* notes 118 and 124 and accompanying text. The *Transaction Guide* goes on to say that a "standard filing" may be needed in "some cases," CALIFORNIA LEGAL FORMS—TRANSACTION GUIDE, *supra*, and its later checklist for perfecting a security interest includes a chattel records filing on fixtures along with a fixture filing, *id.* § II(D)(3), at 42-52, so a careful user of the volume may be safe. The other Matthew Bender form book, used for litigation more than transactional guidance, states that "[p]erfection is typically accomplished by filing a financing statement (*or a fixture filing*) . . ." 12C CALIFORNIA FORMS OF PLEADING AND PRACTICE, *Secured Transactions*, at IV-18 (Matthew Bender 1989) (emphasis added). This source's later discussion of place of filing does not tell the reader to file in the real property records to perfect a security interest in fixtures, but neither does it explicitly state that a fixture filing will not perfect a security interest in fixtures. *Id.* at IV-22. The authors of the Matthew Bender form books apparently understand the law, but their readers may be confused by the lack of a clear statement that fixture filing does not perfect security interests in fixtures.

99. J. AYER, SECURED TRANSACTIONS IN CALIFORNIA COMMERCIAL LAW PRACTICE

B. *The Likely Result—Real Losses for Secured Parties*

There is evidence that the misleading nature of the subtle California

§§ 3.68, 3.72, 4.65 (1986); Bayer, *California's New Law of Fixtures: Section 9313 of the Uniform Commercial Code*, 56 CAL. ST. B.J. 60, 61 (1981); Scarberry, *supra* note 3, at 440 & n.160; Uniform Commercial Code Committee of the Business Law Section of the State Bar of California, *Report Regarding Legal Opinions in Personal Property Secured Transactions*, 44 BUS. LAW. 791, 812-13 (1989) [hereinafter *Report Regarding Legal Opinions*]; Note, *Fixtures: A Real Fix*, *supra* note 29, at 998-1000 (not noting the misleading nature of the California changes and neither quoting from nor emphasizing the legislative history).

None of these sources analyze the *State Bar Committee Report* in any detail. The student Note argues that the language of the California version plainly and unambiguously indicates that fixture filing does not perfect security interests. Note, *Fixtures: A Real Fix*, *supra* note 29, at 997-1002. However, the argument is unconvincing. See *supra* notes 68-77 and accompanying text.

The title of the Business Lawyer *Report Regarding Legal Opinions*, *supra*, does not indicate a special emphasis on California law, so it may not be used as a reference by those contemplating California transactions. The *Report* devotes only three sentences to the perfection of security interests in fixtures. *Report Regarding Legal Opinions*, *supra*, at 812-13. It does not point out that the California version is misleading, but does say flatly that fixture filing is ineffective to perfect a security interest. *Id.* Unfortunately, the *Report* does not refer to the legislative history and does not explain the relation between California Commercial Code sections 9401(1) and 9401(7). See *id.* In fact, at another point, the *Report* somewhat misleadingly states that the California version "permits the perfection of a security interest in goods that are fixtures by filing a financing statement with the secretary of state." *Id.* at 834 (emphasis added). If the reader does not turn to the cross-referenced discussion at pages 812-13, the reader will likely believe that filing in the Secretary of State's office is merely a permitted means of perfection, as under the Official Text, see *supra* note 4, and that a fixture filing is sufficient to perfect a security interest in fixtures in California.

Indeed, the authors of another article in the same May 1989 Business Lawyer refer to the *Report Regarding Legal Opinions*, but do not seem to understand that fixture filing does not perfect security interests in California. Fitzgibbon & Glazer, *Legal Opinions in Corporate Transactions: Opinions Relating to Security Interests in Personal Property*, 44 BUS. LAW. 655, 673-74 n.70 (1989). The authors state that "[t]he Code refers to such filing [fixture filing] as a method of perfection," citing Official Text section 9-313(4)(b), and then, in the same footnote, quote from the *Report Regarding Legal Opinions* and from another work discussing legal opinions in California transactions. *Id.* However, Fitzgibbon & Glazer do not point out that California's Article 9 (specifically California's version of section 9-313(4)(b)) does not refer to fixture filing as perfection. Most importantly, they do not point out that fixture filing does not perfect security interests in fixtures in California.

Presumably most out-of-state lawyers and businesspeople will not subscribe to the California State Bar's magazine, and one of the reasons for having a *Uniform Commercial Code* is so people will not have to buy separate practice guides for each state. Thus, the excellent but very brief article by Mr. Bayer and the equally excellent book by Professor Ayer are not likely to assist persons outside of California. Due to space requirements, neither of these works explain the authors' conclusion that the California version requires a chattel records filing, but no reader of these works will ignore the advice of these authoritative authors.

See also Homrighausen & Sodergren, *Recent Amendments to California UCC Relating to Priorities in Fixtures*, 4 BUS. L. NEWS 36, 36 (1981) (stating that "[i]n many cases, Section 9313 requires both perfection of the security interest in the goods as otherwise prescribed by the Code (ordinarily by filing with the Secretary of State) and a fixture filing, before the fixtures claimant will qualify for priority over a conflicting real estate claimant"—by negative implica-

changes will lead to real losses on the part of secured parties. Secured parties in numerous reported cases from other jurisdictions made only real estate records filings.¹⁰⁰ Under the Official Text, a secured party who makes only a fixture filing will have a perfected security interest if the collateral is in fact held to be fixtures, but *only* if the collateral is held to be fixtures.¹⁰¹ Therefore, secured parties should make both a fixture filing and a precautionary chattel records filing even if the secured parties are sure the collateral is fixtures, just in case the secured parties are wrong. A substantial number of secured parties outside of California have failed to follow this good advice to their loss.¹⁰² There is no reason to believe California secured parties will always follow it. A secured party in California who is misled by the subtle California changes and who is certain the collateral is fixtures will probably be as likely as secured parties in other states to make only a fixture filing.

Perhaps there are no reported California cases in which this has happened because California has not suffered a severe downturn in the real estate market since the fixture provisions were adopted in 1980. As Grant Gilmore pointed out, fixture priority cases tend to be minimal in a

tion a fixture filing does not, at least in "many cases," suffice to perfect a security interest in fixtures; however, this article does not appear in any of the usual indexes to legal literature).

100. Indeed, secured parties appear to be much more likely to make only a real property records filing than to make only a chattel records filing when the collateral may or may not be classified as fixtures. In a prior article, the author gathered cases decided under the 1962 version of Article 9 in which secured parties suffered loss because they incorrectly made only real estate filings or only chattel records filings. See Scarberry, *supra* note 3, at 415-16 & nn.64-65. There are three times as many cases in which the secured parties made only real estate filings. *Id.* The author has not attempted to count the number of cases in which secured parties made only real estate filings and were vindicated when the court held the collateral to be fixtures. For a case in which a secured party filed only a fixture filing and prevailed because the court held the collateral to be fixtures, see *In re Galvin*, 39 Bankr. 1016 (Bankr. D.N.D. 1984).

101. Scarberry, *supra* note 3, at 441-42 & n.165.

102. The court in each of the following cases held that the collateral was not fixtures, that the security interest was unperfected because only a real estate filing had been made, and that the security interest was avoidable in bankruptcy: *In re Factory Homes Corp.*, 333 F. Supp. 126 (W.D. Ark. 1971); *In re Park Corrugated Box Corp.*, 249 F. Supp. 56 (D.N.J. 1966); *In re Hammond*, 38 Bankr. 548 (Bankr. E.D. Tenn. 1984); *Still v. City Bank & Trust Co.* (*In re Belmont Indus.*), 1 Bankr. 608 (Bankr. E.D. Tenn. 1979); *In re Kahl*, 10 U.C.C. Rep. Serv. (Callaghan) 1322 (Bankr. W.D. Wis. 1972); *In re Plummer*, 6 U.C.C. Rep. Serv. (Callaghan) 555 (Bankr. E.D. Mich. 1969); *In re Nelson*, 6 U.C.C. Rep. Serv. (Callaghan) 857 (D. Utah 1969), *aff'g* 6 U.C.C. Rep. Serv. (Callaghan) 854 (Bankr. D. Utah 1968); *In re Collier*, 3 U.C.C. Rep. Serv. (Callaghan) 1076 (Bankr. E.D. Tenn. 1966); *In re Universal Container Corp.*, 2 U.C.C. Rep. Serv. (Callaghan) 802 (Bankr. E.D. Pa. 1963). See also *Cain v. Country Club Delicatessen, Inc.*, 25 Conn. Supp. 327, 203 A.2d 441 (1964) (collateral held not to be fixtures so secured party who made proper chattel records filing had priority over secured party who filed as if the collateral were fixtures and did not make chattel records filing).

time when real estate values are increasing,¹⁰³ as they have, by and large, in California. Interestingly, no reported cases have dealt with *any* of the California fixture provisions.

VI. HOW THE CALIFORNIA VERSION SHOULD BE AMENDED

Simple additions to California Commercial Code sections 9401(7) and 9313(1)(b) can make the California version clear. The following three sentences could be added to section 9401(7):

The making of a fixture filing neither perfects a security interest in fixtures nor constitutes the filing of a financing statement for purposes of section 9312. However, a fixture filing is required for priority over conflicting interests in fixtures to the extent provided in section 9313. Subdivision (1) of this section governs the place of filing of financing statements that are filed in order to perfect security interests in fixtures.

The following very similar sentences could be added to section 9313(1)(b):

The making of a fixture filing neither perfects a security interest in fixtures nor constitutes the filing of a financing statement for purposes of section 9312. However, a fixture filing is required for priority over conflicting interests in fixtures to the extent provided in this section. Subdivision (1) of section 9401 governs the place of filing of financing statements that are filed in order to perfect security interests in fixtures.

If the substance of the California provisions is to remain intact, then, at the very least, these additions should be made to clarify the California version.¹⁰⁴

However, since an amendment is needed, it is worth considering whether the California version should be substantively amended to permit fixture filings to perfect security interests in fixtures in California, at least in some cases. To consider that, we must consider why California rejected the Official Text's rule that fixture filing perfects a security interest in fixtures.

103. 2 G. GILMORE, *supra* note 4, § 28.7, at 771.

104. The reference to section 9312 is necessary to explain fully the intended consequences of California's refusal to allow fixture filing to perfect a security interest in fixtures. If a fixture filing were sufficient to give a secured party a priority date for purposes of section 9312, then a lender who considered lending against fixtures would need to search the real estate records before lending to be sure that there were no fixture filings that could be the basis for an earlier secured party's claim of priority. That would frustrate the purpose of the California fixture provisions, especially to the extent that the fixtures are "readily removable" factory or office machines. See *infra* notes 161-62 and accompanying text.

A. *Why California Does Not Permit Perfection by Fixture Filing*

The State Bar Committee identified four reasons for not permitting security interests in fixtures to be perfected by fixture filing. First, it may prevent creditors from being misled as to the proper place to file financing statements.¹⁰⁵ Second, it may minimize disputes over whether particular goods are or are not fixtures.¹⁰⁶ Third, it may prevent creditors from being misled as to the proper place to search for financing statements.¹⁰⁷ Fourth, it may allow creditors not to have to search in places where it would be undesirable to require them to search.¹⁰⁸ Interestingly, three of the four examples in the *State Bar Committee Report's* Comment to section 9313 involve readily removable collateral.¹⁰⁹ As we will see, the changes California made in the readily removable fixtures priority rules provide the only persuasive reason for not permitting fixture filings to perfect security interests in fixtures.¹¹⁰

1. California's first and second reasons, which are applicable in any state

The State Bar Committee's first and second reasons for not permitting perfection by fixture filing are generally applicable in any state that has adopted U.C.C. Article 9. The first reason is that the Official Text may mislead creditors into filing in the wrong office.¹¹¹ Many of the reported fixture cases involve secured parties who incorrectly concluded that their collateral was fixtures and who, as a result, made only fixture filings. Those secured parties ended up with unperfected security interests, because a real property records filing does not perfect a security interest in non-fixtures even under the Official Text.¹¹² The usual result was that the security interests were avoided—eliminated—in bankruptcy.¹¹³ The State Bar Committee reasoned that if the law required a chattel records filing in all cases, then secured parties would make chattel records filings even if they thought their collateral was fixtures; the result

105. STATE BAR COMMITTEE REPORT, *supra* note 27, reprinted in CAL. ASSEMBLY J., at 19443-44, and Appendix 2, *infra*, at 747-48 (Comment 1(a) to proposed section 9313).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*, reprinted in CAL. ASSEMBLY J., at 19443-45, and Appendix 2, *infra*, at 747-50 (Comments 1(a) and 3 to proposed section 9 313).

110. See *infra* notes 141-63 and accompanying text.

111. STATE BAR COMMITTEE REPORT, *supra* note 27, reprinted in CAL. ASSEMBLY J., at 19443-44, and Appendix 2, *infra*, at 747-48 (Comment 1(a) to proposed section 9313).

112. Scarberry, *supra* note 3, at 441-42 & n.165.

113. See cases cited *supra* note 102.

would be that the secured parties would have perfected security interests even if they were incorrect in their assumption that their collateral was fixtures.¹¹⁴

This approach would make some sense if the California changes were not so subtle. The State Bar Committee's scheme will help a secured party not to be misled *if* the secured party *knows* that a chattel records filing must be made, regardless of whether the goods are fixtures. If the secured party is so informed, then he will make the chattel records filing even if he is sure the collateral is fixtures. Then, even if the secured party is wrong and the collateral is not fixtures, the security interest will still be perfected, because of the chattel records filing.

The State Bar Committee's second reason for not permitting perfection by fixture filing—to minimize disputes over whether items are or are not fixtures¹¹⁵—would also make some sense if California's changes were not so subtle. If a secured party makes the required chattel records filing under the State Bar Committee's scheme along with a fixture filing, then the parties and the courts can often avoid the difficult question of whether the collateral is fixtures. If the collateral is fixtures, then (1) the secured party will prevail over most chattel claimants to the fixtures, including the trustee in bankruptcy,¹¹⁶ because the chattel records filing perfected the security interest,¹¹⁷ and (2) the secured party will prevail over real estate claimants because, in addition to perfecting her security interest, she also made a fixture filing.¹¹⁸ If the collateral turns out not to

114. STATE BAR COMMITTEE REPORT, *supra* note 27, reprinted in CAL. ASSEMBLY J., at 19443-44, and Appendix 2, *infra*, at 747-48 (Comment 1(a) to proposed section 9313).

115. *Id.*

116. See Scarberry, *supra* note 3, 474-78.

117. See CAL. COM. CODE § 9201 (West 1964 & Supp. 1990) (security agreement is effective against other creditors and against purchasers of the collateral except as otherwise provided by the code); *id.* § 9301(1)(b) (judicial lien creditor has priority over secured party only if judicial lien arises *before the security interest is perfected*); *id.* § 9301(1)(c) (non-ordinary course bona fide purchaser of the collateral from the debtor has priority over secured party only if she gives value and receives collateral *before security interest is perfected*); *id.* § 9312(4) (secured party who *perfects* purchase money security interest within 20 days of debtor's receipt of collateral has priority over other secured parties); *id.* § 9312(5)(a) (secured party who is the *first either to perfect or to file* a financing statement has priority over other Article 9 secured parties unless they qualify for purchase money priority).

