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U.C.C. Filings: Changing Circumstances Can Make a Right Filing Wrong. But Can They Make a Wrong Filing Right?

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A secured party who wishes to perfect an Article 9 security interest by filing must file a proper financing statement in the correct office. If a security interest is perfected, changing circumstances, such as a lapse in time after a change in the location of the collateral, may transform the perfected security interest into an unperfected one. Consequently, the security interest, much to the dismay of the secured party, will be subject to all the deficiencies of an unperfected interest. But, under the Uniform Commercial Code, can the converse be true? That is, for example, can an unperfected security interest, unperfected because the financing statement was initially filed in the wrong location, be perfected when circumstances change so that the filing is consequently made in the correct office (i.e., the office in which future filings would be made).

This Article argues that filings, initially ineffective, should be deemed effective and hence should perfect the security interest if a

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1. U.C.C. Article 9 (1978) [hereinafter cited as U.C.C.]. All references and citations in this Article to the text and comments of the U.C.C. are to the 1978 version unless otherwise indicated.
2. A security interest may also be perfected by possession. U.C.C. § 9-305. Certain types of security interests can be temporarily or permanently perfected without filing or possession. U.C.C §§ 9-302(1), -304(4), (5), -321(2).
3. See, e.g., U.C.C. § 9-103 (1)(d) (change in location of collateral if action required by Part 3 of Article 9); § 9-401 (Alternative Subsec. (3)) (intercounty change in the location of the collateral, debtor’s residence, or debtor’s place of business).
change in circumstances would make the original filing effective if it were filed after the change.

I. BACKGROUND: FILING LOCATION AND CONTENT

The correct office for filing purposes, though of critical importance to the secured party, can be difficult to determine. The choice depends on the U.C.C.'s response to two questions: (1) in which state must a financing statement be filed, and (2) where in the proper state must a filing be made. The answer to the first question is found in the conflict-of-laws rules of U.C.C. section 9-103. This section is divided into six subsections, each of which contains the conflict-of-laws provision for a particular kind of collateral. The primary rule, however, is

4. If the secured party files in the wrong place or not in all the places required by the U.C.C., the security interest will remain unperfected. The general rule is: "Except as otherwise provided by this Act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors." U.C.C. § 9-201. Despite the general rule, an unperfected security interest is unenforceable against most third parties because the number of exceptions to the general rule have in fact gobbled up the rule. See, e.g., U.C.C. § 9-301 (list of persons who take priority over an unperfected security interest); § 9-312(5) (conflicting unperfected security interests are given priority based on time of attachment).

Although an improper filing can never perfect a security interest, it can be effective against certain third parties because "[a] filing which is made in good faith in an improper place or not in all of the places required . . . is . . . effective with regard to any collateral . . . covered by the financing statement against any person who has knowledge of the contents of such financing statement." U.C.C. § 9-401(2). For cases interpreting this provision, see In re Davidoff, 351 F. Supp. 440, 443-44 (D.N.Y. 1972); In re Komfo Prods. Corp., 247 F. Supp. 229, 239 (D. Pa. 1965); In re King Furniture City, Inc., 240 F. Supp. 453, 457 (D. Ark. 1965); In re Babcock Box Co., 200 F. Supp. 80, 81 (D. Mass. 1961); In re Luckenbill, 156 F. Supp. 129, 131-32 (D. Pa. 1957); Chrysler Credit Corp. v. Bank of Wiggins, 358 So. 2d 714, 717 (Miss. 1978); In re Enark Indus., Inc., 86 Misc. 2d 985, 987 (1976).

5. A rough estimate of the number of cases involving an allegedly misfiled financing statement reported in U.C.C. Rep. Serv. (Callaghan) exceeds 200.


7. The six categories of collateral are: (1) documents, instruments, and ordinary goods; (2) goods covered by a certificate of title; (3) accounts, general intangibles, and mobile goods; (4) chattel paper; (5) minerals; and (6) uncertificated securities. U.C.C. § 9-103. For discussions of the conflict-of-laws rules under the U.C.C., see generally Coogan, The New UCC Article 9, 86 Harv. L. Rev. 477, 529-58 (1973) (presenting the theory behind the current Article 9 conflict-of-law rules and expressing doubt as to the efficacy of the last event test); Kripke, The "Last Event" Test for Perfection of Security Interests Under Article 9 of the Uniform Commercial Code, 50 N.Y.U. L. Rev. 47, 47-75 (1975) (responding to contemporary criticism of the primary conflict-of-laws rule and illustrating the proper application of the rule); Petit, Choice of Law Under Article
the "last event" test.\(^8\)

Except as otherwise provided in this subsection, perfection and the effect of perfection or non-perfection of a security interest in collateral are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected.\(^9\)

Although this Article says very little that is novel about the last event test and section 9-103 in relation to the initial choice of filing location, both will be considered and relied upon to support the argument for perfection by changed circumstances.

After the secured party resolves the "which state" question by applying section 9-103, he must determine the proper office or offices within the state in which to file the financing statement. Section 9-401(1) offers each adopting state the choice of three alternative provisions that fix the place to file.\(^10\) Depending on the provision a state adopts, the answer to the "where in the state" question could depend on the debtor's place of residence or business, the location of the collateral, or the use of the collateral.\(^11\)

Once the secured party determines the proper office or offices in which to file, he must clear one further hurdle to ensure an effective filing. The financing statement must meet the sufficiency requirements of U.C.C. section 9-402(1), which states that a financing statement is sufficient if it gives:

- the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral.\(^12\)

\(^8\) For an overview of the last event test, see infra text accompanying notes 78-100.

\(^9\) U.C.C. § 9-103(1)(b).

\(^10\) The first choice provides almost exclusively for a single central filing. U.C.C. § 9-401 (First Alternative Subsec. (1)). Under the second option, central filing is again the basic rule, but unlike the first, a local filing is required if the collateral is farm related or consumer goods. U.C.C. § 9-401 (Second Alternative Subsec. (1)). The third option is identical to the second but requires a local filing in addition to a central filing when a debtor is doing business in only one county of the state or if the debtor has no place of business within the state but resides in the state. U.C.C. § 9-401 (Third Alternative Subsec. (1)).

