Preserving Existing Security Interest under Revised Article 9 of the Uniform Commercial Code: A Concise Summary of the Transition Rules and Some Recommendations for Secured Parties

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PRESERVING EXISTING SECURITY INTERESTS UNDER REVISED ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE: A CONCISE SUMMARY OF THE TRANSITION RULES AND SOME RECOMMENDATIONS FOR SECURED PARTIES

Vincent Paul Cardi

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I. INTRODUCTION

In 1998, the American Law Institute and the National Conference of
Commissioners on Uniform State Laws each approved the major revision of Article
9 of the Uniform Commercial Code. By January, 2001, Revised Article 9 (also

The Permanent Editorial Board of the Uniform Commercial Code (“U.C.C.”) began studying the
desirability of a major overhaul of Article 9 in 1990. A drafting committee was organized in 1993, and met
fifteen times between then and 1998 when it produced its final draft. After the 1998 approval of the final
draft, minor changes have been made and approved by the Permanent Editorial Board, so there are several
slightly different evolving versions of the Model Act, including the 1999 version quoted herein.

The citations to the existing or “Prior” Article 9, the latest version of the original model act
adopted nationwide, are to Article 9 as it appears in the 1995 Official Text of the Uniform Commercial Code.
Choosing the model text for the Revised Act is a little more complicated. Approved in 1998,
errors and ambiguities quickly became evident, and a task force was appointed by the Standby Committee.
This resulted in thirty-three technical amendments to the Official Text made in August, 1999 and January,
variously referred to as "Revised Article", "Revised 9" and "Revised Act") had been adopted by at least twenty-eight states and the District of Columbia, and was still being considered by eighteen other states and the U.S. Virgin Islands.

Revised Article 9 keeps the same general approach to security interests in personal property as existing Article 9 (variously referred to as "Prior Article 9", and "Prior 9"). It first defines the scope and coverage of Article 9 prescribe how Article 9 security interests are created, continues to group collateral into different classifications for different treatment in some situations, provides ways in which security interests can be perfected, lays out priority rules, and then sets rules governing default, repossession, disposition of the collateral, and distribution of the proceeds. Yet, while continuing the same basic approach, the drafters of the Revised Act have largely reorganized the code sections, substantially

2000, a number of technical amendments to the Official Comments made in October, 1999 and January, 2000, and errata issued on eight different dates through March, 2000. These have been winding their way through the U.C.C. approval process. It can be expected that some of the adopting states adopted different versions of the text. This article cites to the Official Text appearing in The New Article 9 (2d ed. 2000) edited by CORRINE COOPER, a publication of the American Bar Association. It includes the amendments and errata through March, 2000.


4. See id. § 9-203.

5. For example, the rule governing priority between a perfected purchase money security interest ("PMSI") in "inventory" and an earlier perfected security interest in the same "inventory," see Rev. U.C.C. § 9-324(b)(1999), is different from the rule governing priority between a perfected PMSI in "equipment" and an earlier perfected security interest in the same "equipment." See id. § 9-324(a).


7. See id. §§ 9-201(a), 9-317 to 9-339.

8. See id. §§ 9-601 to 9-606.

9. See id. §§ 9-603(b), 9-609.


12. Part 1 of the Revised Article contains definitions and defines the scope of Article 9 ("Part 1" refers to those sections of Article 9 which begin with the number "1", therefore including sections 9-101 through 9-110.). Part 2 addresses creation of the security interest and rights and duties of the secured party. Part 3 lays out the rules prescribing perfection, and the rules governing priorities among the secured party, debtor, and third parties. Part 4 deals with aspects of third party rights and duties that are unrelated to perfection and priority. Part 5 lays out a variety of rules, twenty-five sections in all, addressing filing of financing statements and operations of the filing offices. Part 6 addresses default and enforcement of the security
rewritten many of those sections, and added a great many new provisions. Revised Article 9 expands the number of sections from 55 in Prior 9 to 134 in Revised 9, and, as an indication of the expanded length of many sections, expands the number of pages (in similar sized typeface), including Official Comments, from 114 pages to an astounding 295 pages!

The resulting Revised Article 9 answers a number of questions that were not addressed by Prior Article 9\(^{15}\) or were addressed ambiguously.\(^{16}\) but also leaves a good number of existing questions unanswered.\(^{17}\) As with all lengthy, complicated statutes, Revised Article 9 will no doubt create numerous new questions.\(^{18}\) Nor has the rewriting simplified and clarified the meaning of the Code. The drafting is sometimes so torturous and so complicated, that the code went from a fairly complex, yet manageable set of rules to a very complicated document that

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15 For example, under the Prior Act, when a repossessing and selling secured party did not follow the requirements of the code and was owed a deficiency after the sale, states took different approaches as to the debtor’s liability for the deficiency. Some states held that the debtor was no longer liable for any deficiency, some held that there was a rebuttable presumption that the value of the collateral sold was equal to the value of the total debt, while other states held that the debtor had to prove what the collateral would have sold for if it had been properly conducted, and held debtor liable for the difference between that price and the total debt. The Revised Act adopts the rebuttable presumption rule. See Rev. U.C.C. § 9-626(a)(3)(4)(1999). But, as an example of how the revised act continues to leave some questions unanswered, this code section only applies to non-consumer secured transactions. The Official Comment 4 to this section explains that the drafters decided to leave the remedies for consumer debtors up to development by state courts. See id.

16 For example, section 9-107 of the Prior Act provides that a “security interest[1] is a ‘purchase money security interest’ ["PMSI"] to the extent that it is (a) taken or retained by the seller of the collateral to secure all or part of its price; . . . .” (emphasis added) U.C.C. § 9-107(1995). Where the security agreement provides that the collateral sold on credit secures the payment of the purchase price and payment of other obligations of the debtor, is the security interest a PMSI to the extent it secures the purchase price? The language suggests yes and no, and the courts have answered both yes and no. Revised Article 9 clears up the ambiguity when it provides “[i]n any transaction other than a consumer-goods transaction, a purchase money security interest does not lose its status as such, even if: (1) the purchase-money collateral also secures an obligation that is not a purchase-money obligation; . . . .” Rev. U.C.C. § 9-103(f)(1999).

17 As an example, a recurring problem in security agreement identification of collateral involves the under focused collateral description. For example, assume the security agreement states “debtor gives Bank a security interest in 20 Holstein Cows.” The cows are not further identified, and at the time of the security agreement debtor actually owns 50 cows. Query, which individual cows have been given as security, and upon default, which of debtor’s, say, 43 remaining Holstein Cows does Bank have a right to repossess? Prior Article 9 does not address this question and the courts have disagreed on how to treat it. Revised 9 is also silent. Whether the drafters intentionally decided to leave this question to court development, or just failed to look at it, is not clear from the Official Comments.

18 For example, Prior Article 9 covers “any transaction . . . . intended to create a security interest in personal property . . . .” U.C.C. § 9-102(a)(1)(1995). The corresponding Revised 9 section provides that Article 9 covers “a transaction . . . . that creates a security interest in personal property . . . . by contract.” Rev. U.C.C. § 9-109(a)(1) (1999). Consider, if Bank loaned Debtor $10,000 on March 1, taking no security, and later, feeling insecure, on July 1 asked Debtor for a security interest in Debtor’s truck to guarantee the loan, and Debtor executed to Bank an appropriate security agreement covering the truck, would Bank’s interest in the truck be covered by Revised Article 9? The answer would clearly be yes under Prior 9 and we can predict it will be yes under Revised 9. But, a competing creditor could argue that because no consideration was given by Bank for the security interest, the security interest was not created by “contract” but by gift, and therefore Bank’s claim is not governed by Revised 9. This might be answered by Official Comment 2 to Rev. § 9-109 which states “No change in meaning is intended.” Id. But the Comment is not the statute.
reads like the tax code. The revisions have been the subject of much scholarly commentary. By the end of 2000, over 100 law review articles, symposia, and books have been published on Revised Article 9.

Revised Article 9 in some ways substantially changes the existing law. Because it was important that as part of the Uniform Commercial Code the revision constitute uniform law followed around the country to the extent possible, the drafters included a clause providing a uniform effective date for the Act to take effect, delaying the effective date for three years until July 1, 2001. There was hope that by putting off the effective date, a great number of states would be able to adopt it and enter the era of the new code at the same time. This hope appears to have been rewarded, as all of the jurisdictions so far adopting the Revised Act have adopted the July 1, 2001 effective date.

In addition to this delay in the effective date, the new code incorporates eight other sections providing rules governing the transition from Prior Article 9 to the Revised Article 9. These transition rules are found in Part 7 of Revised 9, entitled "Transition," and are the subject of this article.

This article first attempts to simplify these transition rules and summarize them in a number of discreet, clearly stated, easily understood rules. It then

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19 One of many examples of such drafting can be found in Rev. U.C.C. § 9-705(a)(1999):
(a) [Pre-effective date action; one-year perfection period unless reperfected.] If action, other than the filing of a financing statement, is taken before this [Act] takes effect and the action would have resulted in priority of a security interest over the rights of a person that becomes a lien creditor had the security interest become enforceable before the [Act] takes effect, the action is effective to perfect a security interest that attaches under this [Act] within one year after this [Act] takes effect. An attached security interest becomes unperfected one year after this [Act] takes effect unless the security interest becomes a perfected security interest under this [Act] before the expiration of that period.


21 See Rev. U.C.C. § 9-701(1999). This is commonly referred to in this article and the literature as the "effective date."


23 These rules deal with the scope and timetable of the Revised Act’s application to secured transaction problems, application to pending lawsuits, application to security interests created before the effective date, created and perfected before the effective date, created before and perfected after the effective date, transactions created before the effective date and not covered by the Prior Act but covered by the Revised Act, and the effects of changes in classification and changes in place of filing. These transition rules are complex and difficult to reduce to several principles.

recommends some steps that secured parties should take to preserve their existing security interests, the perfected nature of these interests, and the existing rights, remedies, and protection from liability that presently accompany these existing security interests. This article is not intended to advise existing secured parties on how to improve or expand their security interests, as by adding as collateral new property that is now included as Article 9 collateral. Several existing articles do attempt to do this. This article also does not attempt to advise lawyers and potential secured parties on how to rewrite their form security agreements for immediate future use in order to maximize their protection under Revised Article 9. This is a vitally important task, and lawyers and potential creditors, and debtors where they have the leverage, should rewrite their form security agreements as soon as possible. This article does not address this issue; several recent articles do so.

This article also does not examine action that secured parties should take to extend Revised 9's coverage to existing security interests that are not subject to Prior Article 9 but are covered by Revised Article 9. For example, most or all state law versions of Prior Article 9 exclude deposit accounts from Prior Article 9 coverage. Because Revised Article 9 does cover deposit accounts except in consumer transactions, an existing common law security interest in the deposit account could gain Revised Article 9 protection if the secured party followed Revised 9 procedures for creation and perfection. If not, the secured party is left only with the existing, often unclear, common-law rights. Similarly, automatic, non-consensual statutory liens are not covered by Prior Article 9, but at least one, statutory agricultural liens, fall within the scope of Revised 9. Although the agricultural lien remains enforceable under the transition rules, by taking action before a year after the effective date, the secured party could also avail itself of


27 "This [Prior 9] Article does not apply... to a transfer of an interest in any deposit account... ". See UCC § 9-104(1) (1995).