118. Of course, the secured party will have to satisfy the other requirements of section 9313 to have priority over real estate claimants. See CAL. COM. CODE § 9313(4)(a) (West Supp. 1990) (secured party's purchase money security interest has priority if secured party makes fixture filing within 10 days after the collateral is affixed); *id.* § 9313(4)(b) (secured party has priority if she makes fixture filing before the real estate claimant records his interest, if real estate claimant's interest arose before the collateral was affixed). Neither sections 9313(4)(c) (readily removable fixtures) nor 9313(4)(d) (conflict with judicial lien creditor) require fixture filing for priority. *Id.* §§ 9313(4)(c), (d).

be fixtures, then (1) the secured party again will prevail over chattel claimants to the collateral because the chattel records filing perfected the security interest,¹¹⁹ and (2) the secured party will prevail over real estate claimants because they have no interest at all in the collateral if it is not fixtures.¹²⁰

The cases show that, under the Official Text approach, determining whether the collateral is fixtures is often crucial. As we have seen, secured parties often make only fixture filings in the belief that their collateral is fixtures, knowing that if the goods are fixtures, then the fixture filing is sufficient. If the goods turn out not to be fixtures, however, the security interest is unperfected and thus vulnerable to the trustee in bankruptcy, among others.¹²¹ Thus, it has often been crucial for courts to determine whether the goods are fixtures.

By insisting on a chattel records filing in every case, the State Bar Committee's approach may minimize the number of cases in which it matters whether the collateral is fixtures, thus minimizing the number of disputes over that difficult issue.¹²² However, a court still must determine if the collateral is fixtures if a real estate claimant would have priority over the Article 9 secured party if the collateral were fixtures.¹²³

As the State Bar Committee's first and second reasons for not permitting perfection by fixture filing apply in any state that has adopted U.C.C. Article 9, it would be surprising if the State Bar Committee was the first to suggest that a chattel records filing should be required even when the collateral is fixtures. In fact, Professor Homer Kripke made such a proposal in 1964—sixteen years before the State Bar Committee.¹²⁴ He pointed out that this could provide "some alleviation of the

119. See *supra* notes 116-17.

120. See U.C.C. § 9-313, Official Comment 4 (introductory language).

121. See cases cited *supra* note 102.

122. Determining whether collateral is fixtures can be very difficult. See Scarberry, *supra* note 3, at 417-28.

123. For example, the secured party may have made only a chattel records filing because she did not realize that the collateral might be fixtures. Such a secured party's security interest in non-readily removable fixtures will be subordinate to the recorded interest of a real estate mortgagee or of a purchaser of the real estate. CAL. COM. CODE § 9313(4), (7) (West Supp. 1990). Other examples would be cases in which a secured party made the fixture filing too late to qualify for the purchase money priority of section 9313(4)(a) or for the first-in-time priority of section 9313(4)(b).

124. Kripke, *supra* note 4, at 57-58. However, Professor Kripke would have permitted an unperfected security interest in fixtures to prevail against real estate claimants if the real estate filing had been made. *Id.* at 59-60. The State Bar Committee's proposal—which California adopted—does not; the fixture filing is worthless unless the security interest is perfected. See STATE BAR COMMITTEE REPORT, *supra* note 27, reprinted in CAL. ASSEMBLY J., at 19444, and Appendix 2, *infra*, at 748 (Comment 1(a) to proposed section 9313).

present disastrous consequences that arise if a secured party guesses incorrectly whether an article is or is not a fixture."¹²⁵ Professor Kripke understood, however, that it was necessary to "distinguish sharply" between the chattel records filing which perfects the security interest and the real estate records filing which merely provides some priority advantages as against real estate claimants.¹²⁶ Therefore, Professor Kripke suggested the real estate records filing not be called a "filing" at all, but rather a "real estate notification."¹²⁷

If the State Bar Committee had taken Professor Kripke's advice, there would be no problem. No one would assume that a "real estate notification" would perfect a security interest; both the Official Text and the California version of Article 9 demand the *filing* of a *financing statement* for perfection.¹²⁸ Unfortunately, under the State Bar Committee's proposal the real estate filing is called a fixture filing and is characterized as the filing of a financing statement, even though it does not perfect a security interest.¹²⁹

Even though Professor Kripke was the principal draftsman of the present Official Text Article 9 fixture provisions,¹³⁰ the Official Text does not require a chattel records filing to perfect a security interest in fixtures. If the collateral is fixtures, a real property filing (a fixture filing) is sufficient.¹³¹ Professor Kripke either changed his mind or was unable to convince the members of the Article 9 Review Committee that a chattel records filing should be required. The first and second reasons given by the State Bar Committee for not permitting perfection by fixture filing were apparent to Professor Kripke and the others involved in drafting and approving the present Official Text's Article 9 fixture provisions.¹³² They must have concluded that the benefits of requiring a chattel records filing were outweighed by the cost of filing two financing statements in many transactions. In every case where fixtures are the collateral, a chat-

125. Kripke, *supra* note 4, at 57.

126. *Id.* at 60.

127. *Id.*

128. CAL. COM. CODE § 9302(1) (West Supp. 1990); U.C.C. § 9-302(1) (1987).

129. A student Note recognizes that the State Bar Committee's scheme is similar to Professor Kripke's suggestion, and even recognizes that California failed to follow Professor Kripke's suggestion that the real estate filing be called a "notification." Note, *Fixtures: A Real Fix*, *supra* note 29, at 998 n.105, 999 n.108. However, the student Note does not point out the misleading nature of the California version, nor does it criticize California's failure to follow Professor Kripke's suggestion.

130. See Scarberry, *supra* note 3, at 439 & n.155.

131. *Id.* at 441-43.

132. See *supra* notes 124-25 and accompanying text.

tel records filing would be needed,¹³³ even if the secured party made a fixture filing and even if the collateral was unquestionably fixtures. Each chattel records filing by itself is not very expensive, but the cumulative expense of all the extra chattel records filings by all the secured parties was apparently considered too great.

The distinguished scholars and practitioners who formulated the present Official Text thus rejected the State Bar Committee's first and second reasons for not permitting perfection by fixture filing as insufficient. Perhaps they were wrong, but they were not so clearly wrong that a state should sacrifice the interests of uniformity and require a chattel records filing to perfect a security interest in fixtures. Therefore, the Committee's first and second reasons are not sufficient to justify California's basic change in the scheme of Article 9's fixture provisions. However, the State Bar Committee identified two additional reasons for its approach, both of which apply with peculiar force in California.

2. California's third and fourth reasons, which apply with peculiar force in California

a. the third and fourth reasons

The State Bar Committee's third reason for not permitting perfection by fixture filing was its concern that otherwise creditors would be misled into searching in the wrong set of records for filed financing statements.¹³⁴ The fourth reason for the Committee's approach was that, otherwise, creditors would be required to search for financing statements in the real property records—an undesirable requirement in some cases.¹³⁵

The State Bar Committee must have been primarily concerned here with creditors who may consider taking non-purchase money security interests. Creditors considering taking purchase money security interests seldom need to bother with searches at all,¹³⁶ so the Committee's third

133. There is an exception for purchase money security interests in consumer goods (other than motor vehicles and boats which are required to be registered); the security interests are automatically perfected without filing even if the goods are fixtures. CAL. COM. CODE § 9302(1)(d) (West 1964 & Supp. 1990); U.C.C. § 9-302(1)(d) (1987). A filing is made only if the secured party desires protection against the possibility that the consumer may sell the consumer goods to another consumer. See U.C.C. § 9-307(2) (1987). California did not adopt section 9-307(2). See CAL. COM. CODE § 9307 (West 1964 & Supp. 1990). Thus there is no need for a filing in California to protect against the consumer re-purchaser.

134. STATE BAR COMMITTEE REPORT, *supra* note 27, reprinted in CAL. ASSEMBLY J., at 19443-44, and Appendix 2, *infra*, at 747-48 (Comment 1(a) to proposed section 9313).

135. *Id.*

136. A purchase money security interest in non-inventory collateral will have priority over any other Article 9 security interest if the purchase money security interest is perfected within

and fourth reasons have little application to them. As we will see, the need to facilitate such non-purchase money lending on readily removable fixtures provides the only persuasive rationale for not permitting fixture filing to perfect a security interest in fixtures.

The Committee's third and fourth reasons are closely related. A potential Article 9 secured party who does not realize that items may be fixtures will not search the real property records for financing statements. If the items *are* fixtures, then, under the Official Text, a security interest in them could be perfected by a filing in the real property records without any chattel records filing.¹³⁷ The potential Article 9 secured party will thus have been misled (by his conclusion that the items were not fixtures) into searching only the chattel records. The potential Article 9 secured party might then take a security interest in the items without knowing of a perfected security interest which has priority. On the other hand, a potential Article 9 secured party who realizes that the items might be fixtures will be forced, under the Official Text, to make a costly real property records search for fixture filings to be sure no prior perfected Article 9 security interest in the items exists. Thus, the Official Text either misleads a potential secured party into not searching the real property records, or forces that party to do an expensive real property records search.

By requiring a chattel records filing for perfection, the California version insures that a potential Article 9 secured party who does not think to search the real property records will still find a financing statement in the chattel records if a prior perfected security interest in the items exists. Similarly, the California version permits a potential Article 9 secured party to determine whether there are any perfected Article 9 security interests in the items without doing an expensive real property records search. A potential Article 9 secured party can intentionally omit the real property records search even if she is aware that the items may be fixtures. By simply requiring an inexpensive chattel records filing in every case, the California version renders the expensive real property records search unnecessary.

This argument sounds appealing, but would have little force if Cali-

20 days after the debtor receives possession of the collateral. CAL. COM. CODE § 9312(4) (West Supp. 1990). The Official Text of section 9-312(4) only allows 10 days. U.C.C. § 9-312(4) (1987). Thus, there is little need to search for other security interests. Similarly, as against real estate interests that are in existence at the time the collateral is affixed, the purchase money security interest will have priority if a fixture filing is made within 10 days after the collateral is affixed, CAL. COM. CODE § 9313(4)(a) (West Supp. 1990), eliminating any need to search for such real estate interests.

137. Scarberry, *supra* note 3, at 441-43.

fornia had not made another change in the Official Text. Real property claimants, such as real property mortgagees,¹³⁸ do not have to file in the chattel records; they simply record their interests in the real estate records. If the potential Article 9 secured party does not make a real property records search, she will not discover the interests of real property claimants, who pose a greater danger to her fixture security interest than do other Article 9 secured parties. Here we reach the crux of the issue.

Suppose the only change a state makes in the Official Text is to require chattel records filings to perfect Article 9 security interests in fixtures. A creditor who takes a non-purchase money security interest in collateral in that state without searching the real property records can have a high degree of assurance that there are no perfected Article 9 security interests in the collateral, if his search of the chattel records reveals no financing statements.¹³⁹ However, if the collateral turns out to be fixtures, that creditor has much more to worry about than just competing Article 9 security interests. The creditor will be junior to prior recorded real property claimants, such as mortgagees of the underlying real property.¹⁴⁰ It would be small comfort to the creditor to be protected against competing claims of other Article 9 secured parties who did not make chattel records filings when he is not protected against the much more likely claim of a real property mortgagee. As a practical matter, the creditor could not safely omit the real property records search simply because the Official Text had been changed so that security interests in fixtures could not be perfected by fixture filing.

Thus, if the only change California made to Article 9's fixture provisions was to require a chattel records filing in every case, the Committee's third and fourth reasons supporting the change would be unpersuasive. The extra chattel records filings would be a waste of time and money. However, the State Bar Committee's third and fourth reasons for requiring chattel records filings in every case become somewhat persuasive in light of another change California made—a change

138. Trust deeds, rather than mortgages, are typically used as real property security devices in California. Whenever a reference is made in this article to a "mortgage" or "mortgagee" the terms are meant to include "deed of trust" and "beneficiary under the deed of trust."

139. The secured party can have a high degree of assurance of this, but cannot be certain of it. See McLaughlin, "Seek But You May Not Find": *Non-UCC Recorded, Unrecorded and Hidden Security Interests Under Article 9 of the Uniform Commercial Code*, 53 *FORDHAM L. REV.* 953 (1985), reprinted in 29 *CORP. PRAC. COMMENTATOR* 65 (1987-88).

140. The creditor will be unable to qualify for priority under section 9-313(4)(a) (because the creditor's security interest will not be a purchase money security interest), (b) (because the real estate interests are already recorded), or (c) (because the collateral is already affixed). The real estate claimants will therefore prevail under section 9-313(7).

designed to facilitate non-purchase money lending against existing readily removable fixtures.

b. why the third and fourth reasons have particular strength in California: herein of the California changes to the readily removable fixture priority rules

The State Bar Committee's third and fourth reasons for not permitting perfection by fixture filing apply with particular strength in California because California changed Official Text section 9-313(4)(c).¹⁴¹ That section deals with various kinds of "readily removable" fixtures: "readily removable factory or office machines," and "readily removable replacements of domestic appliances which are consumer goods."¹⁴²

i. the readily removable fixture priority rules under the Official Text

Under the Official Text, a security interest in such "readily removable" fixtures has priority over the interests of real estate claimants, such as real property mortgagees, if "before the goods become fixtures the security interest is perfected by any method permitted by this Article."¹⁴³ The secured party does not have to perfect by fixture filing; instead, the secured party can perfect by making a chattel records filing or even by doing nothing in the case of automatic perfection of purchase money security interests in consumer goods.¹⁴⁴ As long as the security interest is perfected by one of these means *before the collateral is affixed to the real property*, the Article 9 secured party will have priority over real estate claimants.

However, if the security interest is not perfected until after the collateral is affixed, Official Text section 9-313(4)(c) does not help the Article 9 secured party; in that case the real estate claimant will prevail unless the Article 9 secured party is protected by one of the other subsections of 9-313.¹⁴⁵ As against a real property mortgagee, for example, the Article 9 secured party would either have to perfect by fixture filing before the mortgagee recorded his interest,¹⁴⁶ or the Article 9 secured party would have to obtain a purchase money security interest in the

141. See Appendix 1, *infra*, at 721 (comparing California fixture provisions with fixture provisions of U.C.C. Article 9 Official Text).

142. U.C.C. § 9-313(4)(c) (1987).

143. *Id.*

144. See R. HENSON, *supra* note 3, § 8-3, at 308.

145. See U.C.C. § 9-313(7) (1987) (unless the secured party prevails under one of the other subsections of section 9-313, the security interest is subordinate to the interest of the real estate claimant).

146. See *id.* § 9-313(4)(b).

collateral and perfect it by fixture filing within ten days after the collateral was affixed.¹⁴⁷

Therefore, if at the time the debtor seeks financing the fixtures have already been affixed to the real property and a real property claimant has already recorded, there is no effective way to use readily removable fixtures as collateral under the Official Text of Article 9. A potential lender who seeks an Article 9 security interest in the readily removable fixtures is unlikely to lend if he is not assured of a first priority position in the fixtures. The potential lender will not be able to obtain a purchase money security interest in the fixtures because the debtor already owns them;¹⁴⁸ thus, the potential lender cannot obtain priority under Official Text section 9-313(4)(a). The potential lender will not be able to perfect by fixture filing before the real estate claimant's interest is recorded because the real estate claimant has already recorded; thus, the potential lender will not be able to obtain priority under Official Text section 9-313(4)(b). The potential lender will not be able to perfect the security interest before the fixtures are affixed to the real property because they are already affixed; thus, the potential lender will not be able to obtain priority under Official Text section 9-313(4)(c), even though the fixtures are readily removable.

The existing real property mortgagee is unlikely to extend additional credit under the mortgage in reliance on the readily removable fixtures, even if they were added after the mortgage was taken. It will seldom be clear that the readily removable fixtures are in fact fixtures; a court might well find them not to be fixtures, and, in that case, they would not be covered by the mortgage. The mortgagee probably could safely make the loan if he took an Article 9 security interest in the fixtures to complement

147. *See id.* § 9-313(4)(a). Section 9-313(4)(d) would not apply because the mortgagee is not a judicial lien creditor. *See id.* § 9-313(4)(d). Of course, the secured party would have priority if she obtained a waiver of interest or a subordination agreement from the mortgagee. *Id.* §§ 9-313(5)(a), 9-316.