\(^11\) See supra note 10.

\(^12\) U.C.C. § 9-402(1). Note, however, that "[a] financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are
Typically, the filing is effective and remains effective until the secured obligation has been satisfied. The term "effective" indicates the filing immediately perfects a pre-existing security interest or it perfects the security interest immediately upon attachment. This Article is not concerned with effective filings, however, but rather with ineffective ones. For purposes of this Article, an ineffective filing is one that does not seriously misleading." U.C.C. § 9-402(8). Thus, only minor deviations from the norm of § 9-402 are permitted. See, e.g., In re Smith, 508 F.2d 1323, 1324-25 (5th Cir. 1975) (incomplete street address of debtor sufficient); In re Wilco Forest Mach., Inc., 491 F.2d 1041, 1045 (5th Cir. 1974) (use of a corporate name which no longer designated a separate corporate entity sufficient); Mid-Eastern Elecs., Inc. v. First Nat'l Bank of S. Md., 455 F.2d 141, 146 (4th Cir. 1970) (mistake in date of maturity of a debt obligation sufficient); Citizens Bank v. Ansley, 467 F. Supp. 51, 53-55 (D. Ga. 1979) (use of "Ansley Farms" instead of debtor's true name, "E. Ansley," insufficient); In re Hammous, 438 F. Supp. 1143, 1153-54 (S.D. Miss. 1977) (signature of only one of two partners sufficient); In re Bosson, 432 F. Supp. 1013, 1015-18 (C.D. Conn. 1977) (financing statement sufficient when only husband signs even though title is in wife's name; however, security interest defective on other grounds); In re Reece Elec. Co., 415 F. Supp. 238 passim (S.D. Me. 1976) (absence of debtor's corporate suffixes sufficient); In re Southern Supply Co. of Greenville, N.C., 405 F. Supp. 20, 22 (E.D. N.C. 1975) (fact that debtor named only as "Southern Supply Co." sufficient); In re Hollis, 301 F. Supp. 1, 2-4 (C.D. Conn. 1969) (date of lien noted in security agreement, but not on form, sufficient); In re Cushman Bakery, 16 U.C.C. Rep. Serv. (Callaghan) 897, 902-04 (D. Me. 1975) (disclosure of only the nominee or agent of principal creditor sufficient); In re Eichler, 9 U.C.C. Rep. Serv. (Callaghan) 1406, 1406-07 (E.D. Wis. 1971) (use of informal trade name of debtor insufficient); In re Modern Eng'g & Tool, 25 U.C.C. Rep. Serv. (Callaghan) 580, 587-89 (Bankr. C.D. Conn. 1978) (use of term "inventory" to describe listed equipment sufficient); In re Skinner, 22 U.C.C. Rep. Serv. (Callaghan) 1286, 1287-92 (Bankr. W.D. Mich. 1977) (addition of debtor's trade name following his real name sufficient); In re James Well Enters., Inc., 21 U.C.C. Rep. Serv. (Callaghan) 900, 901-03 (Bankr. M.D. Fla. 1977) (insufficient to identify debtor by trade name instead of real name); In re Wayne's Olive Knoll Farms, Inc., 21 U.C.C. Rep. Serv. (Callaghan) 1210, 1210-12 (Bankr. E.D. Cal. 1976) (continuation statement filed after statutory time period insufficient); In re Raymond F. Sargent, Inc., 8 U.C.C. Rep. Serv. (Callaghan) 583 passim (Bankr. C.D. Me. 1974) (absence of debtor's name insufficient); In re Brawn, 7 U.C.C. Rep. Serv. (Callaghan) 565, 578 (Bankr. Ref. C.D. Me. 1970) (error in mailing address of debtor insufficient); In re Bennett, 6 U.C.C. Rep. Serv. (Callaghan) 994, 996 (Bankr. Ref. W.D. Mich. 1969) (security agreement filed as a financing statement sufficient); In re Carlstrom, 3 U.C.C Rep. Serv. (Callaghan) 766, 772 (Bankr. Ref. C.D. Me. 1966) (absence of secured party's signature sufficient); In re First State Bank of Nora Springs, Iowa, 183 N.W.2d 728, 730 (Iowa 1971) (wrong county used in describing location of real estate on which the items the financing statement covers sufficient); Southwest Bank of Omaha v. Moritz, 203 Neb. 45, 54, 277 N.W.2d 430, 435 (1979) (absence of collateral owner's signature insufficient); Roberts v. International Harvester Credit Corp., 143 Ga. App. 206, 207, 237 S.E.2d 697, 698 (1977) (one word omission from lender's name sufficient); Samuel Breiter & Co. v. Domler Leasing Corp., 19 U.C.C. Rep. Serv. (Callaghan) 1248, 1249-50 (N.Y. Sup. Ct. 1976) (incorrect serial number of collateral sufficient).

13. U.C.C. § 9-403(2). The filing's effectiveness, however, is limited to a period of five years from the date of filing unless a continuation statement is filed within six months prior to the expiration of that period. Id.

14. It is quite possible that when the filing occurs the security interest will not have attached. Such an order of events is expressly sanctioned by the U.C.C. in that "[a] financing statement may be filed before a security agreement is made or a security interest otherwise attaches." U.C.C. § 9-402(1). See also U.C.C. § 9-303(1) ("A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken.").
not immediately perfect a pre-existing security interest, one that does not perfect the security interest immediately upon attachment, or one that was previously effective, but will no longer perfect the security interest due to a change of circumstances.\textsuperscript{15} To narrow the issue still further, this Article is not concerned with the myriad of problems which inhere in making a determination of effectiveness or the results which flow from that determination. Instead, this Article focuses on whether an admittedly ineffective financing statement can be, and should be, \textit{cured}\textsuperscript{16} by a change in conditions.

