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New Tricks For Old Dogs

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Basic Familiarization with the Creation and Perfection of a Security Interest Under Article 9 of the Uniform Commercial Code—

New Tricks for Old Dogs

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I

On the first day of January, 1966, Virginia practitioners will receive a bagful of new tricks. The UNIFORM COMMERCIAL CODE becomes effective in Virginia on that day.

In adopting the Code during its 1964 legislative session Virginia became the twenty-ninth state to adopt the Code; the Virginia version of the Code follows, with but few exceptions, the official version sponsored by the Commissioners on Uniform State Laws.

The subject matter covered by the Code includes Sales, Negotiable Instruments, Bank Deposits and Collections, Letters of Credit, Bulk Sales, Warehouse Receipts, Bills of Lading, Investment Securities, and Secured Transactions.

Doubtless, intensive efforts to familiarize practitioners with the Code will soon be undertaken by the combined continuing legal education sections of the State Bar and State Bar Association.

There seems to be unanimous agreement that Article 9, the secured transactions Article of the Code, is the most "novel" or "radical" portion of the Code. For this reason, along with the circumstance that secured transactions almost inevitably drift into the practice of even those practitioners who are not "commercial lawyers" (and who therefore may shun the continuing legal

education programs), familiarization with Article 9 should begin now.

Thus, we come to the purpose of this article: Familiarization with the general plan and scheme of Article 9, no more. Consideration of details and difficult problems will have to be postponed and evaded; oversimplification, with its attendant "half-truths," will sometimes be employed. Specifically, this article is not intended to be, nor should it be used as, a reference work; its sole purpose is to put the general practitioner on a "first name" basis with the scheme of Article 9. It is not intended to enable the practitioner to make a Freudian psychoanalysis of Article 9's total personality.

A. General.

Peter Coogan (an eminent practicing attorney and lecturer at Harvard Law School) states there are two ways of approaching Article 9: We can look for and employ our knowledge of what's familiar or we can look for and accent what's different. Employing the first approach, Coogan demonstrates that the fundamentals of Article 9 are easily and quickly grasped by "security lawyer." Coogan, A *Lazy Lawyer's Guide to Secured Transactions Under the Code,* 60 MICH. L. REV. 685 (1962).

Coogan suggests that lawyers continue to think in terms of traditional security devices when employing Article 9 with respect to secured transactions. Following this suggestion, we will attempt to show how the more common traditional (Virginia) secured transactions would be created and "perfected" under Article 9.

Let us stipulate, however, that the oversimplifications which follow will conceal some difficult problems which could arise under Article 9. (The problems concealed would be equally or more difficult under present law.)

B. General Observations and Essential Definitions.

No amount of oversimplification can conceal the fact that Article 9 is complex (but so is present security law),

so some minimum of definition and background is essential to even a simplified exploration of Article 9:

1. The concepts of "title" and "lien" are not employed in the determination of rights, duties, and priorities in Article 9.

2. Only the conceptual dividing lines between traditional security devices have been abandoned; the approach is functional, that is, rights, duties, priorities etc., turn on what purpose the security was intended to serve rather than the conceptual form of the security, *e.g.*, having the controversy turn upon whether a particular instrument was a chattel mortgage or a conditional sale does not happen under Article 9.

3. The traditional terminology surrounding secured transactions has been largely abandoned—this to escape the existing judicial and legislative meanings given the old terminology.

4. "Filing" (recording) under Article 9 does not necessarily "perfect" the security interest.

5. A "perfected" security interest under Article 9 will not always have priority over another security interest. However, a "perfected" security interest, in the *original* security, will "always" withstand attack by lien creditors and a trustee in bankruptcy (to the fullest extent to which state law can afford the latter protection).

6. Article 9 contains three distinct methods of "perfecting" security interests: (a) taking possession, (b) filing or (c) "doing nothing." BUT: The method or methods of "perfecting," permitted under Article 9, turn upon the nature of the security, and/or the use to which the security is to be put (*E.g.*, is the security—a television set being purchased by retailer?—or by a consumer?—or is the security a warehouse receipt?), and/or the needs and desires of the secured party.

7. No secured creditor should be content with the security interest he has created until he has thoroughly studied the sections of Article 9 dealing with priorities.

