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**THE 1981 REVISIONS TO
THE MARYLAND LAW OF SECURED TRANSACTIONS:
AN OVERVIEW FOR THE PRACTITIONER**

JAMES M. SMITH* AND RICHARD CLARK FAINT, JR.**

Effective January 1, 1981, Maryland joined the majority of states¹ in enacting² a version of the 1972 Official Text to Article 9 of the Uniform Commercial Code as promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.³ Maryland's new revised Article 9 (hereinafter cited as the Revised Code) makes several major changes from the previous version (hereinafter cited as the Prior Code) of the 1962 Official Text⁴ in the law of secured transactions, most notably with respect to multistate transactions, the treatment of proceeds, filing requirements for consignments, and changes and clarifications in the priority rules. The revised Code also makes a number of technical changes that are of importance to the practitioner in properly perfecting and dealing with secured transactions. It is the intention of this article to highlight the important changes made in Article 9 by focusing upon the practical effects of those

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1. More than one-half of the states have enacted some version of the 1972 Official Text. At least one commentator recently has stated that the 1972 Official Text "will likely be the law in all states (except Louisiana) before too long." B. CLARK, *THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE*, ¶ 14.1 (1980).

2. 1980 Md. Laws ch. 824.

3. The 1972 Official Text, the AMERICAN LAW INSTITUTE NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE: 1972 OFFICIAL TEXT AND COMMENTS OF ARTICLE 9 SECURED TRANSACTIONS [hereinafter cited as 1972 OFFICIAL TEXT], was published in the spring of 1972. For a general discussion of the changes between the 1972 OFFICIAL TEXT and the 1962 OFFICIAL TEXT, see B. CLARK, *supra* note 1, at ¶ 14.1-¶ 14.11; W. DAVENPORT & D. MURRAY, *SECURED TRANSACTIONS passim* (1978); Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477 (1973); Funk, *The Proposed Revision of Article 9 of the Uniform Commercial Code*, 26 BUS. LAW. 1465 (1971), 27 BUS. LAW. 321 (1971); Hawkland, *The Proposed Amendments to Article 9 of the U.C.C.*, 76 COM. L.J. 416 (1971), 77 COM. L.J. 12 (1972); Levenberg, *Comments on Certain Proposed Amendments to Article 9 of the Uniform Commercial Code*, 56 MINN. L. REV. 117 (1971). Additionally, the rationale for the various changes made by the Board can be found in the Comments to the 1972 OFFICIAL TEXT, which comments were *not* adopted by Maryland [hereinafter cited as 1972 OFFICIAL COMMENTS], and in the Appendix to the 1972 OFFICIAL TEXT entitled 1972 OFFICIAL TEXT SHOWING CHANGES MADE IN FORMER TEXT OF ARTICLE 9, SECURED TRANSACTIONS AND OF RELATED SECTIONS AND REASONS FOR CHANGES [hereinafter cited as REASONS FOR CHANGES].

4. Maryland adopted, with minor variations, the 1962 OFFICIAL TEXT. 1963 Md. Laws ch. 538.

changes upon secured transactions in Maryland, and to discuss the procedures that practitioners must follow in order to comply with the new revisions.

I. MULTISTATE TRANSACTIONS

Section 9-103 of the Revised Code, governing which jurisdiction's laws control perfection or non-perfection,⁵ has been totally revised and is a significant departure from previously existing law. It provides simplified, mandatory rules for filing which vary depending upon the specific type of collateral involved in the transaction.⁶ Hence, the first steps for the practitioner in dealing with a multiple jurisdiction perfection question under the Revised Code are to ascertain the specific classification of the subject collateral, and then to refer to the rules relating to that particular type of collateral under Section 9-103.⁷

A. Documents, Instruments, and Ordinary Goods

1. The General "Situs Rule"

Section 9-103(1)(b) of the Revised Code states a general situs rule with respect to collateral consisting of documents,⁸ instruments,⁹ or

5. It should be noted that Section 9-103 essentially governs the question of perfection or nonperfection of the secured interest holder *vis a vis* third parties, and it is not a choice of law rule between the contracting parties. Section 1-105(1) permits the contracting parties to agree among themselves when the transaction "bears a reasonable relationship" to "this state" or to "another state or nation" that the laws of the agreed state or nation will control their rights and duties. However, such an agreement is not binding in determining perfection questions with respect to third parties. *See, e.g., In Re Automated Bookbinding Services, Inc.*, 336 F. Supp. 1128, 10 U.C.C. Rep. 209 (D. Md. 1972), *rev'd on other grounds*, 471 F.2d 546, 11 U.C.C. Rep. 897 (4th Cir. 1972) (although security agreement for machinery brought into Maryland from New York provided that the New York U.C.C. would govern the rights of the parties and such an agreement could arguably control in a dispute between the parties to the agreement, those parties could not successfully bind a creditor of the debtor who was not a party to the agreement); *Doyle v. Northrop Corp.*, 455 F. Supp. 1318, 25 U.C.C. Rep. 932 (D. N.J. 1978) (although parties to a contract are free to choose the law they wish to govern the transaction, the provisions of Article 9-103 are mandatory).

6. Section 9-103(1) provides the rules governing collateral ordinarily located at a fixed point, that is, documents, instruments, and ordinary goods; subsection (2) applies to movable collateral for which the law requires notation of any security interest on the certificate of title; subsection (3) provides both the rules applicable to collateral that, by its nature, is not easy to locate, such as accounts and general intangibles, and the rules applicable to equipment or inventory that is mobile and is not covered by a certificate of title; subsection (4) deals simply with the special problems of chattel paper; and, finally, subsection (5) covers minerals, including oil and gas, and the laws applicable thereto.

7. *See* note 6 *supra*.

8. MD. COM. LAW CODE ANN. § 9-105(f) (Cum. Supp. 1980).

9. MD. COM. LAW CODE ANN. § 9-105(i) (Cum. Supp. 1980).

ordinary goods.¹⁰ the law controlling perfection of a security interest in these types of collateral will be the law of the jurisdiction where the collateral is located "when the last event occurs on which is based the assertion that the security interest is perfected or unperfected." This new provision retains the "location of the collateral" test as embodied in Section 9-103(3) of the Prior Code, but it significantly changes the time at which the test is to be applied.

Section 9-103(3) of the Prior Code provided that the "validity" of the security interest¹¹ was to be determined by the law of the jurisdiction where the security interest "attached." Attachment occurred under Prior Code Section 9-204(1) when there was a security agreement providing that it attach, when value had been given, and when the debtor had rights in the collateral.¹² Under the Prior Code, when the last of these three events occurred, the situs test of Section 9-103(3) was triggered for reference as to the validity of the security interest. In contrast, perfection occurs under both the Prior Code and the Revised Code¹³ when the security interest has attached *and* when, depending upon the type of subject collateral, a financing statement has been filed or the secured party has obtained possession of the collateral.¹⁴

Thus, under the provisions of the Revised Code, to determine which state's law governs perfection or non-perfection in a multistate transac-

10. MD. COM. LAW CODE ANN. § 9-105(h) (Cum. Supp. 1980).

11. The focus of Revised Code Section 9-103 upon questions of "perfection or non-perfection" as opposed to the question of the "validity of the security interest" reflects the intent of the drafters of the 1972 OFFICIAL TEXT strictly to confine the focus of Section 9-103 to conflicts rules determining perfection and not choice of law questions between the contracting parties. See REASONS FOR CHANGES, *supra* note 3, at § 9-103 n.1, where it is stated:

The section now concerns itself exclusively with perfection of security interests and the effect of perfection or non-perfection thereof. The 1962 Code has several references to the "validity" of a security agreement, and these have been deleted. Likewise, a deletion has been made from Section 9-102 of the language which went beyond that section's basic function of defining the scope of Article 9 and purported to state a choice of law rule. These two changes make it clear that Article 9 does not govern problems of choice of law between the original parties, and that this question is governed by the general choice of law provisions in Section 1-105.

However, the Fourth Circuit Court of Appeals in the case of *In Re Automated Bookbinding Services, Inc.*, 471 F.2d 546, 11 U.C.C. Rep. 897 (4th Cir. 1972), found that the term "validity" as used in Section 9-103(3) of the Prior Code should be interpreted as meaning "perfection."

12. The Revised Code combines the concepts of enforceability and attachment in Section 9-203. However, the criteria for attachment as embodied in Prior Section 9-204(1) remain the same.

13. MD. COM. LAW CODE ANN. § 9-303 (Cum. Supp. 1980).

14. For certain limited exceptions to this general rule, see MD. COM. LAW CODE ANN. § 9-302 (1975).

tion involving documents, instruments, or ordinary goods, one must look to where the last event occurred on which an assertion of perfection or non-perfection is based.¹⁵ For example, if perfection is to be obtained by filing, and filing is the last event to occur of those events required for perfection, then a proper filing would be where the collateral is located. Similarly, if perfection is obtained by possession and possession is the last event to occur, one would look to the state where possession occurred. However, if one of the other events of perfection occurs last, then it is crucial that the collateral still be in the jurisdiction where the filing was made. If the collateral has been moved to another jurisdiction after filing, but prior to the happening of the last event, then perfection will date from the time of filing in the new jurisdiction where the collateral is then located. In most cases and as a matter of practicality, the general rule in circumstances involving documents of title, instruments, or ordinary goods is that filing should be made at *the situs of the collateral*, and *changed* upon movement of the collateral.

2. The "30 Day Rule" Exception to the "Situs Rule".

Section 9-103(1)(c) of the Revised Code provides an important exception to the general "situs rule" in the limited circumstances of purchase money financing¹⁶ of goods intended for transport. Basically, this provision provides that 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,"¹⁷ then the law of the other (the receiving) jurisdiction will govern perfection from the time the security interest attaches until thirty days after possession of the goods is obtained by the debtor, and thereafter,¹⁸ if the goods actually reach the receiving jurisdiction before the expiration of the thirty-day period.

This rule continues the policy of Prior Code Section 9-103(3) that if the parties intend for goods purchased in one jurisdiction to be kept in

15. There has been much debate by commentators about the meaning of Revised Section 9-103(1)(b). Some believe that the "last event" must be one of the affirmative steps required for perfection of the security interest. Others contend that since the test formulated in Section 9-103(1)(b) also focuses on non-perfection, the "last event" need not necessarily be one of the steps required for perfection. Compare Kripke, *The "Last Event" Test for Perfection of Security Interests under Article 9 of the Uniform Commercial Code*, 50 N.Y.U. L. REV. 47 (1975) with Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477 (1973).

16. MD. COM. LAW CODE ANN. § 9-107 (1975).

17. MD. COM. LAW CODE ANN. § 9-103(1)(c) (Cum. Supp. 1980).

18. MD. COM. LAW CODE ANN. § 9-403.1.1 (Cum. Supp. 1980) provides for a period of effectiveness of twelve years for financing statements filed after June 30, 1978.

another jurisdiction, the laws of the jurisdiction where the goods will be kept should govern the secured transaction. Even so, the new "30 Day Rule" is a major change from, and improvement over, the provisions of the Prior Code. The new "30 Day Rule" is limited to purchase money security interests in goods, while Prior Code Section 9-103(3) applied to personal property subject to any type of security interest.¹⁹ Additionally, while both the Prior and Revised Codes were meant to determine which state's law governed the secured transaction, the Revised Code deals with issues of perfection while the Prior Code focused on the validity of the security interest.²⁰ Moreover, the new rule covers the movement of collateral in both directions — incoming goods to "this jurisdiction" and outgoing goods from "this jurisdiction" — while the old rule covered only incoming goods.²¹ Finally, more certainty is provided by the Revised Code as to the ascertainment of when the thirty-day period is in effect: the time period ends thirty days after the debtor receives possession of the goods. Under the Prior Code the time period ended thirty days after the date the security interest attached.

In dealing with the operation of the "30 Day Rule," it is important to keep in mind that the rule applies only if the parties *understand at the time the security interest attaches* that the goods will be *kept* in another jurisdiction. The practitioner should be especially wary of the evidentiary problems of intent that might arise in ascertaining what the parties "understood" at the time the security interest attached. It is suggested that the prudent practitioner representing the creditor will carefully memorialize in the security agreement the "understanding" of the parties that the goods are to be kept²² in another jurisdiction. Further, the practitioner must be cognizant that a filing in the receiving state *must* be made (unless the secured creditor is perfected by possession). "The 30-day period is not a period of grace during which

19. Due to the nature of the "30 Day Rule," its most frequent use is probably when purchase money security interests are given. See W. DAVENPORT & D. MURRAY, *supra* note 3, at 229.

20. *But see In Re Automated Bookbinding Services, Inc.*, 471 F.2d 546, 11 U.C.C. Rep. 897 (4th Cir. 1972) (court interpreted "validity" as used in Prior Section 9-103(3) to mean "perfection").

21. W. DAVENPORT & D. MURRAY, *supra* note 3, at 230.

22. The Code does not define the meaning of "kept". The 1972 OFFICIAL COMMENTS, *supra* note 3, at § 9-103, explain: ". . . the concepts that goods are 'kept' in a state or 'brought' into a state . . . imply a stopping place of a permanent nature in the state, not merely transit or storage intended to be transitory." Be aware, however, that Maryland did not enact these comments as a part of the Revised Article 9. Although Prior Section 9-103(3) applied the "30 Day Rule" to property brought into the state "for purposes other than transportation through this State," this language is not a part of Revised Section 9-103(1)(c).

filing is unnecessary or has retroactive effect, but merely states the other jurisdiction is the place of filing."²³ Dual filing is often recommended and necessary since it provides protection in the situation where the goods, for unforeseen reasons, do not reach the receiving jurisdiction before the end of the thirty day period.