\section*{II. ILLUSTRATIONS OF THE PROBLEM}

The issue addressed by this Article can best be illustrated by the following hypotheticals:

(1) Buyer enters into an installment contract for the purchase of a tractor (farm equipment). To secure the purchase price, Seller reserves a purchase money security interest. At the time of the purchase and delivery of the tractor, Buyer resides in County A. Nevertheless, Seller files a financing statement in County B because Buyer represents to Seller his intention to relocate immediately in County B.\textsuperscript{17} Buyer subsequently moves to County B, but after a short time moves back to County A and then to other counties.\textsuperscript{18}

At the moment of filing, the financing statement was ineffective to perfect a security interest in favor of the Seller since it was not filed in the county in which Buyer resided.\textsuperscript{19} The filing would have remained ineffective.

\begin{footnotesize}
\begin{enumerate}
\item An effective filing can become ineffective for a number of reasons. \textit{See}, \textit{e.g.}, U.C.C. § 9-103(1)(d) (interstate relocation of collateral); § 9-401 (Alternative Subsec. (3)) ("a change to another county of the debtor's residence or place of business or the location of the collateral, whichever controlled the original filing"); § 9-402(7) (a filing will not perfect a security interest in after-acquired collateral, acquired four months after certain name or organizational changes by the debtor); 9-403(2) (five year limitation on the effectiveness of an initial filing).
\item The term \textit{cure} has been used infrequently in this context. \textit{See}, \textit{e.g.}, DeKoven, \textit{Uniform Commercial Code, Annual Survey: Secured Transactions}, 37 Bus. Law 1011, 1034-36 (1982) (cure terminology used in context of changing circumstances and defective financing statement). Cure is the most accurate and concise term to describe whether subsequent events can validate an ineffective financing statement.
\item A local filing may be required if the collateral is farm equipment. U.C.C. §§ 9-401 (Second Alternative Subsec. (1)), (Third Alternative Subsec. (1)).
\item The source of this not so hypothetical hypothetical is International Harvester Credit Corp. v. Vos, 95 Mich. App. 45, 48-50, 290 N.W.2d 401, 403-04 (1980).
\item \textit{See} U.C.C. §§ 9-401 (Second Alternative Subsec. (1)), (Third Alternative Subsec. (1)) (under both alternatives the proper place to file to perfect a security interest is in the county of debtor's residence if the collateral is farm equipment).
\end{enumerate}
\end{footnotesize}
ineffective if the Buyer continued to reside in County A.\textsuperscript{20} The question, then, is whether the subsequent relocation of Buyer to County B \textit{cures} the ineffective filing.

(2) Debtor is a corporation with a place of business in only one county in the state. In need of a vast sum of money, Debtor contacts its favorite loan officer at the local bank. The loan officer agrees to the loan if it is secured by a security interest in all of the Debtor's assets. Debtor agrees and both a security agreement and financing statement are properly executed. The loan is made and the financing statement is then filed only with the Secretary of State. Subsequently, Debtor prospers and expands its business throughout the state.\textsuperscript{21}

Since Debtor was initially doing business in only one county, a dual filing was required.\textsuperscript{22} Had Debtor been doing business in more than one county, however, only the single filing would have been required.\textsuperscript{23} Therefore, the singular filing with the Secretary of State was ineffective to perfect the bank's security interest. This hypothetical is similar to the previous one, except here the central filing was necessary but insufficient to perfect the bank's security interest. The question, once again, is not whether the initial filing was effective but whether a change in conditions can \textit{cure} an admittedly ineffective filing. In this case, the change is the expansion of Debtor's business throughout the state.

(3) Debtor is a corporation with the name ABC, Inc. It believes that its profit potential will be realized only by the infusion of additional cash. It contacts its favorite loan officer at the local bank and requests a loan. The loan officer insists that the loan be secured by a security interest in all of Debtor's assets. In addition, the loan officer points out that Debtor has received some negative publicity recently and suggests that Debtor change its name. Debtor agrees to the security interest and also announces its intention to change its name to XYZ Co. The loan is made and Debtor executes all the necessary docu-

\begin{enumerate}
\item \textsuperscript{20} Under any test the filing in County B is initially ineffective. \textit{See infra} text accompanying notes 45-54.
\item \textsuperscript{22} U.C.C. § 9-401 (Third Alternative Subsec. (1)(c)).
\item \textsuperscript{23} \textit{Id.}
ments. The loan officer, aware of the imminent name change and the Code-imposed obligation of good faith, designates Debtor in the financing statement as XYZ Co. The financing statement is then filed in the proper offices. Some time later, Debtor changes its name to XYZ Co.

At the time of filing, the financing statement was ineffective and did not perfect the bank's security interest because Debtor, at the time of filing, was ABC, Inc., not XYZ Co., and, therefore, Debtor's name was not given. Subsequently, however, Debtor changed its name to correspond with the name given in the financing statement. Although this hypothetical differs from the previous two in that the filing was originally made in the correct office, it nevertheless raises the identical issue: whether a change in conditions can cure an admittedly improper filing.

(4) Debtor, while a resident of State A, grants a bank a security


In 1972, subsection (7) was added to U.C.C. § 9-402 which provides, in part:

Where the debtor so changes his name or in the case of an organization its name, identity or corporate structure that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless a new appropriate financing statement is filed before the expiration of that time.

U.C.C. § 9-402(7).

25. See U.C.C. § 1-203 ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.").

26. It is not suggested, and the reader should not assume, that the characters in these hypotheticals are practicing commercial law well. The fact that those hypotheticals are suggested by actual cases would attest otherwise.

27. This not so hypothetical hypothetical with some modification is suggested by In re Kalamazoo Steel Process, Inc., 503 F.2d 1218, 1220 (6th Cir. 1974).