29 See id. § 9-702(b).

30 See id. Such security interests will be covered under the Revised Act, but would not be enforceable unless properly created according to the requirements of the Revised Act. If not, the pre-existing common law rights remain enforceable.


33 See id. § 9-702(b).
Revised Article 9 rights and remedies.34

The Revised Act makes hundreds of changes, some codifying developing case law, many addressing smaller issues not addressed by Prior Article 9. Some of the changes are major. Revised Article 9 adds new types of transactions and collateral to Article 9 coverage. Security interests in commercial deposit accounts, commercial tort claims, health care insurance receivables, and statutory agricultural liens, excluded under the Prior Act,35 are covered by Revised Article 9 instead of the common law.36 The new Act increases the kinds of security interests that are perfected automatically,37 by possession,38 or by control.39 Importantly, the place of filing a financing statement has been largely changed from local to statewide filing,40 and the state in which to file is the state of the location of the debtor, not the location of the collateral.41 For corporations, this is defined as the state in which the corporation is incorporated.42 Finally, debtors and third parties are given added protections upon disposition of the collateral, including increased requirements for notice to other secured parties.43

II. A CONCISE SUMMARY OF THE RULES GOVERNING THE TRANSITION FROM PRIOR ARTICLE 9 TO REVISED ARTICLE 9

Part 7 of Revised Article 9 lays out the basic prescriptions governing the transition from Prior Article 9 to Revised Article 9. The drafters of Revised Article 9 recognized that existing commercial relationships and vested legal rights should not be suddenly disrupted, but, where appropriate, should be changed over time in order to allow the parties to adapt to the changes. The drafters provided for change by formulating a series of rules which ease the actors and their relationships into the new legal framework over a period of up to five years.44 These rules are called the “transition rules,” and are laid out in sections 9-701 through 9-709 of Revised

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34 See id.
35 See U.C.C. §§ 9-104(l)(k), 9-104(g), 9-104(c) (1995).
37 See id. §§ 9-308(d) to (g), 9-309, 9-312.
38 See id. §§ 9-312(d), 9-313.
40 See id. § 9-501(a).
42 See id. § 9-307(e).
43 See id. § 9-611.
44 While the Model Act gives one to five year grace periods, West Virginia’s Act provides for two to five year grace periods. See W. VA. CODE § 46-9-704(2) (2000).
Article 9.\textsuperscript{45} Many, and maybe most, of the new rules are not eased in over time, but apply immediately. For example, for a disposition sale to be held on June 30, 2001, a foreclosing secured party need not give other perfected secured parties, however perfected, notice of the sale, except for other secured parties who have been sent written notice of their interest in the collateral.\textsuperscript{46} If the disposition sale is held on July 1, 2001, after the effective date of Revised 9, the foreclosing secured party must give other perfected (by filing) secured parties notice of the sale.\textsuperscript{47} But some of the most important changes do come in over time, at least to the extent they apply to security interests existing before the effective date. The central feature in the transition rules is the saving clauses, which continue the validity of existing security interests and perfection of those interests for a period of time after the effective date of the Revised Act, in order to give secured parties further opportunity to take steps to meet the requirements for creation and perfection under the Act. These savings rules are summarized in the following.

\textit{Summary of the Savings Clauses in Revised Article 9}

1. Existing Valid Unperfected Security Interests Which Also Meet The Requirements of Revised Article 9 for Creating Security Interests.

If the pre-July 1, 2001 action creating a security interest under Prior 9 (security agreement, possession pursuant to agreement, and so forth) meets the requirements of Revised 9 to create a security interest, then the security interest created thereby continues to be valid after July 1, 2001.\textsuperscript{48}

2. Existing Valid Perfected Security Interests Which Also Meet The Requirements of Revised 9 for Creating and Perfecting Security Interests.

If the pre-July 1, 2001 action (filing financing statement, possession, and so forth) meets the requirements of Revised 9 to create and perfect a valid security interest, then the perfected security interest continues to be valid after July 1, 2001.\textsuperscript{49}

\textsuperscript{45} Some states may have adopted a version of the Model U.C.C. which contains only eight sections in Part 7. Section 9-707, entitled “Amendment of Pre-Effective Date Financing Statement,” was added as a technical amendment and approved effective January 15, 2000 after the formal promulgation of the Official Text of Revised Article 9. See CORRINE COOPER, THE NEW ARTICLE 9 405, 444, (2d ed. 2000).

\textsuperscript{46} See U.C.C. § 9-504(3) (1995).

\textsuperscript{47} See Rev. U.C.C. § 9-611(c)(3) (1999).

\textsuperscript{48} See id. § 9-704(1).

\textsuperscript{49} See id. § 9-703(1).
3. **Existing Valid Unperfected Security Interests Which Do Not Meet the Requirements of Revised 9.**

   If the pre-July 1, 2001 action creating a security interest under Prior 9 (security agreement, possession pursuant to agreement, and so forth) does not meet Revised 9 requirements to effectively create a security interest:

   The security interest remains enforceable for one year.\(^{50}\)

   It will continue to be enforceable beyond the one year\(^{51}\) if action is taken within one year\(^{52}\) to meet the Revised 9 requirements.\(^{53}\)

4. **Existing Valid Security Interests Perfected by Means Other Than Filing That Do Not Meet the Requirements of Revised 9.**

   If the pre-July 1, 2001 valid perfection through other than filing (possession, automatic, control, certificate of title) does not meet Revised 9 requirements to effectively perfect a security interest:

   The perfection remains valid for one year.\(^{54}\)

   It will continue to be perfected beyond the one year\(^{55}\) if action is taken within one year\(^{56}\) of the effective date to meet the Revised 9 requirements of perfection.\(^{57}\)

5. **Existing Valid Perfected Security Interests Perfected by Filing That Do Not Meet the Requirements of Revised 9.**

   If the pre-July 1, 2001 valid perfection through filing does not meet Revised 9 requirements to effectively perfect a security interest because the financing statement or place of filing does not meet the requirements of Revised 9,

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\(^{50}\) See id. § 9-703(b). The period is two years in West Virginia. See W. VA. CODE § 46-9-703(b)(2000).

\(^{51}\) The period is two years in West Virginia. See W. VA. CODE § 46-9-704(2).

\(^{52}\) See id.


\(^{54}\) See id. § 9-703(b). The period is two years in West Virginia. See W. VA. CODE § 46-9-704(2)(2000).

\(^{55}\) The period is two years in West Virginia. See W. VA. CODE § 46-9-703(b)(3) (2000).

\(^{56}\) The period is two years in West Virginia. See id.

then the financing statement and the perfection continue to be valid until they lapse under the Prior Act, usually five years after the last filing, up to June 30, 2006. In more detail, the Revised Act’s transition rules can be summarized in the following general rules:

**EFFECTIVE DATE OF REVISED 9**

1. Unless otherwise provided, the effective date of Revised Article 9 is July 1, 2001.

**APPLICABILITY OF REVISED 9**

2. Except as provided in part 7, Revised Article 9 applies to all transactions and liens within its scope even if entered into or created before the effective date.

**LAWSUITS FILED BEFORE EFFECTIVE DATE OF REVISED 9**

3. Revised Article 9 does not apply to lawsuits which were commenced before the effective date of Revised Article 9.

**RIGHTS AS TO PRE-EXISTING COMMON LAW LIENS NEWLY COVERED BY REVISED ARTICLE 9**

4. Transactions and liens not covered by Revised Article 9, but which were valid under non-code law and are now covered by Revised Article 9, will be enforceable after the effective date under both Revised Article 9 and the common law.

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52 See id. § 9-701.

53 (A) "[Pre-effective-date transactions or liens.] Except as otherwise provided in this part, this [Act] applies to a transaction or lien within its scope, even if the transaction or lien was entered into or created before this [Act] takes effect." Id. § 9-702(a).

54 Note, one of the features of Revised Article 9 is subheadings within the sections. These subheadings "are not a part of the official text [of the Model Act] itself and have not been approved by the sponsors. Each jurisdiction in which this article is introduced may consider whether to adopt the headings as part of the statute." Rev. U.C.C. § 9-101, Official Comment 3 (1999). These subheadings are therefore in brackets in the Model Act. In the West Virginia Code, these subheadings are not in brackets, and therefore West Virginia, among other states, has presumably adopted these subheadings as part of the statute.

55 (c) "[Pre-effective-date proceedings.] This [Act] does not affect an action, case, or proceeding commenced before this [Act] takes effect." Rev. U.C.C. § 9-702(c) (1999).

56 Rev. U.C.C. § 9-702(b) (1999) provides:

57 (b) [Continuing validity.] Except as otherwise provided in subsection (c) and Sections 9-703 through 9-709:

58 (1) transactions and liens that were not governed by [former Article 9], were validly

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PRESERVING EXISTING SECURITY INTERESTS

CONTINUATION OF PRE-EXISTING UNPERFECTED SECURITY INTERESTS

5. An unperfected security interest under Prior Article 9 remains enforceable for one year after the effective date, even if it does not meet the requirements of enforceability under Revised Article 9.

6. An unperfected security interest under Prior Article 9 remains enforceable beyond one year after the effective date if it is enforceable under section 9-203 of Revised Article 9, by the effective date or within one year after the effective date.

entered into or created before this [Act] takes effect, and would be subject to this [Act] if they had been entered into or created after this [Act] takes effect, and the rights, duties, and interests flowing from those transactions and liens remain valid after this [Act] takes effect; and (2) the transactions and liens may be terminated, completed, consummated, and enforced as required or permitted by this [Act] or by the law that otherwise would apply if this [Act] had not taken effect.

The period is two years in West Virginia. See W. VA. CODE § 46-9-704(1) (2000).

"A security interest that is enforceable immediately before this [Act] takes effect but which would be subordinate to the rights of a person that becomes a lien creditor at that time: (1) remains an enforceable security interest for one year after this [Act] takes effect." Rev. U.C.C. § 9-704(1) (1999).

The grace period in West Virginia is two years. See W. VA. CODE § 46-9-704(2) (2000).

Rev. U.C.C. § 9-203(b) (1999) provides: (b) [Enforceability.] Except as otherwise provided in subsections (c) through (i), a security interest is enforceable against the debtor and third parties with respect to the collateral only if: (1) value has been given; (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and (3) one of the following conditions is met: (A) the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned; (B) the collateral is not a certificated security and is in the possession of the secured party under Section 9-313 pursuant to the debtor's security agreement; (C) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under Section 8-301 pursuant to the debtor's security agreement; or (D) the collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, and the secured party has control under Section 9-104, 9-105, 9-106, or 9-107 pursuant to the debtor's security agreement.

The period is two years in West Virginia. See W. VA. CODE § 46-9-704(2) (2000).