148. Section 9-107 provides:

- A security interest is a "purchase money security interest" to the extent that it is
- (a) taken or retained by the seller of the collateral to secure all or part of its price; or
 - (b) 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.

U.C.C. § 9-107 (1987). A lender who is considering lending against existing readily removable fixtures is not the seller of the fixtures and cannot make advances that enable the debtor to acquire the fixtures—the debtor already owns them. Even if the secured party could obtain a purchase money security interest, she would still have to perfect by fixture filing within 10 days after the fixtures were affixed to the real property to have priority under section 9-313(4)(a). This would not be possible unless by coincidence the fixtures had been affixed to the real estate within 10 days before the secured party took her security interest.

his mortgage interest. If the items are ultimately considered fixtures, the mortgagee's mortgage would cover them;¹⁴⁹ if they are ultimately not considered fixtures, then the mortgagee's Article 9 security interest would protect the mortgagee. However, the mortgagee may choose not to lend or may exploit his effective monopoly position. If the mortgagee chooses not to lend, the debtor may have no other source of financing. If the mortgagee chooses to lend, he may be able to force the debtor to accept less favorable terms than the debtor would accept if the debtor had another option.

ii. the California change in the readily removable fixture rules and the rationale for the change

If real estate mortgagees were likely to rely on readily removable fixtures, it would be reasonable to protect them in the way the Official Text does. However, mortgagees are not likely to rely on existing readily removable fixtures in making their initial loans because it will seldom be clear that the items are in fact fixtures.¹⁵⁰ Similarly, mortgagees will not likely forbear to foreclose or grant extensions of time to repay or grant additional credit under their mortgages in reliance on any later-affixed readily removable fixtures. Thus, it may make sense to allow the debtor to use readily removable fixtures to obtain Article 9 financing from persons other than the mortgagee.

Accordingly, California's version of section 9-313(4)(c) gives the Article 9 secured party priority over real estate claimants if the Article 9 security interest is perfected, regardless of when it is perfected.¹⁵¹ There is no requirement that the security interest be perfected before the collateral is affixed, before the real estate claimant records his interest, or by any other deadline.¹⁵² Therefore, real estate claimants in California cannot safely rely on their real estate liens in the kinds of readily removable fixtures that are covered by 9313(4)(c). At any time the debtor can grant an Article 9 security interest in those fixtures; the Article 9 secured party can then obtain priority over the real estate claimants simply by making

149. However, the advance will not be "obligatory," and hence may not have the same priority as the original mortgage loan as against other real estate claimants, such as junior mortgagees. See 4 H. MILLER & M. STARR, CURRENT LAW OF CALIFORNIA REAL ESTATE § 9:10, at 36 (2d ed. 1989).

150. See Scarberry, *supra* note 3, at 417-28.

151. "A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where . . . (c) The fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods." CAL. COM. CODE § 9313(4)(c) (West Supp. 1990).

152. *Id.*

a chattel records filing. A real property mortgagee in California who wants to assure that he has priority as to such fixtures must take an Article 9 security interest along with the real property mortgage.

Presumably the foregoing analysis was what the State Bar Committee had in mind when it stated that, "[a]s a policy matter, the Committee concluded that perfected security interests in the types of goods that are described in paragraph (4)(c) should prevail over adverse real estate interests regardless of the time of perfection."¹⁵³ Also, as the State Bar Committee pointed out, the California version of (4)(c) will tend to minimize disputes over whether items are fixtures, "since the holder of a perfected security interest in these types of goods will prevail over adverse real estate interests whether or not the goods constitute 'fixtures.'"¹⁵⁴

- iii. why California's change in the readily removable fixture priority rules gives particular strength to the third and fourth reasons

The particular strength of the State Bar Committee's third and fourth reasons for not permitting perfection by fixture filing in California now becomes apparent. To restate those reasons: the State Bar Committee wanted to prevent creditors from being misled as to where to search for financing statements—if a creditor did not realize that an item might be a fixture, the creditor would not think to search in the real property records; the State Bar Committee also wanted to allow a creditor to omit an expensive real property records search even if he realized the item might be a fixture.¹⁵⁵

As shown above, if the only change California had made to the Official Text was to require chattel records filings on fixtures, the State Bar Committee's goals would not have been accomplished. A creditor who made only a chattel records search would discover any perfected Article 9 security interest, but would not discover adverse real estate claims.¹⁵⁶ Thus, the creditor who omitted the expensive real property records search, whether intentionally or not, would be at risk.

However, California's amendment to Official Text section 9-313(4)(c) allows the creditor safely to omit the expensive real property records search *if the items are readily removable items of the types de-*

153. STATE BAR COMMITTEE REPORT, *supra* note 27, reprinted in CAL. ASSEMBLY J., at 19444, and Appendix 2, *infra*, at 749 (Comment 1(c) to proposed section 9313).

154. *Id.*

155. See *supra* notes 107-08 and 134-35 and accompanying text.

156. See *supra* notes 139-40 and accompanying text.

scribed in section (4)(c).¹⁵⁷ If the Article 9 secured party perfects his security interest in such readily removable items at any time, the Article 9 secured party will have priority over the real estate claims.¹⁵⁸ Therefore, the Article 9 secured party can safely omit the expensive real property records search that would otherwise be needed to discover those real estate claims. The State Bar Committee asserts that the Official Text forces creditors to make searches that they should not be forced to make.¹⁵⁹ It is now apparent why the only example the State Bar Committee gives in support of this assertion involves readily removable fixtures.¹⁶⁰

Thus, there is a connection between the two California changes. The change in the priority rules allows a potential secured party to omit a real property records search for real estate interests because she will have priority over any real estate interests that may exist. The refusal to permit perfection by fixture filing allows her to omit the search of the real estate records for fixture filings made by other Article 9 secured parties, because, if another Article 9 secured party has made only a fixture filing, that secured party will have an unperfected, and therefore junior, security interest.

If fixture filing could perfect a security interest, the potential secured party would have to do more than just search the real estate records for normal fixture filings. The search would have to extend to mortgages and trust deeds, which can be effective as fixture filings.¹⁶¹ Further, at least one mortgage or trust deed exists on most real estate. If the search reveals a mortgage or trust deed, and if it qualifies as a fixture filing, what could the potential secured party do? Even if the mortgagee has not yet taken an Article 9 security interest in the readily removable fixtures, he may take one in the future. If the mortgagee were to do so, the mortgagee's security interest would have priority over the potential secured party's security interest under the first-to-file-or-perfect rule.¹⁶² Therefore, a potential secured party could not safely lend against existing read-

157. CAL. COM. CODE § 9313(4)(c) (West Supp. 1990).

158. See *supra* notes 151-54 and accompanying text.

159. STATE BAR COMMITTEE REPORT, *supra* note 27, reprinted in CAL. ASSEMBLY J., at 19443, and Appendix 2, *infra*, at 747 (Comment 1(a) to proposed section 9313).

160. See *id.*

161. CAL. COM. CODE § 9402(6) (West Supp. 1990).

162. This result follows even if the mortgagee had not yet taken an Article 9 security interest in the readily removable fixtures at the time the potential secured party ("PSP") was considering lending against them. If PSP went ahead and lent against the fixtures, he would be the first to obtain a perfected Article 9 security interest against those fixtures. However, if the mortgagee later took an Article 9 security interest in the fixtures, the mortgagee's Article 9 security interest would have priority over PSP's Article 9 security interest. That result would

ily removable fixtures without obtaining a waiver or a subordination agreement from any existing mortgagee or mortgagees.¹⁶³

Thus, the case for refusing to allow perfection by fixture filing is stronger in California than in other states which have not changed the readily removable fixture priority rules.

B. How the California Version Should Be Amended—The Choices

We have seen that California's Article 9 fixture provisions should be amended. The question becomes how they should be amended. The amendments:

- (1) could simply make it clear that a fixture filing does not perfect a security interest in fixtures and is irrelevant to priority disputes except as provided in section 9313;¹⁶⁴
- (2) could conform the California version to the Official Text to the extent that a fixture filing will perfect a security interest in fixtures and provide a priority date under section 9312; or
- (3) could take the middle ground by providing that a fixture filing perfects a security interest in fixtures and provides a priority date under section 9312 unless the fixtures are readily removable fixtures of the kinds described in section 9313(4)(c).

The author believes the third choice is the best.

The only persuasive reason for refusing to permit perfection by fixture filing in California is the prohibitive effect it would have on financing secured by existing readily removable fixtures covered under section

follow if we gave fixture filings the same effect as ordinary chattel record filings, as the following analysis shows.

Under California's section 9312(5), as under the Official Text section 9-312(5), priority contests between Article 9 secured parties are won by the interest with the earlier priority date. A security interest's priority date under section 9312(5) is the *earlier* of the date on which the security interest was perfected or on which a financing statement covering the collateral was filed. CAL. COM. CODE § 9312(5) (West Supp. 1990). We are assuming the mortgagee's recorded mortgage is effective as a fixture filing, as it likely will be. The mortgage was recorded before PSP filed a financing statement and before PSP perfected his security interest. Thus, if the fixture filing is effective to give mortgagee a priority date, mortgagee's Article 9 security interest will have an earlier priority date than PSP's. See generally J. WHITE & R. SUMMERS, *supra* note 86, at § 24-4 (discussing the first-to-file-or-perfect rule of U.C.C. § 9-312).

Therefore, PSP cannot safely lend without getting a subordination agreement from mortgagee. If PSP lends without getting such an agreement, the mortgagee can later take a security interest in the readily removable fixtures and have priority over PSP.

163. See Bayer, *supra* note 99, at 60 (before passage of 1980 California fixture provisions, borrowers often could not obtain credit on the security of existing fixtures because of the inability to convince landlords and mortgagees to waive their interests or to subordinate them).

164. For language that would accomplish this result, see *supra* text accompanying note 104.

9313(4)(c).¹⁶⁵ The unwanted effect can be avoided completely simply by requiring the making of a chattel filing to perfect a security interest in such fixtures.¹⁶⁶ There is no need to require chattel filings on fixtures that are not readily removable fixtures covered under section 9313(4)(c). Requiring such filings, as California law presently does,¹⁶⁷ allows the tail to wag the dog. Most readily removable items are not fixtures at all,¹⁶⁸ at least apart from large consumer appliances such as ranges and dishwashers which slide into place and appear to be "built-in."¹⁶⁹ Further, there is some question whether secured parties will be able to rely on section 9313(4)(c).

Apparently no reported cases in the United States construe the term "readily removable," and eminent commentators profess not to know what the term means.¹⁷⁰ The situation is probably not as bad as that; a review of the drafting history of section 9-313(4)(c) and of statements by

165. See *supra* notes 143-49 and accompanying text.

166. See *supra* notes 151-63 and accompanying text.

167. See *supra* notes 36-62 and accompanying text.

168. See U.C.C. § 9-313, comment 4(d); see also, e.g., *In re Park Corrugated Box Corp.*, 249 F. Supp. 56 (D.N.J. 1966). The machine in *Park Corrugated Box* was held not to be a fixture, even though it weighed over 22 tons, measured 10 feet by 8 feet, and was anchored by screws. *Id.* at 58. This was in spite of the fact that New Jersey law is one of the most favorable for a holding that loose or loosely affixed industrial equipment is fixtures, under its "institutional doctrine." *Id.* However, the machine had been moved several times within the plant by the plant owner. *Id.*

169. The older California cases held that "gas stoves or ranges when installed in a dwelling are not fixtures and that electrical appliances such as refrigerators and stoves are personal property . . . where . . . they are movable and can be disconnected by pulling a plug or unscrewing a gas connection." *Babbitt v. Babbitt*, 44 Cal. 2d 289, 294, 282 P.2d 1, 4 (1955) (citing *Daniger v. Hunter*, 114 Cal. App. 2d 796, 798, 251 P.2d 353, 354 (1952)). A more recent case held that a stove would be presumed to be a fixture in the absence of evidence to the contrary, but the court did not cite the earlier cases. *Fowler v. Fowler*, 227 Cal. App. 2d 741, 747, 39 Cal. Rptr. 101, 105 (1964). The author questions whether the older cases will be followed as to modern appliances that are designed to appear to be an integral part of the dwelling.

170. J. WHITE & R. SUMMERS, *supra* note 86, § 24-10, at 1158. Typewriters and photocopying machines are readily removable but perhaps not "lathes, drill presses and typical industrial machinery [I]t is quite unclear to us the extent to which 'readily removable factory or office machines' actually reaches into the plant and establishes a special rule for manufacturing equipment." *Id.* at 1159.

To date no cases have construed the 1972 Text of Section 9-313(4)(c), and interpretational issues abound. The most basic is the type of attachment to real estate that is sufficient to make factory and office machines and replacements of domestic appliances that are consumer goods fixtures under non-Code real estate law while at the same time leaving them "readily removable" under Article 9. "Factory or office machines" and "replacements of domestic appliances which are consumer goods" also are undefined terms. In view of these interpretational issues, subsection (4)(c) cannot be relied upon and is best used defensively if a real estate interest claims factory or office machines or replacements of domestic appliances that are consumer goods that a secured party previously had not considered to be fixtures.

its drafters yields a reasonably clear idea of the meaning of the term, and shows that most ordinary factory and office machines and most domestic appliances are "readily removable."¹⁷¹ The term has a definite enough

2 R. ALDERMAN & R. DOLE, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 1051 (2d ed. 1983).

171. Many readily removable items will not be fixtures at all. U.C.C. § 9-313, comment 4(d) (1987). To the extent such items might be fixtures, the drafters intended that ordinary machine tools, other ordinary factory and office machinery, and ordinary domestic replacement appliances be included in the "readily removable" category. 1969 A.L.I. PROC. 297-98 (comments by Professor Kripke); 1970 A.L.I. PROC. 426-27 (comments by Professor Kripke); see also *A Look at the Work of the Article 9 Review Committee: A Panel Discussion*, 26 BUS. LAW. 307, 314-15 (1970) (comments by the late Peter Coogan, one of the main participants in the formulation of the 1972 U.C.C. fixture amendments: the readily removable fixture rules should "take the pressure off for most of the typical financings involving the replacement of machines"). Professor Kripke, the principal draftsman of the 1972 U.C.C. fixture amendments, thought that in 90% of the machine tool cases a secured party would be able to count on the machinery being "readily removable." Kripke, *The Review Committee's Proposals to Amend the Fixture Provisions of the Uniform Commercial Code*, 25 BUS. LAW. 301, 305 (1969). Ordinary machinery, whether held down by gravity, bolts, or electric or water connections, was intended to be considered "readily removable." *Panel: A Second Look*, *supra* note 4, at 987 (comments by Mr. Coogan). It takes more than the fastening down of a machine or appliance with bolts or screws, the setting of it on a concrete emplacement, or the attachment of it to gas, electric or water lines to make it not "readily removable." 1969 A.L.I. PROC. 297-98 (comments by Professor Kripke); 1 P. COOGAN, W. HOGAN, D. VAGTS & J. MCDONNELL, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 3A.02[4], at 182-83, 3AA.13[1][iii], at 3AA-54 (1989) [hereinafter COOGAN-HOGAN-VAGTS-MCDONNELL]; *Panel: A Second Look*, *supra* note 4, at 982-84 (comments by Mr. Coogan); 9 W. HAWKLAND, R. LORD & C. LEWIS, UNIFORM COMMERCIAL CODE SERIES § 9-313:05, at 222-24 (1986 & Supp. 1989). Apparently a machine or appliance is readily removable unless it can only be removed "with great difficulty." 1 COOGAN-HOGAN-VAGTS-MCDONNELL, *supra*, § 3A.02[4], at 183.