28. E.g., U.C.C. § 9-402(1) (name of debtor essential requirement of any financing statement). The name of the debtor is important because the filing officer is required to index the financing statement under the debtor's name. U.C.C. § 9-403(4). Although the 1962 version of U.C.C. § 9-402(1) did not expressly require that the debtor's name be given in the financing statement, courts uniformly held that the debtor's legal name had to appear so the statement could be filed and indexed in such a manner that a person searching the records under the debtor's legal name could locate it. E.g., K.N.C. Wholesale, Inc. v. Awnco, Inc., 56 Cal. App. 3d 315, 320, 128 Cal. Rptr. 345, 350 (1976); White Star Distrib., Inc. v. Kennedy, 66 A.D. 2d 1011, 1011, 411 N.Y.S. 2d 751, 752 (1978); General Motors Acceptance Corp. v. Terra Contractors Corp., 6 U.C.C. Rep. Serv. (Callaghan) 544, 547 (N.Y. Civ. Ct. 1969).
interest in certain equipment located in State A. The bank files a financing statement in the proper office in State A. Debtor then moves the equipment to State B where it remains for a period of six months. The bank does not file a financing statement in State B. After the six-month period, Debtor returns the equipment to State A.29

When the financing statement was filed in State A, it was effective, and perfected the bank's security interest.30 When the collateral was moved to State B, the bank had four months within which to file a new financing statement in State B to continue its perfected status.31 Since it did not refile, bank's interest became imperfect at the expiration of the four-month period.32 The question raised by this hypothetical is whether the relocation of the collateral back into State A reperfected the bank's security interest and, hence, cured the original filing.

Unlike the previous hypotheticals, the filing here was initially effective, and a change of conditions caused it to become ineffective. Yet, once the filing is deemed ineffective, the identical issue involving cure arises; the cure here being the relocation of the collateral back to State A. The issue does not change merely because the filing was originally effective.

These hypotheticals, by illuminating the problems created by ineffective filings or unperfected security interests, will aid in the following analysis of cure.

III. THE JUDICIAL APPROACH TO CURE

In contrast to the change in conditions in hypotheticals (1) through (3), the change in hypothetical (4) involved the interstate relocation of the collateral. For analytical clarity, a discussion of cure by interstate relocation of the collateral will be set out separately from the possibility of cure resulting from other changes.33 Let us now look at the way the
courts have resolved or eliminated\(^{34}\) the issue of cure where there has been an interstate relocation of collateral.

### A. Cure Involving Interstate Relocation of Collateral

*In re Miller\(^ {35}\)* is the only reported case involving a question of cure by interstate relocation, although the court did not use the term when framing the issue. *In re Miller* involved facts similar to those of the fourth hypothetical.\(^ {36}\) The debtor, while a resident of California, granted a security interest in certain equipment to a credit company. The credit company filed in California.\(^ {37}\) The debtor then moved the collateral to Oregon and granted a security interest to a lender who filed in Oregon. The credit company never filed in Oregon where the collateral remained for more than four months. The collateral was then returned to California and the lender properly refiled there within four months. The debtor then went bankrupt.

The court concluded that the credit company's originally perfected security interest lapsed after the collateral had been in Oregon longer than four months. Had the collateral remained there the lender's priority would have been unquestioned.\(^ {38}\) The issue, then, was whether return of the equipment to California cured the lapsed filing of the credit company. The court declared that once a gap occurs, “the original perfection is not revived.”\(^ {39}\)

The court concluded that the trustee in bankruptcy took subject to the lender’s security interest but not that of the credit company.\(^ {40}\) It is not clear, however, whether the court believed that the credit com-

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\(^{34}\) If a court adopts the time of filing or time of attachment test to determine where to file a financing statement, a financing statement cannot be cured. Hence, courts which have adopted either test in effect have “eliminated” the issue. See infra text accompanying notes 67-71.


\(^{36}\) See supra text accompanying notes 29-32.

\(^{37}\) The court assumed that the collateral was not customarily used in more than one jurisdiction so that the law of the jurisdiction in which the collateral was located governed perfection. 14 U.C.C. Rep. Serv. (Callaghan) at 1047-48, 1050. The court did state that its “conclusions . . . in the present case would be the same under either [Old Code § 9-103(2)] or [Old Code § 9-103(3)].” Id. at 1049. Although the case was decided under the Old Code, it is doubtful the court would have decided it differently under the U.C.C. Id.

\(^{38}\) Id. at 1043. See Old Code § 9-103(3) (regarding the need to refile within four months after interstate relocation of the collateral).

\(^{39}\) Id. at 1046 (emphasis in original).

\(^{40}\) Id. at 1047.
pany's security interest was re-perfected, but subordinated, or remained unperfected, when the collateral returned to California. Hence, the only legal proposition for which this case can stand is that, for the purpose of priority, the return of the collateral to the original state of perfection does not revive the original date of filing. The court could have reached the identical result had it concluded that the credit company's security interest was re-perfected the moment the collateral was returned to California, but that for the purpose of a priority contest with the lender, the credit company's filing was deemed to date from the time the collateral re-entered California. Thus, the lien of the lender would continue to have priority. The interest of the credit company could still be subordinate to that of the trustee who would assert that the cured filing resulted in a voidable preference. Only a finding of re-perfection would be congruent with the recognition of cure.

B. Cure Not Involving Interstate Relocation of Collateral

In 1981, the issue of cure not involving the interstate relocation of collateral arose in two cases resulting in conflicting decisions. The first case, originally decided by the Bankruptcy Court for the Eastern District of Virginia, was In re G. G. Moss Co., which involved facts similar to those of the second hypothetical. When the secured party first filed, two filings were required because the debtor had a place of business in only one county within the state. The secured party filed both centrally and locally, but the local filing was made in the wrong county. After these initial filings, the debtor began a second business in a second county. The secured party then filed an amendment to the central filing which added collateral.