These sections control his right to ultimate realization as much, or more so, than the sections dealing with creation and "perfection" of the security interest.

8. Article 9 enables a secured creditor to claim a security interest in the "proceeds" of the original security, *e.g.*, the conditional sales contract obtained by an automobile dealer when selling to a consumer would be "proceeds" as regards a secured party whose original security interest was obtained by "floor-planning" the autos for the dealer. (Extending the security interest to "proceeds" is not entirely novel; the Uniform Trust Receipts Act, already Virginia law, extends the security interest to "proceeds." Incidentally, any lawyer familiar with the Trust Receipts Act will have a relatively easier task of understanding Article 9.) Article 9 extends the "proceeds" concept to all security interests; in so doing, entirely new and difficult priority problems have been created.

9. The "security agreement" and a "financing statement" are not the same; they have different purposes. But a "security agreement" may be used as a "financing statement."

Thus alerted to the more obvious quirks of Article 9, we proceed to the minimum of definitions essential to basic understanding of the Article. For brevity and simplicity, the definitions will be by way of factual illustration and/or in terms of present law, when practicable:

"Goods"—tangible personal property.

There are four types of "goods" in Article 9. (§9-109).

"Consumer goods"—a television set, auto, furniture, etc., being held for *personal* use.

"Farm products"—things grown or produced and *held by a farmer*—wheat, eggs, etc., *in the hands of the farmer.*

"Equipment"—machinery in a plant, furniture in an office, an auto used primarily for business, etc.

"Inventory"—the things being manufactured by a manufacturer, also cars, televisions, hardware, clothing or other merchandise being offered for sale to consumers by retailers.

"Instrument"—a negotiable instrument or a security (Article 8) other than a document of title, *e.g.*, a demand negotiable note. (§§ 9-105(g), 3-104 and 8-102).

"Document"—a document of title such as a bill of lading or a warehouse receipt. (§§ 9-105(e) and 1-201).

"Chattel paper"—a conditional sale contract or a chattel mortgage. (§ 9-105(b)).

"Account"—an unsecured unconditional right to receive money arising from a sale of goods or services—the traditional "accounts receivable." (§ 9-106).

"Contract right"—an unsecured conditional right to receive money—a builder's contract right to payment when, and if, he completes the building. (§ 9-106).

"General intangibles"—any form of intangible personal property not previously mentioned above—copyrights, trademarks, patents, and the like. (§ 9-106).

"Purchase money security interest"—a security interest taken or retained by a seller to secure the price or a security interest taken by a lender of money whose loan has enabled a person to acquire personal property—a bank loan made directly to a consumer and used by the consumer to purchase an automobile, the bank taking a chattel mortgage as security for its loan. (§ 9-107).

THE METHOD, OR METHODS, OF PERFECTION, PLACE OF FILING, AND PRIORITY ALL TURN ON THE ABOVE CLASSIFICATIONS OF PROPERTY AND THE PURCHASE MONEY CONCEPT. HENCE, IT COULD WELL BE SAID THAT THESE CLASSIFICATIONS AND THE PURCHASE MONEY CONCEPT ARE ARTICLE 9's SUBSTITUTE FOR THE PRESENT LAW'S CONCEPTUAL METHOD OF DISTINGUISHING AMONG THE VARIOUS SECURITY DEVICES.

C. A Brief Analysis of How Some Common Virginia Secured Transactions Would Be Classified and Treated Under Article 9.

1. Conditional Sale—(a) At retail level other than automobile: Illustrations—a consumer buys a refrigerator from a dealer and secures the price with a conditional sale. Under Article 9 this would be classified as a *purchase money security interest in consumer goods.* The security agreement must be in writing to be valid even between the dealer and the consumer (a change in Virginia law). But any writing which evidences an intent to secure the transaction, describes the collateral, and is signed by the consumer-debtor is sufficient. (§ 9-203). Thus, we can continue to use existing forms. The dealer does not have to file anything as his security interest is perfected *without* filing. (§ 9-302). The only risk the dealer runs by not filing is that he could lose his security interest if the consumer sold the refrigerator to a person without actual knowledge of the security interest and that person used the refrigerator for his *personal* use (not a second hand dealer, for example); even this slight risk is eliminated if the dealer wishes to, and does in fact, file. (§ 9-307 (2)).

