

1976

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Paul J. Petit

*Assoc., Peterson, Ross, Rall, Barber & Seidel, Chicago, IL*

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### Recommended Citation

Paul J. Petit, *Choice of Law Under Article Nine of the UCC*, 7 Loy. U. Chi. L. J. 641 (1976).

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# Choice of Law Under Article Nine of the UCC

PAUL J. PETIT\*

The problem of the removal of collateral between filing districts within the same state has been treated. . . . as a matter of no interest or importance, intellectual or economic, and disposed of, almost without thought in the simplest method that came to hand. The factually similar problem of the removal of collateral across a state line has evoked a quite different response: Contemplation of the moral, jurisprudential and (perhaps) constitutional problems which are involved when a slave, a horse, an automobile, or a piece of industrial equipment crosses the line from State A to State B has long stimulated the legal profession to prodigies of intellection and to orgies of subtlety and refinement. The issues have been debated in the treatises, reargued in the law reviews and authoritatively decided in a never-ending series of cases. Despite this vast outpouring of professional energy we seem to be no nearer to a solution, or even a consensus, than we were a hundred years ago. It may be concluded that, given the complexities of our federal system, the problems created by the interstate movement of tangible personal property are not easy of solution.<sup>1</sup>

## CHOICE OF LAW UNDER THE 1962 UCC ARTICLE 9

### *The General Choice of Law Rule: 9-102(1)*

The 1962 UCC<sup>2</sup> contains three choice of law sections relating to

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\* Associate with the firm of Peterson, Ross, Rall, Barber & Seidel, Chicago, Illinois; B.S., Loyola University of Chicago; J.D., *cum laude*, Loyola University of Chicago School of Law; Instructor, Loyola University of Chicago School of Law.

1. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* 599-600 (1965).

2. The UNIFORM COMMERCIAL CODE (1962) will be hereinafter referred to as UCC or Code. Those sections which have been altered by the 1972 amendments will be specified as UCC(R). Unless indicated otherwise, all citations to the UCC refer to the UNIFORM LAWS ANNOTATED. (Master edition 1968).

It would have been logical to assume that nation-wide adoption of the UCC would have laid to rest all questions of conflict of laws regarding transactions governed by the provisions of the UCC. This assumption was inaccurate as to secured transactions for at least two reasons. First, the provisions of the official Article 9 have been significantly amended by the various enacting states. In November of 1966 the Permanent Editorial Board Reported that:

337 non-uniform, non-official amendments have been made to the various sections of Article 9. Some sections have been amended by as many as 30 jurisdictions, each jurisdiction writing its own amendment without regard to the amendments made by other jurisdictions. . . . 47 of the 54 sections of Article 9 had been non-uniformly amended.

Permanent Editorial Board for the Uniform Commercial Code, Report No. 3, at X (1967).

This phenomenon has persisted, as can be demonstrated by a review of the local variations

secured transactions: 1-105, 9-102(1) and 9-103. Section 1-105(1)<sup>3</sup> states the general UCC policy towards choice of law: when a transaction bears a "reasonable relation" to this state and to another state (or nation) the parties may by agreement specify that the law of one of those states will apply. If the parties fail to make such an agreement, the law of this state ("this Act") will apply to any transaction "bearing an appropriate relation to this state."

The terms "reasonable relation" and "appropriate relation" are not defined in a UCC provision or the Official Comments to 1-105, leaving the enacting state free to provide definitions by judicial interpretation consonant with that state's general choice of law principles. Therefore, for the majority of conflict of laws issues arising in transactions subject to its provisions, the UCC provides no choice of law rules, but instead incorporates the general choice of law rules of the enacting jurisdiction.

However, under 1-105(2) certain Code sections "govern" choice of law questions and contrary agreement is allowed only "to the extent permitted by the law (including the conflict of law rules)" of the state specified by the governing section. Among these exceptional sections are 9-102 and 9-103, which concern the applicability and

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reported in detail by the UNIFORM COMMERCIAL CODE REPORTING SERVICE (UCC REP. SERV.). Although many of the amendments do not represent material variations, a substantial number enact changes which must be considered in conflict with the Official Text versions.

Second, perfection of a security interest has geographic limitations, as will be noted from the discussion herein. Thus, the choice of law rules regarding perfection of a security interest also determine what actions must be taken in which jurisdiction to achieve and maintain perfection.

3. UCC § 1-105(1) provides as follows:

Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

The question of contractual specification of applicable law in a multi-state transaction was raised in *In re Kokomo Times Publishing and Printing Corp.*, 301 F. Supp. 529 (S.D. Ind. 1968). The parties had there elected that Illinois (UCC) law apply to a security interest in goods to be kept in Indiana, which had not yet enacted the UCC. The court held that perfection of the security interest was to be determined by the law of Indiana. The court looked to Illinois law and cited the 9-103(3) rule regarding the validity of a security interest in goods which are to be kept in another jurisdiction, as a choice of law rule governing issues of perfection, which of course it is not. However, it is clear that under the UCC, as well as under pre-Code law, the parties to a security interest may not select the law to govern perfection, and thus affect the rights of strangers to the security agreement. Thus, the court's decision to apply Indiana law, though short on analytical merit, reflects that conclusion. *Cf.*, *Jim v. CIT Financial Services Corp.*, 86 N. Mex. 784, 533 P.2d 751 (1975), where the court reversed the trial court's dismissal of debtor's action for damages caused by repossession where debtor maintained that parties had specified that Navajo tribal law apply to repossession procedures.

scope of Article 9.<sup>4</sup> The draftsmen have withdrawn Article 9 from the general choice of law rule of 1-105(1) and established special rules not subject to the adopting state's general choice of law rules.

This division of conflict of laws authority between Article 9, with its specific choice of law rules, and the remaining articles of the UCC, as governed by general choice of law rules of the enacting state, may result in the application of the law of several states to different aspects of a transaction governed by the UCC. For example, a sale of goods (Article 2) with a retained security interest (Article 9) may be governed, as to issues relating to the sale by the contracts choice of law rule of the enacting state, while those issues relating to the validity, attachment and perfection of the security interest will be resolved by the specific rules of 9-102 and 9-103. This analysis creates the uncertain and potentially inequitable result of applying different laws to parts of a single business transaction. But, as will be seen,<sup>5</sup> the UCC choice of law rules operate upon this very assumption: that different questions arising from the same transaction may be governed by the laws of different states.<sup>6</sup>

Sections 9-102 and 9-103 are intended to govern the whole spectrum of choice of law problems which arise under Article 9. To apply 9-102 and 9-103 it is necessary to distinguish validity, perfection and

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4. As regards Article 9, 1-105(2) provides as follows:

Where one of the following provisions of this Act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflicts of laws rules) so specified: . . . Policy and scope of the Article on Secured Transactions. Section 9-102 and 9-103.

The other sections specified as exceptions to the 1-105 rule are 2-402, 4-102, 6-102 and 8-106. Section 2-402(2) provides that a creditor of a seller may treat a sale on an identification of goods to a contract as void if, as against him, the seller's possession of the goods is fraudulent under any rule of law of that state where the goods are located. Section 2-402(3)(b) provides that nothing contained in Article 2 shall impair the rights of a creditor of the seller where identification to the contract for sale is made in satisfaction of, or as security for, a pre-existing claim under circumstances which would make that identification a fraudulent transfer or voidable preference under any rule of law of that state where the goods are located. Under 4-102 the liability of a bank regarding its handling of an instrument for purposes of presentment, payment or collection is governed by the law of the place where the bank is located. Section 8-106 makes the law (including the conflict of laws rules) of the jurisdiction of organization of the issuing corporation applicable to questions of validity of an investment security and the rights and duties regarding registration of transfer of that security.

5. See, e.g., text accompanying notes 7 through 18 *infra*.

6. The divisibility concept is taken up in Weintraub, *Choice of Law in Secured Personal Property Transactions: The Impact of Article 9 of the Uniform Commercial Code*, 68 MICH. L. REV. 684, 691-97 (1970) [hereinafter cited as Weintraub]; 2 GILMORE, SECURITY INTEREST IN PERSONAL PROPERTY § 4.9.11 at 1278 (1965) [hereinafter cited as GILMORE]; Cf. Skinner v. Tober Foreign Motors, Inc., 345 Mass. 429, 187 N.E.2d 669, 1 UCC REP. SERV. 1 (1963). That the laws of different states may apply to different questions arising under a single secured transaction is inherent in the structure of the Article 9 choice of law rules. Cf., Interstate Tire Co. v. United States, 12 UCC REP. SERV. 948 (D. Ariz. 1973).

default questions. The Code does not define, but merely names these categories. Section 9-102(1) appears to deal with all Article 9 questions; the subsections of 9-103 address either perfection alone or both validity and perfection.

Perfection, the most easily delimited category, deals with the rights of a secured party vis-a-vis some intervenor, typically a trustee in bankruptcy or subsequent purchaser, including a holder of a subsequent security interest in the same collateral. However, whether this category encompasses further questions concerning the secured party's rights in the collateral upon the debtor's default, such as the right to repossession, is questionable. Professor Gilmore suggests that, at least for the purposes of choice of law, default rights fall within the 9-103 category of "perfection,"<sup>7</sup> and cites this language in Comment 7 to 9-103:

Note that even after the four-month period it is the law of the jurisdiction where the security interest attached which determines its validity. That is to say, such matters as formal requisites continue to be tested by the law with reference to which parties originally contracted; other matters (rights of third parties, rights on default and so on) are governed by this article.

Gilmore's conclusion that the draftsmen intended that default issues be controlled by the same law which governs perfection issues finds its sole support in this comment. However, as a question of descriptive categorization, perfection is unrelated to default or redemption. First, perfection protects the secured party from intervening priority of third party interests, and has no relation to the rights of the secured party vis-a-vis the debtor. Second, had the draftsmen intended to include questions of default rights in the term "perfection" they could easily have so stated. Default rights may be governed by the 9-103 rules regarding perfection, but that conclusion is not free from doubt.<sup>8</sup>

The "validity" concept clearly includes issues of enforceability of the security interest between debtor and creditor. Default issues do not fall within this category, being concerned with enforcement rights and procedures and not with whether an enforceable agreement exists. That default rights are not intended to be governed by the choice of law rules for validity is reinforced by a reading of Comment 6 to 9-103 which clearly separates default questions from validity questions. Although all this seems clear enough, the editors of the *Restatement (Second) Conflict of Laws* remain unconvinced:

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7. GILMORE, *supra* note 6, at 1276-77.

8. *Cf.*, Weintraub, *supra* note 6, at 698-99.

It has not been determined what issues are covered by the term "validity" as used in §9-103. Undoubtedly, the term includes certain requirements as to formalities (see §9-203), but it is not clear that the term covers such issues as capacity, illegality and fraud. *Also it is not clear that the term covers issues of redemption.*<sup>9</sup>

In spite of this doubt it seems safe to conclude that validity does not include default rights.

If default rights are not included in the UCC concepts of validity or perfection, and the choice of law rules of 9-103 concern only validity and perfection, it is evident that 9-102(1) controls default rights. Section 9-102(1) states:

Except as otherwise provided in Section 9-103 on multiple state transactions and in Section 9-104 on excluded transactions this Article applies so far as concerns any personal property and fixtures within the jurisdiction of this state. . .