3. The "Four Month Rule" Exception to the "Situs Rule."

Revised Code Section 9-103(1)(d) provides a second important exception to the general "situs rule" with respect to "collateral" (as opposed to merely "goods" as covered by the "30 Day Rule") brought into and kept in this state (the receiving state) while subject to a perfected security interest in another state. In such a situation the creditor's security interest will remain perfected unless action is required in the receiving state to perfect (*i.e.*, filing) and that action is not taken before the first to occur of (i) the expiration of perfection in the other jurisdiction or (ii) the expiration of four months after the collateral is brought into the receiving state. In other words, for four months the receiving state will recognize perfection under the law of the jurisdiction from which the collateral came unless the remaining period of effectiveness of the perfection in that jurisdiction was less than four months.²⁴ If timely perfection occurs in the receiving state prior to the expiration of either of these two time periods, the security interest remains perfected and will be effective even against a bona fide purchaser for value.²⁵ If, however, the security interest becomes unperfected because proper action was not taken before the shorter of the two time periods expires, it is ineffective with respect to a subsequent person who became a purchaser after removal and is subordinate to any who would have priority over an unperfected security interest.²⁶ Under the 1962 Official Text, there was considerable litigation in other jurisdictions involving the situation where the perfected secured party did not file in the receiving state, but a bona fide purchaser for value acquired the collateral *prior* to the expiration of

23. 1972 OFFICIAL COMMENTS, *supra* note 3, at § 9-103 comment 2. The effect of a late filing is governed by other Article 9 provisions. See, *e.g.*, MD. COM. LAW CODE ANN. §§ 9-103 and 9-312 (Cum. Supp. 1980).

24. 1972 OFFICIAL COMMENTS, *supra* note 3, at § 9-103 comment 7.

25. See, *e.g.*, *Utah Farm Production Credit Association v. Dinner*, 302 F. Supp. 897, 6 U.C.C. Rep. 937 (D. Colo. 1969); *Exchange Bank of Osceola v. Jarrett*, 588 P.2d 1006, 25 U.C.C. Rep. 877 (1979); *Garden City Production Credit Ass'n. v. Lanna*, 186 Neb. 668, 186 N.W.2d 99, 8 U.C.C. 1163 (1971).

26. See, *e.g.*, *Massey-Ferguson Credit Corp. v. Wells Motor Co., Inc.*, 374 So. 2d 319, 27 U.C.C. Rep. 267 (Ala. 1979); *Wind v. Westinghouse Credit Corp.*, 260 Pa. Super. 385, 394 A.2d 980, 25 U.C.C. Rep. 268 (1978).

the four month period.²⁷ This apparent ambiguity in Section 9-103 is eliminated in the Revised Code by the language of Section 9-103(1)(d)(i) which provides that where the security interest has not been perfected in the receiving state by the end of the four month period or before the expiration of perfection in the other state, whichever occurs first, the security interest is "thereafter deemed to have been unperfected as against a person who became a purchaser²⁸ after removal."

The leading decision in Maryland construing the application of the "Four Month Rule" is the case of *In Re Automated Bookbinding Services, Inc.*²⁹ In that case, the United States Court of Appeals for the Fourth Circuit was faced with a factual situation under the Prior Code in which the secured party shipped goods to a debtor in Maryland and subsequently filed a financing statement in Maryland covering the equipment less than four months after the goods had been shipped from New York. In the litigation, the creditor contended that it had priority over the perfected lien of a finance company in after-acquired property, reasoning that it had perfected in New York by possession and accordingly it was entitled to the four month time period to file in Maryland under the provisions of Prior Code Section 9-103(3). Judge Sobeloff, writing for the court, held that the four month rule was inapplicable to the case and explained:

[Prior Code Section 9-103(3)] was designed to protect secured parties whose debtors absconded with their collateral. When the secured party knows where the collateral is to be taken, and that the transfer will take place within the short period of 30 days after the security interest attached, there is no reason or justification for allowing the secured party . . . to delay filing in the second state (emphasis added)³⁰

One commentator has characterized the result in *In Re Automated Bookbinding Service, Inc.* as "eminently sound in its reasoning, and the

27. For decisions holding that a bona fide purchaser for value prevails over the secured creditor under such circumstances, see *United States v. Squires*, 378 F. Supp. 798, 15 U.C.C. Rep. 718 (S.D. Iowa 1974); *Arrow Ford, Inc. v. Western Landscape Construction Co., Inc.*, 23 Ariz. App. 281, 532 P.2d 553, 16 U.C.C. 1124 (1975). For decisions holding what is apparently the majority view that all purchases made during the four month period are subject to the secured creditor's lien, see *United States v. Burnette-Carter Co.*, 575 F.2d 587 (6th Cir. 1978); *Pascack Valley Bank and Trust Company v. Ritar Ford, Inc.*, 6 Conn. 489, 276 A.2d 800, 9 U.C.C. Rep. 523 (1970); *First National Bank of Bay Shore v. Stamper*, 93 N.J. Super. 150, 225 A.2d 162, 3 U.C.C. Rep. 949 (1966).

28. Defined at MD. COM. LAW CODE ANN. § 1-201(33) (1975).

29. 471 F.2d 546, 11 U.C.C. Rep. 897 (4th Cir. 1972).

30. *Id.* at 554-55.

result is codified in the 1972 amendments to Section 9-103.³¹ It is submitted, however, that Judge Sobeloff's reasoning cannot be extended under the Revised Code to become an all-encompassing rule that the "30 Day Rule" applies when the secured party expects the goods to be moved to another state and the "Four Month Rule" applies solely to the absconding debtor situation and not to any other situations where the secured party has knowledge in advance that the goods are to be relocated into another state. This becomes readily apparent when it is realized that the "30 Day Rule" under the Revised Code applies only to purchase money security interests. Hence, it is reasonable to contend that Judge Sobeloff's position is applicable at most in the purchase money security interest situation, since the drafters of Revised Code Section 9-103 could not have intended to deprive secured parties dealing with non-purchase money security interests of protection under both the "30 Day Rule" and the "Four Month Rule" when, at the inception of the transaction, the subject collateral is intended for immediate relocation. Moreover, the language of Revised Code Section 9-103(d) in delineating the "Four Month Rule" contains no references or limitations based upon intent or knowledge, and instead simply applies itself without restriction to "a security interest perfected under the law of the jurisdiction from which the collateral was removed." It is suggested, however, that the prudent practitioner in Maryland should continue to file immediately when dealing with relocation of collateral into Maryland, and should not rely solely upon the protection of the "Four Month Rule" until the continued extent of viability of *In Re Automated Bookbinding Services, Inc.* has been clearly determined. Finally, it is clear that under either the "30 Day Rule" or the "Four Month Rule" the prudent creditor should police his collateral very carefully to ensure that it actually reaches and remains in the jurisdiction where the creditor is properly perfected.³²

31. B. CLARK, *supra* note 1, at ¶9.3.

32. The classic case illustrating the perils of financing goods that are being transferred between jurisdictions is the case of *In Re Dennis Mitchell Industries, Inc.*, 419 F.2d 349, 6 U.C.C. Rep. 573 (3rd Cir. 1969), where the court dealt with the factual situation of a buyer that received delivery of equipment under a conditional sales agreement in New York, which agreement provided that the equipment was to be taken to Pennsylvania. Without policing the collateral to ensure knowledge of its eventual situs, the conditional seller filed in Pennsylvania. The equipment instead was transported directly to New Jersey and the buyer subsequently filed for bankruptcy, with the result that the conditional seller was forced to have an unperfected security interest in the equipment.

B. Goods Covered by a Certificate of Title

Section 9-103(2) of the Revised Code sets forth rules determining the effect of perfection or non-perfection (including the conflict of law rules) for goods covered by a certificate of title under a state's statute that requires indication of a security interest on the certificate as a condition of perfection.³³

The Revised Code expands upon the simplistic approach of Section 9-103(4) of the Prior Code by adding several explanatory provisions. It continues to provide that where the collateral is covered by a certificate of title requiring indication thereon of the security interest, the law of the issuing jurisdiction will govern the effect of perfection. However, the Revised Code improves upon this provision by adding that the notation of the security interest in the issuing jurisdiction will control until four months after the goods are removed from the issuing jurisdiction, and thereafter until the collateral is registered in another jurisdiction,³⁴ but in no event beyond the surrender of the old certificate.³⁵ Section 9-103(2)(c) deals with the situation where a security interest is perfected otherwise than by notation on the certificate of title. This section provides that a perfected security interest in goods that come into this state and are thereafter covered by a certificate of title is subject to the general four month rule provided in Section 9-103(1)(d).³⁶

Finally, there is special protection for the non-professional buyer. Revised Code Section 9-103(2)(d) provides that a security interest perfected in another jurisdiction in goods brought into this state is subordinate to the rights of a buyer of goods who is not a professional seller of goods of that kind, to the extent he gives value and takes delivery of the goods after issuance of the certificate and without

33. Maryland is a "title" state. The provisions of MD. TRANS. CODE ANN. § 13-201 *et seq.* (1977), specify the method by which security interests in motor vehicles are to be perfected.

34. *See In Re Hartberg*, 25 U.C.C. Rep. 1429 (E.D. Wis., Bankr. J. 1979), where the court applied Section 9-103(2) to find that a perfected lien by notation on a motor vehicle certificate in Florida became invalid after the automobile was removed to Wisconsin for more than four months and was registered in Wisconsin, and that actual knowledge of the lien holder was irrelevant.

35. The 1972 OFFICIAL COMMENTS, *supra* note 3, at § 9-103 comment 4(c), state that the rationale for this provision is that since it is the secured party who holds the certificate, surrender could not occur without his action.

36. *See* notes 24 to 32 and accompanying text *supra*.

knowledge of the security interest, and if he receives a "clean" certificate of title issued by this state showing no security interests.³⁷

C. Accounts, General Intangibles, and Mobile Goods

Section 9-103(1) of the Prior Code provided that with respect to "accounts"³⁸ filing should be in the jurisdiction where the account records were kept.³⁹ Prior Code Section 9-103(2) provided that the "chief place of business" of the debtor was where filing should be accomplished for "general intangibles"⁴⁰ or with regard to "goods of a type which are normally used in more than one jurisdiction" (mobile goods). The Revised Code has a unified provision in Section 9-103(3)(b) which provides that the law (including the conflicts of law rules) governing perfection for all three categories of collateral (accounts, general intangibles, and mobile goods) will be the "jurisdiction in which the debtor is located," which phrase is defined in Section 9-103(3)(d) to mean the place of business of the debtor if he has one, or at his "chief executive office" if he has more than one place of business, or otherwise at his residence.⁴¹ Section 9-103(3)(a) of the Revised Code further adds

37. As stated in Coogan, *supra* note 3, at 545, the purpose of this provision is "obvious", since:

[T]his is the class of buyer least able to protect itself. Officers issuing a certificate of title will not always be able to know all the parties who have security interests in other states and will not always be meticulous about either contacting them or listing them on the certificate. Moreover, sellers may transfer fraudulent certificates. Nevertheless, the issuing state has a strong interest in insuring that its certificates will be trusted by those most likely to rely upon them. The professional buyer, on the other hand, is presumed to know the practices of his trade and to be on the alert for the possible existence of security interest whose actual existence is not disclosed.

38. See MD. COM. LAW CODE ANN. § 9-106 (Cum. Supp. 1980), which provides a different definition of "Account" from that formerly provided.

39. See, e.g., *United States v. Ed Lusk Const. Co., Inc.*, 504 F.2d 328, 15 U.C.C. Rep. 952 (10th Cir. 1974) (Oklahoma Bank that was assigned for security purposes an interest in an Oklahoma contract by an Arkansas corporation was required to file in Arkansas where the assignor kept its records); *Barocas v. Bohemian Import Co., Inc.*, 518 P.2d 850, 14 U.C.C. Rep. 191 (Colo. App. 1974) (in action for attachment upon two accounts in Colorado, the court held that the validity and perfection of security interest of creditor was determined by New York since the only office of the defendant was located in New York).

40. MD. COM. LAW CODE ANN. § 9-106 (1975).

41. The drafters of the 1972 OFFICIAL TEXT explained that the change with respect to account filing to the debtor's "chief executive office" was to eliminate the uncertainty that record searchers might have as to where a debtor keeps his records. REASONS FOR CHANGE, *supra* note 3, at § 9-103 n.3. However, under either test, such a determination is likely to involve contested and difficult factual determinations with respect to some types of debtors. See, e.g., *Associates Financial Services Co., Inc. v. First National Bank of South Central Michigan*, 82 Mich. App. 495, 266 N.W.2d 490, 24 U.C.C. Rep. 420 (1978) (filing was correct in Indiana with respect to mobile goods although debtor was a Michigan corporation, since debtor's "principal place of business" was deemed to be in Indiana where

new language with respect to "mobile goods" not covered by a certificate of title, which specifies that the goods must indeed be mobile and which expands the definition from the Prior Code to include goods "held for lease."

Thus, when dealing with general intangibles, accounts, and non-titled mobile goods, filing should be made where the debtor is located. Care should be taken in dealing with the far-flung debtor in ascertaining his "chief executive office," since a factual dispute could easily arise in connection with this determination. Prudent counsel should require an affirmative representation from the debtor in the security agreement as to the location of the debtor and his chief executive office. In cases of doubt where multiple filings are not burdensome, it is a safe practice to file in all jurisdictions where the debtor is located.⁴² Additionally, the determination of whether particular collateral constitutes "mobile goods" involves a factual determination that, if settled adversely, can eliminate a secured party's claim to perfection.⁴³ In cases of doubt as to the exact nature of the goods, it is prudent to file both at the situs of the collateral *and* at the situs of the debtor.