The consumer runs no risk of buying subject to an existing security interest against the dealer's stock in trade; even if he knows of such interest he cuts it off. (§ 9-307 (1)). (But see Comment 2, § 9-307 for an un-

likely situation in which the buyer would take subject to the secured interest.)

In the event of default the dealer may peaceably repossess, sue for the balance, repossess by legal action, etc. (§§ 9-503, 9-504, 9-505, and 9-506). He may sell at public sale and in certain instances he may sell at private sale. (§ 9-504 (3)). The dealer's expenses of repossession, storing, selling, and reasonable attorney's fees may be added to the debt. (§ 9-504 (1) (a)). However, if the consumer has paid 60% or more of the purchase price, or the loan, the consumer may request a public sale. (§ 9-505(1)). Unless the dealer and consumer agree that the dealer will accept the collateral in satisfaction of the debt, the dealer has a right to a deficiency judgment. (§§ 9-504 (2) and 9-505 (2)). (These are changes in present Virginia law giving clearer and better rights to both dealer and consumer.)

(b) Conditional sale — at retail level — automobile: Under the Code this transaction would be handled as in (a) above, except the existence of the security interest must be noted on the title certificate to become perfected. (§ 9-302 (3) (b)). Remedies of dealer and consumer are the same as in (a) above.

(c) Conditional sale contract or purchase money chattel mortgage or deed of trust, assigned or sold to bank or other lending institution by dealer: Illustration—appliance dealer sells or assigns his conditional sales contract to bank.

Under Article 9 this transaction would be classified as a *security interest in chattel paper.* The bank need not examine for prior filings by other lenders; the bank will take the contracts free of any existing security interest unless it had actual knowledge of a prior security interest. (first sentence, § 9-308). The bank steps into the shoes of its assignor insofar as method of filing, perfection priority, and method of realizing upon the security, as against creditors of and purchasers from the

consumer who purchased from the dealer. However, as against creditors of, or purchasers from, the dealer (the bank's assignor), the bank needs to perfect its security interest in the chattel paper. This perfection may be accomplished in either of two ways: if the bank retains possession of the conditional sales contracts its security interest is perfected by its possession (§ 9-305); if the bank chooses to give possession of the conditional sale contracts to the dealer (for collection or other purposes) it may do so without the risk of having the transaction declared void for failure to "police" the collections (repeal of *Benedict* v. *Ratner,* 268 U.S. 353 (1925), (§9-205)), but now the bank must file a financing statement to perfect its security interest and even after filing the bank runs a risk that a purchaser without notice of the contracts left in the dealer's hands will cut off the bank's security interest. (§ 9-308). The bank can eliminate this risk by stamping the conditional sales contracts (the "chattel paper") in such a way so as to indicate its security interest. The bank is given a limited security interest in the money collected by the dealer from the consumer as "proceeds" of the original security. (§ 9-306).

All of the above observations also apply to a conditional sale contract which is in the form of a lease. (§ 9-102 (2)).

2. Chattel Mortgage or Chattel Deed of Trust—

(a) As security for purchase money at retail level other than automobiles:

Under Article 9 this would be classified as a *purchase money security interest in consumer goods.* Hence, all the observations and rules stated in part 1(a), above, relative to conditional sales would be applicable. The difference in the conceptual form of the security would make no difference in operation and result.

(b) As security for purchase money at retail level—automobiles:

Under Article 9, same rule and results as under 1(b), above, on conditional sales.

(c) Chattel mortgage other than purchase money:

This is the orthodox use of the chattel mortgage. Under Article 9 rights, duties, and priorities will turn upon the further question of the type of goods which the chattel mortgage secures. That is, are the goods "consumer goods," "equipment" or "farm products"? Illustration —An owner of a fully paid-for pleasure boat borrows and uses the boat as security. Under Article 9 this would be classified as a *security interest in consumer goods, not* purchase money. (§ 9-109 (1)).