Extremely large machines, for which the building is in essence merely a shell, or which would require demolition of part of the building to remove, are probably not readily removable. 1969 A.L.I. PROC. 297-98 (comments by Professor Kripke regarding such large machines); *Panel: A Second Look*, *supra* note 4, at 982-84 (comment by Peter Coogan that a beer vat which could only be removed by taking down "quite a bit of masonry" would not be readily removable). Collateral which is embedded in concrete presumably is not readily removable. *Id.* at 982-84 (comment by Peter Coogan that a bottling machine not embedded in concrete but fastened with bolts would be readily removable).

The Official Comments seem to assume that machinery and domestic appliances are generally readily removable and thus are silent as to the meaning of "readily removable." The Comments do say that the special priority rule of section 9-313(4)(c) applies against construction lenders even though the purchase money priority rule in section 9-313(4)(a) does not. The Comments give a reason that again suggests a broad application for the term "readily removable." U.C.C. § 9-313, comment 4(d) (1987). The reason given is that "[f]actory and office machines are not always financed as part of a construction mortgage, and the mortgagee should be alert to conflicting chattel financing of these machines." *Id.* The underlying point is that most factory and office machines are assumed to be readily removable, so the reason is not qualified to apply only to some special "readily removable" machinery sub-class of factory and office machines.

The 1969 A.L.I. Proceedings noted above and Professor Kripke's 1969 article concern the Article 9 Review Committee's original draft, which was *Preliminary Draft No. 1*, *supra* note

meaning for the American Law Institute and the National Conference of Commissioners on Uniform State Laws to use it in the proposed revision of U.C.C. Article 6.¹⁷² Thus, in many cases secured parties probably could rely on their collateral being held to be "readily removable" if it is held to be fixtures at all.¹⁷³ However, setting a rule for perfection for all security interests in fixtures based on concerns that apply only to those "readily removable" items that a court might hold to be fixtures is inappropriate, especially when the rule creates such a serious lack of uniformity with other states' versions of Article 9. Therefore, fixture filings should be permitted to perfect security interests in at least some fixtures.

On the other hand, California law is confused on when items become fixtures, especially when the question arises between a personal property claimant like an Article 9 secured party and a real estate claimant like a mortgagee.¹⁷⁴ This confusion was the main reason that for

87. *Preliminary Draft No. 1* attempted to define "fixtures," and excluded "readily removable factory and office machines and readily removable replacements of domestic appliances" from the definition of fixtures. The draft's definitional scheme created too much complexity, so it was not ultimately adopted. However, the category of "readily removable" fixtures was not abandoned; instead of being used in a definition of fixtures, it was used in the later drafts (and is now used in the Official Text) as part of a priority rule. U.C.C. § 9-313(4)(c) (1987); see Scarberry, *supra* note 3, at 431-32. In moving the category from definition to priority rule, the Review Committee was trying to preserve the result that its overly complex definitional scheme would have provided. 1970 A.L.I. PROC. at 415. Thus, the Review Committee's understanding of the term "readily removable" from Draft No. 1 is relevant to the term's meaning in the Official Text.

172. See REVISED UNIFORM COMMERCIAL CODE: ARTICLE 6—BULK SALES, 2A U.L.A. § 6-102(1)(a)(i), at 206 (Supp. 1989) (Alternative B—Revised Article 6). The National Conference of Commissioners for Uniform State Laws approved the repeal of Article 6 in its entirety, but also approved a revised version of Article 6 for those states that choose not to repeal it. *Id.* §§ 6-101 through 6-110. The American Law Institute concurred, with amendments to the text of Revised Article 6 that are not relevant here. See *Relative Priorities of Security Interests in the Cash Proceeds of Accounts, Chattel Paper, and General Intangibles*, [Current Materials **] U.C.C. Rep. Serv. 2d (Callaghan), *Current Material Highlights Part II*, no. 2, 1-2 (June 1989). The revised version of Article 6 uses the Article 9 "readily removable fixtures" terminology in the Article 6 definition of the term "assets;" "assets" do not include fixtures "other than readily removable factory and office machines." REVISED ARTICLE 6, *supra*, § 6-102(1)(a)(i).

173. *But see* 1 COOGAN-HOGAN-VAGTS-MCDONNELL, *supra* note 171, § 3A.02, at 183-84 (because there is much room for dispute as to what is readily removable and as to meaning of other terms in section 9-313(4)(c), perhaps the great value of (4)(c) is as a defense for the secured party who never thought of the collateral as being fixtures).

174. See STATE BAR COMMITTEE REPORT, *supra* note 27, reprinted in CAL. ASSEMBLY J., at 19435-36, and Appendix 2, *infra*, at 736-38 (quoting H. MARSH & W. WARREN, REPORT ON PROPOSED AMENDMENTS TO THE UNIFORM COMMERCIAL CODE, SENATE FACT FINDING COMMITTEE ON JUDICIARY, SIXTH PROGRESS REPORT TO THE LEGISLATURE, Part I at 578 (1961)). The determination of whether an item is a fixture for purposes of Article 9 should be made by asking whether, if no Article 9 security interest existed in the item, an interest in the real estate would extend to the item. Adams, *Security Interests in Fixtures Under Missis-*

many years California refused to adopt the fixture provisions of Article 9.¹⁷⁵ Given the confusion, lenders and their attorneys understandably want the comfort of the change California made to the readily removable priority rules of the Official Text. California's change allows lenders safely to provide needed credit on the security of the debtor's readily removable items, especially machinery,¹⁷⁶ despite the small chance that a court will hold the items to be fixtures. The change also allows the attorney to give the legal opinion that the lender needs as to the priority of the security interest in the items. Permitting perfection of security interests in readily removable items by fixture filing would effectively eliminate the comfort given by the changes to the readily removable fixture priority rules.¹⁷⁷ Permitting perfection of security interests in readily removable fixtures by fixture filing would also require courts to determine whether the items really are fixtures, which can largely be avoided if perfection by fixture filing is not permitted. Thus, California probably should not permit perfection of security interests in readily removable fixtures by fixture filing.

California should take the middle ground and choose the third approach. The author therefore proposes that the following sentences should be added to section 9401(7) and, for the sake of clarity, to section 9313(1)(b):

The making of a fixture filing perfects a security interest in fixtures and constitutes the filing of a financing statement for purposes of priority in the fixtures under section 9312, except to the extent that the fixtures are readily removable fixtures of the types listed in section 9313(4)(c). The making of a fixture filing does not perfect a security interest in fixtures that are readily removable fixtures of the types listed in section 9313(4)(c) nor does it constitute a filing of a financing statement for purposes of section 9312 with respect to such readily removable fixtures.

This proposal will not result in many more chattel record filings than would be made under the Official Text. Secured creditors who believe their collateral may be readily removable will usually make chattel records filings in any case to guard against the very strong possibility that

sippi's Uniform Commercial Code, 47 Miss. L.J. 831, 838-39, 894-97 (1976); Scarberry, *supra* note 3, at 460-64. Thus, special pre-UCC rules designed for the personal-property-security-interest-versus-real-property-mortgagee case should *not* be used to determine whether items are fixtures. However, courts may still use them.

175. See STATE BAR COMMITTEE REPORT, *supra* note 27, reprinted in CAL. ASSEMBLY J., at 19435-36, and Appendix 2, *infra*, at 736-38.

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

177. See *supra* notes 155-63 and accompanying text.

the collateral is not fixtures at all. Thus, the proposal avoids some of the wastefulness of the existing California provisions, which require a chattel records filing in every case.

The proposal will create no additional uncertainty in California law. Even under existing California law, a secured party must be convinced that the items in question are "readily removable" before he can safely rely only on the chattel records and be sure that section 9313(4)(c) will give him priority over the interests of real estate claimants. Further, a secured party who understands the proposed California scheme can simply make a chattel records filing if she is unsure whether fixtures will be considered "readily removable."

The proposal will bring California's provisions much closer to the Official Text provisions, with the benefits that naturally result from uniformity. The extent of the non-uniformity will be made clear with language that will tell the reader in unmistakable terms that a fixture filing will not perfect a security interest in readily removable fixtures covered under section 9313(4)(c). Parties who for some reason do not realize that California law is not the same as the Official Text will by and large be protected. Even under the Official Text, they would almost always file precautionary chattel records filings if the collateral is readily removable, because of the strong possibility that the collateral will be held not to be fixtures. If the collateral is not readily removable, and if the secured parties make only fixture filings in the belief that the collateral is certainly fixtures, the security interests will be perfected, so long as the collateral is found to be fixtures.

APPENDIX 1

COMPARISON OF CALIFORNIA FIXTURE PROVISIONS WITH FIXTURE
PROVISIONS OF UNIFORM COMMERCIAL CODE 1987
OFFICIAL TEXT¹⁷⁸

Material in brackets was deleted by California from the Official Text; material in italics was added by California. (Underlining is used in place of italics where California added isolated punctuation marks.) California did not adopt the captions of the Official Text; the California session laws which adopted and amended the California Commercial Code do not contain captions for the sections. The California version reproduced below is the version in effect as of January 1990. Various amendments were made to the California version after 1980, so the sections below are not identical to the provisions adopted in 1980 as a result of the proposal by the Uniform Commercial Code Committee of the Business Law Section of the California State Bar. None of the post-1980 amendments are relevant to the fixtures issues discussed in the foregoing article, but some of them did involve other fixture issues.

California Commercial Code § 9313:

(1) In this section and in the provisions of [Part 4 of this Article] *Chapter 4 (commencing with Section 9401)* referring to fixture filing, unless the context otherwise requires

(a) [g]Goods are "fixtures" when they become so related to particular real estate that an interest in them arises under real estate law.

(b) [a]A "fixture filing" is 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 conforming to the requirements of [subsection (5) of Section 9-402] *subdivision (5) of Section 9402*.

(c) [a]A mortgage is a "construction mortgage" to the extent that it secures an obligation incurred for the construc-

178. California made some truly stylistic but pervasive changes in the U.C.C. The California Commercial Code omits the dash that appears in Official Text section numbers; thus, for example, California Commercial Code section 9313 is the California counterpart of U.C.C. section 9-313. California calls the Uniform Commercial Code's Articles "Divisions," so in California Article 9 is Division 9. The Official Text's "Parts" are termed "Chapters" in California; thus U.C.C. Article 9's Part 3 (the 9-300 series of sections) is Chapter 3 of the California Commercial Code's Division 9. Subsections of individual sections are called "subdivisions" in California, even though the individual sections are still called sections.

tion of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates.

(2) A security interest under this [Article] *division* may be created in goods which are fixtures or may continue in goods which become fixtures, but no security interest exists under this [Article] *division* in ordinary building materials incorporated into an improvement on land.

(3) This [Article] *division* does not prevent creation of an encumbrance upon fixtures pursuant to real estate law.

(4) A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where

(a) [t]The security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, [the security interest is perfected by a fixture filing] *a fixture filing covering the fixtures is filed* before the goods become fixtures or within [ten] 10 days thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate; or

(b) [the security interest is perfected by a fixture filing] *A fixture filing covering the fixtures is filed* before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate; or

(c) [t]The fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods[, and before the goods become fixtures the security interest is perfected by any method permitted by this Article]; or

(d) [t]The conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this [Article] *division*.

(5) A security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where

(a) [t]The encumbrancer or owner has consented in writing to the security interest or has disclaimed an interest in the goods as fixtures; or

(b) [t]The debtor has a right to remove the goods as against the encumbrancer or owner. If the debtor's right termi-

nates, the priority of the security interest continues for a reasonable time.

(6) Notwithstanding paragraph (a) of [subsection] *subdivision* (4) but otherwise subject to [subsections] *subdivisions* (4) and (5), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.

(7) In *the* cases not within the preceding [subsections] *subdivisions*, a security interest in fixtures is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor.

(8) When the secured party has priority over all owners and encumbrancers of the real estate, he may, on default, subject to the provisions of [Part 5] *Chapter 5 (commencing with Section 9501)*, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.

California Commercial Code § 9401:¹⁷⁹

(1) The proper place to file in order to perfect a security interest is as follows:

(a) [w]hen the collateral is [equipment used in farming operations, or farm products, or accounts or general intangibles arising from or relating to the sale of farm products by a farmer, or] consumer goods, then in the office of the [. . . .] *county recorder* in the county of the debtor's residence or if the debtor is not a resident of this state, then in the office of [the in] *county recorder of the county [where] in which* the goods are kept[, and in addition when the collateral is crops growing or to be grown in the office of the in the county where the land is located];

179. California's version of section 9-401(1) is closest to the Official Text's Second Alternative Subsection (1). Therefore, the Official Text's First and Third Alternatives for subsection (1) are omitted; the additions and deletions shown are additions to and deletions from the Official Text's Second Alternative Subsection (1). California adopted the Official Text's standard subsection (3) rather than the Official Text's Alternative Subsection (3). The Alternative Subsection (3) is therefore omitted from this comparison.

(b) [w]When the collateral is *crops growing or to be grown*, timber to be cut or is minerals or the like (including oil and gas) or accounts subject to [subsection] *subdivision* (5) of Section [9-103] *9103*, [or when the financing statement is filed as a fixture filing (Section 9-313) and the collateral is goods which are or are to become fixtures,] then in the office where a mortgage on the real estate would be [filed or] recorded[;].

(c) [i]In all other cases, in the office of the Secretary of State.¹⁸⁰

(2) A filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this [Article] *division* and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement.

(3) A filing which is made in the proper place in this state continues effective even though the debtor's residence or place of business or the location of the collateral or its use, whichever controlled the original filing, is thereafter changed.

(4) The rules stated in Section [9-103] *9103* determine whether filing is necessary in this state.

(5) Notwithstanding [the preceding subsections] *subdivision* (1), and subject to [subsection] *subdivision* (3) of Section [9-302] *9302*, the proper place to file in order to perfect a security interest in collateral, including fixtures, of a transmitting utility is the office of the Secretary of State.¹⁸¹ This filing *also* constitutes a fixture filing (Section [9-313] *9313*) as to the collateral described therein which is or is to become fixtures.

(6) For the purposes of this section, the residence of an organization is its place of business if it has one or its chief executive office if it has more than one place of business.

(7) *The proper place to file a financing statement filed as a fixture filing is in the office where a mortgage on the real estate would be recorded.*

180. The Official Text places brackets around the words "Secretary of State," to indicate that the state's functional equivalent should be inserted if the state has no secretary of state. Of course, the California version omits the brackets.

181. The Official Text places brackets around the words "Secretary of State," to indicate that the state's functional equivalent should be inserted if the state has no secretary of state. Of course, the California version omits the brackets.

California Commercial Code § 9402:¹⁸²

(1) A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor, and contains a statement indicating the types, or describing the items, of collateral. *A financing statement should include the debtor's trade name or style, if any, if known to the secured party, but a failure to include the trade name or style shall not under any circumstances affect the validity of the financing statement.* A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown, the statement must also contain a description of the real estate concerned. When the financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to [subsection] *subdivision* (5) of Section [9-103] *9103*, or when the financing statement is filed as a fixture filing (Section [9-313] *9313*) and the collateral is goods which are or are to become fixtures, the statement must also comply with [subsection] *subdivision* (5). A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor. A [carbon, photographic or other reproduction of a security agreement or] *certified copy of a financing statement or security agreement* is sufficient as a financing statement if [the security agreement so provides or if] the original [has been filed] *thereof was filed* in this state.

