Modernizing Kentucky's Uniform Commercial Code

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Modernizing Kentucky's Uniform Commercial Code*

By Harold R. Weinberg,
Louise Everett Graham and
Thomas J. Stipanowich**

Table of Contents

Introduction .................................................. 517
I. The 1972 Amendments .................................... 519
   A. Scope of Article Nine .............................. 520
   B. Consignments and Leases .......................... 522
   C. Classifying the Collateral ......................... 524
   D. Attachment, Enforceability, and Perfection of Security Interests .................. 527
   E. Filing and Financing Statements .................... 529
      1. Content ............................................ 529
      2. Place of Filing .................................... 531
      3. Duration .......................................... 533
      4. Administration ..................................... 536
   F. Proceeds .................................................. 536
      1. Creating and Perfecting Security Interests in Proceeds .................... 536
      2. Proceeds-Related Priority Rules .......................... 540
      3. Other Proceeds Clarifications .................. 542
   G. Priorities ............................................... 543
      1. Purchase Money Priority to Inventory ........ 543
      2. The First-to-File and First-to-Perfect Rules .................. 544
      3. Priority of Future Advances ..................... 546
         a. Secured Party v. Secured Party ............ 547

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b. Secured Party v. Judgment Creditor or Purchaser .......................... 549
4. Priority of Lien Creditors .............................................. 550
H. Default ................................................................. 551
I. Fixtures and Other Collateral Associated With Real Estate ................. 554
   1. Security Interests in Fixtures .................................... 556
      a. Definitional Issues .......................................... 556
         i. Fixtures Under Kentucky Law ......................... 556
         ii. Present Code Treatment of Security Interests in Fixtures .... 557
         iii. Effect of the 1972 Amendments .................. 558
      b. Fixture Filing And Perfection Issues ..................... 560
         i. Present Code Provisions .............................. 560
         ii. Effect of the 1972 Amendments .................. 561
         iii. Perfection of Security Interests by Fixture Filing .... 562
      c. Priority Concerns ........................................... 563
         i. Present Code Provisions .............................. 563
         ii. Effect of the 1972 Amendments .................. 566
   2. Perfection of Security Interests in Oil, Gas, Minerals and Timber .... 570
J. Agricultural Finance .................................................. 571
K. Multistate Transactions ............................................... 573
   1. Documents, Instruments and Ordinary Goods ........................ 575
      a. The Basic Rule—The Last Event Test ...................... 575
      b. Exceptions to the Last Event Rule ........................ 579
   2. Certificate of Title ............................................. 583
      a. Movement from a Certificate of Title State to Kentucky .... 586
      b. Movement from a Nontitle State to Kentucky ............. 588
      c. Movement from Kentucky to a Title State ................ 589
   3. Accounts, General Intangibles and Mobile Goods ..................... 589
INTRODUCTION

In 1958 Kentucky became the third state to enact the Uniform Commercial Code promulgated by the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL). The General Assembly stated that this legislation was intended to modernize, clarify and simplify the law of commercial transactions. Enactment of the Code also evidenced the legislature's intent to make Kentucky commercial law uniform with that of the other states. Subsequent General Assemblies further implemented these policies by enacting substantially all of the uniform amendments to the Code proposed by the ALI and NCCUSL through 1964.


2 See KRS § 355.1-102(2)(a).

3 See KRS § 355.1-102(2)(c). Forty-nine states have enacted the Code. Louisiana has enacted only some of its provisions. See U.C.C. Rep. Serv. (Callaghan) state correlation tables (1979) [hereinafter cited as TABLEs].

Unfortunately, these enactments represent our legislature’s last successful efforts to update Kentucky’s Uniform Commercial Code.\(^5\) None of the uniform amendments promulgated by the ALI and NCCUSL since 1964 have been enacted in Kentucky.\(^6\) Most importantly, Kentucky lacks the 1972 Official Amendments to the Code which relate to secured financing and which have been substantially enacted in at least forty-four jurisdictions.\(^7\) Kentucky also lacks the 1977 Official Amendments which relate to investment securities and which have been substantially enacted in at least seventeen jurisdictions.\(^8\)

The purpose of this Article is to highlight the various sets of uniform amendments against the backdrop of current Kentucky law. Hopefully this Article will facilitate discussion by persons interested in whether the amendments should be enacted in Kentucky and will serve as a guide in the event they are

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\(^{5}\) A Special Study Commission (chaired by Senator David Karem) established by the Legislative Research Commission is currently reviewing the Kentucky Uniform Commercial Code and may make recommendations for amendments to the 1986 General Assembly. The authors of this Article are not members of the special Commission but have been informal participants in its meetings. In 1980, H.R. 673 (BR 344) containing the 1972 Amendments was introduced in the General Assembly but was not enacted. H.R. 683, 1980 Reg. Sess., 14 LEG. REC. 60 (Apr. 16, 1980).

\(^{6}\) The most substantial uniform amendments were adopted in 1977 and 1972 dealing, respectively, with investment securities (Article Eight) and secured transactions (Article Nine). See Permanent Editorial Board for the Uniform Commercial Code, Proposed Revision of Article 8 and Related Changes in Other Articles (1977) [hereinafter cited as 1977 Amendments]; ALI & Nat’l Conf. of Comm’rs on Uniform State Laws, 1972 Official Text and Comments of Article 9 Secured Transactions and Conforming Amendments to Related Sections With Supplementary Text Showing Additions and Deletions and Statement of Reasons for Changes Made (1972) [hereinafter cited as 1972 Amendments]. See also Permanent Editorial Board for the Uniform Commercial Code, Review Committee for Article 9 of the Uniform Commercial Code, Final Report (1971) [hereinafter cited as Final Report]. Other official amendments were promulgated in 1966. See Report No. 3 of the Permanent Editorial Board for the Uniform Commercial Code Including the 1966 Official Recommendations for the Amendment of the Code (1967). None of these amendments have been enacted in Kentucky. However, in 1972, a provision similar to § 8-102(3) of the 1977 Amendments was enacted. See KRS § 355.8-102(3) (Cum. Supp. 1984). See generally Dantzer, Securities Transfers Without Certificates: Amendments to Section 8-102, 7 U.C.C. L.J. 109 (1974). All the uniform amendments are now reflected in ALI & Nat’l Conf. of Comm’rs on Uniform State Laws, 1978 Official Text of the Uniform Commercial Code.

\(^{7}\) See 1 Secured Transactions Guide (CCH) ¶ 650A (May 14, 1985). One or more of the 1966 Amendments have been enacted in at least 26 jurisdictions. See generally Tables, supra note 3.

\(^{8}\) See note 7 supra.
enacted. It may also assist Kentucky lawyers who encounter the amendments as part of some other jurisdiction’s laws, a likely event given the amendments’ wide adoption and the interstate character of many commercial transactions and law practices.9

The provisions of the Kentucky Uniform Commercial Code currently found in chapter 355 of the Kentucky Revised Statutes (KRS) will be referred to herein as the present UCC or Code.10 The various uniform texts and amendments will be designated by reference to their respective year of adoption by the ALI and NCCUSL.11

I. THE 1972 AMENDMENTS

The secured transactions provisions in Article Nine of the present Code are unique in their commercial significance. No other UCC article affects as many commercial transactions, touches the professional lives of as many commercial practitioners, or is more critical in the crucible of debtor insolvency and bankruptcy.12 The 1972 Amendments are the product of an in-depth study intended to clarify Article Nine and to answer questions that arose concerning its operation.13 However, it is far from a complete redraft. Changes were kept to a minimum in recognition of the fact that the Article generally operates in a satisfactory manner and that many of the problems perceived by critics and commentators were of more theoretical than practical importance.14 The following is a discussion of the most

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9 For example, Ohio, Virginia and West Virginia have enacted the 1972 and 1977 Amendments. See TABLES, supra note 3.
10 The Kentucky Code contains several nonuniform provisions not found in any of the official ALI and NCCUSL texts. See TABLES, supra note 3, at 185-90; TABLES, supra note 3, at 67-69 (Supp. June, 1984); Whiteside, supra note 4, at 4-15. These provisions are considered by this Article when relevant.
11 For example, see 1972 AMENDMENTS, supra note 6, at § 9-102 and UCC § 9-102 (1972). ALI and NCCUSL publications containing the amendments and their drafting history are described in notes 4 and 6 supra.
12 See generally Coogan, The New UCC Article 9, 86 Harv. L. Rev. 477, 479-81 (1972-73).
14 See Final Report, supra note 6, at 195-96; 1972 Amendments, supra note 6, at vii-ix.
important secured transactions topics which would be affected by enactment of the 1972 Amendments.

A. Scope of Article Nine

Article Nine of the present UCC broadly applies to any transaction, regardless of its form, which is intended to create a security interest in personal property. Excluded from its provisions are various types of collateral or transactions that are governed by other laws, that are noncommercial in nature, or that are excluded for other reasons. Some of the changes in coverage that would result from enactment of the 1972 Amendments relate to conflict of laws, proceeds, leases and consignments. Other 1972 Amendments would either expand or contract the present Code's coverage in various ways.

The 1972 Amendments would provide Code coverage of financing arrangements in the form of equipment trusts covering railway rolling stock. These trusts originally were excluded from the official text of the UCC as too specialized to fall within the scope of a general personal property security law. Subsequently, it was determined that a better approach would be to include these trusts within Article Nine as another type of secured financing, but to exclude them from Article Nine's filing requirements.

Enacting the 1972 Amendments would also make clear that a judgment taken on a right to payment (such as an account receivable) serving as collateral under a security agreement is

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15 See KRS § 355.9-102.
16 See KRS § 355.9-104. See generally Cessna Fin. Corp. v. Skyways Enters., 580 S.W.2d 491 (Ky. 1979) (perfection of security in aircraft governed by federal law); Hawkland, The Proposed Amendments to Article 9 of the U.C.C. - Part IV: The Scope of Article 9, 77 COM. L.J. 79 (1972) [hereinafter cited as Hawkland, Part IV].
17 For a discussion of the effect of the 1972 Amendments in these areas, see notes 384-515 infra and accompanying text (conflict of laws); notes 135-37 infra and accompanying text (proceeds); notes 33-42 infra and accompanying text (leases and consignments).
18 Some of the scope amendments merely reflect the decision to delete "contract rights" as a separate collateral category. See notes 45-51 infra and accompanying text.
19 See UCC § 9-104 (1972). This amendment would delete the exclusion applicable for these trusts in KRS § 355.9-104(e). See 1972 Amendments, supra note 6, at 188.
20 See Final Report, supra note 6, at 242.
within the scope of the Code despite its general nonapplicability to judgment assignments.22

The 1972 Amendments would reduce the present Code's scope by excluding security interests created by government debtors.23 This amendment clarifies that government borrowing—collateralized by assignments of utility charges, rent from college dormitories, and the like—is left to extra-Code law dealing with government finance.24 However, this amendment is broadly worded and all governmental secured transactions may be excluded. The breadth of this exclusion has been criticized as inconsistent with the Article Nine policy of unifying personal property security law and because of uncertainty concerning the extra-Code legal framework for governmental finance.25

Transfers of a single account to an assignee in complete or partial satisfaction of a preexisting indebtedness would also be expressly excluded from the present Code's scope if the 1972 Amendments were enacted in Kentucky.26 The present Code has previously been interpreted to be inapplicable to these assignments.27 The rationale for this amendment is that ordinarily such transfers are not part of commercial financing transactions.28 This amendment would be consistent with other provisions already contained in the present Code.29

Definitions play an important role in defining the scope of Article Nine. By amending the definition of "document" the 1972 Amendments would, if enacted, make clear that the UCC applies to consensual security interests in certain documents of title issued by owners of goods (such as owners of whiskey or grain) as well as to documents issued by commercial bailees (such as warehousemen).30 This amendment is intended by the

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22 See UCC § 9-104(h) (1972).
23 See UCC § 9-104(e) (1972).
24 See UCC § 9-104 comment 5 (1972).
26 See UCC § 9-104(f) and comment 6 (1972).
28 See UCC § 9-104(f) and comment 6 (1972).
29 See KRS §§ 355.9-104(f), 355.9-302(1)(e).
30 See UCC § 9-105(f) (1972). See also Final Report, supra note 6, at 242. The class of owners that may issue receipts is specified in KRS § 355.7-201(2).
ALI and NCCUSL to have the effect of conforming the Code to the reasonable but incorrect assumption on the part of some financers that security interests in owner-issued documents of title were within its scope.31

The 1972 Amendments also would modify the present Code’s application to timber and minerals. These changes will be considered along with other mineral and timber finance related issues in a subsequent part of this Article.32

B. Consignments and Leases

Article Nine of the present Code applies to leases and consignments that actually are secured transactions.33 "True" consignments and leases are not subject to Article Nine but are governed by Article Two for some purposes and extra-Code law (such as the law of agency or bailments) for others.34 Often it is difficult to distinguish leases and consignments intended as security from those which are "true" in nature. This complex issue and the important consequences that can turn on its resolution are the subject of a voluminous legal literature and have generated much litigation.35 Although they do not resolve all the problems in this area, the 1972 Amendments would add two provisions to the present Code that would clarify the existing law in certain important respects.

The first provision can be illustrated through the following example. Suppose Secured Party One (SPI) obtains a perfected security interest in all the debtor-appliance dealer’s present and after-acquired inventory of new and used home appliances. Sub-

31 See generally Hawkland, Part IV, supra note 16, at 84.
32 See notes 353-61 infra and accompanying text.
33 See KRS §§ 355.1-201 (37), 9-102(2).
sequently Secured Party Two (SP2) finances a new line of microwave ovens pursuant to what is actually a purchase money security agreement drafted to resemble a consignment. At about the same time Consignor (C) delivers several used refrigerators to the dealer pursuant to a true consignment agreement.

Article Nine of the present Code specifies that SP2's disguised security interest can have priority over SP1 if SP2 complies with a special rule applicable to purchase money security interests in inventory. This rule requires that SP2 perfect his or her security interest and notify SP1 of its existence before the debtor-appliance dealer receives possession of the new ovens. These requirements are designed to prevent SP1 from believing that his or her security interest will enjoy priority in the new line of inventory.

C's true consignment, on the other hand, is governed by Article Two of the present UCC, which indicates that C can protect the consigned goods against SP1's inventory security interest by complying with Article Nine's "filing provisions." However, it is unclear whether C is required to give notice to SP1 comparable to that required of SP2. The 1972 Amendments would require that C give the same notice required from SP2 in order to have priority over SP1.

As indicated above, it may also be difficult to distinguish between true leases and leases intended as security. The latter are actually secured sales which are subject to Article Nine of the present UCC. In some instances, a transaction may intentionally be structured to look as much as possible like a true lease for tax or other reasons. On other occasions agreements contain both lease and security agreement characteristics and the parties may not be certain of the proper category even if they consider the issue when structuring the agreement. The correct

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36 See text accompanying notes 173-80 infra for a discussion of KRS § 335.9-312(3).
37 See KRS § 355.2-326(3)(c). Compliance with the filing provisions of Article Nine is normally the most practical of the available means for true consignors to insulate consigned goods against the claims of the consignee's creditors. See KRS § 355.2-326(1)-(3).
38 For divergent views on this issue see D. Leibson & R. Nowka, THE UNIFORM COMMERCIAL CODE OF KENTUCKY 659 (1983); Hawkland, Part V, supra note 35, at 111-12.
39 See UCC § 9-114 (1972); Final Report, supra note 6, at 223.
category typically comes into issue when a bankruptcy trustee or some other third party argues that the transaction is subject to Article Nine and is unperfected because no financing statement was filed. Of course, a financing statement might be filed to protect against this eventuality. But such a filing is a two-edged sword under the present Code. It might be viewed as evidence that the agreement is a secured sale with the result that all of Article Nine becomes relevant.\textsuperscript{40} This includes the Article Nine security agreement and financing statement formalities, default provisions, and other regulatory rules. The 1972 Amendments are intended to protect a protective filer from being penalized for being cautious. The Amendments expressly authorize protective filings and prohibit the existence of such a filing from being a factor in deciding whether Article Nine is applicable.\textsuperscript{41} This provision for protective filings is also applicable to consignment transactions.\textsuperscript{42}

C. Classifying the Collateral

The present Code contains a set of classifications for collateral subject to security interests.\textsuperscript{43} Placing the collateral into the proper classification can be essential to correctly resolving a host of practical questions ranging from how to describe collateral in the security agreement or financing statement to determining a secured party's rights upon the debtor's default.\textsuperscript{44} For the most part, enactment of the 1972 Amendments would not affect this classification scheme. However, it would result in an important change with respect to the classification of certain intangible rights.\textsuperscript{45}

Suppose that a business sells widgets from inventory. When the company accepts a widget purchase order from a buyer, the company’s resulting intangible rights under the sale agreement

\textsuperscript{40} See KRS § 355.1-201(37). Such a conclusion might have unfortunate tax and financial statement implications. See generally R. Henson, Secured Transactions Under the Uniform Commercial Code § 3-12 (2d ed. 1978).

\textsuperscript{41} See UCC § 9-408 (1972).

\textsuperscript{42} See id.

\textsuperscript{43} See KRS §§ 355.9-105, 9-106, 9-109.

\textsuperscript{44} See D. Baker, A Lawyer's Basic Guide to Secured Transactions § 1-5 (1983).

\textsuperscript{45} See UCC § 9-106 (1972).
would be characterized by the present Code as a "contract right" which is "any right to payment under a contract not yet earned by performance." When the sale agreement is performed, the company's intangible rights evolve into an "account." The latter classification applies under the present Code to "any right to payment for goods sold or leased or for services rendered." This approach creates a misclassification pitfall for practitioners because it is not always clear when the "performance" that gives rise to the account has occurred. This may result in an incorrect collateral description in the security agreement or financing statement and can lead to proceeds and priority questions. Moreover, these difficulties are unnecessary because the contract right concept is of virtually no significance in the pres-

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46 KRS § 355.9-106. See Citizens Fidelity Bank & Trust Co. v. Fenton Rigging Co., 522 S.W.2d 862 (Ky. 1975) (applying definition of "contract right"); Spurlin v. Sloan, 368 S.W.2d 314.

47 KRS § 355.9-106.

48 See 1972 AMENDMENTS, supra note 6, at 194; FINAL REPORT, supra note 6, at 214-16.

49 Examples illustrating these problems are contained in D. BAKER, supra note 44, § 1-5(c)(1)(a), at 55-56 n.209:

Assume, for instance, that on Day 1 Creditor 1 files a financing statement listing only "accounts" as collateral. On Day 2, Creditor 2 files a financing statement claiming "contract rights and proceeds." The contract in question calls for delivery of goods by the debtor-manufacturer to a buyer. If the priority conflict between Creditor 1 and Creditor 2 arises on Day 4 (by virtue of the debtor's default at that point) prior to delivery, it is uncertain whether Creditor 1, having referred only to "accounts" in his financing statement, has any claim to what is arguably still a "contract right" to future payment.

