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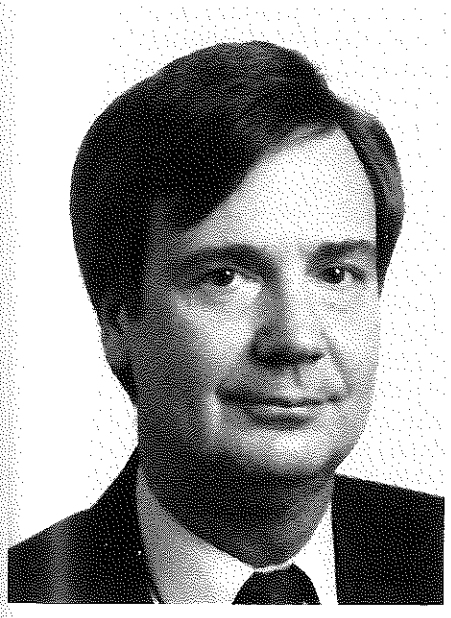
The Modern World of Conflicts for Article Nine Security Interests, Part I: Multistate Choice of Law Analysis and the Impact of the 1972 Uniform Revisions

By Alvin C. Harrell



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This is the first of a three part series of articles on current choice of law issues confronting the Article Nine secured party. Part I of this series addresses traditional multistate choice of law issues. Part II: The Relationship Between State and Federal Law, by Frank P. McEachern, and Part III: Conflicts Within the Uniform Commercial Code, by Professor Harrell, will appear in later issues of the Quarterly Report.

I. Introduction

A traditional choice of law problem can arise anytime a transaction involves parties or properties in more than one state. In such cases, ordinarily the initial question must be: are the laws of the various states different? Normally, if the laws are not different there is not a choice of law problem. However, perfection of security interests is an exception, because uniformity of internal law does not eliminate choice of law questions regarding perfection. For example, even if all of the interested states have identical filing and perfection rules, the secured party still must decide where to file or otherwise perfect the security interest. In addition there may be questions concerning the proper method of perfection.

The hybrid character of some collateral (such as energy and agricultural collateral, vehicles, securities, fixtures, and mobile homes) exacerbates these problems because different states may characterize the same collateral in different ways, thereby requiring different perfection methods in different states. Differences in characterization of the property also may trigger different choice of law rules in different states, since choice of law for perfection purposes typically depends on the nature and character of the collateral.[1] Nonuniform judicial interpretation also remains a problem. Therefore, even if the U.C.C. provisions are the same in every state, some choice of law analysis always will be necessary in a multistate Article Nine secured transaction.

In reality, of course, even with nationwide enactment of the U.C.C., complete uniformity is rare and non-uniform amendments are commonly encountered. Therefore, at the outset, the multistate lender often is faced with a tripartite problem involving the possibility of differing characterizations of the collateral, nonuniform statutes, and conflicting interpretations on where and how to perfect the security interest. Finding a solution to these problems requires a combination of traditional choice of law analysis and an understanding of the Uniform Commercial Code.

A. Renvoi

A potential problem is presented anytime a rule calls for application of the "the law" of another state, since that may include a reference to the conflicts of law rules of the second state. The conflicts rules of the second state may refer to the law (including the conflicts rules) of a third state, and so on indefinitely. This is commonly referred to as "renvoi."[2] Renvoi can be a problem under the Uniform Commercial Code, since several choice of law provisions at section 9-103 refer to "the law (including the conflict of laws rules)" of another jurisdiction. In addition this problem may have been exacerbated by the 1972 uniform revisions, which eliminated the "situs " rule at section 9-102 of the 1962 code. Under the 1962 code the section 9-102 "situs" rule made it likely that section 9-103 of the state where the collateral was located would be applied to perfection issues, regardless of where the case was tried. Lawyers could logically assume that compliance with the choice of law, perfection and priority rules of the "situs" state would be sufficient safeguard. Under the 1972 uniform revisions this may not be the case.

The 1972 uniform revisions eliminated the section 9-102 "situs" rule and instead require that all Article Nine choice of law analysis begin with the general U.C.C. choice of law rule at section 1-105. As a result any court having sufficient contacts with the transaction for purposes of exercising jurisdiction likely will have "an appropriate relation" to the transaction under Section 1-105 and may be prone to apply its own law. In other words, application of section 1-105 is likely to lead to application of the law of the forum, including the

1. *See, e.g.,* U.C.C. § 9-103(1972); Phillips, *Flawed Perfection: From Possession to Filing Under Article 9-Part III,* 59 B.U.L. Rev. 209, 210-222 (1979). *See also* Taylor, *Uniformity of Commercial Law and State-By-State Enactment: A Confluence of Contradictions,* 30 Hastings L.J. 337 (1978); Minahan, *The Eroding Uniformity of the Uniform Commercial Code,* 65 Ky. L.J. 799 (1976). This portion of the article draws heavily from Harrell & Dancy, *Oil and Gas Financing Under Uniform Commercial Code Article 9,* 41 Okla. L. Rev. 53 87-98 (1988) [hereinafter Harrell & Dancy].

2. Black's Law Dictionary 1167 (5th ed. 1979).

forum section 9-103 choice of law rules for perfection issues.[3] Thus section 9-103 of the situs state will not be applied automatically (or otherwise) unless the forum also is the situs or the forum's whole law refers to the whole law of the situs state.[4]

Aside from the fact that this forum-oriented rule represents something of a departure from prior law, it highlights the matter of renvoi. When the forum applies its own section 9-103, the rules of that section may refer to the law of some other state. This may include a reference to the "whole law" of that second state, including its conflicts rules, which in turn may refer to the whole law of a third state, and so on.[5] For example, a reference by the conflict of law rules of the forum to the law of state X could constitute a reference to the whole law (including the conflict of law rules) of state X. This would invoke the conflicts rules of state X, which might call for application of the laws of a third state. In turn the law of this third state could reference the law of still another state (or one of the previous states), and so on ad infinitum. Absence of an overriding "situs" rule tying section 9-103 to the situs of the collateral may make such analysis more likely.

The position of the Restatement (Second) of Conflict of Laws in Section 13 is probably the best general statement of the law dealing with this problem. This section provides that normally when there is a reference to the law of another state, that reference is limited to the "local" law, excluding the conflicts of law rules of that state. However, where the objective of the particular choice of law rule is for the forum to reach exactly the same result on the facts involved as would the courts of the other state, i.e. where uniformity is a preeminent factor, the forum should then apply the whole law (including the choice of law rules) of the other state. The usual circumstances where this would be important are in those cases involving title to property and the marital status of individuals. The former could include issues relating to the priority of claims to personal property that is being used as collateral, as well as claims to hybrid collateral with elements of both real and personal property (such as oil and gas, fixtures, and sometimes even mobile homes). Thus, under traditional choice of law analysis, numerous examples of Article Nine collateral could be subject to a renvoi analysis. This is confirmed by the Uniform Commercial Code. In the 1972 version of the U.C.C., statutory choice of law rules for certificate of title goods,[6] accounts, intangibles, mobile goods,[7] minerals,[8] and both certificated and uncertificated securities[9] contain references to the whole law of the chosen jurisdiction, and therefore require a renvoi analysis.[10] The rules for ordinary goods, instruments and documents[11] contain no such reference, and therefore normally should not involve a renvoi analysis.[12] The 1962 code is similar.

As an example, consider the potential impact of renvoi in the context of a hypothetical transaction involving an Oklahoma corporation owning a right to production payments from Colorado minerals. If a Colorado court found this to be a general intangible,[13] then Colorado choice of law rules would refer to the whole law of Oklahoma (including Oklahoma choice of law rules) as the location of the debtor under section 9-103(3)(b). An analysis of Oklahoma law, however, suggests that it would treat these production payments as real property,[14] therefore referring to the whole law of Colorado (including Colorado choice of law rules) as the law of the situs. Thus, applying Colorado law leads to application of Oklahoma law which then calls for application of Colorado law, and so on.

B. The Most Significant Relationship Approach

A number of states have embraced the "most significant relationship" approach to choice of law for tort litigation, as embodied in the Restatement (Second) of Conflict of Laws. The Restatement (Second) "most significant relationship" test provides an approach to conflicts problems differing significantly from the traditional "vested rights" or territorial approach. It remains to be seen whether the Restatement (Second) approach to the entire field of conflicts will be adopted universally or whether its implications primarily will be limited to torts and perhaps some areas of the contracts field. The U.C.C. previously relied heavily on a territorial or "situs" approach (traditional for property related issues) but the 1972 U.C.C. revision, deleting the section 9-102 situs rule in favor of section 1-105, reflects the influence of the more analytical approach of the Restatement (Second).

C. Impact of the 1972 Amendments and the Importance of Section 1-105

The scope and effect of section 1-105 of the 1962 Code (along with its 1962 Article Nine companion provision — section 9-102) was changed in important ways as a part of the 1972 revisions to the U.C.C. The language of section 1-105 remains fundamentally unchanged, but its scope and effect were altered by the significant revision of section 9-102. The purpose of the revision was to remove from Article Nine all choice of law rules not relating to perfection of security interests (the rules for perfection remain in Article Nine at section 9-103).[15] This change also eliminated the "law of the situs" test at section 9-102 of the 1962 code.[16] The drafters concluded that there was no reason to treat non-perfection Article Nine issues any differently from other choice of law issues. Therefore, Article Nine choice of law analysis for issues not relating to perfection was moved from section 9-102 to section 1-105, and the scope of section 1-105 was expanded accordingly.[17] Since not all states have adopted the 1972 revisions, consideration must be given to the possibility of significant variations in the statutory text between different states, and the effect of the interplay between the 1962 and 1972 versions.

One significant change resulting from these revisions is that under the 1972 code the section 1-105 "reasonable relation" test and its forum-oriented rules could alter the choice of law basis for applying the section 9-103 perfection rules. Section 9-103 of a given state is applicable only if Article Nine of that state is applicable; that is, section 9-103 is applicable only after there has been an initial choice of law analysis and a resultant decision to apply the law (including Article Nine) of that state. This requires an initial analysis under section 1-105 (with a likelihood that the law of the forum will be chosen), as a prerequisite to application of section 9-103. This will most often result in choice of the forum's law, including the forum state's section 9-103. This may represent a significant departure from the generally automatic "law of the situs" approach that is more familiar under section 9-102 of the 1962 code.

Section 1-105(1) recognizes the right of the parties to choose the state of the applicable law, as to certain issues, as long as this choice "bears a reasonable relation" to the transaction.[18] In the absence of a valid choice by the parties, U.C.C. section 1-105(1) provides for application of "this Act" to any transaction "bearing an appropriate relation to this state." Although this "appropriate relation" test is somewhat vague, it is likely to be construed in a manner consistent with the Restatement (Second) of Conflict of Laws Section 188.[19]

Finally, section 1-105(2) specifies application of section 9-103 of "this Act," despite an agreement to the contrary, to certain specified issues, except "to the extent permitted by the law (including the conflict of laws rules) so specified...."[20] The elimination in the 1972 code of the "situs" rule (at section 9-102 of the 1962 code), and the references to "this Act" in section 1-105, create an inherent bias in favor of the law of the forum, including its section 9-103 choice of law rules for perfection issues. This creates a likelihood that section 9-103 of the forum state will be applied, and this represents a potential shift from the automatic "law of the situs" rule that most lawyers came to expect under section 9-102 of the 1962 version of the code.

D. The Impact of Party Autonomy

Despite the reference to party autonomy at section 1-105(1), it's doubtful that the agreement of the parties will be given effect for perfection purposes. Section 1-105(2) specifies that, except in limited circumstances, the perfection choice of law rules at section 9-103 cannot be modified by agreement of the parties. The court is directed by section 1-105(2) to apply its own law (including section 9-103) to choice of law issues regardless of any contractual provisions and regardless of the location of the collateral.