Rev. U.C.C. § 9-704(2) (1999) provides: "A security interest that is enforceable immediately before this [Act] takes effect but which would be subordinate to the rights of a person that becomes a lien creditor at that
PERFECTION OF PRE-EXISTING UNPERFECTED SECURITY INTERESTS

7. A security interest that is unperfected under Prior Article 9 becomes perfected under Revised Article 9 when it meets the requirements of perfection under Revised Article 9, automatically on the effective date if the acts of perfection are taken before the effective date, or when the acts of perfection are completed if completed after the effective date. 70

CONTINUATION OF PRE-EXISTING PERFECTED SECURITY INTERESTS

8. A security interest perfected under Prior Article 9 remains perfected under Revised Article 9 if the original acts taken to create and perfect the security interest are sufficient to create and perfect a security interest under Revised Article 9. 71

9. Where the acts other than filing were sufficient to perfect a security interest under Prior Article 9, but are insufficient to perfect a security interest under Revised Article 9, the interest remains perfected for one year 72 after the effective date of Revised Article 9. 73

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70 Rev. U.C.C. § 9-704(3) (1999) provides:
A security interest that is enforceable immediately before this [Act] takes effect but which would be subordinate to the rights of a person that becomes a lien creditor at that time: . . .

(3) becomes perfected:
(A) without further action, when this [Act] takes effect if the applicable requirements for perfection under the [Act] are satisfied before or at that time; or
(B) when the applicable requirements for perfection are satisfied if the requirements are satisfied after that time.

71 Rev. U.C.C. § 9-703(a) (1999) provides:
(A) [Continuing priority over lien creditor: perfection requirements satisfied.] A security interest that is enforceable immediately before this [Act] takes effect and would have priority over the rights of a person that becomes a lien creditor at that time is a perfected security interest under this [Act] if, when this [Act] takes effect, the applicable requirements for enforceability and perfection under this [Act] are satisfied without further action.

Therefore no further action need be taken to keep the perfected security interest. See also Rev. U.C.C. § 9-203, cmt.1 (1999).

72 The period is two years in West Virginia. See W. VA. CODE § 46-9-703(b)(3) (2000).

73 Rev. U.C.C. § 9-703(b)(1) (1999) provides:
(b) [Continuing priority over lien creditor: perfection requirements not satisfied.] Except
10. Where the filing was sufficient to perfect a security interest under Prior Article 9, but are insufficient to perfect a security interest under Revised Article 9, the interest remains perfected for the original period of effectiveness, up to June 30, 2006.

11. An existing perfected security interest remains perfected beyond one year after the effective date, if acts are taken within the one year which would both create and perfect a security interest under Revised Article 9.

EFFECTIVENESS OF PRE-EXISTING FINANCING STATEMENTS

12. Filing a financing statement meeting the requirements of Revised Article 9 before the effective date operates as a filing under Revised Article 9.

13. A financing statement, valid and effectively filed under Prior Article 9, remains effective until it lapses under the Prior

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as otherwise provided in Section 9-705, if, immediately before this [Act] takes effect, a security interest is enforceable and would have priority over the rights of a person that becomes a lien creditor at that time, but the applicable requirements for enforceability or perfection under this [Act] are not satisfied when this [Act] takes effect, the security interest: (1) is a perfected security interest for one year after this [Act] takes effect.

74 The period is usually five years after the last filing. See U.C.C. § 9-403(2) (1995).

75 See Rev. U.C.C. § 9-705(c)(1999). This savings clause blunts the immediate effect of Revised 9's changes in the place of filing the financing statement from local to statewide, and from the state of location of the collateral to the state of location of the debtor. Prior perfected security interests perfected by local or state of the collateral location will remain perfected for the remaining effective period of last effective filing, up to July 1, 2006.

76 The period is two years in West Virginia. See W. VA. CODE § 46-9-703(b)(3) (2000).

77 The period is two years in West Virginia. See id.

78 Rev U.C.C. § 9-703(b)(3) (1999) provides:

(b) [Continuing priority over lien creditor: perfection requirements not satisfied.] Except as otherwise provided in Section 9-705, if, immediately before this [Act] takes effect, a security interest is enforceable and would have priority over the rights of a person that becomes a lien creditor at that time, but the applicable requirements for enforceability or perfection under this [Act] are not satisfied when this [Act] takes effect, the security interest: . . .

(3) remains perfected thereafter only if the applicable requirements for perfection under this [Act] are satisfied before the year expires.

Of course, if the pre-effective date acts meet the Revised 9 requirements for creating a security interest, the security interest continues automatically, and the secured party only needs to take acts to perfect within the year to continue the perfected security interest.

79 "(b) [Pre-effective-date filing.] The filing of a financing statement before this [Act] takes effect is effective to perfect a security interest to the extent the filing would satisfy the applicable requirements for perfection under this [Act]." Rev. U.C.C. § 9-705(b) (1999).
Article 9 period of effectiveness,\textsuperscript{80} or June 30, 2006, whichever comes first (subject to Revised Code sections 9-705(d) and (e) rules on continuation statements and transmitting utilities)\textsuperscript{81}(2) June 30, 2006.

CONTINUING PERFECTION BY FILING CONTINUATION AND FINANCING STATEMENTS

14. Filing a proper continuation statement after the effective date does not continue perfection unless the place in which it is filed is (a) the same office in which the original financing statement was filed, and (b) such office is the place prescribed by Revised Article 9 as the place for filing the financing statement.\textsuperscript{82}

15. A financing statement consisting of a financing statement filed before the effective date and a continuation statement filed after the effective date is effective only if they satisfy the revised Article 9 requirements of an initial financing statement.\textsuperscript{83}

16. The secured party may, on its own, file a financing statement or continuation statement if needed to perfect or continue the

\textsuperscript{80} The period is generally five years after the last filing. See U.C.C. § 9-403(2) (1995).

\textsuperscript{81} Rev. U.C.C. § 9-705(c) (1999) provides:
\hspace{1em} (c) [Pre-effective-date filing in jurisdiction formerly governing perfection.] This [Act] does not render ineffective an effective financing statement that, before this [Act] takes effect, is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in [former Section 9-103]. However, except as otherwise provided in subsections (d) and (e) and Section 9-706, the financing statement ceases to be effective at the earlier of:
\hspace{1em} (1) the time the financing statement would have ceased to be effective under the law of the jurisdiction in which it is filed; or
\hspace{1em} (2) June 30, 2006.

\textsuperscript{82} Rev. U.C.C. § 9-705(d) (1999) provides:
\hspace{1em} (d) [Continuation statement]. The filing of a continuation statement after this [Act] takes effect does not continue the effectiveness of the financing statement filed before this [Act] takes effect. However, upon the timely filing of a continuation statement after this [Act] takes effect and in accordance with the law of the jurisdiction governing perfection as provided in Part 3, the effectiveness of a financing statement filed in the same office in that jurisdiction before this [Act] takes effect continues for the period provided by the law of that jurisdiction.

\textsuperscript{83} "(f) [Application of Part 5.] A financing statement that includes a financing statement filed before this [Act] takes effect and a continuation statement filed after this [Act] takes effect is effective only to the extent that it satisfies the requirements of Part 5 for an initial financing statement." Rev. U.C.C. § 9-705(f) (1999). An "initial financing statement" is one that meets the requirements of Part 5 of Revised Article 9. These requirements are simple, and except for real-property related collateral, See id. § 9-502(b), merely require the names of the debtor and the secured party, and an indication of the collateral. See id. § 9-502(a). For some purposes, such as continuing the effectiveness of a pre-effective date financing statement, the "initial financing statement" must contain more information. See id. § 9-703(c).
perfection of a security interest.\textsuperscript{84}

17. A pre-effective date financing statement will be continued by filing a new, initial, financing statement if:
   
   a. The security interest could be perfected under Revised 9 by such filing, in that office,\textsuperscript{85}
   b. The original financing statement was filed in a different office,\textsuperscript{86} and
   c. The new financing statement satisfies revised section 9-706(c) and Revised Article 9 requirements for a financing statement (names of debtor and creditor and indication of collateral),\textsuperscript{87} states the original financing statement is still effective,\textsuperscript{88} and identifies that statement and the most recent continuation statement by location, dates, and filing numbers.\textsuperscript{89}

**PERFECTING SECURITY INTERESTS UNDER REVISED 9 BY PRE-EFFECTIVE DATE ACTS OTHER THAN FILING**

18. Acts taken within one year\textsuperscript{90} before the effective date (other than filing a financing statement), which would create a perfected security interest under Revised Article 9 but not

\textsuperscript{84} "A person may file an initial financing statement or a continuation statement under this part if:
   (1) the secured party of record authorizes the filing; and
   (2) the filing is necessary under this part:
      (A) to continue the effectiveness of a financing statement filed before this [Act] takes effect; or
      (B) to perfect or continue the perfection of a security interest." Rev. U.C.C. § 9-708 (1999).

\textsuperscript{85} "(a) [Initial financing statement in lieu of continuation statement.] The filing of an initial financing statement in the office specified in Section 9-501 continues the effectiveness of a financing statement filed before this [Act] takes effect if:
   (1) the filing of an initial financing statement in that office would be effective to perfect a security interest under this [Act] . . ." Id. § 9-706(a)(1).

\textsuperscript{86} "(2) the pre-effective-date financing statement was filed in an office in another State or another office in this State . . ." Id. § 9-706(a)(2).

\textsuperscript{87} "(c) [Requirements for initial financing statement under subsection (a).] To be effective for purposes of subsection (a), an initial financing statement must:
   (1) satisfy the requirements of Part 5 for an initial financing statement . . ." Rev. U.C.C. § 9-706(c)(1) (1999). See also id. § 9-502(a).

\textsuperscript{88} "(3) indicate that the pre-effective-date financing statement remains effective." Id. § 9-706(c)(3).

\textsuperscript{89} "(2) identify the pre-effective-date financing statement by indicating the office in which the financing statement was filed and providing the dates of filing and file numbers, if any, of the financing statement and of the most recent continuation statement file with respect to the financing statement . . ." Id. § 9-706(c)(2).

\textsuperscript{90} The period is two years in West Virginia. See W. VA. CODE § 46-9-705(a) (2000).
under Prior Article 9, are effective to perfect any security interest that attaches within one year after the effective date.\footnote{91}

PRIORITIES

19. Where the relative priorities of conflicting claims were established before the effective date, Prior Article 9, not Revised Article 9, determines priority.\footnote{93}

20. Conflicting claims to collateral are determined by Revised Article 9, unless the relative priorities were established before the effective date.\footnote{94}

21. Where a pre-effective date filing satisfies Revised 9 filing requirements but not Prior 9 filing requirements, the priority date is the effective date for purposes of the first to file or perfect priority rules of Revised 9.\footnote{95}

\footnote{91} The period is two years in West Virginia. See id.

\footnote{92} Rev. U.C.C. § 9-705(a) (1999) provides:
(a) [Pre-effective date action; one-year perfection period unless reperfected.] If action, other than the filing of a financing statement, is taken before this [Act] takes effect and the action would have resulted in priority of a security interest over the rights of a person that becomes a lien creditor had the security interest become enforceable before this [Act] takes effect, the action is effective to perfect a security interest that attaches under this [Act] within one year after this [Act] takes effect . . . .

\footnote{93} Rev. U.C.C. § 9-709(a) (1999) provides:
“(a) However, if the relative priorities of the claims were established before this [Act] takes effect, [former Article 9] determines priority.”