The lender should check for prior filings. (§ 9-312). The significant difference in the handling of this secured transaction from those previously discussed is caused by its *not* being a purchase money security interest; thus, even though "consumer goods" are involved the lender's security interest requires a filing to become "perfected" (§ 9-302 (1)) unless the lender takes possession of the boat. (§ 9-305). A filing would also be required to perfect "chattel mortgage" security interests in "equipment" and "farm products." The lender's priority in the original security (boat) would, we believe, be almost unassailable if prompt filing had been made by the lender and the lender had checked and found no prior filing. (§ 9-312). (Perhaps the security interest would lose effect if the borrower were a boat dealer and placed this, his personal boat, in his inventory.) See § 9-307 and comments thereto.

(d) Assignment or sale of chattel mortgage to a buyer or lender:

Under Article 9 the chattel mortgage would be "chattel paper." Thus, as regards the rights, duties, and priorities of the buyer or assignee of the chattel mortgages, as against creditors of and purchasers from the lender's seller or assignor, the discussion in 1(c) above on conditional sales would be applicable in its entirety.

3. Trust Receipt Financing—

This form of financing is used in Virginia to finance acquisition of inventory by retailers, particularly acquisitions of large items such as autos, refrigerators, etc. It is often referred to as "floor planning." It may also be used to finance the acquisition of new material for manufacturers.

Probably its most typical use is to finance the purchase by an auto dealer of his stock of *new* cars. We select this as our illustration.

Under Article 9 the "floor planning" of new autos would be described as a *purchase money security interest in inventory.* The lender should first check for prior filings. Dealer and lender must have a written security agreement. The lender's security interest cannot become perfected until a financing statement is filed (§ 9-302) unless the lender takes possession of the autos. (§ 9-305). Filing can antedate the advance of money. The financing statement is the same for all secured transactions under Article 9 (except "farm products" and fixtures); it must contain the address of the secured party, give the mailing address of the debtor, state the type of collateral, and be signed by the debtor. (§ 9-402). This illustration affords a most appropriate instance for the financing statement to claim a security interest in "proceeds" from the sale of the automobile. (§§ 9-402 (3), (4) and 9-306; but see 9-308).

After this type of security transaction is "perfected" the lender has excellent priority as to the original security (§ 9-312) but one who lends against inventory will almost always lose to purchasers in the ordinary course of business. (§ 9-307 (1) and comment 2).

If in checking the records our lender had found that another lender's financing statement covered the same type collateral, he could still have financed the purchase of new cars for this dealer and obtained a valid security interest by giving the notice set forth in § 9-312(3). Thus,

Article 9 quite effectively prevents one financier from obtaining a monopoly in the financing of a customer's inventory.

All that has been stated in this portion of this article would be equally applicable to "floor planning" refrigerators, stoves, television sets, etc.

It will be noticed that perfecting the security interest when "floor planning" *used* cars, the security interest must be noted on the certificate of title (§ 9-302(4)); the change which Virginia made from the official version of the Code (see VALC comments to § 9-302) probably made it unnecessary to *both* file a financing statement and note the security interest on the title certificate of *used* cars. To emphasize these points: as to "floor planning" new cars (in dealer's possession), filing a financing statement is all that is required to perfect the security interest; as to used cars, the security interest must be noted on the title certificate, but no financing statement need be filed.

4. Accounts Receivable financing—

(a) Factoring type arrangement: Illustration—retailer or manufacturer procures money by a "sale" or assignment of amounts due him by his customer.

This lender should first check for prior filings. Lender and borrower must enter into a written security agreement. (§ 9-203). A security interest in accounts can be perfected only by filing unless the total of the assignments transfers only an "insignificant part of the outstanding accounts of the assignor." (§ 9-302(1) (e)). The best rule to follow is—file!

A security interest in accounts is not rendered legally invalid because of failure of the lender to "police" collections and returned merchandise; Article 9 abolishes the rule of *Benedict* v. *Ratner, supra.* (§ 9-205).

An assignment of an account is legally effective even though no notice is given the account debtor but the account debtor may pay the assignor of the account and be

discharged unless he, the account debtor, has been notified of the assignments. (§ 9-318(3)).

Quite frequently a large customer of the borrower will use a purchase order which prohibits assignments of the customer's account. Article 9 expressly invalidated a clause prohibiting assignments. (9-318(4)). Thus the existing practice of some lending institutions to make loans on such accounts is no longer clouded by legal uncertainty.