As a result, for perfection matters (and for other issues in the absence of an effective choice by the parties), choice of law analysis likely will begin by application of the law of the forum, even if the collateral is located elsewhere. Under the 1972 code, generally this will mean application of the section 1-105(1) "reasonable relation" test for non-perfection matters, and sections 1-105(2) and 9-103 of the forum for perfection matters. (In comparison, perfection issues and other Article Nine matters typically would be governed by sections 9-102 and 9-103 of the situs state under the 1962 version of the code.) For perfection issues this process of analysis likely will not be affected by any contractual choice of law by the parties.[21]

For issues not relating to perfection, however, there is considerable deference to party autonomy at section 1-105(1). The only apparent limit is the requirement that the choice must bear a "reasonable relation" to the parties and the transaction.[22] This suggests the possibility of using a contractual choice of law provision to incorporate the law of another state for purposes of legitimatizing a practice or provision which otherwise would be unlawful.[23] As long as the transaction bears a "reasonable relation" to the chosen state, such a choice arguably is appropriate under section 1-105(1), and this is consistent with traditional choice of law analysis.[24] For example, courts traditionally have recognized a reasonable choice by the parties for purposes of usury or validation of the contract, barring some compelling consideration to the contrary.[25] However, to the extent that party autonomy at section 1-105(1) serves to incorporate Article Nine law, it may be limited by section 9-201, which specifies that Article Nine is not intended to legitimate any charge or practice invalid under otherwise applicable law.[26] Furthermore, there are grounds for arguing that the right of party autonomy extended at section 1-105(1) applies only to the choice of U.C.C. law, and does not by itself validate choices of other governing statutes and regulations.[27] Nevertheless, in comparison to the stricter limits on choice of perfection rules at sections 1-105(2) and 9-103, the party autonomy rules at section 1-105(1) of the 1972 code represent potentially fertile ground for choice of law pre-planning, and provide considerable incentive for effective use of a choice of law provision in the loan agreement.

3. *See* U.C.C. § 1-105(2) (1987). *Cf.* The Restatement (Second) of Conflicts of Laws (1971):
   Section 6. Choice of Law Principles
   1. A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

4. This is a distinct possibility under traditional choice of law analysis. *See, e.g.*, Restatement (Second) of Conflict of Laws §§ 251-254 (1971). Such probability, however, is a far cry from the relative certainty provided by the statutory situs rule at § 9-102 of the 1962 code.

5. Note that if the second state is the state where the collateral is located, a probability under traditional choice of law analysis, and a possibility under U.C.C. § 9-103(1)(1972), then the result may be the same as that reached under the 1962 "situs" rule at U.C.C. § 9-102. *Id. See also* p. 163, ¶ II E, *infra*.

6. U.C.C. § 9-103(2) (1972).

7. U.C.C. § 9-103(3) (1972).

8. U.C.C. § 9-103(5) (1972).

9. U.C.C. § 9-103(6) (1972); *See also* U.C.C. § 8-106 (1977).

10. As noted, this may lead to application of the law of the situs state, leading to continuity of the situs-oriented rule of the 1962 code despite the elimination of § 9-102. But again, this is not quite the same as the relative certainty provided by a statutory situs rule such as that in the 1962 version of U.C.C. § 9-102. *See infra* text accompanying notes 32-35.

11. U.C.C. § 9-103(1) (1972). The definition of "instrument" includes certificated securities. *See* U.C.C. § 9-105(1)(i) (1972).

12. Perhaps this is unfortunate in the sense that it reduces the probability of the forum referring to the whole law of the situs state. As noted, *supra* notes 4 & 5, use of renvoi to incorporate the whole law of the situs state (where the situs is different from the forum) would be a convenient means of preserving the traditional rule calling for application of the whole law of the situs, despite the deletion of U.C.C. § 9-102 as part of the 1972 uniform revisions.

13. It appears that this is a possibility, although not a certainty, under the rationale of a recent Colorado case, Citicorp v. Fremont Nat. Bank, 738 P.2d 29 (Colo.App. 1987). That case dealt with a real estate sales contract (and hence could be seen to involve concepts of equitable conversion not applicable to a production payments contract). The court treated the seller's right to the sales proceeds as personal property. For purposes of this illustration, we can assume that the rationale could be extended so that a production payments contract would be considered a form of "realty paper," and hence, personal property in the form of a general intangible subject to U.C.C. Article Nine. *Cf.* U.C.C.§§ 9-102(3), 9-104(j) (1987).

14. *See, e.g.*, Davis v. Lewis, 187 Okla. 91, 100 P.2d 994 (1940).

15. *See, e.g.*, U.C.C. § 9-103, Reasons for 1972 Change; Coogan, *The New UCC Article 9*, 86 Harv. L. Rev. 477, 530 (1973) [hereinafter Coogan]. Peter Winship included the Coogan article in his list of the "Top Ten" law review articles. *See* Winship, *Contemporary Commercial Law Literature in the United States*, 43 Ohio St. L.J. 643, 649 n. 31 (1982). *See also* Petit, *Choice of Law Under Article Nine of the UCC*, 7 Loy. U. Chi. L.J. 641 (1976).

16. *See supra* note 15 and authorities cited therein.

17. *See* Reasons for 1972 Change, *supra* note 15; Coogan, *supra* note 15; *cf. infra* note 32. *See also* Leflar, *Conflict of Laws Under the U.C.C.*, 35 Ark. L. Rev. 87, 95 & 107-109 (1981) [hereinafter Leflar].

18. U.C.C. § 1-105(1) (1972).

19. Section 188 of the Restatement (Second) emphasizes factors such as the place of contracting, negotiation, and performance, location of the parties and the "subject matter of the contract." It's likely that any state with sufficient minimum contacts for jurisdiction also will have sufficient contacts to apply to its own law. *See, e.g.*, Home Ins. Co. v. Dick, 281 U.S. 397, 50 S. Ct. 338, 74 L. Ed. 926 (1930); Seeman v. Philadelphia Warehouse Co., 274 U.S. 403, 47 S. Ct. 626, 71 L. Ed. 1123 (1927). *See also* Allstate Ins. Co. v. Hague, 449 U.S. 302, 101 S. Ct. 633, 66 L. Ed. 2d. 521 (1981), *rehearing denied*, 450 U.S. 971 (1982); *cf.* Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d. 683 (1977); Confederation Life Ins. Co. v. deLara, 409 U.S. 953, 93 S. Ct. 284, 34 L. Ed. 2d 225 (1972).

20. U.C.C. § 1-105(2)(1972). This latter clause permits application of § 9-103 of another state where that is called for by a reference in § 9-103 of the forum state to the "whole law" of that other state. *See supra* text accompany notes 2-13.

21. *See* U.C.C. § 1-105(2)(1972). *See also In re* Yant, 5 U.C.C. Rep. Serv. (Callaghan) 645 (Bankr. W.D. Mich. 1968). In *Yant* the collateral was an automobile purchased in Indiana but taken to Michigan and kept there. The contract stated that Indiana law would apply and the secured party perfected under Indiana law. The court found that Indiana law did not bear a reasonable relation to collateral located in Michigan; Michigan law was applied and the security interest was unperfected.

22. U.C.C. § 1-105(1) (1987); *cf. In re* Yant, *supra* note 21. *See also* Leflar, *supra* note 17, at 15 & 95-103.

23. *See, e.g.*, Coogan, *supra* note 15, at 530-531.

24. *Id., e.g.*, n. 125; *cf.* The Restatement (Second) Conflict of Laws § 187 (1971).

25. *See supra* note 24 and authorities cited therein. *But see* Langer & Wood, *A Comparison of the Most Favored Lender and Exportation Rights of National Banks, FSLIC-Insured Savings Institutions, and FDIC-Insured State Banks*, 42 Consumer Fin. L. *Q. Rep.* 4 (Winter 1988) [hereinafter Langer & Wood] for a discussion of the impact of federal preemption in this area.

26. *See* Coogan, *supra* note 15, at 531; U.C.C. § 9-201 (1987).

27. *Supra* note 26 and authorities cited therein. Party autonomy also may be limited by other state laws placing limits on contractual choice of law provisions. *See, e.g.*, Tex. Bus. & Com. Code Ann. tit. 35D § 35.53 (Vernon 1987).

E. The 1962 Code and its Relationship to the 1972 Revision

The 1962 version of the Uniform Commercial Code contains a general choice of law rule for all Article Nine issues at section 9-102(1). This provides that the Article Nine law of the forum state should apply to "any personal property and fixtures within the jurisdiction of this state. . . ." This generally has been taken to create a choice of law rule applying the law of the situs of the collateral to all Article Nine issues.[28] As mentioned,[29] the 1972 revision was intended to abolish this blanket rule and bring all nonperfection Article Nine issues under the U.C.C. choice of law rule at section 1-105.[30]

One criticism of the 1962 code was that the "situs" rule at section 9-102(1) was vague and potentially conflicted with the more analytical "reasonable relation" approach evidenced at section 1-105.[31] In fact it was possible to have three different sources of law for a single transaction: The law of the situs of the collateral for nonperfection Article Nine issues under section 9-102, the law of the forum or some other state with a "reasonable relation" to the transaction, for non-Article Nine issues under section 1-105, and the perfection rules of a third state under the choice of law rules at section 9-103. The 1972 amendments were intended to simplify this by merging all non-perfection U.C.C. choice of law rules into section 1-105 and eliminating the section 9-102 situs rule in favor of the "reasonable relation" and forum-oriented tests at section 1-105.[32] Section 9-103 is thus to be applied only after analysis of the problem pursuant to section 1-105 of the forum, for determination of which section 9-103 to apply. This effectively substitutes the forum-oriented approach of section 1-105 for the old situs rule at section 9-102, as the starting point for Article Nine choice of law analysis and the basis for choosing the appropriate section 9-103.[33]

Clearly the 1962 "situs" rule at section 9-102(1) has its shortcomings. For example, if collateral is moved it may have one situs at the time of attachment, another situs at the time of perfection, another upon default or repossession, and still another at the time of the lawsuit. Or the collateral may be spread across several different states at the same time, so that several different choice of law rules are applicable in the same transaction to different parts of the same pool of collateral.[34] The problems with application of the 1962 "situs" rule and the potential conflict with section 1-105 in such cases were among the reasons for the 1972 revision.[35] (Creditors and practitioners should continue to be alert to these problems if a 1962 code state is or is likely to become the situs of the collateral.)

At the same time it was addressing these problems, the 1972 amendment abolishing the section 9-102 "situs" rule created some new problems of its own. Although the 1962 "situs" rule at section 9-102 applied to non-perfection issues, and potentially was in conflict with section 1-105, it also applied to perfection issues and therefore served as a choice of law backdrop for application of the perfection rules at section 9-103. Section 9-102 was the anchor that tied section 9-103 to the situs of the collateral. Application of the situs state's section 9-103 rules describing "where to file" depended on application of that state's U.C.C. under the situs rule at section 9-102. This was natural in view of the situs orientation of the traditional choice of law rules for property issues.[36] Eliminating the situs rule at section 9-102 also eliminated the anchor which tied applicable Article Nine law to the situs of the collateral. Under the 1972 code there is no equivalent basis for the application of Article Nine or section 9-103 of the situs state. Instead, to establish that section 9-103 of a particular state should apply, one must first resort to the "reasonable relation" and forum-oriented analysis required by section 1-105. While more flexible and analytical than the vested rights "situs" test in the 1962 code, section 1-105 of the 1972 code also offers somewhat less certainty and predictability. Section 1-105 of the 1972 code generally encourages (or even requires) the forum to apply its own law, suggesting a likelihood that section 9-103 of the forum state will be applied rather than section 9-103 of the situs state. Since it may be difficult to predict where a lawsuit will be brought, this can lead to a result different from what the parties have come to expect under the pure "situs" rule of the 1962 code.