41. Of course, this proposition assumes that the collateral did not return within four months after its removal. See U.C.C. § 9-103(1)(d) (expiration of the period of perfection takes place only when collateral is brought into and kept in the new state for the specified time).
42. See infra text accompanying notes 122-27.
43. See 11 U.S.C. §§ 60a-b (1970) (applicable sections at time case was decided); Kripke, supra note 7, at 50 n.15 (the fact that re-perfection occurred within a few days before bankruptcy might have allowed preference retention under the Bankruptcy Act).
45. See supra text accompanying note 21.
46. Virginia had adopted the Third Alternative Subsection (1) of U.C.C. § 9-401 which requires dual filing when a debtor has only one place of business in the state. Va. Code § 8.9-401(1) (1965 added volume).
47. A financing statement may be amended by filing a writing signed by both the debtor and the secured party. U.C.C. § 9-402(4). It is not clear why a secured party would include additional collateral by way of an amendment to an original filing instead of simply filing an additional
this later filing contained all the information required for a financing statement.\textsuperscript{48} It is clear, therefore, that: (1) the original filing did not perfect the security interest because the necessary local filing was not properly made, and (2) at the time the amendment was filed, only a central filing was required because the debtor had expanded its business into a second county.\textsuperscript{49}

The bulk of the court's opinion was devoted to the issue of whether the amendment perfected the security interest. The court refused to accept the secured party's argument that the opening of a second place of business made a second filing unnecessary. The secured party had argued that the status of the initial central filing was elevated from one which was necessary but insufficient to one which was both necessary and sufficient to perfect the security interest once the debtor had expanded his business into a second county. On this latter point, the court concluded that:

To subscribe to [the secured party's] position would create unintended results. For example, if a company, which had but one location improperly files only at the S.C.C. and not in the county or city of its business, it would be unperfected. But at the instance that it opened a second business, which would require filing only at the S.C.C., [the secured party's] logic would dictate that the security interest would be perfected at that moment. The Code provides otherwise and sound logic would also dictate otherwise.\textsuperscript{50}

The court never specified the applicable Code provision or explained why sound logic would dictate otherwise. The court concluded that the security interest was unperfected because an amendment "relates back to the original financing statement and cannot perfect a security interest if the original was defective."\textsuperscript{51} The court's view rested solely on the theory that an amendment cannot perfect a security interest.\textsuperscript{52}

\textsuperscript{48} The Moss court so interpreted the last sentence of U.C.C. § 9-402(4) which reads: "In this Article, unless the context otherwise requires, the term 'financing statement' means the original financing statement and any amendments".\textsuperscript{52}
The second case addressing the issue of cure was *Genoa National Bank v. Sorensen*, which involved a secured party who originally took a security interest in growing crops. Although collateral of unharvested crops required a filing with the Public Service Commission, the secured party failed to file with the Commission. The secured party did file, however, in the office of the county clerk, a filing which alone would have been sufficient if the collateral had been harvested by the debtor. The issue, as in *Moss*, was whether the local filing, originally ineffective, became effective after the crops were harvested, thus perfecting the security interest at that time.

In holding that the security interest had been perfected, the *Sorensen* court relied on the fact that a financing statement may be filed before a security interest attaches, stating:

> We therefore believe the better rule, and the one supported both by the language of the Uniform Commercial Code and logic, requires us to hold that if an otherwise unperfected lien is not filed at all the proper places at the time of filing, but through the passage of time or change in character of the property becomes a proper filing under the provisions of the Uniform Commercial Code, the lien also becomes properly perfected and has superior rights over all other liens not otherwise perfected prior to the time that the previous security lien was perfected.

Although an amendment can serve many purposes it cannot act as a financing statement. Had the court adopted the secured party's position, however, this issue would have been moot.

53. 208 Neb. 423, 304 N.W.2d 659 (1981). Disagreeing with only this portion of the court's opinion, the decision was subsequently reversed by the district court and the reversal affirmed by the Fourth Circuit Court of Appeals "for the reasons sufficiently stated in the district court's opinion." 33 U.C.C. Rep. Serv. (Callaghan) 777 (Bankr. E.D. Va. 1981), aff'd, No. 81-1818 (4th Cir. 1982). The district court had reasoned that

> [t]here is no question that but for the fact that it was labeled as an "amendment," appellant's 1976 filing fulfilled both the letter and spirit of Virginia's filing laws. Virginia is a notice filing state. . . . Appellant's 1976 filing gives adequate notice of its interest in the debtor's inventory. Its designation as an amendment is not seriously misleading in this context. Even more importantly, however, when considered by itself the filing also meets all the technical statutory requirements of a filing statement. Id. at 779.


55. 208 Neb. 423, 425-26, 304 N.W.2d 659, 661.

56. *U.C.C. § 9-402(1).*

57. 208 Neb. at 428-29, 304 N.W.2d at 663. In support of its ruling, the court theorized that the security interest first attached to the crops when they were harvested; the filing was simply made before the time of attachment. 208 Neb. at 428-29, 304 N.W.2d at 662-63. This reasoning appears to be convoluted and has been criticized by one commentator who states that:

In the court's view, the security interest attached to the crops at the time they were harvested and the earlier filing perfected the security interest at that time. However, it
Hence, the Nebraska Supreme Court, unlike the Moss court, is of the opinion that an initially ineffective financing statement can be cured by a subsequent change in circumstances, at least where such change involves a change in the character of the collateral.