Finally, Revised Code Section 9-103(3)(e) provides some protection for the perfected security interest creditor when the debtor changes his location. Like the rule under Section 9-103(1)(d), the perfected security interest will remain so until the expiration of four months after the change of debtor's location to another jurisdiction or until perfection would have ceased under the laws of the first jurisdiction, whichever expires first.

it gave an Indiana address, had development of Indiana property as prime concern, and bulldozer was delivered to Indiana); *In Re Neuman*, 26 U.C.C. Rep. 768 (W.D. Tenn. 1979) (the maintenance of two checking accounts by a professional basketball player in Utah was sufficient to establish his "office" in Utah); *Moody Day Co. v. Westview Nat. Bank, Waco.*, 452 S.W.2d 572, 7 U.C.C. Rep. 425 (Tex. Civ. App. 1970) (Texas resident who obtained the bulk of his income from Texas business managed by his wife found to have chief place of business in New Mexico where he operated mining operations that he regarded as his chief concern and where he spent most of his time).

42. See *Associates Financial Services Co., Inc. v. First National Bank of South Central Michigan*, 82 Mich. App. 495, 266 N.W.2d 490, 24 U.C.C. Rep. 420 (1978).

43. As noted by the court in *In Re Dennis Mitchell Industries, Inc.*, 419 F.2d 349, 358, 6 U.C.C. Rep. 573, 586 (3rd Cir. 1969), in determining that hydraulic cutting machines used in the manufacturing of metal and plastic products are not "goods of a type which are normally used in more than one jurisdiction":

It seems clear that the test for mobile goods turns on the type of goods involved and not on their actual use in or transportation between more than one jurisdiction. To say that goods fall within that section simply because they may be and are easily transported from state to state overlooks the nature of the test for mobile goods.

D. Chattel Paper

Section 9-103(4) of the Revised Code succinctly sets forth the choice of law rules for chattel paper,⁴⁴ by providing that where the security interest is perfected by possession, the chattel paper is subject to the rules stated for goods in Section 9-103(1), and that where the security interest is perfected by filing, the rules of Section 9-103(3) governing intangibles will control.

E. Minerals, Oil, and Gas

Both the Prior Code and the Revised Code treat preextraction mineral rights as real estate and provide that they are not governed by Article 9 of the U.C.C., although the Revised Code is more explicit as to this exclusion.⁴⁵ However, Revised Code Section 9-103(5) provides that the place for filing with respect to the perfection of security interests in extracted minerals (including oil and gas) and accounts generated by the sale of minerals is the jurisdiction where the minehead or wellhead is located.⁴⁶

It should also be noted that special filing requirements exist under the Revised Code for this type of collateral. Section 9-401(1)(b) provides that proper filing is "in the office where a mortgage of the real estate concerned would be filed or recorded," and Section 9-402(5) requires that the financing statement must show that it covers "this type of collateral," recite that it is "to be recorded in the land records," and contain a description of the real estate, as well as the name of the record owner of the real estate if the debtor does not have an interest in the real estate.

II. PROCEEDS

As was true of the Prior Code provision, Section 9-306 sets forth the rights of a secured party in the proceeds received by a debtor upon disposition of collateral and the requirements for perfecting his interest in such proceeds. Even so, Revised Code Section 9-306 provides greater

44. MD. COM. LAW CODE ANN. § 9-105(1)(b) (Cum. Supp. 1980).

45. See MD. COM. LAW CODE ANN. § 2-107 (1975). Note that Revised Code Sections 9-103(5) and 9-105(1)(h) more clearly delineate the concept of extraction.

46. The rationale for this change is that in many cases mineral rights are split into a variety of interests and it is unnecessarily burdensome to require searches to review the location of a multitude of different assignors who may be scattered throughout the country. 1972 OFFICIAL COMMENTS, *supra* note 3, at § 9-103 comment 8.

clarity and specificity in defining the rules relating to proceeds in an attempt to cure many of the ambiguities that had developed concerning the treatment of proceeds under Article 9.

A major addition to Article 9, which helps to eliminate some of the confusion as to the scope of the term "proceeds,"⁴⁷ is its explicit treatment of insurance benefits. Revised Code Section 9-306(1) specifically provides that insurance benefits payable by reason of damage or loss to the collateral constitute proceeds, with the exception of insurance proceeds payable to someone not a party to the security agreement.⁴⁸ A

47. Although at least one court has indicated that the definition of proceeds is to be given "a flexible and broad content," *In Re Munger*, 495 F.2d 511, 513, 14 U.C.C. Rep. 790, 792 (9th Cir. 1974), the case law is at best confusing in this area, with many courts taking a less expansive view of the applicability of this term. See, e.g., *American East India Corp. v. Ideal Shoe Co.*, 400 F. Supp. 141, 17 U.C.C. Rep. 527 (E.D. Pa. 1975) (where the rights of an assignee of a contract right who had the duty to perform under a contract were subordinated to a perfected security interest in the contract right, the secured party's remedy did not include a right to receive an interest in the payment pursuant to its secured interest in the payment earned by the assignee's performance since it was not "proceeds"); *Division of Western Farm Service, Inc. v. Central Valley Feed Yards, Inc.*, 70 Cal. App. 3d 513, 139 Cal. Rptr. 8, 22 U.C.C. Rep. 221 (1977) (money advanced to debtor for promise to sell hay did not constitute "proceeds" of the crop; there could be no proceeds until sale); *First National Bank of Brush v. Bostron*, 39 Colo. App. 107, 564 P.2d 964, 21 U.C.C. Rep. 1475 (1977) (security interest in feed did not extend to cattle which consumed the feed since the cattle were not "proceeds" of the collateral); *In Re Continental Trucking, Inc.*, 16 U.C.C. Rep. 526 (M.D. Fla. 1974) (where collateral consisted of a truck, a check representing service warranty benefits did not constitute "proceeds"); *Bank of New York v. Margiotta*, 99 Misc. 2d 423, 416 N.Y.S.2d 493, 26 U.C.C. Rep. 1032 (1979) (secured interest holder in an automobile has no action against third party for damage to the automobile since a cause of action cannot be said to be "proceeds" of the collateral); *In Re J & J Auto Sales, Inc.*, 9 U.C.C. Rep. 909 (E.D. Tenn. Ref. 1971) (a percentage of the wholesale cost of new automobiles sold at retail which an automobile manufacturer had agreed to pay under its dealership agreement did not constitute proceeds of dealer's inventory). For a discussion of insurance benefits, see note 48 *infra*. Nevertheless, the decisions of other courts show a willingness to extend the reach of the term "proceeds." See, e.g., *In Re Munger*, 495 F.2d 511, 14 U.C.C. Rep. 790 (9th Cir. 1974) (secured interest holder in crops and proceeds is secured into the subsidy payments made by the federal government in connection with the crops as "proceeds"); *Matthews v. Artic Tire, Inc.*, 106 R.I. 691, 262 A.2d 831, 7 U.C.C. Rep. 369 (1970) (the drafters have used "broad and encompassing language" in describing proceeds). See also note 50 *infra*.

48. The rationale for this exception, that although Section 9-306(1) does confer a right in insurance proceeds "flowing to the debtor vis-a-vis the collateral," it also confers a statutory right upon third persons who are not parties to the security agreement and to whom such benefits are made payable, was explained by the court in *McGraw-Edison Credit Corp. v. All State Insurance Co.*, 406 N.Y.S.2d 337, 340, 24 U.C.C. Rep. 767, 772 (1978):

[D]irect recovery from the buyer's insurer would impose upon the insurer the onerous burden of searching the record for the existence of liens on personalty even though the insurer has no privity of contract with the secured creditor and is probably unaware of the latter's existence. More importantly, as between the secured creditor and the buyer's insurer, the former is usually in the better position to police the enforcement of its agreement with the debtor with respect to insurance coverage on the collateral.

corresponding change was made in Revised Code Section 9-104, which under the Prior Code had provided an exemption from the application of Article 9 of "an interest in or claim in or under any policy or insurance."⁴⁹ Although this specific automatic inclusion of insurance benefits into the definition of proceeds is a welcome addition in clarifying an area of major dispute,⁵⁰ as a matter of practicality, it is still prudent for the practitioner representing the secured creditor to insist also that his client be specifically named as the loss payee under the applicable insurance policy.

Under the Prior Code an "apparent inconsistency and ambiguity"⁵¹ existed between the provisions of Section 9-203(1)(b), which implied that a claim for proceeds had to be specifically stated in the security agreement, and Section 9-306(2), which appeared to state an absolute right to proceeds. Section 9-203(3) of the Revised Code deals sensibly with this problem by providing an automatic right to proceeds unless "otherwise agreed" in the security agreement. Moreover, Revised Code Section 9-306(3) eliminates the need "to check the proceeds box"⁵² by its treatment of a filed claim to the original collateral as automatically constituting a filing as to the proceeds of that collateral.

49. MD. COM. LAW CODE ANN. § 9-104(g) (1975).

50. The courts have differed as to the inclusion of insurance benefits into the definition of proceeds. *See, e.g.*, the following cases holding that insurance proceeds are *not* proceeds: *In Re Waltman*, 18 U.C.C. Rep. 576 (D. Ala., Bankr. J. 1975); *In Re Levine*, 6 U.C.C. Rep. 238 (D. Conn. Ref. 1969); *White v. Household Finance Corp.*, 302 S.E.2d 828, 13 U.C.C. Rep. 858 (Ind. App. 1973); *Quigley v. Caron*, 247 A.2d 94, 5 U.C.C. Rep. 943 (Me. 1968); *In Re Parks*, 19 U.C.C. Rep. 334 (E.D. Tenn., Bankr. J. 1976). *But see* the following cases holding that insurance proceeds under the 1962 OFFICIAL TEXT are proceeds: *Paskow v. Calvert Fire Ins. Co.*, 579 F.2d 949, 24 U.C.C. Rep. 1009 (5th Cir. 1978); *PPG Industries, Inc. v. Hartford Fire Ins. Co.*, 531 F.2d 58, 18 U.C.C. Rep. 569 (2nd Cir. 1976); *In Re Hunter*, 9 U.C.C. Rep. 928 (D. Ohio, Ref. 1971); *Ettinger v. Central Penn. Nat. Bank*, 27 U.C.C. Rep. 1192 (E.D. Pa. 1979).

51. REASONS FOR CHANGE, *supra* note 3, at § 9-306.

52. Preprinted finance statement forms routinely have a box that can be "checked" to indicate that proceeds are secured. Professor Thomas M. Quinn has opined that many of the proceeds problems arose under the 1962 version of Article 9 because it was "too simple" to check the proceeds box. As Professor Quinn states:

The box was routinely checked and the proceeds clause now operated like a vacuum cleaner, literally sucking into its maw everything that came through the debtor's door, thereby creating massive priority disputes between inventory financiers, receivable financiers, and chattel paper financiers, to name but a few. Nor was that all, for checking that nasty proceeds box, it seemed, had the miraculous effect of perfecting (by filing) assets that could not be perfected by filing, e.g. "instruments." No less wondrous was the box's apparent ability to allow for perfecting by filing in one location (as proceeds) notwithstanding the fact that the Code mandated filing somewhere else as to that type of collateral (as original collateral) — a nightmare, to put it mildly.

T. M. QUINN, UNIFORM COMMERCIAL CODE AND LAW DIGEST ¶ 9-306[A]||3| (1978).

A major limitation exists under Revised Section 9-306(3) to this general rule that there is no longer a need to indicate a reference to proceeds on the financing statements. This limitation, of extreme danger to the secured lender, provides that a perfected security interest will become unperfected ten days after receipt of the proceeds by the debtor, absent reperfecting, where the filing of the security interest in the original collateral of the transaction is not sufficient, either because of inappropriate location or improper means of perfection, to perfect a security interest in the type of collateral of which the proceeds now consist.⁵³ For example, where the security interest was perfected in the original collateral by filing, but that collateral has been replaced by a note, with respect to which a security interest can be perfected only by possession,⁵⁴ the secured lender would become unperfected with respect to the note ten days after the debtor received the note. Similarly, a problem might arise in the situation where the proceeds were accounts receivable relating to mineral rights (recall that filing must be in the jurisdiction of the minehead or wellhead),⁵⁵ or where inventory is sold and generates an account to a debtor with a chief place of business in another jurisdiction (where, as discussed above, filing should be made).⁵⁶

It should be noted that under Revised Code Section 9-306(3)(b) the perfected security interest remains perfected in identifiable cash proceeds. Nevertheless, a problem arises under Revised Code Section 9-306(3)(a) if the cash proceeds are then used to acquire collateral that is not the type of collateral originally indicated on the financing statement. In such a situation, the perfected security interest lapses, absent reperfecting, after ten days. For example, where a creditor is secured as to a debtor's inventory, the debtor sells some inventory for cash, and then uses the cash to purchase goods, equipment, or some other type of non-inventory collateral, and the secured creditor does not reperfect his security interest within the ten day grace period, he will lose his perfected security interest in the collateral purchased with the cash. Practitioners representing lenders involved in inventory financing

53. The practical effect of this rule is as stated by Funk, *supra* note 3, at 1480: [S]omeone dealing with a prospective debtor who finds a financing statement on file should realize that the filing creditor has a permanently perfected security interest in all the property of the type described in the financing statement and all goods directly exchanged for such property, such as trade-ins; but that the creditor will have only a temporarily perfected interest in other types of property acquired by the debtor with cash or bank deposits.

54. MD. COM. LAW CODE ANN. § 9-304(1) (Cum. Supp. 1980).

55. MD. COM. LAW CODE ANN. § 9-401(1)(b) (Cum. Supp. 1980).

56. See notes 38 to 43 and accompanying text *supra*.

might well consider as an alternative to this type of exposure, routinely providing a very broad generic list of multiple types of collateral on the financing statement. In any event, it is clear that the new proceeds requirements of Section 9-306 militate that secured lenders must closely police their collateral and carefully monitor their continued perfection in proceeds.