\footnote{94} Rev. U.C.C. § 9-709(a) (1999) provides:
“(a) [Law governing priority.] This [Act] determines the priority of conflicting claims to collateral. However, if the relative priorities of the claims were established before this [Act] takes effect, [former Article 9] determines priority.”

Official Comment 1 to Rev. U.C.C. § 9-709 also gives the following example of this general rule:
Example 1: In 1999, SP-1 obtains a security interest in a right to payment for goods sold (“account”). SP-1 fails to file a financing statement. This Article takes effect on July 1, 2001. Thereafter, on August 1, 2001, D creates a security interest in the same account in favor of SP-2, who files a financing statement. This Article determines the relative priorities of the claims. SP-2’s security interest has priority under Section 9-322(a)(1).

\footnote{95} Rev. U.C.C. § 9-709(b) (1999) provides:
(b) [Priority if security interest becomes enforceable under Section 9-203.] For purposes of Section 9-322(a), the priority of a security interest that becomes enforceable under Section 9-203 of this [Act] dates from the time this [Act] takes effect if the security interest is perfected under this [Act] by filing a financing statement before this [Act] takes effect which would not have been effective to perfect the security interest under [former Article 9]. This subsection does not apply to conflicting security interests each of which is perfected by the filing of such a financing statement.

Official Comment 2 to Rev. U.C.C. § 9-709 provides the following example of this rule.
III. SOME STEPS SECURED PARTIES SHOULD CONSIDER TAKING TO
PREERVE RIGHTS UNDER EXISTING SECURITY AGREEMENTS

A. Preserving the Existing Security Interest: Changes in Creation Rules And How to Deal With Them

A valid security interest, with very few exceptions, is created by a voluntary agreement between the debtor and the secured party which meets the elements of section 9-203 of the Prior Act, and in the future, section 9-203 of the Revised Act.65 The elements of both are generally the same. They require that value be given, debtor have an interest in the collateral, and either an authenticated agreement describing the collateral, or secured party’s possession of the collateral pursuant to agreement. Revised Article 9 allows the agreement to be stored in electronic medium67 and adds “control” over the collateral, something less than possession, as an additional substitute for an authenticated document.68

But even if the actions needed to create security interests under the Prior Act at first blush seem to be sufficient to create security interests under the Revised Act, some of the changes from the Prior to the Revised Act in related definitions and requirements can keep old actions from meeting the new requirements. Two examples of this involve the requirement in both the Prior and the Revised Act that the security agreement “provide[] a description of the collateral.”69

Example 6: In 1999, SP-1 obtains a security interest in D’s existing and after-acquired instruments and files a financing statement covering “instruments.” In 2000, D grants a security interest in its existing and after-acquired accounts in favor of SP-2, who files a financing statement covering “accounts.” After this Article takes effect on July 1, 2001, one of D’s account debtors gives D a negotiable note to evidence its obligation to pay an overdue account. Under the first-to-file-or-perfect rule in Section 9-322(a), SP-1 would have priority in the instrument, which constitutes SP-2’s proceeds. SP-1’s filing in 1999 was earlier than SP-2’s in 2000. However, subsection (b) provides that, for purposes of Section 9-322(a), SP-1’s priority dates from the time this Article takes effect (July 1, 2001). Under Section 9-322(b), SP-2’s priority with respect to the proceeds (instrument) dates from this filing as to the original collateral (accounts). Accordingly, SP-2’s security interest would be senior.


67 Absent possession or control, revised section 9-203(b)(3)(A) requires that “debtor has authenticated a security agreement.” Security agreement is defined as “an agreement that creates or provides for a security interest.” Rev. U.C.C. § 9-102(73) (1999). “Authenticate” is defined as “(A) to sign; or (B) to execute or... encrypt or similarly process a record... with the present intent... to... adopt or accept the record.” Id. § 9-102(7). “Record” means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.” Id. § 9-102(69).


1. Supergeneric Collateral Descriptions

Prior Article 9 provides that the "description" is "sufficient... if it reasonably identifies what is described."100 Although the cases have been mixed, some jurisdictions have recognized supergeneric descriptions, such as "all of debtor's property," as valid under the Prior Act.101 Revised Article 9 expressly states such supergeneric descriptions do not reasonably identify the collateral.102 Therefore, an existing security interest created by a security agreement using such a supergeneric description will not qualify under the Revised Act, and the security interest will terminate under the general savings clause at the end of one year103 after the effective date.104 For this reason, if a secured party's existing security agreement uses a supergeneric collateral description, it should be changed within a year105 after the effective date.

2. Consumer Transactions

A similar problem can occur with the use of generic106 descriptions, such as "all personal property" or "all consumer goods," in some consumer transactions.107 Under Prior Article 9, generic descriptions of collateral in the security agreement have routinely been held valid as long as they were preceded by the word "all." For example, "all inventory," "all the debtor's existing inventory," and "all the debtor's existing and after acquired inventory" have been held sufficient to identify the collateral.108 The only facts needed to determine if the subject property was collateral covered by the security agreement are (1) whether this property is inventory and (2) whether the debtor owns this property.

102 "[Supergeneric description is not sufficient.] A description of collateral as 'all the debtor's assets' or 'all the debtor's personal property' or using words of similar import does not reasonably identify the collateral." Rev. U.C.C. § 9-108(c) (1999).
103 The grace period is two years in West Virginia. See W. VA. CODE § 46-9-702(b) (1999).
104 See Rev. U.C.C. § 9-702(b) (1999); see also supra text accompanying notes 65 and 69.
105 Again, the grace period lasts for two years in West Virginia. W. VA. CODE § 46-9-704 (2000).
106 Distinguished from "supergeneric" in that supergeneric covers all of debtor's property where "generic" covers only all of a certain type of debtor's property.
107 "'Consumer transaction' means a transaction in which (i) an individual incurs an obligation primarily for personal, family, or household purposes, (ii) a security interest secures the obligation, and (iii) the collateral is held or acquired primarily for personal, family, or household purposes." Rev. U.C.C. § 9-102(26) (1999).
Revised Article 9 continues this rule when it provides "[E]xcept as provided in subsection (d) a description of collateral reasonably identifies the collateral, if it identifies the collateral by . . . (2) category; (3) except as otherwise provided in subsection (e), [by] a type of collateral defined in [the Uniform Commercial Code] . . . ."\textsuperscript{109} But this same section goes on to state that "A description only by type of collateral . . . is an insufficient description of . . . (2) in a consumer transaction, consumer goods, a security entitlement, a securities account, or a commodity account."\textsuperscript{110} "Type of collateral" refers to the Article 9 classes of collateral such as equipment, inventory, investment property, and consumer goods.\textsuperscript{111} This Revised code section requires greater specificity in consumer goods collateral description than a general description by type.

Existing security agreements which use broad, generic descriptions of collateral in consumer transactions can cause unforeseen trouble for the secured party. For example, assume that the security agreement provides "on June 1, 2001, Sally Smith hereby gives State Bank a security interest in all of her present and after acquired investment property to secure a $100,000 personal loan made to her today." Assuming further that on June 1, 2001 Sally Smith personally owns $40,000 in General Motors stock held in a Smith Barney account, and on March 1, 2002 acquires $40,000 in Ford stock. Because the loan was obtained for personal, non-business use, and the stock is held for personal use, the transaction is a consumer transaction.\textsuperscript{112} Accordingly, the security agreement generic description will cease to be effective on July 1, 2001,\textsuperscript{113} and will clearly not cover the Ford stock.\textsuperscript{114} It will cease to cover the General Motors stock on July 1, 2002, the end of

\textsuperscript{109} Rev. U.C.C. § 9-108(b) (1999). Subsections (a) and (b) of § 9-108 read more fully:
(a) [Sufficiency of description.] Except as otherwise provided in subsections (c), (d), and (e), a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.
(b) [Examples of reasonable identification.] Except as otherwise provided in subsection (d), a description of collateral reasonably identifies the collateral if it identifies the collateral by:
(1) specific listing;
(2) category;
(3) except as otherwise provided in subsection (e), a type of collateral defined in [the Uniform Commercial Code];
(4) quantity;
(5) computational or allocational formula or procedure; or
(6) except as otherwise provided in subsection (e), any other method, if the identity of the collateral is objectively determinable.

\textsuperscript{110} Id. § 9-108(e).

\textsuperscript{111} See id. § 9-108(b)(3).

\textsuperscript{112} See id. § 9-102(a)(26).

\textsuperscript{113} See id. § 9-703(b). The date is July 1, 2003 in West Virginia. See W.VA. CODE § 46-9-703(b) (2000).

\textsuperscript{114} This is the interpretation of Eldon H. Reiley in Transition to Revised Article 9: Planning Should Begin Now, 32 UCC L. J. 56, 61 n.17 (1999).
the one year grace period granted by the Revised Act.\textsuperscript{115} Changing the collateral description to “all General Motors stock owned by debtor” or “all stock held in debtor’s Smith Barney stock account” should be sufficiently specific to preserve the security interest in the General Motors stock after the effective date.

The lesson of all of this is that secured parties who presently have security interests created in any transaction by security agreements using supergeneric descriptions, or in consumer transactions by security agreements using generic descriptions of consumer goods, securities, or commodities, should change their security agreements to add a more specific collateral description.

B. Preserving the Existing Perfection of the Security Interest.

With some exceptions, the existing perfection of a security interest will lapse after one year\textsuperscript{116} after the effective date, unless the original acts constituting perfection under Prior Article 9 will also constitute perfection under Revised Article 9. The most common causes of lapse of perfection will be Revised 9’s change in the place of filing from the state of the location of the collateral under Prior 9\textsuperscript{117} to the state of the location of the debtor under Revised 9,\textsuperscript{118} and the change from filing locally\textsuperscript{119} to filing in one central location in the state.\textsuperscript{120} But there will be other causes, including changes in collateral classification and changes in the method of perfection for certain kinds of collateral. The new perfection rules have already received a good deal of commentary.\textsuperscript{121}

1. Change From Local To Statewide Filing

One major change in the manner of perfection made by Revised Article 9 is to move from local filing of financing statements to statewide filing. This change means that many security interests perfected under Prior 9 by local filing will not meet Revised 9’s perfection requirements. Fortunately for existing secured

\textsuperscript{115} See Rev. U.C.C. § 9-703(b) (1999) and Example 1 in Official Comment 2 to § 9-703.

\textsuperscript{116} The grace period is two years in West Virginia. See W.VA. CODE § 9-703(b) (2000).

\textsuperscript{117} See U.C.C. § 9-103(1)(b) (1995).