(2) A financing statement which otherwise complies with [subsection] *subdivision* (1) is sufficient when it is signed by the secured party instead of the debtor if it is filed to perfect a security interest in *or as a fixture filing covering any of the following*:

(a) [c]Collateral already subject to a security interest in another jurisdiction when it is brought into this state[,] or when the debtor's location is changed to this state. [Such a] *The financing statement must state that the collateral was brought into this state or that the debtor's location was changed to this state under such circumstances[; or].*

(b) [p]Proceeds under Section [9-306] *9306*, if the security interest in the original collateral was perfected. [Such a] *The financing statement must describe the original collateral and give the date of filing and the file number of the prior financing statement [; or].*

182. CAL. COM. CODE § 9402 (West Supp. 1990).

(c) [c]Collateral as to which the filing has lapsed[; or]. *The financing statement must include a statement to the effect that the prior financing statement has lapsed and give the date of filing and the file number of the prior financing statement.*

(d) [c]Collateral acquired after a change of name, identity or corporate structure of the debtor ([subsection] *subdivision* (7)). *The financing statement must include a statement that the name, identity or corporate structure of the debtor has been changed and give the date of filing and the file number of the prior financing statement and the name of the debtor as shown in the prior financing statement.*

(3) A form substantially as follows is sufficient to comply with [subsection] *subdivision* (1):

Name of debtor (or [assignor] *assigner*) _____

Address _____

Name of secured party (or assignee) _____

Address _____

Debtor's trade name or style, if any _____

1. This financing statement covers the following types (or items) of property: (Describe) _____

2. (If collateral is crops) The [above described] *above-described* crops are growing or are to be grown on: (Describe [R]real [E]estate) _____

3. (If applicable) The above goods are *or are* to become fixtures on* (Describe [R]real [E]estate) _____ and this financing statement is to be [filed for record¹⁸³] *recorded* in the real estate records. (If the debtor does not have an interest of record) The name of a record owner is _____

4. (If products of collateral are claimed) Products of the collateral are also covered.

([u]Use _____
whichever _____
is _____
applicable) Signature of [S]secured [P]party (or [A]assignee)

* Where appropriate substitute either "The above timber is standing on" or "The above mineral[s] or the like (including oil and gas) or accounts will be financed at the wellhead or minehead of the well or mine located on"

183. The words "for record" are optional language in the Official Text.

(4) A financing statement may be amended by filing a writing signed by both the debtor and the secured party, *or by the secured party alone in the case of an amendment pursuant to subdivision (7)*. An amendment does not extend the period of effectiveness of a financing statement. If any amendment adds collateral, it is effective as to the added collateral only from the filing date of the amendment. In this [Article] *division*, unless the context otherwise requires, the term "financing statement" means the original financing statement and any amendments.

(5) A financing statement covering timber to be cut or covering minerals or the like (including oil and gas) or accounts subject to [subsection] *subdivision (5)* of Section [9-103] *9103*, or a financing statement filed as a fixture filing (Section [9-313] *9313*) 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 record¹⁸⁴] *recorded* 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.¹⁸⁵ If the debtor does not have an interest of record in the real estate, the financing statement must show the name of a record owner. *A financing statement filed as a fixture filing (Section 9313) where the debtor is not a transmitting utility must also recite either that it is filed as a fixture filing or that it covers goods which are or are to become fixtures.*

(6) A mortgage is effective as a financing statement filed as a fixture filing from the date of its recording if *all of the following conditions are met*:

- (a) [t]The goods are described in the mortgage by item or type[; and].
- (b) [t]The goods are or are to become fixtures related to the real estate described in the mortgage[; and].
- (c) [t]The mortgage complies with the requirements for a financing statement in this section other than a recital that it is to be filed in the real estate records[; and].
- (d) [t]The mortgage is duly recorded.

No fee with reference to the financing statement is required other than the regular recording and satisfaction fees with respect to the mortgage.

(7) A financing statement sufficiently shows the name of the debtor if it gives the individual, partnership or corporate name of the debtor,

184. The words "for record" are optional language in the Official Text.

185. The language in this sentence beginning with the word "sufficient" is optional under the Official Text.

whether or not it adds other trade names or names of partners. Where the debtor so changes his *or her* 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 *or an appropriate amendment to the filed financing statement* is filed before the [expiration of that time] *acquisition of the collateral by the debtor*. 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 transfer.

(8) A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading. *A financing statement filed as a fixture filing (Section 9313) where the debtor is not a transmitting utility is not effective if it does not recite that it is to be recorded in the real estate records and either that it is filed as a fixture filing or that it covers goods which are or are to become fixtures.*

(9) *A financing statement substantially complying with the requirements of this section creates a security interest only to the extent of the interest of the debtor.*

(10) *No person or entity acting for or on behalf of the parties to a financing statement shall incur any liability for the consequences of recording a financing statement in the real estate records, and no action may be brought or maintained against that person or entity as a result of the recordation.*

California Commercial Code § 9403:

(1) Presentation for filing of a financing statement, [and] tender of the filing fee [or] *and* acceptance of the statement by the filing officer constitutes filing under this [Article] *division*.

(2) Except as provided in [subsection] *subdivision* (6), a filed financing statement is effective for a period of five years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of [the five year] *such five-year* period unless a continuation statement is filed prior to the lapse. If a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against the debtor, the security interest remains perfected until termination of the insolvency proceedings and thereafter for a period of 60 days or until expiration of the [five year] *five-year* period, whichever occurs later. Upon *such* lapse the security interest becomes unperfected[,] unless it is perfected without filing. If the security interest becomes unperfected upon lapse, it is

deemed to have been unperfected as against a person who became a purchaser or lien creditor before lapse. *If a fixture filing is effective at the time insolvency proceedings are commenced by or against the debtor, the fixture filing remains effective until termination of the insolvency proceedings and thereafter for a period of 60 days or until expiration of the five-year period or termination pursuant to subdivision (6), whichever occurs later. Upon lapse of a fixture filing, it is deemed to have been ineffective as against a person who became a purchaser or lien creditor before lapse.*

(3) A continuation statement may be filed by the secured party of record within six months prior to the expiration of the [five year] *five-year* period specified in [subsection] *subdivision* (2). Any such continuation statement must be signed by the secured party of record, identify the original statement by *giving the date and the names of the parties thereto and the file number thereof* and state that the original statement is [still effective] *continued*. [A continuation statement signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record and complying with subsection (2) of Section 9-405, including payment of the required fee.] *A continuation statement filed to continue the effectiveness of a financing statement filed as a fixture filing (Section 9313) is not effective unless the following requirements are met:*

(a) *If the debtor did not have an interest of record in the real estate as of the date of the filing of the original statement, the continuation statement shall contain the name of a record owner of the real estate as of the date of the filing of the original statement.*

(b) *The continuation statement shall contain substantially the following statement: "This continuation statement is filed to continue the effectiveness of a financing statement filed as a fixture filing"; provided, that such statement shall clearly indicate the intent to continue the effectiveness of a financing statement as a fixture filing.*

Upon timely filing of the continuation statement, the effectiveness of the original statement is continued for five years after the last date to which the filing was effective whereupon it lapses in the same manner as provided in [subsection] *subdivision* (2) unless another continuation statement is filed prior to such lapse. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the original statement. [Unless a statute on disposition of public records provides otherwise, t]The filing officer may remove a lapsed *financing* statement and related filings from the files and destroy [it] *them* immediately if he

or she has retained a microfilm or other photographic record, or in other cases after one year after the lapse. The filing officer shall so arrange matters by physical annexation of financing statements to continuation statements or other related filings, or by other means, that if he *or she* physically destroys the financing statements of a period more than five years past, those which have been continued by a continuation statement or which are still effective under [subsection] *subdivision* (6) shall be retained. *The filing officer shall not destroy a financing statement and related filings as to which he or she has received written notice that there is an action pending relative thereto or that insolvency proceedings have been commenced by or against the debtor.*

(4) Except as provided in [subsection] *subdivision* (7) a filing officer shall mark each *financing* statement with a *consecutive* file number and with the date and [hour] *time* of filing and shall hold the statement or a microfilm or other photographic copy thereof for public inspection. In addition the filing officer shall index the statement according to the name of the debtor and shall note in the index the file number and the address of the debtor given in [the] *this* statement. *The filing officer shall mark each continuation statement with the date and time of filing and shall index the same under the file number of the original financing statement.*

(5) The uniform fee for filing, [and] indexing and [for stamping a copy furnished by the secured party to show the date and place of filing] *furnishing filing data (subdivision (1) of Section 9407)* for an original financing statement, *an amendment* or [for] a continuation statement shall be [\$ ____] *five dollars (\$5)* if the statement is in the standard form prescribed by the Secretary of State¹⁸⁶ and otherwise shall be [\$ ____] *six dollars (\$6)*, plus in each case, if the financing statement is subject to subsection (5) of Section 9-402, \$ _____. The uniform fee for each name more than one required to be indexed shall be \$ _____. The secured party may at his option show a trade name for any person and an extra uniform indexing fee of \$ ____ shall be paid with respect thereto.]

(6) If the debtor is a transmitting utility ([subsection] *subdivision* (5) of Section [9-401] *9401*) and a filed financing statement so states, it is effective until a termination statement is filed. A real estate mortgage which is effective as a fixture filing under [subsection] *subdivision* (6) of Section [9-402] *9402* remains effective as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real estate.

186. The Official Text places brackets around the words "Secretary of State," to indicate that the state's functional equivalent should be inserted if the state has no secretary of state. Of course, the California version omits the brackets.

(7) [When a financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to subsection (5) of Section 9-103, or is filed as a fixture filing, it shall be filed for record and¹⁸⁷ the filing officer shall index it under the names of the debtor and any owner of record shown on the financing statement in the same fashion as if they were the mortgagors in a mortgage of the real estate described, and, to the extent that the law of this state provides for indexing of mortgages under the name of the mortgagee, under the name of the secured party as if he were the mortgagee thereunder, or where indexing is by description in the same fashion as if the financing statement were a mortgage of the real estate described.] *A financing or continuation statement covering collateral described in paragraph (b) of subdivision (1) of Section 9401 or filed as a fixture filing shall be recorded and indexed by the filing officer in the real property index of grantors under the name of the debtor and any owner of record shown on the financing statement. A financing or continuation statement so recorded and indexed and containing a description of real property affected thereby shall constitute constructive notice from the time of its acceptance for recording to any purchaser or encumbrancer of the real property of the security interest in such collateral.*

(8) *The standard form of original financing statement prescribed by the Secretary of State pursuant to subdivision (5) shall include the wording "Financing statements are effective, with certain exceptions, only for five years from the date of filing, pursuant to Section 9403 of the California Commercial Code." or substantially equivalent warning language as prescribed by the Secretary of State.*

187. The phrase "it shall be filed for record and" is in brackets in the Official Text as optional language.

APPENDIX 2

FINAL REPORT OF THE UNIFORM COMMERCIAL CODE COMMITTEE
ON SECTION 9-313 OF THE UNIFORM COMMERCIAL CODE

January 25, 1980

Section 9-313 of the Official Text of the Uniform Commercial Code ("the Code") governs conflicts between security interests in fixtures attached to real estate and adverse claims asserted by owners and encumbrancers of the real estate. Of the 49 states that have enacted the Code, only California has failed to adopt some form of Section 9-313 and the related provisions of the Code dealing with fixtures. California's singular approach prompted the Uniform Commercial Code Committee* ("the Committee") to study the desirability of implementing the fixtures provisions of the Code in California. This Report is the result of the Committee's undertaking.

The Committee has concluded that Section 9-313 and the related fixtures provisions of the Code should be adopted, with certain modifications, in California. The Committee's specific proposal is set forth in Appendix "A" attached to this Report. The Committee's conclusion was based primarily upon the Committee's determination that the present state of the law in this area is unnecessarily confused and complicated and that clarification and guidance are sorely needed. The Committee was also motivated, albeit to a lesser extent, by a desire to achieve some degree of uniformity in this area with the other states that have enacted the Code. The Committee believes that the proposal described in Appendix "A" will promote both of these goals.

This Report is divided into three parts. Part I briefly discusses the background of Section 9-313, from the 1962 Official Text through the 1972 amendments to the Code (implementing the 1972 Official Text). Part I also summarizes the fixtures provisions of the 1972 Official Text and describes non-uniform modifications made in the states that have adopted those provisions.

Part II examines the reasoning behind California's failure to adopt Section 9-313. This issue is considered both in the context of the initial passage of the Code in 1963 and in the context of the 1972 amendments to the Code that were enacted in California in 1975.

The Committee's specific recommendations are discussed in Part III. Appendix "A" to this Report is a proposed bill that would imple-

* Uniform Commercial Code Committee of the Business Law Section of the State Bar of California.

ment the Committee's views. Following each Section of the proposed bill are comments of the Committee explaining changes in existing law, deviations from the Official Text of the Code, and the Committee's reasons for recommending the specific change.

I. BACKGROUND AND STATUS OF FIXTURES PROVISIONS OF THE UNIFORM COMMERCIAL CODE.

A. 1962 Official Text

The 1962 Official Text of the Code contained provisions dealing with conflicts between security interests in "fixtures" and adverse real estate interests. The central provision was Section 9-313. With the exception of California and Iowa, every state that enacted the 1962 Official Text, and the District of Columbia, adopted some form of Section 9-313 and the related provisions of the Code dealing with fixtures. The fixtures provisions were not uniform in these jurisdictions, however, as some states deviated from the language of the Official Text.

The fixtures provisions of the 1962 Official Text were met with some criticism. One of the primary objections was that a purchaser or encumbrancer of real estate could be subject to the claims of an earlier perfected security interest in fixtures even though a search of the local real estate records would not reveal the secured party's interest. Another concern was that in many instances a security interest in fixtures could be prior to the lien of a construction mortgage—a result found to be undesirable by construction financiers.

As a result of growing discontent with Section 9-313 and other portions of Article 9 of the 1962 Official Text, a "Review Committee for Article 9" was appointed in 1966 to re-examine those provisions. The end product was the adoption, in 1972, of a revised Article 9 to the Official Text of the Code (herein the "1972 Revisions" or "1972 Official Text").

B. 1972 Official Text

The 1972 Revisions contained a major overhaul of the fixtures provisions of the Code, including Section 9-313. Among other changes, the 1972 version of Section 9-313 clarified the meaning of "fixtures," gave a specific "super priority" to purchase money security interests in fixtures, created a "fixture filing" that would be indexed in the same manner as a mortgage and would be discoverable through a search of the real estate records, and set forth certain priorities between construction lenders and fixture financiers. A copy of the 1972 version of Section 9-313 appears in

Appendix "B" to this Report. The following is a summary of Section 9-313 and the related provisions of the 1972 Official Text:

1. *Section 9-313.* Subsection (1) of Section 9-313 defines "fixtures," "fixture filing," and "construction mortgage." Under Subsection (1)(a), "goods are 'fixtures' when they become so related to particular real estate that an interest in them arises under real estate law." A "fixture filing" is defined as a financing statement covering fixtures which conforms to certain requirements and is filed in the real estate records. Section 9-313(1)(b). "Construction mortgage" is defined in Section 9-313(1)(c).

Subsection (2) declares that no security interest exists under Article 9 "in ordinary building materials incorporated into an improvement on land." Thus, even if ordinary building materials incorporated into an improvement on land are technically "fixtures," no security interest in them will be recognized under the Code.

Subsection (3) provides that Article 9 does not prevent the creation of an encumbrance on fixtures "pursuant to real estate law." This provision acknowledges that the lien of a mortgage or deed of trust may extend to fixtures on land as well as to the land itself.