Identifying and applying section 1-105 as the foundation for Article Nine choice of law analysis is not the end. After this analysis is conducted and the appropriate choice of Article Nine law is made, further analysis is necessary. Once the initial choice of law has been made under section 1-105, and the applicable version of Article Nine has been identified, a choice of law analysis is necessary under section 9-103 of the chosen state. This may lead to the "last event" test at section 9-103(1)(b),[37] which in turn may refer to the law of an entirely different (and otherwise unrelated) state. Similar problems could be encountered under the "situs" and "attachment" rules of the 1962 code, but the 1972 revisions seem to have exacerbated the inherent uncertainty of this analysis by making it more difficult to predict which version of section 9-103 will be applied.

Thus, if a creditor has perfected a security interest in goods under the law of only one state, that perfection will be completely safe only if that is the sole state with the potential for jurisdiction and a "reasonable relation" to the transaction (section 1-105), that state was the situs at the time of attachment and trial (1962 sections 9-102 and 9-103), and if that state was the location of the collateral at the time of the "last event" (1972 section 9-103). Any other combination leaves open the possibility that the law of some other state might be applicable and that this application might lead to different (and unforeseen) perfection and choice of law rules. These uncertainties will remain until, and perhaps even after, complete uniformity of law is attained.

28. Section 9-102, Official Comment 3, of the 1962 code states:
> In general this article adopts the positions . . . that the law of the state where the collateral is located should be the governing law, without regard to possible contacts in other jurisdictions.

Cf. § 9-103, Official Comment 1 of the 1972 code:
> The general rules on choice of law between the original parties in section 1-105 apply to this article.

See also, e.g., United Counties Trust Co. v. Mac Lum, Inc., 643 F.2d 1140 (5th Cir. 1981).

29. *See supra* note 15 and authorities cited therein and accompanying text.

30. *Id. See also supra* note 28, and authorities cited therein.

31. *See, e.g.*, Kripke, *The "Last Event" Test for Perfection of Security Interests Under Article 9 of the Uniform Commercial Code*, 50 N.Y.U. L. Rev. 47, 48 (1975) [hereinafter Kripke], citing R. Weintraub, Commentary on the Conflict of Laws 360-62 (1971).

32. It should be noted that Professor Kripke and others consider § 9-103 to be the 1972 substitute for the 1962 situs rule at § 9-102. Kripke, *supra* note 31. *See also* Smith & Faint, *The 1981 Revisions to the Maryland Law of Secured Transactions; An Overview for the Practitioner*, 40 Md. L. Rev. 508, 509 (1981); Bailey, *The New U.C.C. Article 9 in Oregon; Choice of Law and Filing Problems*, 12 Williamette L. Rev. 207, 208-209 (1976); Leflar, *supra* note 17, at 108-109. However, § 9-103 contains no "anchor" tying application of that section to collateral located in that state. Instead application of § 9-103, unlike the 1962 code version of § 9-102, formally requires prior choice of law analysis under the forum-oriented rules at § 1-105. *See supra* text and accompanying notes 15-28. *See also infra* p. 163 ¶ II E; *infra* note 34.

33. *See supra* text and accompanying notes 15-28; Kripke, *supra* note 31. *See also* Murray, *Choice of Law and Article 9: Situs or Sense?*, 9 Hofstra L. Rev. 39, 51 (1980). Murray notes that "[T]he abolition of the situs test of the 1962 section 9-102 may have fatally undercut the assumptions upon which the last-event test of the 1972 section 9-103 was apparently founded." *Id.*, at 73-74.

34. It should be noted that the choice of law dilemmas created by these circumstances have been addressed but not eliminated by the statutory revisions. *See, e.g.*, § 9-103(1)(b) of the 1972 version, recognizing a perfection choice of law rule based on the situs of the collateral at the time of the "last event" relating to perfection of the security interest (discussed *infra* at text and accompanying notes 38-40). But the application of this provision comes at a later stage of the analysis, after the appropriate choice of Article Nine law has been made, and therefore it does not relate to the initial choice of Article Nine law as did § 9-102. Therefore, § 9-103(1)(b) is not a precise counterpart to the old "situs" rule at § 9-102. Despite this, many consider § 9-103(1)(b) to be the 1972 code replacement for the 1962 § 9-102. *See, e.g.*, Kripke, *supra* note 31, at 48. *See also infra* p. 163 ¶ II E; *supra* note 32.

35. *See* Kripke, *supra* note 31, at 48.

36. *See, e.g.*, Restatement (Second) Conflict of Laws §§ 251-254 (1971).

37. *See* U.C.C. § 9-103(1)(b) (1987). This is applicable if the collateral consists of documents, instruments, or ordinary goods.

F. Summary of the Initial Analysis

Under the 1972 code, all choice of law analysis, including consideration of Article Nine perfection issues, must begin at section 1-105. Section 1-105 directs the court to apply section 9-103 of the forum, even if that is not the state where the collateral is located, so long as the forum has a reasonable relation to the transaction. In contrast, the 1962 version of the Code generally called for application of section 9-103 to collateral located in that state, under section 9-102. The 1972 version encourages the forum to apply its own version of section 9-103 regardless of the location of the collateral. (All possible versions must be considered because of the possibility that litigation might be encountered or some of the collateral might be located in another state with one or the other of these variations of the code.) When a choice of law is made pursuant to section 1-105 (or 1962 section 9-102), that choice will determine that the Article Nine law of a given state will apply. The next step is to refer to section 9-103 of the chosen state for the choice of law rules determining the law that will govern perfection. Under section 9-103 this choice depends on the nature and type of the collateral.

II. Goods, Documents, Instruments: Analysis Under Section 9-103

Under the 1972 version of section 9-103, perfection of a security interest in documents, instruments or ordinary goods and its effect will be governed by the law of the situs of the collateral at the time when the "last event" in the security transaction is completed.[38] This reference to the "last event" could be a reference to attachment, filing, or perfection, whichever occurs last; the 1972 revision rejects any view which focuses solely on the location of the collateral at the time of filing (or alternatively at the time of attachment).[39] The "last event" test presumably was intended to compensate for loss of the situs rule at section 9-102 of the 1962 code, but its effect is entirely different.

Determination of the "last event" is the culmination of a multistage analysis under the 1972 code which requires an analysis of section 1-105, application of section 9-103 of the chosen state, identification of the state where the collateral was located when the "last event" occurred, and ultimately, application of the law of that "last event" state. Normally, in the case of goods, documents, and instruments, this will mean application of the perfection rules of the "last event" state.[40] However, this may not be the state where the collateral is currently located.[41]

A. The Last Event Test

The "last event" test can be surprisingly troublesome. In a given multistate transaction it may not be entirely clear just what event constitutes the qualifying "last event" in order to trigger an appropriate choice of law.[42] For example, suppose that collateral is temporarily located in state A, but is expected to be shipped at any moment to state B, so the secured party files in state B. Assuming that all of the other requisites for perfection previously have been met, is the filing in state B, while the collateral remains in state A, the "last event" necessary to trigger application of the choice of law rule at section 9-103(1)(b)? If so, does this mean that the law of State A (as the situs at the time of the "last event") governs this perfection, or is there some theory that would apply the law of state B, even though the collateral is still located in state A?[43] Or would proper analysis necessarily conclude that in these circumstances a filing in state B is inadequate to perfect a security interest as to goods still located in state A, so that there has been no perfection and no "last event" as long as the collateral remains in state A?[44]

Taking the analysis a step further, does the filing in state B (while the collateral is still located in state A) constitute a proper "last event," thereby establishing state A (where the collateral is located but no filing has been made) as the permanent choice of law for perfection issues relating to this security interest under section 9-103(1)(b)? If so, and the perfection is forever to be governed by the law of state A, can the filing in state B ever be effective to perfect that security interest? In other words, do these facts trigger a choice of law reference to state A (as the situs of the collateral at the time of the "last event") which will govern even after the collateral has been moved to state B?[45] These questions could be crucial if the goods become subject to a competing lien or security interest before they leave state A, or even after they arrive in state B, or in still other cases, for example where they are removed directly from state A to a third state.

Under these facts, if the goods are taken directly to a third state, the first secured party can claim the benefits of the four-month period of automatic perfection (provided at section 9-103(1)(d)) only if the security interest was considered to have been perfected under the law of the state from which the goods were removed (state A).[46] If a filing in state B does not satisfy this test as to collateral located in state A, and never brought within the boundaries

38. U.C.C. § 9-103(1)(b) (1972). Note again that some consider § 9-103(1)(b) to be the 1972 substitute for the 1962 situs rule at § 9-102. *See* Kripke, *supra* note 31, at 48. While both sections provide a situs-oriented choice of law rule, § 9-103 does not perform one important task formerly accomplished by 1962 § 9-102: it does not provide a basis for applying Article Nine (including § 9-103) of the situs state. Instead the 1972 code leaves the initial choice of Article Nine law entirely to § 1-105. *See supra* text accompanying notes 15-28; *supra* notes 32 & 34. The definition of instrument includes certificated investment securities. *See* U.C.C. §§ 9-105(1)(i), 8-102 (1987). The relationship between U.C.C. Articles Eight and Nine will be discussed in Part III of this series.

39. *Cf.* the 1962 version of § 9-103, which calls for application of the law of the situs at the time of attachment. *See also* Kripke, *supra* note 31, at 61.

40. For other types of collateral the reference under § 9-103 will include a reference to the choice of law rules of the chosen state, which may result in reference to the law of still other states. *See supra* text accompanying notes 2-13.

41. *See* § 9-103(3) of the 1962 version of the U.C.C.; *infra* text accompanying notes 42-57.

42. As to the possible application of a "last event" test for intrastate transactions, *see* Kripke, supra note 31, at 63-65; *cf.* Hammon v. Fedders Fin. Corp., 614 F.2d 399 (5th Cir. 1980) (applying the last event test to an intrastate problem after consideration of arguments to the contrary). *See also* Wallach, *Perfecting and Reperfecting Security Interests Under the Uniform Commercial Code*, 30 Bus. Law. 447 (1975). The last event test was not specifically adopted in the code for single state transactions. *Id.* at 454.

43. *See* Coogan, *supra* note 15, at 537-544. *Cf.* U.C.C. § 9-103(1)(c) (1987), discussed *infra* text at notes 51-66.

44. *Id. See also* Kripke, *supra* note 31, at 48-49; U.C.C. § 9-103, Official Comment 1 (1972).

45. *See, e.g.*, Kripke, *supra* note 31, at 62-63 (construing R. Henson, Handbook of Secured Transactions Under the Uniform Commercial Code (1973) and other authorities as being supportive of this view (which Kripke rejects)).

46. *See* U.C.C. § 9-103(1)(d) & Official Comment 1 (1972).

of state B,[47] then the security interest was never perfected under the laws of either state, and the four month grace period of automatic perfection at section 9-103(1)(d) would not apply upon removal of the goods to a third state.