Or suppose the conflict arises on Day 6, after the debtor has delivered, earned the right to payment, and thereby clearly created an account. On the one hand, it can be argued that Creditor 1 should win under 1962 Section 9-312(5)(a) because he filed first as to "accounts"—the type of collateral now in controversy. On the other hand, it can be argued that Creditor 2 should prevail, on the following reasoning: Section 9-306(1) of the 1962 Code defines "proceeds" to include "the account arising when the right to payment is earned under a contract right." Moreover, under the 1962 Code, the first-to-file rule of Section 9-312(5)(a) does not clearly govern priority with respect to proceeds; priority might be based on who perfected first. If the latter is true, Creditor 2 perfected first by virtue of having a continuously perfected interest in the accounts as proceeds dating back to his filing on the original collateral (contract rights) on Day 2. 1962 UCC § 9-306(3). And under 1962 Section 9-204(2)(d), Creditor 1's security interest did not attach and thus did not become perfected until the account "came into existence" on Day 5 (original emphasis).
ent Code's scheme-of-things. The 1972 Amendments would eliminate this source of uncertainty by eliminating contract rights as a collateral classification and by defining account to mean "any right to payment for goods sold or leased or for services rendered . . . whether or not it has been earned by performance."

While this amendment is justified in the name of clarity and simplification, it should be noted that its enactment would alter the correct classification for some collateral in certain instances. For example, under the present UCC the right to payment for services to be performed in the future is a contract right. Under the 1972 Amendments, it would be an account. Or consider a tenant's right to the future return of a security deposit pursuant to the terms of a written lease. The present Code may characterize this asset as a contract right. Under the 1972 Amendments, it would fall into the residual category of "general intangibles."

Another collateral classification problem relates to money. Money can be proceeds of original collateral (such as when inventory is sold for cash) and might also serve as original collateral (such as in the case of a security interest in coins or currency of numismatic value). The present Code leaves open the possibility that money might be classified as a general intangible. Security interests in general intangibles can be perfected by filing. This makes no sense in the case of money, the most negotiable of personalty. The 1972 Amendments would specify

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50 Although utilized in several places, the definition of contract right was used to contrast with the concept of account in only one Article Nine provision. This section was redrafted to eliminate its dependence on this definition. See UCC § 9-318 (1972); FINAL REPORT, supra note 6, at 215.

51 See UCC § 9-106 (1972).

52 See KRS § 355.9-106.


54 See R. HENSON, supra note 40, at 168 n.44.

55 UCC § 9-106 (1972) (any personal property (including things in action), other than goods, accounts, chattel paper, documents, instruments and money).

56 See KRS § 355.9-306(1).

57 Id. See generally R. HENSON, supra note 40, at 102 n.9.

58 See KRS § 355.9-302(1).


that money is not a general intangible and that a security interest in money can be perfected only by taking possession.  

D. Attachment, Enforceability, and Perfection of Security Interests

Attachment, enforceability, and perfection are independent but interrelated concepts under the present Code. The statutory language dealing with these concepts would be modified by enactment of the 1972 Amendments in several ways.

"Attachment" describes the requirements that must be satisfied in order for personalty to become collateral subject to a security interest. These requirements are that there be an agreement that the security interest attach, that value be given, and that the debtor have rights in the collateral. The present UCC also provides a set of rules indicating when a debtor obtains rights in collateral. It specifies, for example, that the debtor has no rights in an account until it comes into existence and no rights in fish until they are caught.

The present Code's "enforceability" provision is in the nature of a statute of frauds. A security interest is not enforceable against the debtor or third parties (such as other secured creditors of the debtor) unless either the debtor has signed a written security agreement meeting certain formal requirements or the collateral is in the possession of the secured party.

"Perfection" can take place only when the security interest has attached and relates to the additional steps that a secured

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60 See generally R. Henson, supra note 40, at 57-60.
61 See KRS § 355.9-204(1).
62 See KRS § 355.9-204(2).
63 Id.
party must take in order to insulate its claim to the collateral against third parties. Depending on the nature of the secured transaction, the additional steps (if any) required for perfection may consist of filing a financing statement or secured party possession of the collateral.

The 1972 Amendments would cure an anomaly that exists in the present Code. It is currently possible for a security interest to have attached and become perfected even though it is unenforceable for lack of a written security agreement. The 1972 Amendments would remedy this by integrating the requirements for attachment and enforceability in order that a security interest can never be perfected before it is enforceable under the Article Nine statute of frauds.

The 1972 Amendments also would eliminate the present Code's special attachment rules on the grounds that they are arbitrary, sometimes confusing or superfluous, and because the issue of when the debtor has rights in the collateral is best left to the courts. Actually, this issue was not removed from the courts by the present Code. Rather, it is framed in different terms. For example, there seems to be little difference between asking when an account comes into existence and asking whether the debtor has rights in the account. Nor is anything important gained from the present Code's specification that the debtor has no rights in an uncaught fish.

Other 1972 Amendments to the present UCC's treatment of attachment, enforceability and perfection relate to topics including proceeds, agricultural and mineral finance, and multistate

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65 See KRS § 355.9-303(1).
66 See KRS §§ 355.9-302, .9-304, .9-305.
67 See Final Report, supra note 6, at 217.
68 For a contrast of the requirements for each of these concepts, see text accompanying notes 60-66 supra.
69 See UCC §§ 9-203, 9-204 (1972).
70 See UCC § 9-203 (1972); 1972 Amendments, supra note 6, at 200. See also Final Report, supra note 6, at 217-18. Deletion of the special rule that the debtor has no rights in timber until cut conforms to the proposed treatment of timber as goods. See notes 364-66 infra and accompanying text.
transactions. These modifications are considered in those contexts.  

E. Filing and Financing Statements

Filing a financing statement is the most frequently employed means of perfecting a security interest. Part four of Article Nine of the present Code contains detailed provisions regulating the content, place, duration and administrative handling of filings. Several changes of varying degrees of significance would result from enactment of the 1972 Amendments.

1. Content

The present Code’s rule for the content of a financing statement requires the debtor’s name. This is a crucial piece of information because financing statements are indexed by debtor name. An unresolved question under the present Code is whether, in filings against sole proprietorships, it is permissible to use a trade name (Lauren’s Computer Shoppe) instead of the proprietor’s individual name (Lauren Ruth). The 1972 Amendments would require the individual’s proper name and permit the adding of a trade name. The relevant amendment also would make clear that in the case of a partnership debtor, the partnership name must be used and the names of individual partners or trade names may be added at the secured party’s option. This amendment’s rationale is that trade names are too uncertain to serve as a basis for indexing the filing system. However, it should be noted that another 1972 Amendment permits optional trade name indexing.

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72 For a discussion of these modifications, see notes 130-50 infra and accompanying text (proceeds); notes 367-83 infra and accompanying text (agricultural finance); notes 353-66 infra and accompanying text (mineral finance); notes 384-515 infra and accompanying text (multistate transactions).

73 See KRS §§ 355.9-401 to 406.


75 See KRS § 355.9-402.

76 See KRS § 355.9-403(4).

77 See UCC § 9-402(7) (1972). See also Final Report, supra note 6, at 245-46.


79 See UCC § 9-402 comment 7 (1972).

80 See UCC § 9-403(5) (1972).
A related problem under the present Code is the lack of a rule applicable to debtors’ name changes and to changes in business form (such as when a subsidiary corporation is merged into its parent). The 1972 Amendments would supply a rule applicable both to name changes and to changes in the identity or structure of an organization.\footnote{See UCC § 9-402(7) (1972).} If the previously filed financing statement becomes seriously misleading as a result of the change, the filing will not be effective to perfect a security interest in collateral acquired by the debtor more than four months after the change unless a new financing statement is filed prior to expiration of the four month period.\footnote{See KRS § 355.9-306(2), which was applied in J.I. Case Co. v. Borg-Warner Acceptance Corp., 669 S.W.2d 543 (Ky. Ct. App. 1984). The secured party also may be “cut off” by a priority rule. See note 88 infra and accompanying text.} The original filing would continue to perfect collateral acquired by the debtor prior to the end of the four month period.\footnote{See UCC § 9-402(2)(d) (1972). This amendment also would authorize financing statements signed only by the secured party that are filed to perfect security interests in collateral for which the filing has lapsed or when the debtor’s location has changed. See UCC § 9-402(2) (1972).} The “seriously misleading” standard is already used in the present UCC.\footnote{See UCC § 9-402 comment 7 (1972).} Compliance with this new provision would be facilitated by the enactment of another 1972 Amendment which authorizes the secured party alone to sign the subsequent financing statement.\footnote{See UCC § 9-402(7) (1972). This amendment should not be read to reverse by implication the rule in the present Code that a security interest will be terminated by secured party consent. See D. Baker, supra note 44, at 108.}

Sometimes collateral is transferred by the debtor (A) to another person (B). The transfer may or may not be authorized by the secured party and B may or may not assume A’s secured obligation. The present Code provides that the security interest will continue in the transferred collateral unless the transfer was authorized.\footnote{See KRS § 355.1-201(28).}\footnote{See UCC § 9-402(7) (1972). See also Final Report, supra note 6, at 246.} A 1972 Amendment would add the corollary that a filed financing statement covering the collateral remains effective after the transfer whether or not the secured party knew of or consented to it.\footnote{See UCC § 9-402 comment 7 (1972).} A secured party is thus under no statutory obligation to learn of the transfer. (Of course, this information...}
may be of critical, practical import.) Nor is the secured party required to file against the transferee. Third persons interested in the state of B's title, such as potential purchasers, theoretically would be obligated to check the record for any security interests in the property previously granted by A as well as for any granted by B. However, this burden may not be as great as it first may appear. Third persons may be protected against the security interest pursuant to the present Code's priority rules even though the filing against A technically remains effective after the transfer. Moreover, this amendment would not make a filing against A effective against B for assets acquired by B from sources other than A. This is so even if the assets are collateral subject to an after-acquired property clause in a security agreement entered into by A and subsequently assumed by B.

The present Code requires the signatures of both the secured party and the debtor on the financing statement. The 1972 Amendments eliminate the former requirement because it was thought to serve no useful purpose and might sometimes invalidate an otherwise sufficient filing. An additional reason supporting this change may be found in the present Code's lack of an express requirement that the secured party's signature appear on the security agreement creating the security interest. A related 1972 Amendment would require the signatures of both the secured party and the debtor on amendments to financing statements. This limited dual-signature requirement is intended to preclude the possibility that either party could prejudice the other's rights.

2. Place of Filing

The present Code's filing section contains three specific rules specifying the correct place to file a financing statement under

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88 See generally D. Baker, supra note 44, at 108 n.68.
89 See Final Report, supra note 6, at 246.
90 See KRS § 355.9-402(1).
91 See UCC § 9-402(1) (1972). See also Final Report, supra note 6, at 151-52. Kentucky precedent indicates that the absence of the secured party's signature does not necessarily invalidate a financing statement. See Riley v. Miller, 549 S.W.2d 314 (Ky. Ct. App. 1977); Alloway v. Stuart, 385 S.W.2d 41 (Ky. 1964).
92 See KRS § 355.9-203(1)(b); text accompanying note 64 supra.
93 See UCC § 9-402(4) and comment 4 (1972).
various circumstances.\textsuperscript{94} Two of the rules are primarily applicable to farming related collateral and fixtures.\textsuperscript{95} The third rule applies to all other types of collateral for which filing is a permissible means of perfection (such as industrial equipment or a merchant’s inventory or accounts).\textsuperscript{96} Depending on the facts, it calls for filing in the county of the debtor’s “residence” or the county of the debtor’s “principal place of business.”\textsuperscript{97} Interpretative case law provides some guidance as to the meaning of residence and principal place of business in the case of business debtors.\textsuperscript{98} Both the filing provision and the case law have been a source of criticism.\textsuperscript{99}

This language in Kentucky’s present Code must be contrasted with the ALI & NCCUSL 1962 Official Text. The 1962 text calls for certain filings in the county of the debtor’s residence or place of business and differs in other ways from the current Code.\textsuperscript{100}

\textsuperscript{94} See KRS § 355.9-401.
\textsuperscript{95} See notes 277-79 infra and accompanying text. KRS § 355.9-401(1)(a) also applies to consumer goods. These present Code rules are the same as those contained in the uniform text of the Code prior to the 1972 Amendments. See UCC § 9-401(1)(a), (b) second and third alternative subsections (1) (1962).
\textsuperscript{96} See KRS § 355.9-401(1)(c), which provides:
The proper place to file in order to perfect a security interest is as follows:
(c) In all other cases, if the debtor is a resident of this state in the office of the county clerk in the county of the debtor’s residence, if the debtor is not a resident of this state but has a principal place of business in this state, in the office of the county clerk in the county where the nonresident has a principal place of business, if the debtor is a nonresident of this state and has no principal place of business in this state then in the office of the secretary of state of the Commonwealth of Kentucky....
\textsuperscript{97} Id.
\textsuperscript{99} The history of this provision and the problem of applying it to business debtors are described in Whiteside, supra note 4, at 8-9. For criticisms see D. Lenson & R. Nowka, supra note 38, at § 8.3(c)(2); Fitzgerald, The Crazy Quilt of Commercial Law: A Study of Legislative Patchwork, 54 Ky. L.J. 85, 87 (1965-66).
\textsuperscript{100} For example, see UCC § 9-401(1) (1962) third alternative subsection (1), which provides:
(l) The proper place to file in order to perfect a security interest is as follows:
(c) in all other cases, in the office of the [Secretary of State] and in addition, if the debtor has a place of business in only one county of this state, also in the office of ....... of such county, or, if the debtor has no place of business in this state, but resides in the state, also in the office of ....... of the county in which he resides.
A 1972 Amendment, tailored to mesh with this official language, would specify that the residence of an organization is its "place of business" if it has one or its "chief executive office" if it has more than one place of business.\textsuperscript{101} It is apparent that enactment of this 1972 Amendment could confuse what already is a troublesome Kentucky filing rule.

The present Code contains two nonuniform provisions that anticipate the 1972 Amendments. One exempts from Article Nine's filing provisions security interests created by specified utilities engaged in the electric, water, telephone, gas pipeline and other businesses.\textsuperscript{102} These security interests can be perfected only by recording in accordance with a special statute, applicable to public utility mortgages, which authorizes filing in the county of the utility's principal office.\textsuperscript{103} The second provision indicates that it is not necessary to file a financing statement to perfect a security interest in the realty or personalty of any public utility corporation or railroad that is "recorded and filed" pursuant to the applicable provisions of the Kentucky Revised Statutes.\textsuperscript{104} The apparent purpose of these exemptions is to avoid the multiple-county filings that otherwise would be required under the present Code. One can understand this purpose by imagining the numerous filings necessary to perfect a security interest in a railroad's poles, signals and other chattels that are affixed to, or otherwise associated with, its multicounty realty holdings. The 1972 Amendments deal with the same problem by designating certain debtors "transmitting utilities" and authorizing central filing in the Secretary of State's office as the exclusive means for perfecting security interests in their collateral.\textsuperscript{105}

3. \textit{Duration}

The present Code provides that a filed financing statement is effective for five years from the date of filing.\textsuperscript{106} Excepted are

\textsuperscript{101} See UCC § 9-401(6) (1972). This amendment originated out of uncertainty concerning the residence of corporate farms. See Final Report, supra note 6, at 209-10.

\textsuperscript{102} See KRS § 355.9-302(5).

\textsuperscript{103} KRS § 382.340.

\textsuperscript{104} See KRS § 355.9-302(1)(g).


\textsuperscript{106} See KRS § 355.9-403(2).
financing statements with a stated maturity date of the obligation secured of five years or less.\textsuperscript{107} These financing statements are effective until the maturity date plus sixty days.\textsuperscript{108} As one might anticipate, financing statements with maturity dates are few and far between. For this reason, the 1972 Amendments would eliminate the exception with the result that all financing statements would be effective for five years.\textsuperscript{109}

The present Code provides that upon the expiration of a financing statement (and absent the prior filing of a continuation statement) the filing lapses and the security interest becomes unperfected.\textsuperscript{110} Enactment of the 1972 Amendments would make it clear that a lapse will not result in nonperfection if the security interest is perfected without filing, a result that is implied in the present Code.\textsuperscript{111} This would protect a secured party who had taken possession of collateral (perhaps upon the debtor's default) which can be the subject of a possessory security interest such as goods or instruments.\textsuperscript{112} It also would save security interests that are automatically perfected such as a purchase money security interest in consumer goods.\textsuperscript{113}

A special problem, for which the present Code has no certain answer, arises when a financing statement expires during the course of bankruptcy or other insolvency proceedings.\textsuperscript{114} The cases do not agree on whether the secured party's perfected status at the commencement of the insolvency proceeding is frozen so that a timely continuation statement is not required for the security interest to remain perfected during the proceeding.\textsuperscript{115} The 1972 Amendments would provide the rule that if a filing expires during insolvency proceedings, the security interest

\textsuperscript{107} See id.

\textsuperscript{108} Id.

\textsuperscript{109} See UCC § 9-403(2) (1972); Final Report, supra note 6, at 243. The amendments would permit a longer effective period in the case of real estate mortgages that constitute fixture security interests and transmitting utilities. See UCC § 9-403(6) (1972).

\textsuperscript{110} KRS § 355.9-403(2).

\textsuperscript{111} See UCC § 9-403(2) (1972). This result is implied in KRS § 355.9-303(2).

\textsuperscript{112} See KRS § 355.9-305.

\textsuperscript{113} See KRS § 9-302(1)(d); UCC § 9-302(1)(d) (1972). The secured party might have filed to avoid being "cut off" under KRS § 355.9-307(5). See UCC § 9-307(2) (1972).

\textsuperscript{114} See KRS § 355.1-201(22) (definition of "insolvency proceedings").

\textsuperscript{115} See generally R. Henson, supra note 40, at 82. KRS § 355.9-403(3) provides for continuation statements.
remains perfected until sixty days after the proceeding is terminated.\textsuperscript{116}

The 1972 Amendments also expressly deal with the effect of a lapsed financing statement on the outcome of priority disputes, another topic about which the present Code is unclear.\textsuperscript{117} For example, suppose Secured Party (SP) perfects a security interest in one of Debtor's pieces of equipment by filing. Subsequently, Creditor (CR) obtains a judgment lien on the same equipment. Then SP's filing lapses and becomes unperfected because of the expiration of five years. SP clearly had priority over CR before the lapse under the present Code.\textsuperscript{118} After the lapse, the 1972 Amendments would deem SP to be unperfected against persons who became lien creditors before the lapse.\textsuperscript{119} CR also would prevail over SP if CR were a purchaser (which includes a secured party).\textsuperscript{120}

The proper way to avoid a lapse under the present Code is by filing a continuation statement.\textsuperscript{121} The 1972 Amendments add the requirement that a continuation statement signed by a person other than the secured party (such as an assignee) be accompanied by a written statement of assignment that meets specified requirements including the signature of the secured party of record.\textsuperscript{122}

The 1972 Amendments relating to termination statements present another instance in which the Kentucky General Assembly anticipated the ALI and NCCUSL. Under the present Code, the secured party is required to send the debtor a termination statement upon demand by the debtor.\textsuperscript{123} There is no obligation to file the statement. This provision is very similar to the language contained in the ALI and NCCUSL 1962 Official Text prior to the 1972 Amendments.\textsuperscript{124} However, the present Code

\textsuperscript{116} UCC § 9-403(2) (1972). See 1972 Amendments, supra note 6, at 241.

\textsuperscript{117} See Final Report, supra note 6, at 244-45.

\textsuperscript{118} KRS § 355.9-301(1)(b).

\textsuperscript{119} See UCC § 9-403(2) (1972).

\textsuperscript{120} See UCC § 9-403(2) (1972). "Purchaser" would include a person who acquires a security interest. See KRS § 355.1-201(32) to (33).