Subsection (4) sets forth rules of priority governing conflicts between the holder of a perfected security interest in a fixture and the owner or encumbrancer of the real estate. The Subsection grants priority to the holder of a perfected security interest in the fixture over the owner or encumbrancer of the real estate in the following four cases:

(1) The security interest is a "purchase money security interest" (Section 9-107), a "fixture filing" is filed before or within 10 days after the goods become fixtures, the interest of the owner or encumbrancer arose before the goods became fixtures, and the debtor has an interest of record in the real estate or is in possession thereof [§ 9-313(4)(a)]; or

(2) A fixture filing is filed before the interest of the encumbrancer or owner is of record, the security interest has priority over all prior interests in the real estate, and the debtor has an interest of record in the real estate or is in possession thereof [§ 9-313(4)(b)] [This provision gives to the holder of a purchase money security interest in a fixture a priority over subsequent real estate interests where the secured party is entitled to priority over prior real estate interests under Subsection (4)(a)]; or

(3) The fixtures are "readily removable factory or office machines or readily removable replacements of domestic appli-

ances which are consumer goods," and prior to the goods becoming fixtures the security interest is perfected in any manner under Article 9 [§ 9-313(4)(c)]; or

(4) The conflicting real estate interest is a lien on the real estate obtained "by legal or equitable proceedings" after the security interest became perfected in any manner under Article 9 [§ 9-313(4)(d)].

A fixture filing is not required under paragraphs 3 and 4 above.

Subsection (5) sets forth two additional priorities given to the holder of a security interest in fixtures, whether or not perfected, over certain real estate interests. Under Subsection 5(a), the secured party is given priority over an owner or encumbrancer of the real estate who "has consented in writing to the security interest or has disclaimed an interest in the goods as fixtures." Subsection 5(b) gives the secured party priority over an owner or encumbrancer of the real estate where "the debtor has a right to remove the goods as against the encumbrancer or owner." The same Subsection states that this priority continues for a "reasonable time" after the debtor's right to remove the goods terminates.

Notwithstanding the purchase money priority under Section 9-313(4)(a), Subsection (6) gives a priority to construction mortgages over purchase money security interests in fixtures where (a) the construction mortgage was recorded before the goods became fixtures, and (b) the goods became fixtures before completion of construction. The same priority is accorded a mortgage "given to refinance a construction mortgage."

Subsection (7) states that in all cases not covered by Section 9-313, the secured party will be subordinate to the conflicting interest of an encumbrancer or owner of the real estate other than the debtor.

Finally, Subsection (8) deals with the secured party's right to remove the fixtures on default. This right is given to the secured party, subject to Part 5 of Article 9, provided that the secured party has priority over all owners and encumbrancers of the real estate. The secured party is required to compensate any owner or encumbrancer other than the debtor for any physical damage to the real estate resulting from removal.

2. *Other Sections.* In addition to Section 9-313, the following is a list of other provisions of the 1972 Official Text that concern fixtures:

(a) Sections 9-102(1)(a) and 9-104(j) (re: applicability of Article 9 to fixtures) (*Compare* Cal. UCC §§ 9102(1)(c) and 9103(1)(a));

(b) Section 9-105(1)(h) (providing that the definition of "goods" includes "fixtures");

(c) Section 9-302(1)(d) (providing that no filing is required to perfect a purchase money security interest in consumer goods, except to the extent that a "fixture filing" is required under Section 9-313);

(d) Section 9-401 (requiring that a fixture filing be filed "in the office where a mortgage on the real estate would be filed or recorded");

(e) Sections 9-402(1), (3) and (5) (requiring that fixture filings recite that they are to be filed in the real estate records, contain a description of the real estate, and, where the debtor does not have a record interest in the real estate, show the name of the record owner);

(f) Sections 9-402(6) and 9-403(6) (re: when a real estate mortgage is effective as a fixture filing);

(g) Section 9-403(7) (requiring that fixture filings be indexed in the same manner as real estate mortgages); and

(h) Section 9-405(2) (re: assignment of fixture filings).

Sections 9-401, 9-402 and 9-403 are particularly significant in that they describe the information that a financing statement must contain in order to be filed as a "fixture filing" and require that fixture filings be filed in the real estate records and indexed in the same manner as real estate mortgages.

C. State Variations in the Fixtures Provisions of the 1972 Official Text.

The 1972 Revisions to the Code have now been enacted in 30 states. The following 10 states have enacted revised Section 9-313 without change: Arkansas, Colorado, Connecticut, Illinois, Maine, Nevada, New Hampshire, North Dakota, Virginia and West Virginia. The following 10 states have made only minor, nonsubstantive changes: Hawaii, Idaho, Michigan, Minnesota, New York, North Carolina, Oregon, Texas, Utah and Wisconsin.

The only significant change in Iowa is the substitution of "equipment" for "factory or office machines" in Section 9-313(4)(c). Arizona made the same change and also added a sentence at the end of Section 9-313(6) intended to explain when a mortgage "is given to refinance a construction mortgage."

The only variation in Kansas is an expanded definition of "fixtures"

under Section 9-313(1)(a). Georgia adopted the Uniform version of Section 9-313, except for the addition of Subsection (4)(e) dealing with "readily removable carpeting or padding for carpeting."

Ohio made certain minor changes to the provisions dealing with readily removable factory or office machines or replacements of domestic appliances that are consumer goods. Ohio also amended Subsection (8) to require the secured party to give notice of its intention to remove collateral to all persons entitled to reimbursement under that Subsection.

The only states adopting the 1972 Revisions that made any major changes in Section 9-313 are California (which deleted the Section in its entirety) and Mississippi (which deleted the purchase money super priority in fixtures and added a new non-uniform Subsection (9)).

Of those states that enacted some form of the 1972 Official Text of Section 9-313, most adopted all of the other sections noted above [Sections 9-102(1)(a), 9-104(j), 9-105(1)(h), 9-302(1)(d), 9-401, 9-402(1), (3), (5) and (6), 9-403(6) and (7), and 9-405(2)] without any significant changes in the provisions dealing with fixtures. A few states adopted special provisions relating to certain transmitting or public utilities. *See, e.g.*, Section 9-302 as adopted in Arizona, Connecticut, Georgia, North Carolina, Oregon and Virginia. The only noteworthy change was in the states that amended Section 9-402 to expressly require that a "fixture filing" contain a "legal description" of the real estate. These states include Arizona, Kansas, Mississippi, Utah and Wisconsin.

II. CALIFORNIA'S TREATMENT OF FIXTURES UNDER THE UNIFORM COMMERCIAL CODE.

When the Code was first under study in California in 1961, the State Bar Committee on the Uniform Commercial Code recommended that Section 9-313 be deleted. *See Uniform Commercial Code—Special Report by the California State Bar Committee on the Commercial Code*, 37 Cal. St. B.J. 119, 201 (1962) (hereinafter referred to as the "1962 State Bar Report"). The same conclusion was reached by Professors Marsh and Warren. *See Sixth Progress Report to the Legislature by the Senate Fact Finding Committee on Judiciary (1959-61), Part I*, 436-613, at 576-78 (hereinafter referred to as the "Marsh and Warren Report").

The rejection of Section 9-313 was clearly not based upon satisfaction with existing law in the field of fixtures—on the contrary, the existing state of the law was uniformly criticized by the State Bar Committee and Professors Marsh and Warren. *See 1962 State Bar Report* at 201; *Marsh and Warren Report* at 577-78. Nevertheless, there was a concern that Section 9-313 was insufficient to solve the existing

problems relating to fixtures, and that the Section might cause more confusion than it would eliminate. The main objection related to the question as to when goods became "fixtures." In contrast to Section 9-313(1)(a) of the 1972 Official Text, the version of the Code that was studied by the State Bar Committee and Professors Marsh and Warren required this determination to be made with reference to "[t]he law of this state other than this Act." As explained by Professors Marsh and Warren:

"The scheme of this Section of the Code is that the law of the State outside of the Code determines whether an object is a 'fixture' and this Section of the Code then supplies the legal conclusion flowing from this classification. Any such bifurcation of the existing law of fixtures is impossible, since what the Code treats as two separate processes of judgment are all one under existing law. In other words, what the Code asks the judge to do is to decide in the abstract under 'existing law' whether an object is a 'fixture', and the Code will then tell him whether, for example, a subsequent mortgagee of the land will prevail over the owner of an interest in the object apart from the land. But under the only existing law that there is, an answer to the first question answers the second also; and the answer might very well be different if the legal problem presented was different.

It would probably be a great advance in the law if the law of fixtures could be codified and separated into two distinct problems: A factual classification of an object as a 'fixture', which is recognized as something different both from 'realty' and 'personalty'; and, secondly, a statement of the legal results in various circumstances which follow from such a classification. It is impossible, however, to do only half of this job without making a greater mess than there was before. We agree with the criticism that this Section would only 'add to the confusion' of the California law of fixtures (which is not unique in that regard.)" Marsh and Warren Report at 578.

Compare Section 9-313(1)(a) of the 1972 Official Text, which does not preclude consideration of the impact of the Code in determining whether goods are fixtures.

The California legislature followed the recommendation of the State Bar Committee and the Marsh and Warren Report and enacted the Code without Section 9-313 or the related provisions of the Code dealing with fixtures. In order to fill any gaps created by the omission of the fixtures

provisions, the California version of the Code specifically provided that Division 9 would apply to any transaction intended to create a security interest in "fixtures,"

" . . . but as against third parties having or acquiring an interest in or a lien on the real property, the rights and duties of the parties to the secured transactions are governed by the law of this state relating to real property and fixtures." California Uniform Commercial Code § 9102(1)(c).

Shortly after the 1972 Revisions to the Code were approved by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, AB 2510 was introduced in the California Assembly to implement the changes made to the Official Text. The original version of the bill, introduced on May 23, 1973, by Assemblyman Z'berg, contained the fixtures provisions of the 1972 Official Text. The fixture provisions were deleted from the bill in June of 1974, when the bill was amended for the third time. The bill was passed in August of 1974 without the fixtures provisions.

The legislative history of AB 2510 does not indicate why the fixtures provisions were stricken approximately 13 months after the bill was first introduced. The Committee has ascertained, however, that the deletion was made at the request of representatives of certain title insurance companies who felt that additional time would be required to study the impact of the proposed legislation.

III. RECOMMENDATIONS OF THE UNIFORM COMMERCIAL CODE COMMITTEE

Existing California law in the field of fixtures has been aptly described as being "in a state of chaos." *Uniform Commercial Code Section 9-313: Time for Adoption in California*, 27 *Hast. L.J.* 235, 240 (1975). *See also Goldie v. Bauchet Properties*, 15 *Cal. 3d* 307 (1975). The current state of the law lends little guidance in determining whether or when goods are or become fixtures or the consequences that flow from that determination. In large part, the deficiencies in existing law have resulted from the absence of practical statutory rules and procedures applicable to conflicting interests in fixtures. Experience has shown that the regulation of this field by the courts on a case-by-case basis has been inefficient, unpredictable and counterproductive.

The Committee believes that the rules set forth in the fixtures provisions of the 1972 Official Text of the Code would help to eliminate much of the uncertainty in the present law. The Committee therefore recom-

mends that those provisions be adopted, subject to the modifications reflected in the proposed bill attached to this Report as Appendix "A." The proposed bill conforms substantially to the fixtures provisions of the 1972 Official Text, although a few changes have been made in those instances where the Committee felt that modifications to the Official Text were needed or desirable either because of peculiarities in California law or other reasons. The text of the proposed bill indicates changes to existing California law. The Comments following each Section describe the reason for the change and any deviations from the Official Text. [The only deviation from the fixtures provisions of the Official Text not noted in the proposed bill deals with assignments of financing statements under Section 9-405(2). The existing California provision dealing with assignments (which presently differs from the Official Text) is sufficient without further change. *See* California UCC § 9406(2).]

The Committee does not believe that the objections raised prior to the adoption of the Code by the Marsh and Warren Report and the 1962 State Bar Report apply to the Committee's proposal. Those objections were directed primarily to the requirement that the determination as to whether goods are fixtures or non-fixtures be made without reference to the consequences that flowed from that determination. This requirement is no longer a part of the Official Text of the Code and therefore is not contained in the proposed bill. Moreover, as explained in Comment 3 to proposed Section 9313, the Committee is opposed to any effort to further refine the definition of fixtures.

With reference to the position of the title insurance companies, the Committee has communicated with the California Land Title Association and has been advised that the Association does not object to the provisions of the 1972 Official Text dealing with fixtures. The Association's position is apparently based in part upon the satisfactory experience of title companies operating in states that have adopted those provisions.

The Committee has also considered the non-uniform variations in the fixtures provisions made in other states. The only variation indorsed by the Committee is the substitution of "equipment" for "factory or office machines" that was made in Arizona and Iowa. The Committee concluded that none of the other state deviations merited further modification to the provisions of the Official Text.

In order to avoid the impairment of rights that may be vested under existing law, the Committee has concluded that its proposal should be limited to conflicts where both of the following conditions are met: (1) the goods in question became fixtures on or after the effective date of the

Committee's proposal, and (2) the security interest attached on or after such date. *See* proposed Section 11109 and Comments thereto.

Conclusion

The Uniform Commercial Code Committee believes that the proposed bill attached as Appendix "A" represents a substantial improvement over existing law in the field of fixtures. The Committee therefore recommends that the proposed bill be enacted in California.

APPENDIX A TO REPORT OF THE UNIFORM COMMERCIAL CODE
COMMITTEE ON SECTION 9-313 OF THE UNIFORM
COMMERCIAL CODE

The people of the State of California do enact as follows:

SEC. 1. Section 9102 of the Commercial Code is amended to read:

9102. (1) Except as otherwise provided in Section 9104 on excluded transactions, this division applies

(a) To any transaction (regardless of its form) which is intended to create a security interest in personal property *or fixtures* including goods, documents, instruments, general intangibles, chattel paper or accounts; and also

(b) To any sale of accounts or chattel paper; ~~and also~~

~~(c) To any transaction (regardless of its form) which is intended to create a security interest in goods which are or later become "fixtures" under the law of this state, but as against third parties having or acquiring an interest in or a lien on the real property, the rights and duties of the parties to the secured transactions are governed by the law of this state relating to real property and fixtures.~~

(2)-(4) [No change]

[Comment of the Uniform Commercial Code Committee:

1. In 1963, when the Code was enacted in California, it was determined that security interests in fixtures should be subject to Division 9, but that non-Code real estate law should be applied in resolving adverse claims to fixtures asserted by owners or encumbrancers of the real estate. To accomplish this purpose, Section 9-313, which dealt with priorities between security interests in fixtures and adverse real estate interests, was deleted and a new non-uniform Section 9102(1)(c) was added. Section 9102(1)(c) expressly states that non-Code law is to be applied when adverse real estate interests are in issue. This provision is inconsistent with proposed Section 9313, which itself purports to deal with conflicting real estate interests. In order to eliminate this inconsistency, it is recommended that Section 9102(1)(c) be repealed, and that the words "or fixtures" be inserted in Section 9102(1)(a).

2. With the changes noted above, Section 9102(1) would be the same as Section 9-102(1) of the 1972 Official Text.]

SEC. 2. Section 9103 of the Commercial Code is amended to read:

9103. (1)(a) This subdivision applies to documents and instruments and to goods other than those covered by a certificate of title de-

scribed in subdivision (2), mobile goods described in subdivision (3), and minerals described in subdivision (5), ~~except that as to goods which are or later become fixtures under the law of this state, the application of this subdivision is limited by the provisions of subdivision (1)(c) of Section 9102.~~

(b)-(d) [No change]

(e) *If goods are or become fixtures (Section 9313(1)(a)) in relation to real estate located in this state, the conflicting interest of an encumbrancer or owner of the real estate is governed by Section 9313.*

(2)-(5) [No change]

[Comment of the Uniform Commercial Code Committee:

1. Section 9103 contains choice of law rules applicable to transactions governed by the Code. With respect to fixtures attached to California real estate, the deleted language apparently was intended to confirm the requirement of Section 9102(1)(c) that California law "relating to real property and fixtures" be applied in any case involving adverse real estate interests. The deleted language is not found in the Official Text.