In these circumstances it is likely that there never was any effective "last event" to provide a basis for claiming perfection of the security interest. Indeed, it's doubtful that even the secured party will claim that the filing in state B was the "last event," if the collateral at that time was located in state A. Section 9-103(1)(b) calls for application of the law of the state where the collateral was located at the time of the "last event"; in the facts stated above this would be state A, and in state A there was no filing or perfection. It is possible to argue that this reference makes state A the appropriate choice of law for perfection of this security interest, even under the law of state B, and even after the collateral has been brought to state B, because of the language of section 9-103(1)(b) referring to the situs of the collateral at the time of the "last event." In fact one can argue that a "last event" (such as a filing in state B) while the collateral was still located in state A would make state A forever the appropriate choice of law for purposes of this perfection, regardless of where the collateral was subsequently moved. In this hypothetical situation, there was no effective perfection in state A, by filing in state B, but state A would be established as the choice of law for perfection purposes under section 9-103 (1)(b), so the security interest would remain forever unperfected by the initial filing in state B, even after the collateral was brought into that state.[48] This view has been called "absurd" and most lawyers probably would agree with this criticism; nonetheless, one must confront this view under the plain meaning of the statute.[49]

An alternative, and preferable, view would be that the filing in state B is not the "last event" until the collateral is brought into that state, because until that time the filing in state B is not effective as a basis for claiming perfection of the security interest.[50] In this view, state B becomes the proper choice of law for perfection purposes, but not until entry of the collateral into that state, regardless of the time of the filing there.[51] But even in this view, the security interest would remain unperfected, and therefore subordinate to certain other claims,[52] prior to and until the collateral is actually brought into state B. This would mean, among other things, that removal of the collateral directly to a third state from state A would not trigger the four month grace period provided at section 9-103(1)(d), because the security interest was not perfected in the state from which the goods were removed (state A).

B. Purchase Money Security Interests

All of this is subject to a limited exception for certain purchase money security interests in goods, provided at U.C.C. section 9-103(1)(c). If the parties creating a purchase money security interest "understand" at the time of attachment that the goods

> will be kept in another jurisdiction, then the law of the other jurisdiction governs the perfection and the effect of perfection or non-perfection of the security interest from the time it attaches until thirty days after the debtor receives possession of the goods and thereafter if the goods are taken to the other jursidiction before the end of the thirty day period.[53]

Notice that as a prerequisite to application of this section and the law of the second state,[54] the statute requires only that there be a purchase money security interest and an "understanding" that the goods will be taken to and kept in the second state. It apparently is not necessary that the goods actually be delivered in accordance with that understanding. If the goods are in state A at the time of attachment, and the parties at that time have the requisite "understanding" as to delivery in state B, then the law of state B is applicable from that point in time until thirty days after the debtor receives possession, regardless of the actual location and delivery of the goods. Conversely, an understanding at any other point in time will not be effective to trigger application of this rule.[55]

If this rule is triggered while the goods are in state A, and the "understanding" refers to state B, then the law of state B would apply to perfection matters for the stated period (which will be longer than thirty days whenever attachment precedes delivery of possession), even if the goods never enter state B. Furthermore, if the goods are taken to a third state (state C) before the end of the thirty day period, this exception would recognize perfection "under the law of the jurisdiction from which the collateral was removed,"[56] even if there is no filing in state A, since the filing in state B is recognized as perfection under the law of state A at section 9-103(1)(c). This in turn would trigger automatic perfection in the third state (state C) for a period of four months after the removal. Thus, under sections 9-103(1)(c) and 9-103(1)(d), an informal "understanding" at the appropriate moment in time can mean that a filing in state B (an otherwise unrelated jurisdiction) could result in perfection as to goods in states A and C, for a total period potentially in excess of five months.[57]

C. Problems With Lien Creditors

Other problems arise in these circumstances, if the competing creditor has a judicial lien and the security interest does not qualify as a purchase money security interest, because of the priority rules at section 9-301(1)(b). In a non-purchase money transaction section 9-103(1)(c) would not be available under any theory to trigger application of the law of state B prior to the goods being brought to that state. (Section 9-103(1)(c) also would be inapplicable absent the requisite "understanding" noted above.) As a result, a filing in state B while the goods are still in state A likely would not be effective as perfection until the goods were actually brought to state B.[58]

Even assuming that in this case the "last event" is deemed to be entry of the collateral into state B (so that the law of state B applies and the prior filing in state B becomes effective as perfection under section 9-103(1)(b) when the goods are brought into state B), the result is that perfection does not occur until the goods are brought into state B, even though the filing there was earlier. For purposes of some priority conflicts, priority will date from the time of filing, even though perfection came later.[59] But for other purposes, the time of perfection is a crucial event.[60]

For example, any lien creditor or transferee of the collateral who obtained a lien (or in the case of a transferee took possession of the collateral for value and without knowledge)[61] before the goods were brought to state B, would take priority under section 9-301(1)(b) or (c). This competing claimant would have priority even though its claim arose after the financing statement was filed in state B, because priority under sections 9-301(1)(b) and (c) is dependent on the time of perfection, not filing. Without benefit of the purchase money exception at section 9-103(1)(c) the filing in state B cannot constitute perfection as to goods located in state A, until the goods are brought into state B. Therefore, any party with a claim under section 9-301(1)(b), (c), or (d) that arose before the goods entered state B would be entitled to priority.

Indeed, even in the case of a purchase money security interest, priority as against a competing lien creditor may be jeopardized in an interstate transaction, because of an oddity at section 9-301(2) that provides protection against a lien creditor only if the lien is obtained between attachment and filing of the security interest. (Section 9-301(1)(b) provides protection against liens acquired after perfection.) In an intrastate context, filing and perfection normally will be the same, and section 9-301(2) will provide the needed protection during the interim between attachment and filing/perfection. But in a multistate transaction there may be a gap between filing and perfection, because the filing in one state may not constitute perfection until the goods are brought into that state. In that case a lien obtained after the financing statement is filed, but before movement of the collateral results in perfection, will have priority over the security interest even if it is a purchase money security interest, unless the exception at section 9-103(1)(c) applies.

Assume, for example, the following facts: The rule at section 9-103(1)(c) is not applicable because there was no requisite "understanding" at the appropriate time; the purchase money security interest attaches while the goods are in state A; and a filing is made in state B ten days later. Section 9-301(2) protects the purchase money security interest during that ten-day period. But if the filing has been made in state B and the goods are not brought into that state for, say, another 45 days, that filing will not constitute perfection, because the security interest will not be perfected by a filing in state B (under even the most generous view) until the goods have been brought into state B.[62] During that 45 day period there is no perfection or protection against a lien creditor or transferee under section 9-301.[63] Section 9-301(2) will protect the security interest between the time of attachment and the time of filing in state B. After the goods are brought to state B that filing will constitute perfection and the security interest will be protected against subsequent liens by section 9-301(1)(b). But there is no protection anywhere in the code against a lien obtained during the period between the time the financing statement was filed in state B and the time it became effective as perfection as a result of the collateral being brought into state B.

D. Summary: The "Last Event" Test

The "last event" test at section 9-103(1)(b) contains several pitfalls for secured creditors in cases where the collateral is out of state or in transit when the financing statement is filed. If a creditor is taking a security interest in goods, documents or instruments located temporarily in another state, two distinct sets of problems need to be considered under the 1972 or later versions of code.

First, if it is a purchase money transaction, then the parties' *understanding* at the *time of attachment* as to where the goods will be kept triggers application of that law from the time of attachment until 30 days after the debtor receives possession of the collateral,[64] even if the goods are never brought into that jurisdiction. Thus, for a period potentially in excess of 30 days, perfection of the security interest may be governed by the law of a state that has no visible connection to the transaction. Perfection under the law of this state will constitute perfection under the law of the situs state, even though there is no filing in the situs state. Because the security interest is deemed to be perfected in the situs state, removal from that state to a third state should trigger the four-month period of automatic perfection in the third state.[65] Thus, a filing in an otherwise unrelated state, based on the "understanding" of the parties,[66] can result in perfection in the situs and a removal state for a total period potentially in excess of five months.

The second group of issues to be considered arises in the context of non-purchase money transactions. A non-purchase money security interest in goods, documents, or instruments is not subject to the special choice of law rule described

47. *Supra* note 46 and authorities cited therein. *See also* Kripke, *supra* note 31, at 56-57. The possible exception is at § 9-103(1)(c). *See infra* text accompanying notes 53-57.

48. Even in this view, it is likely that subsequent removal of the collateral to state B would constitute a new perfection due to the filing in that state, with a new choice of law based on state B as the situs at the time of this new "last event." *See* Kripke, *supra* note 31, at 56-57. *See also* notes 50-52, *infra;* U.C.C. § 9-103, Official Comment 1 (1987).

49. *See, e.g.*, U.C.C. § 9-103(1)(b) (1987); Kripke, *supra*, note 31, at 61-63; Coogan, *supra* note 15, at 539-541.

50. *See* Kripke, *supra* note 31, at 49; U.C.C. § 9-103, Official Comment 1 (1987).

51. Kripke, *supra* note 31, at 49; U.C.C. § 9-103, Official Comment 1 (1987). This can be viewed as a corollary of the law applicable to "after-acquired" property. *See, e.g.*, Kripke, *supra* note 31, at 51-52.

52. For example lien creditors would have priority under U.C.C. § 9-301(1)(b) (1987). *See also* Kripke, *supra* note 31, at 4-8.

53. U.C.C. § 9-103(1)(c) (1987). Note that this will be longer than a "thirty day period" if attachment precedes possession. "Possession" is not a defined term.

54. From the time of attachment until thirty days after possession. *Id.*

55. Coogan, *supra* note 15, at 536-537.

56. U.C.C. § 9-103(1)(d) (1987).

57. If the goods are delivered to state B still other problems may arise. Even though § 9-103(1)(c) calls for application of the law of state B from the time of attachment, there is an outside possibility, depending on the law of state B, that a court in state B would not treat a state B filing as sufficient to perfect a security interest in goods located in another state. If this is so, then the filing in state B would not become effective as perfection in state B until the goods entered state B, even if perfection in state B is recognized prior to that time by the law of the prior situs state (state A). Even if the priority of the security interest relates back to the time of filing in state B, under § 9-312(5), it may not become effective as "perfection" in state B until the goods actually are brought to that state. This could affect application of the purchase money priority rules at §§ 9-312(3) and (4), which are dependent on the date of actual perfection rather than the date of filing. It's likely, of course, that under § 9-103(1)(c) the date of filing in state B would be viewed as the date of perfection even though at that time the collateral was still located in another state. However, problems still could arise if the necessary "understanding" cannot be proven or if more than thirty days have passed since the debtor received "possession." These issues suggest that caution be excercised when relying on § 9-103(1)(c), even when the goods are delivered as expected.

58. *See, e.g.*, U.C.C. § 9-103, Official Comment 1 (1972). The alternative view is that a filing in state B is never effective for perfection as to goods at that time located in state A, if that filing was the "last event," because the rule at section 9-103(1)(b) incorporates state A as the appropriate choice of law for collateral located at that time in state A. In this view, the filing in state B, while the goods are in state A, would designate state A as the choice of law for perfection purposes. The filing in state B would be ineffective as perfection if state A is chosen as the state of the applicable law. As long as the filing in state B remained the "last event," the law of state A would remain applicable as the situs of the collateral at the time of that event. Conceivably state A could remain the applicable choice of law forever, even if the goods were subsequently brought to and kept in state B. There would not even be a four month grace period of automatic perfection after the goods are brought into state B under section 9-103(1)(d), because the security interest was not first perfected in state A. *See supra* text accompanying notes 43-49; U.C.C. § 9-103, Official Comment 1 (1972).

59. *See, e.g.*, U.C.C. § 9-312(5) (1987).

60. *See, e.g.*, U.C.C. §§ 9-312(3)(a), (4) (1987).