Revised Code Section 9-306(4) states the rules governing a secured creditor's claim to proceeds in the event of "insolvency proceedings, initiated by or against a debtor." This provision states that the perfected secured party has a perfected security interest in: identifiable non-cash proceeds and separate deposit accounts containing only proceeds; identifiable cash proceeds in the form of money that is neither commingled with other money nor deposited in a deposit account prior to insolvency proceedings; and identifiable cash proceeds in the form of checks and the like that are not deposited in a deposit account prior to insolvency proceedings.⁵⁷ The secured creditor, then, does prevail over the trustee in bankruptcy as to those *identifiable* proceeds described above. The secured creditor also has a limited perfected security interest in proceeds that have been commingled with other funds.⁵⁸ The effect of this revision is to make clear that the claim to cash allowed in insolvency is exclusive of any other claim based on tracing.⁵⁹ But enforcement of Section 9-306(4)(d) has not been without problems. Courts have not agreed upon the meaning of the language itself, and trustees in bankruptcy continue to challenge the secured creditor's claim under this provision on a variety of grounds.⁶⁰ Be aware that at this point in the development of the law under this provision, there are serious questions as to what is the actual time period to use when determining the amount of the commingled proceeds to which the perfected secured creditor is due, and as to what actually constitutes the cash proceeds that are to be used as the measuring stick to determine the amount due the secured creditor.

Finally, Section 9-308 was modified to provide that the holder of a negotiable instrument who might not qualify as a holder in due course will still qualify for priority over a security interest holder in the instrument that is perfected under either Section 9-304 (permissive filing and temporary perfection) or under Section 9-306, if either the holder acted without knowledge of the security interest or the security

57. MD. COM. LAW CODE ANN. § 9-306(4)(a), (b), and (c) (Cum. Supp. 1980).

58. MD. COM. LAW CODE ANN. § 9-306(4)(d) (Cum. Supp. 1980).

59. REASONS FOR CHANGE, *supra* note 3, at § 9-306.

60. See generally J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 1013-17 (1980).

interest is claimed merely as proceeds of inventory. The purpose of this change is to bring negotiable instrument holders into parity with the status enjoyed by chattel paper holders under both the Prior and Revised Codes.⁶¹

III. PRIORITIES

The Revised Code makes several significant changes in the priority rules of Article 9. An understanding of those changes is of utmost importance to the practitioner both in terms of correctly obtaining priority status for secured creditors, and in properly interpreting the status and rights of secured claims *vis a vis* other claimants.

"Lien creditors"⁶² who gain such a status before a security interest is perfected now enjoy the same rights as perfected security interest holders; Revised Code Section 9-301(1)(b) subordinates the unperfected security interest but does not subordinate the secured debt to this lien.⁶³ Section 9-301(1)(b) of the Revised Code eliminates the provision that a lien creditor could obtain priority over an unperfected security interest only if the lien creditor lacked knowledge of the unperfected security interest. The rationale for this change is that a lien creditor under the Prior Code could become subordinated to an unperfected security interest even though he had no knowledge when he extended credit but "acquired knowledge while attempting to extricate himself."⁶⁴ The drafters reasoned that such a result was "completely inconsistent in spirit with the rules of priority between security interests, where

61. REASONS FOR CHANGE, *supra* note 3, at § 9-308.

62. Defined at MD. COM. LAW CODE ANN. § 9-301(3) (Cum. Supp. 1980). There has been considerable litigation involving the classification of parties within the narrow definition of "lien creditor." See, e.g., *Massachusetts Mutual Life Ins. Co. v. Central Penn Nat. Bank*, 372 F. Supp. 1027, 14 U.C.C. Rep. 212 (E.D. Pa. 1974) (holder of temporary restraining order found to be "lien creditor"); *Copeland v. Stewart*, 124 Cal. Rptr. 860, 18 U.C.C. Rep. 200 (1975) (judgment holders against payee on a note did not become "lien creditors" by levying upon the makers of the note, and could only obtain that status by levying upon the note); *Madison National Bank v. Newarth*, 261 Md. 321, 275 A.2d 495, 8 U.C.C. Rep. 1153 (1971) (holder of assignment in trust of a partnership interest in a partnership as security for the indebtedness of assignor and corporation controlled by assignor was not a "lien creditor" but a "secured party"); *Estate of Hill*, 27 Or. App. 893, 557 P.2d 1367, 20 U.C.C. Rep. 1319 (1976) (personal representative of an estate is not a "lien creditor" of the decedent, and cannot defeat claim of creditor holding an unperfected security interest in net proceeds of a lawsuit); *Meadows v. Bierchwale*, 516 S.W.2d 125, 16 U.C.C. Rep. 515 (Tex. 1975) (holder of "equitable right to a constructive trust" held to be a "lien creditor").

63. Be aware that the ten-day grace period for filing provided for secured parties under Prior Code Sections 9-301(2) and 9-301(2A) is retained in the Revised Code.

64. REASONS FOR CHANGE, *supra* note 3, at § 9-301.

knowledge plays a very minor role.”⁶⁵ Moreover, the questions of what information constituted “knowledge” and when “knowledge” could be said to have existed frequently raised troublesome factual problems for both the parties and the courts.⁶⁶

Maryland did *not* adopt Section 9–301(4) of the 1972 Official Text, which would have given priority to future advances made under a perfected security interest for forty-five days after the lien creditor came into existence and thereafter if, when the secured creditor made such advances or made commitments for such advances, he lacked knowledge of the judgment lien.⁶⁷ This provision would have been burdensome to some secured lenders, since it would have had the direct effect of requiring a lender contemplating making an advance on an already perfected security interest to undertake judgment and lien checks prior

65. *Id.*

66. The courts have generally held that the burden of proof is *not* on the lien creditor to prove his lack of knowledge, but rather upon the unperfected security interest holder to establish the requisite knowledge of the lien creditor. *See, e.g.*, *Massachusetts Mutual Life Insurance Co. v. Central Penn. Nat. Bank*, 372 F. Supp. 1027, 14 U.C.C. Rep. 212 (E.D. Pa. 1974); *In Re Komfro Products Corp.*, 247 F. Supp. 229, 2 U.C.C. Rep. 1107 (E.D. Pa. 1965); *Levine v. Pascal*, 94 Ill. App. 2d 43, 236 N.E.2d 425, 5 U.C.C. Rep. 344 (1968); *ITT Industrial Credit Co. v. Robinson*, 350 So. 2d 48, 22 U.C.C. Rep. 841 (Miss. 1977); *Kulik v. Albers, Inc.*, 91 Nev. 134, 532 P.2d 603, 16 U.C.C. Rep. 859 (1975). However, the courts have differed in determining what degree of “actual” as opposed to “constructive” knowledge is required. Some courts have held that knowledge may not be imputed to the lien creditor but indeed must be actual. *See, e.g.*, *In Re Dennis Mitchell Industries, Inc.*, 419 F.2d 349, 6 U.C.C. Rep. 573 (3rd Cir. 1969) (“knowledge” as used in the U.C.C. means “actual knowledge”); *Fas-Pac, Inc. v. Fillingame*, 123 Ga. App. 203, 180 S.E.2d 243, 8 U.C.C. Rep. 914 (1971) (knowledge of existence of note not sufficient to establish knowledge of security interest in collateral listed on note); *Whitmire v. Keylon*, 12 U.C.C. Rep. 1203 (Tenn. App. 1973) (knowledge of the existence of a debt is alone not knowledge of a secured debt); *Clark Oil & Refining Co. v. Liddicoat*, 65 Wis. 2d 612, 223 N.W.2d 530, 15 U.C.C. Rep. 1145 (1974) (“knowledge” as used in Section 9–301(1)(b) means “actual knowledge,” and it is irrelevant whether judgment creditor had reason to know circumstances that should have reasonably prompted it to check beyond the filed record). Other decisions indicate a willingness to apply a reasonableness standard in determining when a prudent lien creditor possesses or should possess the requisite degree of knowledge. *See, e.g.*, *Stanley v. Fabricators, Inc.*, 459 P.2d 467, 6 U.C.C. Rep. 1262 (Alaska 1969) (failure of creditor to actually know of security interest does not prevent the creditor from having imputed knowledge of the existence of the security interest); *Ford Motor Credit Co. v. Patchogue Truck & Equipment Co.*, 5 U.C.C. Rep. 1272 (N.Y. Sup. Ct. 1969) (there was sufficient information on debtor’s credit application from which creditor by diligent inquiry could have obtained knowledge of security interest such that creditor could be said to have had “knowledge” of the security interest).

67. This provision was primarily intended by the drafters to deal with the priority of optional future advances over intervening Federal tax liens. As stated in the REASONS FOR CHANGE, *supra* note 3, at § 9–301, the forty-five day rule was believed “essential to give the secured party the protection against Federal tax liens believed to have been intended by the Federal Tax Lien Act of 1966, the operation of which is made to depend on state law.”

to each advance. As a practical matter, prudent lenders in significant transactions frequently update lien and judgment searches as a matter of course prior to making future advances, but Section 9-301(4) would have mandated that this procedure be followed in order to ensure protection in all instances.

Revised Code Section 9-312(7) provides a welcome resolution to a previously troublesome question: to what extent do future advances have priority over competing security interests? Simply stated, future advances will relate back automatically to the priority status of the first advance,⁶⁸ and future advances made during a time period of temporary perfection under Section 9-304 will have priority from the date of the advance, unless the advance is made pursuant to a commitment.⁶⁹

Revised Code Section 9-312(5) significantly changes the rule for determining priorities between two competing security interest holders. The rule under Prior Code Section 9-312(5) was that priority would be granted to the first creditor *to file* if both creditors perfected by filing, and that the first creditor *to perfect* would prevail if one creditor had perfected by filing and one by possession.⁷⁰ The new rule of Section 9-312(5) is that the priority of competing security interests will be determined by the first security interest to file *or* perfect.⁷¹

Example: Creditor 1 files, but does not advance. Creditor 2 thereafter files and advances. Creditor 1 then advances. Under both the Prior Code and the Revised Code, Creditor 1 wins. But, if Creditor 2 had perfected by possession instead of by filing, Creditor 2 would win under the Prior Code but would lose under the Revised Code.

68. For an example of the application of Revised Code Section 9-312(7), see *Provident Finance Co. v. Beneficial Finance Co.*, 36 N.C. App. 401, 245 S.E.2d 510, 24 U.C.C. Rep. 1332 (1978).

69. The rationale of Revised Section 9-312(7) can be best explained as follows: The theory here is that the intervening party is protected so long as he has notice of the possible existence of a competing security interest in the collateral with which he is concerned; thus, in a commercial world in which a creditor and debtor may typically engage in a series of financial transactions involving the same collateral, the initial creditor should not have to be concerned with repeated perfections of his continuing security interest.

Coogan, *supra* note 1, at 511.

70. See, e.g., *Household Finance Corp. v. Bank Comm'r of Maryland*, 248 Md. 233, 235 A.2d 732 (1967) (a discussion of the operation of the former rule with illustrative examples).

71. As explained in REASONS FOR CHANGE, *supra* note 3, at § 9-312 n.4, the questions of priority "have been the subject of an enormous legal literature." To settle these questions, a unified rule of ranking priority in time was adopted in Section 9-312(5).

As a practical matter, the procedures to be followed by secured creditors and their counsel under the new priority rule will be the same. Obviously, a search is necessary to verify the lack of any prior conflicting financing statements, and creditors still must verify in advance that only the debtor has possession of the subject collateral. Additionally, advance filing of financing statements is still to be recommended where debtor cooperation can be obtained.⁷²

Revised Code Section 9-312(4) affirmatively resolves that the priority of purchase money security interests in non-inventory collateral extends not only to identifiable cash proceeds of that collateral but also to *all* proceeds of that collateral.⁷³

Example: Creditor 1 has a security interest in all equipment of Debtor. Subsequently, Debtor buys new equipment from Creditor 2 who takes back a purchase money security interest in the new equipment and properly perfects. Debtor later sells the equipment and receives partial payment in cash with the remainder to be paid on credit, which creates an "account." Creditor 2 prevails over Creditor 1 with respect to priority in both the cash and the account.

Changes were made in Section 9-312(3) in order "to answer unresolved questions under the 1962 Code."⁷⁴ The new provision recognizes "as sound" the preference of purchase money interests by protecting the priority of purchase money creditors in inventory and in identifiable cash proceeds received before delivery of the inventory to a buyer over nonpurchase money interests, provided that certain notice requirements are met.⁷⁵ Specifically, the purchase money creditor must give written notice⁷⁶ to conflicting security interest holders of record

72. The mere filing of a financing statement clearly does not create any liabilities against the borrower or alone establish a security interest. *Land V. Company v. Asch*, 267 Md. 251, 297 A.2d 285 (1972); *Plemens v. Didde-Glaser, Inc.*, 244 Md. 556, 224 A.2d 464 (1966).

73. The rationale for this change was explained by the drafters as follows:

Here, where it is not ordinarily expected that the collateral will be sold and that proceeds will result, it seems appropriate to give the party having a purchase money security interest in the original collateral an equivalent priority in its proceeds. The 1962 Code was unclear on this point.

REASONS FOR CHANGE, *supra* note 3, at § 9-312 n.3.

74. REASONS FOR CHANGE, *supra* note 3, at § 9-312 n.2.

75. *Id.*

76. The effect of the failure of a purchase money creditor to comply with these requirements will be the clear forfeiture of whatever priority that creditor could have obtained under Section 9-312(3). *See, e.g., Kimbell Foods, Inc. v. Republic National Bank of Dallas*, 557 F.2d 491, 23 U.C.C. Rep. 177 (5th Cir. 1977), *aff'd*, 440 U.S. 715, 26 U.C.C. Rep. 1 (1979); *Borg-Warner Acceptance Corp. v. First National Bank of Pipestone*, 307 Minn. 20, 238 N.W.2d 612, 18 U.C.C. Rep. 526 (1976).

within five years before the debtor receives possession of the inventory, which notice must state that the person giving notice has, or expects to acquire, a purchase money security interest in the inventory of the debtor. The notice must also describe the subject inventory by "item or type."