(b) Bank "Change plans":

In essence, these plans are true sales of accounts, or non-recourse assignments of accounts; however they would be treated as a security interest under Article 9—a *security interest in accounts.* (§ 9-102(1) (b). Thus, the discussion in 4(a), immediately above, would be fully applicable to such charge plans, or any other true sale of accounts.

5. Agricultural Deeds of Trust and Crop Liens—

Under Article 9 these would be classified as a *security interest in farm products.* (§§ 9-105 (1) (f) and 9-109 (3)). Unborn animals and growing crops can be subjects of such security interests. (§ 9-105(1)(f)). An after-acquired property clause is limited in its effect to crops which become such within one year after the execution of the security interest except where the security agreement containing the after-acquired property clause was a purchase money or improvement deed of trust on the land itself. (§ 9-204(4)(a)).

The lender should check for prior filings. A security agreement in writing must be executed. (§ 9-203). A financing statement must be filed for "perfection," but here the financing statement must contain additional information. It must describe the land on which the crops are growing or are to be grown and the name of the record owner. (§§ 9-402(1), 9-402(3)). The place of filing a financing statement for "farm products" includes

the county in which the crops are growing or are to be grown. (§ 9-401-optional).

The lender who makes loans on crops, etc., ("farm products") is given a preferred position insofar as protection against purchasers is concerned. A purchaser in the ordinary course of business does not buy free of a perfected security interest when he buys directly from the farmer. (§ 9-307(1)).

A lender making an enabling advance against crops not more than three months before planting is given a very limited priority over lenders whose security interest in the crop did not result from an enabling advance. (§ 9-312(2)). However, if this priority is not satisfactory to a lender making an enabling advance, Article 9 recognizes the validity of a subordination agreement, and thus the enabling lender, with the consent of the lender having a higher priority, could advance his priority. (§ 9-316).

6. Pledges—

(a) Tangible personal property—"goods": Illustration—pledge of personal diamond ring.

Under Article 9 this would be classified simply as a *security interest in consumer goods perfected by possession.* The lender should check for prior filings. The security agreement is effective even though not in writing. (§ 9-203(a)). No filing is required; the security interest is perfected by possession, however, the lender *may* also perfect by filing. (§§ 9-305 and 9-302).

The rights, duties and remedies on default are clearly spelled out in Article 9. (§§ 9-504, 9-507, and 9-207).

If our lender found no prior filing his security interest would, it seems, have top priority. (§§ 9-312(5) (6)).

(b) Bills of lading and warehouse receipts—"Documents":

Under Article 9 a pledge of these documents would be classified as *security interests in documents perfected by possession.*

If the documents are negotiable, and have been "duly negotiated" to our lender, then he need not check for a prior filing. (§§ 9-309, 9-304(1)).

Again, no written security agreement is legally required (§ 9-203(1)), but the lender would be wise to reduce the transaction to writing because these documents will ultimately leave the lender's possession and the lender might desire a perfected security interest for a period longer than his period of possession plus twenty-one days, and our lender might wish to claim "proceeds" and perfect his interest in proceeds for a period longer than *thirty-one days.* (See §§ 9-304 (5) and (6) and 9-306(3)).

Again, the security interest is perfected by possession, and, in addition it is perfected for twenty-one days after a release of possession if the release of possession was for the usual business purposes. (§ 9-304(5)).

During the period of time the documents are out of the lender's possession he runs the risk of losing his security interest by due negotiation to a holder, that is, a transfer to one who is a "holder in due course." (§ 9-309). This is not a change in the law. The lender may protect himself by notation on the document or by seeing to it that the borrower has no opportunity to negotiate the document.

Filing, although not necessary, is advisable because of the limited duration of perfection as to the document and its proceeds. (§§ 9-304(5) and (6) and 9-306 (3)). The filing can precede the advances.

Priority is excellent so long as possession is retained and for twenty-one days thereafter (with the exception noted above). (§ 9-312(5) (a)).

(c) Negotiable paper — "Instruments": Illustration —pledge of a negotiable note.

Under Article 9 a pledge of negotiable paper would be described as a *security interest in instruments per-*

fected by possession. The bank need not check for prior filings. (§ 9-309).