61. U.C.C. § 9-301(1)(c) (1987).

62. Of course if the exception at § 9-103(1)(c) is applicable the law of state B will apply from the date of attachment, and the security interest will be deemed perfected from the beginning and will have priority under § 9-301(1)(b). But the exception at § 9-301(1)(c) is applicable only in limited circumstances and by no means governs all purchase money transactions. *See supra* text accompanying notes 53-57.

63. There also must be some doubt about the effectiveness of a filing in state B as to any lien creditor or transferee in state A, under §§ 9-103(1)(b) and 9-301(2).

64. U.C.C. § 9-103(1)(c) (1972).

65. U.C.C. § 9-103(1)(d)(i) (1972).

66. U.C.C. § 9-103(1)(c) (1972).

in the preceding paragraph.[67] Therefore, in a multistate secured transaction, choice of law for perfection purposes will be governed by the "last event" test at section 9-103(1)(b). But if attachment has occurred and the financing statement is filed in one state while the collateral is still located in another state, what is the qualifying "last event"? Is a filing in one state the "last event" as to goods located in another state? If so, then section 9-103(1)(b) calls for application of the law of the situs state and that will mean that filing in the other state is ineffective as perfection. Alternatively, if a filing in one state does not constitute the "last event" until the goods are brought into that state, then filing in one state while the goods are located in another also will leave the security interest unperfected in both states. This may jeopardize the secured party's position under priority[68] and purchase money[69] rules that are dependent on the time of perfection.

Two basic lessons stand out from all of this. First, the secured party should always perfect in the jurisdiction where the goods are currently located, even if other filings are also made to cover other contingencies. This will assure an initial valid perfection and choice of law, upon which a later chain of continuous perfection can be built. For example, perfection in the situs state will trigger the automatic four month grace period at section 9-103(1)(d) should the collateral be moved to an unforeseen destination. Perfection in the situs state also will make it more likely that the security interest will meet the grace period tests necessary to qualify for purchase money priority.[70] These benefits suggest a need for filing in the situs state even if the secured party also files in the ultimate destination state under section 9-103(1)(c) or some other theory.

The second lesson is that early filing, otherwise encouraged by the code,[71] entails risks in a multistate transaction. There is always a danger than an early filing, made without regard to the current location of the collateral, may lead to an unforeseen "last event," triggering some unanticipated choice of law under section 9-103(1)(b). For example, an early filing made before attachment would not be the "last event," but would assure that some later, perhaps otherwise obscure event, will become the crucial "last event" to trigger a choice of law. An early signing of the loan agreement and filing of the financing statement could mean that the "last event" will occur the moment the debtor obtains "rights in the collateral."[72] This could mean anything from identification of the goods or an insurable interest[73] to complete and unrestricted possession.[74] Since the goods may be in transit during the process of delivery this could lead to an unforeseen choice of law. In the context of a multistate problem, a later rather than a earlier filing may be useful as a means of specifying an incontrovertible "last event" and hence a clear choice of perfection law.

E. A Modern "Situs" Rule?

The thrust of the 1972 revisions to the choice of law provisions was to eliminate the old situs rule at section 9-102 (thereby bringing all non-perfection choice of law issues under the more analytical and forum oriented rules of section 1-105), and then to create a new "situs" rule for ordinary goods, instruments, and documents, based on the location of the collateral at the time of the "last event" under section 9-103(1)(b). The law of the forum rules of section 1-105 will encourage a court to follow its instincts and apply its own law, including section 9-103(1)(b). To the extent that section 9-103(1)(b) is the same everywhere, this will lead to application of a universal rule based on the law of the situs at the time of the "last event." Subsequent changes in the location of the collateral would be handled under the "four-month rule" at section 9-103(1)(d) (discussed *infra*); this may lead to a new and uniform situs-oriented choice of law analysis that originates with section 1-105 and the law of the forum, rather than separating choice of law analysis by issue and attempting to apply the law of the situs directly to perfection issues under section 9-102.

To the extent that the system functions in this manner, the 1972 changes should not in most cases alter the basic results that have come to be expected under earlier versions of the Code. The law of the situs should be applied to perfection issues, albeit under sections 1-105 and 9-103 of the forum rather than by purporting to apply the law of the situs state. The potential problem lies in the significant changes to the route by which the analysis must travel to reach this conclusion, and the resultant potential for roadblocks or detours along the way. Some of these, including problems of nonuniformity in the law and uncertainties surrounding the "last event" test, have been discussed. Others will be discussed *infra*, e.g. the four-month rule, which becomes crucial as a means of tying the forum's choice of law to the current situs of the collateral in the absence of section 9-102. Even where the results don't change, however, the lawyer and secured party should be aware that the required analysis has changed significantly, and that reliance on the simple and direct "law of the situs" rule at section 9-102 is no longer a sufficient or prudent practice.

F. The Four-Month Rule

Both purchase money and non-purchase money security interests in documents, instruments, and ordinary goods will be governed by the standard four-month rule at section 9-103(1)(d) if the collateral is moved from one jurisdiction to another.[75] If the security interest is perfected in the first state and the secured party reperfects in the second state within the four month period, then under the 1972 Code, the security interest is deemed to have been continuously perfected in the second state from the date of its original perfection in the first state.[76] If, however, there is no reperfection within the four-month period, the security interest becomes unperfected at the end of the four months and thereafter is deemed to have been unperfected during the four-month period as against anyone who became a "purchaser" after the

67. *Id.*

68. *See, e.g.*, U.C.C. §§ 9-301(1)(b), (2) (1972).

69. *See, e.g.*, U.C.C. §§ 9-312(3), (4) (1972).

70. U.C.C. §§ 9-312(3), (4) (1972).

71. Consider, for example, the incentives for early filing created by U.C.C. §§ 9-312(3), (4), (5) (1972).

72. U.C.C. § 9-203(1)(c) (1972).

73. *See, e.g.*, U.C.C. §§ 2-501, 2-401 (1972).

74. Finance Co. of America v. Hans Mueller Corp. (*In re* Automated Bookbinding Servs., Inc.), 471 F.2d 546 (4th Cir. 1972); Cain v. Country Club Delicatessen, 25 Conn. Supp. 327, 203 A.2d 441 (1964).

75. Section 9-103(1)(d) provides that a security interest perfected in one state remains perfected for four months after the collateral is removed from that state to another state. (This is the 1972 version–the 1962 version is similar.) *See* U.C.C. § 9-103(1)(d)(ii) (1972). The definition of "instrument" includes certificated securities as defined at U.C.C. § 8-102 (1972). *See* U.C.C. § 9-105(1)(i) (1972).

76. U.C.C. § 9-103(1)(d)(i) (1972). *See also* U.C.C. § 9-303(2) (1972). The requirement to refile within four months may not apply if the debtor is in bankruptcy. *See* U.C.C. § 9-403 (2); Carroll & Harrell, *Casenote: Reperfection of Security Interests and the Impact of Bankruptcy*, 42 Consumer Fin. L. *Q. Rep.* 169 (1988) [hereinafter Carroll & Harrell].

removal.[77] There is some ambiguity in the 1962 version as to the priority position of competing claimants whose interests arise or are perfected during the four-month period as against a security interest that was not reperfected within the four-month period.[78] Also, the four-month period may be reduced by an earlier expiration of the five year term of the original financing statement in the original state, although the code comments indicate that a refiling within that original state is sufficient to extend the perfection for the full four-month period, even though the collateral already has been moved out of that state.[79]

An excellent case illustrating the lapse of the four-month period is *Rockwell International Credit Corp. v. Valley Bank.*[80] Two secured creditors had properly perfected security interests in collateral located in Idaho. When the debtor moved the collateral to Wyoming, neither creditor reperfected within the four-month period, hence both became unperfected. Later, one of the secured creditors took possession of the collateral in Wyoming, and still later the other secured creditor reperfected by filing in Wyoming. Once the four-month period ended both creditors were unperfected in Wyoming, and priority went to the creditor who subsequently first perfected (by possession in this case) after the end of the four-month grace period. Neither knowledge of the competing security interest nor priority under Idaho law was relevant to this determination.

The four-month rule for interstate removal may have a counterpart for intrastate transfers under the U.C.C. in some states.[81] Alternative Subsection 9-401(3) states that a filing made in the proper place within the state continues to be effective for four months after the debtor's residence, place of business, or the location of the collateral changes within the state. This could require reperfection within four months of any intrastate move that would affect perfection.[82]

There is another optional provision at U.C.C. subsection 9-401(1), calling for statewide central filing for most commercial security interests, and there should be relatively few problems with intrastate moves of such collateral where this version is in effect. However, some states have nonuniform code provisions calling for local filing for some types of collateral.[83] This could be important, since Alternative Subsection 9-401(3) provides that a filing continues to be effective only for four months after a change of location within the state, and then becomes ineffective unless there is a proper refiling within the four-month period.

As a result, for example, an intrastate move of oil and gas equipment in Oklahoma (or a change in the use of the equipment) could result in loss of perfection.[84] If there is a refiling within the four-month period, perfection continues to date from the beginning; however, a failure to refile within four months could make the first filing ineffective and any subsequent refiling would be effective only as of the date of refiling.[85] This also could be true for consumer goods collateral (other than licensed vehicles), and certain agricultural collateral, if they are subject to county or other local filing systems.[86] In addition, changes in the debtor's name or organizational structure also could trigger a requirement to refile within four months, at least as to new collateral, under U.C.C. section 9-402(7).[87] Other changes such as the passage of time pose additional problems.[88]

G. Return of the Goods After a Prior Removal

Professor Kripke has commented[89] that this problem has all of the earmarks of a law school hypothetical: Suppose that collateral subject to perfection by filing in state A is removed to state B (where there is no filing), and then more than four months later is returned to state A.[90]

In *In re Miller*[91] the collateral was subject to perfection by filing in California, was subsequently moved to Oregon and there subjected to a competing security interest perfected by an Oregon filing, and then (more than four months later) was returned to Caliufornia.[92] The first (California) secured party did not refile in Oregon. Then, to top it all off, the debtor filed bankruptcy immediately after the collateral was returned to California. The bankruptcy judge treated the first security interest as being unperfected in California at the time of the bankruptcy.[93] This would make the first security interest subordinate to both the trustee in bankruptcy and the second creditor, even though the first creditor was the first to file in California as to collateral then located in that state. This conclusion was apparently based on the theory that, since the first (California) security interest became unperfected once the collateral had been out of the state of California for more than four months, it was unperfected in Oregon and there was no four month grace period of automatic perfection upon its return from Oregon to California.[94]

77. *See* U.C.C. § 9-103(1)(d)(i) (1972). *See also* Vintero Corp. v. Corporacion Venezolana De Fomento (*In re* Vintero Corp.), 735 F.2d 740 (2d Cir. 1984), *cert. denied*, 469 U.S. 1087 (1984); Prairie State Bank v. I.R.S., 745 P.2d 966, 970 (Ariz.App. 1987). Apparently a competing claimant who, for example, obtained a nonconsensual lien during the four-month period and cannot qualify as a "purchaser" under U.C.C. §§ 1-201(32), (33), will continue to be subordinate to the security interest even if it is not reperfected within the four-month period. *Id. Cf.* U.C.C. § 9-103(2)(d) (1972). *See also*, Zaretsky. *Lapse of Perfection in Secured Transactions: A Search for a Consistent Approach*, 22 B.C.L. Rev. 247 (1981). Note, however, that a secured party who took a security interest in the second state during the four-month period should qualify as a "purchaser" under U.C.C. §§ 1-201(32) & (33).