2. Upon the enactment of proposed Section 9313 (and the repeal of Section 9102(1)(c)), disputes between security interests in fixtures and adverse real estate interests would be resolved under the Code. The Committee believes that the Code choice of law rules should be applied in cases involving such disputes, subject to the qualification that the California version of Section 9313 be applied whenever the fixtures relate to California real estate. Two changes are required to accomplish this purpose. First, Section 9103(1)(a) should be amended to delete the exception dealing with fixtures. As thus amended, Section 9103(1)(a) would read the same as the 1972 Official Text. Second, proposed Section 9103(1)(e) should be enacted. This provision, which has no counterpart in the Official Text, is intended to assure that Section 9313 will be applied whenever fixtures are located in this state.

3. Under the Committee's approach, the priority of adverse real estate interests with respect to fixtures attached to California real estate will always be resolved under the California version of Section 9313. However, in determining whether a security interest is "perfected" (whenever such determination is relevant under Section 9313), the other choice of law rules of proposed Section 9103(1) should be applied.]

SEC. 3. Section 9104 of the Commercial Code is amended to read:
9104. This division does not apply

(a)-(i) [No change]

(j) *Except to the extent that provision is made for fixtures in Section 9313, to* ~~To~~ the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder and to any interest of a lessor and lessee in any such lease or rents; or

(k)-(l) [No change]

[Comment of the Uniform Commercial Code Committee:

1. The proposed language, taken from the 1972 Official Text, is intended to clarify that the Code applies to security interests in fixtures, even though the fixtures may be considered to be "real estate" under applicable law.

2. Proposed Section 9104(j) is the same as the Official Text with the exception of that portion of the Section following the word "thereunder," which is unique to California.]

SEC. 4. Section 9105 of the Commercial Code is amended to read:
9105. (1) In this division unless the context otherwise requires:

(a)-(g) [No change]

(h) "Goods" includes all things which are movable at the time the security interest attaches or which are fixtures (*Section 9313*) ~~(other than goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metalwork and the like unless the structure remains personal property under applicable law)~~, but does not include money, documents, instruments, accounts, chattel paper, general intangibles or minerals or the like (including oil and gas) before extraction. "Goods" also includes standing timber which is to be cut and removed under a conveyance or contract for sale, the unborn young of animals, and growing crops;

(i)-(o) [No change]

(2) Other definitions applying to this division and the sections in which they appear are:

"Account." Section 9106.

"Attach." Section 9203.

"Consumer goods." Section 9109(1).

"Construction mortgage." Section 9313(1).

"Equipment." Section 9109(2).

"Farm products." Section 9109(3).

"Fixture." *Section 9313(1)*.

"*Fixture filing.*" Section 9313(1).

"General intangibles." Section 9106.

"Inventory." Section 9109(4).

"Lien creditor." Section 9301(3).

"Proceeds." Section 9306(1).

"Purchase money security interest." Section 9107.

"United States." Section 9103.

[Comment of the Uniform Commercial Code Committee:

1. Present Section 9105(1)(h) excludes from the definition of "goods" certain types of materials that have been incorporated into a structure on land. The effect of this exclusion is to prevent the creation of a security interest in these types of materials under the Code. Proposed Section 9313(2) arrives at the same result by expressly providing that a security interest under the Code may not be granted in "ordinary building materials incorporated into an improvement on land." With the adoption of proposed Section 9313(2), the exclusion of building materials from the definition of "goods" is no longer necessary. For this reason, and to promote uniformity, it is recommended that the exclusion be deleted. As proposed, Section 9105(1)(h) reads the same as Section 9-105(1)(h) of the 1972 Official Text.

2. The purpose of the change to Section 9105(2) is to show the new definitions added by proposed Section 9313. The reference to "construction mortgage" is already a part of the California version of Section 9105(2), apparently as a result of an oversight. Proposed Section 9105(2) substantially conforms to Section 9-105(2) of the 1972 Official Text.]

SEC. 5. Section 9302 of the Commercial Code is amended to read:
9302. (1) A financing statement must be filed to perfect all security interests except the following:

(a)-(c) [No change]

(d) A purchase money security interest in consumer goods; but filing is required for a motor vehicle or boat required to be registered; *and fixture filing is required for priority over conflicting interests in fixtures to the extent provided in Section 9313;*

(e) [Not adopted in California]

(f)-(h) [No change]

(2)-(4) [No change]

[Comment of the Uniform Commercial Code Committee:

1. The new language, taken from the 1972 Official Text, is intended to confirm that, to the extent required by proposed Section 9313, a fixture filing is required in order for a purchase money security interest in consumer goods to gain priority over conflicting real estate interests. Thus, although a fixture filing is not necessary when the purchase money secured party relies on Section 9313(4)(c) and (d), such a filing will be required when the secured party attempts to gain priority under Section 9313(4)(a) or (b). From a technical point of view, the new language is probably unnecessary, since proposed Section 9313, unlike Section 9-313 of the Official Text, does not characterize a fixture filing as "perfection." See Comment 1(a) to proposed Section 9313. Thus, even in the absence of the added language, nothing in Section 9302(1)(d) would suggest that a fixture filing otherwise required under Section 9313 need not be made with respect to a purchase money security interest in consumer goods. Nevertheless, in order to avoid any possible inference that fixture filing is never necessary with respect to consumer goods, and in the interest of uniformity, it is recommended that the new language be adopted.

2. With the exception of the words "or boat" which do not appear in the Official Text, proposed Section 9302(1)(d) is the same as the uniform version.]

SEC. 6. Section 9313 is added to the Commercial Code to read:

9313. (1) In this section and in the provisions of Chapter 4 of this division referring to fixture filing, unless the context otherwise requires

(a) Goods are "fixtures" when they become so related to particular real estate that an interest in them arises under real estate law.

(b) A "fixture filing" is the filing in the office where a mortgage on the real estate would be recorded of a financing statement covering goods which are or are to become fixtures and conforming to the requirements of subdivision (5) of Section 9402.

(c) A mortgage is a "construction mortgage" to the extent that it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates.

(2) A security interest under this division may be created in goods which are fixtures or may continue in goods which become fixtures, but no security interest exists under this division in ordinary building materials incorporated into an improvement on land.

(3) *This division does not prevent creation of an encumbrance upon fixtures pursuant to real estate law.*

(4) *A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where*

(a) *The security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, a fixture filing covering the fixtures is filed before the goods become fixtures or within 10 days thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate; or*

(b) *A fixture filing covering the fixtures is filed before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate; or*

(c) *The fixtures are readily removable equipment or readily removable replacements of domestic appliances which are consumer goods; or*

(d) *The conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this division.*

(5) *A security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where*

(a) *The encumbrancer or owner has consented in writing to the security interest or has disclaimed an interest in the goods as fixtures; or*

(b) *The debtor has a right to remove the goods as against the encumbrancer or owner. If the debtor's right terminates, the priority of the security interest continues for a reasonable time.*

(6) *Notwithstanding paragraph (a) of subdivision (4) but otherwise subject to subdivisions (4) and (5), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.*

(7) *In the cases not within the preceding subdivisions, a security interest in fixtures is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor.*

(8) *When the secured party has priority over all owners and encumbrancers of the real estate, he may, on default, subject to the provisions of Chapter 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor*

and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.

[Comment of the Uniform Commercial Code Committee:

1. This Section is substantially the same as Section 9-313 of the 1972 Official Text of the Code, with the following exceptions:

(a) Under the Official Text of the Code, the filing of a fixture filing serves two purposes: first, the fixture filing qualifies the secured party for priority over conflicting real estate interests in accordance with Section 9-313(4); and second, the fixture filing constitutes a "perfection" device as against other chattel interests within the scheme of Part 3 of Article 9. The Committee felt that the utilization of fixture filing as a "perfection" device might lead to undesirable results, to confusion and to misleading creditors as to the proper place to file or search. For example, in the case of readily removable fixtures of the types described in Subsection (4)(c), a secured party presumably could, under the rule of the Official Text, perfect its security interest against other chattel interests by filing a fixture filing in the real estate records (*see* UCC § 9-401(1)(a)). Under that rule, a subsequent creditor would be required to search the real estate records in order to discover the conflicting chattel interest of the prior secured party. The Committee felt that this was an undesirable result. As another example, consider the reference in Subsection (4)(c) to certain readily removable items; in the case of readily removable goods which are *not* fixtures, a fixture filing under the Official Text would be ineffective and would not perfect a security interest vis-a-vis conflicting chattel interests. Thus, a creditor who mistakenly believes the collateral to be "fixtures" could be lulled into filing in the wrong place. The Committee concluded that these potential problems and pitfalls could be minimized by limiting the effect of fixture filing to the first of the two purposes described above, *i.e.*, establishing priority as against conflicting real estate interests, and by applying the same rules of perfection to goods which are fixtures as are applied to goods which are not. To accomplish this purpose, all references to "perfection" as a consequence of

fixture filing have been deleted from the Committee's proposal. In the context of Sections 9-313(4)(a) and (b), the phrase "a fixture filing covering the fixtures is filed" has been inserted in lieu of "the security interest is perfected by a fixture filing." See also proposed Sections 9302(1)(d), 9401(5), 9401(7), 9402(2) and 9403(2) and Comments thereto. At the same time, the Committee decided to follow the requirement of the Official Text that a security interest be "perfected" in order to qualify for priority against conflicting real estate interests under proposed Section 9313(4). Consequently, the Committee's proposal requires both perfection (ordinarily by filing) as well as a fixture filing. This approach should tend to reduce disputes as to whether particular goods are fixtures, since the holder of a perfected security interest who has filed a fixture filing will prevail over subsequent chattel interests (such as the trustee in bankruptcy) whether or not the goods are determined to be fixtures. Under this approach, perfection may be accomplished by filing a regular financing statement with the Secretary of State or the county recorder (whichever place of filing may be appropriate under the circumstances (see Cal. UCC § 9401(1)) or by any other method permitted by the Code. See Cal. UCC §§ 9302(1)(d), 9305. To repeat, the filing of a fixture filing will not result in "perfection" under the Committee's proposal. The effect of the perfection requirement is that an unperfected security interest will not qualify for priority under Section 9313(4), even if a fixture filing has been filed. As a result of proposed Section 9313(7), which is identical to the Official Text, an unperfected security interest in fixtures will normally be subordinate to conflicting real estate interests unless the security interest qualifies for priority under Sections 9313(3) or 9313(5). The Committee takes no position on the effect of a fixture filing under Section 9313(3).

(b) In Subdivision (4)(c), the phrase "factory or office machines" has been replaced with the word "equipment."[†] The Committee recognizes that the term "equipment" is, to a certain degree, a "catchall," but believes that this term is preferable to "factory or office machines" for two reasons. First, the use of "equipment," which is defined in Section 9109(2) of

[†] Note by Professor Mark S. Scarberry: The Committee's recommendation on this point was not followed. The California Legislature retained the phrase "factory or office machines." See *supra* Appendix 1, at 721.

the California Code, will eliminate the creation of a new category of goods under the Code (*i.e.*, "factory or office machines"). The use of a term already defined in the Code will add a degree of certainty as to which types of goods are covered by the subdivision, and will avoid additional litigation as to the meaning of new terms. Second, the Committee does not believe that there is any logic to distinguishing between "factory or office machines" and other "equipment," such as machines used elsewhere than in factories and offices and equipment other than machines (*e.g.*, furniture and storage tanks). The use of the phrase "readily removable equipment" should not be construed to mean that all goods of this type are "fixtures" within the meaning of Section 9313. Any item of readily removable equipment will be a fixture *only* when it becomes "so related to particular real estate that an interest in [it] arises under real estate law." See Official Comment 4(d) to Section 9-313 of the Official Text.

(c) The Committee also chose to delete from proposed Section 9313(4)(c) the requirement, found in paragraph (4)(c) of the Official Text, that the security interest be perfected before the goods become fixtures as a condition to the security interest qualifying for the priority contained in that paragraph. As a policy matter, the Committee concluded that perfected security interests in the types of goods that are described in paragraph (4)(c) should prevail over adverse real estate interests regardless of the time of perfection. This approach should eliminate disputes as to whether or when goods are or become fixtures, since the holder of a perfected security interest in these types of goods will prevail over adverse real estate interests whether or not the goods constitute "fixtures."

2. Proposed Section 9313(1)(a) states that "goods are 'fixtures' when they become so related to particular real estate that an interest in them arises under real estate law." The Code does not define "real estate law" or when an interest in goods "arises under" that law. The phrase "real estate law" should be construed to include any law which gives to an owner or encumbrancer of real property, by reason of his interest in the real property, an interest in goods which are "related" (or affixed) to the real property. See Official Comment 4 to Section 9-313. Under this analysis, it should not be necessary to independently determine whether the interest of the owner or encumbrancer

in the goods arose under some body of law known as "real estate law." The mere existence of the interest in the goods as an incident to the real estate interest would mean that the interest arose under "real estate law." The key question, therefore, is whether an owner or encumbrancer of real property acquires an interest in goods attached to the real property by reason of the real property interest. In applying this test, the courts should not be limited to the law of fixtures existing prior to the adoption of proposed Section 9313, but should be free to consider the impact of that Section in rendering a decision.

3. In drafting the proposed bill, the Committee considered the desirability of formulating a more precise definition of "fixtures" than that contained in Section 9-313(1)(a). Proposals were made with reference to size and physical characteristics of the goods, manner of affixation, and intentions or expectations of the parties. However, the Committee concluded that the definition of fixtures should remain flexible and that a more precise definition was neither feasible nor necessary. The Committee's conclusion was based in part on the fact that the enactment of proposed Section 9313 should eliminate in many cases the need to determine whether goods are fixtures. For example, in the case of a perfected purchase money security interest in goods which may be fixtures, the secured party can avoid the question as to whether the goods are fixtures by complying with the procedures set forth in Section 9313(4)(a), *i.e.*, by both perfecting the security interest and filing a fixture filing. In that event, the secured party will prevail over adverse real estate interests whether or not the goods are fixtures. Similarly, under proposed Section 9313(4)(c), the holder of a perfected security interest in goods which are readily removable equipment need not be concerned with whether the goods are fixtures, since the secured party will prevail in any event, even if he has not made a fixture filing.

4. Under Section 9313(1)(c), a mortgage cannot be a "construction mortgage" unless "the recorded writing so indicates." Designation of a mortgage or deed of trust as a "Construction Trust Deed" as described in California Civil Code § 3097(j) should be sufficient to satisfy this requirement. The phrase "an obligation incurred for the construction of an improvement" should be deemed to include costs of financing,

such as advances for interest, title fees, and other customary charges.

5. The Committee has retained Section 9-313(3) of the Official Text which permits the creation of a lien on fixtures pursuant to real estate law. To the extent that a creditor obtains a lien on fixtures by reason of a mortgage or trust deed on the real estate, the creation, perfection and enforcement of that lien will be governed by real estate law and not by the Code. Neither a chattel filing nor a fixture filing is required to perfect a lien created in this manner. However, the priority of a lien on fixtures created pursuant to real estate law will be subject to the rules set forth in Section 9313.

6. As to the meaning of the phrase "goods which . . . are to become fixtures" as used in Section 9313(1)(b), see Comment 3 to proposed Section 9401.]