The phrase "within the jurisdiction of the state" may refer to the location of the collateral or to the existence of judicial jurisdiction over parties and subject matter; however, it seems the drafters' intent that the phrase define collateral physically within the geographical limits of the state. Comment 3 to 9-102 reinforces this conclusion:

In general this Article adopts the position, implicit in prior law, *that the law of the state where the collateral is located should be the governing law*, without regard to possible contacts in other jurisdictions. Thus, the applicability of the Article is by this Section stated to extend to transactions concerning "personal property and fixtures within the jurisdiction of this state [emphasis added].

Section 9-102(1) states a situs rule which determines whether "this Article," as the law of this state, is to apply. Thus, the location of the collateral in the enacting state is sufficient contact to allow imposition of that state's law, even if all other contacts are elsewhere.

Having determined that 9-102(1) states a situs rule and that this rule governs choice of law regarding default questions, other questions remain. The most important question is: at what point in the history of the transaction is the choice of law decision as to default rights fixed by situs of the collateral.

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9. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 250, at 119-20 (P.O.D. III, 1969) (emphasis added).

There are four events in the life of a secured transaction which could be utilized as fixing points for application of the situs rule: attachment of the security interest; perfection of the security interest; default (or resulting foreclosure, repossession or resale); or maintenance of an action to enforce rights under the security interest or to attack the enforceability or priority of that interest.

If choice of law regarding default questions is determined on the basis of the situs of the collateral upon either attachment or perfection of the security interest, there is the real danger that the rule will operate to select the law of a state whose only contact with the transaction is that the collateral was present within its boundaries at the time of attachment. The draftsmen never intended that default rights be fixed by the law of the situs upon attachments, as Comment 6 to 9-103 advises that the law governing default rights will change when the collateral is moved. However, the draftsmen fail to advise whether choice of law concerning default rights is fixed by situs of the collateral at the time of default, repossession, resale or maintenance of an action.<sup>10</sup>

It is apparent that the UCC creates more problems than it solves in attempting to provide choice of law rules relating to default questions. First, it is not clear whether default questions are governed by 9-102(1) or are encompassed within the 9-103 rules regarding perfection. Second, the application of the 9-102 situs rule will result in the inequities, inherent in any situs rule, generated by application of the law of the situs state when the parties have significant contacts elsewhere. Finally, 9-102(1) provides no time reference to fix the situs rule, and none of the alternatives are optimal.

Aside from the time selection dilemma, the concept of situs breaks down when the collateral consists of either accounts, contract rights or those legal rights which the UCC categorizes as "general intangibles." Comment 2 to 9-103 describes the problem:

Accounts, contract rights and general intangibles do not fit that simple pattern. As to them, there is no indispensable or symbolic document which represents the underlying claim, whose endorsement or delivery is the one effectual means of transfer.

There is a considerable body of case law dealing with the situs of

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10. See 9-201 regarding the scope of the term "validity." In *Lewis v. First National Bank of Miami*, 17 UCC REP. SERV. 297 (1975) the court applied the law of the State of Georgia (the situs of the collateral upon repossession and resale) to questions concerning the propriety of the repossession and resale and to questions concerning the secured party's right to a deficiency judgment, notwithstanding the fact that the collateral was purchased in Florida, under a contract specifying the applicability of Florida law, and was subject to a security interest perfected in Florida.

choses in action. This case law is in the highest degree confused, contradictory and uncertain; it affords no base on which to build a statutory rule.

For this reason, 9-103(1) and 9-103(2) formulate specific rules for choice of law regarding these types of collateral. However, if 9-103 does not apply to default questions, as it apparently does not, the draftsmen have required application of the 9-102(1) situs rule to default questions, while at the same time indicating that this rule, as applied to accounts, contract rights and general intangibles, invites a variety of contradictory results.

Because the 9-102(1) rule regarding default rights is fraught with confusion, reliance upon a single interpretation may be dangerous. Can the parties obviate the difficulty by agreeing between themselves as to the applicable law? Section 1-105(2) allows the parties to specify the applicable law only where the law of the state to which the 9-102 (or 9-103) choice of law rule refers allows such specification.<sup>11</sup> In order to effectively agree on an applicable law, the parties must decide to which state law the 9-102(1) rule refers, and examine the choice of law rules of that state to determine whether contrary specification will be allowed.

If the first step provides alternative answers regarding the applicable law, the second step may provide contradictory answers as to the validity of the specification. Further, how can the parties be certain of the result of 9-102(1) at the time of attachment of the security interest when the draftsmen have indicated that situs at time of attachment will not fix the default rights? And further, if the situs state (assuming agreement on which state, that is) has 9-102(1) as its choice of law rule, does this not foreclose any contrary agreement from the onset? The Code leaves these questions unanswered.

That the converse of the 9-102(1) situs rule also operates has been assumed throughout this discussion: State X will apply its own law if the collateral is within its boundaries; but if the collateral is elsewhere, the courts of State X will apply the law of that state. Putting aside the problems of time reference and geographical placement of intangibles, the last problem seems to be whether we are dealing with a choice of law provision at all. If the converse of the 9-102(1) rule is the law, then 9-102(1) is a true conflicts rule and will direct the application of a foreign law, be it the UCC, the law of Louisiana or the law of some foreign country. Neither Code com-

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11. See text accompanying note 4 *supra*.



ments nor text provide guidance regarding this problem. Therefore, it is doubtful whether the draftsmen's intent will become apparent until exhaustive construction by the courts. Such construction is not forthcoming.<sup>12</sup>

As previously noted,<sup>13</sup> 9-103 deals with security interests in specific types of collateral and governs perfection and validity of those interests. Because the 9-103 rules do not cover all situations, it is logical to assume that the draftsmen intended the 9-102(1) rule to operate in all non-excepted situations. Thus, as 9-102(1) itself provides, its rule is a general one which is preempted only to the extent that 9-103 carves out specific exceptions. These exceptions will be dealt with in turn.<sup>14</sup>

Validity concerns at least issues of enforceability<sup>15</sup>—the legal efficacy of the secured transaction. As to validity, the situs rule of 9-102(1) could select the applicable law based upon situs of the collateral either at the time of attachment or commencement of an enforcement action challenging the validity of the agreement. Because it would be unjust to allow the debtor to affect the validity of the secured party's interest by moving the collateral from one jurisdiction to another, situs at attachment is clearly the only workable alternative. However, the situs at attachment rule for issues concerning validity suffers a serious impediment where the presence of the collateral in a state at the time of attachment is the only contact with that jurisdiction, for such limited contact might be insufficient by due process standards to allow a state to impose its own law.

By operation of 9-103, the 9-102(1) rule does not determine the choice of law regarding issues of validity under certain circumstances: where the collateral is accounts, contract rights, general intangibles, mobile equipment or mobile inventory for lease, or collateral of any type which the parties agree shall be used in a state other than its present situs and which is moved to that state within thirty days of attachment of the security interest. But as to security agree-

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12. In *Fidelity Bank & Trust Co. of New Jersey v. Production Metals Corp.*, 366 F. Supp. 613, 14 UCC REP. SERV. 219 (E.D. Pa. 1973), the court imposed a duty of preservation of collateral pledged and selected the applicable law by reference to 9-102(1). Because the corporate stock pledged was kept by the pledgee bank in New Jersey, the court applied New Jersey law to the question of the bank's duty to preserve the collateral. The court found that duty arose under 9-207(1) as well as extra-Code New Jersey law. This decision suggests that the 9-102(1) rule may be treated as a true conflicts rule, determining the applicable law, including extra-Code laws. In addition, this decision demonstrates that questions may arise which do not fit readily into the categories of validity, perfection and default rights.

13. See text accompanying notes 6 through 10 *supra*.

14. See text accompanying notes 18 through 50 *infra*.

15. See text accompanying note 9 *supra*.

ments covering all other types of collateral and as to all other circumstances of removal of the collateral from the state of situs upon attachment, the 9-102(1) situs rule determines choice of law on validity issues.

The law of the jurisdiction of the situs of the collateral at the time of attachment of the security interest should not, in every situation, determine the validity of that interest. The security agreement is a contract, and the issues which the UCC arguably categorizes as validity issues are questions of enforceability of that contract. Apparently, the draftsmen believed that to allow choice of law questions to be determined by the enacting state's rules regarding contract validity and enforceability would inject non-uniformity into Article 9. Unfortunately, the system fashioned to forestall this result falls far short of providing a workable choice of law system.

Perfection is governed by the 9-102(1) rule to the extent that 9-103 does not provide exceptions.<sup>16</sup> Under pre-Code forms of secured transactions perfection was always considered a localized commodity. Perfection provided protection against the claims of third parties to the collateral only so long as the collateral remained in that jurisdiction where the act of perfection, usually possession or some sort of recordation, had occurred. Under the pre-Code rule, third party rights were to be determined according to the law of that state where the property was situated at the time of the transaction upon which the third party claim was based. As filing became the preferred method of perfection, the secured party's protection thus ended when the goods were removed from that jurisdiction where the filing had been made. This rule was tempered by a corollary which permitted recognition of perfection accomplished in State A, if the collateral was removed from State A without the secured creditor's consent or knowledge, so long as the secured creditor acted seasonably to protect his interest by filing in State B, to which the property was removed.<sup>17</sup> The 9-102(1) rule, read in light of this

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16. Section 9-103 provides choice of law rules regarding the perfection of security interests in accounts, contract rights, general intangibles (personal property other than goods, accounts, chattel paper, documents, instruments and money) mobile goods (see 9-103(2)) and goods which are covered by a certificate of title. Thus, 9-102(1) governs all questions of perfection as to other collateral types except that questions of perfection regarding incoming "personal property" are governed by the last two sentences of 9-103(3). Therefore, 9-102(1) is a choice of law rule for perfection questions where the collateral is chattel paper, documents, instruments, non-mobile goods not covered by certificate of title (whether classified as consumer goods, farm products, equipment, or inventory) except where the security interest in such property is perfected in the state of its situs upon attachment and thereafter brought into this state.

17. The cases are collected at Weintraub, *supra* note 6, at 705-07n.n.72-75.

history of localized perfection, requires application of the law of that state which is the situs of the collateral at the time of the transaction creating the right which a third party claims to be superior to the security interest.

Under 9-102(1), perfection is accomplished by the presence of the collateral in this state plus some perfecting act, *i.e.*, filing or possession in this state. Thus, 9-102(1) both governs choice of law and sets geographic limits to perfection. The parties may not be able to obviate the choice of law result of 9-102(1) by agreement. First, 1-105(2) allows contrary agreements to govern only if the law of the state selected by the 9-102(1) rule condones such an agreement. If 9-102(1) is truly a conflicts rule, there is no reason for a state to allow agreements in contravention of its choice of law rule. Second, the courts are always reluctant to impose the choice of law agreement upon third parties, such as subsequent purchasers.<sup>18</sup>

*The Exceptions of 9-103 to the Situs Rule of 9-102.*

A. *Section 9-103*

Section 9-103(1) provides:

If the office where the assignor of accounts or contract rights keeps his records concerning them is in this state, the *validity* and *perfection* of a security interest therein and the possibility and effect of proper filing is governed by this Article; otherwise by the law (including the conflict of laws rules) of the jurisdiction where such office is located [emphasis added].

Therefore, as to the issues of validity and perfection of a security interest in accounts, the law of the jurisdiction where the debtor keeps his records controls. This rule eliminates the problem of locating the "situs" of an account or a contract right, but creates other problems.