\textsuperscript{121} See KRS § 355.9-403(3).

\textsuperscript{122} See UCC § 9-403(3) (1972). Similar requirements are added for the release of collateral and termination statements. See UCC §§ 9-404, 9-406 (1972).

\textsuperscript{123} See KRS § 355.9-404(1).

\textsuperscript{124} See UCC § 9-404(1) (1962).
contains a nonuniform exception which leaves little of the uni-
form rule. In the absence of a demand for a termination state-
ment, and within fifteen days after the secured transaction has
terminated, the secured party must send a termination statement
to the county clerk for filing.\textsuperscript{125} Willful noncompliance with this
requirement can cost the secured party twenty-five dollars plus
the amount of any loss caused to the debtor.\textsuperscript{126} A 1972 Amend-
ment places a similar affirmative obligation on creditors claiming
security interests in consumer goods.\textsuperscript{127}

4. \textit{Administration}

The 1972 Amendments contain several provisions relevant to
the administrative details of operating a filing system. For ex-
ample, they would authorize county clerks to charge an extra
fee for filings not made on a standard form.\textsuperscript{128} Another amend-
ment would require clerks to annex financing statements to
continuation statements in order to preserve those financing
statements which have been given continued vitality.\textsuperscript{129}

F. \textit{Proceeds}

1. \textit{Creating and Perfecting Security Interests in Proceeds}

The present Code permits a secured party to claim a security
interest in "original collateral" (such as inventory) and the "pro-
ceeds" thereof (such as cash generated by the sale of the inven-
tory).\textsuperscript{130} Perhaps surprisingly, uncertainty exists under the present
statutory language as to whether it is necessary to expressly refer
to proceeds in a security agreement in order to have a proceeds
claim.\textsuperscript{131} The 1972 Amendments would resolve the question by
providing that, unless otherwise agreed, the security agreement

\textsuperscript{125} See KRS § 355.9-404(2). See Ford Motor Credit Co. v. Gibson, 566 S.W.2d 154 (Ky. Ct. App. 1977) (provision does not require notice of termination to debtor).
\textsuperscript{126} KRS § 355.9-404(2).
\textsuperscript{127} See UCC § 9-404(1) (1972). The 1972 Amendment provides for an arguably more realistic penalty of $100 plus damages. See id.
\textsuperscript{128} See UCC §§ 9-403(5), 9-404(3) (1972). Cf. KRS §§ 64.012, 355.9-403(5).
\textsuperscript{129} See UCC § 9-403(3) (1972).
\textsuperscript{130} See KRS § 355.9-306.
\textsuperscript{131} See Hawkland, \textit{The Proposed Amendments to Article 9 of the UCC Part II: Proceeds}, 77 Com. L.J. 12, 16 (1972) [hereinafter cited as Hawkland, \textit{Part II}]; \textit{Final Report}, \textit{supra} note 6, at 218. Compare KRS § 355.9-203(1)(b) with KRS § 355.9-306(2).
covers proceeds. This assumption that the parties intended the security interest to extend to proceeds is probably correct in the great majority of cases. For similar reasons, a cognate 1972 Amendment would eliminate the present UCC’s requirement that financing statements refer to proceeds if they are claimed by the secured creditor. Such claims are so routine that some commercial financing statement forms come with a preprinted proceeds designation.

Under the present Code, a proceeds claim may encompass whatever is received when original collateral or proceeds is sold, exchanged, collected or otherwise disposed of. This broad definition includes what might be called first generation proceeds (such as the cash or accounts resulting from the sale of business inventory that is original collateral) and second generation proceeds (such as a video cassette recorder purchased with the cash for personal use in the debtor’s home). Subsequent generations are also included within the definition. The 1972 Amendments would clarify this definition by specifying that insurance payable to the debtor or secured party by reason of loss or damage to the collateral is proceeds, an issue upon which the courts have split.

It is clear in light of this expansive definition of proceeds that third parties who search for UCC filings against a particular person may learn little when they discover a financing statement, whether or not it mentions “proceeds.” This problem is illustrated by the example in the immediately preceding paragraph. A file searcher can be expected to understand that cash or accounts often are first generation proceeds of inventory. But it

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132 See UCC § 9-203(3) (1972). Wise counsel still might insert a reference to proceeds to counter the argument that they were not intended to be included. There was some discussion of whether the 1972 Amendments’ automatic proceeds claim would run afoul of the Bankruptcy Act. See Hawkland, Part II, supra note 131, at 16. There is less reason for concern after passage of the Bankruptcy Reform Act of 1978. See 11 U.S.C. § 552(b) (1982).


134 See Final Report, supra note 6, at 219.

135 The account that arises when the right to payment is earned under a contract right is also included. See KRS § 355.9-306(1).

136 See Final Report, supra note 6, at 220. The present UCC limits the ability to actually recover proceeds both through its requirement that proceeds be “identifiable” and through its priority rules. See KRS §§ 355.9-306(2), .9-312(1).

is unlikely that someone deciding whether to make a loan against the video cassette recorder would realize that it is subject to a security interest taken by an earlier secured party in "inventory and proceeds."

A comparable problem results from the present Code's rule that a security interest in proceeds is continuously perfected if the interest in the original collateral was perfected by a filed financing statement covering the original collateral and also mentioning proceeds.138 Suppose that a security agreement and properly filed financing statement cover "inventory and proceeds" and that the debtor exchanges some of the inventory for a promissory note due in six months. The present Code arguably gives the secured party a perfected interest in the note as proceeds even though the Code very definitely specifies possession as the means for perfecting a security interest in notes as original collateral.139 This problem of inappropriate means of perfection also exists for proceeds that may be perfected by filing. Suppose that the inventory is located in Kentucky and that the debtor maintains computer records at its Ohio corporate headquarters relating to accounts generated by the sale of the inventory. The present Code's filing and choice of law rules indicate that the proper place to file for the inventory is in Kentucky, but that a filing for accounts as original collateral should be in Ohio.140 However, the proceeds provision seems to suggest that the Kentucky filing is sufficient for the accounts as proceeds.141 Many of the proceeds-related 1972 Amendments deal with these sorts of problems.

The 1972 Amendments would require a financing statement to be more descriptive when it is intended to cover second and subsequent generations of proceeds. This is accomplished in two steps. First, the amendments specify that money, checks, check-
ing accounts, and the like are "cash proceeds." Second, they provide that in order to perfect a security interest in proceeds acquired with cash proceeds, the financing statement must indicate the types of proceeds claimed. The rationale is that most file searchers understand that a financing statement reference to "proceeds" includes cash proceeds which typically result from the disposition of original collateral. However, there is less certainty concerning what may have been acquired if the cash proceeds were exchanged by the debtor for other assets. Thus, under the 1972 Amendments, a security interest in a home video cassette recorder acquired for the debtor’s personal use with cash proceeds from the sale of inventory will not be perfected unless the financing statement specifies that the proceeds claimed include consumer goods.

The 1972 Amendments would also make certain that the means for perfecting a security interest in proceeds is appropriate for the type of proceeds involved. Under these amendments (with two exceptions described below), a security interest in proceeds can be perfected only by the methods or under the circumstances permitted for original collateral of the same type. Thus, a security interest in a promissory note claimed as proceeds can be perfected only through possession; filing is not sufficient. If the proceeds consist of a type of collateral for which filing is appropriate, then the financing statement must be filed in the correct office for that type of property.

These 1972 Amendments may have the effect of requiring secured parties to give additional thought to the identity of the proceeds that they intend to claim in order to properly perfect. This is appropriate given the present Code’s strong policy of

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143 See UCC § 9-306(3)(a) (1972). The present UCC permits original collateral to be described by type in financing statements. See KRS § 355.9-402(1). Concerning the meaning of this provision and the cognate security agreement description, see, e.g., In re Cooley, 624 F.2d 55 (6th Cir. 1980).
144 See UCC § 9-306(3)(a) (1972); KRS § 355.9-109(1) (definition of consumer goods). The 1972 Amendments would not help the file searcher in unusual barter transactions where original collateral (such as inventory) is traded for noncash proceeds (such as a home video cassette recorder) without intermediary cash proceeds. See id.
145 UCC § 9-306(3) (1972). See also FINAL REPORT, supra note 6, at 213, 219.
146 UCC § 9-306(3)(a) (1972). See also FINAL REPORT, supra note 6, at 219.
placing third parties on notice. However, the amendments may not affect many secured parties for two reasons. First, a security interest in identifiable cash proceeds (often the most important type of proceeds) will be perfected so long as the security interest in the original collateral is perfected by a filed financing statement. Second, a secured party claiming proceeds will have a ten day grace period that begins to run upon the debtor's receipt of the proceeds. During this period, the security interest in proceeds will be temporarily perfected if it was perfected for the original collateral. The secured party would have continuous perfection as to the proceeds if any required additional filing or if possession were accomplished during this period.

2. Proceeds-Related Priority Rules

The present Code contains a curious priority-related anomaly. Suppose that SP1 takes and perfects a security interest in the debtor's "inventory and proceeds." Debtor then sells one item of inventory on credit to a buyer who executes chattel paper evidencing the buyer's monetary obligation and a security interest in the purchased goods. Another item of inventory is sold on credit to the same buyer who executes a negotiable note. The debtor then uses the chattel paper and note as collateral for a loan from SP2. SP1 claims the chattel paper and note as proceeds and SP2 claims the same assets as original collateral. Which secured party has priority?

The present Code awards the chattel paper to SP2 if SP2 took possession of the paper in the ordinary course of business.

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147 Cf. General Elec. Credit Corp. v. Fancher, 600 S.W.2d 42 (Ky. Ct. App. 1978) (Kentucky appellate courts have frequently emphasized the notice requirements of the Code).


149 UCC § 9-306(3)(c) (1972). KRS § 355.9-401(1) provides for a local filing in the county of the debtor's residence in many cases. This also may have the effect of reducing the instances in which a second filing is necessary to perfect a security interest in proceeds.


151 Chattel paper is defined at KRS § 355.9-105(1)(b): "Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper. . . .
and gave new value. It does not matter whether SP2 knew of SP1’s claim to the chattel paper. Surprisingly, this same knowledge would result in the note being awarded to SP1 under a different priority rule for instruments. The effect of these rules is to make chattel paper more negotiable than negotiable instruments, a result generally not contemplated by the present Code or demanded by commercial practice or policy. The 1972 Amendments would cure this anomaly by applying the same priority rule to both types of collateral and awarding priority in both to SP2.

The present Code is also unclear on the outcome of the dispute that results when one secured party claims accounts as the proceeds of inventory and another secured party claims the same accounts as original collateral. Suppose SP1 takes a properly perfected security interest in accounts. Then SP2 obtains a properly perfected purchase money security interest in inventory and proceeds. Does SP1, as the first to file for the accounts, take priority over SP2’s claim to accounts that are proceeds of the inventory? Or, does SP2’s special purchase money priority for the inventory (that would enable it to defeat a prior inventory financer) “carry-through” to the accounts? The 1972 Amendments would extend this purchase money priority in inventory only to identifiable cash proceeds received by

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152 See KRS § 355.9-308, which was recently applied in J.I. Case Co. v. Borg-Warner Acceptance Corp., 669 S.W.2d 543 (Ky. Ct. App. 1984).

153 See KRS § 355.9-308.

154 See KRS §§ 355.9-309, 3-302. (SP2 could not meet the requirements for holding in due course and, thus, could not achieve priority under these circumstances).

155 For example, a security interest in a negotiable instrument can be perfected only by possession (with two narrow exceptions), whereas a security interest in chattel paper may be perfected by filing. See KRS § 355.9-304(1). Concerning the policies underlying negotiability, see Weinberg, Commercial Paper in Economic Theory and Legal History, 70 Ky. L.J. 567 (1981-82).

156 See UCC § 9-308(b) (1972). The qualifying purchaser of an instrument might also be entitled to priority pursuant to KRS § 355.9-309. See note 154 supra and accompanying text. See generally FINAL REPORT, supra note 6, at 214.

157 This problem has received much attention in the commercial law literature and various approaches have been suggested. See generally R. HENSON, supra note 40, at § 6-5; D. LIEBSON & R. NOWKA, supra note 38, at 787-88.

158 See KRS § 355.9-312(5)(a).

159 See KRS § 355.9-312(3). A purchase money secured party is one that finances the debtor’s acquisition of the collateral. See KRS § 355.9-107.
the debtor on or before delivery of the inventory to a buyer. This new rule was arrived at after consideration of several alternatives and is based upon economic and commercial aspects of accounts receivable and inventory financing. It should be noted that under this amendment a secured party who properly files as to inventory and proceeds would take priority over another secured creditor who subsequently files as to accounts. Thus, a financer who files first for inventory and proceeds can be assured of priority over an accounts financer.

Although, under the 1972 Amendments, a purchase money priority in inventory has a "carry-through" limited to narrowly defined cash proceeds, other types of purchase money security interests would reach all proceeds. Thus, SP1, the accounts financer in the above example, would lose if SP2 had been secured in equipment and proceeds. The difference in result is based upon the smaller probability that noninventory will be sold or that the proceeds generated by such a sale would have been relied upon as collateral by the prior secured party.

3. Other Proceeds Clarifications

The 1972 Amendments would improve the present UCC's proceeds-related provisions in other respects. For example, the present Code provides that a secured party with a claim to proceeds is also entitled to recover the original collateral from one who purchases the collateral from the debtor. A 1972 Amendment removes any question that the secured party can follow the collateral into the hands of subsequent purchasers as well. The secured party will lose this right if the disposition

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160 See UCC § 9-312(3) (1972). Concerning "cash proceeds," see note 142 supra and accompanying text.
161 See UCC § 9-312(5)(a) (1972).
162 See 1972 AMENDMENTS, supra note 6, at 220; FINAL REPORT, supra note 6, at 225-26. It also is supported by the first-in-time principle. See Hawkland, Part II, supra note 131, at 20.
163 Priority in this case is not controlled by the purchase money priority rule for inventory. See UCC § 9-312(5)(a), (6) (1972).
164 See UCC § 9-312(4) (1972).
165 See 1972 AMENDMENTS, supra note 6, at 221.
166 See KRS § 355.9-306(2).
167 See UCC § 9-306(2) (1972).
of the collateral by the debtor or any purchaser was authorized by the secured party. The 1972 Amendments also are intended to improve the clarity of the present Code’s provisions applicable to proceeds claims in bankruptcy.

G. Priorities

The present Code generally validates security agreements: “Except as otherwise provided . . . a security agreement is effective according to its terms . . . against purchasers of the collateral and against creditors.” Various priority rules provide important exceptions to this general statement of validity. The present Code’s priority rules sometimes provide ambiguous answers. Some of these problem areas and the “cures” that would be provided by the 1972 Amendments have been discussed in this Article’s section on proceeds. Others are covered in this section.

1. Purchase Money Priority to Inventory

Suppose SP1 perfects by filing a security interest in “all of the debtor’s inventory of radios, TVs, stereos, and all other consumer appliances and electronics.” Debtor then asks SP2 to finance a new line of home computers. SP2, who may be the seller of the computers or a lender, can have priority over SP1 by complying with the present Code’s inventory purchase money priority rule. The rule requires, among other things, that SP2 give notice of his or her purchase money security interest to any secured party (such as SP1) who has filed a financing statement covering the relevant type of inventory and to any other person whose security interest is known to SP2. The notice must be received by the persons entitled before the debtor receives possession of the new computer inventory and must describe the

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168 See id. It should be noted that priority rules may protect the purchasers. See, e.g., KRS § 355.9-307.
169 Compare KRS § 355.9-306(4) with UCC § 9-306(4) (1972). No significant change in substance was intended. See Final Report, supra note 6, at 221.
170 KRS § 355.9-201.
171 See, e.g., KRS § 355.9-312(1).
172 See notes 151-69 supra and accompanying text.
174 See KRS § 355.9-312(3)(b).
new inventory by item or type. The rule enables SP2 to have priority and protects SP1 against making advances in reliance upon the new line of computers.

The present Code does not state how often this notice must be given. The 1972 Amendments would specify that the notice is good for five years based upon an analogy to the duration of financing statements. Thus SP2 could give one notice to SP1 that would be effective both for the computers and for a new line of microwave ovens financed by SP2 three years later.

The 1972 Amendments also would eliminate as superfluous SP2's duty to give notice to prior secured parties who are known to SP2 but who did not file financing statements. SP2 can defeat these prior parties as the first to file for the inventory without the need for a purchase money priority.

Under the 1972 Amendments, as under the present Code, the deadline for giving and receiving notice is the time at which the debtor receives possession of the goods. However, the present Code's inventory purchase money priority would be modified in some other ways. For example, the required notice to prior secured parties would have to be written.

2. The First-to-File and First-to-Perfect Rules

The present Code provides that between two non-purchase money secured parties, priority is determined in the order of filing if both are perfected by filing regardless of which security interest attached first and whether it attached before or after

175 See KRS § 355.9-312(3)(b), (c).
176 See UCC § 9-312(3)(c) (1972); FINAL REPORT, supra note 6, at 221.
177 See UCC § 9-312(3)(b) (1972).
178 See FINAL REPORT, supra note 6, at 222. There also was concern that the failure to give notice to prior but nonfiled secured parties might result in denial of the purchase money priority despite the giving of notice to prior filed secured parties. See id. The present Code's priority framework generally disregards notice or knowledge of prior claims as an outcome-determinative factor in resolving priority disputes. See, e.g., KRS § 355.9-312(5)(a).
179 No change in these requirements was intended. See D. BAKER, supra note 44, at 167-70.
180 See UCC § 9-312(3)(b) (1972). Of course, giving a written notice is a very good idea under the present UCC. Other modifications would clarify the relationship between KRS § 355.9-312(3) and KRS § 355.9-304(5). See UCC §§ 9-312(3)(b)(ii), 9-304(5)(a) (1972). See generally FINAL REPORT, supra note 6, at 222; R. HENSON, supra note 40, at 136-37.
This is the first-to-file rule. If one of the security interests is perfected by means other than filing, priority is determined by the order of perfection. This is the first-to-perfect rule. The 1972 Amendments would modify the statutory language of the two rules in order to deal with an inconsistency that may be best illustrated through an example.

Suppose SP1 files a financing statement describing certain collateral owned by debtor. The financing statement meets all the relevant formal requisites and is filed in the appropriate place. Before anything else happens, SP2 enters into a security agreement with debtor for the same collateral, gives value, and properly files a legally sufficient financing statement. Then SP1 enters into a security agreement with the debtor describing the collateral and gives value.

The present UCC’s first-to-file rule makes SP1 the victor in a priority dispute with SP2. It is irrelevant that SP2’s security interest was the first to attach or to be perfected. However, this outcome would be reversed if SP2 perfected by taking possession of the collateral instead of filing. This is because the latter case then is governed by the first-to-perfect rule.