No written security agreement is legally necessary. (§ 9-203(1) (a)). The security interest is perfected by taking possession. (§ 9-305). There is no advantage gained by filing; possession and "automatic perfection" are the only ways of perfecting a security interest in negotiable paper. (§ 9-304(1) (4) (5)). The lender's rights will turn largely upon Article 3 on Commerical Paper.

Some rights and duties of the lender are set out in §§ 9-207 and 9-504.

Again, top priority seems likely so long as possession has not terminated, twenty-one days thereafter has not elapsed, and a holder in due course has not acquired rights. (§§ 9-312(5) (b) and 9-309).

(d) "Field warehousing":

This is essentially a pledge of the goods. If the field warehouse is "bona fide" there would be no need of filing under the Code. However, a lender may wish to have a written security agreement and file a financing statement as insurance against a creditor sucessfully proving that the field warehouse was not bona fide, in which event, the lender's security interest would be defeated unless he could show that under the Code he had "an existing security interest in inventory—perfected by filing." To the extent that field warehousing involves the issuance and pledge of documents of title the previous discussion on pledges is applicable.

7. "Lay-away" plans — Illustration — consumer buys a dress from a merchant and the merchant retains possession of the dress until all installments have been paid. Under Article 9 this would be classified as a *purchase money security interest in consumer goods perfected by possession.*

There is at present no satisfactory law in Virginia

covering this security device. Unfairness and harsh forfeitures are too frequent.

Under the Code, this "seller's lien" in a "lay-away" (which arises under 2-703(a) of Article 2) is a "security interest" under Article 9. (§ 9-112). Clear, and ostensibly fair, rules are laid down in Article 9 for the adjustment of a controversy between a "lay-away" merchant and his customer. (§§ 9-504 through 9-507).

8. Fixtures—Illustration—furance in a home.

Article 9 provides for a security interest in fixtures but does not define the term.

There can be no security interest under Article 9 as regards lumber, brick, tile, and the like which are incorporated into a building. (§ 9-313).

The security interest in fixtures must be evidenced by a written security agreement. (§ 9-203(1) (b)). Perfection is achieved by filing a financing statement. (§ 9-302(1)). The financing statement must also contain a description of the land on which the fixture is located and the name of the record owner of the land. (§ 9-402). The financing statement is filed and indexed with mortgages and deeds of trust on land. (§ 9-401).

A perfected security interest in fixtures has priority over:

(a) a purchaser for value of the realty,

(b) a prior encumbrance on the realty but only to the extent of advances made by the realty lender after perfection of the security interest in fixtures,

(c) a lien creditor subsequent to perfection of the security interest in fixtures.

BUT: When a holder of a security interest in fixtures exercises his priority over persons having an interest in the realty he must reimburse any non-consenting holders of an interest in the realty for the cost of any repair of any physical injury caused the realty by the removal of the fixtures. (§ 9-313(1-5)).

II

Under present Virginia law all the stock-in-trade, equipment, and accounts of a retailer can be encumbered: Trust Receipts, Conditional Sales of Equipment, Consignments, Factoring, and Assignment of Accounts Receivable, when combined, can, even today, encumber *all* the assets of a retailer.

The change made by Artcile 9, in this regard, is that it's easier and less hazardous to encumber *all* the assets of a borrower, and if the lender is "piggish" he can now legally claim a "floating lien" which covers after-acquired property. (§ 9-204). Security may also be given to cover future advances. (§ 9-204(5)).

Will lenders be "piggish" and abuse their rights under the Code? The experience in Pennsylvania has shown they will not. In addition, if the lender attempts to make full use of his legally permissible right to "tie up his borrower" the lender is likely to find his security upset, in bankruptcy. See Coogan, *The Effect of the Uniform Commercial Code Upon Receivables Financing—Some Answers and Some Unresolved Problems,* 76 HARV. L. REV. 1529 (1936). This and sound business policies, could help explain why lenders operating under the Code have not proved "piggish."