78. *See* United States v. Burnette-Carter Co., 575 F.2d 587, 591 (6th Cir. 1978); Finance Co. of America v. Hans Mueller Corp. (*In re* Automated Bookbinding Servs., Inc.), 471 F.2d 546 (4th Cir. 1972); Rental Electronics, Inc. v. SSC Corp., 27 U.C.C. Rep. Serv. (Callaghan) 828 (Bankr. D. Utah 1979). *See also* McCullough & Muhlstein, *Perfecting and Protecting Security Interests in Ordinary Goods Moving Across State Lines*, 29 Prac. Law., Mar. 1983, at 13 [hereinafter McCullough & Muhlstein].

79. *See* U.C.C. § 9-103, Official Comment 7 (1972); Kripke, *supra* note 31, at 53 n. 22.

80. 109 Idaho 406, 707 P.2d 517 (Ct. App. 1985), *construed in* Clark, *Uniform Commercial Code Annual Survey: Secured Transactions*, 42 Bus. Law. 1333, 1390 (1987).

81. *See, e.g.*, Hammons v. Fedders Fin. Corp. 614 F.2d 399 (5th Cir. 1980); *cf.* Kripke, *supra* note 31, at 63-75. *See also* U.C.C. § 9-401, Official Comment 6 (1972).

82. See *supra* note 81 and authorities cited therein. In contrast, the standard version of § 9-401(3) provides that a filing in the proper place continues to be effective even though the location of the debtor or the collateral changes. It is, however, possible that such a change could still affect after-acquired property. *See* U.C.C. § 9-402(7) (1972); Kripke, *supra* note 31, at 70-74. *See also* Bank of the West v. Commercial Credit Fin. Servs., No. 87-1940, slip op. (9th Cir. July 26, 1988).

83. *See, e.g.*, Okla. Stat. tit. 12A § 9-402(5) (Supp. 1987), which requires county filing for certain oil and gas related security interests.

84. *Id. Cf.* Kripke, *supra* note 31, at 66-70, 72. *See also* U.C.C. § 9-401 Official Comment 6 (1972); Harrell & Dancy, *supra* note 1, at 72-78.

85. *Supra* note 84 and authorities cited therein; *cf.* U.C.C. § 9-303(2) (1972).

86. *See, e.g.*, Okla. Stat. tit. 12A §9-401(1)(a) (Supp. 1987). This also applies to certain farm products collateral, although to some extent this may have been preempted by the federal Food Security Act. *See, e.g.*, *Part II: The Relationship Between State and Federal Law*, of this series, in the following issue of the *Quarterly Report*.

Similar problems can arise with regard to a continuation statement filed pursuant to U.C.C. § 9-403(3) or an amended financing statement filed pursuant to U.C.C. § 9-402(4). Should this be filed in the original county or in some other county which would now be the appropriate location for a new filing due to changed circumstances? *See* General Elec. Credit Corp. v. Fancher, 600 S.W. 2d 472 (Ky.Ct. App. 1978) which required a filing in the new county, rejecting Kripke's view to the contrary. *Id.* at 475.

87. *See, e.g.*, Kripke, *supra* note 31, at 74-75; U.C.C. § 9-402, Official Comment 7 (1972). *See also* Knippenborg, *Debtor Name Changes and Collateral Transfer Under 9-402(7): Drafting From the Outside In*, 52 Mo. L. Rev. 87 (1987); Burke, *The Duty to Refile Under Section 9-402(7) of the Revised Article 9*, 35 Bus. Law. 1083 (1980). *See also Bank of the West*, *supra* note 82.

88. *See, e.g.*, Kripke, supra note 31, at 70-74. *See also* Pearson, *Absolute Versus Conditional Protection for Secured Parties: Problems of Lapsed Perfection Under Article 9 of the Uniform Commercial Code*, 17 Hous. L. Rev. 1 (1979); General Elec. Credit Corp. v. Fancher, *supra* note 86; Frisch, *U.C.C. Filings: Changing Circumstances Can Make a Right Filing Wrong. But Can They Make a Wrong Filing Right?* 56 S. Cal. L. Rev. 1247 (1983); Carroll & Harrell, *supra* note 75. *See also* Worthen Bank & Trust Co., v. Hilyard Drilling Co. (*In re* Hilyard Drilling Co.), 840 F. 2d 596 (8th Cir. 1988) (New financing statement no substitute for required continuation statement).

89. *See* Kripke, *supra* note 31, at 47-48.

90. *Id.* As noted by Professor Kripke, this "academic hypothetical" came to life in *In re* Miller, 14 U.C.C. Rep. Serv. (Callaghan) 1042 (Bankr. D. Or. 1974). *See* Kripke, *supra* note 31, at 49-60.

91. *In re* Miller, *supra* note 90.

92. *Id.*

93. *Id.* at 1046; Kripke, *supra* note 31, 50 & nn. 15 & 57.

94. Kripke, *supra* note 93.

This reasoning overlooks the basic point that collateral removed from the state (and therefore not subject to perfection by the original filing in that state after more than four months) should once again become subject to perfection by the original filing if the collateral is brought back into that original state.[95] While this does not answer the real questions presented by this case, such as the relative priority of this resuscitated perfection as against subsequent but continuously perfected security interests from other states, and the trustee's power to avoid preferential transfers,[96] still it is a basic point which must be recognized as a basis for further analysis.[97]

The basic point is that bringing the collateral back within the "territorial reach" of the original financing statement in California should be a sufficient "last event" under section 9-103(1)(b) to constitute perfection under the law of that state, regardless of the lapse of any prior perfection in that state due to an earlier removal of the goods.[98] The fact that the same financing statement previously perfected a security interest in the same collateral at some earlier point in time, before the collateral was removed from the state and then returned, does not detract from this new "last event" as an act of perfection.[99]

As noted, the more difficult questions involve the priority of this security interest as against a competing security interest perfected later but continuously, and as against the trustee in bankruptcy if the debtor files bankruptcy within ninety days of the "reperfection" by return of the collateral to the original jurisdiction.[100] Professor Kripke suggests that where a competing security interest has been continuously perfected it ought to prevail over the "resuscitated" security interest, even if the latter technically was perfected by an earlier filing, on grounds of simple fairness.[101] In other words, he would limit the "first-in-time" rule of section 9-312(5) to periods of continuous perfection.[102] This seems appropriate, although one might wish for some additional word of encouragement on this in the code.[103] Similar reasoning probably would lead to the conclusion that resuscitation of the security interest by return of the collateral to the "territorial reach" of the original financing statement converted an unperfected security interest into a perfected one and therefore constituted a preferential transfer if the debtor files bankruptcy within ninety days.[104]

H. Changes in Use of the Collateral

U.C.C. section 9-401 Alternative Subsection (3) provides that "[a] change in the use of the collateral does not impair the effectiveness of the original filing."[105] This should continue to be the case even without that optional subsection. But this does not eliminate use-related problems. For example, for oil and gas collateral Oklahoma's special nonuniform amendment at section 9-402(5) is specifically conditioned on the collateral being "*used* in mining, storing, treating and marketing such minerals,"[106] suggesting that a change in such use could disqualify the security interest from perfection under that section. Also consider *In re Burgess*,[107] where it was held that the proper place and method of perfection depend on the *normal use* for such collateral, and that the debtor's *actual use* is therefore immaterial (tractor and plow used by diesel service operator were considered "farm equipment"); and *United States v. Hext*,[108] holding that Mr. Hext using his collateral as a farmer was separate from the same Mr. Hext as a cotton ginner, so that the farm products exception to U.C.C. section 9-307 did not apply to transactions with the latter. Or see *In re Watertown Tractor & Equip.. Co.*,[109] involving farm equipment owned by a dealer but on lease to farmers. The Supreme Court of Wisconsin held that the lease arrangements did not alter the character of the collateral as dealer inventory.[110] Other cases have split on the issue of whether actual use or intended use governs the character of the collateral.[111] Aside from its impact on intrastate filing questions, the use and characterization of the collateral and the debtor can have an impact on interstate choice of law. For example, when are goods classified as "mobile" for purposes of the special choice of law rule at section 9-103(3)?[112] By its terms, that section applies to goods "of a type normally used in more than one jurisdiction," suggesting a "normal use" test rather than an "actual use" test.[113]

I. Security Interests in Vehicles

In the 1972 version of the code goods subject to title certificate laws are covered exclusively and separately by subsection 9-103(2), if the applicable title certificate law requires notation of a security interest on the face of the title certificate.[114] Assuming that section 9-103(2) applies, under either the 1962 or 1972 version, perfection and the effects of perfection or nonperfection generally are governed by the laws of the state that issued the current title certificate. As provided in the 1972 revision, once a security interest is properly perfected in this manner, it remains perfected upon removal of the goods from the state, "until four months after the goods are removed from that jurisdiction and thereafter until the goods are registered in another jurisdiction."[115] However, in no event does the security interest continue "beyond surrender of the certificate" in the second jurisdiction.[116] Presumably in most cases this will refer to surrender of the certificate to the registration authorities in the second or removal state, so that there will be no conflict between these two clauses.

95. *See, e.g.*, Kripke, *supra* note 31, at 52-53, 56-57 & n. 19.

96. 11 U.S.C. § 547 (Supp. IV 1986). *See infra* text accompanying notes 100-104.

97. *See, e.g.*, Kripke, supra note 31, at 47; *cf.* U.C.C. § 9-303(1972).

98. *See supra* note 97 and authorities cited therein. *See also* Kripke, *supra* note 31, at 57; U.C.C. § 9-401, Official Comment 6 (1972).

99. *See supra* note 98 and authorities cited therein. *See also*, Kripke, *supra* note 31, at 51-53.

100. The ninety-day period is crucial under the preferential transfer rules at § 547(b) of the Bankruptcy Code, 11 U.S.C. § 547(b) (Supp. IV 1986). If the secured party was an "insider" of the debtor, the period is extended to one year. *See* 11 U.S.C. §§ 101(30), 547(b)(4)(B) (Supp. IV 1986). *See also* Kripke, supra note 31, at 54-56.

101. *See* Kripke, *supra* note 31, at 59; *cf.* U.C.C. § 9-303(2)(1972).

102. *See supra* note 101 and authorities cited therein.

103. *Id.*

104. *See* Kripke, *supra* note 31, at 54-59. *See also* Glessner v. Massey-Ferguson, Inc., 353 F.2d 986 (9th Cir. 1965); Bankruptcy Code § 547(b), 11 U.S.C. § 547(b) (Supp. IV 1986). For "insiders" the preference period is one year. *See* 11 U.S.C. §§ 101(30), 547(b)(4)(B) (Supp. IV 1986). *See also* Zaretsky, *supra* note 77, at 278; Harrell & Carroll, *supra* note 75.

105. *See* U.C.C. § 9-401, Alternative Subsection (3) (1972).

106. Okla. Stat. tit. 12A §9-402(5) (Supp. 1987) (emphasis added).

107. 36 U.C.C. Rep. Serv. (Callaghan) 708 (Bankr. W.D. Okla. 1983).

108. 444 F.2d 804 (5th Cir. 1971); *cf.* American State Bank v. White, 217 Kan. 78, 535 P.2d 424 (1975); United States v. Squires, 378 F. Supp. 798 (S.D. Iowa 1974). United States v. Hext, *supra*, was criticized in First Nat'l. Bank of Amarillo v. Southwestern Livestock, Inc., 616 F.Supp. 1515, 1519 (D.C. Kan. 1985).

109. 289 N.W.2d 288 (Wis. 1980), *construed in* Schumberg, *Uniform Commercial Code Annual Survey: Secured Transactions*, 36 Bus. Law. 1347, 1357 (1981).

110. 289 N.W.2d at 294.

111. *See* Smith, *Uniform Commercial Code Annual Survey: Secured Transactions*, 39 Bus. Law. 1395, 1431 n. 126 (1984).