Assume that the secured party (SP) takes a security interest in all of debtor's (D) accounts, as to which some of the records are "located" in States X, Y and Z. In addition, D maintains a central computer data bank on all accounts at its office in State Z. Section 9-103(1) speaks of "the office where the assignor of accounts or contract rights keeps his records concerning them," and thus assumes that D will have only one office keeping records of its accounts. As a result, the 9-103(1) rule does not cover this situation if D keeps records concerning the same account in two different loca-

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18. *Cf.*, *Industrial Packaging Products Co. v. Fort Pitt Packaging International, Inc.*, 399 Pa. 643, 161 A.2d. 19, 1 UCC REP. SERV. 634 (1960).

tions, duplicates records as to certain accounts in different statistical media (*e.g.* ledger sheet and computer bank), or maintains several accounts offices, each keeping records as to some of D's accounts or contract rights.<sup>19</sup>

The result is that SP will be required to file in each state in which D maintains any account records to safeguard perfection as to all accounts. However, the 9-103(1) rule applies to validity of the security interest as well and because SP takes an interest in all of D's accounts, the law of either X, Y or Z could govern validity. Therefore, because 9-103(1) does not appear to anticipate multiple accounts records offices, the laws of three different states must be applied in some unspecified manner to determine the validity of a security interest in accounts governed by a single security agreement.

What result if D keeps his accounts records only in State X, but thereafter moves them all to State Y? Need SP refile in State Y? Comment 2 to 9-103 indicates that he must do so:

If the record-keeping office is moved into "this state" after a security interest has been perfected under the law of another jurisdiction, the secured party should file in this state, since Section 9-401(3) [giving effect to a good faith filing in the wrong place] is inapplicable.

Must he do so immediately, or is perfection continued for four months after removal under 9-103(3)? Both accounts and contract rights are outside the scope of 9-103(3), and thus perfection lapses immediately upon removal of the accounts records office. The result is that where the debtor moves his accounts' record office across state lines without advance notice to the secured party, the creditor has no opportunity to maintain his perfected status as of the date of original perfection. Thus, the time lapse between removal and filing in the new situs state allows an intervening purchaser or lienholder to obtain an unjust priority.

Since validity is also governed by 9-103(1), we must decide whether moving the records office changes the law governing the validity of a security interest in accounts. If perfection issues follow

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19. Cases dealing, without apparent problem, with this rule include: *United States v. Ed Lusk Construction Co., Inc.*, 15 UCC REP. SERV. 952 (10th Cir. 1974); *Borocas v. Bohemia Import Co., Inc.*, 518 P.2d 850, 14 UCC REP. SERV. 191 (Colo. App. 1974). In light of the pre-Code history of geographic limits to perfection, if the "situs" of an account or contract rights is the place of the debtor's office, then filing in that jurisdiction would be required to perfect a security interest in that jurisdiction.

the office, so, it seems, must issues of validity.<sup>20</sup> However, it is arguable that a security contract's validity ought not be put into question merely because some records which signify the assigned right to payment are relocated in another state. Unfortunately, this result appears unavoidable under 9-103(1).

Thus, the 9-103(1) rule regarding validity and perfection of security interests in accounts and contract rights fails to address situations where the debtor maintains more than one records office for accounts or contract rights and may require the application of the laws of several states to a single transaction. In addition, should the debtor move his records office, no temporary perfection provision allows the secured party to maintain continuity of perfection. Finally, 9-103(1) deserves criticism in that the validity of the security interest should not be affected by movement of the location of account or contract records of the debtor.

#### B. Section 9-103(2)

Section 9-103(2) provides a choice of law rule regarding perfection and validity of security interests in two types of collateral: general intangibles,<sup>21</sup> and goods (referred to herein as "mobile goods") of a type normally used in more than one jurisdiction if they are classified as equipment<sup>22</sup> or as inventory<sup>23</sup> for lease. The law of the state where the debtor's chief place of business is located governs the validity and perfection of security interests in these collateral types. The location of the collateral is irrelevant.<sup>24</sup>

Comment 3 to 9-103 provides some guidance as to the meaning of "chief place of business":

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20. Section 9-103(3) provides that the validity of a security interest will be governed by the law of the jurisdiction of situs of the collateral *upon attachment* (except where the parties anticipate that the collateral in another state upon attachment will be kept in this state and is removed to this state within 30 days). However, 9-103(3) does not apply to the types of personal property dealt with in 9-102(1) and 9-103(2), *i.e.*, accounts, contract rights and "mobile goods." The comment to 9-103 provides no clue as to why the draftsmen did not incorporate rules similar to those found in 9-103(3) to govern the validity of security interests in accounts, contract rights and "mobile goods" in removal situations.

21. Defined in 9-106.

22. Defined in 9-109(2).

23. Defined in 9-109(4).

24. In *Powell v. Whirlpool Employees Federal Credit Union*, 42 Mich. App. 228, 201 N.W.2d 683, 11 UCC REP. SERV. 849 (1972), the court held that a security interest in mobile goods perfected by filing in Michigan, the debtor's chief place of business, remained perfected notwithstanding removal of the goods to Florida. *Accord*, *Foley Machinery Co. v. John T. Brady Co., Inc.*, 7 UCC REP. SERV. 872 (1970); *General Electric Credit Corp. v. R. H. Heintz Construction Co.*, 302 F. Supp. 958, 6 UCC REP. SERV. 1137 (D. Or. 1969); *Ray v. City Bank & Trust Co. of Natchez*, 358 F. Supp. 630, 13 UCC REP. SERV. 355 (S.D. Ohio 1973); *In re Leasing Consultants, Inc.*, 486 F.2d 367, 13 UCC REP. SERV. 189 (2d Cir. 1973).

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

The drafters’ admonishment that a secured party may “easily” file at each potential “chief” place of business does not obviate the problems encountered in deciding which law governs the validity of the security interest. Filing in a variety of jurisdictions does not aid in determining whether the security interest is valid; a decision as to which of a debtor’s places of business is “chief” will, to the exclusion of other criteria, determine the law controlling validity.

If the debtor moves his chief place of business, Comment 3 to 9-103 indicates that the secured party must refile in the state of the debtor’s new location.<sup>25</sup> As is the case with 9-103(1),<sup>26</sup> section 9-103(2) provides no period of temporary perfection — no grace period in which the security interest remains perfected. This precludes continuity of perfection after removal and allows potential superiority to an intervening purchaser or lienholder. The chief place of business rule may produce inequitable results where the debtor and the collateral are distant, for it requires the creditor to maintain cognizance of the debtor’s location to prevent defeat of perfected status by a change in situs of the principal office.<sup>27</sup>

This problem was raised in *General Electric Credit Corp. v. Western Crane & Rigging Co.*<sup>28</sup> Debtor, a construction contractor with its chief place of business in Colorado, entered a conditional sales contract with a Colorado dealer for the purchase of a truck crane (mobile goods). The seller assigned his interest to plaintiff. On the date of the agreement, the crane was located in New Mexico and was later moved to Arizona. Plaintiff, the secured party, recorded the

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25. Comment 5 to 9-103 provides:

[If the debtor’s chief place of business is moved into “this state” after a security interest has been perfected in another jurisdiction, the secured party should file in this state, since 9-401(3) is inapplicable.

26. See text at page 650 *supra*.

27. Haydock, *Certainty and Convenience - Criteria for the Place of Filing under the Uniform Commercial Code*, 3 B.C. IND. & COM. L. REV. 179, 180-85 (1962).

28. 184 Neb. 212, 166 N.W.2d. 409 (1969).

conditional sales contract in Colorado, which, at this time, had not yet adopted the UCC. Debtor then moved his chief place of business to Arizona and subsequently returned the crane to the Colorado dealer for repair, whereupon the dealer sold the crane to defendant. Plaintiff maintained that it held a perfected security interest in the crane and thus had rights in it superior to that of defendant, a subsequent purchaser. Defendant argued that plaintiff was required to file in Arizona upon removal of debtor's chief place of business to that state, and without such filing plaintiff's interest was not perfected on the date of defendant's purchase.<sup>29</sup>

The Nebraska Supreme Court, citing its 9-103(2), applied the law of the state where debtor's chief place of business was located. The court held that the pre-Code Colorado law governed, and under that law, plaintiff's interest remained perfected since the goods were sold from Colorado where filing had occurred. The court did not mention that debtor had moved his chief place of business to Arizona, but focused only on debtor's chief place of business at the time the security interest attached. However, if the purpose of the rule is to protect those entering subsequent transactions with the debtor by providing filed notice at his chief business location, then the governing law must continue to be that of the state of the debtor's location, even where the debtor has moved. Had the court considered the question, there seems no possible dispute that, in the above fact situation, the law of Arizona, and the local perfection concept fixed at the debtor's chief place of business, must apply.<sup>30</sup> Since the secured party had no filing on record in Arizona at the time of the sale to defendant, his interest should have been unperfected.

Both 9-103(1) and 9-103(2) provide that where the choice of law rules specify the application of the law of another state, the law so specified is the whole law of that state including the conflict of laws rules. This specification raises the possibility of *renvoi*, a circular choice of law reference which remains the nemesis of conflicts theory. Comment 6 to 9-103 states that this language is operative only where a multistate transaction involves a Code state and non-Code state.<sup>31</sup> For example, assume that State X has adopted the

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29. Apparently, defendant purchaser removed the crane to Nebraska and plaintiff filed an action there.

30. See Comment 6 to 9-103.

31. Comment 6 to 9-103 provides as follows regarding the whole law reference:

So far as validity, perfection and filing are concerned, the subsections [at 9-103] state the rule that the applicable law, if it is not the law of this state, will be that of the jurisdiction where the assignor keeps his records of accounts or contract rights, or in the case of mobile chattels or general intangibles where the debtor's

UCC, but State Y, where D's chief place of business is located, has not. If SP acquires a security interest in some of D's mobile equipment which is located in State X, where does SP file? Under 9-103(2) the validity and perfection of the security interest are to be determined by the law of the jurisdiction where D's chief place of business is located, *i.e.*, State Y. But the law of State Y (being non-UCC law) probably does not recognize as effective a filing on property not located within its boundaries. According to the conflict of laws rule of State Y, D must file where the goods are located, which is State X.

By referring to the whole law of the state of D's chief place of business, 9-103(2) accomplishes a *renvoi* reference back to the law of State X. What does State X law do with this reference? Section 9-103(2) solves the problem by allowing SP to file in State X where State Y does not recognize as effective his filing there, thus, in *renvoi* terminology "accepting" the reference.

But 9-103(1) and 9-103(2) state choice of law rules as to issues concerning validity as well. Further, 9-103(1) does not provide for perfection of a security interest in contract rights or accounts by filing in this state where the choice of law rule of the state where the debtor's chief place of business is located does not require filing there. In the hypothetical drawn above, which state's law governs the validity of the security interest if the collateral is goods, or its perfection, if the collateral consists of accounts or contract rights? Section 9-103(2) directs us from State X to the whole law of State

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chief place of business is located. If the jurisdiction whose law is applicable has enacted this Article or comparable legislation, filing, for example, in that jurisdiction will be recognized in this state as perfecting the security interest here. The other jurisdiction may, however, not have such legislation. For example, mobile equipment is located in this state; the debtor's chief place of business is in State X, which has not enacted this Article. Presumably State X will not permit or recognize filing on property not physically located in State X. Subsections (1) and (2) solve this difficulty by making specific reference to the conflict of laws rules of State X. If the law of State X does not assert the jurisdiction which is disclaimed by the subsections, then the applicable law will be the law which the courts of State X would apply to the transaction under their conflict of laws principles. In the case of mobile equipment, that would be presumably this state, where the equipment is located, and so filing in this state would perfect the interest. In the case of accounts, contract rights and general intangibles it would be the jurisdiction where the property is deemed located under the State X case law on the *situs* of choses in action.