Prior to the Moss and Sorensen decisions, two other courts explicitly ruled on the possibility of cure when there is a change in circumstances. International Harvester Credit Corp. v. Vos involved facts identical to those of the first hypothetical, where the secured party filed in a county other than where the debtor resided. The debtor subsequently moved to the county where the filing was made. The trial court held that the security interest became perfected when the debtor relocated to the county in which the ineffective filing had been made. It reasoned that upon relocation there was "a 'unity' of the requisites of perfection, i.e., a security agreement, attachment and filing in the county of the debtor's residence, which 'cured' the misfiled financing statement and perfected plaintiff's security interest." The Michigan Court of Appeals, reversing the trial court's decision, concluded that "the county of the debtor's residence is the proper place for filing the financing statement, and should be determined at a specific moment in time." The court then ruled that the specific moment in time at which the debtor's residence must be determined is the moment the security interest first attaches. In response to the trial

would seem preferable to view the security interest as attaching at the time the agreement was made, value was given, and the debtor had rights in the collateral, with subsequent perfection at the time the crops were harvested and the filing became appropriate to perfect an interest in them. Moreover, while the court raised no question as to whether the collateral was properly described and the exact descriptions in the security agreement and financing were not quoted, the court stated that "crops growing on land leased by" the debtor were collateral, which perhaps should have raised an issue as to whether harvested crops were included in the description, although harvested crops might arguably be proceeds of growing crops under § 9-306(1). Under § 9-306(1) the problem is whether stored crops are "proceeds" of "growing crops" within the statutory language of "whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds." DeKoven, U.C.C. Survey: Secured Transaction, 37 Bus. Law. 1034, 1036 n. 131 (1982). Hence, "[t]he problem may not have been as simple as the court reported." Id.

Perhaps the court felt constrained to reason as it did. The court may have felt obligated to subscribe to the view that a determination of where to file is to be made at the time the security interest attaches. If this is true, then only by extending the point in time at which the interest attached could the court hold that the security interest was perfected. See infra text accompanying notes 67-72.

59. See supra text accompanying notes 17-18.
60. 95 Mich. App. at 50, 290 N.W.2d at 403.
61. Id. at 53, 290 N.W.2d at 405.
62. Id. at 58, 290 N.W.2d at 408.
court's "unity of factors" approach, the appellate court stated:
By upholding plaintiff's priority of lien under a "unity of factors" analysis, the trial court holding perpetuates and encourages a business practice which needlessly complicates, confuses, and impedes the law governing commercial transactions. To condition the perfection of a security interest upon the debtor's eventual residence in the county of filing results not in a floating lien, as contemplated by the UCC, but in a lien "'drifting' in aimless and hazardous disregard of the rights of others necessarily navigating the same lanes of commerce."63

Another case dealing expressly with the possibility of cure is In re Kane.64 The facts are similar to those in Moss except that no amendment was filed. As in International Harvester, the Kane court concluded that "the filing requirements for perfection of the security interest were to be determined as of the time when the security interest attached . . . ."65 The court rejected the secured party's argument that when the debtors opened other places of business, the formerly insufficient filing became sufficient, concluding that "[p]erfection could not be made to depend upon what the debtor subsequently does."66

The U.C.C. does not state when the place of filing is to be determined. A resolution of this issue is necessary whenever there has been a change of circumstances between the time the security interest first attaches and the time of filing. Though related to the issue of cure, the two issues are not identical. The issue of cure necessarily presupposes a filing which is initially ineffective. The issue of when the relevant factors are determined for purposes of filing controls whether the initial filing is effective and, hence, whether the issue of cure can ever arise. The two issues are similar in that the test adopted by a court for determining initial effectiveness will ordinarily provide an answer to the question of cure.

C. THREE TESTS FOR WHERE TO FILE AND THEIR EFFECT ON CURE

The courts have used three different tests to determine the proper location to file a financing statement. Some courts have used the "time of attachment" test. Under this test the facts existing at the time the se-

63. Id. at 52-53, 290 N.W.2d at 404-05 (citing In re Pelletier, 5 U.C.C. Rep. Serv. (Callahghan) 327, 335 (D. Me. 1968)).
65. 1 U.C.C. Rep. Serv. (Callahghan) at 587.
66. Id.
security interest first attaches control the place of filing.\textsuperscript{67} For example, if the debtor resides in County A at the time the security interest first attaches, a filing would be proper in that county regardless of the debtor's place of residence at the time of filing.\textsuperscript{68} \textit{Kane} and \textit{International Harvester} demonstrate that the time of attachment test\textsuperscript{69} precludes the possibility of later cure because the proper place to file is determined at a particular moment in time and that place will not change regardless of later events.

Other courts have opted for a "time of filing" test.\textsuperscript{70} Under this test, a creditor can safely ignore the facts existing at the time the security interest first attaches and focus entirely on the facts existing when the filing is contemplated. For example, if the security interest first attaches when the debtor resides in County A, but if before a filing is made the debtor relocates to County B, the time of filing test would require a filing in County B.\textsuperscript{71} The application of this test also precludes the possibility of cure because the proper place to file is again determined at a particular moment in time, \textit{i.e.}, the time of filing. Whatever occurs subsequent to the filing is irrelevant when making a determination of the filing's effectiveness.

A third test, the "last event" test, dictates that the proper place to file is determined by the facts existing when the last event occurs upon which the perfection of the security interest is based. The use of the last event test is suggested by a comment to the U.C.C.:

If the Third Alternative subsection (I) is adopted, then local filing, in addition to the central filing, is required in all the cases

\begin{itemize}
\item \textsuperscript{67} See \textit{In re} O'Donnell, 7 U.C.C. Rep. Serv. (Callaghan) 888, 892 (D. Me. 1970) (security interest perfected by filing in municipality of debtor's residence at the time the security interest attached, notwithstanding debtor's relocation); \textit{In re} Pelletier, 5 U.C.C. Rep. Serv. (Callaghan) 327, 331 (D. Me. 1968) (requiring financing statement to be filed in municipality of debtor's permanent residence as of the date the security interest attaches); \textit{In re} Kane, 1 U.C.C. Rep. Serv. (Callaghan) 582, 587 (E.D. Pa. 1962) (filing in wrong county does not perfect security interest even if debtor later does business there, because filing requirements are determined as of the time when the security interest attaches to the collateral).
\item \textsuperscript{68} For numerous examples of the applications of the time of attachment rule, see generally Wallach, \textit{Perfecting and Reperfecting Security Interests Under the Uniform Commercial Code}, 30 Bus. Law. 447, 450-51 (1975).
\item \textsuperscript{69} For a brief application of the time of attachment test (location of filing place determined as of the time the security interest attaches), see Wallach, supra note 68, at 451-52.
\item \textsuperscript{70} \textit{In re} Page, 6 U.C.C. Rep. Serv. (Callaghan) 250, 252 (W.D. Ky. 1968). \textit{See In re} Golden Kernel, Inc., 5 U.C.C. Rep. Serv. (Callaghan) 43, 47 (E.D. Pa. 1968) (single filing insufficient when debtor consolidated his place of business from two counties to one county between the time debtor ordered equipment and the time secured party filed).
\item \textsuperscript{71} See Wallach, supra note 68, at 450-53 (illustrating use of time of filing test).
\end{itemize}
stated in the preceding paragraph, with respect to any debtor whose places of business within the state are all within a single county (township, etc.) or a debtor who is not engaged in business. \textit{The last event test stated in Section 9-103(1)(b) and Comment thereto applies to determine whether local filing is required under the present section, as well as to determine in which state filing is required.}\textsuperscript{72}