As a practical matter, the bulk of the creditors that will be receiving these notices will be creditors secured under after-acquired property clauses. Such creditors are likely to find the notice requirements of Revised Code Section 9-312(3) to be of aid in monitoring and policing the financial borrowing of their debtors, particularly where the receipt of the notices actually serves to provide warnings of borrowing that is in violation of the covenants of existing loan documentation between the debtor and the creditor.

Revised Section 9-312(6) bridges the gap between the new proceeds rules in Section 9-306 and the changed rules of priority contained in Section 9-312(5) by providing that for priority purposes the date of filing or perfection for collateral will also be the date of filing or perfection for proceeds of the collateral. The drafters have called this the "most debated subject under Article 9."⁷⁷ The debate on this point becomes particularly fierce over the natural competition between inventory financiers and accounts financiers for priority in accounts generated from the sale of inventory. Revised Code Section 9-312 resolves this issue by essentially promulgating a "first-to-file" rule. Revised Section 9-312(5) establishes that if an accounts financier files first, he will defeat a subsequent inventory financier. This rule even applies in the purchase money situation, since the Section 9-312(3) purchase money rights in proceeds are limited to "identifiable cash proceeds,"⁷⁸ and "accounts" of this type do not meet that definition. Conversely, by operation of Revised Code Section 9-312(6), an inventory financier that files ahead of an accounts financier will clearly have priority over accounts generated from the sale of the inventory. Accordingly, the time of filing is crucial in accounts receivable and inventory financing, and must be monitored closely in order to ensure priority.

77. REASONS FOR CHANGE, *supra* note 3, at § 9-312 n.4. See Henson, *Counter-Suggestions Regarding Article 9: A Reply to Professor Kripke*, 42 N.Y.U. L. Rev. 74 (1967); Henson, *Priorities Under the Uniform Commercial Code*, 41 NOTRE DAME LAWYER 425 (1966); Kripke, *Suggestions For Clarifying Article 9*, 41 N.Y.U. L. Rev. 687 (1966).

78. The term "cash proceeds" is defined at MD. COM. LAW CODE ANN. § 9-306(1) (Cum. Supp. 1980).

IV. FILING REQUIREMENT CHANGES

Although the changes in filing requirements made by the Revised Code are undoubtedly less esoteric than some of the other changes to the Code, they should be of tremendous importance to the practitioner who wants to perfect security interests by filing. Most of these changes are pragmatic in nature and clearly were intended to simplify the procedures of filing and to eliminate areas of uncertainty and dispute that existed under the 1962 Official Text.

The Revised Code makes a number of changes in the formal requisites of financing statements and their amendments. Revised Code Section 9-402(1) changes the signature requirements for filing by providing that only the debtor need sign the financing statement. This change from the previous requirement that *both* the secured party and debtor had to sign the financing statement was meant to eliminate misunderstandings arising with secured parties who were accustomed to pre-U.C.C. practices and to real estate practices under which only the debtor signed chattel mortgages and real estate mortgages.⁷⁹ This modification permits security agreements, which only have to be signed by the debtor,⁸⁰ to be recorded as financing statements, provided that the security agreement contains the information otherwise required by Revised Code Section 9-402(1) for financing statements.⁸¹

Section 9-402(2) has been revised and new situations have been added in which it is sufficient for only the secured party to sign the financing statement. All of these situations involve previously existing security interests where common sense and expediency dictate that there is no need to once again obtain the debtor's signature. The first addition involves changes in location by the debtor to Maryland when the collateral was already subject to the secured party's security interest in another jurisdiction. It should be noted that the financing statement must recite "that the debtor's location was changed to this State under such circumstances."⁸² Secondly, only the secured party need sign where the original filing has lapsed. Note that perfection nevertheless will

79. REASONS FOR CHANGE, *supra* note 3, at § 9-402.

80. See MD. COM. LAW CODE ANN. § 9-203 (Cum. Supp. 1980).

81. This is not a significant change from the Prior Code since it was permissible under the Prior Code Section 9-402(1) to file security agreements as financing statements, if all the requirements of a financing statement were met, which, of course, included the signatures of both the debtor and the secured party. *Plemens v. Didde-Glaser, Inc.*, 244 Md. 556, 224 A.2d 464, 3 U.C.C. Rep. 1017 (1966). Note that conditional sales contracts offered for re-recording on or after the effective date of the UNIFORM COMMERCIAL CODE have been treated as satisfactorily serving as financing statements if they otherwise met the requirements of a financing statement. 49 Op. Md. Atty. Gen. 106 (1964).

82. MD. COM. LAW CODE ANN. § 9-402(2)(a) (Cum. Supp. 1980).

have been terminated retroactively, and the secured party will be perfected only from the date that the new financing statement is filed. The last of the new situations where only the secured party need sign the financing statement involves the collateral acquired after a change of name, identity, or corporate structure of the debtor.

A much needed clarification in the area of correctly expressing the debtor's name has been added by Revised Code Section 9-402(7). Considerable litigation was engendered by the lack of specificity in the Prior Code as to exactly what names should be used on financing statements in situations involving partnerships and sole proprietorships operating under trade names.⁸³ Revised Code Section 9-402(7) explicitly provides that financing statements sufficiently state the debtor's name if they provide the individual, partnership, or corporate name of the debtor, regardless of whether trade names⁸⁴ or names of partners are stated. As a practical matter, prudent creditors should still file not only under the individual, partnership, or corporate name, but also under trade names and partners' names, where they are not too numerous to be impractical, since the additional recordation costs are insignificant, and the secured party will generally want to make it as easy as possible for potential conflicting security interest holders and other creditors or purchasers to ascertain the existence of the filing.⁸⁵

Section 9-402(7) of the Revised Code also provides that where a debtor changes its name, identity, or corporate structure such that a then currently filed financing statement becomes "seriously misleading," the existing filing will not be effective to perfect a security interest

83. The courts have tended to adopt one of two opposite approaches to this question. Many decisions reflect a very strict approach to the application of the requirements of Section 9-402 and have vigorously invalidated financing statements filed solely under trade names, finding that such filings do not accurately reflect the legally correct name of the debtor. *See, e.g., In Re James Wells Enterprises, Inc.*, 21 U.C.C. Rep. 900 (D. Fla., Bankr. J. 1977) (financing statement that identified debtor only by trade name was insufficient to perfect security interest even though it was signed in the correct legal name of debtor). Other courts however, have taken a broader and more practical approach to this question and have determined the issue by analyzing whether a searcher of the records could effectively locate the transaction, even if the filing was under a trade name, and not the legally correct name of the debtor. *See, e.g., In Re Platt*, 3 U.C.C. Rep. 275 (E.D. Pa. 1966), *vacated on other grounds*, 257 F. Supp. 478, 3 U.C.C. Rep. 719 (E.D. Pa. 1966) (filing in trade name of "Platt Fur Company" instead of name and individual debtor "Henry Platt" was effective filing).

84. The 1972 OFFICIAL COMMENTS, *supra* note 3, at § 9-407 comment 7, state that the rationale for the lack of reliance upon trade names the 1972 OFFICIAL TEXT is, "[t]rade names are deemed to be too uncertain and too likely not to be known to the secured party or person searching the record, to form the basis for a filing system."

85. Pursuant to the provisions of MD. COM. LAW CODE ANN. § 9-403(5) (Cum. Supp. 1980), the fees for recordation are as stated in MD. CTS. & JUD. PROC. CODE ANN. § 7-202 (1980).

in collateral subsequently acquired by the debtor unless a new financing statement reflecting the change is filed within the four month period following the change.⁸⁶ The "seriously misleading" test has, as one would imagine, stimulated a considerable amount of litigation in determining the application of this term, and generally the courts have taken a common sense approach.⁸⁷ However, Revised Code Section 9-402(7) does provide that a filed financing statement remains effective with respect to collateral transferred by the debtor even though the secured party knows of or consents to the transfer.⁸⁸ Nevertheless, despite this broad protective language, it is suggested that practitioners refile under the transferee's name. Moreover, this provision illustrates

86. The operation of this section and the burdens placed upon the secured creditor were particularly well delineated by the court in the case of *In re Taylorville Eisner Agency, Inc.*, 445 F. Supp. 665, 668, 24 U.C.C. Rep. 241, 244-45 (1977):

The secured party must determine whether the filed financing statement has become seriously misleading. If so, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change unless a new appropriate financing statement is filed before the expiration of that time. There is no knowledge requirement included in the sentence. That means that from the time a change occurs which makes the financing statement misleading there must be a refiling within four months. The burden of realizing a change has occurred, checking the effect the change has on the financing statement, and filing a new financing statement within four months if necessary, is upon the secured party.

87. The "seriously misleading" test is not new and appears under both the Prior Code (Section 9-402(5)) and the Revised Code (Section 9-402(8)) in connection with curative provisions. These sections provide that financial statements substantially complying with the requirements of Section 9-402 are sufficient to constitute valid filings even if such financing statements contain "minor errors which are not seriously misleading." The use of the term "seriously misleading" under Revised Section 9-402(7) with respect to name and organizational changes is a natural extension of the term's use. The courts have generally interpreted the test to require as basic whether a searcher of the financing statement records can still readily retrieve the financing statement after the change. *See, e.g., In re Kittyhawk Television Corp.*, 516 F.2d 24, 16 U.C.C. Rep. 1401 (6th Cir. 1975) (debtor's name change from "Kittyhawk Broadcasting Corporation" to "Kittyhawk Television Corporation" held sufficiently similar that a searcher could reasonably be expected to be put on notice or at least be required to make further inquiry); *Borg-Warner Acceptance Corp. v. Wolfe City National Bank*, 544 S.W.2d 947, 21 U.C.C. Rep. 631 (Tex. Civ. App. 1976) (change from "Nations' David Brown Tractor Company" to "Nations' Tractor Company" not seriously misleading).

88. For an example of the operation of this provision, see *In re Ocean Electronics Corp.*, 451 F. Supp. 511, 24 U.C.C. Rep. 749 (S.D. Cal. 1978). *But see In re Conger Printing Co., Inc.*, 18 U.C.C. Rep. 224 (D. Or., Bankr. J. 1975) (Section 9-402(7) does not automatically eliminate the need to reperfect where both a name change and an authorized transfer of collateral from the debtor to an "in house" corporation formed by debtor result in filing to become inaccurate; if inaccuracy results from agreed authorization, which precedes the filing of the financing statement, the good-faith obligations of Section 1-203 require the secured party to file or refile to avoid misleading other creditors of debtor).

the wisdom of obtaining representations from debtors as to all names used within the last twelve years and the need for checking the financing statement records with respect to those names.

A troublesome area for secured lenders now exists under the new requirements of Section 9-402(7). A substantial burden is placed upon lenders with floating liens on after-acquired property to continually monitor their debtors and detect any changes that render financing statements already on file "seriously misleading." The failure to detect such changes and to refile within the four month time period has the direct and automatic effect of invalidating the security interest of the secured party for property acquired after that date. The following examples illustrate this problem:

Example: Creditor 1 makes a loan to Debtor, secured into existing and after-acquired inventory. Debtor then changes its name in a "seriously misleading" manner. Five months later Debtor borrows from Creditor 2, who secures into the Debtor's inventory. Unless Creditor 1 has filed a new financing statement, his interest will be unperfected as to all inventory acquired four months after the Debtor's name change, and Creditor 1 will lose to Creditor 2, if Creditor 2 has priority either through filing or perfection.

Example: X Corp. borrows from Creditor 1 and gives a security interest in all existing and after-acquired equipment. X Corp. merges with Y Corp. and the successor is Y Corp. (whose name is a "seriously misleading" change). Y Corp. borrows from Creditor 2, and gives a security interest in the same equipment. Creditor 1 is perfected as to existing equipment and to the equipment acquired up to four months after the merger. It will *not* be perfected with respect to equipment acquired thereafter, unless a new financing statement is filed.

Obviously, lenders must vigorously police their debtors and must be sensitive to any changes in the names of their debtors. Prudent lenders will not guess as to what constitutes a "seriously misleading" change, and should interpret conservatively most changes in names as meeting that test, and thus should file a new, updated financing statement within the four month period. As a policy decision, this change in Article 9 is sensible and reasonable since subsequent lenders should have the opportunity either to be able to detect the existence of existing security interests or to be able to rely upon the absence of any filings indexed under the debtor's names.

Prior Code Section 9-403(2) provided that where a maturity date of less than twelve years was actually stated on the financing statement,

then the financing statement was effective only until sixty days after the maturity date. The Revised Code makes a minor change by deleting any reference to earlier maturity dates and by providing that every financing statement is effective for a period of twelve years.⁸⁹ As a practical matter, this change will have little effect on most practitioners since existing practice is such that financing statements rarely state a maturity date.

Under Revised Code Section 9-403(2), a continuation statement must be filed before the expiration of the twelve-year period if continuation of the security interest is desired. Resolving an issue of considerable dispute, Revised Code Section 9-403(2) further provides that if a lapse of the security interest does in fact occur, then the security interest is to be considered as unperfected *vis a vis* purchasers or lien creditors of the collateral who became such before the lapse.⁹⁰ Note, however, that Revised Code Section 9-403(6) has special rules for transmitting utilities⁹¹ and for situations involving the use of real estate mortgages (and deeds of trust)⁹² as filings for perfection into fixtures. If the debtor is a transmitting utility, the filing is effective until a termination statement is filed. Where a mortgage is serving as a financing statement for fixtures, it will be effective until the mortgage is released.