\textsuperscript{120} See Rev. U.C.C. § 9-501(a) (1999).

creditors in this situation, Revised Article 9 supplies a longer, up to five years, grace period.\textsuperscript{122}

Prior Article 9 provides three alternative provisions from which state legislatures can chose to set their required places of filing.\textsuperscript{123} The first alternative provides that the financing statement will be filed in the local county for minerals, timber, and fixture filings, the local county and the Secretary of State's office when the collateral is consumer goods, and for remaining collateral, in the Secretary of State's office. The second and third alternatives each have more extensive local filing for different kinds of collateral. The Revised Act simplifies the process, providing for local filing only when the collateral is as-extracted minerals,\textsuperscript{124} timber to be cut, and when a fixture filing is made.\textsuperscript{125} For all other collateral, the financing statement must be filed in the Secretary of State's office.\textsuperscript{126} Therefore, in those states which have adopted the second or third alternative of Prior Article 9, many financing statements will have been filed locally only, and therefore would not be sufficient to perfect under the requirements of the Revised Act. The transition rules continue the validity of the perfection by such filing for the remainder of the effective period of the filing (usually five years from the date of filing)\textsuperscript{127} or until June 30, 2006, whichever comes first.\textsuperscript{128} In order to continue the perfection beyond this time, an existing secured party should examine its financing statement filings. For those financing statements where local filing is insufficient under Revised 9, the secured party should file an "initial financing statement"\textsuperscript{129} in the proper

\textsuperscript{122} The grace period for pre-effective date, validly filed financing statements is the remainder of the period left under the original filing, usually five years from the last filing, see U.C.C. § 9-403(2) (1995), up to June 30, 2006. See Rev. U.C.C. § 9-705(c) (1999).


(a) Filing offices. Except as otherwise provided in subsection (b), if the local law of this State governs perfection of a security interest or agricultural lien, the office in which to file a financing statement to perfect the security interest or agricultural lien is:

(1) the office designated for the filing or recording of a record of a mortgage on the
related real property, if:
(1) the collateral is as-extracted collateral or timber to be cut; or
(2) the financing statement is filed as a fixture filing and the collateral is
goods that are or are to become fixtures; or
(2) the office of [ ] or any office duly authorized by [ ], in all other cases,
including a case in which the collateral is goods that are or are to become fixtures and
the financing statement is not filed as a fixture filing.

\textsuperscript{127} See U.C.C. § 9-403(2) (1995).

\textsuperscript{128} See Rev. U.C.C. § 9-705(e) (1999).

\textsuperscript{129} Rev. U.C.C. § 9-706(a) and (e) (1999) provides:
§ 9-706. When Initial Financing Statement Suffices to Continue Effectiveness of
Financing Statement.

(a) [Initial financing statement in lieu of continuation statement.] The filing of an
Secretary of State’s office, in the state where the debtor is located.

2. Change of State of Filing From Location of Collateral To Location of Debtor

The other substantial change in the proper place to file requires that the financing statement be filed in the state in which the debtor is located, not where the collateral is located. Revised 9 provides that the law where the debtor is located generally governs issues related to perfection by filing. The Revised Act goes on to provide that if the debtor is an individual, the debtor is located at the individual’s residence, if not an individual but an organization which has only one place of

initial financing statement in the office specified in Section 9-501 continues the effectiveness of a financing statement filed before this [Act] takes effect if:

(1) the filing of an initial financing statement in that office would be effective to perfect a security interest under this [Act];
(2) the pre-effective-date financing statement was filed in an office in another State or another office in this State; and
(3) the initial financing statement satisfies subsection (c).

(c) [Requirements for initial financing statement under subsection (a)]. To be effective for purposes of subsection (a), an initial financing statement must:

(1) satisfy the requirements of Part 5 for an initial financing statement;
(2) identify the pre-effective-date financing statement by indicating the office in which the financing statement was filed and providing the dates of filing and file numbers, if any, of the financing statement and of the most recent continuation statement filed with respect to the financing statement; and
(3) indicate that the pre-effective-date financing statement remains effective.

See Rev. U.C.C § 9-301(1) (1999). Issues related to perfection of possessory security interests are governed by the law of the state where the collateral is located. See id. § 9-301(2). There are other exceptions to this complicated rule as the following section shows.


Except as otherwise provided in Sections 9-303 through 9-306, the following rules determine the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral:

(1) Except as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral.

(2) While collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral.

(3) Except as otherwise provided in paragraph (4), while negotiable documents, goods, instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs:

(A) perfection of a security interest in the goods by filing a fixture filing;
(B) perfection of a security interest in timber to be cut; and
(C) the effect of perfection or nonperfection and the priority of a nonpossessory security interest in collateral.

(4) The local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in as-extracted collateral.


§ 9-307. Location of Debtor.

(a) [“Place of Business.”] In this section, “place of business” means a place where a debtor conducts its affairs.
(b) [Debtor’s location: general rules.] Except as otherwise provided in this section,
business, then the debtor is located at its place of business, and if it has more than one place of business then it is located at its chief executive office. But significantly, if the debtor is a registered organization, such as a corporation, the debtor's location is in the state in which it is registered or incorporated. This is a substantial change from the existing law, and a significant number of financing statements presently filed in central state offices are filed in the wrong state under the Revised Act. Fortunately, the transition rules also supply a longer grace period for a financing statement which turns out now to have been filed in the wrong place because the new law has changed the jurisdiction, meaning state, of the proper filing. This provision allows the existing perfection to extend until the time when it would expire under the existing original or continuation filing, or June 20, 2006, whichever comes earlier. But eventually the existing financing statements will lapse and the secured party should immediately begin reviewing its financing statements, determine the location of each debtor, and file an “initial financing statement” in the proper state.

3. Credit Card Receivables

Credit card receivables are clearly accounts under Revised Article 9. This was not so clear under Prior Article 9, and accordingly, existing security interests in credit card receivables might on occasion be perfected in ways other

the following rules determine a debtor's location:

(1) A debtor who is an individual is located at the individual's principal residence.
(2) A debtor that is an organization and has only one place of business is located at its place of business.
(3) A debtor that is an organization and has more than one place of business is located at its chief executive office.

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132 See id. § 9-307(b)(2).
133 See id. § 9-307(b)(3).
134 "(70) 'Registered organization' means an organization organized solely under the law of a single State or the United States and as to which the State or the United States must maintain a public record showing the organization to have been organized." Rev. U.C.C. § 9-102(a)(70) (1999).
135 "(e) [Location of registered organization organized under State law.] A registered organization that is organized under the law of a State is located in that State." Rev. U.C.C. § 9-307(e) (1999).
(e) [Pre-effective-date filing in jurisdiction formerly governing perfection.] This [Act] does not render ineffective an effective financing statement that, before this [Act] takes effect, if filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in [former Section 9-103]. However, except as otherwise provided in subsections (d) and (e) and Section 9-706, the financing statement ceases to be effective at the earlier of:
(1) the time the financing statement would have ceased to be effective under the law of the jurisdiction in which it is filed; or
(2) June 30, 2006.
137 "'Account'... means a right to payment of a monetary obligation, whether or not earned by performance... (vii) arising out of the use of a credit or charge card or information contained on or for use with the card..." Id. § 9-102(a)(2).
than filing, and which would not perfect accounts under Revised Article 9. Secured parties should review such perfection of existing security interests, and make sure they are perfected by filing the financing statement as required for accounts under Revised Article 9.¹³⁸

4. Certificates of Deposit

Deposit accounts are not covered by Prior Article 9,¹³⁹ but Prior 9's definition of "deposit accounts" did not include certificates of deposit ("CD's").¹⁴₀ Therefore, CD's have been included in Prior 9 coverage and classified as either an "instrument" if evidenced by a written right to payment or negotiable instrument,¹⁴¹ or a "general intangible" if not represented by such a writing.¹⁴² If the CD is classified as an instrument, under Prior 9 it can be perfected only by possession.¹⁴³ If classified as a general intangible, it can be perfected only by filing.¹⁴⁴

Under Revised Article 9, a CD will be an instrument if it is negotiable or otherwise in a writing that evidences a right to payment,¹⁴⁵ or a "deposit account" if it is "a demand, time, savings, passbook, or similar account maintained with a bank . . . [and is not an account] . . . evidenced by an instrument."¹⁴⁶ Under Revised 9, a security interest in an instrument can be perfected by possession¹⁴⁷ or by filing.¹⁴⁸ If it is a deposit account, it can be perfected only by control.¹⁴⁹

¹³⁸ See id. § 9-310(a).
¹⁴¹ See id. § 9-105(1)(i).
¹⁴² See id. § 9-106.
¹⁴³ See id. § 9-305. An exception is temporary automatic perfection under § 9-304(4).  Id.
¹⁴⁴ See id. § 9-302(1).
¹⁴⁶ Id. § 9-102(a)(29).
¹⁴⁷ See id. § 9-313(a).
¹⁴⁸ See id. § 9-312(a). Security interests in instruments may also be perfected temporarily for 20 days if given for new value under an authenticated security agreement, or when made available to debtor for the purpose of selling. See id. § 9-312(c)(g).
(b) [Control or possession of certain collateral.] Except as otherwise provided in Section
9-315(c) and (d) for proceeds:
(1) a security interest in a deposit account may be perfected only by control under
Section 9-314; . . .
See id.

See also id. § 9-314.
Perfection by Control.
(a) [Perfection by control.] A security interest in investment property, deposit accounts,
letter-of-credit rights, or electronic chattel paper may be perfected by control of the
A secured party who has a perfected security interest in a CD on the effective date, will continue to have a perfected security interest if the CD is considered an instrument as long as the secured party maintains possession which has constituted the perfection from the start. The secured party will also be able to file a financing statement to continue the perfection under the Revised Act if it so wishes, but possession will be sufficient to continue the perfection. But if the CD is determined under the new act to be a deposit account, the pre-existing possession or filing will cease to perfect after the grace period of one year.

The upshot is that an existing secured party with a perfected security interest in a CD must soon determine whether the CD is an instrument or a deposit account under Revised 9. If it is an instrument, the existing perfection by possession should continue the perfection under Revised 9. But if it is characterized as a deposit account under Revised 9, the secured party must establish a control agreement with a depository bank, otherwise the existing perfection will be lost after a year after the effective date. Revised Article 9 sets out the procedure and the test for maintaining control over a deposit account.

5. Collateral In Possession of Bailee

Under Prior Article 9, a security interest in collateral in possession of a bailee who has not issued a negotiable or nonnegotiable document could be perfected by giving notice to the bailee of the secured party’s security interest. Revised Article 9 changes this by requiring the bailee to authenticate a record, either before or after the bailee takes possession of the collateral, acknowledging

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150 Of course, the acts of possession must conform to the Revised 9 requirements.

151 See Rev. U.C.C. § 9-703(b) (1999). The grace period is two years in West Virginia. See W.VA. CODE § 46-9-703(b) (2000).

152 See Rev. U.C.C. § 9-104 (1999), which provides:
§ 9-104. Control of Deposit Account.
(a) [Requirements for control.] A secured party has control of a deposit account if:
(1) the secured party is the bank with which the deposit account is maintained;
(2) the debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; or
(3) the secured party becomes the bank’s customer with respect to the deposit account.
(b) [Debtor’s right to direct disposition.] A secured party that has satisfied subsection (a) has control, even if the debtor retains the right to direct the disposition of funds from the deposit account.


154 "Authenticate" means: (a) to sign; or (B) to execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent ... to identify the person and adopt or accept the record.” Rev. U.C.C. § 9-102(a)(7) (1999).

155 "Record... means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.” Id. § 9-102(a)(69) (1999).
that the bailee holds possession of the collateral for the secured party’s benefit.156

A secured party should check to see if it holds any existing security interests in collateral in the possession of bailees which have been perfected not by filing or by possession of a negotiable or a nonnegotiable document issued by the bailee, but have been perfected merely by giving notice to the bailee that the secured party has a security interest in the property. In such cases, the secured party should immediately attempt to convince the bailee to sign a written acknowledgment that the bailee holds the collateral for the secured party. Otherwise, the existing perfection will be lost one year after the effective date of Revised Article 9.157 In convincing the bailee to sign the document, the secured party will likely need at least the cooperation of the debtor, obtained under threat of acceleration if needed.