SEC. 7. Section 9401 of the Commercial Code is amended to read: 9401. (1)-(4) [No change]

(5) Notwithstanding subdivision (1), and subject to subdivision (3) of Section 9302, the proper place to file in order to perfect a security interest in collateral, including fixtures, of a transmitting utility is the office of the Secretary of State. *This filing also constitutes a fixture filing (Section 9313) as to the collateral described therein which is or is to become fixtures.*

(6) [No change]

(7) *The proper place to file a financing statement filed as a fixture filing is in the office where a mortgage on the real estate would be recorded.*

[Comment of the Uniform Commercial Code Committee:

1. The sentence added to paragraph (5) is taken from the Official Text of the Code, with the exception of the word "also," which has been added to clarify that a financing statement filed under paragraph (5) may constitute both a regular filing which "perfects" the security interest and a fixture filing. See Comment 1(a) to proposed Section 9313.

2. Proposed Subdivision (7) provides that financing statements that are filed as fixture filings are to be filed in the local real estate records. This Section does not state that all financing statements covering fixtures are to be filed locally, but applies only to those which are filed as fixture filings in order to gain priority over conflicting real estate interests under pro-

posed Section 9313. *Compare* Section 9-401(1)(b) of the 1972 Official Text, which provides in part that “[t]he proper place to file in order to *perfect* a security interest . . . when the financing statement is filed as a fixture filing . . . [is] in the office where a mortgage on the real estate would be . . . recorded.” (Emphasis added). Since a fixture filing does not result in “perfection” of a security interest under proposed Section 9313, it is recommended that present Section 9401(1)(b) not be amended to conform to the Official Text, and that Section 9401(7) be added instead. *See* Comment 1(a) to proposed Section 9313.

3. The use of the phrase “is to become fixtures” in Subdivision (5) is not intended to inject a new element of “intent” in determining whether goods are fixtures, but is intended only to make clear that Subdivision (5) encompasses goods which may later become fixtures. Similar phraseology appears in proposed Sections 9313(1)(b), 9402(1), (3) and (6), and the same understanding applies there.]

SEC. 8. Section 9402 of the Commercial Code is amended to read:

9402. (1) A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. A financing statement should include the debtor’s trade name or style, if any, if known to the secured party, but a failure to include such trade name or style does not affect the validity of the financing statement. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown, the statement must also contain a description of the real estate concerned. When the financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to subdivision (5) of Section 9103, *or when the financing statement is filed as a fixture filing (Section 9313) and the collateral is goods which are or are to become fixtures*, the statement must also comply with subdivision (5). A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor. A certified copy of a financing statement or security agreement is sufficient as a financing statement if the original thereof was filed in this state.

(2) A financing statement which otherwise complies with subdivision (1) is sufficient when it is signed by the secured party instead of the

debtor if it is filed to perfect a security interest in *or as a fixture filing covering*

(a)-(c) [No change]

(d) Collateral acquired after a change of name, identity or corporate structure of the debtor (subdivision ~~(6)~~(7)). Such a financing statement must include a statement that the name, identity or corporate structure of the debtor has been changed and give the date of filing and the file number of the prior financing statement and the name of the debtor as shown in the prior financing statement.

(3) A form substantially as follows is sufficient to comply with subdivision (1):

Name of debtor (or assignor) _____

Address _____

Name of secured party (or assignee) _____

Address _____

Debtor's trade name or style, if any _____

1. This financing statement covers the following types (or items) of property: (Describe) _____

2. (If collateral is crops) The above-described crops are growing or are to be grown on: (Describe real estate) _____

3. (If applicable) The above goods are or are to become fixtures on* (Describe real estate) _____ and this financing statement is to be recorded in the real estate records. (If the debtor does not have an interest of record) The name of a record owner is _____

~~3.4.~~ (If products of collateral are claimed) Products of the collateral are also covered.

(Use _____
whichever _____
is _____
applicable) _____
Signature of debtor (or assignor)
Signature of secured party (or assignee)

*Where appropriate substitute either "The above timber is standing on" or "The above mineral or the like (including oil and gas) or accounts will be financed at the wellhead or minehead of the well or mine located on"

(4) A financing statement may be amended by filing a writing signed by both the debtor and the secured party, or by the secured party alone in the case of an amendment pursuant to subdivision ~~(6)~~ (7). An amendment does not extend the period of effectiveness of a financing statement. If any amendment adds collateral, it is effective as to the ad-

ded collateral only from the filing date of the amendment. In this division, unless the context otherwise requires, the term "financing statement" means the original financing statement and any amendments.

(5) A financing statement covering timber to be cut or covering minerals or the like (including oil or gas) or accounts subject to subdivision (5) of Section 9103, or a financing statement filed as a fixture filing (Section 9313) where the debtor is not a transmitting utility, must show that it covers this type of collateral, must recite that it is to be recorded 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. If the debtor does not have an interest of record in the real estate, the financing statement must show the name of a record owner.

(6) *A mortgage is effective as a financing statement filed as a fixture filing from the date of its recording if*

(a) *The goods are described in the mortgage by item or type; and*

(b) *The goods are or are to become fixtures related to the real estate described in the mortgage; and*

(c) *The mortgage complies with the requirements for a financing statement in this section other than a recital that it is to be filed in the real estate records; and*

(d) *The mortgage is duly recorded.*

No fee with reference to the financing statement is required other than the regular recording and satisfaction fees with respect to the mortgage.

(7) [Renumber present (6) to (7)]

(8) [Renumber present (7) to (8)]

[Comment of the Uniform Commercial Code Committee:

1. The proposed amendment to Section 9402(1) is intended solely as a cross-reference to Section 9402(5), which sets forth certain requirements applicable to financing statements that are filed as fixture filings. The proposed language is taken from the 1972 Official Text of Section 9-402(1).

2. The addition to paragraph (2) is recommended in order to extend the provisions of that paragraph to fixture filings as well as to financing statements "filed to perfect a security interest." See Comment 1(a) to proposed Section 9313. The proposed language is not contained in the Official Text.

3. The revision to Section 9402(3) implements the requirements of Section 9402(5) relating to fixture filings. This revision follows the Official Text, except for the words "are or,"

which have been added to correct what appears to be a minor oversight. (The California versions of Section 9402(1) and (3) differ somewhat from the uniform provisions, but the differences are unrelated to the fixtures provisions.)

4. The amendment to Section 9402(5) requires that certain specified information be contained in any financing statement filed as a fixture filing. The purpose of this Section is to accommodate the indexing of fixture filings in such a manner that they would be disclosed by a search of the real estate records. One of the requirements is that the financing statement 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." Under this provision, a full legal description will always be sufficient. A less formal description, such as a street address, will suffice only where the description, if contained in a mortgage, would be sufficient to impart constructive notice of the mortgage under California law. As written, proposed Section 9402(5) is substantially the same as Section 9-402(5) of the Official Text.

5. New Section 9402(6) provides that a real estate mortgage will be effective as a fixture filing provided certain requirements are met. This Section is identical to Section 9402(6) of the Official Text.

6. Changes are made to Sections 9402(2)(d) and 9402(4) to reflect the renumbering of paragraph (6) to (7).

7. As to the meaning of the phrase "are to become fixtures" as used in Section 9402(1), (3) and (6), see Comment 3 to proposed Section 9401.]

SEC. 9. Section 9403 of the Commercial Code is amended to read:
9403. (1) [No change]

(2) Except as provided in subdivision (6), a filed financing statement is effective for a period of five years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of such five-year period unless a continuation statement is filed prior to the lapse. If a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against the debtor, the security interest remains perfected until termination of the insolvency proceedings and thereafter for a period of 60 days or until expiration of the five-year period, whichever occurs later. Upon such lapse the security interest becomes unperfected unless it is perfected without filing. If the security interest becomes unperfected upon lapse, it is deemed to have been

unperfected as against a person who became a purchaser or lien creditor before lapse. *If a fixture filing is effective at the time insolvency proceedings are commenced by or against the debtor, the fixture filing remains effective until termination of the insolvency proceedings and thereafter for a period of 60 days or until expiration of the five-year period or termination pursuant to subdivision (6), whichever occurs later. Upon lapse of a fixture filing, it is deemed to have been ineffective as against a person who became a purchaser or lien creditor before lapse.*

(3)-(5) [No change]

(6) If the debtor is a transmitting utility (subdivision (5) of Section 9401) and a filed financing statement so states, it is effective until a termination statement is filed. *A real estate mortgage which is effective as a fixture filing under subdivision (6) of Section 9402 remains effective as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real estate.*

(7) A financing or continuation statement covering collateral described in paragraph (b) of subdivision (1) of Section 9401 *or filed as a fixture filing* shall be recorded and indexed by the filing officer in the real property index of grantors under the name of the debtor *and any owner of record shown on the financing statement*. A financing or continuation statement so recorded and indexed and containing a description of real property affected thereby shall constitute constructive notice from the time of its acceptance for recording to any purchaser or encumbrancer of the real property of the security interest in such collateral.

[Comment of the Uniform Commercial Code Committee:

1. The addition to Section 9403(2) is intended to insure that the effectiveness of a financing statement filed as a fixture filing will continue during insolvency proceedings in the same manner as a financing statement filed to "perfect" a security interest. *See* Comment 1(a) to proposed Section 9313. The proposed language is not contained in the Official Text.

2. The addition to paragraph (6) provides that a mortgage which serves as a fixture filing is effective as such for the same time period as the mortgage is effective with respect to the real estate. Thus, a mortgage filed as a fixture filing is exempt from the requirement that a continuation statement be filed every five years. The proposed language is the same as the Official Text.

3. The revisions to paragraph (7) are necessary to insure that fixture filings are properly indexed in the real estate records. *Compare* Section 9-403(7) of the 1972 Official Text.]

SEC. 10. Section 9501 of the Commercial Code is amended to read:

9501. (1)-(3) [No change]

(4) If the security agreement covers both real *property* and personal property *or fixtures* (Section 9313(1)(a)), the secured party may proceed under this chapter as to the personal property *or fixtures* or he may proceed as to both the real *property* and the personal property *or fixtures* in accordance with his rights and remedies in respect of the real property in which case the provisions of this chapter do not apply.

(5) [No change]

[Comment of the Uniform Commercial Code Committee:

1. Present Section 9501(4) provides that where a security agreement covers both real and personal property, the secured party may either: (a) proceed against the personal property under the Code; or (b) proceed against both the real and personal property under real estate law. If a security agreement covers both real property and "fixtures," this Section would, by its terms, apply only where the fixtures are deemed to be "personal property."

2. The suggested language is intended to result in the equal treatment of all fixtures under Section 9501(4), whether the fixtures are classified as real property or as personal property under California law. Thus, under the proposed Section, where a security agreement covers both real property and fixtures which are real property, the secured party may proceed against the fixtures under the Code in the same manner and to the same extent as he might if the fixtures were personal property, or he may proceed as to both the real property and fixtures under real estate law.

3. The Committee's recommendation is not contained in the Official Text of the Code. The failure of the Official Text to treat all fixtures equally under Section 9-501(4) appears to be the result of an oversight.]

SEC. 11. Section 11109 is added to the Commercial Code to read:

11109. (1) The amendments to this Code relating to fixtures adopted by the Legislature at the 1979-1980 Regular Session shall apply to security interests which attach on or after [effective date of amendments] in goods which become fixtures on or after [effective date of amendments].

(2) If the record of a mortgage of real estate would have been effective as a fixture filing of goods described therein if the amendments to this

Code relating to fixtures adopted by the Legislature at the 1979-1980 Regular Session had been in effect on the date of recording the mortgage, the mortgage shall be deemed effective as a fixture filing as to such goods under subdivision (6) of Section 9402 as of [effective date of amendments].

[Comment of the Uniform Commercial Code Committee:

1. Paragraph (1) is intended to apply the fixtures provisions of the Code only where both of the following conditions are met: (a) The goods in question became fixtures on or after the effective date of the amendments, and (b) the security interest attached on or after the effective date of the amendments. The first requirement is intended to avoid the impairment of rights and priorities that may have vested under existing law. The second requirement is intended to prevent the automatic application of Section 9313(7) to existing security interests in fixtures that might qualify for priority over conflicting real estate interests under present law.

2. Paragraph (2) is adopted from the transition provisions prepared by the Reporters of the 1972 Official Text. *See* Section 11-105(4).]

SEC. 12. Section 731 is added to the Code of Civil Procedure to read:

731. Except as otherwise provided in Section 9501(4) of the Commercial Code, none of the provisions of this chapter or of Sections 580a, 580b, 580c, or 580d apply to any security interest in fixtures governed by the Uniform Commercial Code.

[Comment of the Uniform Commercial Code Committee:

1. This Section is intended to clarify that California real estate foreclosure law (including California's anti-deficiency legislation and the one-form-of-action rule) is not to be applied to security interests in fixtures governed by the Code, except to the extent provided in Section 9501(4). *Compare* Civil Code Sections 2914 and 2944.

2. If a security agreement covers both real property and fixtures and, pursuant to Section 9501(4), the secured party proceeds as to both the real property and fixtures "in accordance with his rights and remedies in respect of the real property," then the real estate foreclosure rules will be applicable.

3. The Committee takes no position with respect to *Walker v. Community Bank*, 10 Cal. 3d 729 (1974), and neither

this Section nor the amendments proposed to Section 9501(4) are intended to overrule or modify that decision.]

SEC. 13. Section 27282 of the Government Code is amended to read:

27282. (a) The following documents may be recorded without acknowledgment, certificate of acknowledgment, or further proof:

(1)-(5) [No change]

(6) *A fixture filing as defined in Section 9313(1)(b) of the Commercial Code.*

(b) [No change]

[Comment of the Uniform Commercial Code Committee:

The adoption of Section 27282(a)(6) is recommended to assure that fixture filings may be recorded without acknowledgment, and that such recordation will constitute constructive notice of the contents thereof to subsequent purchasers and mortgagees of the real property. *See* Government Code § 27282(b).]

APPENDIX B TO REPORT OF THE UNIFORM COMMERCIAL CODE
COMMITTEE ON SECTION 9-313 OF THE UNIFORM
COMMERCIAL CODE

§ 9-313. Priority of Security Interests in Fixtures

(1) In this section and in the provisions of Part 4 of this Article referring to fixture filing, unless the context otherwise requires

- (a) goods are "fixtures" when they become so related to particular real estate that an interest in them arises under real estate law
- (b) a "fixture filing" is 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 conforming to the requirements of subsection (5) of Section 9-402
- (c) a mortgage is a "construction mortgage" to the extent that it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates.

(2) A security interest under this Article may be created in goods which are fixtures or may continue in goods which become fixtures, but no security interest exists under this Article in ordinary building materials incorporated into an improvement on land.

(3) This Article does not prevent creation of an encumbrance upon fixtures pursuant to real estate law.

(4) A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where

- (a) the security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within ten days thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate; or
- (b) the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate; or
- (c) the fixtures are readily removable factory or office ma-

chines or readily removable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any method permitted by this Article; or

- (d) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this Article.

(5) A security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where

- (a) the encumbrancer or owner has consented in writing to the security interest or has disclaimed an interest in the goods as fixtures; or
- (b) the debtor has a right to remove the goods as against the encumbrancer or owner. If the debtor's right terminates, the priority of the security interest continues for a reasonable time.

(6) Notwithstanding paragraph (a) of subsection (4) but otherwise subject to subsections (4) and (5), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.

(7) In cases not within the preceding subsections, a security interest in fixtures is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor.

(8) When the secured party has priority over all owners and encumbrancers of the real estate, he may, on default, subject to the provisions of Part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation. Amended in 1972.