If read literally, the comment calls for the application of the last event test only to determine, under the Third Alternative Subsection (1) of section 9-401, whether a local filing is required in addition to a central filing.\textsuperscript{73}

Although the comment does not suggest use of the last event test to determine where in the state the original filing should be made, one court has done so. In the case of \textit{In re Hammons}\textsuperscript{74} the security interest did not become perfected until the secured party gave value to the debtor and the debtor had rights in the collateral, both of which occurred when the secured party delivered part of the merchandise financed under the security agreement. At the time of delivery, the debtor was doing business in a different county from the county in which the financing statement had been filed. The Fifth Circuit correctly concluded that the issue was "at what time in the course of his dealings with a single-place-of-business debtor the creditor must determine the proper county in which to make his local filing."\textsuperscript{75} The court rejected both the time of filing and time of attachment tests in favor of the last event test and held that the security interest was unperfected because the security party had failed to file in the county where the debtor was doing business when the last event, the delivery of merchandise, occurred. Because there was no indication that the debtor ever had places of business in two counties at any one time,\textsuperscript{76} it is clear that the last event test determined the filing location within the state.

Unlike the time of filing or time of attachment tests, the adoption of the last event test to determine where initially to file leads a court to the inescapable conclusion that an ineffective filing can be cured by a

\textsuperscript{72} U.C.C. § 9-401, Comment 4 (emphasis added). \textit{See} Wallach, \textit{supra} note 68, at 453-54 (describing the history of Comment 4).

\textsuperscript{73} For a discussion of the application and history of U.C.C. Comments, see Greenberg, \textit{Specific Performance Under Section 2-716 Of The Uniform Commercial Code: "A More Liberal Attitude" in the "Grand Style"}, 17 NEW ENG. 321, 327-28 (1982).

\textsuperscript{74} 614 F.2d 399 (5th Cir. 1980).

\textsuperscript{75} \textit{Id.} at 404.

\textsuperscript{76} \textit{Id.} at 403 n.2.
change in circumstances.\textsuperscript{77} Since the test adopted to determine initial effectiveness of the filing will resolve the issue of cure, it is necessary to focus on (1) the benefits, if any, of permitting a financing statement to be cured, and (2) which of the three foregoing tests is best suited to serving the purpose of the U.C.C. filing system, keeping in mind that the answer to this question will necessarily resolve the issue of cure.

IV. RESOLUTION OF THE PROBLEM

A. PROPER CONSTRUCTION OF THE LAST EVENT TEST

Collateral that is subject to the last event test of U.C.C. section 9-103(1)(b) is tangible collateral with a relatively permanent situs.\textsuperscript{78} Thus, it made perfect sense to adopt a conflict-of-laws rule that provides that perfection and the effect of perfection be governed by the law of the jurisdiction in which the collateral is located.\textsuperscript{79} On its face, such a rule seems simple enough. All the secured party must do is determine where the collateral is located and then comply with that jurisdiction's perfection requirements. Such a rule, though simple, is not satisfactory; the various types of collateral covered by section 9-103(1) have a relatively fixed location, but are nevertheless capable of movement. The following hypothetical illustrates the problem:

(5) Both Debtor and Secured Party are located in New York. A security agreement is executed and a financing statement is filed in New York covering Debtor's inventory of furs. Debtor then moves the furs to California. After the furs arrive in California, Secured Party then makes the secured loan to Debtor.

This hypothetical illustrates that it is not enough to simply tell a secured party that he must comply with the perfection requirements of the state in which the collateral is located. During the period when the security interest was being created, the collateral was located first in New York and then in California. A secured party needs a rule that tells him whether, in such a case, a filing is required in New York, California, or in both states. Section 9-103(1)(b) addresses this need by combining a temporal test with a location test. The secured party is told at what point in time the location of the collateral is to be deter-

\textsuperscript{77} For a discussion of the last event test and its application to cure, see infra notes 78-81 and accompanying text.

\textsuperscript{78} U.C.C. § 9-103(1). Ordinary goods are those goods "other than those covered by a certificate of title described in subsection (2), mobile goods described in subsection (3), and minerals described in subsection (5)." U.C.C. § 9-103(1)(a).

\textsuperscript{79} U.C.C. § 9-103(1)(b).
mined. Location is to be determined when "the last event occurs on which is based the assertion that the security interest is perfected or unperfected." 80

As applied to the foregoing hypothetical, the last event test poses little difficulty. Before a security interest is perfected, the following four events must occur: 81

1. the collateral must be in the possession of the secured party pursuant to a pledge agreement, or the debtor must have signed a security agreement; 82
2. value must have been given by the secured party; 83
3. the debtor must have rights in the collateral, 84 and
4. the collateral must be in the possession of the secured party or the secured party must have filed a financing statement. 86

In the hypothetical, the last of these four events to occur was the giving of value by the secured party. When this event occurred, the collateral was located in California, so its law governed perfection. Since the secured party did not possess the collateral, a financing statement had to be filed in California. No statement was filed, so the secured party's interest was unperfected.