112. *See* U.C.C. § 9-103(3) *& Id.* Official Comment 5(b) (1972). Section 9-103(3) does not apply to consumer goods. *Id.*

113. *See* U.C.C. § 9-103(3) (1972). *See also, e.g.*, Ingersoll-Rand Fin. Corp. v. Nunley, 31 U.C.C. Rep. Serv. (Callaghan) 1114 (W.D. Va. 1981); McCullough & Muhlstein, *supra* note 78 at 22-23; *cf. In re* Burgess, *supra* note 107.

114. *See* U.C.C. § 9-103(2)(a) (1972).

115. U.C.C. § 9-103(2)(b) (1972).

116. *Id.*

Unfortunately, however, this may not always be the case, and as a result problems relating to vehicle collateral have not been eliminated by this provision.[117] For one thing, the title certificate statutes adopted by various states may differ significantly, both in coverage and content. Thus the meaning of the terms "registration" and "surrender of the certificate," both crucial concepts under subsection 9-103(2)(b) and somewhat vague at best, may be different in different states.[118] In addition there is the somewhat uncertain effect of the new "four-month rule" added to subsection 9-103(2)(b) as part of the 1972 Uniform Amendments.[119]

Furthermore, there is little uniformity as to the types of collateral covered. For example, is a mobile home a vehicle, covered by a title certificate for perfection purposes?[120] Or is it an ordinary chattel,[121] covered by the choice of law rules at subsection 9-103(1) and the filing rules at subsection 9-401? Or is it a fixture governed by sections 9-313 and 9-401(1)(b)?[122] Or perhaps it has become part of the realty and is governed by real property mortgage laws. Or it could be a mobile good subject to section 9-103(3). These can be troublesome questions within a given state, and even more so in an interstate context.[123] Beyond this, as noted,[124] goods that normally fit in one of these categories may be used in such a way that would suggest some other characterization. Is it the actual use or the normal use that governs? What about a residential mobile home being used as a business office at an oil well drilling site? Or being held as inventory by an equipment dealer?[125] Section 9-103(3) of the 1972 code (covering mobile goods) suggests a "normal use" test.[126] But such analysis may not be applicable in all cases and this suggests a need for multiple perfections under alternative theories.

Oil and gas drilling equipment pose other special problems. *Sooner Oil & Gas Corp. v. Great Guns, Inc.*[127] involved mobile seismographic equipment mounted on a heavy truck. Under the Oklahoma statute in effect at that time it was held to be a vehicle subject to the state certificate of title perfection system.[128] Conversely, in another Oklahoma case, truck mounted oil well workover rigs were found to be "special mobilized machinery" governed by section 9-103(3) and not subject to certificate of title perfection.[129] Such collateral also involves potential problems under the rules governing accessions.[130]

J. Other Special Considerations for Oil and Gas Collateral[131]

Oil and gas collateral provides a typical illustration of the special choice of law problems that can arise in dealing with collateral that has multifarious or hybrid characteristics. Minerals "or the like (including oil and gas)" are covered separately in the 1972 uniform code at subsection 9-103(5).[132] The basic rule calls for application of the law of the situs. Notice that this special rule also applies to "an account resulting from the sale [of minerals] at the wellhead or minehead."[133] Therefore, there is a significant distinction between accounts that arise from the sale of minerals at the wellhead or minehead (governed by the special rule at subsection 9-103(5)), as compared to other accounts, including those that arise from the sale of minerals subsequent to that initial sale (these will be covered by the ordinary rule for accounts at subsection 9-103(3)).[134] There was no separate provision for minerals in the 1962 version of the code.

Since choice of law and the perfection rules depend on the nature of the property interest being used as collateral, it is important to properly characterize the different types of property represented in a given transaction. Nowhere is this more difficult than in oil and gas financing, where the collateral may encompass a wide range of property types, with differing and even unique choice of law and perfection rules. For example, the collateral for an oil and gas loan may include any or all of the following:

Leasehold Interests:
- Mineral Interests
- Royalty Interests
- Working Interests
- Overriding Royalty Interests
- Production Payments

Hydrocarbons:
- In place
- At the wellhead
- In tanks or pipes

117. *See, e.g.*, U.C.C. § 9-103, Official Comment 4(b) (1972); Furnish, *Multi-State Security Interests in Automobiles Under U.C.C. Section 9-103*, 1975 Ariz. St. L.J. 293; Meyers, *Multi-State Motor Vehicle Transactions Under the Uniform Commercial Code: An Update*, 30 Okla. L. Rev. 834 (1977); Gilbert, *Observations on U.C.C. Article 9: Mississippi's First Five Years*, 44 Miss. L.J. 208, 209-211 (1973).

118. *See supra* note 117 and authorities cited therein.

119. For example, consider Patti v. Barnett Bank (*In re* Hartberg), 25 U.C.C. Rep. Serv. (Callaghan) 1429 (Bankr. E.D. Wis. 1979). A Florida bank properly perfected by noting its security interest on the face of the title certificate, and also retained possession of the certificate. When the debtor moved to Wisconsin he was unable to obtain a new title (since the bank held the existing certificate), but Wisconsin did issue a "certificate of registration" and new license plates. When the debtor took bankruptcy the trustee convinced the court that Wisconsin law should apply since the vehicle had been in that state for more than four months and had been reregistered. Since the bank had failed to perfect in Wisconsin it became an unperfected and unsecured creditor, despite its retention of the only title certificate in existence.

120. The answer was yes in *In Re* Gray, 40 Bankr. 429 (Bankr. W.D. Okla. 1984). *See also* BankOklahoma Agri-Service Corp. v. C.I.T. Fin. Servs., 58 Okla. B.J. 1959 (1986), *Rev'd.* 58 Okla. B.J. 2882 (1987), *corrected and reh'g. denied*, C.I.T. Fin. Servs. v. Premier Corp., 747 P.2d 934 (Okla. 1987). These cases apparently led the Oklahoma Legislature to amend the Oklahoma Vehicle License and Registration Act, Okla. Stat. tit. 47 §§ 1101-1151 (Supp. 1987), to provide that a security interest in a mobile home is not affected by that home becoming a fixture or otherwise related to real estate after the security interest is perfected. *See* Enr. H.B. No. 1641, amending Okla. Stat. tit. 47 § 1110 E (May 24, 1988).

121. *See, e.g.*, Cochran v. Buddy Spencer Mobile Homes, Inc., 618 P.2d 947 (Okla. Ct. App. 1980); Jackson v. Glasgow, 622 P.2d 1088 (Okla. Ct. App. 1980), Osburn v. Bendix Home Systems, Inc., 613 P.2d 445 (Okla. 1980); authorities cited *supra* at note 120.

122. *See, e.g.*, C.I.T. Fin. Servs. v. Premier Corp., 747 P.2d 934 (Okla. 1987). *See also supra* note 120.

123. *In re* Fougere, 5 U.C.C. Rep Serv. (Callaghan) 410 (Bankr. D. Me. 1968); *In re* Vinarsky, 287 F. Supp. 446 (Bankr. N.D.N.Y. 1968); Wilcox Trailer sale, Inc. v. Miller, 200 Kan. 315, 436 P.2d 860 (1968); *In re* Radny, 12 U.C.C. Rep. Serv. (Callaghan) 583 (Bankr. W.D. Mich. 1973); *In re* Merrill, 9 U.C.C. Rep. Serv. (Callaghan) 755 (Bankr. D. Neb. 1971); Newell v. Nat'l. Bank of Alaska, 646 P.2d 224 (Alaska 1982); Harwell v. First Nat'l. Bank (*In re* Sewell) 32 Bankr. 116 (Bankr. N.D. Ala. 1983); *In re* Gray, 40 Bankr. 429 (Bankr. W.D. Okla. 1984); Albany Discount Corp. v. Mohawk Nat'l. Bank, 28 N.Y.2d 222, 269 N.E. 2d 809, 321 N.Y.S.2d 94 (1971). *See also, e.g.*, Ingersoll-Rand Fin. Corp. v. Nunley, 31 U.C.C. Rep. Serv. (Callaghan) 1114 *cited in* McCullough & Muhstein, *supra* note 78.

124. *See supra* text accompanying notes 105-113.

125. *See, e.g.*, *In re* Watertown Tractor & Equip. Co., *supra* note 109.

126. *See* U.C.C. § 9-103, Official Comment 5(b)(1972). Consumer goods are not "mobile goods" subject to U.C.C. § 9-103(3)(1972). *Id. See also In re* Burgess, *supra* note 107, where the place to file within the state was governed by the normal use rather than the actual use of the collateral.

127. 24 Bankr. 479 (Bankr. W.D. Okla. 1982).

128. It is significant to note that at the time of *Sooner*, the definition of truck set out in Okla. Stat. tit. 47 § 22.1(32) (Supp. 1984) included:

> all other motor vehicles of the truck type used for any commercial or industrial purpose *including oil well servicing units* (emphasis added).

The relevant portion of this definition has now been eliminated from the Oklahoma statutes. The opinion suggests that, but for that definition, the collateral units in question would have been classified as special mobilized machinery, due to the fact that they clearly fell into that category of goods as described in Okla. Stat. tit. 47 § 22.1(27) (Supp. 1984) (Now Okla. Stat. tit. 47 § 1102.18 (Supp. 1985)). The units in question did not transport people or goods and their use of the highways was only incidental, in that they used the highways only to get to a place (off the road) where they performed their service.

129. Chase Manhattan Bank v. Ramco Well Serv., Inc. (*In re* Ramco Well Serv., Inc.) 32 Bankr. 525 (Bankr. W.D. Okla. 1983).

130. *See* U.C.C. §§ 9-314, 9-315 (1972).

131. For a more thorough analysis on choice of law and other considerations for security interests in oil and gas collateral, *See* Harrell & Dancy, *supra* note 1, 87-98, from which portions of this discussion were drawn. *See also* Clark, *The New U.C.C. Article 9 Amendments*, 44 Kan. B.A.J. 131, 133-134 (1975) [hereinafter Clark].

132. U.C.C. § 9-103(5) (1972). *See also Id.* Official Comment 8.

133. U.C.C. § 9-103(5) (1972).

134. U.C.C. §§ 9-103(5), 9-103(3) (1972).

Accounts and Proceeds of Production.

Contractual Rights, such as:
- Exploration Agreements
- Farm-Out Agreements
- Operating Agreements
- Production Sales and Processing Agreements

Surface and Subsurface Equipment:
- Machinery, equipment, facilities or other property used in connection with the production, treatment, storage and transportation of hydro-carbons (including temporary drilling equipment).

Processing Plants, e.g., desulfurization plants and the contracts, products and proceeds attributable thereto.

Special ownership interests:
- Joint ventures
- Partnerships

Proper classification of these interests is essential to a proper choice of law analysis for perfection and other purposes. U.C.C. section 9-103(5) calls for application of the law of the state where the wellhead is located for purposes of a security interest in "minerals or the like (including oil and gas) before extraction and which attaches thereto as extracted, or which attaches to an account resulting from the sale thereof at the wellhead . . . ."[135] Most versions of U.C.C. section 9-401(1) then prescribe that the place to file within that state is the place where a real estate mortgage on the property would be recorded. Most states require the filing of a financing statement under U.C.C. sections 9-302 and 9-401.