One further point should be made. Under the Code a security interest is so easily and cheaply created and perfected that any seller who has doubts as to unsecured credit could become a secured creditor. The manufacturer supplying the small retailer could himself achieve secured priority over a "floating lien" by (1) giving notice, (2) obtaining a written security agreement from his retailer (the seller's order blank would suffice with the addition of one sentence), and (3) filing once (which would cover a chain of transactions). (See § 9-312(3)).

III

Under the Code, the method or methods of "perfecting" the security interest will vary with the type of security and/or the desires and needs of the secured party.

As previously mentioned, "perfection" is sometimes accomplished by the secured party merely creating a valid security interest, *e.g.,* (§ 9-302(1) (d)); at times "perfection" *may* be accomplished by taking possession of the collateral, while at other times taking possession is the *only* manner in which a security interest may be permanently "perfected" in the collateral. (§§ 9-305, 9-302(b), 9-304).

However, it is "perfection" by "filing" with which the practitioner will be more frequently concerned and about which he is expected to "do something." Thus, the third portion of this article will attempt to outline answers to the major questions relating to "filing" under the Code.

In adopting the Code, Virginia, with slight modifications, adopted the third of three alternative methods of filing offered by the Commissioners on Uniform State Laws. It is the third alternative which is discussed herein.

A. *What* is filed?

The UCC offers two alternatives as to what is filed:

1. the security agreement itself may be filed, *or,*

2. a "short form" financing statement may be filed. (This is "notice filing" substantially the same as the present trust receipt financing statement.) (9-402).

The paper filed must be signed by both the secured party and the debtor.

If the "short form" is used it must contain the following minimum of information: the names and addresses of the secured party and debtor, the *type* of item covered by the security interest, and, if the security is crops or

fixtures, a brief description of the real estate and the name of the record owner.

In practice, even the "short form" will frequently contain more than the minimum information required by the Code.

The "short form" ("notice" type) filing will be a practical necessity when a series of transactions are involved or contemplated.

No photographic reproducing or abstracting is done; the paper itself is "filed" like the present trust receipt financing statement.

B. *Who* files? (§ 9-302).

All secured parties must file to perfect their security interest *except*:

1. one having a purchase money security interest in farm equipment having a value of $500 or less,

2. one having a purchase money security interest in consumer goods (*e.g.*, retail sale of T.V.), (*But* both (a) and (b) *may* file and be protected against even a sale to one who purchases for his personal use without knowledge of the security interest. § 9-307(2).),

3. a secured party who takes possession of the collateral (pledges),

4. one whose security interest in documents and instruments is temporarily perfected (21 days) (§ 9-304),

5. one whose security interest is in things subject to federal filing, *e.g.*, ships, *railroads under the I.C.C.*,

6. motor vehicles—perfected *only* by notation on title certificate, (However, as to *new* vehicles *not* yet registered, filing would be the appropriate method of perfecting the security interest.),

7. public utility companies as defined in Va. Code Ann. § 56-1 (Repl. Vol. 1959). Such companies will continue to record under Va. Code Ann. § 55-96 (Repl. Vol. 1959). (§ 9-302(5)).

Filing is *not* effective as to instruments (such as a negotiable bill or note); such security interest can be per-

fected only by taking possession and "temporary perfection" under § 9-304 (5).

C. *Why* file?

Filing (except as noted above) "perfects" the security interest. "Perfection" "insures" validity against creditors and the trustee in bankruptcy. "Perfection" does not always protect the security interest against claims of purchasers, *e.g.*, §§ 9-307 and 9-309.

Purchase money security interests in consumer goods (*e.g.*, retail sale of T.V.) and farm equipment having a price not in excess of $500 need *not* be filed to be perfected, *but* are vulnerable to one who purchases such goods for his personal use without knowledge of the security interest, *unless* there is filing. (§ 9-307 (2)). For this reason it is likely that the present practice of certain large retailers *not* to file their conditional sales contracts will receive additional impetus from adoption of the Code; this will reduce somewhat the volume of filing done at the local level; eventually there may be practically no filings of purchase money security interests in consumer goods except by merchants selling to the lowest classes of consumers.