The outcome in the latter case is inconsistent with the present Code’s notice filing system which expressly contemplates the prefiling of financing statements by creditors who wish to be assured of priority for an anticipated, but as yet unconsummated, extension of secured credit. SP2 was given constructive notice of such a possible transaction between SP1 and the debtor through SP1’s filing. This notice should have the same effect on SP2’s priority regardless of whether SP2 chooses to perfect by filing or by taking possession. The 1972 Amendments would repair this inconsistency and reverse the result in the latter case by unifying the first-to-file and first-to-perfect rules to create a

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181 See KRS § 355.9-312(5)(a).
182 See KRS § 355.9-312(5)(b).
183 See KRS § 355.9-312(5)(a).
184 See KRS § 355.9-312(5)(b).
185 See KRS §§ 355.9-402(1), .9-303(1).
single rule that awards priority to the first secured party to file or perfect.\textsuperscript{186}

3. \textit{Priority of Future Advances}

Inventory and accounts receivable financings typically provide for future extensions of credit as the debtor's collateral turns over and expands or contracts in value. Other types of financing arrangements also may provide for multiple advances. The present Code validates these financing patterns.\textsuperscript{187} However, it fails to address a number of priority-related issues that arise when a secured creditor who has made a future advance competes with some other person who also claims an interest in the collateral.

One cause of uncertainty in the present Code is its failure to distinguish between future advances that are optional at the discretion of the secured lender and future advances that are made pursuant to a contractual commitment. This distinction necessarily must be a function of the contract terms which bind or excuse the secured lender.\textsuperscript{188} The 1972 Amendments provide that "[a]n advance is made 'pursuant to commitment' if the secured party has bound himself to make it."\textsuperscript{189} The advance will be pursuant to commitment whether or not a subsequent event not within the lender's control has or may in the future

\textsuperscript{186} See UCC § 9-312(5)(a) (1972). Consider this additional instructive discussion of the unified rule:
There are two additional permutations of the case where the intervenor enters before the first party perfects and the two parties perfect by different methods. If A and B both made their advances prior to either any filing or any possession, then the first creditor either to file or to perfect by some other method would have priority under both the old and the new 9-312(5). Similarly, under both the old and new 9-312(5), if B took possession of the collateral and, before B made his advance, A intervened by simultaneously making an advance and filing, A's security interest would have priority over B's because A was the first to perfect. Since there is no difference in the results of these cases under old and new Article 9, the revision of 9-312(5) will affect the result only in situations like [the one discussed in the text of this article]. . . .
Coogan, \textit{supra} note 12, at 508-09 n.81.

\textsuperscript{187} See KRS § 355.9-204(5). \textit{Compare} UCC § 9-204(3) (1972). The 1972 Amendments add a definition for the phrase "pursuant to commitment." See notes 188-90 \textit{infra} and accompanying text.

\textsuperscript{188} See Coogan, \textit{supra} note 12, at 506-07.

\textsuperscript{189} UCC § 9-105(1)(k) (1972).
relieve the lender from his or her obligation to make the advance. Under this definition, an advance would be pursuant to commitment even though the contract provides that the lender will be excused if the debtor defaults (such as by failing to pay off prior loans) or if the value of the debtor's collateral is insufficient to secure the advance according to a specified debt to collateral ratio. The advance also would be pursuant to commitment if the lender makes it despite being excused by the occurrence of a contractual excuse. On the other hand, an advance would not be pursuant to commitment if the secured party reserves complete discretion regarding if and when the advance is made. The 1972 Amendments employ the definition of "pursuant to commitment" in some of the new rules dealing with the priority of future advances.

a. Secured Party v. Secured Party

Suppose that SP1 makes a loan to debtor and perfects by filing. Then SP2 makes a loan and perfects in the same collateral by filing. Finally, SP1 makes an advance pursuant to a future advance clause contained in the original security agreement. Assuming that the collateral is insufficient to satisfy both secured claims, does SP1 have priority over SP2 for both advances?

Under the present Code, SP1 clearly has priority for his first advance under the first-to-file rule. SP1 should have priority for the second advance under the same priority rule. Indeed, SP1 should have priority for the second loan even if it was pursuant to a new security agreement describing the same collateral employed in the first loan. The language of the present Code's rule is identical to that contained in the 1962 Official ALI and NCCUSL text which was thought to be so clear and supportive of these results that there was no reason to modify it in the 1972 Amendments. Unfortunately, a recent opinion of the Kentucky Court of Appeals indicates that SP2 would have

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190 See id.
191 See notes 192-212 infra and accompanying text.
192 See KRS § 355.9-312(5)(a).
193 It should make no difference whether the original debt was outstanding at the time of the future advance or whether SP1 and the debtor contemplated future advances when their security agreement was executed. See Final Report, supra note 6, at 226-27; Coogan, supra note 12, at 509.
priority in the new security agreement case. The criticism generated by this opinion is justified.

The correct answer to the priority dispute between SP1 and SP2 is less clear if the facts are modified so that SP2's perfection is by means other than filing, such as through possession of the collateral. Under these new facts, SP2 can argue that the issue is controlled by the present Code's first-to-perfect rule and SP2 can claim perfection before SP1 made and became perfected for the future advance. This argument is strengthened if the future advance clause gives SP1 discretion concerning the making of advances. In effect, this is an argument that SP1 has two security interests and that each is perfected independently. Conversely, SP1 will claim a single security interest of fluctuating size which became perfected when he or she made the initial loan and which was continuously perfected thereafter.

SP1 should have the better argument under the present Code. The 1972 Amendments remove any doubt concerning SP1's priority for both advances by providing that future advances made while a security interest is perfected by filing or possession have the same priority as the initial advance. SP1's initial advance has priority under the 1972 Amendments as the first to file or perfect. Thus, SP1's second advance has priority over SP2 because the first advance has priority.

This new rule facilitates financing transactions because secured parties who are the first to file or perfect can make subsequent advances without the need to reperfect each time. Subsequent secured parties should not be harmed by this result.

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196 See KRS § 355.9-312(5)(b).
197 See KRS § 355.9-303(2). Cf. note 204 infra and accompanying text.
198 See UCC § 9-312(7) (1972). This amendment also provides that if a commitment is made before or while the security interest is perfected, the security interest has the same priority with respect to advances made pursuant thereto. This amendment does not apply if the initial advance was perfected automatically without filing or possession. See id.; FINAL REPORT, supra note 6, at 227.
199 See UCC § 9-312(5)(a) (1972). See also note 186 supra and accompanying text.
200 See UCC § 9-312(7) (1972).
201 See Coogan, supra note 12, at 511.
because they are on constructive notice as a result of the earlier secured party's filing or possession of the collateral. Furthermore, a subsequent secured party may be able to obtain a purchase money priority.\textsuperscript{202}

b. \textit{Secured Party v. Judgment Creditor or Purchaser}

Suppose that SP makes a loan to debtor and perfects by filing against specified collateral owned by debtor. The security agreement provides SP with the option of making future advances. A judgment creditor (JC) then obtains a lien on the same assets. Finally, SP makes an optional advance to debtor. The present Code provides SP with priority over JC for the first advance.\textsuperscript{203} Although lacking a rule specifically applicable to this issue, the present Code can and should be interpreted to afford priority for the future advance.\textsuperscript{204}

The 1972 Amendments would provide a specific rule that awards priority to SP (1) if the advance was made before or within forty-five days after the lien came into existence; (2) if the advance was made without knowledge of the lien; or (3) if the advance was pursuant to a commitment made without knowledge of the lien.\textsuperscript{205} The forty-five day absolute priority was designed to mesh with the Federal Tax Lien Act\textsuperscript{206} which protects advances made within forty-five days after a tax lien is filed.\textsuperscript{207}

The 1972 Amendments' rule works a reasonable accommodation between secured parties and lien creditors. Although the latter persons often may lose under this rule, the debtor's working assets are enhanced by the advance, which may be of some advantage to lien creditors. Of course, lien creditors are free to levy upon assets that are not subject to prior security interests.

\textsuperscript{202} See notes 173-80 \textit{supra} and accompanying text.

\textsuperscript{203} See KRS § 355.9-301(1)(b).

\textsuperscript{204} Here again the conceptual question is whether there is a single perfected security interest of varying size or whether each advance creates a separate security interest. See note 196 \textit{supra} and accompanying text. The former conceptualization is correct. See \textit{generally} Friedlander v. Adelphi Mfg. Co., 5 UCC Rep. Serv. (Callaghan) 7 (N.Y. Sup. Ct. 1968) (optional future advance has priority over judgment lien); R. HENSON, \textit{supra} note 40, at § 5-14.

\textsuperscript{205} See UCC § 9-301(4) (1972).

\textsuperscript{206} See 26 U.S.C. § 6323(c)-(d) (1982).

These assets can usually be identified by checking for UCC filings and making certain that the secured party is not in possession. A lien creditor who does levy on encumbered assets can obtain some protection against future advances by giving notice of its lien to prior secured parties.\(^{208}\)

A problem similar to that described in the lien creditor example may arise if the intervening person is a purchaser. The present Code will protect the purchaser by entirely "cutting off" SP's security interest if the purchaser is a buyer in the ordinary course (BOC).\(^{209}\) It will also protect a non-BOC if the sale was authorized by the secured party.\(^{210}\) But will a non-BOC in an unauthorized sale be subject to a prior security interest to the extent that it secures future advances made after the purchase?\(^{211}\) The present Code does not answer this question.

The 1972 Amendments would provide that a non-BOC takes free of a security interest to the extent that it secures advances made after the secured party acquires knowledge of the purchase or made more than forty-five days after the purchase, whichever first occurs.\(^{212}\) The secured party also will be protected if the advance was pursuant to a commitment entered into without knowledge of the purchase and before the expiration of the forty-five day period. This rule, which is similar but not identical to the lien creditor rule, assumes that secured parties ought to become aware of sales of collateral by the debtor. The secured party has forty-five days of grace for making this discovery.

4. **Priority of Lien Creditors**

The 1972 Amendments would make a change in the present Code's rule governing priority disputes between secured parties and lien creditors that was not discussed in connection with future advances. The present UCC subordinates security interests to the rights of persons who become lien creditors without

\(^{208}\) See KRS § 355.9-301(4).

\(^{209}\) See KRS §§ 355.9-307(1), .1-201(9).

\(^{210}\) See KRS § 355.9-306(2). This provision has been applied in several Kentucky cases. See, e.g., J.I. Case Co. v. Borg-Warner Acceptance Corp., 669 S.W.2d 543.

\(^{211}\) The non-BOC will be subject to a prior perfected security interest to the extent that it secures advances made prior to the purchase. See KRS § 355.9-301(1)(c). The 1972 Amendments would not alter this outcome. See UCC § 9-301(1)(c) (1972).

\(^{212}\) See UCC § 9-307(3) (1972).
knowledge of the security interest and before the security interest is perfected. The lack of knowledge requirement is anomalous given that the presence or absence of knowledge generally is not outcome-determinative under other priority rules. For this reason, the 1972 Amendments would drop the requirement that the lien creditor lack knowledge. A lien creditor would have priority over an unperfected security interest even if it knew of the security interest prior to obtaining the lien. This 1972 Amendment should not have a detrimental effect on secured parties who already have ample incentive to perfect promptly under the present Code.

H. Default

The default-related 1972 Amendments have been characterized as nonrevolutionary. Several sections contained in Part Five of Article Nine of the present Code would not be affected, while others would be modified only slightly. A few of the amendments, relating to the compulsory disposition of collateral and foreclosure sales, are worthy of discussion.

The present Code authorizes compulsory disposition of collateral, sometimes called strict foreclosure. Under this procedure, the secured party may keep the collateral in full satisfaction of the secured indebtedness, thereby foregoing its rights to a deficiency judgment against the debtor. Special protection is afforded to consumer debtors who have substantial equity in the collateral. These debtors are entitled to a foreclosure proceeding. However, this protection can be waived after default.

213 See KRS § 355.9-301(1)(b).
214 See note 178 supra.
215 See UCC § 9-301(1)(b) (1972). The present Code's definition of lien creditor would be conformed to this modification. See UCC § 9-301(3) (1972).
216 See Coogan, supra note 12, at 518.
218 See KRS § 355.9-505. This remedy is frequently designated "strict foreclosure." See J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code § 26-8 (2d ed. 1980). However, it is different from the common law right of strict foreclosure, at least in Kentucky. See D. Liebson & R. Nowka, supra note 38, at 839.
219 KRS § 355.9-504(2) gives the secured party the right to a deficiency judgment when the collateral is disposed of in a foreclosure proceeding.
220 If the consumer debtor has paid 60% of the cash price or loan, he is entitled to a foreclosure proceeding. KRS § 355.9-505(1).
221 See id.
In addition, all debtors are entitled to written notice of a strict foreclosure proposal and have the right to object within thirty days from receipt of the notification. Such an objection results in a foreclosure sale of the collateral. However, the present Code does not expressly provide debtors with the right to waive notice.

The 1972 Amendments specify that these rights can be waived after the default. This rule (like the right to waive the special consumer protective provision described above) seems consistent with the original rationale for strict foreclosure: The secured party and debtor are frequently better-off without a foreclosure sale with its attendant costs and possibility of a deficiency judgment and therefore should be permitted to employ strict foreclosure when it seems mutually beneficial. Likewise, it may be mutually beneficial to dispense with the notice and thirty-day objection period in order to facilitate the use of strict foreclosure and deficiency avoidance.

A similar problem exists under the present Code’s rules relating to foreclosure sales. The present Code requires sending notice of a foreclosure sale to the debtor under many circumstances, but the Code is silent on whether this right to notice may be waived. The 1972 Amendments expressly permit a post default waiver by the debtor. After a waiver, the secured party would still be required to dispose of the collateral in a commercially reasonable manner.

The 1972 Amendments also seek to remedy other problems that have surfaced with respect to the present Code’s strict foreclosure provisions. The thirty-day objection period noted above begins to run upon the debtor’s receipt of the secured

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222 See KRS § 355.9-505(2).
223 See KRS § 355.9-505.
224 See UCC §§ 9-501(3), 9-505(2) (1972); Final Report, supra note 6, at 247.
225 See UCC § 9-505 comment 1 (1962).
226 See KRS § 355.9-504(3).
227 See id. Kentucky case law indicates that after default a debtor may waive his right to notice of sale or be estopped to claim damages by reason of the secured party’s failure to give it. Nelson v. Monarch Investment Plan of Henderson, Inc., 452 S.W.2d 375 (Ky. Ct. App. 1970).
party's strict foreclosure proposal. As a result, the actual waiting period may exceed thirty days. The wise secured party should obtain a postal return-receipt or other evidence demonstrating the debtor's receipt. The secured party's situation is further complicated by the present UCC's requirement that notice also be sent (except in the case of consumer goods) to any other secured party who has duly filed a financing statement against the collateral in question or who is otherwise known by the secured party to have a security interest. These persons also have the right to object within thirty days of receipt. Thus, the secured party cannot retain the collateral pursuant to its strict foreclosure proposal until thirty days after the receipt of a notice by the last person entitled to it.

The present Code's strict foreclosure rules are also unclear on when the thirty-day period ends, merely stating that the objection must be "within thirty days" from the receipt of the notice. Because it is possible that an objection posted on the thirtieth day may be timely, a careful secured party could feel compelled to wait several additional days.

All this ambiguity may cause the secured party to wait forty or more days. This can be longer than would be required to sell the collateral in a foreclosure sale. To make strict foreclosure more expeditious, the 1972 Amendments would reduce the waiting period to twenty-one days running from the sending of the strict foreclosure proposal. In addition, objections must be received by the secured party during the twenty-one day period in order to require a foreclosure sale.

The 1972 Amendments also place limits on the secured parties who are entitled to a strict foreclosure notice. As mentioned above, under the present Code, notice must be sent to all secured parties who have duly filed a financing statement or who are

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230 KRS § 355.9-505(2).
231 See id.
232 See id.
233 See id.
235 See UCC § 9-505(2) (1972). The meaning of "send" includes depositing in the mail with a proper address and postage provided. See KRS § 355.1-201(38).
236 See UCC § 9-505(2) (1972).
known to the secured party who is proposing strict foreclosure. This means that a prudent secured party who wishes to give notice must search the filing records and also its own records and memory in order to identify any person who may have claimed a security interest at some time. Of course, such claims, which can be informal or verbal, may never have been recorded or may have been forgotten. This burden may not be justified. The existence of other secured claimants is probably the exception rather than the rule. Moreover, in the unusual case where there are multiple secured parties, the debtor’s equity in the collateral frequently is sufficient to satisfy only the secured party proposing strict foreclosure. This secured party is virtually always senior. These considerations underlie the 1972 Amendments which would require notice only to secured parties who have made written claims of interests in the collateral prior to the sending of a strict foreclosure proposal to the debtor (or before the debtor makes a postdefault waiver of this notice).

Returning to the present Code’s foreclosure by sale requirements, the same rather open-ended group of secured parties (those that have duly filed plus those who are known to the foreclosing creditor) are entitled to notice of a foreclosure sale. This notice requirement would be reduced by enactment of the 1972 Amendments in the same fashion and for the same reasons that limits would be added in the strict foreclosure context.

I. Fixtures and Other Collateral Associated With Real Estate

Article Nine of the present UCC (which is identical to the ALI and NCCUSL 1962 Official Text) was designed chiefly to govern the creation, perfection and enforcement of security in-

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237 See KRS § 355.9-505(2).
238 See Final Report, supra note 6, at 248.
239 See id.
240 See Davenport, supra note 234, at 289 n.82.1.
241 See UCC § 9-505(2) (1972). This amendment also eliminates the present Code’s rule that secured parties who are not entitled to notice may “[object] in writing thirty days after the secured party obtains possession” and force disposition under KRS § 355.9-504. See KRS § 355.9-505(2).
242 See KRS § 355.9-504(3). This notice requirement is inapplicable in the case of consumer goods. Id.
243 See UCC § 9-504(3) (1972). See also 1972 Amendments, supra note 6, at 253.
terests in personal property.\textsuperscript{244} It "does not apply . . . to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder."\textsuperscript{245} However, the present Code does regulate conflicts between chattel financers and real estate claimants relating to various categories of collateral associated with real property.\textsuperscript{246}

The most significant and most controversial present Code provision governing the relationship between personal property lenders and real property owners or encumbrancers is section 9-313, titled "Priority of Security Interests in Fixtures."\textsuperscript{247} This provision substantially changed the relative rights and priorities of competing real property encumbrancers and secured chattel lenders.\textsuperscript{248} The provision also introduced additional confusion and uncertainty into the law pertaining to fixtures.\textsuperscript{249} The widespread dissatisfaction with section 9-313 was a primary reason for the establishment of the Review Committee to analyze the 1962 Official Text of Article Nine and offer proposed improvements.\textsuperscript{250}

The 1972 Amendments to Article Nine address the significant concerns regarding fixture conflicts with a complete overhaul of section 9-313 and modifications to related filing provisions.\textsuperscript{251} The result is a clearer, fairer and more comprehensive system of rules governing perfection of security interests in fixtures and priority conflicts between secured lenders and real estate claimants.\textsuperscript{252}

\textsuperscript{244} See KRS § 355.9-102.
\textsuperscript{245} KRS § 355.9-104(j).
\textsuperscript{246} See KRS §§ 355.9-313, .9-401.
\textsuperscript{247} See KRS § 355.9-313.
\textsuperscript{248} Compare \textit{Uniform Conditional Sales Act} § 7 (act repealed 1952) (real estate purchaser or lender to such purchaser was protected from secured chattel lenders who had not filed their security interests in the office where the deed of such real estate was recorded) \textit{with} KRS § 355.9-313 (unfiled secured chattel lender could have priority over an earlier recorded real estate mortgage).
\textsuperscript{250} Carlson, \textit{supra} note 249, at 382.
\textsuperscript{251} See UCC §§ 9-313 app., 9-401 to 9-403 app. (1972).
\textsuperscript{252} See generally \textit{Final Report, supra} note 6, at ix (aim of 1972 Amendments was to solve problems generated by Article Nine).
The rationale supporting the wholesale revamping of section 9-313 in the 1972 Amendments is best understood in the context of the specific concerns raised by its much-criticized predecessor—the present KRS section 355.9-313—and related sections.