However, there are various nonuniform state amendments such as Oklahoma section 9-402(5), which additionally permits perfection of a security interest in extracted minerals and other personal property relating to the well (leasehold interests, equipment, accounts and proceeds) by recordation of a real estate mortgage in the county where the well is located. Another example is Texas U.C.C. Section 9-402(f),[136] which, like Oklahoma, permits perfection by real estate mortgage but, unlike Oklahoma, excludes oil and gas equipment from this rule (thereby requiring a normal Article Nine filing for perfection as to oil and gas equipment). Compare New Mexico U.C.C. Section 9-103(1),[137] which conflicts with both Texas and Oklahoma law by requiring perfection of a security interest in oil and gas related accounts at the place where the debtor has its office or keeps its records rather than at the wellsite.

Classifying collateral for purposes of applying these statutes is made more difficult by the uncertain nature of individual oil and gas interests. For example, in Oklahoma the interest typically subject to an oil and gas mortgage has been described as:

> a profit *a prendre*, a corporeal hereditament, an incorporeal hereditament, an estate in land, not an estate in land, an estate in oil and gas, not an estate in oil and gas, a servitude, a chattel real, real estate, interest in land, not an interest in land, personal property, a free hold, a tenancy at will, property interest and the relation of landlord and tenant.[138]

Determining whether an oil and gas interest is an interest in personal property or an interest in real property may be crucial in making a proper choice of law decision. It is difficult enough when dealing with the law of a single state; when a multistate transaction is involved the different treatment by different states further complicates the matter. For example, Texas oil and gas leases are real property interests, while in Oklahoma an oil and gas lease "is a hybrid estate deriving its characteristics from both real and personal property, yet it is actually neither . . . ."[139]

In some states a lessee's interest under an oil and gas lease is considered to be personal property not subject to a judgment lien.[140] However, the leasehold interest also has been characterized as a "a chattel real, an incorporeal hereditament and a profit a prendre."[141] In most cases it appears that a mortgage of such an interest should be recorded under real estate law.[142] Most of the other types of property which serve as security for an oil and gas loan, e.g. hydrocarbons in tanks and pipes, proceeds, equipment, accounts, and various contractual interests, are personal property. But even with types of property that appear to be clearly personal property, such as accounts and proceeds of production, courts have made a distinction to the extent they *relate* to real property.[143] And as noted, some states have nonuniform amendments permitting perfection by real estate mortgage for certain personal property associated with oil and gas production and transmission.[144] Conversely, the law of New Mexico requires perfection of oil and gas related accounts at the place of the seller's executive offices. These differences can result in some interesting conflicts.[145]

III. Mobile and Intangible Collateral

A. Accounts, General Intangibles, and Mobile Goods

Section 9-103(3) of the 1972 U.C.C. covers intangible collateral and mobile goods, which by their nature have no fixed tangible situs and therefore cannot be subjected to a choice of law rule based on physical presence. Excluded from this provision are accounts relating to mineral interest collateral, covered by a separate provision at section 9-103(5).[146] Also excluded from U.C.C. section 9-103(3) are uncertificated securities; although clearly intangible collateral under U.C.C. section 9-106, these are governed by Article 8.[147]

"Accounts" and "general intangibles" are defined at U.C.C. section 9-106; the 1972 definition of "accounts" now includes "contract rights," which were treated as a separate designation in the 1962 code. General intangibles can include such things as plans, specifications, blueprints, drawings and file information,[148] licenses and franchise rights,[149] and an assignment of or security interest in a real estate contract.[150] The latter was not considered an account because it did not arise out of a sale of goods or services.[151]

"Mobile goods" are defined and illustrated at section 9-103(3)(a) as: "goods . . . of a type normally used in more than one jurisdiction, such as motor vehicles, trailers, rolling stock, airplanes, shipping containers, road building and construction machinery and commercial harvesting machinery and the like . . . not covered by a certificate of title described in subsection (2)."[152] As mentioned, the characterization of "mobile goods" can be troublesome.[153] Often it is the normal use of the collateral which determines this status rather than the actual use.[154] Truck-mounted equipment may be considered either "mobile goods" or "vehicles," depending on whether it is built on an ordinary roadworthy chassis or a special off-road carriage and other factors.[155] Drilling rigs and other specialized oil and gas or mining equipment may constitute "mobile goods." Other problems may be encountered with the "accession" rules at U.C.C. sections 9-314 and 9-315.

The basic perfection rule for accounts, intangibles and mobile goods is at U.C.C. section 9-103(3)(b) of the 1972 Uniform Code. It calls for application of "the law (including the choice of law rules) of the jurisdiction in which the debtor is located . . . ."[156] A debtor located in the United States will be deemed to be located at its place of business, or its chief executive office if it has more than one place of business, otherwise at the person's residence.[157] This requires identification of the debtor's "place of business." In one case the debtor's "chief place of business" was found to be Colorado even though the greatest volume of its business was conducted in Oklahoma, because Colorado was the location of the debtor's executive office and records, and was the place where its officers and directors resided.[158]

Section 9-103(3)(e) provides another "four-month rule" for cases where the debtor changes location. A security interest properly perfected remains perfected for four months after the debtor moves its place of business to another jurisdiction, unless it would have terminated earlier under the law of the first jurisdiction. If the security interest is properly reperfected within the four-month period it will be deemed to have been continuously perfected from the date of first perfection; otherwise it will be deemed to have been unperfected as against a purchaser after the change. This is equivalent but not identical to the four-month rule for goods at section 9-103(1)(d).[159]

B. Chattel Paper

Chattel paper is described as a "semi-intangible security interest which may be perfected either by possession or by filing (sections 9-304(1), 9-305)."[160] Chattel paper is defined at subsection 9-105(b) to include "writings which evidence both a monetary obligation and a security interest in or a lease of specific goods. . . ." Thus "chattel paper" can mean either a note and security agreement or a genuine lease of goods, and perfection can be either by possession or filing. This results from the hybrid (or "semi-intangible") character of such collateral, combining as it does some attributes of an account and some attributes of an instrument.

This hybrid character is reflected in the 1972 choice of law provision.[161] This rule recognizes the alternative methods of perfection for chattel paper (possession and filing) and provides reference to a different choice of law rule for each. Specifically, if the security interest is perfected by possession the chattel paper is treated as an instrument and the choice of law rules for instruments at subsection 9-103(1) apply. (Recall that these provide for application of the law of the situs at the time the "last event" occurs.) If the security interest is perfected by filing, the chattel paper is treated like an account, and the choice of law rules provided for accounts at subsection 9-103(3) will apply. These call for filing in the state where the debtor is located, meaning generally in the state where the debtor's chief executive office is located. Also, note that if the Chattel paper is a genuine lease (as opposed to a security agreement), the lessor-assignor's reversionary interest in the goods will not be covered by the chattel paper assignment. To cover the reversionary interest the secured party will have to take a separate security interest in the goods; this will be subject to different choice of law rules and may require a separate filing if the goods are located in a state different from that of the debtor's location.[162]

(Part II of this series will appear in the Fall, 1988 issue of the *Quarterly Report*. Part III will appear in a subsequent issue of the *Quarterly Report*.)

135. U.C.C. § 9-103(5) (1972).

136. Tex. Bus. & Com. Code Ann. § 9-402(f) (Vernon 1968).

137. N.M. Stat. Ann. § 55-9-103(1) (1987).

138. 1A, W. Summers, A Treatise on the Law of Oil and Gas § 152, 371 (1927).

139. Continental Supply Co. v. Marshall, 152 F.2d 300, 305 (10th Cir. 1945). For a discussion of the classification of oil and gas leases under both Oklahoma and Texas law, *see* Carroll v. Holliman, 336 F.2d 425 (10th Cir. 1964).

140. See Pauline Oil & Gas Co. v. Fischer, 185 Okla. 108, 90 P.2d 411 (1939) *rev'd on other grounds*, 309 U.S. 294 (1940); First Nat'l Bank v. Dunlap, 122 Okla. 274, 254 P. 729 (1927). *See also* Hinds v. Phillips Petroleum Co., 591 P.2d 697 (Okla. 1979); Harmon v. Oklahoma Tax Comm'n, 189 Okla. 475, 118 P.2d 205 (1941).

141. Casper v. Neubert, 489 F.2d 543, 545 (10th Cir. 1964); *cf.* Okla. Stat. tit. 12A §§ 9-402(5), 9-403(7) (Supp. 1987).

142. *See, e.g.*, Carroll v. Holiman, *supra* note 139; Okla. Stat. tit. 12A §§ 9-402(5), 9-403(7) (Supp. 1987). *See also* Ingram v. Ingram, 214 Kan. 415, 521 P.2d 254 (1974); Harrell & Dancy, *supra* note 1; Clark, *supra* note 131.

143. *See, e.g.*, Continental Supply Co. v. Marshall, *supra* note 139. *See also* Ege, *An Essay on Real and Personal Property, or, Fixtures Unmasked*, 7 Val. U.L. Rev. 345 (1973).

144. *See supra* text accompanying notes 135-143.

145. For example, a New Mexico corporation engaged in Oklahoma energy production would be subject to a New Mexico statute requiring perfection as to accounts in New Mexico (as the state of the debtor's location), and also an Oklahoma statute calling for perfection of the same security interest in Oklahoma (at the situs of the well). *See* Okla. Stat. tit. 12A § 9-103.1(5) (Supp. 1984); N.M. Stat. Ann. § 55-9-103(1) (1987).

146. *See* U.C.C. § 9-103(5) (1972). *See also* U.C.C. § 9-402(5) (1972).

147. *See* U.C.C. §§ 8-102(1), 8-106, 8-108, 9-102(1), 9-106, 9-108 (1987). The relationship between articles 8 and 9 will be discussed in Part III of this series.

148. United States v. Antenna Systems, Inc., 251 F. Supp. 1013 (D. N.H. 1966).

149. O'Neill's Shannon Village v. Dorothy, 750 F.2d 679 (8th Cir. 1984).

150. *See, e.g.*, Crichton v. Himlie Properties, 713 P.2d 108 (Wash. 1986); Citicorp v. Fremont Nat'l. Bank, *supra* note 13.

151. Crichton, *supra* note 150.

152. U.C.C. § 9-103(3)(a) (1972). "Mobile goods" do not include consumer goods. *See* U.C.C. § 9-103, Official Comment 5(b) (1972). Often mobile goods will be subject to separate federal statutes which will preempt Article Nine to the extent of any conflict. *See* Part II of this series, *The Relationship Between State and Federal Law*, in the next issue of the *Quarterly Report*.

153. Notice that the U.C.C. definition of "mobile goods" does not necessarily track similar definitions which may define the scope of state law certificate of title perfection systems for purposes of the preemption recognized at U.C.C. § 9-302(3)(b) (1972).

154. U.C.C. § 9-103(3)(a) (1972) refers to "goods which are mobile and which are of a type *normally* used in more than one jurisdiction . . . ." (emphasis added). *See also, e.g.*, Ingersoll-Rand Fin. Corp. v. Nunley, 31 U.C.C. Rep. Serv. (Callaghan) 1114 (W.D. Va. 1981), *cited in* McCullough & Muhlstein, *supra*, note 78. In an intrastate context, *see In re* Burgess, *supra* note 107. *See also supra* text accompanying notes 105-113.

155. Ray v. City Bank & Trust Co., 358 F. Supp. 630 (S.D. Ohio 1973).

156. U.C.C. § 9-103(3)(b) (1972).

157. *Id.*

158. Golf Course Builders Leasing, Inc. v. United Bank of Denver, 768 F.2d 1167 (10th Cir. 1985).

159. U.C.C. § 9-103(1)(d) (1972).

160. U.C.C. § 9-103(4), Official Comment 6 (1972).

161. U.C.C. § 9-103(4) (1972).

162. *See, e.g.*, Feldman v. First Nat'l City Bank (*In re* Leasing Consultants, Inc.), 486 F.2d 367 (2d Cir. 1973); Harrell & Dancy, *supra* note 1, at 63-69.