D. *Where* does a secured party file?

Filing, when required or allowed, will be done as follows:

1. *LOCAL FILING ONLY*:

Where the security interest is in

(a) *farm* equipment (thresher, elevator, etc.), or,

(b) *farm* products (eggs, chickens, butter, etc., in hands of farmer), or,

(c) (*farm*) accounts, (*farm*) contract rights, and (*farm*) general intangibles from sale of farm products,

(d) consumer goods (retail sale of T.V., refrigerator, etc.),

the filing is in the clerk's office of the county or corporation of the *debtor's residence, or if* the debtor is *not a resident,* then where the *goods* are *kept,*

and, if

(e) crops, then *also* file in the clerk's office of county or corporation *where land* on which crops are growing or to be grown *is* located, (So, as to crops, if the debtor is a resident of county X and crops are grown in county Y, the secured party would file in *both* X and Y; if debtor is a nonresident, then file only where the crops are grown.),

and, if

(f) fixtures—

file in the county or corporation where a mortgage on real estate would be filed.

THERE IS *NO* CENTRAL FILING IN ANY OF THE ABOVE LISTED TRANSACTIONS.

2. CENTRAL *AND* LOCAL FILING (*DUAL* FILING):

If and when the debtor has a place of business in *only* one county or corporation or, if the debtor has no place of business in this state but resides in this state *and* the security interest is in the following:

(a) equipment other than farm equipment (dry cleaning machine, drill press used by manufacturer, industrial machines, etc.),

(b) inventory (goods held for sale, goods being manufactured, etc.), or,

(c) accounts, contract rights, and general intangibles (other than those arising from the sale of farm products), (Examples — factoring, "Bank of Virginia Charge Plan" etc.), or,

(d) chattel paper (sale or assignment of conditional sale contracts), or,

(e) documents (bills of lading and warehouse receipts)—the filing must be dual—both central (State Corporation Commission) and local. The local filing in these situations is where the debtor's place of business is located or, if he has no place of business in this state but resides herein, then where he resides.

But, security interests in (d) and (e) above need not be filed to be perfected if the secured party has possession.

3. CENTRAL FILING *ONLY*:

If the debtor has a *place of business* in *more than one county or corporation,* then as to all of the situations listed in 2. above there need be central filing only, *not* dual filing. (The place of central filing is the State Corporation Commission.)

4. AUTOS AND OTHER REGISTERED VEHICLES:

The security interest is perfected only by noting the same on the title certificate, if the vehicle is required to be registered. Thus, it appears that it is only after a *new* car has left the dealer's ownership that the security interest must be noted on the title certificate.

E. *When* can one file?

Under the Code filing of a financing statement can be accomplished even prior to the entry into a secured transaction.

F. *How* does one file?

One files by presenting the appropriate filing office or officers with a financing statement and paying the required fee or fees.

The fee for filing the financing statement is $1.00.

G. *How often* must one file?

Filing is valid for five years *unless* the filed instrument states a maturity date for the debt in which event filing is effective for 60 days after the stated maturity date.

Continuation statements may be filed; they are valid for five additional years; there is no limit on the number of continuation statements which may be filed.

The fee for filing a continuation statement is $1.00.

H. Miscellaneous additional aspects of UCC filing.

1. Termination Statements—(§ 9-404).

   If the secured transaction has come to an end the secured party "must" file a termination statement.

   The fee for filing a termination statement is $1.00.

2. Assignment of the Security Interest—(§ 9-405).

   A record may be made of the assignments of a security interest.

   The fee for filing such assignment is $1.00.

3. Release of All or Part of the Collateral.

   The secured party may release all or part of his collateral.

   The fee for filing such release is $1.00.

IV

No lawyer in his right mind will attempt to solve any security problem with only the information presented in this article. We do hope, however, that the veil of mystery allegedly surrounding Article 9 has been lifted somewhat and that a firm basis has been established for that fuller understanding of Article 9 we should have as of it's effective date.

If you are of that strange breed who can't restrain an impluse to know more about this deadly, dull, but essential subject, you will find that law review writers have catered to your neurosis. The serious "security lawyer" will want a copy of COOGAN, HOGAN, VAGTS, SECURED TRANSACTIONS UNDER U.C.C. (1963). Other text writers

and publishers are reported to be responding to the challenge.

Finally, if while attending a continuing legal education program on Article 9 you notice a fellow with a glazed, puzzled look on his face, please speak to him. It will probably be the writer of this article.