It is clear that cases may arise where the application of these rules will not be a simple matter. It is thought, however, that the advantages of the rules far outweigh these difficulties — which indeed already exist under several state accounts receivable statutes. The incorporation of the other jurisdiction's conflict of laws rules makes it possible to arrive at a solution in any given case. Where both jurisdictions have enacted this Article or comparable legislation, there is no difficulty in applying the rules.



Y. If the conflict rule of State Y requires the application of the law of State X, the *renvoi* circle is complete.

This *renvoi* problem poses serious questions concerning the perfection of security interests in accounts and contract rights, as well as the validity of all security interests governed by 9-103(1) and 9-103(2), in conflicts between the laws of Code and non-Code jurisdictions and between the laws of jurisdictions having different versions of the UCC.

### C. Section 9-103(3)

Section 9-103(3)<sup>32</sup> governs security interests in collateral other than those varieties encompassed by 9-103(1) and 9-103(2). Excluded from the operation of 9-103(3) are security interests in contract rights, accounts, mobile goods and general intangibles. Section 9-103(3) thus covers security interests in "ordinary goods" (all but mobile goods) classified as inventory, equipment, farm products, or consumer goods, and collateral classified as chattel paper, instruments or documents.

Section 9-103(3) includes several rules, clarifying or varying the 9-102(1) situs rules, which apply only to security interests in those collateral types not specified in 9-103(1) and 9-103(2). Under 9-103(3), validity is determined by the law of the jurisdiction which was the situs of the collateral upon attachment of the security interest, *i.e.*, before its removal to this state. However, if the parties understand that the collateral will be brought into this state and kept here, and if the collateral is in fact brought into this state

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32. 9-103(3) provides:

If personal property other than that governed by subsections (1) and (2) is already subject to a security interest when it is brought into this state, the validity of the security interest in this state is to be determined by the law (including the conflict of laws rules) of the jurisdiction where the property was when the security interest attached. However, if the parties to the transaction understood at the time that the security interest attached that the property would be kept in this state and it was brought into this state within 30 days after the security interest attached for purposes other than transportation through this state, then the validity of the security interest in this state is to be determined by the law of this state. If the security interest was already perfected under the law of the jurisdiction where the property was when the security interest attached and before being brought into this state, the security interest continues perfected in this state for four months and also thereafter if within the four month period it is perfected in this state. The security interest may also be perfected in this state after the expiration of the four month period; in such case perfection dates from the time of perfection in this state. If the security interest was not perfected under the law of the jurisdiction where the property was when the security interest attached and before being brought into this state, it may be perfected in this state; in such case perfection dates from the time of perfection in this state.

within 30 days of attachment, validity will be determined by the law of this state.

Section 9-103(3) also provides that if the security interest was perfected under the law of the jurisdiction which was the situs of the collateral at the time of attachment and the collateral is then brought into this state, the security interest remains perfected for four months. The security interest will remain perfected after the four-month period expires only if perfected in this state within the four-month period. If the security interest was not perfected in the state of situs upon attachment, it may be perfected in this state if the collateral is moved here, and perfection then dates from time of perfection in this state.

The rule determining choice of law for validity issues by situs at time of attachment presents little difficulty. The same is true of the 30-day removal rule, which allows the validity of a security interest to be determined by the law of the recipient state if the goods were removed and kept there within 30 days of attachment of the security interest.

However, the rules regarding the continuity of perfection in goods in which are removed present some intriguing problems. *In re Dennis Mitchell Industries, Inc.*,<sup>33</sup> is an interesting misinterpretation of those rules which achieved the correct result. D, whose chief place of business was in Philadelphia, contracted to buy equipment from SP to be used in D's plant in Pennsylvania. D instead installed the equipment in another of its plants in New Jersey. Meanwhile, SP filed in Pennsylvania, the supposed location of the equipment. Later, D was adjudicated a bankrupt, and SP asserted a priority in the equipment by virtue of his perfected interest. The court concluded that SP's interest was not perfected, and SP was relegated to the status of general creditor.

The court first concluded, correctly, that the 30-day removal rule of 9-103(3) was inapplicable on the ground that this rule governs validity questions only. Further, the machinery in question could not be classified as mobile goods, which removed the possibility of applying 9-103(2). However, the court concluded that the machines were subject to a perfected security interest upon removal to New Jersey and that this interest remained perfected for the four-month period provided in 9-103(3). This period having elapsed, SP's interest was unperfected for lack of a New Jersey filing.

The court's conclusion, although correct, is based upon improper

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33. 6 UCC REP. SERV. 573 (3d Cir. 1969).

reasoning. Proper analysis would have resulted in the realization that the security interest was simply not perfected. The collateral was never located in Pennsylvania; without situs of the collateral in that jurisdiction, filing there was ineffective.

This case raises by implication a more interesting problem. The four-month removal rule applies only where the security interest was perfected under the law of the jurisdiction where the property was located when the interest attached. Security interests perfected after removal of goods from the state of situs at the time of attachment do not fall under 9-103(3). This situation is illustrated by the following hypothetical. SP is a dealer in stamping machines in State X. D contracts to buy 50 machines on time, with SP retaining a security interest which attaches while the goods are in State X. SP ships the machines to D's plant in State Y, and files in State Y. D then moves the machines to State Z and two months after removal files a voluntary bankruptcy petition. SP and trustee both claim the stamping machines. Trustee argues that the four-month rule of 9-103(3) does not operate because the security interest was never perfected under the law of State X where the machines were situated when the security interest attached, and a literal reading of 9-103(3) supports his argument.<sup>34</sup> However, there is no reason to favor the secured party who perfects in the state of the situs of the collateral at the time of attachment over the secured party who perfects his interest some time after it attaches and does so in a state which was not the situs of the collateral upon attachment of the interest. By a literal reading of 9-103(3), however, the four-month temporary perfection rule will not protect a security interest unless it is perfected in the state of the good's situs on attachment. This result is anomalous.

The court in *Mitchell* also observed that the four-month grace period begins to run on removal of the collateral, and not upon the secured party's discovery of that removal. The onus is on the secured party to police the collateral and in situations where the collateral is removed from one state, or never reaches that state, the secured party must take appropriate action—he must file in the state of situs within four months.

The 9-103(3) removal rule has also sparked some imaginative decisions. In *In re Automated Bookbinding Services, Inc.*,<sup>35</sup> SP had

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34. Section 9-204(1) provides that attachment occurs when the following conditions are fulfilled: (1) an agreement that the interest will attach must be in existence; (2) value must be given; and (3) debtor must have rights in the collateral. In a conditional sale situation, all of this can occur simultaneously when the debtor signs the chattel paper.

35. 471 F.2d 546, 11 UCC REP. SERV. 897 (4th Cir. 1972).

taken a security interest is all of D's equipment, and had filed a financing statement in Maryland, where D's plant was located. SP2 agreed to sell D a new bookbinding machine, while retaining a purchase money security interest. Component parts of the machines were shipped from Europe via New York to Maryland, where SP2's agents were also apparently involved in taking delivery in New York and transshipping. After the machine had been assembled, SP2 filed its purchase money security interest in Maryland. Thereafter, D was adjudicated bankrupt. Both secured parties claimed priority.

The district court<sup>36</sup> had held, as one alternative, that SP2 had priority by effect of 9-103(3). The court's rationale was strained. For a purchase money secured party to take priority over a general equipment financier, the purchase money interest must be perfected at the time the debtor receives possession of the collateral or within ten days thereafter.<sup>37</sup> SP2 did not file within ten days after D received possession. However, the court held that by having its agents receive the component parts in New York, SP2 had perfected by possession in New York, pursuant to 9-305. When the collateral was removed from New York, the 9-103(3) four-month rule operated to sustain SP2's perfection. At the time D received the goods, SP2's interest was perfected, and entitled to priority.

The court of appeals reversed, holding that mere postponement of delivery could not effect perfection by possession. The court found the district court's result unmanageable, as it would have created an automatic four-month perfection in all multistate transactions where the goods were held by the seller-secured party after putative attachment of the security interest. The court concluded that SP2 was required to file in Maryland within ten days of delivery of the collateral. Having failed to do so, his priority as a purchase money secured creditor was not established.

The court of appeals also held that the 30-day removal rule, which governs validity under 9-103(3), must also govern perfection.<sup>38</sup> Plain reading of 9-103(3) demonstrates that this view is in error. The result of such an interpretation would be to deny the secured party the right to have his interest perfected during a delivery journey. If perfection is to be governed by the law of the eventual resting place of the collateral, there is no way to perfect the security interest until the goods reach their destination, and the secured party risks losing priority to an intervenor. For this reason, 9-103 allows the secured

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36. 336 F. Supp. 1128, 10 UCC REP. Serv. 209 (D. Md. 1972).

37. See UCC § 9-312(4).

38. Accord, 1 GILMORE, *supra* note 6, at 629.

party to perfect by filing in the state from which the goods are shipped if attachment occurs there, and then to invoke the four-month grace period after removal enroute to the eventual destination.

A few interesting decisions have arisen in the area of consumer goods transactions. In *In re Atchison*,<sup>39</sup> SP had retained a security interest in a color television sold to D in Illinois. The security interest was automatically perfected without filing under the Illinois version of 9-302(1)(d). D moved his domicile and television to Wisconsin, and later filed a bankruptcy petition there. Trustee and SP both claimed the collateral. The referee concluded that SP was no longer perfected on the date of filing the petition, and therefore the trustee's claim took priority. The secured party's interest ceased to be perfected because the Wisconsin version of 9-302(1)(d) placed a \$250 ceiling on the automatic perfection provision. Since the television was worth more than \$250, SP would have had to file to perfect his interest in Wisconsin. The automatically perfected Illinois purchase money security interest ceased to be effective four months after removal, and failure to file in Wisconsin before the bankruptcy was fatal to perfection. Thus, where the goods are removed from a state wherein perfection did not require filing to a state where filing is required, the security interest remains perfected for four months after removal, and thereafter, only if the secured party files in the new location.

*In re Marshall*<sup>40</sup> considered a corollary to this aspect of the four-month rule of 9-103(3). In *Marshall*, D had removed the consumer goods subject to SP's purchase money interest from Illinois to Ohio. Neither the Illinois nor Ohio versions of 9-302(1) required filing to perfect the purchase money interest, and under the laws of both states the interest was automatically perfected upon attachment. D's trustee in bankruptcy claimed that perfection had lapsed four months after removal by operation of 9-103(3). The referee disagreed. Where SP was not required to file to protect his perfected status under the general requirements of the Ohio law, the referee saw no reason to impose a special filing requirement merely because the goods were at one time in another state.

*Marshall* and *Atchison* suggest a further problem. Under 9-302(1), a purchase money secured creditor whose interest covers consumer goods need not file to perfect his interest. However, if the consumer sells the goods to a good faith purchaser, 9-307(2) provides that the

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39. Bankruptcy No. 68-B-1761, 6 UCC REP. SERV. 258 (E.D. Wis. 1969).

40. Bankruptcy No. B69-1198, 10 UCC REP. SERV. 1290 (N.D. Ohio 1969).

secured party's interest will be subordinated to the rights of the purchaser. However, 9-307(2) allows the secured party to protect his interest against subsequent good faith purchasers by filing.

Assume that SP, a seller of consumer goods, holds a purchase money security interest in D's television set, and that he has filed in State X, where both he and D are located. D moves to State Y and sells the television to P, a purchaser for value, without notice of SP's interest, who also takes the collateral as consumer goods. The secured party and X both claim the television—who prevails?