6. Computer Software

Computer software is a "general intangible" to the extent that it fits the Revised Act’s definition of a computer program and any supporting information provided "in connection with a transaction relating to that program."158 To the extent the computer software meets this definition it must be perfected as a general intangible, that is by filing a financing statement.159 Some computer software will fall under the definition of goods, which states:

[goods] . . . also includes a computer program imbedded in goods and any supporting information provided in connection with a transaction relating to the program if (i) the program is associated within the goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program imbedded in the goods that consist solely of the medium in which

156 See Rev. U.C.C. § 9-313(c) (1999), which provides:
(c) [Collateral in possession of person other than debtor.] With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor’s business, when:

(1) the person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party’s benefit; or
(2) the person takes possession of the collateral after having authenticated a record acknowledging that it will hold possession of collateral for the secured party’s benefit.

157 See id. § 9-703(b)(1). The existing perfection will last for two years in West Virginia. See W.VA. CODE § 46-9-703(b)(1) (2000).


159 See id. § 9-310(a).
the program is imbedded. 160

The holder of a perfected existing security interest in software which is not imbedded in the goods should realize that the perfection of such software will terminate after a year after the effective date, 161 unless the secured party takes action within the year 162 to perfect it as an intangible by filing a financing statement in the proper place.

C. Preserving Existing Remedies and the Rights Accompanying These Remedies

Both the Prior Act and the Revised Act contemplate that most of the rights and obligations of the secured party and the debtor inter se will be left to their bargain as reflected in the security agreement. Yet both Acts carve out some basic rights for the parties. These provisions can be roughly grouped together according to the issues they address. These groupings include: (a) basic rights of the parties under the security agreement, 163 (b) protection of debtor against initial security agreement waiver of some very basic rights, 164 (c) secured parties’ obligations regarding collateral in its possession, 165 (d) right of debtor to receive information on account balance and termination, 166 (e) repossession, 167 (f) notification of sale, manner of disposition and distribution of proceeds, 168 (g) rights of secured party to keep collateral in full satisfaction of the debt and right of debtor to redeem, 169 (h) liability on the deficiency 170 and (i) liability of secured party for failure to comply with Article 9 duties. 171

The rights and obligations of the parties, especially after default, are not the same under the Revised Act as under the Prior Act, and many of these changes seem to impose more obligations on the secured party. 172 To preserve the rights and

160 Id. § 9-102(a)(44).
161 See id. § 9-703(b)(1).
162 See id. § 9-703(b)(3).
172 For an excellent review of the changes in the rights and remedies of the parties see ZINNECKER, supra note 20.
limits on obligations enjoyed under the Prior Act, the secured party should consider, among other things, examining the differences, and preserving such prior rights by persuading the debtor to agree to them in a modified security agreement or by other means.

1. Choosing the Desired Article 9 by Acting Before or After the Effective Date

The transition rules provide that “This [Act] does not affect an action, case, or proceeding commenced before this [Act] takes effect.” After the effective date, Revised Article 9 generally applies to determine the rights and liabilities of the parties. Sometimes the Revised Act imposes restrictions on the secured party not imposed by the Prior Act. In such a case, the secured party should consider repossessing and selling the collateral or bringing a lawsuit before the effective date, so that the Prior Act, not the Revised Act with the less favorable rules, will apply.

An example of the Revised Act’s stricter rules which could disadvantage a repossessing secured party are found in section 9-611 of the Revised Code, which require the secured party to take more stringent efforts in notifying interested parties than are required by the Prior Act. For example, under the Revised Act a secured party selling repossessed collateral other than consumer goods must notify

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174 See id. § 9-109.
175 Rev. U.C.C. section 9-611(a-c) (1999) provides:
(a) ["Notification Date"] In this Section, “notification date” means the earlier of the date on which:
(1) a secured party sends to the debtor and any secondary obligor an authenticated notification of disposition; or
(2) the debtor and any secondary obligor waive the right to notification.
(b) [Notification of disposition required] Except as otherwise provided in subsection (d), a secured party that disposes of collateral under Section 9-610 shall send to the persons specified in subsection (c) a reasonable authenticated notification of disposition.
(c) [Persons to be notified] To comply with subsection (b), the secured party shall send an authenticated notification of disposition to:
(1) the debtor;
(2) any secondary obligor; and
(3) if the collateral is other than consumer goods:
   (1) any person from which the secured party has received, before the notification date, an authenticated notification of a claim of an interest in the collateral;
   (2) any other secured party or lienholder that, 10 days before the notification date, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that:
      (1) identified the collateral
      (2) was indexed under the debtor’s name as of that date; and
      (3) was filed in the office in which to file a financing statement against the debtor covering the collateral as of that date; and
   (3) any other secured party that, 10 days before the notification date, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in Section 9-311(a).
all other secured parties who have previously perfected by filing.\textsuperscript{176} This involves the expense of searching for financing statements and giving notice, and can bring other interested competing bidders to the sale. At present, the secured party need only notify other secured parties who have given written notice to the selling secured party.\textsuperscript{177} Not only does this save some expense, it increases the chances that the selling secured party will be able to make a bargain purchase at the sale, reselling later at a profit, while in many cases still keeping the debtor liable on the deficiency. In such cases, a secured party contemplating repossession and disposition should consider taking action to repossess before the effective date. It has been suggested that the Revised Act's rule providing that the Prior Act applies to lawsuits brought before the effective date might also apply to non-lawsuit enforcement actions such as repossessions, if such actions started before the effective date.\textsuperscript{178} The code language is silent on this.

In other circumstances, the holder of an existing security interest should also consider delaying repossession or filing a lawsuit until after the effective date in situations where Revised Article 9 offers advantages over Prior Article 9. Revised Article 9 applies to all lawsuits brought after the effective date.\textsuperscript{179} For example, courts in a jurisdiction which have followed the minority rule and denied a secured party any deficiency where the secured party committed some wrongful act in repossession or disposition, would presumably still follow that rule in a lawsuit brought before the effective date. Revised Article 9 changes the result in these minority states by providing that the debtor is still liable for any deficiency over and above the amount the collateral would have sold for had the secured party acted properly in the disposition of the collateral.\textsuperscript{180}

2. Existing Common Law Security Interests

The Revised Act adds a number of security interests that are not included within the scope of Prior Article 9. These include agricultural liens, commercial tort claims, and commercial deposit accounts.\textsuperscript{181} Where an action to enforce one of these non-article 9 security interests is brought before the effective date, the rights and obligations of both parties would be defined by non-UCC common law.\textsuperscript{182} These common law rights are often difficult to ascertain, as in many jurisdictions there is no clear case law on many of the issues surrounding the creation and enforcement of these rights. When they can be determined, these rules may differ

\textsuperscript{176} See id. § 9-611(c).
\textsuperscript{177} See U.C.C. § 9-504(3) (1995).
\textsuperscript{179} See Rev. U.C.C. § 9-702(a) (1999).
\textsuperscript{180} See id.
\textsuperscript{181} See id. § 9-109.
\textsuperscript{182} See id. § 9-702(c).
substantially from traditional Article 9 rules.

After the effective date, security interests in agricultural liens, commercial torts, and commercial deposit accounts are covered by Article 9 and the rights and obligations of the parties are laid out by Article 9.\textsuperscript{183} But where action is taken after the effective date to enforce an agricultural lien, commercial tort claim, or a commercial deposit account created before the effective date, Revised Article 9 allows a party to choose between the traditional non-UCC common law, and Revised Article 9 rules.\textsuperscript{184} First, this means that if a secured party or prospective secured party is contemplating creating a security interest in one of these types of collateral, it should consider creating the security interest before the effective date by taking steps that satisfy the non-Article 9 rules of creating such interests, and at the same time taking additional steps which upon the effective date of Revised 9 would result in the creation of an Article 9 security interest under Revised 9.\textsuperscript{185} Second, a secured party contemplating bringing a lawsuit on an existing common law security interest might want to delay the lawsuit until after the effective date so that it can take advantage of the Article 9 rules if it then so chooses. Third, if after the effective date a party holding such interest contemplates taking action on that security interest, it should remember that there is a choice between using the traditional common law rules or the rules of Revised Article 9 for determination of its rights and obligations in enforcing this interest.

But Revised 9 does not identify which party has the right to choose which body of law is to be applied. The statute simply says “the transactions and liens may be terminated, completed, consummated, and enforced as required or permitted by this [Act] or by the law that otherwise would apply if this [Act] had not taken effect.”\textsuperscript{186} Presumably, the party taking the action, by repossessing, bringing the lawsuit, or other similar positive conduct, can choose. But the statute does not say this, and another party to the dispute might assert that it, and not the initial actor, has the right to choose the law to apply.

To illustrate the problem, consider the following hypothetical example:

In 2000, Secured Party 1 loaned Debtor Corporation $50,000 and to secure the debt, took a consensual security interest in Debtor Corporation’s health-care-insurance accounts receivable owed to Debtor Corporation by X. To evidence the transaction, Secured Party 1 and Debtor Corporation executed a written security agreement that satisfied the future Revised Article 9 requirements for creation of security interest,\textsuperscript{187} and Secured Party 1 filed a financing statement that satisfied Revised Article 9 requirements.

\textsuperscript{183} See id.


\textsuperscript{185} See id. § 9-704(2).

\textsuperscript{186} Id. § 9-702(b)(2).

\textsuperscript{187} See id. § 9-203.
for such financing statements.\(^{188}\)

At this point, Secured Party 1’s only interest is a common law contractual security interest covered by state common law rules, because Prior Article 9 does not cover a security interest in any claim under any policy of insurance.\(^{189}\) On July 1, 2001, Secured Party 1’s security interest automatically becomes a perfected Article 9 security interest\(^{190}\) because Revised Article 9 now covers the transaction, and pre-effective date acts are effective to create and perfect\(^{191}\) a security interest.\(^{192}\)

On July 10, 2001, Secured Party 2 loaned Debtor Corporation $100,000, and properly took a security interest in Debtor Corporation’s health-care-insurance accounts receivable owed Debtor Corporation by X, to secure the debt and perfected it by filing a financing statement.

On September 10, 2001, Secured Party 1 declared default, repossessed Debtor Corporation’s health-care-insurance accounts receivable claim against X by notifying Debtor Corporation and X, and scheduled a disposition sale. Because Secured Party 1 did not notify Secured Party 2 about the pending sale. At the disposition sale, attended by several potential buyers, Secured Party 1 was the high bidder and purchased the health-care accounts receivable claim for $50,000, applying the $50,000 to pay off Debtor Corporation’s debt to secured Party 1. Seven months later, after filing suit against X, Secured Party 1 settled the claim with X for $200,000, pocketing the entire amount, considering the $150,000 above its secured claim as profit.