Revised Code Section 9-403(2) further clarifies the filing requirements with respect to debtors involved in insolvency proceedings by providing that if a security interest perfected by filing exists at the time insolvency proceedings are commenced, it remains perfected until the later of (i) the expiration of sixty days after the termination of the insolvency proceedings, or (ii) the date when the security interest would otherwise have lapsed.⁹³

89. The rationale for this change is that it facilitates renewals or extensions "without the danger of the financing statement ceasing to be effective." REASONS FOR CHANGE, *supra* note 3, at § 9-403.

90. See, e.g., *United States v. Squires*, 378 F. Supp. 798, 15 U.C.C. Rep. 718 (S.D. Iowa 1974).

91. Defined at MD. COM. LAW CODE ANN. § 9-105(1)(n) (Cum. Supp. 1980).

92. Defined at MD. COM. LAW CODE ANN. § 9-105(1)(j) (Cum. Supp. 1980) as: A consensual interest created by a real estate mortgage, a trust deed on real estate, or the like (emphasis added).

93. The basis for this change is explained succinctly by the drafters of the 1972 OFFICIAL TEXT as follows:

Subsection (2) also recognizes that financing statements might expire during an insolvency proceeding. While the prevailing line of decisions is to the effect that the situation is frozen at the moment of bankruptcy without an obligation to refile, there are contrary decisions, and this situation might prove an inadvertent trap to a secured party who failed to refile or file a continuation statement during a bankruptcy. The change continues the validity of the financing statement until the end of the

As a common sense accommodation to secured lenders, Revised Code Section 9-402(1) provides that photocopies of financing statements may be filed if the security agreement so provides or if the original has already been filed in Maryland. As a practical matter, practitioners should routinely include such a provision in security agreements. However, it is puzzling as to how the filing officers are to know, without reviewing the security agreement or ascertaining the existence of prior filing in Maryland, if the filing should be accepted.

Revised Section 9-404(1) adds a requirement that with respect to financing statements covering consumer goods filed on or after January 1, 1981, a secured party must file termination statements within one month or within ten days of written demand by the debtor after the obligation of the consumer has been satisfied and no security interest is further claimed.⁹⁴ With respect to commercial debtors, the rule remains the same as under the Prior Code, such that the secured party's duty to supply a termination statement is triggered only by demand therefor by the debtor.⁹⁵

Lessors and consignors often encounter disputes as to whether a particular transaction is a "true lease"⁹⁶ or "true consignment"⁹⁷ as

insolvency proceedings and for 60 days thereafter, or until the expiration of the five-year period, whichever is later. Ordinarily, if the secured party expects that the secured debt may continue in existence after the end of the insolvency proceedings, he should file a continuation statement on the normal schedule, to preserve the filing for the use at the end of the insolvency proceeding and to preclude any discontinuity of the filings.

REASONS FOR CHANGE, *supra* note 3, at § 9-403.

94. It should be noted that Revised Section 9-404(1) provides that if the secured creditor fails to file a termination statement as required, *e.g.*, within ten days after demand by the debtor, "he shall be liable to the debtor for one hundred dollars, and in addition for any loss caused to the debtor by such failure." Obviously, practitioners should educate their clients as to their obligations under this Section and help to develop procedures which efficiently dispatch termination statements on a timely basis. It should also be noted that the mere filing of the termination statement is sufficient compliance, and the consumer debtor need not be actually advised of the filing. *Ford Motor Credit Co. v. Gibson*, 24 U.C.C. Rep. 1038 (Ky. App. 1977).

95. The distinction between the consumer goods situation and commercial debtors and the imposition of a mandatory affirmative obligation upon secured parties in the consumer situation is made because many consumers will not realize the importance of clearing the situation as it appears on file. Therefore, an affirmative duty is put on the secured party in that case. 1972 OFFICIAL COMMENTS, *supra* note 3, at § 9-404 comment 1.

96. The leading case in Maryland on this subject is *Crest Investment Trust, Inc. v. Atlantic Mobile Corporation*, 252 Md. 286, 250 A.2d 246 (1969), where the Court of Appeals adopted the following considerations and factors in determining when a "lease in form is a lease in fact or a security instrument:"

1. The facts in each case control to show intention of the parties to create a security interest.

2. Reservation of title in a lease or option to purchase appurtenant to or included in the lease does not in and of itself make the lease a security agreement.

opposed to a financing arrangement structured in form to appear as a lease or a consignment. Frequently, this question involves a close factual determination, and it is devastating if the arrangement is found to be a financing arrangement instead of a consignment or lease, and the consignor or lessor has not properly filed.⁹⁸ Typically, prudent lessors and consignors in the past have routinely filed as a precautionary measure. Frequently, such financing statements have contained disclaimer language to the effect that the parties believe the transaction to be a "true lease" or "true consignment" and that the filing is being made only as a notice and precautionary measure. In order to eliminate this problem, and to avoid the question of whether such a precautionary filing can be construed as an admission that a true lease or true consignment is actually a sham financing arrangement,⁹⁹ Revised Code Section 9-408 expressly provides that a consignor or lessor of goods may

3. Lease agreement which permits the lessee to become the owner at the end of the term of the lease for a nominal or for no additional consideration is deemed intended as a security agreement as a matter of law.

4. The percentage that option purchase price bears to the list price, especially if it is less than 25%, is to be considered as showing the intent of the parties to make a lease as security.

5. Where the terms of the lease and option to purchase are such that the only sensible course for the lessee at the end of the lease term is to exercise the option and become the owner of the goods, the lease was intended to create a security interest.

6. The character of a transaction as a true lease is indicated by:

(a) Provision specifying purchase option price which is approximately the market value at the time of the exercise of the option.

(b) Rental charges indicating an intention to compensate lessor for loss of value over the term of the lease due to aging, wear and obsolescence.

(c) Rentals which are not excessive and option purchase price which is not too low.

(d) Facts showing that the lessee is acquiring no equity in leased article during the term of lease.

Id. at 289, 250 A.2d at 248.

97. For an excellent discussion of the law governing consignments, see Duesenberg, *Consignments Under the UCC: A Comment on Emerging Principles*, 26 BUS. LAW. 565 (1970). See also *Columbia International Corp. v. Kempler*, 46 Wis. 2d 550, 175 N.W.2d 465, 7 U.C.C. Rep. 650 (1970) (an example of an application of a functional analysis for the determination of when a consignment is a security device only).

98. See, e.g., *Clark Oil & Refining Co. v. Liddicoat*, 65 Wis. 2d 612, 223 N.W.2d 530, 15 U.C.C. Rep. 1145 (1974) (where gasoline was furnished to gasoline dealer on a "consignment" basis with no U.C.C. filings, the arrangement was found to be intended for security purposes with the result that an intervening judgment creditor who attached on the goods prevailed over the "consignor").

99. Most courts that have considered this question under the 1962 OFFICIAL TEXT have held that such a filing by itself will not be determinative of whether a lease is intended for security. See, e.g., *In re Lockwood*, 16 U.C.C. Rep. 195 (Ref. D. Conn. 1974); *In re Universal Medical Serv., Inc.*, 8 U.C.C. Rep. 614 (Ref. E.D. Pa. 1970). But see *In re Lakeshore Transit-Kenosha, Inc.*, 7 U.C.C. Rep. 607 (Ref. E.D. Wis. 1969).

file a financing statement using the terms "consignor," "consignee," "lessor," "lessee," or the like, and that such a filing "shall not of itself be a factor in determining whether or not the consignment or lease is intended as security." Accordingly, there now exists no good reason to avoid such filings, and due care and common sense dictate that lessors and consignors routinely make these filings using the appropriate designations.

V. CONSIGNMENTS

In order to resolve the questions of filing requirements arising from the inevitable conflicts between inventory lenders and consignment suppliers of goods, an entirely new Section 9-114 has been enacted in the Revised Code. This new Section gives priority to the person who delivers goods under "a consignment which is not a security interest" (*i.e.*, a "true" consignment) and who would be required to file under Section 2-326(3)(c) over the secured creditors of the consignee in the goods and in the identifiable cash proceeds thereof if various procedures are followed. These procedures closely parallel those imposed upon purchase money financing under Revised Section 9-312(3).¹⁰⁰ Simply stated, the consignor must file a financing statement¹⁰¹ before the consignee receives possession of the goods; the consignor must give notification in writing to the holders of any previously filed conflicting security interests, stating that the consignor expects to deliver goods on consignment to the consignee, which notification must describe the goods by item or type; and the holders of any conflicting security interests must receive the notification within five years before the consignee receives the goods. Although it is clear that Article 9 applies to consignments intended for security,¹⁰² it should be noted that the filing requirements of Revised Section 9-114 apply even to a true consignment if the person delivering the goods would be required to file by Section 2-326(3)(c).¹⁰³

100. See notes 74 to 76 and accompanying text *supra*.

101. See MD. COM. LAW CODE ANN. §§ 9-402 and 9-408 (Cum. Supp. 1980).

102. See MD. COM. LAW CODE ANN. §§ 9-102(2) and 1-201(37) (Cum. Supp. 1980).

103. The rationale for this requirement was stated by the drafters of the 1972 OFFICIAL TEXT as follows:

An uncertainty has existed under the 1962 Code whether the filing rule in Section 2-326(3) applicable to true consignments requires only filing under Part 4 of Article 9 or also requires notice to prior inventory secured parties of the debtor under Section 9-312(3). The new Section 9-114 accepts the latter view, and provides in substance that, in order to protect his ownership of the consigned goods, the consignor must give the same notice to an inventory secured party of the debtor that he would have to give if his transaction with the consignee was in the form of a security transaction instead of in the form of a consignment.

REASONS FOR CHANGE, *supra* note 3, at § 9-114.

With the changes made by the Revised Code, it is important that consignors file financing statements as insurance. The effect of failure to comply with Revised Section 9-114 is catastrophic to consignors, since Revised Section 9-114(2) expressly provides that where these requirements have not been met, a person who delivers goods to another on consignment is subordinate to a person who would have a perfected security interest in the goods if they were the property of the debtor.

VI. CHANGES RELATING TO AGRICULTURE

The Revised Code contains several minor but important changes to the law governing agricultural financing. The Revised Code eliminates the one-year limit on after-acquired crop financing contained in Prior Section 9-204(4)(a),¹⁰⁴ the automatic perfection provisions relating to farm equipment costing less than \$500 contained in Prior Section 9-302(1)(c),¹⁰⁵ and the provision of Prior Section 9-307(2) that farmers who purchased equipment in which automatic perfection had occurred took free of the security interest.

The problem of ascertaining the "residence" of a farm operation spread over several counties is resolved by the provisions in Revised Section 9-401(6) that the "residence" will be "its place of business if it has one or its chief executive office if it has more than one place of business." However, multiple filings still should be made where practical since the determination of the "chief executive office" involves a factual determination, and multiple filings would introduce more certainty into the transaction for the secured lender. Finally, Revised Section 9-301(1)(c) provides priority to a buyer of farm products in the

104. The former one-year limitation was an attempt by the drafters of the 1962 OFFICIAL TEXT to deal with the "seed loan" problem farmers face in buying seed and fertilizer for their crops. As Professor Hawkland has observed, the reasoning for this provision was that a farmer "could become a peon if he were able to encumber his crops for years to come." Hawkland, *The Proposed Amendment to Article 9 of the U.C.C. — Part 1: Financing the Farmer*, 76 COM. L.J. 416, 421 (1971). However, this provision did not work to accomplish that purpose since:

there was no corresponding limit on the scope of a financing statement covering crops, and under the Code's notice-filing rules the priority position of a security arrangement covering successive crops would be as effectively protected by the filing of a first financing statement whether the granting clause was in one security agreement with an after-acquired property clause or in a succession of security agreements.

REASONS FOR CHANGE, *supra* note 3, at § 9-204. See, e.g., *United States v. Minster Farmers Cooperative Exchange, Inc.*, 430 F. Supp. 566, 21 U.C.C. Rep. 1439 (N.D. Ohio, 1977); *United States v. Gleaners & Farmers Cooperative Elevator Co.*, 8 U.C.C. Rep. 13 (N.D. Ind. 1970).

105. The practical effect of Prior Section 9-302(1)(c) was actually detrimental to farmers since the fear of "hidden liens" was such that farmers' equipment became generally unacceptable as collateral. See REASONS FOR CHANGE, *supra* note 3, at § 9-302.

ordinary course of business *vis a vis* an unperfected security interest in such products, to the extent that the buyer gives value and receives delivery of the farm products without knowledge of the security interest and before it is perfected.

VII. DEFINITIONAL TERMINOLOGY CHANGES

The Revised Code contains some changes in basic terminology, as well as the addition of various definitions. One of the more significant changes in terminology is the elimination of the term "contract right" from Article 9. Section 9-106 of the Prior Code defined "contract right" to include any right to payment under a contract that has not yet been earned by performance and that is not evidenced by an instrument or chattel paper. A distinction was made between "contract rights" and "accounts," and once performance was completed, the collateral was no longer a "contract right" but became an "account."¹⁰⁶ This distinction has been eliminated completely by the Revised Code. The very existence of the term "contract rights" lead to confusion in proceeds situations where contract rights became an account by performance, since the Prior Code provided that there could be no right in an account until it came into existence. As a result, frequent mistakes were made in collateral descriptions in financing statements by the claiming of "accounts" or "general intangibles" when, before performance, the description should properly have been "contract rights."¹⁰⁷ The term is now more simply subsumed in Revised Section 9-106 with its expanded definition of "accounts."