Section 9-307(2) bestows a special protection, beyond that of automatic perfection, upon the secured party who files as to his purchase money interest in consumer goods. The 9-103(3) four-month rule governs issues of perfection, and could arguably govern this special perfection as well. This would, however, be an unfortunate result. The rationale for protecting the filed interest from the subsequent consumer purchaser is that constructive notice is given to all by filing. But how effective was the filing in State X in giving notice to P in State Y? In this situation, it seems more reasonable to protect the good faith purchaser than the holder of the security interest. The four-month rule should not operate to carry over the effect of filing after removal of the collateral, but should be limited to questions of perfection only.

The four-month grace period rule of 9-103(3) creates other problems as well. Assume that SP1 has a security interest in certain of D's goods in State X perfected by filing in State X. D removes those goods to State Y and within four months SP2 takes a security interest in those goods and perfects by filing in State Y. Six months after removal of the goods D is adjudicated a bankrupt and the trustee claims the goods, as do SP1 and SP2. SP1 argues that its interest is superior to that of SP2 and bases that argument upon the fact that 9-103(3) contains no requirement that SP2 perfect in State Y within four months in order to perfect his interest for the four-month period. SP1 concedes that upon lapse of the four-month period his perfection ceased, but maintains that during the four-month period his interest remained perfected and is thus superior to that of SP2.

The question, then, is whether failure to perfect within the four-month period precipitates a retroactive lapse in perfection, *i.e.*, whether perfection ceased as of removal. The alternative is to consider the four-month period after removal as an absolute period of perfection during which no intervening purchaser (including a secured party) or lienholder (including a trustee in bankruptcy) can achieve an interest prior to SP1's interest.

Although decisions on this question have gone both ways,<sup>41</sup> it is clear that the only reasonable conclusion is that the perfection bestowed by the four-month grace period of 9-103(3) is conditional upon filing in the state to which the goods have been removed within the four-month period. This can be illustrated by returning to our hypothetical. If we assume that SP1's perfection during the four-month post-removal period is absolute, then SP1's interest must be superior to that of SP2. However, because the trustee acquired his interest six months after removal, his interest is superior to that of SP1, whose perfection has lapsed. However, the trustee's interest is inferior to the prior-perfected interest of SP2. Therefore, SP1's interest is superior to that of SP2, but inferior to that of the trustee, while SP2's interest is superior to that of the trustee but inferior to that of SP1. To avoid this result, the perfection of those interests which are not perfected by filing in the state to which the collateral has been removed within the four months must be considered as having lapsed as of the date of removal.<sup>42</sup>

#### D. Section 9-103(4)

Section 9-103(4) has received the greatest amount of judicial attention. It provides:

Notwithstanding subsections (2) and (3), if personal property is covered by a certificate of title issued under a statute of this state or any other jurisdiction which requires indication of any security interest in the property as a condition of perfection, then the perfection is governed by the law of the jurisdiction which issued the certificate.

There are but two operative concepts to this rule: the property must be "covered" by a certificate of title, and the certificate of title statute must require notation of the security interest on the certifi-

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41. Perfection lapsed as of date of removal where interest was not perfected within four months after removal: *Arrow Ford, Inc. v. Western Landscape Construction Co., Inc.*, 532 P.2d 553, 16 UCC REP. SERV. 1124 (Ariz. App. 1975); *United States v. Squires*, 378 F. Supp. 798, 15 UCC REP. SERV. 718 (S.D. Iowa 1974). Perfection absolute during four-month period: *American State Bank v. White*, 217 Kans. 78, 535 P.2d 424, 16 UCC REP. SERV. 1359 (1975); *Morris v. Seattle - First National Bank*, 516 P.2d 1055, 13 UCC REP. SERV. 1166 (Wash. App. 1973); *In re Miller, Bk. No. B73-3128*, 14 UCC REP. SERV. 1042 (D. Or. 1974). Cf. *GMAC v. Long-Lewis Hardware Co.*, 53 Ala. App. 188, 306 So. 2d 277, 15 UCC REP. SERV. 496 (1974); *Al Maroone Ford, Inc. v. Manheim Auto Auction, Inc.*, 205 Pa. Super. 154, 208 A.2d 290 (1965); *Utah Farm Production Credit Association v. Dinner*, 302 F. Supp. 897, 6 UCC REP. SERV. 937 (D. Colo. 1969); *Casterline v. GMAC*, 195 Pa. Super. 344, 171 A.2d 813 (1961); *Churchill Motors, Inc., v. A. C. Lohman, Inc.*, 16 A.D.2d 560, 229 N.Y.S.2d 570 (1962).

42. This problem is dealt with at Adams, *The 1972 Official Text of the Uniform Commercial Code: Analysis of Conflict of Laws Provisions*, 45 Miss. L.J. 281, 291-92 (1974).

cate as a condition of perfection. Whether a piece of personalty is "covered" by a certificate of title seems, at first, a simple determination. If a certificate of title is actually issued for the property, the property will be "covered" and if the title act under which the certificate was issued is of the mandatory notation type, the law of that jurisdiction will govern. Questions regarding when a certificate of title from one state ceases to cover personal property after the debtor relocates in a different state, and when a debtor must obtain a certificate of title when property is moved from a non-mandatory notation state to a mandatory notation state must be answered by referring directly to the certificate of title acts.

In *Streule v. Gulf Finance Corp.*,<sup>43</sup> the court was faced with a typical situation requiring an interpretation of 9-103(4). A Virginia auto dealer had perfected his security interest in a vehicle sold to debtor under a conditional sales contract. D then absconded with the vehicle to the District of Columbia where, more than four months later, a tax lien attached. The car was sold at a foreclosure sale and the plaintiff, Streule, took a "fresh" District of Columbia certificate of title. Defendant, assignee of the dealer, repossessed the car from the plaintiff, and the plaintiff brought an action to recover the car. The court held that even though the vehicle had been transported into the District of Columbia and had remained there for a considerable period of time, it was still "covered" by a Virginia certificate of title because this certificate had never been surrendered and the debtor had never obtained a District of Columbia certificate of title. Further, the 9-103(3) four-month grace period was not the operable section here, since 9-103(4) had expressly displaced it. Thus, the law of Virginia, under which defendant's interest was properly perfected, remained the governing law. Finally, that plaintiff had obtained a new certificate of title in the District of Columbia after purchasing the car at a tax sale did not operate to make District of Columbia law applicable under 9-103(4). The court found that unilateral action of a subsequent purchaser will not be allowed to cut off a secured party's interest.

Notwithstanding this decision, if the rule of 9-103(4) is to be understood, it must be determined what being "covered" by a certificate of title law means. Certificate of title acts contain their own jurisdictional parameters and most require that a certificate of title from another state be surrendered and a new certificate issued some time subsequent to the vehicle's permanent situs in the state. Therefore, a logical interpretation of 9-103(4) is that personalty is

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43. 7 UCC REP. SERV. 734 (D.C. Cir. 1970).



covered by a certificate of title act when the act requires a certificate. Yet, because certificate of title acts differ from state to state, most courts have interpreted the "coverage" of one state's certificate of title as continuing until the certificate is surrendered or that of another state is procured.<sup>44</sup>

Applying that rule to the *Streule* case, it is clear that at some point the Virginia perfection ceases. Arguably, the court is correct when it asserts that the buyer's unilateral action should not cut off the secured party's interest. But it was the tax sale, not the buyer or the debtor, that washed the title. In the situation presented by *Streule*, the conclusion that the Virginia certificate of title ceased to cover the vehicle upon issuance of the District of Columbia certificate of title is at least as tenable as the one reached by the court.

It is also unclear whether the 9-103(4) rule absolutely displaces the four-month grace period of 9-103(3). Section 9-103(4) states that the law of the state whose certificate of title covers the property applies notwithstanding subsections (2) and (3), excluding the possibility that the 9-103(3) grace period could operate where that rule would result in perfection persisting after the goods cease to be "covered" by the certificate of title issued by the state from which they were removed.<sup>45</sup> Further, the certificate of title acts of many states provide for a period of continued perfection after a certificate of title has been issued covering the goods.<sup>46</sup>

The concept of mandatory notation has raised some obstacles to the operation of 9-103(4). In *In re Edwards*,<sup>47</sup> D had borrowed on his car while a resident of Wisconsin and SP had taken a security interest in the car and had perfected it under Wisconsin law by notation on the certificate of title. D then moved to Michigan, surrendered

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44. Cf., *In re Edwards*, Bankruptcy No. 69-460-B, 6 UCC REP. SERV. 1124 (E.D. Mich. 1969); *Callaghan v. Commercial Credit Corp.*, 437 F.2d 898, 8 UCC REP. SERV. 901 (4th Cir. 1971); *In re Wolf*, Bankruptcy No. NK 4-1-71B, 9 UCC REP. SERV. 177 (W.D. Mich. 1971).

45. In *Morris v. Seattle-First National Bank*, 10 Wash. App. 129, 516 P.2d 1055, 13 UCC REP. SERV. 1166 (1973), the court applied the four-month grace period rule of 9-103(3) where property "covered" by a certificate of title was removed to another state where a subsequent certificate of title was issued, without indication that the certificate of title act of the state to which the goods were removed was of the non-mandatory notation type. Where the goods are removed to a non-mandatory notation state and a certificate of title from that state is issued, the 9-103(3) four-month grace period rule is properly applied, assuming perfection in the state of situs on attachment, as in *Associates Discount Corp. v. Reeves*, 13 UCC REP. SERV. 709 (Okla. App. 1973); *In re Dobbins*, 371 F. Supp. 141, 14 UCC REP. SERV. 796 (D. Kans. 1973); *Arrow Ford, Inc. v. Western Landscape Construction Co., Inc.*, 532 P.2d 553, 16 UCC REP. SERV. 1124 (Ariz. App. 1975).

46. See *GMAC v. Long-Lewis Hardware Co.*, 54 Ala. App. 188, 306 So. 2d 277, 15 UCC REP. SERV. 496 (1974); *Town House Motel, Inc. v. Ward*, 2 Ill. App. 3d 699, 276 N.E.2d 809, (1971).

47. 6 UCC REP. SERV. 1124 (E.D. Mich. 1969).

the Wisconsin certificate of title, and applied for a Michigan certificate. The Michigan certificate of title indicated the security interest, but Michigan law required not only notation on the certificate, but also filing to perfect the security interest. D filed a voluntary bankruptcy petition, and both SP and trustee claimed the car. The referee concluded that upon application for Michigan certificate of title, the car ceased to be covered by the Wisconsin certificate, and under Michigan law the security interest was unperfected. This decision may incite an exodus from Wisconsin to Michigan.

The most upsetting of the 9-103(4) problems involves the title wash situation. SP holds a security interest in D's car perfected by filing under the law of State X, which does not have a mandatory notation certificate of title act. D moves with the car to State Y, which has a mandatory notation act providing no perfection grace period for security interests in incoming goods, and acquires a State Y certificate of title. Has D thereby cut off SP's interest? An ingenious Texas court was faced with this problem in *Phil Phillips Ford, Inc. v. St. Paul Fire & Marine Insurance Co.*<sup>48</sup> In that case, a third party had absconded with the car from Oklahoma, a non-notation state, to Texas, a notation state. The court concluded that 9-103(4) was not intended to operate when personal property is brought from a state which does not require notation on the certificate of title as a condition of perfection, to a mandatory notation state.

The Texas Supreme Court disagreed with this rationale but upheld the result.<sup>49</sup> The court concluded that 9-103(4) applies in this situation. The court could find no compelling reason to hold otherwise, but managed to cut off the rights of the purchaser by holding that under Texas law, which 9-103(4) directed the court to apply, no title could pass from the third person remover to the purchaser. Therefore, under Texas law, the transaction was void.<sup>50</sup>

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48. 454 S.W.2d 465, 7 UCC REP. SERV. 952 (Tex. Civ. App. 1970).