1. Security Interests in Fixtures

a. Definitional Issues

i. Fixtures Under Kentucky Law

The classification "fixture" denotes a category of property occupying the troublesome middle ground between reality and personality. The Kentucky Court of Appeals has stated that goods which have been properly affixed to reality as "permanent fixture[s] . . . [become] a part or parcel of the real estate . . . and [give] the owner of the soil the same right to [the fixtures] as the soil itself." To a seller of furnaces, lights, appliances, or other goods typically incorporated in a home or used to improve real property, the characterization of goods as fixtures raises serious concerns. If the seller retains a security interest in the merchandise as collateral for payment of the purchase price, how can the seller be sure the "affixed" goods may be recovered if his or her buyer defaults and the holder of a mortgage on the real estate claims priority as to the goods?

For many decades the Kentucky courts resolved such conflicts by determining whether the article "was in fact so annexed

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253 Prof. E.H. Warren has gone so far as to define "fixture" as "realty with a chattel past and fear of a chattel future." See Ayer, supra note 25, at 944 (quoting Professor Warren).

254 Proper affixation is deduced from the following tests: "(1) Annexation to reality, either actual or constructive; (2) adoption or application to the use or purpose to which that part of the reality to which it is connected is appropriated; and (3) intention to make the article a permanent accession to the freehold." First State Bank of Eubank v. Crab Orchard Banking Co., 75 S.W.2d 517, 518 (Ky. 1934). See generally D. LEmsoN & R. NowiKA, supra note 38, at 795 (discussing these tests).

255 Bank of Shelbyville v. Hartford, 104 S.W.2d 217, 218 (Ky. 1937).

256 Compare Morrow Mfg. Co. v. Race Creek Coal Co., 2 S.W.2d 662 (Ky. 1928) (chattel mortgage of conditional vendor of coal-shaking screen installed in coal mine held inferior to prior mortgage on the real estate based upon conclusion that the screen was an "immovable fixture") with Gas & Electric Shop, Inc. v. Corey-Scheffel Lumber Co., 13 S.W.2d 1009 (Ky. 1929) (contrary result obtained where collateral was kitchen appliance deemed not "attached to the freehold").
to the realty that it could not be removed without injury to the freehold. If that question was answered affirmatively, the real estate mortgagor’s interest in the “fixture” would prevail. Later, more sophisticated analyses developed to delineate the “permanent fixture” boundary.

ii. Present Code Treatment of Security Interests in Fixtures

The Kentucky legislature’s adoption of Article Nine of the UCC dramatically altered the landscape of fixture conflicts. However, the present Code does not venture a new or comprehensive definition of “fixtures.” Rather, it defers the matter to “the law of this state other than this Act.” The present UCC does exclude from coverage goods which have become an integral part of the structure, such as “lumber, bricks, tile, cement, glass, metal work and the like.” While structural materials might qualify as fixtures under common law tests, their incorporation into the very fabric of the realty renders them inappropriate subjects for chattel financing. Having thus limited the class of real estate-related goods reachable by an Article Nine security interest to “nonstructural” fixtures, the

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257 See 75 S.W.2d at 517.
258 Id. at 517-18.
259 In Tarter v. Turpin, 291 S.W.2d 547 (Ky. 1956), the Kentucky Court of Appeals stated:

In Doll v. Guthrie, . . . the general rule is laid down that in determining whether an article is a permanent fixture three tests are applied: first, annexation to realty, either actual or constructive; second, adaptation or application to the use or purpose that the part of the realty to which it is connected is appropriated; and, third, the intention of the parties to make the article a permanent accession to the freehold with title to the article in the one owning the freehold. This court has further said, and it is the general rule, that the controlling factor is the intention of the parties.

Id. at 548. In at least one case the Kentucky Supreme Court indicated that there may be “fixtures” which are not a part of the freehold. See Gas & Elec. Shop, Inc. v. Corey-Scheffel Lumber Co., 13 S.W.2d at 1010. To that extent, there may be a common law distinction between a “fixture” and a “permanent fixture.”

260 See notes 247-49 supra and accompanying text.
261 See KRS § 355.9-313(1).
262 Id.
263 See id.
264 In such cases, the rights of a seller of material may be protected through a conventional real estate mortgage or by the filing of a mechanic’s lien on the property. See KRS §§ 376.010, 382.110. See generally D. Liebson & R. Nowka, supra note 38, at 795-96 (exemplifying materials which cannot be secured by a chattel security interest).
present Code goes on to provide that an Article Nine secured lender deemed to have priority over competing security interests may, upon debtor default, remove his or her fixture collateral from the real estate.\(^{265}\) Although material injury to the freehold might theoretically result, the removing party may be liable to real property claimants (other than the debtor) for physical injuries to the property.\(^{266}\) In situations where anticipated repair costs approximate the value of the collateral, a chattel financer may elect not to remove his or her collateral from the premises.\(^{267}\)

### iii. Effect of the 1972 Amendments

The foregoing provisions have not been changed substantially by the 1972 Amendments.\(^{268}\) However, the proposed statutory language is much more straightforward than present Code provisions. Section 9-313 of the 1972 Amendments begins with a general definition of "fixtures": "Goods are ‘fixtures’ when they become so related to particular real estate that an interest in them arises under real estate law. . . ."\(^{269}\)

The new definition of "fixtures," like the common law definition, technically incorporates goods which are integrally incorporated in the real estate.\(^{270}\) However, the amended provision continues to exclude "ordinary building materials incorporated into an improvement on land" from the coverage of Article Nine.\(^{271}\)

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\(^{265}\) See KRS § 355.9-313(5).

\(^{266}\) Id. However, he is not liable for "any diminution in value of the real estate caused by the absence of the goods removed or by any necessity for replacing them."

\(^{267}\) Id. However, he is not liable for "any diminution in value of the real estate caused by the absence of the goods removed or by any necessity for replacing them."

\(^{268}\) See generally Hawkland, Part III, supra note 249, at 44-45.

\(^{269}\) See generally Hawkland, Part III, supra note 249, at 44-45.

\(^{270}\) See UCC § 9-313 (1972).

\(^{271}\) See UCC § 9-313(2) (1972).
The official comment to the amended section makes clear that although an Article Nine security interest may not exist in ordinary building materials incorporated into realty, this is without prejudice to any rights a secured party may have against a debtor or other party for wrongful incorporation of the collateral.272

The 1972 Amendments also retain the substance of the present Code provision expressing the secured party’s right to remove fixture collateral upon debtor default even though some injury to the real property might result.273

The definitional and explanatory language set forth in the 1972 Amendments and related comments offers a clearer, more comprehensive view of the scope of section 9-313 and its relationship to the common law of fixtures than does the present Code.274 However, the basic scope of section 9-313 has not changed.

On the other hand, considerable confusion and controversy has been generated by present UCC provisions relating to (1) perfection of security interests in fixtures and (2) priorities between Article Nine security interests in fixtures and real estate interests.275 This prompted a complete overhaul of the pertinent present Code provisions in the 1972 Amendments.276

272 See UCC § 9-313 comment 2 (1972). The official comment further explains the tripartite classification of property associated with real estate which forms the conceptual foundation of § 9-313. Goods which “retain their chattel character entirely” and which do not give rise to real estate interests (as, for example, a typewriter or portable personal computer) do not fall within the scope of § 9-313 but are generally regulated by other Code provisions governing security interests and priorities. Goods which have become “real estate” for all practical purposes (ordinary building materials incorporated in improvements to realty such as gypsum board or masonry) are not within the scope of § 9-313 or of Article Nine generally. A third, “intermediate” class of goods “which has become real estate for certain purposes, but as to which chattel financing may be preserved” is that class of “fixtures” which is the subject of § 9-313. See UCC § 9-313 comment 3 (1972).


274 See generally Final Report, supra note 6, at ix (aim of 1972 Amendments was to solve problems generated by Article Nine).

275 See generally Carlson, supra note 249, at 381-82 (real estate bar found UCC § 9-313 highly controversial); Coogan, supra note 12, at 483-505 (both real estate owners or occupants who desired non-real estate mortgage financing and present or future realty owners were unhappy with the UCC § 9-313); Hawkland, Part III, supra note 249, at 45-50 (real estate financers confused and upset with the drafting of UCC § 9-313).

276 See Carlson, supra note 249, at 382; Hawkland, Part III, supra note 249, at 45.
b. **Fixture Filing and Perfection Issues**

   i. **Present Code Provisions**

   The present Code gives little guidance to those who would attempt to perfect a security interest in goods which are or may be fixtures. Kentucky’s version of Article Nine provides that a "filing is required for a fixture under KRS 355.9-313." It also states that to perfect a security interest in goods "which at the time the security interest attaches are or are to become fixtures," a secured party must file "in the office where a mortgage on the real estate concerned would be filed or recorded."278

   Does this mean a filing must be made in the real estate records? The present Code fails to provide an explicit answer. The inference of the statutory language and of the official comment is that a filing in the real estate records is expected.279 Curiously, Article Nine provisions regulating the duties of filing officers are devoted exclusively to chattel filings and offer no guidance to officials and others as to how a fixture financing statement is to be filed and indexed in the real estate records.280

   Assuming the "fixture filing" must be made in the real estate records, what form is it to take? Is it sufficient for a filing party to comply with the requirements set forth in Article Nine for standard chattel financing statements?281 If so, how is a real estate encumbrancer or other party searching the real estate files to locate the filing?

   The present Code makes no special provision for fixture filing statements other than to require "a description of the real estate concerned."282 There is no requirement that property be defined by "metes and bounds" or by any other technical description which might be required in the recording of a standard mortgage on real estate.283

   Likewise, the inclusion of the name of the record owner of the property is not required where that person is other than the

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277 KRS § 355.9-302(1)(d).
278 KRS § 355.9-401(1)(b). See notes 94-95 supra and accompanying text.
279 KRS § 355.9-401(1)(b). See also 1962 OFFICIAL TEXT, supra note 4, at § 9-401 comment 2.
280 See KRS § 355.9-403.
281 See KRS § 355.9-402.
282 KRS § 355.9-402(1).
283 See 1962 OFFICIAL TEXT, supra note 4, at § 9-402 comment 1.
debtor.\(^{284}\) This may create problems for a prospective purchaser or mortgagor of rental property. Assume O owns Greenacre and L, occupying Greenacre under a short term lease, installs light fixtures subject to Seller SP’s security interest. Because “fixture debtor” L’s name does not appear in the chain of title, unless O’s name appears on SP’s fixture filing the security interest may not be revealed to a real estate searcher checking O’s title.\(^{285}\)

Concerns regarding the uncertainties and ambiguities of Code provisions relating to fixture filing spurred a wide variety of disparate responses aimed at ensuring the compatibility of the Article Nine filing provisions with existing real estate recording systems.\(^{286}\) Some states revised the UCC filing requirements to require inclusion of the name of the record owner of the related real estate on fixture financing statements; other states went to the extreme of requiring a complete legal description of the land in the fixture filing.\(^{287}\)

ii. *Effect of the 1972 Amendments*

The 1972 Amendments eliminate the uncertainties inherent in existing statutory language. “Fixture filing” is now specifically defined.\(^{288}\) Its special formal requisites include: (1) a statement on the face of the financing statement that it is to be filed in the real estate records, (2) a description of the real estate, and (3) inclusion of the name of a record owner if the debtor does not hold an interest of record.\(^{289}\) States are allowed the option of requiring that the financing statement contain a full-blown description of the real estate comparable in all respects to that which the law would require in connection with a recorded mortgage on the real estate.\(^{290}\) A related subsection specifically provides that a real estate mortgage may be effective as a fixture filing if it contains a description of the affixed goods and meets certain other requirements.\(^{291}\)

\(^{284}\) See KRS § 355.9-402.

\(^{285}\) See generally Coogan, *supra* note 12, at 490-91 (1972 Amendments to Article Nine enable a real estate searcher to locate a fixture debtor).

\(^{286}\) See *id*.

\(^{287}\) *Id*.


\(^{289}\) See UCC § 9-402(5) (1972).

\(^{290}\) See *id*.

\(^{291}\) See UCC § 9-402(6) (1972).
The 1972 Amendments instruct the filing officer to index "fixture filings" in the real estate records. Where the debtor is not a record owner, the financing statement must be indexed under the name of a record owner as well as under that of the debtor.

iii. Perfection of Security Interests by Fixture Filing

Thus the 1972 Amendments clarify Code requirements governing fixture filing. The next question is whether a fixture filing is in all cases necessary or desirable to protect a given security interest associated with realty. For example, consider the case in which Seller SP retains a security interest in an item of factory machinery which he or she sells to A for installation and use in the latter’s plant. If SP is unsure whether the law will deem the installed machinery to be a "fixture" or a "chattel," SP may elect to file both a conventional UCC financing statement in the chattel records and a fixture filing in the real estate records. On the other hand, SP may conclude that the cost of having a fixture filing prepared is excessive in comparison to the protection gained (particularly if a technical legal description of the land is required on the financing statement). In the latter case, could SP derive any protection from the filing of a simple chattel financing statement if his or her collateral is deemed to be a fixture?

Under the present Code, the best answer appears to be that a filing in the personal property records as to property later found to be a fixture provides no protection whatever to the secured party. For example, assume that SP files a personal property financing statement in the UCC records of the appropriate county clerk’s office on the assumption that the collateral is and will remain "equipment." If it turns out that SP was mistaken and that the collateral is connected to real property in such a manner as to be deemed a "fixture," SP’s security interest will be unperfected and vulnerable to subsequent encumbrances.

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292 See UCC § 9-403(7) (1972).
293 Id.
294 See Coogan, supra note 12, at 490-91.
295 J. White & R. Summers, supra note 218, at 1057.
296 See generally KRS §§ 355.9-109(2), 9-401(1)(c) (instructions as to filing location). See notes 94-95 supra and accompanying text.
on the related real estate as well as to perfected chattel security interests and judicial liens.\textsuperscript{297} The last category of competitors includes the "lien creditor par excellence," the trustee in bankruptcy.\textsuperscript{298}

By recognizing certain instances in which priority may be gained and maintained by means of perfection other than fixture filing, the 1972 Amendments have addressed the practical needs of secured sellers of, and lenders against, goods which are or may become fixtures.\textsuperscript{299} These instances include situations in which the fixture collateral is particularly susceptible to characterization as a nonfixture (i.e., consumer goods or equipment) and conflicts involving judicial lienors of real estate (chiefly the bankruptcy trustee).\textsuperscript{300} However, these issues are best explored in the context of concerns regarding priorities of interests in fixtures.

c. Priority Concerns


Central to the present Code fixtures provisions and to Article Nine generally is the setting of priorities of secured interests and other interests in property. Because Article Nine deals primarily with priorities in personal property, it came as a great surprise to real estate lenders to discover that their rights were affected—in some cases dramatically—by the fixtures provisions of the present UCC.\textsuperscript{301}

Of particular concern to many real estate financers was the section of the present Code providing that where an Article Nine security interest in goods attaches prior to affixation of the goods

\textsuperscript{297} See KRS §§ 355.9-313, .9-301.
\textsuperscript{298} See KRS § 355.9-301(3). The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2597 (1978) and the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, H.R. 5174, 98th Cong. 2d Sess. (1984), amended federal bankruptcy law to clarify the status of a bankruptcy trustee vis-a-vis fixtures associated with the bankrupt's real property. 11 U.S.C.A. § 544(a)(3) (West 1979) gives the trustee in bankruptcy the rights of "a bona fide purchaser of real property from the debtor." However, fixtures are expressly excepted from the scope of this provision and it is clear that the trustee's rights as to fixture collateral are to be limited to those of a hypothetical creditor with a judgment lien.
\textsuperscript{299} See UCC § 9-313(3), (4) (1972).
\textsuperscript{300} See id.
\textsuperscript{301} Hawkland, Part III, supra note 249, at 45.
to realty, that interest shall have priority over all prior claims in the related realty.302 Under this provision, a seller creating a security interest in goods before they are affixed to real estate has priority over preexisting mortgages on the realty. This would be the case even if the seller had not filed a fixture filing as to the collateral and the collateral could not be removed without material injury to the real estate.303 Where the security interest attaches after the goods are affixed, the priorities are reversed.304

The rationale behind these provisions is that a real estate mortgagee could not be said to have relied upon the value of goods which were subsequently affixed in place.305 Moreover, to give the real estate mortgagee priority over a financer of fixture improvements to the realty would allow the former to reap a windfall at the expense of the latter. Such a result would discourage chattel financers of fixture-improvements.306

The remaining priority rule in the present Code applies a "race/notice" scheme to determine priorities among fixture secured parties and "subsequent" real estate interests.307 That is, if the secured party perfects first or if the opposing parties act with knowledge of his or her security interest, the secured party achieves priority over "subsequent" real estate purchasers and judicial lien creditors and over prior encumbrancers who subsequently make advances.308

The present Code’s priority system has received severe criticism from chattel and real estate financers on numerous grounds. First, real estate lenders were particularly concerned about the potential impact of a rule which allows even unperfected chattel interests in fixtures to have priority over prior real estate mort-

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302 KRS § 355.9-313(2).
303 See also text accompanying notes 265-67 supra (examining when a secured lender might remove his fixed collateral).
304 KRS § 355.9-313(3).
305 Carlson, supra note 249, at 386.
306 Id.
307 See KRS § 355.9-313(4).
308 See id. The use of the modifier "subsequent" in KRS § 355.9-313(4) is ambiguous. It is unclear whether the drafters were referring to real estate encumbrances which came into being subsequent to attachment of the conflicting security interest or, rather, subsequent to affixation of the goods. However, the implication of comment 4 to the 1962 Official Text is that "subsequent" is intended to mean "post affixation." See D. Leibson & R. Nowka, supra note 38, at 796-98.
gages and encumbrances. The most serious grievance may have been expressed on behalf of construction mortgagees. These lenders typically execute and record their real property security interests prior to the start of construction. Hence, they fall under the rules governing prior encumbrancers. However, a construction mortgagee usually puts additional funds into an improvement to realty as it progresses and therefore does not fit comfortably within the rationale favoring chattel security interests attached to goods prior to affixation over prior real estate encumbrances.

Chattel financers also complained about the present Code's fixtures provisions. Despite being generally able to prevail against prior encumbrancers without regard to perfection, the lender against goods which are to become fixtures must still worry about subsequent interests, such as that of the bankruptcy trustee. As previously discussed, problems with classifying goods as "fixtures" or "nonfixtures" and economic considerations often cause a chattel financer to forego a fixture filing and rely upon the protection afforded by the filing of conventional chattel financing statements. Unfortunately such measures offer no protection against a subsequent interest such as the lien of a bankruptcy trustee if the collateral is determined to be a "fixture."

Moreover, once the chattel security interest is avoided by the trustee, the latter is allowed to "preserve" the interest for the benefit of its estate. To the extent that the avoided chattel security interest was entitled to priority over preexisting real estate encumbrances, the trustee may assert the avoided interest against such real estate encumbrancers (even if the trustee could not avoid the real estate encumbrance by any other means).