Secured Party 2 then brought suit against Secured Party 1 claiming that Secured Party 1 breached its obligation by not giving notice to Secured Party 2 as required by Revised Article 9.\(^{193}\) Debtor Corporation joined the lawsuit, claiming that Secured Party 1 breached its obligation to Debtor by not giving notice to Secured Party 2 as required by Article 9.\(^{194}\) As damages, both Secured Party 2 and Debtor claim that notice to Secured Party 2 would have resulted in a higher sale price at the disposition sale. Secured Party 1 defended by asserting it repossessed and resold the health-care-insurance-accounts receivable as a foreclosure under its common law rights.

Assuming that Secured Party 1’s conduct satisfied the state common law

\(^{188}\) See id. § 9-503.

\(^{189}\) See U.C.C. § 9-104(g) (1995).


\(^{191}\) See id. §§ 9-705(b), 9-310(a).

\(^{192}\) See id. § 9-705.

\(^{193}\) See id. § 9-611(c)(3)(B).

\(^{194}\) See id.
obligations, if the court applies the common law governing foreclosure sales, Secured Party 1 will win. But if the court applies Revised Article 9, Secured Party 2 and Debtor will likely win the lawsuit. Who wins? Revised Article 9 does not answer this question.

3. Warranty of Title in Disposition Sale

The secured party should add a clause to existing security agreements wherein the debtor authorizes the secured party to disclaim warranties upon a disposition sale, and provide that such a disclaimer will not make the disposition sale commercially unreasonable under Section 9-610(b) of Revised Article 9.

Prior Article 9’s rules governing a secured party’s disposition of the collateral, together with Article 2’s rule creating an implied warranty of title in the sale of goods, indicate that a foreclosing secured creditor selling at a foreclosure sale does not make any warranties, as it is not selling the collateral in the ordinary course of business. Revised Article 9 specifically provides otherwise when it states “a contract for sale, lease, license, or other disposition [by secured party] includes the warranties relating to title, possession, quiet enjoyment, and the like which by operation of law accompany a voluntary disposition of property of the kind subject to the contract.” Furthermore, the Permanent Editorial Board has drafted a new Official Comment to Section 2-312, which changes the prior Official Comment. The new Comment states that “[Revised] Section 9-610 provides that a disposition of collateral includes warranties such as those provided by this [2-312] section . . . .”

196 See id. § 2-312.
197 Under Prior Article 9, a “‘buyer in the ordinary course of business’ means a person who in good faith, and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind . . . .” Id. § 1-201(9).
198 Section 2-312(2) of the Prior Act provides that an implied warranty of title will be excluded “by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.” Id. § 2-312(2). Official Comment 5 to §2-312 states “5. Subsection (2) recognizes that sales by . . . foreclosing lienors and persons similarly situated are so out of the ordinary commercial course that their peculiar character is immediately apparent to the buyer and therefore no personal obligation is imposed . . . .” Id.

Official Comment 5 of U.C.C. § 2-312 (1999) provides:
5. Subsection (2) recognizes that sales by sheriffs, executors, certain foreclosing lienors, and persons similarly situated may be so out of the ordinary commercial course that their peculiar character is immediately apparent to the buyer and therefore no personal obligation is imposed upon the seller who is purporting to sell only an unknown or limited right. This subsection does not touch upon and leaves open all questions of restitution arising in such cases, when a unique article so sold is reclaimed by a third party as the rightful owner. Foreclosure sales under Article 9 are another matter. Section 9-610 provides that a disposition of collateral under that section includes warranties such as those imposed by this section on a voluntary disposition of property of the kind involved. Consequently, unless properly excluded under subsection (2) or
Revised section 9-610 goes on to provide that "[a] secured party may disclaim or modify warranties under subsection (d) . . . ." But a buyer at a disposition sale might naturally pay less for collateral for which the warranty of title has been disclaimed than it would for the same collateral accompanied by a warranty of title. For this reason, the disclaimer could be interpreted as making the sale commercially unreasonable, violating debtor's rights to a commercially reasonable sale and subjecting the secured party to damages for wrongful disposition.

Adding a clause to the pre-existing security agreement, stating something like "the debtor authorizes the secured party in any disposition sale to disclaim all warranties of any kind including warranties of title, possession, and quiet enjoyment, and any such disclaimers will not affect the commercial reasonableness of the disposition sale," should be sufficient to protect the secured party. Because this changes the security agreement between the parties, the secured party must convince the debtor to agree to this change. This author assumes that most debtors would likely agree, when it is explained that the change is merely to continue the effect of their present agreement in the face of a changing law. For a debtor who would not agree, a good argument could be made that the new Revised Article 9 changes the respective rights of the parties, thus making the secured party feel insecure under the standard insecurity clause likely contained in the existing security agreement, and thereby giving the secured party the right to declare itself

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200 Rev. U.C.C. § 9-610(e)(1999). Section 9-610(e) and (f) state:
§ 9-610 Disposition of Collateral After Default
(e) [Disclaimer of warranties.] A secured party may disclaim or modify warranties under subsection (d):
(1) in a manner that would be effective to disclaim or modify the warranties in a voluntary disposition of property of the kind subject to the contract of disposition; or
(2) by communicating to the purchaser a record evidencing the contract for disposition and including an express disclaimer or modification of the warranties.
(f) [Record sufficient to disclaim warranties.] A record is sufficient to disclaim warranties under subsection (e) if it indicates "There is no warranty relating to title, possession, quiet enjoyment, or the like in this disposition" or uses words of similar import.

201 Rev. U.C.C. § 9-610(b)(1999) provides:
§ 9-610 Disposition of Collateral After Default
(b) [Commercially reasonable disposition.] Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.

202 See Rev. U.C.C. 9-625 Remedies for Secured Party's Failure to Comply with the Article. In part this section provides " . . . (b) [Damages for non-compliance.] Subject to subsections (e), (d), (f), a person is liable for damages in the amount of any loss caused by a failure to comply with this article . . . ." Id. § 9-625(b).

203 This is not meant to address questions of warranties of quality, such as implied warranties of merchantability, and disclaimers of such warranties.
insecure and accelerate the underlying debt. In the face of a threat to accelerate, the debtor is quite likely to sign the modification of the original security agreement.\footnote{Lack of consideration would not be a problem in these modifications. First, consideration would be supplied in the secured party’s giving up the right to accelerate in return for debtor’s agreement to the modification. Second, while consideration would be required to enforce a debtor’s promise to sign a revised security agreement, once the debtor has actually executed the revised security agreement, lack of consideration is not a defense any more than it would be a defense to a completed gift.}

4. Preserving Broader Financing Statement Collateral Descriptions

Although Revised Article 9 requires that the description of certain kinds of collateral in the security agreement securing consumer debts be specific,\footnote{See Rev. U.C.C. § 9-108(e)(2) (1999). See also supra note 5 and accompanying text.} Revised 9 authorizes very broad collateral descriptions in the financing statement.\footnote{See id. §§ 9-502(a)(3), 9-504.} Despite this, Revised Article 9 seems to change the prior law by making the secured party liable for damages to the debtor when the collateral description in the financing statement is broader than the collateral description in the security agreement. The following hypothetical illustrates the problem:

In August, 2000, John Deere Co. sold three forklifts to Debtor, taking a security interest in the forklifts to secure payment. The August 2000 security agreement described the collateral as “the three John Deere forklifts purchased by Debtor from John Deere Co. on August 3, 2000.” An August 2000 properly filed financing statement described the collateral as “all equipment owned by Debtor.”

In this situation the security agreement description is sufficiently specific to identify the collateral\footnote{See id. § 9-108(b).} and create the security interest, and the broad financing statement description sufficiently “indicates the collateral covered by the financing statement” so the security interest is perfected.\footnote{See id. § 9-502(a)(3).}

Assume further that Debtor later applied to State Bank for a loan, offering to give State Bank a “security interest in all of its metal stamping machines.” As part of its loan determination process, State Bank searched and discovered the financing statement, and thinking that John Deere Co. might have a perfected security interest in Debtor’s stamping machines, denied Debtor’s loan application. Debtor was forced to go to another bank for the loan, eventually borrowing at a higher interest rate.

In this hypothetical, the prospective extender of credit was misled by the financing statement and decided not to extend credit to the debtor. Because Debtor was damaged thereby, the secured party is likely liable under Revised Article 9.
Under Prior Article 9, such broader financing statement descriptions have generally been allowed. For one thing, the Prior Act seems to authorize this in section 9-402 when it provides that the "financing statement is sufficient if it . . . contains a statement indicating the types, or describing the items of collateral." Therefore the security interest created by a security agreement description of "all of debtor's inventory of lamps" is perfected by a financing statement description of "inventory." For another, if the financing statement suggested that more property of the debtor was encumbered in the related security agreement, it was presumed that the prospective extender of credit, with the interested debtor probably doing the leg work, would obtain a copy of the initial security agreement (and possibly a statement by the earlier secured party), which more specifically identifies the collateral that is encumbered, and then the prospective extender of credit would make its decision on accurate information.

Revised Article 9 seems to change this. Whereas Prior Article 9 had no provisions imposing liability on the secured party for using a broader description in the financing statement, Revised 9 does in section 9-625(b). This section provides "a person is liable for damages in the amount of any loss caused by a failure to comply with this article." The word "article" necessarily refers to Article 9, meaning all of Article 9. This same Revised 9 section goes on to prescribe:

In addition to any damages recoverable under subsection (b), the debtor, consumer obligor, or person named as a debtor in a filed record, as applicable, may recover $500 in each case from a person that: . . . (3) files a record that the person is not entitled to file under Section 9-509(a) . . .

This section referred to, section 9-509 states:

(a) [Person entitled to File Record] "A person may file an initial financing statement . . . only if:

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210 The secured party may file a financing statement only where the debtor authorizes such a filing (or for certain agriculture liens). See Rev. U.C.C. § 9-509(a) (1999). Unlike the Prior Act, Revised 9 provides that when the debtor signs a security agreement, it implicitly authorizes the secured party to file a financing statement, section 9-509(b), and in any case any competently drawn security agreement should contain a clause authorizing the secured party to do so.

211 The Prior Act's rule imposing liability on the secured party for wrongful conduct is found in section 9-507(1), and only expressly imposes liability for "... any loss caused by a failure to comply with the provisions of their Part". This "Part" refers to Part 5 of Prior Article 9, which addresses only issues relating to default, repossession, disposition of the collateral, distribution of proceeds, and deficiencies, and not issues relating to filing and perfection.


213 See id. § 9-625(e).
(1) the debtor authorizes the filing in an authenticated record or pursuant to subsection (b) or (c);
(b) By authenticating or becoming bound as debtor by a security agreement, a debtor or new debtor authorizes the filing of an initial financing statement, and an amendment, covering:
(1) the collateral described in the security agreement; and . . . .

These sections can be summarized as providing that a secured party is liable for a loss caused by failing to comply with this article,215 arguably by filing a financing statement indicating collateral not covered in the security agreement,216 and is also liable for a $500 penalty217 for filing a financing statement indicating collateral not covered in the security agreement.218

Therefore, either existing financing statements should be amended by narrowing the collateral description to the collateral actually covered, or existing security agreements should be amended to add a clause authorizing the secured party to use broader descriptions in financing statements, and to reaffirm the secured party's authority for making such broad descriptions in the past. If the financing statement is amended, care should be taken not to interrupt the existing perfection, so as to preserve the existing priority date.