49. 465 S.W.2d 933, 8 UCC REP. SERV. 1331 (Tex. 1971). Cf., *First National Bank of Bay Shore v. Stomper*, 93 N.J. Super. 150, 225 A.2d 162 (1966); *Churchill Motors, Inc. v. A. C. Lohman, Inc.*, 16 A.D.2d 560, 229 N.Y.S.2d 570 (1962).

50. Other cases dealing with 9-103(4) include: *In re Moore*, Bankruptcy No. 5, BK-68-609K and BK-68-606K, 7 UCC REP. SERV. 578 (D. Me. 1969); *Seely v. First Bank & Trust, Boynton Beach*, 315 N.Y.S.2d 374, 8 UCC REP. SERV. 559 (1970); *In re Longnecker*, Bankruptcy No. 919N, 7 UCC REP. SERV. 264 (W.D. Mich. 1969); *In re Brown*, Bankruptcy No. 28106N, 5 UCC REP. SERV. 401 (W.D. Mich. 1968). Cf., 1 GILMORE, *supra* note 6, at 623 (1965); Note, *Security Interests In Motor Vehicles Under the UCC: A New Chassis For Certificate of Title Registration*, 70 YALE L.J. 995, 1015 (1961).

CHOICE OF LAW UNDER THE 1972 UCC ARTICLE 9<sup>51</sup>*Choice of Law and Specification Regarding Validity, Default and Perfection*

In revising the Article 9 choice of law provisions, the draftsmen have given a major face-lift to the sagging jowls of the 1962 version, and have come a long way from the “. . . nadir with regard to both Delphic draftsmanship and regressive policy”<sup>52</sup> which characterized the prior codification.

The situs rule of 9-102(1) is deleted. Section 9-102(R)<sup>53</sup> contains no choice of law rule, but merely defines the scope of Article 9. The “Reasons for 1972 Change” appearing after the 1972 Amendments<sup>54</sup> pertaining to 9-102(R) state that the situs rule was deleted so as to make applicable the general provisions of 1-105(R) regarding choice of law. Section 9-103(R) now deals exclusively with “perfection, the effect of perfection or non-perfection” and no longer governs any questions of validity or default. These issues are now subject to the choice of law rules of 1-105(R) alone.

Section 1-105(1)(R) remains fundamentally unchanged. It provides, as did 1-105(1), that parties to a transaction may specify a choice of this state’s law where the transaction bears a “reasonable relation” to this state and that failing such agreement, this state will apply its law to transactions bearing an “appropriate relationship” to this state. These are the same provisions as are found in 1-105(1)—but under the 1972 UCC they apply to issues of validity and default rights. Section 1-105(2)(R), which controls choice of law by agreement, no longer applies to validity and default issues, but is limited in its scope to the choice of law rules regarding perfection under 9-103(R).

51. As of this writing the following states have enacted the 1972 revisions to the Code: Arizona, ARIZ. REV. STAT. ANN. ch. 14, §§ 44-3104 *et seq.* (Supp. 1976); Arkansas, ARK. STAT. ANN. ch. 7c, tit. 85, §§ 9-101 *et seq.* (Supp. 1975); California, WEST’S CAL. COMM. CODE ch. 23C, §§ 9101 *et seq.* (Supp. 1976); Illinois, ILL. REV. STAT. ch. 26, §§ 9-101 *et seq.* (1975); Iowa, IOWA CODE ANN. §§ 554.9101 *et seq.* (Supp. 1975); Kansas, KAN. STAT. ANN. §§ 84-9-101 *et seq.* (Supp. 1975); Nebraska, NEB. REV. STAT. §§ 90-9-101 *et seq.* (1973); Nevada, NEV. REV. STAT. ch. 104, §§ 104.9101 *et seq.* (Supp. 1975); North Carolina, N. CAR. GEN. STAT., §§ 25-9104 *et seq.* (Supp. 1976); North Dakota, N. DAK. CENT. CODE tit. 41, §§ 41-09-01 *et seq.* (1974); Oregon, OR. REV. STAT. tit. 8, §§ 79.1010 *et seq.* (1974); Texas, TEXAS BUS. & COMM. CODE tit. 1, §§ 9.101 *et seq.* (1974); Virginia, VA. CODE tit. 8, §§ 8.9-101 *et seq.* (1974); West Virginia, WEST VA. CODE ch. 46, §§ 46-9-101 *et seq.* (1975); Wisconsin, WISC. STAT. tit. XL, §§ 409.101 *et seq.* (1974).

52. Weintraub, *supra* note 6.

53. References to the text and comments of the 1972 Official Text, Uniform Commercial Code, will be indicated by a suffixed (R). For an overview of the 1972 UCC Revisions see Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477 (1973).

54. 1972 Official Draft at 744.

Validity and default issues are now governed by the state's general choice of law principles, both as to party competence to specify applicable law, and as to choice of law where no specification has been made. Because there are no longer any choice of law rules in Article 9 regarding default and validity questions, extra-Code law will control the decision as to whether the transaction bears a "reasonable relation" to the state whose law is specified by the parties to govern these questions.

*Choice of Law Under 9-103(R)*

Choice of law regarding perfection is now exclusively controlled by 9-103(R). The principle persists that different rules should control questions of perfection in different varieties of collateral and 9-103(R) provides special rules for security interests in the following types of collateral: (1) documents, instruments and "ordinary goods;" (2) personalty covered by certificate of title; (3) accounts, general intangibles and mobile goods; (4) chattel paper; and (5) minerals. Section 9-103(1)(R) states choice of law rules for documents,<sup>55</sup> instruments<sup>56</sup> and "ordinary goods." "Ordinary goods" are all goods except goods covered by certificate of title, mobile equipment or mobile inventory for lease and minerals.<sup>57</sup>

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55. Defined 9-105(1)(f)(R) and 1-201(15)(R).

56. Defined 9-105(1)(i)(R).

57. UCC § 9-103(1)(R) provides:

(1) Documents, instruments and ordinary goods.

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

(b) Except as otherwise provided in this subsection, perfection and the effect of perfection or non-perfection of a security interest in collateral are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected.

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

(d) When collateral is brought into and kept in this state while subject to a security interest perfected under the law of the jurisdiction from which the collateral was removed, the security interest remains perfected, but if action is required by Part 3 of this Article 1 to perfect the security interest,

(i) if the action is not taken before the expiration of the period of perfection in the other jurisdiction or the end of four months

Under 9-103(1)(b)(R), perfection is governed by the situs of collateral when the last event occurs upon which is based the assertion that the security interest is perfected or unperfected. This general rule provides greater flexibility than prior attempts to frame a situs rule regarding perfection. Section 9-103(1)(d)(R) states the familiar four-month grace period rule for *incoming* goods. This grace period provision coupled with the "last event" rule provides a choice of law system, the operation of which can best be illustrated by the following hypotheticals.

D grants to SP a security interest in all his widgets located in State X. SP files in State X. Subsequently, D is adjudicated a bankrupt. SP will prevail as against the trustee because the widgets were located in State X when SP filed there. Therefore, filing was the last event upon which the perfection claim was based, and the law of State X will apply. If D and SP had entered a purchase money agreement then SP's interest would not attach until D acquired rights in the widgets, even though SP would be entitled to file a financing statement. Where attachment and perfection occur simultaneously, attachment will be the "last event," and the situs of the collateral will determine the applicable law.

If, in the purchase money situation just described, D took possession of the widgets in State Y, where attachment occurred and then brought the widgets into State X, where filing had occurred, crossing the state line would, according to the localized perfection concept, trigger perfection. Under this situation, bringing the goods into State X would be the "last event." But, taking the widgets from State X into State Y, and failing to file in State Y would be the last event upon which a claim that the security interest is *not* perfected could be based, and the law of State Y would apply to this claim.

An exception to the "last event" rule for purchase money security interests in goods is set forth in 9-103(1)(c)(R). If the parties understand at the time of the attachment that the goods will be kept in

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after the collateral is brought into this state, whichever period first expires, the security interest becomes unperfected at the end of that period and is thereafter deemed to have been unperfected as against a person who became a purchaser after removal;

(ii) if the action is taken before the expiration of the period specified in subparagraph (i), the security interest continues perfected thereafter;

(iii) for the purpose of priority over a buyer of consumer goods (subsection (2) of Section 9-307), the period of the effectiveness of filing in the jurisdiction from which the collateral is removed is governed by the rules with respect to perfection in subparagraphs (i) and (ii).

a jurisdiction other than that where they are or will be located upon attachment, then the law of that state governs perfection from attachment until 30 days after debtor receives the goods, and will also govern after the 30-day period if the goods are brought into that jurisdiction within the 30-day period.

The following hypothetical illustrates the operation of 9-103(1)(c)(R). D purchases some widgets from SP in California to be shipped to D's store in New York; SP retains a purchase money security interest in the widgets. The 1962 UCC requires SP to file in California to protect his interest while the goods were enroute.<sup>58</sup> After the goods had arrived in New York, SP would be required to file again in New York, since the California perfection would lapse four months after removal. Under 9-103(1)(c)(R), a single filing in New York protects SP (provided that SP and D understood at the time of attachment that the goods were to be kept in New York) within a period ending 30 days after D received possession. If the goods were brought into New York within that period, a New York filing would be effective thereafter until term or removal of the goods.

This section is not free from interpretational problems. First, what is meant by "the parties. . . understand at the time that the security interest attaches"? Most likely this means either that they so state in the security agreement, or that it was obvious from the transaction and negotiation leading up to the agreement. Undoubtedly, part of the motivation for use of "understand[s]" rather than "agrees" is to allow exploration of events forming the basis of the parties' bargain.

Second, what is meant by the phrase, the debtor "receives possession" of the goods? "Receives possession" should mean either that the goods are delivered to the debtor or are picked up by his agents, but not that the seller has relinquished control to a common carrier. This would defeat the 30-day rule by allowing the shipping time to consume some or all of the 30-day period.

Where the goods do not reach the jurisdiction of "understood" location within 30 days after debtor receives possession thereof, Comment 3 to 9-103(R) advises that:

If the collateral is not kept in that jurisdiction before the end of the 30-day period, paragraph 1(c) ceases to be applicable and

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58. Section 9-102(1) requires perfection in the jurisdiction where the goods are located. Section 9-103(3) provides a four-month perfection grace period only where the security interest is perfected under the law of the state where the collateral was located at the time the security interest attached and is later removed.

thereafter the law of the jurisdiction where the collateral is controls perfection.

Therefore, if the collateral fails to reach the "understood" location by the expiration of the 30-day period, perfection will be governed by the law of the state of situs, entry of the goods into which is the "last event" under 9-103(1)(b)(R).

As noted,<sup>59</sup> under the 1962 UCC SP could perfect by filing in California (assuming attachment occurs before the goods left California) and be perfected while the goods were enroute to New York by the operation of the 9-103(3) four-month perfection rule. The 1972 UCC mandates that the secured party file in New York, and a filing in California, or in any of the states through which the goods would pass to reach New York, would be ineffective. If D is a miscreant who reroutes delivery to a New Jersey store instead, thereby nullifying the understanding as to the goods' locus, the security interest remains unperfected until SP discovers the location of the goods and files there. SP can protect himself against D's actions only by policing the goods.