These and other concerns motivated the Article Nine Review Committee to propose a new and different scheme of priority

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309 Cf. pre-Code cases cited in note 256 supra.
310 See Hawkland, Part III, supra note 249, at 48.
311 See, e.g., Coogan, supra note 12, at 488-89.
312 See Hawkland, Part III, supra note 249, at 48.
313 See text accompanying notes 294-300 supra.
314 See id.
316 See note 315 supra.
rules governing interests in fixtures.\(^{317}\) The 1972 Amendments to the fixtures priority rules explicitly provide that personal property security interests in real-estate-related collateral are subordinate to conflicting realty interests covering the same collateral unless the Code provides otherwise.\(^{318}\)

### ii. Effect of the 1972 Amendments

The main priority rule of the amended fixtures section is based upon the same "race" concept applied generally to priorities under the present Code and nonfixture 1972 Amendments.\(^{319}\)

Thus, to have priority, a fixture financer must make a fixture filing before a conflicting real estate interest is of record.\(^{320}\) This rule prevents "surprise and deception" to real estate interests and redresses the balance between real and personal property financial interests. It also affords real estate encumbrancers additional protection from assaults by bankruptcy trustees.\(^{321}\)

The principal exception to this priority rule involves purchase money security interests in fixtures.\(^{322}\) Provided the security interest is perfected by a fixture filing before the goods are affixed or within ten days thereafter, such interests enjoy priority over earlier-recorded real estate encumbrances.\(^{323}\) Since most Article Nine security interests in fixtures are of the purchase money type, this exception is particularly important.\(^{324}\) The perfection requirement helps to shield the prior encumbrancer's interest from the bankruptcy trustee.\(^{325}\) The ten-day grace period for filing is analogous to the provisions in the 1972 Amendments which regulate purchase money security interests in the context of conventional chattel financing.\(^{326}\)

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\(^{317}\) For a general discussion of other interpretational problems associated with the present § 9-313, see Carlson, *supra* note 249, at 390-94. See also *Final Report, supra* note 6, at 197-205 (discussing the topic of fixtures).

\(^{318}\) See UCC § 9-313(7) (1972).

\(^{319}\) See UCC §§ 9-313(4)(b), 9-301, 9-312 (1972). See also text accompanying notes 181-82 *supra*.

\(^{320}\) See UCC § 9-313(4)(b) (1972).

\(^{321}\) See text accompanying notes 315-16 *supra*.

\(^{322}\) See UCC § 9-313(4)(a) (1972).

\(^{323}\) See id.

\(^{324}\) See Coogan, *supra* note 12, at 494.

\(^{325}\) See text accompanying notes 315-16 *supra*.

\(^{326}\) See UCC § 9-312(4) (1972). See also text accompanying notes 173-80 *supra*. KRS §§ 355.9-312(4), .9-301(2) contain nonuniform 20-day grace periods.
The Review Committee recognized that the purchase money priority presented a "difficult problem" when the competing encumbrancer was a construction mortgagee. The construction mortgagee finances improvements to realty and makes periodic advances in reliance upon that real property. Undoubtedly those advances frequently assist in funding the purchase of goods which are subsequently affixed to the realty. Thus, the 1972 Amendments include a special rule granting a construction mortgagee priority over Article Nine interests in cases where (1) his or her mortgage is recorded before the goods are affixed and (2) the goods are affixed during the course of construction. This "superpriority" during the construction period even defeats the claims of a duly-perfected purchase money lender.

The drafters of the 1972 Amendments have also addressed the need of chattel security lenders for protective measures short of fixture filing. The 1972 Amendments make it clear that fixture collateral is subject to the general rule that a purchase money security interest in consumer goods is perfected without filing and is therefore effective under Article Nine against lien creditors and the trustee in bankruptcy. In those cases involving conflicts between two perfected chattel security interests in a fixture, the matter will likely be resolved under the general Article Nine priority provisions and not section 9-313.

Moreover, the revised section 9-313 describes two situations in which a security interest "perfected by any method permitted by [Article Nine]" takes priority over conflicting real estate encumbrancers. Security interests in fixtures which are "[1] readily removable factory or office machines or [2] readily removable replacements of domestic appliances which are consumer goods" may be perfected by either a chattel filing or a

327 See Final Report, supra note 6, at 203.
328 See id.
329 See id.
331 See UCC §§ 9-302(1)(d), 9-313(4)(c), (d) (1972).
332 See UCC § 9-302(1)(d) (1972); Final Report, supra note 6, at 204. See also note 383 infra and accompanying text.
333 See notes 108-202 supra and accompanying text.
335 See UCC § 9-313(4)(c) (1972).
fixture filing (or perfected automatically in the case of a purchase money security interest in consumer goods), so long as perfection predates affixation of the goods.\textsuperscript{336} As the official comment explains, the rule "was made necessary by the confusions of the law as to whether certain machinery and appliances become fixtures."\textsuperscript{337}

Thus, if a secured party can demonstrate that the collateral securing his or her debt is "readily removable factory or office machines" or "replacements of domestic appliances which are consumer goods,"\textsuperscript{338} the secured party may perfect by means short of a full-blown fixture filing and may even be accorded superiority over construction mortgages.\textsuperscript{339} However, the section introduces a new subcategory of fixtures and raises new definitional issues. Consider the example of Seller A's security interest in an item of factory equipment sold to B for use in B's plant. Presumably if the equipment is mechanical it is "machinery." However, if the equipment is mounted on casters or is relatively portable, it may not qualify as a "fixture" at all and therefore may be entirely outside the scope of section 9-313. On the other hand, if the machine is seemingly a "fixture" but is bolted to the floor or wired into the building's electrical system, is it "readily removable"?\textsuperscript{340} In the latter case uncertainty may dictate that, where possible, the secured party file financing statements in both the chattel and the real estate records.\textsuperscript{341}

Another provision of the amended section 9-313 addresses what may be the single greatest concern of secured lenders: the conflicting interest of a trustee appointed to administer a bankrupt debtor's property.\textsuperscript{342} As previously noted, the present Code appears to allow perfection of security interests in fixtures by a

\textsuperscript{336} Id.

\textsuperscript{337} See UCC § 9-313 comment 4(d) (1972). The exclusion of "original" domestic appliances from the provision was based upon the drafters' conclusion that such appliances are frequently financed as a part of real estate financing of new dwellings; therefore, no special priority is given to chattel financing of "original" domestic appliances. See Carlson, supra note 249, at 410-11.

\textsuperscript{338} See UCC § 9-313(4)(c) (1972).

\textsuperscript{339} See UCC § 9-313(6) (1972); Carlson, supra note 249, at 411.

\textsuperscript{340} See UCC § 9-313(4)(c) (1972). See generally Coogan, supra note 12, at 496-97 (discussing the removability of chattels).

\textsuperscript{341} See Coogan, supra note 12, at 497. A thoughtful critique of § 9-313(4)(c) is presented in Carlson, supra note 249, at 407-12.

\textsuperscript{342} See UCC § 9-313(4)(d) (1972).
single means: filing in the real estate records.\textsuperscript{343} Failing this, a security interest is unperfected for all purposes and will fall before the lien of a trustee in bankruptcy.\textsuperscript{344}

The 1972 Amendments alter this state of affairs by providing that a security interest in fixtures perfected by \textit{any method} permitted by Article Nine shall prevail over judgment liens on the property acquired subsequent to the perfection.\textsuperscript{345} Since bankruptcy trustees and ordinary judgment lien creditors generally acquire their lienor status without reliance upon real estate records, the Article Nine Review Committee concluded that a lender against fixtures should not be required to file in the real estate records to perfect his or her interest.\textsuperscript{346} Thus, for example, perfection by chattel filing of the security interest of a vendor of lighting fixtures sold for office use will protect the secured seller against the onslaught of a bankruptcy trustee for most purposes if the buyer/debtor subsequently goes bankrupt. If the light fixtures are bought for use as consumer goods, perfection is automatic under Article Nine and no filing of any kind would be necessary for such protection.\textsuperscript{347}

Two other provisions of the amended section 9-313 represent no change in the law but serve to clarify certain other situations in which perfection of fixture security interests is unnecessary. First, it is recognized that perfection is unnecessary to provide a chattel financer priority over an encumbrancer or owner of realty who has so consented in writing or otherwise "disclaimed an interest in the goods as fixtures."\textsuperscript{348} Second, the 1972 Amendments address security interests in goods affixed to the real estate of one other than the debtor.\textsuperscript{349} In the latter case, even an unperfected security interest is entitled to priority over rival real estate interests "if the debtor has a right to remove the goods

\textsuperscript{343} See text accompanying notes 294-300 supra.

\textsuperscript{344} Explicit references in §§ 544(a)(3) and 547(e)(1) of the Bankruptcy Code make clear that, where fixtures are concerned, the trustee in bankruptcy is to be treated strictly as a creditor who has acquired a judicial lien upon the property of the debtor. See note 298 supra.

\textsuperscript{345} UCC § 9-313(4)(d) (1972).

\textsuperscript{346} See Final Report, supra note 6, at 200-01.

\textsuperscript{347} See UCC § 9-302(1)(d) (1972). See also note 383 infra and accompanying text.

\textsuperscript{348} UCC § 9-313(5)(a) (1972).

\textsuperscript{349} See UCC § 9-313(5)(b) (1972).
against the encumbrancer or owner. This is an embodiment of the well-recognized principle that a landlord generally has no interest in "trade fixtures" installed by a tenant, and therefore, perfection should not be required to protect an Article Nine security interest in that property against the landlord.

All in all, the 1972 Amendments represent a substantial improvement over existing statutory provisions insofar as security interests in fixtures are concerned.

2. Perfection of Security Interests in Oil, Gas, Minerals and Timber

The present Code treats oil, gas and minerals as a part of realty until they have been extracted. Therefore, it does not provide for filing of a security interest in such collateral to be effective prior to extraction. In general, this practice is continued in the 1972 revisions. Although new filing requirements for security interests in oil, gas and minerals are provided in the revised Article Nine to take account of changes to section 9-103 regarding multistate transactions, such security interests still do not attach until extraction.

Under the present Code, a financing statement against minerals need not describe the land where the minerals are located. However, the security agreement covering the minerals must contain such a description. This requirement is incongruous in

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350 Id.

351 See Carlson, supra note 249, at 405-07.

352 A number of authors have addressed themselves to possible improvements to the fixtures provisions in the 1972 Amendments. For example, Professor Hawkland has noted that while the amended provisions offer some protection to a chattel financier who files a chattel financing statement covering collateral which later turns out to be a "fixture," the revisions offer no solace to the lender who files a fixture filing when a chattel filing was required. Professor Hawkland would include a provision extending limited protection to the latter. See Hawkland, Part III, supra note 249, at 50. For a more general critique of the 1972 Amendments as they affect security interests in fixtures, see Carlson, supra note 249, at 407-29.

353 See KRS §§ 355.2-107, .9-105(1)(f).

354 See Final Report, supra note 6, at 211.


357 See KRS § 355.9-402; Final Report, supra note 6, at 211.

358 KRS § 355.9-203(1)(b).
light of the Code's approach to minerals and would be eliminated by the 1972 Amendments.\textsuperscript{359}

The present statute treats standing timber as real estate.\textsuperscript{360} Timber is not included in the definition of "goods" covered by Article Nine.\textsuperscript{361} Unfortunately, this treatment serves as an impediment to loans against timber to be cut because lenders have been forced to comply with filing requirements relating to real estate mortgages.\textsuperscript{362} For this reason, a number of states with significant timber industries have enacted nonuniform versions of Code provisions relating to timber and have defined timber to be cut under a contract for sale as "goods."\textsuperscript{363}

The 1972 Amendments incorporate changes in Articles Two and Nine to redefine as "goods" timber which is to be cut.\textsuperscript{364} Corresponding revisions to the filing provisions allow a Code filing which designates timber as collateral.\textsuperscript{365} However, the filing must be made in the local real estate records so as to give notice of the security interest to lenders or purchasers of the real estate.\textsuperscript{366}

\textbf{J. Agricultural Finance}

The present UCC contains several provisions specifically applicable to security interests in agriculture-related collateral such as crops, livestock, and farm machinery. The 1972 Amendments would eliminate two of these rules.\textsuperscript{367}

The present Code provides that "[n]o security interest attaches under an after-acquired property clause to crops which become such more than one year after the security agreement is

\begin{footnotesize}
\textsuperscript{359} See UCC § 9-203 (1972).
\textsuperscript{360} See KRS § 355.2-107.
\textsuperscript{361} See KRS § 355.9-105(1)(f).
\textsuperscript{362} See Final Report, supra note 6, at 210.
\textsuperscript{363} Id.
\textsuperscript{364} See UCC §§ 2-107, 9-105(1), 9-203, 9-204(2) (1972). See also notes 70-71 supra and accompanying text.
\textsuperscript{366} See UCC §§ 9-401(1), 9-402(1), 9-402(3), 9-403(7); Final Report, supra note 6, at 210.
\textsuperscript{367} See generally Hawkland, The Proposed Amendment to Article 9 of the U.C.C. - Part I: Financing the Farmer, 76 Com. L.J. 416 (1971) [hereinafter cited as Hawkland, Part I].
\end{footnotesize}
executed.\textsuperscript{368} This rule was intended to protect farmers from long-term encumbrances on their future crops.\textsuperscript{369} It was originally thought that financiers making seed or fertilizer loans should be secured only in crops grown during the current crop year and not thereafter.\textsuperscript{370} This limitation also applies when the crop security interest is granted to secure a long-term arrangement for financing farm machinery or other capital assets.\textsuperscript{371}

In practice, this limitation on after-acquired property clauses frequently has been circumvented by financiers who annually obtain new crop security agreements executed by farmer-debtors.\textsuperscript{372} These financiers enjoy priority for these subsequent security interests dating from the time of filing of their original financing statements pursuant to the present Code's first-to-file priority rule.\textsuperscript{373} The 1972 Amendments would eliminate this limitation because it proved meaningless and created unnecessary paper work.\textsuperscript{374} This repeal also may facilitate enabling loans which make it possible for farmers to acquire credit essential to the purchase of productive assets.\textsuperscript{375}

The 1972 Amendments also would repeal the present UCC rule that a purchase money security interest in farm equipment having a purchase price not in excess of $500 can be perfected automatically without either filing or possession of the collateral.\textsuperscript{376} Prior to the 1972 Amendments, the 1962 Official Text contained an identical rule except that the specified purchase price was $2,500.\textsuperscript{377} The origins of this automatic perfection rule are obscure. It may have been based on a supposed similarity

\textsuperscript{368} KRS § 355.9-204(4)(a). The rule is subject to an exception applicable to certain security interests granted in conjunction with a lease or a land purchase or improvement transaction. See id.
\textsuperscript{369} See Final Report, supra note 6, at 207.
\textsuperscript{370} See id.
\textsuperscript{371} Id.
\textsuperscript{372} Id.
\textsuperscript{373} See notes 106-27 supra and accompanying text (discussion of financing statement duration); notes 181-86 supra and accompanying text (discussion of first-to-file rule).
\textsuperscript{374} See Final Report, supra note 6, at 207.
\textsuperscript{375} See Hawkland, Part I, supra note 367, at 421-22.
\textsuperscript{376} See KRS § 355.9-302(1)(c). Filing is required for farm equipment that are fixtures or motor vehicles required to be licensed. Id. Any downpayment should be included in deciding whether the threshold amount is exceeded. See Mammoth Cave Prod. Credit Ass'n v. York, 429 S.W.2d 26 (Ky. 1968).
\textsuperscript{377} See UCC § 9-302(1)(c) (1962).
between farm equipment and consumer goods which are subject to their own automatic perfection rule.\(^{378}\)

The automatic perfection rule proved unsatisfactory in the view of the ALI and NCCUSL.\(^{379}\) Several states, including Kentucky, minimized its scope by reducing the purchase price of the farm equipment to which it applied.\(^{380}\) There also was substantial opinion that the rule hurt farmers because prospective lenders against farm equipment could not be certain there were no prior unfiled, but perfected, purchase money security interests.\(^{381}\) The rule also may have been of little value to those purchase money secured creditors who could qualify for automatic perfection because filing remained necessary to protect the security interest against certain purchasers of farm equipment.\(^{382}\) For these reasons, the 1972 Amendments eliminate the rule. It should be noted that creditors who finance the acquisition of consumer goods by farmers (that is, goods that will be used for personal, family or household purposes) would still be able to obtain automatic perfection under a revised UCC.\(^{383}\)

**K. Multistate Transactions**

Section 9-103 of the 1972 Amendments contains some of the most significant revisions proposed by the ALI and the NCCUSL. Conflicts scholars have criticized the present Code’s choice of law provisions.\(^{384}\) The 1972 Amendments reflect some of that

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\(^{378}\) See KRS § 355.9-302(1)(d). No maximum price is specified by this consumer goods rule. See generally UCC § 9-302 comment 4 (1962).

\(^{379}\) See Final Report, supra note 6, at 208.

\(^{380}\) See KRS § 355.9-302(1)(c); Final Report, supra note 6, at 208.

\(^{381}\) See Final Report, supra note 6, at 208. The Final Report indicates a concern that “[t]he $2,500 amount cannot be dismissed by lenders as immaterial, because substantial aggregates of collateral could have been financed by separate purchase money transactions each of which was no greater than $2,500.” Id. This possibility presumably is reduced by the $500 cutoff under the Kentucky version of the rule. See KRS § 355.9-302(1)(c).

\(^{382}\) See KRS § 355.9-307(5). The 1972 Amendments, if enacted, would also modify this provision to reflect the elimination of the automatic perfection rule for farm equipment. See UCC § 9-307(2) (1972). The Kentucky General Assembly has also enacted nonuniform amendments intended to protect various purchasers of farm-related collateral. See KRS §§ 355.9-307(2), .9-307(3), .9-307(4), .9-307(6), .9-319.

criticism. Although the choice of law rules selected in the amendments contain some troublesome areas, they eradicate a number of difficulties found in the present Code.