IV. A SUMMARY LISTING OF SOME OF THE STEPS SECURED PARTIES SHOULD CONSIDER TAKING TO PRESERVE RIGHTS UNDER EXISTING SECURITY AGREEMENTS.

To preserve rights under existing security agreements in the face of the kinds of problems discussed herein, secured parties should consider taking the following steps to review, and where appropriate modify, their security agreements and financing statements, and where appropriate, refile the financing statement or take other appropriate action. Additionally, when the secured party is contemplating taking action on existing security interests, the secured party should consider the ramifications of taking action before the effective date or after the effective date, and if the existing security interest is a common law security interest newly covered by Revised Article 9, consider the ramifications of enforcing the interest under the common law or under Revised Article 9.

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215 See id. § 9-625(b).
216 See id. § 509(a), (b).
217 See id. § 9-625(e).
218 See id. § 9-509(a), (b).
A. To Preserve the Existing Security Interest

1. Generally

Secured parties should review each existing security agreement, determine whether the manner in which it was entered into will effectively meet the requirements of Revised U.C.C. § 9-203 with respect to each class of collateral covered by the agreement, and if not, recreate the agreement accordingly before the security interest lapses a year after the effective date.

2. Security Agreement Collateral Description

Where an existing security agreement describes the collateral with a supergeneric description such as "all property of the debtor," the secured party should persuade the debtor to sign a modification which substitutes specific description or a description by type (i.e. "all equipment"), or the security interest could lapse after a year after the effective date.

3. Security Agreement Collateral Description In Consumer Transactions

Where the existing security interest arose out of a consumer transaction, the collateral is consumer goods, a security entitlement, or a securities or commodities account, and the security agreement collateral description is broad or generic and not specific, the secured party should persuade the debtor to sign a modification which substitutes the requisite more specific description of the collateral, or lacking sufficient description, the security interest could lapse after a year after the effective date.

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219 Generally this means meeting the elements of Revised U.C.C. § 9-203 and related sections, including those defining classes of collateral and requirements of collateral descriptions.


221 The period is two years in West Virginia. See W. VA. CODE § 46-9-703(b).

222 See Rev. U.C.C. §§ 9-108(c), 9-703(b) (1999). See also supra text accompanying notes 100-05.


224 The period is two years in West Virginia. See W. VA. CODE § 46-9-703(b) (2000).

B. To Preserve the Existing Perfection of the Security Interest

1. Generally

Secured parties should review the manner in which they perfected each security agreement with respect to each class of collateral, determine whether the manner of perfecting as to each item of collateral will effectively meet the requirements of perfection under Revised 9,226 and where ineffective, take steps to perfect as quickly as possible, if not by filing then at the latest within a year after the effective date,227 if by filing, then by the expiration of the last filing period,228 or June 30, 2006, whichever comes first.229

2. Local Instead of Statewide Filing

Where an existing security interest has been perfected by filing only in a local county clerk’s office, and the collateral is other than as-extracted minerals,230 timber to be cut, or collateral to become fixtures under a fixture filing,231 the secured party should file an initial financing statement232 in the central filing office conforming to the Revised Act’s requirements233 in the state in which the debtor is located234 (if a corporation, meaning where it is incorporated)235 to continue the perfection,236 or the perfection will end under Revised 9 at the earlier of the expiration of the existing perfection period (generally five years from the date of filing)237 or June 30, 2006.238


227 See id. § 9-703(b)(1). The grace period is two years in West Virginia. See W. VA. CODE § 46-9-703(b) (2000).

228 The period is usually five years from the last filing. See U.C.C. 9-403(2) (1995).


230 See id. § 9-102(a)(6).


232 See id. § 9-706(c).

233 See id. § 9-706.

234 See id. § 9-501(a)(2). See also id. § 9-307.

235 See id. § 9-307(e).


PRESERVING EXISTING SECURITY INTERESTS

3. Filing Not In State of Debtor’s Residence

Where an existing security interest in collateral other than as-extracted minerals, timber to be cut, or collateral to become fixtures under a fixture filing has been perfected by filing in a state other than the state in which the debtor is located (if a corporation, meaning where it is incorporated), the secured party should file an initial financing statement in the state in which the debtor is located, or the perfection will end at the expiration of the existing perfection period (generally five years from the date of filing), or June 30, 2006.

4. Credit Card Receivables

Secured parties with security interests in credit card receivables should review the manner in which the security interests were perfected, making sure that a financing statement is properly filed for such collateral, doing this as quickly as possible and within a year at the latest, so as not to lose perfection.

5. Certificate of Deposit Control Agreement

Where the collateral in an existing perfected security interest is a certificate of deposit (“CD”), the secured party must determine whether the collateral is classified as an “instrument” or a “deposit account” under Revised Article 9, and if it is a “deposit account,” then the secured party should insist that

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240 See id. § 9-102(a)(40), (41).
241 See id. § 9-307.
242 See id. § 9-307(e).
243 See id. § 9-706(c).
247 Credit card receivables are defined as “accounts” under the Revised Act. See Rev. U.C.C. § 9-102(a)(2) (1999).
248 See id. § 9-310(a).
249 The grace period is two years in West Virginia. See W. VA. CODE § 46-9-703(b) (2000).
250 See Rev. U.C.C. § 9-703(h) (1999). If the security interest was perfected by a valid pre-effective date filing which would not meet Revised 9 requirements for filing, the grace period is the earlier of five years from the last filing or June 30, 2006. See id. § 9-705(c) and U.C.C. § 9-403(2) (1995). See also supra text accompanying notes 136-37.
a "control agreement" be entered into with the depository bank and the debtor, so as not to lose its perfected status a year (two years in West Virginia) after the effective date.

6. Collateral In Possession of Bailee

Where the collateral is in the possession of a bailee, is not covered by a negotiable or nonnegotiable document, and perfection has been by notice to the bailee and not by filing, the secured party should determine if the bailee has signed a statement acknowledging that it holds for the secured party, and if not, attempt to obtain such a signed acknowledgment before one year after the effective date, or the perfection will be lost at the end of that one year.

7. Computer Software

Secured parties with security interests in computer software should re-examine the nature of the collateral, and if it is a general intangible under Revised 9, make certain the filing is effective under Revised 9, and if it is imbedded in goods, make certain that the perfection is effective under Revised 9, completing this within a year of the effective date.

C. To Preserve Existing Rights and Remedies

1. Generally

Secured parties should survey their security agreements and the Revised Act’s changes in secured parties’ rights and obligations as they relate to the debt and collateral covered by their security agreements, and where appropriate, ask the debtor to redraft the security agreement to continue the pre-existing rights, or

252 See id. §§ 9-312(b)(1) and 9-314(a), (b).

253 See id. § 9-703(b). See also W.VA. CODE § 46-9-703(b) (2000). See also supra text accompanying notes 138-51.


255 See id. § 9-313(c).

256 See id. § 9-703(b). The period is two years in West Virginia. See W. VA. CODE § 46-9-703(b). See also supra text accompanying notes 152-56.


258 See id. § 9-102(a)(42).

259 See id. § 9-310(a).

260 See id. § 9-102(a)(44).

consider acting before the effective date.  

2. Repossessing and Selling the Collateral Before or After the Effective Date

When contemplating repossession or disposition before the effective date, the secured party should examine the legal ramifications of such action under Prior and Revised Article Nine, and act before the effective date when Prior 9 is likely to produce a more favorable result, and after the effective date when Revised Nine is likely to produce a more favorable result.  

3. Bringing a Lawsuit Before or After the Effective Date

When contemplating legal action before the effective date to enforce rights relating to a security interest, the secured party should examine the legal ramifications of such enforcement under Prior Article Nine and under Revised Article Nine, and bring the lawsuit before the effective date where Prior Nine is likely to produce a more favorable result, and after the effective date where Revised Nine is likely to produce a more favorable result.  

4. Bringing a Lawsuit Under Common Law or Under Revised 9

When contemplating action to enforce an existing common law security interest (a security interest not covered by Prior Article 9) that will fall within the scope of Revised Article 9, examine and compare the legal ramifications of enforcing it under the common law or enforcing it under Revised Article 9, and if the latter will likely produce a more favorable result, wait and sue after the effective date; if the common law will likely produce a more favorable result, sue at any time, as Revised 9 allows the secured party a choice to enforce the security interest under either the common law or Revised 9.  

5. Disclaim Disposition Sale Warranties

Have debtor sign a modification of the existing security agreement adding a clause authorizing the secured party to disclaim warranties including the warranty

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262 See supra the short discussion accompanying notes 162-71.
263 Revised Article 9 applies to the rights and duties of the parties after the effective date of the act. See Rev. U.C.C. § 9-702(a). See also supra text accompanying notes 172-79.
264 The reference here is to court action, but as discussed earlier, a court might apply Prior Article Nine to lawsuits brought after the effective date, but which concern enforcement actions, such as repossession or a disposition sale, which occurred before the effective date. See supra text accompanying notes 172-79.
266 See id. § 9-702(a). See also supra text accompanying notes 172-79.
of title upon a disposition sale, and stating that such disclaimer will not make the disposition sale commercially unreasonable.\textsuperscript{268}

6. Preserve Broader Financing Statement Collateral Descriptions

When the financing statement contains broader collateral descriptions than the security agreement, have the debtor sign a modification of the existing security agreement adding a clause authorizing the secured party to use broader collateral descriptions in the financing statement than in the security agreement,\textsuperscript{269} or file an amendment to the financing statement, narrowing the collateral description to the collateral actually covered.

V. CONCLUSION

This article has attempted to lay out the Revised Article 9 transition rules governing the continued effectiveness of pre-effective date security interests and perfection of those security interests, and to advise present holders of security interests about what they should do to preserve and continue their present rights. Certainly all of the threats to the continued effectiveness of existing security interests and their perfection have not been noted here. The Revised Act is a bear. Its 134 expanded sections and nearly 300 pages of statutes and official commentary hold many mysteries that only the many bright lawyers paid to find arguments for their competing creditor clients, the courts, and the passing years will reveal.

These actions should be taken soon, some before July 1, 2001, if possible, and certainly before July 1, 2002.\textsuperscript{270} Some of these acts require the participation of the debtor, but the author believes that in most cases the debtor will readily agree. In most cases, the debtor’s agreement can be obtained, if necessary, by the threat of declaration of default and acceleration. Most security agreements contain an insecurity clause. To the extent the change in the law possibly diminishes the secured parties chances of collecting fully under the security agreement, to that extent the secured party arguably feels insecure. Attorneys who have worked with clients in preparing and advising on security agreements and financing statements, and still represent them, arguably have a professional obligation to notify them about the new law and the fact that it could terminate the client’s security protection earlier than expected unless action is taken, and that their current practices of continuing the protection through traditional continuation statements filed in the usual places might not continue their protection.

\textsuperscript{268} See Rev. U.C.C. § 9-610(b), (d)-(e) (1999). See also Official Comment 5 to Rev. U.C.C. § 2-312 (1999). See also supra text accompanying notes 194-203.

\textsuperscript{269} See Rev. U.C.C. § 9-509 (1999). See also supra text accompanying notes 204-17.