The familiar four-month rule for continued perfection on incoming collateral is embodied in 9-103(1)(d)(R). The 1972 formulation contains noteworthy changes from the former 9-103(3) rule. It provides that if collateral is brought into this state from another jurisdiction while subject to a perfected security interest in the jurisdiction from which it was removed, the security interest remains perfected, unless action is required under Part 3 of Article 9. Part 3 contains provisions concerning how perfection may be effected—by filing or by possession. If a security interest is perfected by possession no action will be required to continue perfection. In the majority of cases perfection in the "other" jurisdiction will have been accomplished by filing. The obvious intent of 9-103(1)(d)(R) is that action, namely filing, will be required by Part 3 to perfect in this state. Section 9-103(1)(d)(i)(R) provides that if such action is not taken within a specified period, the security interest becomes unperfected at the end of that period, and is thereafter deemed to have been unperfected as against a person who became a purchaser after removal. The time period in question is the shorter of two periods: (a) four months or, (b) the unexpired term of perfection in the other jurisdiction.

The four-month (or period of perfection) grace period is absolute as to everyone except purchasers after removal—as to them it is

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59. See text accompanying note 58 *supra*.

conditional. Assume D moves collateral subject to SP's interest, perfected by filing in State X, from State X to State Y. SP has until four months after removal, or until the expiration of perfection under the State X filing (whichever occurs first), to file in State Y. If D becomes bankrupt six months after removal, and SP has not yet filed in State Y, SP's interest will be unperfected and subordinate to that of the trustee. If D's bankruptcy occurs three months after removal, SP will still be perfected vis-a-vis the trustee. However, if SP had notice within the four-month period, he will be unperfected as against a subsequent purchaser (which includes a secured party). Therefore, if D grants a security interest to SP2 three days after removal to State Y, and SP1 never files in State Y, at the end of four months SP1 will be deemed unperfected vis-a-vis SP2. Section 9-103(1)(d)(ii)(R) provides that if filing has occurred before the expiration of the period described in 9-103(1)(d)(i)(R)—perfection continues thereafter. A desirable feature is added to the whole scheme of perfection in multistate transactions by 9-103(1)(d)(iii)(R). This section clarifies the effect of a filing to cut off the rights of a purchaser of consumer goods under 9-307(2)(R). Under the four-month rule of 9-103(3) it was unclear whether a filing in the state of removal cut off the consumer purchaser's rights under 9-307(2). Section 9-103(1)(d)(iii)(R) provides that the effectiveness of a filing to protect a security interest in consumer goods will be governed by the rules regarding perfection stated in 9-103(1)(d)(i)(R) and 9-103(1)(d)(ii)(R). Thus, if SP fails to file within four months after removal (or expiration of term of perfection) his filing will have been ineffective to cut off the rights of a subsequent consumer purchaser as of the date of removal. If SP files within four months, his protection continues as of removal and thereafter.

Section 9-103(2)(R)<sup>60</sup> reflects a more comprehensive attempt to

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60. Section 9-103(2)(R) provides:

(2) Certificate of title.

(a) This subsection applies to goods covered by a certificate of title issued under a statute of this state or of another jurisdiction under the law of which indication of a security interest on the certificate is required as a condition of perfection.

(b) Except as otherwise provided in this subsection, perfection and the effect of perfection or non-perfection of the security interest are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until four months after the goods are removed from that jurisdiction and thereafter until the goods are registered in another jurisdiction, but in any event not beyond surrender of the certificate. After the expiration of that period, the goods are not covered by the certificate of title within the meaning of this Section.



regulate choice of law with regard to property subject to a certificate of title act than did 9-103(4). To the extent that it applies, 9-103(2)(R) preempts the operation of 9-103(1)(R) as to ordinary goods and 9-103(3)(R) as to mobile goods. If the goods are covered by a certificate of title only 9-103(2)(R) applies. It is clear that 9-103(2)(a)(R) only operates where the goods are covered by a certificate of title issued pursuant to a statute which makes notation on the certificate a condition of perfection.

The 1972 UCC attempts to define the slippery concept of "coverage." Rather than relying on the certificate of title acts to enforce a standard of coverage, 9-103(2)(b)(R) contains its own. The section provides that if property is removed from a jurisdiction which issued a certificate of title for the property, it ceases to be covered by the certificate of title:

- (a) four months after removal if there is registration in another state within that period.
- (b) upon registration in another state, if that registration occurs after the four month period.
- (c) but in no event beyond surrender of the certificate of title.

Moreover, 9-103(2)(b)(R) provides that if the property is covered by a certificate of title, the law of the jurisdiction issuing the certificate will govern perfection of the security interest.

It should be noted that neither termination upon expiration after the four-month period nor termination upon surrender need cause any great difficulty of construction. But interpretation of "registration" may reflect a variety of procedures under certificate of title acts intended to cover the situation where goods are brought into this state (if this is a mandatory notation state) from a jurisdiction where perfection by some method, other than notation on the certificate of title, is permitted. In this situation, even though this state will issue a certificate of title, perfection will be governed by the

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(c) Except with respect to the rights of a buyer described in the next paragraph, a security interest, perfected in another jurisdiction otherwise than by notation on a certificate of title, in goods brought into this state and thereafter covered by a certificate of title issued by this state is subject to the rules stated in paragraph (d) of subsection (1).

(d) If goods are brought into this state while a security interest therein is perfected in any manner under the law of the jurisdiction from which the goods are removed and a certificate of title is issued by this state and the certificate does not show that the goods are subject to the security interest or that they may be subject to security interests not shown on the certificate, the security interest is subordinate to the rights of a buyer of the goods to the extent that he gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest.

rules for ordinary goods found in 9-103(1)(d)(R). This appears to ameliorate in part the "wash" problem presented by 9-103(4),<sup>61</sup> preventing the issuance of a certificate of title in this state from cutting off a prior interest perfected by filing in another state by adding a four-month grace period provision.

But this remedy creates another problem. Assume that State X does not have a mandatory notation certificate of title statute, but State Y does. D's car, subject to SP1's security interest filed in State X, is taken to State Y. A State Y certificate of title is issued and SP perfects a security interest in the car by notation on the State Y certificate title. Under the 1972 UCC, which interest will have priority?

In this situation 9-103(2)(c)(R) directs us to 9-103(1)(d)(R). Pursuant to the latter section, if no action is required by Part 3 of Article 9 to perfect SP1's interest, that interest will remain perfected. If such action is required, SP1 must take that action or lose perfected and priority status.

Section 9-302(3)(b)(R) states that ". . . the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to. . . (b) the following statutes of this state [list any certificate of title statute. . .]. . . ." This provision could be read as incorporating the certificate of title notation procedures into Part 3, thereby making such notation an action required by Part 3. However, Comment 8 to 9-302(R) provides: "Subsection (3) *exempts* transactions covered by such laws [certificate of title laws] from the filing requirements of this Article" [emphasis added].

Thus, a defensible argument exists that perfection by notation on a certificate of title is not action required by Part 3 of Article 9, but is action required by the certificate of title act of State Y. Therefore, SP1 above need do nothing to maintain his perfected status, and SP2's interest becomes subordinate. But Comment 4(e) to 9-103(R) suggests a contrary result:

. . . the security interest perfected out of state [by filing] becomes unperfected unless reperfected in this state under the usual four-month rule (paragraph 2 [sic] (d) of the section).

While it is clear the draftsmen intended that a security interest perfected by filing in a "non-certificate" state be granted a four-month perfection grace period, the text language does not display that intent.

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61. See text accompanying notes 42 through 50 *supra*.

Section 9-103(2)(d)(R) is designed to protect the non-merchant buyer in the "wash" situation otherwise covered by 9-103(2)(c)(R). A buyer who is not a dealer in goods of the kind who purchases goods covered by a certificate of title which does not indicate the existence (or the possibility of existence) of a security interest takes priority over the holder of an existing security interest to the extent that the buyer gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest. This rule goes beyond the protection offered the good faith purchaser under 9-307(2)(R) and 9-103(1)(d)(R) and gives the consumer-purchaser an unqualified right to priority where the above conditions are met. Section 9-103(3)(R)<sup>62</sup> is virtually identical to 9-103(2), with three changes. First, 9-103(3)(R) covers interests

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62. Section 9-103(3)(R) provides as follows:

(3) Accounts, general intangibles and mobile goods.

(a) This subsection applies to accounts (other than an account described in subsection (5) on minerals) and general intangibles and to goods which are mobile and which are of a type normally used in more than one jurisdiction, such as motor vehicles, trailers, rolling stock, airplanes, shipping containers, road building and construction machinery and commercial harvesting machinery and the like, if the goods are equipment or are inventory leased or held for lease by the debtor to others, and are not covered by a certificate of title described in subsection (2).

(b) The law (including the conflict of laws rules) of the jurisdiction in which the debtor is located governs the perfection and the effect of perfection or non-perfection of the security interest.

(c) If, however, the debtor is located in a jurisdiction which is not a part of the United States, and which does not provide for perfection of the security interest by filing or recording in that jurisdiction, the law of the jurisdiction in the United States in which the debtor has its major executive office in the United States governs the perfection and the effect of perfection or non-perfection of the security interest through filing. In the alternative, if the debtor is located in a jurisdiction which is not a part of the United States or Canada and the collateral is accounts or general intangibles for money due or to become due, the security interest may be perfected by notification to the account debtor. As used in this paragraph, "United States" includes its territories and possessions and the Commonwealth of Puerto Rico.

(d) A debtor shall be deemed located at his place of business if he has one, at his chief executive office if he has more than one place of business, otherwise at his residence. If, however, the debtor is a foreign air carrier under the Federal Aviation Act of 1958, as amended, it shall be deemed located at the designated office of the agent upon whom service of process may be made on behalf of the foreign air carrier.

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

in accounts as well as in general intangibles and mobile goods. Thus, the situs of the records rules of 9-103(1)<sup>63</sup> is deleted and the proper place to file as to account is the state where debtor's chief place of business is located. Second, this section does not concern itself with issues of validity (which are left to the general principles of 1-105(R)), but deals solely with perfection issues. The one remaining difference is the addition, in 9-103(3)(e)(R), of a rule which operates if the debtor moves his chief place of business to another jurisdiction. Under 9-103(3)(e)(R) a security interest in accounts, general intangibles or mobile goods remains perfected for four months after the debtor moves his chief place of business, or until the expiration of the perfection term in the state of the debtor's prior location, whichever occurs first. The interest will be perfected thereafter only if a secured party files in the state of a debtor's new location. As in 9-103(1)(d), after a change in the debtor's location the secured party is entitled to the four-month protection as against a purchaser after removal only if a financing statement is filed in the new situs state within the four-month period.

Section 9-103(3)(b)(R) requires application of the law of the jurisdiction in which the debtor "is located." It defines "is located" as the debtor's place of business, or debtor's chief executive office if he has more than one place of business, or otherwise, at the debtor's residence. These modifications provide some needed clarity as to the appropriate place of filing under 9-103(3)(R). Although interpretation problems may arise, this section appears to provide sufficient criteria to allow a secured party to file in all jurisdictions whose law might apply.

A possessory security interest in chattel paper<sup>64</sup> is governed by the 9-103(1)(R) rules for goods. If perfection is effected by filing, the rules for accounts set forth in 9-103(3)(R) govern. The simplicity of this rule is apparent. D, whose place of business is in State X, grants a security interest in some chattel paper he holds to SP1, who perfects by filing in State X. SP1 having read 9-103(3)(e)(R) knows that the proper place to file is in the state of D's location and that the situs of the collateral is irrelevant. SP1, therefore, watches D and not the collateral. D moves his chattel paper to State Y, but

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63. See text following note 18 *supra*.