Enactment of the 1972 Amendments would resolve a continuing dispute over which choice of law provisions in the present Code govern secured transactions. Under the 1972 Amendments, section 9-103 governs only the issue of perfection of a security interest in multistate transactions. The revised section eliminates the difficulty in determining whether the present Code’s general choice of law provisions in section 1-105, or the more specific rule of present Code section 9-102, govern other problems arising out of any transaction involving a security interest. This portion of the 1972 Amendments should prove helpful by eliminating from Article Nine consideration of choice of law problems that concern primarily the original parties to a secured transaction, the secured party and the debtor. The 1972 amendments would permit Article Nine to focus upon the more important question of where to file in order to protect an interest against competing third parties. For example, rights of the parties to the agreement upon default would be governed by the general provisions of section 1-105 under the 1972 Amendments, but the perfection or nonperfection of the party claiming secured status would depend upon section 9-103. It should be noted that, while the general choice of law rules under section 1-105 permit the parties to select the law of a jurisdiction “reasonably” related to the transaction, the rules of section 9-103 of the

385 See UCC § 9-103 (1972).
386 See Doyle v. Northrop Corp., 455 F. Supp. 1318, 1326-29 (D.N.J. 1978) (validity of a contract is governed by law of the place where it is made); Associates Discount Corp. v. Cary, 262 N.Y.S.2d 646, 651 (N.Y. City Cir. Ct. 1965) (UCC provisions in state where property is located govern); Mammoth Cave Prod. Credit Ass’n v. Oldham, 569 S.W.2d 833, 838 (Tenn. Ct. App. 1977) (UCC provisions in state where contract is made govern). See also Coogan, supra note 12, at 529-31; Weintraub, supra note 384, at 691-702 (both discuss the issue of whether § 1-105 or §§ 9-102 and 9-103 should apply to conflict of law problems).
387 See UCC § 9-103 comment 1 (1972). See also Final Report, supra note 6, at 230.
388 Final Report, supra note 6, at 230-31. See also Weintraub, supra note 384, at 691-93.
389 Coogan, supra note 12, at 530-31.
390 See UCC § 9-103 comment 1 (1972). See generally J. White & R. Summers, supra note 218, at 964-76 (discusses the perfection rules found in § 9-103).
391 Coogan, supra note 12, at 530.
1972 Amendments are not variable by agreement of the parties.\textsuperscript{392} This distinction is appropriate in view of the fact that the rules of section 9-103 may affect the rights of individuals who are not party to the agreement.\textsuperscript{393}

The 1972 Amendments would divide section 9-103 into five subsections governing different types of collateral. The initial subsection covers documents, instruments and ordinary goods.\textsuperscript{394} Subsequent subsections cover goods subject to certificate of title;\textsuperscript{395} accounts, general intangibles and mobile goods;\textsuperscript{396} chattel paper;\textsuperscript{397} and minerals.\textsuperscript{398} A 1977 amendment would add a sixth section regarding uncertificated securities.\textsuperscript{399} The divisions segregate collateral based upon the particular problems involved with perfecting an interest in the type of collateral.\textsuperscript{400} For example, accounts, general intangibles and mobile goods are grouped together because situs oriented rules could not be applied easily to these types of collateral, which either have no physical location or by their nature lack a fixed location.\textsuperscript{401} Similarly, documents, instruments and ordinary goods are collected under one rule because they are generally nonmobile collateral kept in only one place.\textsuperscript{402}

1. Documents, Instruments and Ordinary Goods

a. The Basic Rule—The Last Event Test

Under the 1972 Amendments, the basic rule controlling ordinary goods is found in section 9-103(1)(b) which dictates that

\begin{itemize}
  \item 392 J. White & R. Summers, supra note 218, at 965.
  \item 393 See In re Vintero Corp., 31 U.C.C. Rep. Serv. (Callaghan) 1145 (Bankr. S.D.N.Y. 1980) ("parties to the original agreement may not, by agreement, make their choice of law binding on creditors and purchasers who were not parties to the original agreement"), rev'd sub nom. Vintero Corp. v. Corporacion Venezolana de Fomento, 675 F.2d 513 (2d Cir. 1982).
  \item 394 See UCC § 9-103(1) (1972).
  \item 395 See UCC § 9-103(2) (1972).
  \item 396 See UCC § 9-103(3) (1972).
  \item 397 See UCC § 9-103(4) (1972).
  \item 398 See UCC § 9-103(5) (1972).
  \item 399 See UCC § 9-103(6) (1977).
  \item 400 See generally J. White & R. Summers, supra note 218, at 965 ("The drafters chose this scheme mainly because the nature of the collateral suggests which state should serve as the focal point for giving notice to third parties."); Coogan, supra note 12, at 531-32 (explains why certain types of collateral are grouped together).
  \item 401 See UCC § 9-103 comment 5(a) (1972).
  \item 402 J. White & R. Summers, supra note 218, at 966.
\end{itemize}
a secured party's perfection or nonperfection depends upon "the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected." The proposed change differs from the current rule found in the first sentence of section 9-103(3) in two respects. First, it refers only to perfection and deletes the confusing reference to the validity of the security agreement. Second, it specifies that the crucial location for perfection is the location of the collateral when the last event related to perfection occurs. This shifts the focus from that of the current Code which requires application of the law of the location of the collateral when attachment occurs.

Like its predecessor, the 1972 Amendment requires attention to both chronological events and location since it dictates that the governing law is that of a particular place at a particular time. As commentators have often pointed out, perfection depends upon both attachment and compliance with requirements for filing, possession or automatic perfection. Attachment itself depends upon three events: (1) satisfaction of the Article Nine statute of frauds by a writing or possession; (2) value given by the secured party; and (3) the debtor's having rights in the collateral. The events necessary for attachment and perfection are not required to occur in any particular order. Moreover, the necessary events other than filing may occur either prior to or after filing.

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403 UCC § 9-103(1)(b) (1972).
404 See KRS § 355.9-103(3).
405 See UCC § 9-103(1)(b) (1972). See also Coogan, supra note 12, at 529-30.
407 See KRS § 355.9-103(3).
408 See, e.g., J. WHITE & R. SUMMERS, supra note 218, at 966 (perfection does not occur until all steps are completed); Coogan, supra note 12, at 537 ("[a] security interest generally is perfected only upon the completion of five steps.").
410 See UCC § 9-203 (1972). The 1972 AMENDMENTS have combined the concepts of enforceability and attachments. Compare KRS §§ 355.9-203, 9-204.
411 UCC § 9-203(2) (1972) states that attachment occurs "as soon as all of the events in subsection (1) have taken place," implying that they may take place in any order. See also KRS § 355.9-204(1).
412 See Coogan, supra note 12, at 537-38 ("[s]teps necessary for perfection may occur in any order").
When ordinary goods are moving across several states, the last event rule requires careful attention from a secured party. Suppose, for example, that SP, a Kentucky secured lender, wishes to advance money to D, a debtor with a plant located in Kentucky, against nonmobile equipment currently located in D’s Florida plant but which D will relocate to a Kentucky installation. Assuming that SP has no perfected interest in the collateral which precedes this transaction, the agreement might be signed while the collateral is still located in Florida and the loan advanced while the equipment is in transit. Because D already has rights in this collateral, the last of the steps necessary for perfection will be SP’s filing, assuming that it has not been made prior to the advance. The 1972 Amendments state that SP should file where the collateral is located at the time SP makes the filing because that is the last event upon which perfection is based. Technically, if SP files in Kentucky as the goods are passing through Georgia, he or she has filed in the wrong place and his or her interest remains unperfected at least until the arrival of the goods in Kentucky.

Perhaps the chances of a lien creditor levying on equipment passing through Georgia on its way to Kentucky are too remote to justify major concern. Other examples of the difficulties with the last event rule are less remote. Suppose that SP2, a Kentucky lender, lends to D2, a Kentucky corporation with plants in Kentucky and Ohio, against collateral not subject to a

413 If S's interest in the collateral were perfected prior to its entry into Kentucky, the rule of § 9-103(1)(d) would govern under the 1972 Amendments. See UCC § 9-103(1)(d), 9-103 comment 1 (1972).
414 The agreement and advance would satisfy two of the requirements of § 9-203. See UCC §§ 9-203(1)(a), (b); 9-203 comment 1 (1972).
416 See KRS § 355.9-303. The 1972 Amendments make no change in the requirements for perfection.
418 See Coogan, supra note 12, at 539.
419 See id.
420 Id. at 540. “S may be content to take the risk of having his security unperfected while the goods are in transit. It is improbable that another creditor of D will levy on the goods during such period because the creditor is unlikely to know where the goods are located. . . .” Id.
prior security interest and currently located in D2's Ohio plant. The loan is made under a written and signed security agreement\textsuperscript{421} containing an after-acquired property clause.\textsuperscript{422} However, SP2 had made no commitment to make future advances to D2 under the agreement.\textsuperscript{423} SP2 files in Ohio. Before SP2 makes an actual advance to D2, D2 moves the collateral to Kentucky. Under the 1972 Amendments' last event test, SP2's advance would be the last event and SP2 should have filed in Kentucky.\textsuperscript{424}

Given this parade of hypothetical horribles, why should this portion of the 1972 Amendments be approved by any legislature? In the first instance, it is important to remember that the basic rule under the present Code can be interpreted to raise similar difficulties with the difference of a focus on attachment rather than perfection.\textsuperscript{425} The 1972 Amendments are in part, therefore, a clarification of an existing scheme. The choices faced by the ALI and the NCCUSL in drafting the 1972 Amendments were limited by the same combination of geographic and political considerations that have influenced the choices of states in enacting or revising secton 9-401 on intrastate filing.\textsuperscript{426} A rule that required filing at the debtor's location might have hampered some local lenders who dealt with multistate debtors whose chief place of business was distantly located.\textsuperscript{427} The ideal of having UCC filings made at a national center available for local access through computer terminals was not possible.\textsuperscript{428}

Other reasons for acceptance of the last event rule also exist. Most of the problems with the rule have been thoroughly hypothesized and discussed. Some solutions for the cautious secured party have been offered.\textsuperscript{429} For example, the secured creditor

\textsuperscript{421} See UCC § 9-203(1)(a) (1972).
\textsuperscript{422} See UCC § 9-204(3) (1972).
\textsuperscript{423} This hypothetical is based on material from Coogan, supra note 12, at 538. The absence of any commitment to make future advances is important in this hypothetical because it assures that S has not given value until S makes the actual loan. See KRS § 355.1-201(44) (defines when a person "gives value").
\textsuperscript{424} See UCC § 9-103(1)(b). See also Coogan, supra note 12, at 538-39.
\textsuperscript{425} See KRS § 355.9-103(3).
\textsuperscript{426} See Coogan, supra note 12, at 533-34.
\textsuperscript{427} Id.
\textsuperscript{428} Id.
in the first hypothetical given above could assure himself or herself of protection by filing in Florida and perfecting an interest in the goods before they are removed from that state.\textsuperscript{430} In that event, under the 1972 Amendments, the creditor would generally have four months in which to file in Kentucky in order to remain perfected in this state.\textsuperscript{431} Finally, the 1972 Amendments' basic choice of law rule for ordinary goods should be judged in light of other alternatives available under modern choice of law rules.\textsuperscript{432} In a field such as secured transactions, certainty and predictability are at a premium. Weighing the contacts that a transaction has with a jurisdiction, or determining a forum's interest in the application of its law to a given transaction, is a hazardous activity which guarantees neither certainty nor predictability. Adoption of the last event rule and its situs oriented focus would provide only known and avoidable hazards for secured parties and debtors. To deviate from that rule would destroy the essential purpose of uniformity that underlies the UCC.\textsuperscript{433}

b. Exceptions to the Last Event Rule

Section 9-103 also contains two exceptions to the basic last event rule. The first of these exceptions is found in section 9-103(1)(c) which extends protection to a creditor whose purchase

\textsuperscript{430} In such a case the secured party's rights would be governed by § 9-103(1)(d). See text accompanying notes 446-53 infra.

\textsuperscript{431} See text accompanying notes 446-53 infra.

\textsuperscript{432} Modern choice of law theory generally divides into two camps: those who adhere to the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) and those who propose offshoots of the governmental interest analysis proposed by Brainerd Currie. Although the Second Restatement requires consideration of certainty and predictability as values to be taken into account in determining choice of law questions, it does not guarantee that a particular state's law will control. See generally W. REESE & M. ROSENBERG, CONFLICT OF LAWS 475-86 (8th ed. 1984). Kentucky courts have adopted the most significant relationship test of the Second Restatement for general contracts questions. See Breeding v. Massachusetts Indem. & Life Ins. Co., 633 S.W.2d 717, 719 (Ky. 1982); Lewis v. Am. Family Ins. Group, 555 S.W.2d 579, 581-82 (Ky. 1977); Prudential Resources Corp. v. Plunkett, 583 S.W.2d 97, 100 (Ky. Ct. App. 1979). However, dicta in Plunkett indicates that Kentucky courts might disregard the policies of other states if Kentucky had a strong forum policy to advance. See 583 S.W.2d at 100. Cf. Foster v. Leggett, 484 S.W.2d 827, 829 (Ky. 1972) (so long as there are some significant contacts with Kentucky, although not necessarily the most significant, then Kentucky law should apply).

\textsuperscript{433} See UCC § 1-102(1)(c) (1972).
Money security interest attaches while the goods are in one jurisdiction, but whose understanding with the debtor at the time of attachment is that the goods will be kept in another jurisdiction.\footnote{See UCC § 9-103(1)(c) comment 2 (1972).} In such a case, a secured party is perfected by filing in the state of destination for thirty days after the debtor receives possession of the collateral and thereafter if the goods arrive in the intended destination state within the thirty days. Unlike its counterpart in the present Code, the section 9-103(1)(c) rule is limited to purchase money secured parties.\footnote{See KRS § 355.9-103(3) (the 30-day rule applies to all security interests, not just purchase money security interests).} Furthermore, the understanding between the parties must exist at the time of attachment.\footnote{See UCC § 9-103(1)(c) (1972). The comments point out clearly that the 30-day period is not a grace period during which no filing is required. See id. at comment 2. Rather the section is intended to dictate in which of two jurisdictions the secured party must file. See In re Duplan Corp., 455 F. Supp. 926, 930-32 (S.D.N.Y. 1978) (plaintiff never filed, so he possessed an unperfected security interest); In re SSC Corp., 27 U.C.C. Rep. Serv. (Callaghan) 828 (Bankr. D. Utah 1979); Joint Holdings & Trading Co., Ltd. v. First Union Nat’l Bank, 123 Cal. Rptr. 519, 523 (Ct. App. 1975) (no “understanding” existed between the parties, so the security interest was unperfected).} Thus, if a debtor decides to ship the collateral from a Michigan manufacturing seller to a Kentucky plant only after the three events for attachment have occurred, the section 9-103(1)(c) rule does not apply.\footnote{See Coogan, supra note 12, at 536.}

The protection of the thirty-day rule would effect a compromise between the need to protect the initial state’s filing system—by limiting the possibility that collateral can be located in the state while being subject to protection without filing—and the needs of the secured party.\footnote{Id. at 543-44.} As a practical matter, the usefulness of the rule is somewhat limited.\footnote{See J. White & R. Summers, supra note 218, at 969.} The rule states that, for thirty days after the debtor receives possession of the goods, the intended destination of the collateral is the place to file.\footnote{UCC § 9-103(1)(c) and comment 3 (1972); FINAL REPORT, supra note 6, at 231.} Thereafter, the state of intended destination is the place to file only if the goods arrive in the state.\footnote{UCC § 9-103(1)(c) (1972).} If, after the thirty-day period, the goods have not arrived at the intended destination and are
levied upon by another creditor, the secured party would lose to
that levying creditor.\footnote{42}

By its own terms the protection of section 9-103(1)(c) lapses
at the end of thirty days.\footnote{43} Section 9-103(1)(d) does not protect
the secured party who filed only in the state of intended desti-
nation, because that section governs “collateral perfected under
the law of the jurisdiction from which the collateral was re-
moved.”\footnote{44} Cases of nonarrival are dangerous for the secured
party because he or she lacks the four month protection of
section 9-103(1)(d). However, that peril can be avoided by filing
in both states.\footnote{45}

The second exception to the last event rule involves collateral
subject to a perfected security interest in one state prior to its
removal to a second state. The 1972 Amendments would retain
a grace period for reperfection in the destination state.\footnote{46} This
grace period would extend for the lesser of four months from
the arrival of the collateral in the destination state or until the
secured party’s filing lapsed in the removal state.\footnote{47} Additionally,
the amendment would clarify several problems arising under
section 9-103(3) of the present Code. The current language states
that a security interest perfected in the state from which the
collateral was removed “continues perfected in [the destination]
state for four months and also thereafter if within the four
month period it is perfected” in the destination state.\footnote{48} Courts
have split over the status under the present Code of a secured
party who challenges a competing interest that arose during the
four-month period, but who makes the challenge after the four-

\footnote{42} Id.
\footnote{43} Id.
\footnote{44} Id.
\footnote{45} Id. Comment 3 states:
A failure of the collateral to reach the intended destination jurisdiction
before the expiration of the 30-day period because of a conflicting claim
or otherwise may cause disappointment of expectations that the law of the
destination jurisdiction will govern continuously, and caution may dictate
filing both in that jurisdiction and in the jurisdiction where the security
interest attaches.
\footnote{46} See UCC § 9-103(1)(d) (1972).
\footnote{47} See id.
\footnote{48} See KRS § 355.9-103(3).
The four-month period has run and without having taken any necessary action to remain perfected in the destination state.\footnote{449}

The 1972 Amendments provide that a secured creditor's interest would be treated as having been unperfected during the four-month period as against a person who became a purchaser after the collateral was removed from its original location.\footnote{450} The Code definition of "purchaser" includes not only buyers but also others who take by voluntary transactions, including other secured parties.\footnote{451} This definition excludes, however, judgment lien creditors and the bankruptcy trustee acting as a hy-


\footnote{450} For a good discussion of case law and commentary on the issue, see International Harvester Credit Corp. v. Peffley, 458 N.E.2d 257, 261-65 (Ind. App. 1983) (the four-month period is not one of absolute perfection). See also United States v. Burnett-Carter Co., 575 F.2d 587, 592 (6th Cir. 1978) ("[T]he 1972 Official Text] clearly adopts the conditional protection version of the four month rule."), cert. denied, 439 U.S. 996 (1978); Final Report, supra note 6, at 236.

\footnote{451} See KRS § 355.1-201(32) to (33). See generally J. WHITE & R. SUMMERS, supra note 218, at 975-76 (discusses the status of claimants who intervene within the four-month period).
pithetical lien creditor. Assume for example, that SP1, a secured creditor, is perfected by filing in Tennessee. The debtor removes the collateral to Kentucky on January 10. On February 10, SP2, a second lender, creates and perfects a second security interest in the collateral with a proper Kentucky filing. On May 20, SP1 discovers the collateral in Kentucky and seeks to repossess it. SP2's interest would prevail in the contest. SP2's interest was properly perfected on February 10. Because SP1's lack of perfection at the end of the four month period relates back as against SP2, SP1 loses. If, however, SP1's competitor were a judgment lien creditor who achieved that status during the four month period, SP1 would prevail. SP1 was perfected during the four-month period, and the lack of perfection at the end of the four-month period would not relate back against a nonpurchaser.

The 1972 Amendments also provide that a refile in the destination state is unnecessary if the secured party is perfected automatically without filing. Secured parties with purchase money security interests in consumer goods may enjoy such protection in the state from which the goods are removed under that state's section 9-302(1)(d). The 1972 Amendments would continue that protection in Kentucky.

2. Certificate of Title

The fit between Article Nine requirements and Kentucky's certificate of title law has never been comfortable. Recent amendments to Kentucky's motor vehicle registration system provide that notation on a certificate of title is the sole means for determining priority in a motor vehicle. The same statute,
however, continues to provide that financing statements for certificate of title vehicles should be filed locally.\textsuperscript{458}

The 1972 Amendments to section 9-302 envision a very different scheme. With the exception of a security interest in collateral held as inventory by the debtor,\textsuperscript{459} filing a financing statement would be neither "necessary nor . . . effective" to perfect a security interest in property subject to a certificate of title statute.\textsuperscript{460} If, for example, Mary Louise's Motors has an inventory of one hundred new Belchfires, financed by Ned's National Bank, Ned's must file to protect its security interest in her inventory.\textsuperscript{461} If, however, Mary Louise sells a car to Carl Consumer and Carl gets Ned's to finance that purchase, Ned's must note its lien on the certificate of title. Filing is neither necessary nor effective to protect Ned's interest in Carl's car. With its statement that notation is the equivalent of filing, section 9-302(4) of the 1972 Amendments further supports these exclusive certificate of title rules.\textsuperscript{462}

The problem lies not with the Article Nine amendments but with Kentucky's existing certificate of title law. Although that law has been amended to ensure that priorities in titled vehicles are governed by certificate of title and not by Article Nine priority rules,\textsuperscript{463} the certificate of title statute continues to be replete with references to financing statements.\textsuperscript{464} The current certificate of title statute seems to envision a parallel system of


\textsuperscript{459} See UCC § 9-302(3)(b) (1972).