An ambiguity that existed under the Prior Code has been eliminated by the express exclusion in Revised Section 9-106 of the term "money"¹⁰⁸ from the definition of "general intangibles." This change was made in order to preclude the argument that a security interest in money can be perfected by filing.¹⁰⁹ Section 9-104, delineating those transactions excluded from Title 9, also has been revised. The former

106. *In re C.E. Pantz & Son, Inc.*, 2 U.C.C. Rep. 1120 (E.D. Pa., Ref. 1967), *aff'd*, 2 U.C.C. Rep. 1131 (E.D. Pa. 1965); *E. Turgeon Construction Co., Inc. v. Elhatton Plumbing & Heating Co., Inc.*, 10 R.I. 303, 292 A.2d 230, 10 U.C.C. Rep. 1353 (1972).

107. *See, e.g., Cissell v. First National Bank of Cincinnati*, 27 U.C.C. Rep. 1385 (S.D. Ohio 1976) (advance tuition payments made by students in connection with proposed travel courses in Europe were contract rights and not accounts in that total service contracted for had not been rendered; accordingly, description of collateral in financing statement as "accounts receivable" was not sufficient to perfect a security interest in contract rights that had not yet ripened into accounts).

108. Defined at MD. COM. LAW CODE ANN. § 1-201(24) (Cum. Supp. 1980).

109. REASONS FOR CHANGE, *supra* note 3, at § 9-106.

exemption for railway financing on rolling stock has been removed, with the effect that railway financing is now within the scope of Article 9. Even so, the filing provisions of Article 9 still do not control with respect to such collateral, and instead secured parties should continue to file in compliance with the central filing provisions of the Interstate Commerce Act. Revised Section 9-104(e) expressly excludes transfers by government or governmental subdivisions or agencies from the coverage of Article 9. Revised Section 9-104(f) specifically excludes from Article 9 "a transfer of a single account to an assignee in whole or partial satisfaction of a preexisting indebtedness." This exclusion is sensible since such transactions clearly are not in reality commercial financing situations. Section 9-104(g) continues to exclude transfers of an interest in insurance policies from Article 9 coverage, but makes clear that Article 9 applies as provided in Section 9-306 with respect to insurance proceeds and in Section 9-312 with respect to priorities in such proceeds. Section 9-104(h) continues to provide that Article 9 does not apply to a right represented by a judgment, but the Revised Code adds that Article 9 does apply to a judgment taken on a right to payment which was collateral (*e.g.*, an account receivable). "Deposit account" is defined in Revised Section 9-105(1)(e) as meaning "a demand, time, savings, passbook or like account maintained with a bank, savings and loan association, credit union or like organization, other than an account evidenced by a certificate of deposit."

VIII. FIXTURES

Perhaps the most sweeping changes advocated for Article 9 under the proposed 1972 Official Text deal with the provisions concerning fixtures.¹¹⁰ In an attempt to grapple with various priority problems that

110. Section 9-313(1) as retained in the Revised Code provides "The law of this State other than Title 1 through 10 of this article determines whether and when other goods become fixtures." Although the case law defining what exactly constitutes a fixture is, at best, murky, the most frequently cited Maryland definition is enunciated in the leading case of *Dudley v. Hurst*, 67 Md. 44, 8 A. 901 (1887), as follows:

The term "fixture" is generally used in reference to some originally personal chattel which has been actually or constructively affixed either to the soil itself, or some structure legally a part of such soil. The tests by which a fixture is determined are generally these:

- (1) Annexation to the realty, either actual or constructive;
- (2) adaptation to the use of that part of the realty with which it is connected;
- (3) the intention of the party making the annexation to make the article a permanent accession to the freehold, this intention being inferred from the nature of the article annexed, the situation of the party making the annexation, the mode of annexation, and the purpose for which it was annexed.

Id. at 47, 8 A. at 902. As a matter of good practice, prudence and care dictate that secured

had arisen in this area, major changes were made to the 1962 Official Text.¹¹¹ Unfortunately, Maryland adopted only minor portions of the provision contained in the proposed 1972 amendments for fixtures, and disappointingly, did *not* adopt the major substantive proposals altering priority rules.

Maryland did, however, make some minor changes, largely of a technical nature, in fixtures financing. Section 9-402(5) of the Revised Code continues the requirement of Prior Section 9-402(6) that a financing statement relating to fixtures must state that it is to be recorded in the land records. Revised Section 9-402(5) further provides that the financing statement must show that it covers "this type of collateral" and must contain a "description of the real estate."¹¹² If the debtor does not have an interest of record in the real estate, for example, a lessee under an unrecorded lease, the financing statement must indicate the name of the record owner. In addition, Revised Section 9-402(9) requires that any financing statement tendered for filing in Baltimore City, or in any county that maintains a block system for the recordation of papers in the land records, must contain in the description of real estate the house number and street, if any, or the appropriate block reference. As a result of these requirements, the prudent lender perfecting into fixtures should perform an abbreviated title search to obtain accurate record ownership, particularly when the debtor is a lessee. Although it is clear that complete "legal descriptions" are not required by Section 9-402(5), prudence dictates that "legal

parties, when in doubt as to whether the collateral is a fixture, utilize both types of filing (fixture and non-fixture).

For an excellent general discussion of the Maryland law governing fixtures, see Stiller, *The Maryland Law of Fixtures*, 25 MD. L. REV. 21 (1965).

111. Professor Hawkland has stated that dissatisfaction with the handling of fixtures under the 1962 OFFICIAL TEXT was "a major reason" for the establishment of the Review Committee to study Article 9 and to make recommendations for improvement. Hawkland, *The Proposed Amendments to Article 9 of the UCC — Part 3: Fixtures*, 77 COM. L.J. 416 (1972).

112. The crucial test in determining whether the description is adequate is whether it is sufficient to permit location of the filing by a search of the land records. *See, e.g.*, *Corning Bank v. Bank of Rector*, 265 Ark. 68, 575 S.W.2d 949, 26 U.C.C. Rep. 1367 (1979) (court held that a name and address alone, when the address is a post-office box number, is too uncertain to be a proper description; instead, the court found that the description must refer "to something *tangible* by which the property can be located."). It should be noted that Maryland did not adopt optional suggested language, proposed in the 1972 OFFICIAL TEXT for Section 9-402(5), that the description of the real estate be "sufficient if it were contained in a mortgage of the real estate to give constructive notice of the mortgage under the law of the state." This optional language was designed by the drafters "to meet the objection as to real estate descriptions but without imposing on a fixture-secured party the duty of obtaining a 'legal description' unless the state's recording system requires it." REASONS FOR CHANGE, *supra* note 3, at § 9-402.

descriptions" be obtained and used in order to eliminate any possible confusion. This requirement does not impose any particular or unreasonable burden upon lenders, and is an excellent safeguard to ensure that the perfected security interest will be correctly revealed in the record owner's chain of title.

Revised Section 9-402(6) makes a common sense adjustment to the prior law in that it permits the use of a mortgage as a financing statement covering goods that are, or are to become, fixtures. However, any mortgage used as a financing statement must describe the particular goods by "item or type," be duly recorded in the appropriate land records, and comply with all of the requirements for a financing statement other than a recital that it is to be recorded in the land records. The practitioner should note this last requirement mandates that the mortgage or deed of trust must contain the address of the secured party.¹¹³ Revised Section 9-403(6) further provides that such a mortgage, when serving double duty as a financing statement, remains effective in perfecting the security interest until released or satisfied of record or otherwise terminated, thus relieving secured parties of the need under such circumstances to file continuation statements.

Any treatment of fixture financing under the Revised Code necessitates a brief discussion of the drastically altered priority analysis of proposed Section 9-313, which was rejected by the Maryland General Assembly and was *not* adopted. This rejected priority approach focuses specifically upon the potential competing interests that exist between interests secured into the real estate (particularly construction loans) and interests secured into the goods that are to become fixtures. The priority analysis retained in Maryland focuses on the time of attachment of the security interest in relation to the time of affixation of the goods to the realty — the so called pre-affixation and post-affixation analysis.¹¹⁴

Basically, a pre-affixation security interest is one that *attaches* to the goods *before* the goods are affixed to the real estate. Accordingly, under Section 9-313, pre-affixation security interests have priority over all existing interest in the real estate, even if the pre-affixation security interests are not perfected. Moreover, pre-affixation security interests have priority over subsequent real estate interests if they are perfected by filing or if the subsequent interest holders have knowledge of the pre-affixation security interests.

A post-affixation security interest is one that *attaches* to the goods *after* the goods are affixed to the real estate. The basic rule stated in

113. See MD. COM. LAW CODE ANN. § 9-402 (Cum. Supp. 1980).

114. See Stiller, *supra* note 110, for a discussion of this analysis.

Section 9-313(3) is that the existing interests in the real estate have priority over post-affixation security interests even if the post-affixation security interest is perfected, unless the holder of the interest in the real estate has consented in writing to the security interest or disclaims an interest in the goods as fixtures.¹¹⁵ An example of such a consent would be the common procedure followed by most practitioners of obtaining "Landlord's Waivers" which typically consent to and acknowledge the priority of security interests. However, subsequent interests in real estate do not have priority over a post-affixation security interest if the security interest is in fact perfected. Section 9-313(4) provides, however, that unless the security interest is perfected, the security interest is subordinate to subsequent purchasers for value, subsequent judgment lienors, and any prior mortgagee to the extent that the prior mortgagee makes subsequent advances (*e.g.*, construction lenders advancing under a draw schedule) unless such person had knowledge of the security interest.¹¹⁶

The proposed amendments to Section 9-313 found in the 1972 Official Text abandon the strict pre-affixation/post-affixation analysis, and instead substitute a first-to-file rule with special priority given to purchase money security interests in fixtures, and super priority given to construction lenders. Generally, the proposed scheme of the 1972 Official Text provides, under proposed Section 9-313(4), that the first party to file notice of his interest, be it a security or a real estate interest, has a priority position. However, this general rule is abrogated under proposed Section 9-313(4)(a) to the extent that a purchase money security interest exists in a fixture and that interest is perfected before the goods become fixtures or within ten days after affixation. In such a case, the purchase money security interest has priority over any prior real estate interests.

Proposed Section 9-313(6) establishes a super priority for construction lenders. Essentially, this provision provides that the exception to the general rule for purchase money security interests in fixtures does *not* defeat a construction mortgage recorded before the goods become

115. It has been held that "an express agreement" is required and that a "general consent to improvement and remodeling" is not sufficient to serve as such a consent or disclaimer. *In re Seminole Park and Fairgrounds, Inc.*, 502 F.2d 1015, 15 U.C.C. Rep. 946 (5th Cir. 1974).

116. Under MD. COM. LAW CODE ANN. § 1-201(25) a person "knows" or "has knowledge" of a fact when "he has actual knowledge of it." *See, e.g.*, *Northwest Equipment Sales Co. v. Western Packers, Inc.*, 543 F.2d 65, 20 U.C.C. Rep. 210 (9th Cir. 1976) (subsequent purchaser for value does not obtain priority if he had actual knowledge of previous fixture-secured interest even if his predecessor had been without knowledge).

fixtures regardless of the timing of the advance under the construction mortgage.

It should be noted that the Maryland State Bar Association's Committee on the Uniform Commercial Code vigorously opposed the 1972 Official Text's proposed priority approach.¹¹⁷ The Committee believed that construction lenders were more capable of policing debtors than were purchase money fixture financiers, and a construction mortgage financier is better able to adjust to priorities for purchase money fixture financing than the latter is able to adjust to a priority for construction financing.¹¹⁸ Thus, the Committee was reluctant to provide construction financing with a priority over purchase money fixture financing.

IX. REMEDIES

The proposed 1972 Official Text contains several changes in the Article 9 provisions relating to remedies, but Maryland rejected the changes that were substantive in nature. One minor change that was adopted is found in Revised Section 9-504(1)(a), which now clarifies that the distribution priority accorded to reasonable expenses of disposing of collateral after default includes charges incurred in either the leasing of the collateral or in the preparation of the collateral for leasing. This is a welcome change, and in fact reflects a situation in which secured lenders involved in equipment financing sometimes find themselves: occasionally it is necessary to lease repossessed collateral on an interim basis prior to sale or other disposition. Of course, the proceeds derived therefrom directly inure to the debtor's benefit in reducing the amount of the debtor's liability for outstanding debt and expense.

Maryland did *not* adopt the proposed change to Section 9-504 that would have altered the notice requirements stated in that provision.

117. See Leitess, *Proposed Changes In Article 9 of the Uniform Commercial Code by its Permanent Editorial Board*, MD. B.J., Apr. 1972, at 29, July 1972, at 16.

118. Specifically, the Committee stated:

It is the opinion of the Bar Committee that the proposed preference for construction mortgages undermines the general philosophic underpinnings of 9-313. Obviously, construction mortgage financing, which is generally long-term financing, is better able to adjust to a priority given to purchase money fixture financing than for the latter, which is generally short-term financing, to adjust to a priority given to the former.

Leitess, *supra* note 117, July 1972 at 19.

Under Section 9-504(3), unchanged by the 1981 revisions, the debtor¹¹⁹ must be given reasonable notice of the time and place of any public sale or the time after which any private sale is to be made.¹²⁰ The proposed amendment permits the secured party to obtain a post-default, but not pre-default, waiver by the debtor of this notice. Unfortunately, this proposed amendment was not adopted. Frequently, it becomes necessary for the secured creditor in possession of repossessed collateral to obtain a rapid sale of the collateral. Debtors often wish to expedite this procedure, and are sometimes willing to provide a post-default waiver of notice. In the absence of the ability to obtain such a waiver of notice, secured creditors are faced with an inevitable delay in the liquidation of repossessed collateral, which can result in loss to both the creditor and the debtor.