64. Section 9-103(4)(R) provides as follows:

(4) Chattel Paper.

The rules stated for goods in subsection (1) apply to a possessory security interest in chattel paper. The rules stated for accounts in subsection (3) apply to a non-possessory security interest in chattel paper, but the security interest may not be perfected by notification to the account debtor.

does not change his business location. While in State Y, D borrows against the chattel paper from SP2, a local bank. SP2 takes possession of the chattel paper and thereby perfects its interest. SP2's possessory interest is governed by the rules for goods in 9-103(1)(R). Under the 9-103(1)(b)(R) rule, the last event upon which the claim of SP2's perfection is based is his taking possession. Conclusion: both SP1 and SP2 hold perfected security interests in the chattel paper, with SP1's being prior because first perfected.<sup>65</sup>

Section 9-103(5)(R)<sup>66</sup> operates only under the following conditions: (1) the security interest is created by a debtor who has an interest in minerals or the like; (2) the security interest is created *before* extraction; and (3) the security interest attaches *upon* extraction. Under these conditions, 9-103(5)(R) states a rule which governs both security interests in the minerals themselves and in accounts resulting from sale of the minerals at the wellhead or minehead. Perfection of such security interests is governed by the law of the jurisdiction where the minehead or wellhead is located. The rule is thus an exception to 9-103(1)(R) and 9-103(3)(R), the general rules regarding security interest interests in goods and accounts in this limited situation.

#### CONFLICT BETWEEN THE NEW RULES AND THE OLD

The following is schema of appropriate choice of law rules under the 1962 and 1972 UCC:

Collateral Classified as:	Applicable Provision	
	1962 UCC	1972 UCC
Ordinary Goods	9-102(1) and 9-103(3) (when goods are moved)	9-103(2)(R)
Goods "covered" by Certificate of Title Accounts (and contract rights)	9-103(4)  9-103(1)	9-103(2)(R)  9-103(3)(R)
General Intangibles	9-103(2)	9-103(3)(R)
Mobile Goods	9-103(2)	9-103(3)(R)

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65. SP's priority is based upon 9-312(5)(a)(R).

66. 9-103(5)(R) provides as follows:

(5) Minerals.

Perfection and the effect of perfection or non-perfection of a security interest which is created by a debtor who has an interest in minerals or the like (including oil and gas) before extraction and which attaches thereto as extracted, or which attaches to an account resulting from the sale thereof at the wellhead or minehead are governed by the law (including the conflict of laws rules) of the jurisdiction wherein the wellhead or minehead is located.

Minerals	9-102(1) & 9-103(3)	9-103(5)(R)
Documents & Instruments	9-102(1) & 9-103(3)	9-103(1)(R)
Chattel Paper	9-102(1) & 9-103(3)	9-103(4)(R)

The above sections of the 1972 UCC refer only to questions of perfection. Under the 1972 UCC, questions of validity and default are governed by the general choice of law rule of 1-105(1)(R), which in practical effect adopts the general choice of law rules of the enacting state. The 1962 UCC stated special rules in 9-103 regarding validity and applied the general rule of 9-102(1) to choice of law on issues of default and those questions of validity not covered by 9-103.

The potential conflict between these rules is apparent, but is confined to a battle between the general choice of law rules of a specific state which has adopted the 1972 UCC as those rules apply to secured transactions, and the choice of law rules under the 1962 UCC. It is sufficient to note the source of the problem without attempting to match each state's choice of law rule against the rules under 9-102(1) and 9-103. Having noted this problem regarding issues of validity and default, questions of perfection remain—an area where the conflict is concretized by the incompatible specific rules of the 1962 and 1972 UCC.

The draftsmen include the phrase “including the conflict of laws rules” in the choice of law rules to allow perfection by filing in this state in those situations where the UCC choice of law rule would direct the secured party to file in a state which would give no effect to such a filing. Such a state would obviously have to be a state which has not enacted the UCC or has a different UCC. This phrase appears in the 1962 UCC rules governing security interests in accounts and contract rights (9-103(1)); general intangibles and mobile goods (9-103(2)); and incoming goods (9-103(3)). The provision is notably absent from the general rule of 9-102(1) (since that rule speaks only of the application of the law of this state) and the certificate of title rule of 9-103(4).

The 1972 UCC uses the same phrase in its choice of law rules governing security interests in mobile goods, accounts and general intangibles (9-103(3)(R)); goods covered by a certificate of title (9-103(2)(R)); and minerals (9-103(5)(R)). The provision is absent from the rules governing documents, instruments, and ordinary goods (9-103(1)(R)). Thus, the law specified under these rules is internal law.

Under 9-103(1) perfection of a security interest in accounts is

governed by the law of the state where the debtor's records are kept. Under 9-103(3)(R) the governing law is that of the debtor's location. Assume that State X has adopted the 1972 UCC, while the 1962 version remains in force in State Y. D assigns all his accounts to SP1 in State X, where D is located. SP1 files in the appropriate office in State X. D opens a business in State Y and promptly assigns the accounts of that business to SP2. SP2, noting that D keeps his records regarding these accounts in State Y, files there. Whose interest is superior?

The outcome will be determined by which forum decides the issue. If the action is brought in State X, 9-103(3)(R) would be applied. Under the State X rule, the law, including the conflicts rule, of the debtor's location governs. In this case, the court of State X would apply X law, and since SP2 never perfected by filing in State X, his interest will be deemed unperfected. SP1 will prevail.

If the action is brought in State Y, however, its court would apply its choice of law rule, 9-103(1), which requires filing in that state where D's records concerning the accounts are kept. The Y court would thus apply Y law, and as SP1 had never filed in the appropriate place, his interest will be deemed unperfected. SP2 will prevail.

Secured parties in such situations must closely police the activities of their debtors, and promptly file in any state where the debtor is likely to transact business which has a different version of the UCC than that under which the secured party operates.

However, assume that the facts of the above case are the same except that State Y has the 1972 UCC, while State X has the 1962 UCC. If an action to determine priority is brought in State X, its conflicts rule, 9-103(1), would require it to apply the law "including the conflict of laws rules" of the state where D kept the accounts records. The X court must therefore apply the 1972 UCC of State Y, specifically the conflicts rule of 9-103(3)(R), which requires the application of the law, "including the conflict of laws rules" of the state where D is located — State X. The result is *renvoi* and the same circular reference would ensue if the action were brought in State Y.

How can this *renvoi* be resolved? The first suggestion that comes to mind is the product of hindsight — that SP1 should have filed in State Y, and SP2 in State X, in addition to the filings that were made — but this solution is of little benefit to either secured party. First, SP1 in State X may have no idea that D is doing business in State Y and assigning the accounts therefrom. If SP1 has not taken the precaution of filing in all states, he must rely on D to supply information as to proposed out-of-state accounts. It is likely, therefore, that SP1 will discover the assignment after-the-fact. Even if

SP1 immediately files in State Y, SP2 will probably already be perfected, and SP1's filing will give him perfection, but not priority under the law of State Y. SP2 is in the same position. Since SP1's interest floats over all accounts and attaches and becomes perfected in State X at the moment that the account in State Y comes into existence, SP2's subsequent filing in State X, although perfecting his interest, would not give him priority over SP1.

A court could break this *renvoi* circle so as to protect the interest perfected by filing in its state, or break the circle so that its law is applied. Thus, State X would either apply the law of Y to bestow perfected status on SP1, who filed in State X, or would apply its own law, to make SP2's the only perfected interest. If the State X court values the governmental interests embodied in 9-103(1), whatever they may be, that court will apply its own law. If State X's court prefers to protect its citizens from nefarious outsiders, it will apply the law of the outsiders, that of State Y. It matters not what logic a court may use to escape the *renvoi* circle, since doing battle with *renvoi* is a pseudo-logical pursuit.

Having discovered *renvoi* in the interplay of the new and old rules regarding accounts filing, we should search for it elsewhere. The *renvoi* problem will arise when the 9-103(2) rule governing mobile goods and general intangibles clashes with the 9-103(3)(R) rule governing security interests in the same collateral types. Here, however, the problem is illusory. Both sections provide that perfection is governed by the law of the debtor's home state.

Security interests in goods which leave the jurisdiction where the secured party filed first do not present any choice of law problems. First, neither 9-103(3) nor 9-103(1)(R) contains the magic *renvoi* formula "including the conflict of laws rules." Second, there is no true conflict between 9-103(3), properly interpreted, and 9-103(1)(R).<sup>67</sup>

However, the removal of goods situation may be troublesome in terms of planning where a secured party attempts to utilize the 9-103(1)(c)(R) rule. This rule makes the law of that state to which the parties understand that the goods will be removed govern the perfection of a purchase money security interest for a period terminating 30 days after the debtor's receipt of possession of the goods in that state, unless the goods are brought into that state within the 30-day period. The rule only covers purchase money interests in goods.

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67. See note 41 *supra* and cases cited therein and accompanying text.



Assume that D contracts to purchase a carload of widgeits, in which SP retains a purchase money interest. SP files in State X (which has the 1972 UCC) where D intends to keep the widgeits. D reroutes the carload to his warehouse in State Y (which has the 1962 UCC). SP never files in State Y but the widgeits are attached by D's lien creditor in State Y.

Under the law of State X, SP would have perfected his interest by filing there under 9-103(1)(c)(R). Under the law of State Y, SP's filing in State X did not effect perfection because the goods were never there. An argument could be made that since the security interest was perfected under the law of State X the four-month grace period of 9-103(3) should apply, and the law of State Y should recognize the perfection of SP's interest for at least four months. But this argument fails, for 9-103(3) brings into play the four-month grace period rule only:

If the security interest was already perfected under the law of the jurisdiction where the property was *when the security interest attached* and before being brought into this state [emphasis added].<sup>68</sup>

Thus, 9-103(3) could not permit State Y to recognize the perfection of SP's interest because the goods were never perfected in the state where the goods were when the interest attached.

Therefore, because the 1972 UCC incorporates the extra-Code conflicts law of the enacting state regarding validity and default issues, conflicts between that law and the 1962 UCC choice of law rules regarding these same issues is inevitable. Further, the foregoing discussion delineates some of the potential conflicts between the 1962 and 1972 Code versions regarding questions of perfection.

#### CONCLUSION

The foregoing analyses of the Article 9 choice of law provisions of the 1962 and 1972 Code demonstrate that many of the problems created by the 1962 version have been remedied by the 1972 UCC. Hopefully, a swift transition to universal enactment of the 1972 UCC will minimize the possibility of conflicts between the 1962 and 1972 versions, as devotion of legal talent and judicial energy to cases raising such conflicts generates no progress towards the ultimate goal of a consistent and uniform choice of law system for secured transactions.

Specific choice of law rules governing secured transactions appear

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68. See pages 656 through 662 *supra*.

to be an absolute necessity. The development of filing as the preferred method of perfection and the volume of secured transactions which are multistate in scope, coupled with the increasing mobility of many debtors and collateral types suggest that those specific rules will be, as the UCC rules clearly are, intricate, complex and at times ambiguous. In addition, the need for predictability in commercial transactions requires that these rules relate not to the governmental interest of the jurisdictions whose laws could apply to a specific transaction, but to the location of participants and specific events in the history of that transaction. Hopefully, the 1972 UCC as it will be interpreted by the courts, will provide a greater degree of predictability and consistency than was found in the 1962 version. The ultimate resolution of the problems dealt with by the choice of law rules of Article 9 will await the universal adoption of the 1972 UCC and the formulation of a nation-wide system of filing for perfection.

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