\textsuperscript{460} See UCC § 9-302(3), (4) and comment 8 (1972). Section 3 provides that a financing statement is not necessary for collateral covered by any listed statute. Section 4 provides that compliance with the listed statute is the equivalent of filing. \textit{Id. See also Final Report, supra} note 6, at 237-39.

\textsuperscript{461} See \textit{Final Report, supra} note 6, at 239.

\textsuperscript{462} See UCC § 9-302(4) (1972); \textit{Final Report, supra} note 6, at 237-38. "While the Code's sponsoring organizations cannot amend certificate of title laws, it is hoped that certificate of title laws will be amended or construed so that the Code filing system for inventory will be exclusive and will not be duplicated by the certificate of title system." \textit{Final Report, supra} note 6, at 238.

\textsuperscript{463} See Lincoln Bank & Trust Co. v. Queenan, 344 S.W.2d 383 (Ky. 1961); McKenzie v. Oliver, 571 S.W.2d 102, 106-08 (Ky. Ct. App. 1978) (defendant holds an unperfected security interest in motor vehicle because notation of lien was not recorded on certificate of title); General Motors Acceptance Corp. v. Hodge, 485 S.W.2d 894, 896 (Ky. 1972) (financing statement filed without recording on certificate of title is not an enforceable lien).

both financing statements and notations on a certificate of title. Adoption of the 1972 Amendments would make filing irrelevant under Article Nine. However, the certificate of title statute would retain the filing requirements.

This result may be no more confusing than the current rules. Present section 9-302(3)(b) states that the filing provisions of Article Nine do not apply to a security interest in property subject to a statute which requires indication of a security interest on a certificate of title. The Code drafters intended, even under this earlier version, that notation on the certificate would substitute for filing. Thus, notation would govern the issues of both perfection and priority between the secured party and other individuals. The current Kentucky certificate of title statute states that notation governs priority, but it makes no provision for the perfection of a security interest by notation. The statute is by no means clear, but interpreting it not to require indication on the certificate strains credulity.

Secured parties are generally interested in perfection because it is the certain avenue to priority, which after all is the crux of the game. Further, even if the legislature intended to require both notation and filing for perfection, KRS section 186A.190 still requires notation on the certificate. The current certificate of title law thus stands in conflict with the present Code. Although adoption of the 1972 Amendments would clarify the status of vehicles held as inventory, only a revision of the certificate of title rules would cure the other problems.

The need for revision of the certificate of title laws becomes even clearer in a transaction in which a vehicle subject to Ken-

465 See id.
466 UCC § 9-302(3), (4) (1972); FINAL REPORT, supra note 6, at 237-38.
467 See KRS § 186A.190.
468 See KRS § 355.9-302(3)(b).
469 See KRS § 186A.190.
470 KRS § 355.9-302(3)(b) does not mention perfection. It only states that Article Nine's filing provisions do not apply to a security interest in property subject to a statute of this state which requires indication of a security interest on a certificate of title. It is helpful to compare the language of UCC § 9-103(2)(a) (1972) relating to indication of a security interest on the certificate of title as a "condition of perfection."
471 See text accompanying notes 170-216 supra (discussion of how priority is determined).
473 See text accompanying notes 464-71 supra.
Kentucky's title laws leaves the state and is reregistered elsewhere. Should that reregistration occur in a state which has adopted the 1972 Amendments to the UCC, section 9-103(2)(a) states that it applies to goods covered by the forum state's title law or by the law of another jurisdiction which requires indication of the security interest on the certificate of title as a condition of perfection. The forum state may have some difficulty in determining whether Kentucky requires notation on the certificate as a condition of perfection. If the forum state determines that Kentucky's reference to priority does not mandate notation as a condition of perfection, the protection afforded Kentucky secured parties as against persons other than nonprofessional buyers will be only the general protection under section 9-103(1)(d) afforded to secured parties with an interest in ordinary goods. Section 9-103(2)(c) requires this result by providing that a security interest perfected in another jurisdiction other than by notation on the certificate of title receives only such protection.

If the problems with the certificate of title law are resolved, the operation of section 9-103(2) may be illustrated as follows:

a. **Movement from a Certificate of Title State to Kentucky**

When a vehicle enters Kentucky from a jurisdiction requiring notation of the security interest on the certificate of title as a condition of perfection, subsection (2)(a) would dictate that the rules of section 9-103(2) apply. Under subsection (2)(b),

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474 UCC § 9-103(2)(a) (1972) (emphasis added).
475 But cf. Lightfoot v. Harris Trust & Savings Bank, 357 So. 2d 654, 655 (Ala. 1978) (The court refused to give "condition of perfection" a narrow and technical reading and because the UCC "is intended to give full force and effect to certificate of title statutes like [Kentucky's] and only a drafting error prevents the smooth interlocking mesh between the UCC and the certificate of title statutes as intended by the drafters.").
476 See UCC § 9-103(2)(c) (1972).
477 See id.
479 UCC § 9-103(2)(b) applies when the goods are covered by a certificate of title issued by either the state from which they were removed or the state of destination. UCC § 9-103(2)(a), (2)(b) (1972). Because the section speaks only of the "jurisdiction issuing the certificate," some confusion results. See J. White & R. Summers, supra note 218, at 978-81; Coogan, supra note 12, at 544-50. "In a connoisseur's list of the most confusing and frustrating problems arising under Article 9, there would surely be a case or two involving a multi-state situation and one or more certificate of title statutes." Coogan, supra note 12, at 544. Most authorities agree that "the certificate" means that issued by the removal state for the first four months or until the original certificate of title is surrendered. Thereafter, "the certificate" means the certificate issued by the destination or second state. See J. White & R. Summers, supra note 218, at 979; Final Report, supra note 6, at 240.
perfection and its effect are governed for at least four months by the law of the state from which the vehicle was removed. 480

Suppose a Texas creditor has noted its lien on the certificate of title and the vehicle subject to the security interest is brought into Kentucky and reregistered with a clean certificate of title. If the Texas creditor asserted its interest within the four-month period, it would prevail over a Kentucky creditor who loaned against the vehicle and had its interest noted on the new Kentucky certificate of title. 481 If the Texas creditor asserted its interest after the four-month period, it would lose to the Kentucky creditor in the preceding hypothetical. 482

It might be argued that the Texas creditor would enjoy absolute protection for four months. That argument will arise because section 9-103(2)(b)'s language mimics the present Code's language in section 9-103(3). 483 In nontitle contexts, some courts have interpreted the statement that the removal jurisdiction's law governs for "four months and thereafter" to permit a secured party to enjoy four months absolute protection. 484 The comments to the 1972 Amendments indicate that the drafters did not intend this absolute grace period. 485 Of course, under section 9-103(2)(b), the four months protection can be cut short by surrender of the certificate of title. 486

Although the protection given by this section is nearly parallel to the protection afforded ordinary goods, it is not exactly the same. Under section 9-103(1)(d), the four-month grace period for ordinary goods begins to run when the collateral is brought into the forum state. 487 Under section 9-103(2)(b), the four-month grace period for certificate of title goods refers to the date upon which the collateral is removed from the jurisdiction.

480 UCC § 9-103(2)(b) (1972). The comment states: "The section provides that the certificate ceases to control after 4 months following removal if registration has occurred. . . ." Id. at comment 4(c).
481 Id. See also J. W. Marple & R. Summers, supra note 218, at 978-79.
482 See UCC § 9-103(2)(b) (1972). See also In re Hartberg, 25 U.C.C. Rep. Serv. (Callaghan) 1429 (E.D. Wis. 1979) (Florida bank's security interest lapsed four months after debtor removed car to Wisconsin and registered it because bank failed to perfect in Wisconsin within the four-month period).
483 See KRS § 355.9-103(3).
484 See cases cited supra note 449.
485 See UCC § 9-103(2)(b), comment 4(c) (1972).
486 See UCC § 9-103(2)(b); Final Report, supra note 6, at 239.
issuing the first certificate of title.\textsuperscript{488} Committee reports indicate that the drafters believed that the tests in the two sections were the same.\textsuperscript{489} Removal from State A, however, need not be synonymous with collateral being brought into State B in every case. Further, a secured party might receive more than the four months protection afforded for ordinary goods if the vehicle were not reregistered in Kentucky.\textsuperscript{490}

A secured party whose interest would generally be protected by section 9-103(2)(b) is nevertheless subject to the interest of one important class of rivals under the 1972 Amendments. Section 9-103(2)(d) states that notwithstanding the other provisions of the section, a nonprofessional buyer—who, without knowledge of the security interest, gives value and takes delivery after a certificate of title is issued in the destination state—prevails over a secured party whose lien was noted only on the certificate of title issued by the removal state.\textsuperscript{491} The category "nonprofessional buyer" excludes automobile dealers and secured parties.\textsuperscript{492}

b. \textit{Movement from a Nontitle State to Kentucky}

Vehicles entering Kentucky from states that do not require notation on the title as a condition of perfection would be treated under the rule of section 9-103(2)(c).\textsuperscript{493} That section dictates that a secured party with an interest in the vehicle receive the same treatment as a secured party with an interest in ordinary goods under section 9-103(1)(d).\textsuperscript{494} Vehicles entering from nontitle states

\textsuperscript{488} See UCC § 9-103(2)(b) (1972).
\textsuperscript{489} Final Report, supra note 6, at 240.

Perfection of a security interest in a motor vehicle which is brought into a jurisdiction which has adopted the 1962 version of the UCC continues if the certificating state requires indication of the security interest on the certificate of title as a condition of perfection and the security interest is perfected in the jurisdiction which issued the certificate of title.

\textsuperscript{491} Id. at 253-54.
\textsuperscript{493} UCC § 9-103(2)(d) (1972). See also Final Report, supra note 6, at 40-41.
\textsuperscript{494} See J. White & R. Summers, supra note 218, at 985-86.
\textsuperscript{492} See UCC § 9-103(2)(c) (1972).
\textsuperscript{493} Id. The secured party's interest would be perfected for four months. If the secured party failed to take action at the end of that period his interest would be deemed to have been unperfected as against a party who became a purchaser during that period. See text accompanying notes 446-53 supra.
could also be subject to priority claims of nonprofessional buyers.495

c. Movement from Kentucky to a Title State

The difficulties in this area have already been mentioned.496 While Kentucky courts may wish to assert that Kentucky is a certificate of title state, the courts in other states will apply the criteria in section 9-103(2)(a) to determine Kentucky's status.497 If Kentucky is treated as a title state, the Kentucky secured party will be protected for four months and thereafter until the vehicle is reregistered in the state of destination or the certificate of title is surrendered.498 After that period, a clean certificate of title in the destination jurisdiction will control.499 If Kentucky is treated as a nontitle state, the Kentucky creditor will receive ordinary goods protection under section 9-103(1)(d).500

3. Accounts, General Intangibles and Mobile Goods

The 1972 Amendments would unify accounts, general intangibles and mobile goods under a single rule.501 Under the present Code, perfection of accounts or contract rights is controlled by the law of the jurisdiction where the assignor keeps his or her records.502 For general intangibles and mobile goods, however, perfection depends upon the law of the chief place of business of the debtor.503 The 1972 Amendments would require filing at

495 See UCC § 9-103(2)(d) (1972) (outlining the requirements the nonprofessional buyer must meet to take priority over the secured party).
496 See text accompanying notes 468-76 supra.
497 See id.
498 See UCC § 9-103(2)(c) (1972).
499 See id.
500 See note 494 supra.
501 In order to qualify under UCC § 9-103(3), goods must meet several requirements. First, the goods must be mobile. See Ingersoll-Rand Fin. Corp. v. Nunley, 31 U.C.C. Rep. Serv. (Callaghan) 1114 (W.D. Va. 1981) (coal mining equipment not mobile). Second, the goods must be of a type normally used in more than one jurisdiction. See In re J.A. Thompson & Son, Inc., 665 F.2d 941, 947 (9th Cir. 1982) (compactors and bulldozers are usually mobile goods). Third, the goods must be either equipment or inventory leased or held for lease by the debtor to others. See In re Utah Agricorp, Inc., 31 U.C.C. Rep. Serv. (Callaghan) 1712 (Bankr. D. Utah 1981). Finally the goods must not be covered by certificate of title.
502 See KRS § 355.9-103(1).
503 See KRS § 355.9-103(2).
the debtor's location for all interests in mobile goods, general intangibles or accounts. This rule reflects the fact that these types of collateral either have no physical location or inherently change location so often that location cannot provide a reliable basis for filing.

Under the 1972 Amendments, a debtor with a place of business would be deemed located at the place of business. A debtor with more than one place of business would be located at his or her chief executive office. The official comments to the 1972 Amendments indicate that "chief executive office" refers, not to the state of incorporation, but to the place from which the debtor manages operations. This rule is a sensible one because the state of incorporation ordinarily has little interest in requiring secured parties to file in its records. If the debtor changes his or her location, a security interest perfected under the rules of section 9-103(3) remains perfected for four months after the debtor's move or until perfection is terminated in the original location. This rule of section 9-103(3)(e) is similar to the ordinary goods rule in section 9-103(1)(d) since a secured party's failure to reperfect within four months causes, as against a party who is a purchaser, his or her lack of perfection to relate back to the debtor's move.


The 1972 and 1977 Amendments also attempt to specify rules for chattel paper, minerals and uncertificated securities in mul-

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504 See UCC § 9-103(3)(b) (1972).
505 Id. at comment 5(b).
507 UCC § 9-103(3)(d) (1972). See In re J.A. Thompson & Son, Inc., 665 F.2d at 950 ("[P]lace of management' focuses on the location which serves as executive headquarters for the debtor's multi-state operation, and not on the location which generates the largest business volume.").
508 See UCC § 9-103 comment 5(c) (1972).
509 See id.
511 See id. See also text accompanying notes 446-53 supra.
tistate situations. The rules with regard to chattel paper depend upon whether a secured party’s attempt to perfect his or her interest is by filing or by possession. When a secured party’s interest is perfected by possession, the amendments make applicable the law of the jurisdiction in which the chattel paper is located. Where filing is used to perfect, the secured party must file in the state where the debtor is located.

Section 9-103(5) provides that a secured party with a security interest in minerals that attaches as they are extracted must file in the state where the mine or wellhead is located. This rule avoids searching the files in many states to discover the interests of multiple assignors.

For uncertificated securities, the law of the jurisdiction where the issuer is organized governs perfection and its effect. Presumably, organization means the state of incorporation for corporations. The rule is a reasonable one since the state of incorporation has an interest in regulating the structure of the corporation it creates.

II. THE 1977 AND 1966 AMENDMENTS

Two other sets of uniform amendments to the Official Text of the UCC have been promulgated by the ALI and NCCUSL. The more extensive set is the 1977 Amendments which relate to investment securities. They have been substantially enacted in at least thirteen jurisdictions. The other set, the 1966 Amendments, is less extensive but more broadly focused. Portions of this set have been enacted in at least twenty-six jurisdictions.

The 1977 Amendments grew out of the paperwork “crunch” experienced in the securities markets during the late 1960s.

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512 UCC § 9-103(4) (1972) states that the § 9-103(1) rule will apply.
514 See UCC § 9-103(5) (1972).
517 See generally Tables, supra note 3.
518 See 1966 AMENDMENTS, supra note 6.
519 See generally Tables, supra note 3.
520 See 1977 AMENDMENTS, supra note 6, at xv.
This crunch resulted from the need to process a huge volume of share certificates. Initially, a committee operating under the auspices of the American Bar Association proposed that Article Eight of the then current Official Text of the UCC be amended to regulate uncertificated shares. The 1977 Amendments are an outgrowth of this recommendation. Their scope and purpose have been described as follows:

Perhaps the best approach to describing the scope of the revision is first to state what it does not do. The revision does not compel the issuance of uncertificated securities by any issuer. Furthermore, the revision does not authorize the issuance of uncertificated securities, a function of the state corporation laws. What the revision is intended to accomplish is to set forth a coherent group of rules for the issuers, buyers, sellers and other persons dealing with uncertificated securities, to the same extent that present Article 8 deals with these matters with respect to certificated securities. Although the primary focus of inquiry regarding the possible elimination of certificates has been on corporate stock, the revision is broad enough to cover uncertificated debt securities, should such be issued in the future. It might be noted that the most significant uncertificated system now in operation is that conducted by the Federal Reserve Banks for United States Government Bonds. It is possible, and, indeed, probable, that particular issues of securities may, temporarily or even permanently, be partly certificated and partly uncertificated. If such be the case, the choice of form will lie with the owner and provisions are made for exchangeability at the owner’s option. . . .

The 1977 Amendments would add four new sections to Article Eight of the present Code. There also would be some wording and structural changes to the existing provisions. In some instances the rules for certificated securities are modified to reflect modern securities practices. In most cases, however,

521 Id.
522 Id. at xvi-xvii.
523 See KRS §§ 355.8-102 to .8-406. There are a few non-uniform provisions among these sections. See KRS §§ 355.8-102(3), .8-301(1). The present Code’s § 355.8-102(3) is similar to UCC § 8-102(3) (1977). See note 6 supra.
524 The 1977 Amendments modified several Code sections that were previously amended by the 1972 Amendments. See UCC §§ 1-201, 9-103, 9-105, 9-203, 9-302, 9-304, 9-305, 9-312 (1977).
the precise language of the rules relating to certificated securities would be preserved. The new rules for uncertificated securities were designed "to conform as closely as possible to the rules for certificated shares."525 One important facet of the 1977 Amendments is that they would enable owners of uncertificated securities to employ these assets as collateral in secured transactions.526 Owners of certificated securities have traditionally been able to do this in pledge transactions.527

The 1966 Amendments are a small but diverse lot.528 For example, one would add a new section to the present UCC specifying that subordination agreements (such as where one creditor subordinates its right to payment by a debtor to that of another creditor) do not create a security interest unless so intended.529 Another would amend the present Code in order to make the Article Two seller's reclamation rights superior to the rights of lien creditors of the buyer.530 A third 1966 Amendment provides for expanding the class of nonprivity plaintiffs with standing to sue sellers for breach of warranty.531

CONCLUSION

The original enactment of the Uniform Commercial Code in Kentucky was a very progressive step. The need for modernization was particularly acute in the area of secured transactions where Kentucky law had fallen badly behind most American jurisdictions.532 Kentucky law also provided little guidance for persons concerned with investment securities.533 As the third legislative body to enact the Code, the General Assembly made

525 1977 AMENDMENTS, supra note 6, at xvii-xviii.
527 See id. 1977 AMENDMENTS, supra note 6, at xx; KRS § 355.9-102(2).
528 The 1972 Amendments modified two Code sections that were previously amended by the 1966 Amendments. See UCC §§ 9-105, 9-106 (1972).
530 See UCC § 2-702(3) (1966).
Kentucky a leader in the movement to modernize commercial law and to make it uniform.\textsuperscript{534} The uniform amendments to the Code, particularly those adopted by the ALI and NCCUSL in 1972 and 1977, provide the vehicle to continue this process and should be given careful legislative consideration.

\textsuperscript{534} See notes 1-4 supra and accompanying text.