Similarly, Maryland did *not* adopt the proposed amendment to Section 9-505 which permits a waiver of the thirty-day waiting period for strict foreclosures. Essentially, under Section 9-505(2), a secured party who desires to retain collateral in full satisfaction of the debt (strict foreclosure) is required to so notify the debtor and to allow the debtor thirty days within which to object to the strict foreclosure and, thus, to force a sale of the collateral under Section 9-504. The proposed amendment allows the secured party to obtain a waiver of the waiting period. Again, it is difficult to perceive how a debtor has been prejudiced by giving a known post-default waiver of the thirty-day period, and it is

119. Note that "debtor" may also include a guarantor of the debt. MD. COM. LAW CODE ANN. § 9-105(1)(d) (Cum. Supp. 1980) defines "debtor" as "the person who owes payment or other performance of the obligation secured" (emphasis added). See, e.g., *Hepworth v. Orlando Bank & Trust Co.*, 323 So. 2d 41, 18 U.C.C. Rep. 542 (Fla. Dist. Ct. App. 1975); *Commercial Discount Corp. v. Bayen*, 57 Ill. App. 295, 372 N.E.2d 926, 23 U.C.C. Rep. 1376 (1978). But see *First National Park Bank v. Johnson*, 553 F.2d 599 (9th Cir. 1977). For a general discussion of this topic, see Sachs & Belgrad, *Liability Of The Guarantor Of Secured Indebtedness After Default And Repossession Under The Uniform Commercial Code: A Walk On The Wild Side By The Secured Party*, 5 U. BALT. L. REV. 153 (1976).

120. For a discussion of the method of providing notice, see *Crest Investment Trust, Inc. v. Alatzas*, 264 Md. 571, 287 A.2d 261 (1972). For a general discussion of the notice requirements, see, e.g., *Wheless v. Eudora Bank*, 256 Ark. 644, 509 S.W.2d 532, 14 U.C.C. Rep. 1068 (1974) (debtor is entitled to specific notification of a date after which the creditor will dispose of the collateral); *Associates Financial Services Co., Inc. v. DiMarco*, 383 A.2d 296, 23 U.C.C. Rep. 1394 (Del. 1978) (notice of a private sale was insufficient where collateral was sold at a public sale); *Morris Plan Company of Bettendorf v. Johnson*, 133 Ill. App. 2d 717, 271 N.E.2d 404, 9 U.C.C. Rep. 728 (1971) (code requires more than a general advertisement or a reasonable expectation on the part of the debtor); *Umbaugh Pole Building Co., Inc. v. Scott*, 58 Ohio St. 2d 282, 390 N.E.2d 320, 26 U.C.C. Rep. 809 (1979) (oral notice is sufficient where written notification would not have given the debtor any more protection). See generally MD. COM. LAW CODE ANN. § 1-203 (1975) which states the obligation of good faith in performing duties under the Uniform Commercial Code.

evident that a failure to obtain such a waiver only unnecessarily increases the burdens which already exist upon the creditor in such a situation.

Both Sections 9-504 and 9-505 require a secured party exercising any default remedies under those provisions to send notice to any subordinate security interest holders in the collateral and to the debtor. The proposed amendment under the 1972 Official Code eliminates the necessity of a post-default financing statement search by requiring that the above notices only be given to those subordinate security interest holders who actually notify the secured party in writing of their interest in the collateral. The Bar Committee vehemently objected to this amendment on the basis that the junior encumbrancer was in such an inferior position under the Code that the need to protect him far outweighed the burden placed upon the secured party to conduct the financing statements records search.¹²¹ As a practical matter, the prudent secured creditor desiring to obtain the maximum return on repossessed collateral would desire to notify any party having a potential claim, in the hopes that such party might aid in generating prospective purchases of the collateral or otherwise act to financially protect its subordinate interest, and thus hopefully clear the lien of the first lien security interest holder. Accordingly, the failure of Maryland to adopt this change does not appear to have any practical harmful effect upon secured lenders.

X. TRANSITIONAL PROVISIONS

Revised Code Sections 10-105 through 10-112 provide transition rules governing the application of the Revised Code provisions. These rules should be carefully reviewed by practitioners, particularly with respect to the Revised Code's application to existing security interests. While Revised Code Section 10-105(2) states that the Revised Code becomes effective at 12:01 a.m. on January 1, 1981, Revised Code Section 10-106 provides that Prior Code Section 10-102 will continue to be effective in governing the transition from pre-Code law to the Uniform Commercial Code concerning transactions validly entered into prior to the effective date of the Prior Code. In addition, this Section requires that the Prior Code and the Revised Code are to be considered as one continuous statute for the purposes of that transition.

Section 10-112 of the Revised Code states that the amendments enacted in the Revised Code are deemed declaratory of the meaning of

121. Leitess, *supra* note 117, July 1972 at 21.

the Prior Code unless a change in law has *clearly* been effected.¹²² The general rule of transition is stated in Revised Section 10-107, which states that the new amendments apply even to security interests granted under the Prior Code, and that such interests may be "terminated, completed, consummated, or enforced" under the Revised Code.¹²³ However, a major exception to this general transition rule is found in Section 10-111 of the Revised Code, which requires that priority matters are to be determined under the Prior Code if the positions of the parties were fixed prior to January 1, 1981. The following is an example of the operation of this exception, illustrating the applicable changes under Section 9-312(5) (the "first-to-file or-perfect" rule) of the Revised Code.

- Day 1 — A files but makes no advance under loan.
- Day 4 — B makes loan and perfects by possession.
- Day 6 — A makes an advance.

Pursuant to the prior "first-to-perfect" rule, B wins and his security interest has priority. Under the revised "first-to-file or-perfect" rule, A wins and his security interest has priority.

Under the transitional rules, if Day 4 is *before* January 1, 1981, then the prior rule prevails because the positions of the parties were fixed before January 1, 1981, and B's security interest is superior. If

122. The California Court of Appeals, Fourth Appellate District has applied this rule of interpretation in the case of *Dynair Electronics, Inc. v. Video Cable, Inc.*, 55 Cal. App. 3d 11, 127 Cal. Rptr. 268, 18 U.C.C. Rep. 1047 (1976). In that case, the court was classifying eight contracts which involved rights to performance as either contract rights or general intangibles. In reaching its decision, the court observed that the definitional consolidation of contract rights and accounts under the 1976 amendments to the California Commercial Code clarify that contract rights as defined before the 1976 amendments only involved rights to payments and not rights to performance. As a basis for this conclusion, the court relied upon CAL. COM. CODE Section 11108 which is California's equivalent to Revised Code Section 10-112.

Although the Florida District Court of Appeal, Third Circuit, did not specifically cite the Florida statutory equivalent of Revised Code Section 10-112, this same rule of statutory interpretation was utilized by that court in the case of *Kahn v. Capital Bank*, 384 So. 2d 976, 29 U.C.C. Rep. 289 (Fla. App. 1980). In deciding that the proceeds of a casualty insurance policy were properly payable to a secured party holding a perfected security interest on the destroyed collateral, the court observed that the 1979 amendments to the Florida Commercial Code were simply declaratory of the pre-amendment case law dealing with the proceeds of insurance policies on collateral.

123. The major advantage of having the amendments proposed under the 1972 OFFICIAL TEXT applicable to security interests existing as of the effective date of the amendments is the more liberal notice rules under proposed Sections 9-504 and 9-505; however, since Maryland did not incorporate those amendments in the Revised Code, that potential advantage is of no consequence in Maryland.

Day 4 is *on or after* January 1, 1981, then the revised rule governs and A's security interest has priority.¹²⁴

In addition, Revised Section 10-108 provides a curative provision which states that security interests not properly perfected under the Prior Code will be deemed to be perfected as of January 1, 1981, if under the Revised Code the security interest would be considered perfected.¹²⁵ Revised Section 10-109(1) regulates the duration of financing statements that had not lapsed prior to January 1, 1981. This section basically states that such financing statements remain effective for the period prescribed under the Prior Code in effect at the time of the filing.¹²⁶ Practitioners should take special note of the provisions found in Revised Section 10-109(2) dealing with refilings. If the provisions of the Revised Code require a different filing office from the one in which a financing statement was originally filed, then a new financing state-

124. The significance of a provision equivalent to Revised Code Section 10-111 is also illustrated by the decision of the Illinois Appellate Court in the case of *Mid-West National Bank v. Metcoff*, 23 Ill. App. 3d 607, 319 N.E.2d 336, 16 U.C.C. Rep. 230 (1974). That case involved a priority conflict concerning the rights to a beneficial interest in a land trust between a lien creditor and a secured party who had not filed a financing statement. By the time that the appeal was heard, Illinois had adopted the 1972 OFFICIAL TEXT of Section 9-302(1)(c) which provides automatic perfection, without filing, for security interests arising out of the assignment of beneficial interests in a trust. The court observed that since the 1962 OFFICIAL TEXT of Section 9-302 was in effect at the time the competing interests arose, the Illinois statutory equivalent of Revised Code Section 10-111 made it clear that the change in filing requirements were of no avail to the dilatory secured party.

125. An example may be helpful. Revised Code Section 9-103(3) provides, in effect, that a secured party holding a security interest in accounts should perfect in the jurisdiction in which the debtor's chief executive office is located. Under Prior Code Section 9-103(1) perfection is obtained in the jurisdiction where the debtor maintained an office in which records of the accounts were maintained. Under the curative provision of Revised Code Section 10-111, such a secured party who was unperfected because he had improperly filed prior to January 1, 1981 in Maryland (the chief executive office jurisdiction) would be automatically perfected on January 1, 1981.

In addition, under Revised Code Section 9-302(1)(c) a security interest arising out of an assignment of a beneficial interest in a decedent's estate or trust is automatically perfected without filing. This particular automatic perfection provision did not exist under the Prior Code. Thus, if a secured party who has been assigned such a beneficial interest prior to January 1, 1981 had failed to file a financing statement, his security interest would nevertheless become perfected on January 1, 1981 pursuant to curative provision in Revised Code Section 10-108. It is important to remember that his priority position *vis a vis* competing secured interests would still be determined under Revised Code Section 10-111. See note 124 *supra*.

126. Under Prior Code Sections 9-403 and 9-403.1, financing statements filed prior to June 30, 1978 are effective for a period of five years from the date of filing unless an earlier date is stated, and financing statements filed after June 30, 1978 are effective for a period of twelve years from the date of filing unless an earlier maturity date is stated.

ment conforming to Revised Code Section 10-110¹²⁷ or the original or a photocopy of the original must be filed in the correct filing office.¹²⁸ This Section creates a trap for unwary practitioners or secured lenders who have not kept abreast of the changes occasioned by the Revised Code.¹²⁹ Revised Code Section 10-109(2) also requires that any continuation or other statements relating to the original financing statements be filed in the filing office as required by the Revised Code.

Section 10-110(1) of the Revised Code establishes a three-year grace period for the perfection of security interests that were perfected without filing under the Prior Code but for which filing is required under the Revised Code.¹³⁰ In such instances perfection will continue until January 1, 1984; thereafter, perfection lapses unless a financing statement, as opposed to a continuation statement, is filed in accordance with Section 10-110(4) of the Revised Code.¹³¹

CONCLUSION

Maryland's adoption of many major substantive and procedural changes in Article 9 as proposed in the 1972 Official Text requires

127. The special requirements for a financing statement to be filed under Section 10-110(4) of the Revised Code are that it: (1) identify the security agreement; (2) identify the office and date of the last filing; (3) identify the recording numbers of the last filing; and (4) state that the security agreement is still effective. This Section also provides that the financing statement is effective if it is signed by either the debtor or the secured party.

128. Revised Code Section 9-103(3)(b), dealing with multistate transactions involving accounts, is the most obvious provision which may cause refilings to be made in filing offices that are different from the one in which the original financing statement is filed. See text accompanying notes 38 to 43 *supra*.

129. Revised Code Section 10-109(2) differs significantly from its corresponding provision under the 1972 OFFICIAL TEXT, Section 11-105(2). Under proposed Section 11-105(2) it is obvious that existing financing statements remain effective as to existing collateral but not as to after-acquired property, unless an appropriate refiling is made. Revised Code Section 10-109(2) does not provide any such comfort. Unfortunately, the section is completely devoid of any stated sanction or consequence for a failure to comply with the refiling requirement. In light of this uncertainty, prudent practitioners will be wise to review their clients' existing transactions which might require a refiling under Revised Code Section 10-109(2) under the assumption that failure to refile, where appropriate, may result in the loss of perfection.

130. The most readily apparent situation to which this provision applies is Section 9-302(1)(c) of the Prior Code which provided automatic perfection for purchase money security interests in farm equipment having a purchase price of \$500 or less. This exception to the filing requirements has been eliminated under Revised Code Section 9-302, and thus, perfection will continue for existing security interests without filing until January 1, 1984.

131. Revised Code Section 10-110(4) permits filing of financing statements "within six months before the perfection . . . would otherwise lapse." Thus, immediate filings to avoid the lapse of perfection prescribed in Revised Code Section 10-110(1) would appear to be fruitless, and such filings should be withheld until July 1, 1983.

practitioners to review carefully their procedures and documentation. The impact of these changes is significant since Article 9 of the Uniform Commercial Code directly or indirectly affects most commercial transactions. Unfortunately, the degree of a practitioner's compliance with the requirements of Article 9 only becomes evident under the test of litigation or bankruptcy proceedings.

The changes made in the Revised Code remedy many imperfections that became apparent after the initial adoption by Maryland of Article 9. Moreover, these changes have the practical effect of making Maryland law more consistent with the laws of other states. Unfortunately, Maryland has rejected a great opportunity to adopt the altered priority analysis proposed in the 1972 Official Text with respect to fixture financing, and the relatively minor, but significant, waiver proposals with respect to post-default notices. However, it is believed that an overall evaluation of the changes can only lead to the conclusion that both debtors and creditors in Maryland have gained greatly from the clarifications and improvements in practice found in Revised Article 9.