The application of the last event test to this hypothetical was simple because the relevant last event was clearly one of the affirmative four steps necessary for perfection. 87 What is not so clear, however, is whether the relevant last event can be an event other than the four above. 88 Only if it can will an ineffective financing statement be cured by a change in conditions.

To illustrate the potential ambiguity of the last event test, Mr. Peter Coogan posits the following hypothetical:

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80. Id.
81. See U.C.C. § 9-303(1) ("A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken.").
82. U.C.C. § 9-203(1)(a).
83. U.C.C. § 9-203(1)(b).
84. U.C.C. § 9-203(1)(c).
85. U.C.C. § 9-305.
86. U.C.C. § 9-302(1).
88. See Coogan, supra note 7, at 539-42 (discussion of last event test ambiguities); Kripke, supra note 7, at 61-62 (discussing "misapprehensions" about last event test); R. HENSON, supra note 87, at 330 (last event language labeled "infelicitous"); Wallach, supra note 68, at 62-63 (noting conflict between last event test and U.C.C. § 9-401(3)). Haydock, Book Review, 21 WAYNE L. REV. 183, 187-89 (1974) (disagreeing with U.C.C. definition of "event").
(6) D and S, both located in Pennsylvania, execute a security agreement covering D's inventory, including after-acquired items. S makes a large advance and files a financing statement in Pennsylvania. Suppose certain after-acquired inventory is to be shipped from California and the debtor acquires rights in those goods while they are still in California. Mr. Coogan correctly asserts that:

S's filing in Pennsylvania would not protect him before the goods arrive there. The last event on which S would have to base his assertion that he had a perfected security interest in the goods before their entry into Pennsylvania would be D's acquisition of rights in the collateral. But since the goods were not located in Pennsylvania when this event occurred, paragraph (1)(b) tells us that Pennsylvania law did not at the time of this event govern perfection, and that, therefore, the Pennsylvania filing is ineffective.

Mr. Coogan's concern is the status of S's security interest once the goods arrive in Pennsylvania. He believes a literal reading of section 9-103(1)(b) supports the following argument:

[S]ince no "last event" has occurred prior to the entry of the goods into Pennsylvania on which could be based a valid assertion that S's security interest is perfected, a "last event"—presumably another filing—will have to occur after the goods arrive in order for perfection in Pennsylvania to be good. Since the collateral would be located in Pennsylvania when this "last event" occurred, the second Pennsylvania filing would be effective. Were the original filing in Pennsylvania to become effective upon the collateral's arrival there, it could be argued, paragraph 9-103(1)(b) would essentially be making the movement of goods into a jurisdiction a sixth step of perfection—a step not listed in 9-303.

This argument assumes that the last event must be one of the statutory events required for perfection. Since one of the statutory events necessary for attachment cannot reoccur once the goods arrive in Pennsylvania and a statutory event is necessary, the secured party will have to create such an event by filing.

89. Coogan, supra note 7, at 539. Though the debtor had not received possession of the goods, it is still possible that upon contracting for sale the debtor acquired rights in the collateral because a buyer obtains a "special property and an insurable interest" in goods by identification of existing goods to a contract of sale. U.C.C. § 2-501(1).

90. Coogan, supra note 7, at 539.

91. Coogan, supra note 7, at 541 (emphasis in original).

92. Mr. Coogan suggests that this problem could be avoided if the parties provide in their security agreement that the security interest not attach until arrival of the goods in Pennsylvania pursuant to U.C.C. § 9-203(2). Id. at 543. Mr. Haydock, in my opinion, correctly refutes this position by pointing out that it will not work "because even though the parties agree to delay
If such an argument were successful then an ineffective financing statement could never be cured. When the debtor in the foregoing hypothetical acquired rights in the after-acquired collateral, the secured party's security interest attached to those goods. At that moment, the Pennsylvania filing was ineffective to perfect the security interest. Unless the movement of the collateral into Pennsylvania constitutes a last event, cure is impossible and, as Mr. Coogan points out, a new filing would be necessary in Pennsylvania. It is only when the last event for purposes of section 9-103(1)(b) is interpreted as any event, which would result in the financing statement being effective if then filed, that cure becomes possible.

To limit the last event to one of the statutory events required for perfection is "patently absurd." According to Professor Kripke such an interpretation ignores the drafting style of the Code. Had it been the intention to limit the category of "last events" to the affirmative five steps required to perfect a security interest, cross-references to the relevant sections would have been made and the same terminology used. But this, of course, was not done. Happily, even Mr. Coogan believes that "[s]uch a result could not have been intended by the draftsmen and is not dictated by the logic of Article 9."

Apart from the fact that the literal wording of the U.C.C. does not support such an interpretation, limiting the permissible last event would be nonsensical. First, to require a second filing after the goods enter Pennsylvania would serve no useful purpose whatsoever. Second, such an interpretation would contradict the mandate of the U.C.C. that it be interpreted to "simplify, clarify and modernize the law governing commercial transactions." The secured party, in Mr. Coogan's hypothetical, would constantly have to monitor the debtor's acquisition of goods and determine at what point the debtor acquired rights in goods. If the debtor first acquired rights in after-acquired goods before their entry into Pennsylvania, then the secured party would have to file again in Pennsylvania after their entry. Such a requirement would

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attachment until the property is moved into state A, the four events necessary for perfection would have in fact occurred." Haydock, supra note 88, at 188.  
93. Haydock, supra note 88, at 188; Kripke, supra note 7, at 63.  
94. Kripke, supra note 7, at 61.  
95. Coogan, supra note 7, at 541.  
96. U.C.C. § 1-102.
place an intolerable burden upon the secured party. Ultimately this would limit the use of inventory as collateral.

To further illustrate that the last event should not be so limited and that a financing statement should be able to be cured in cases involving interstate movement, consider the following hypothetical:

(7) Debtor is a national retail chain with stores in all fifty states. Secured Party has a security interest in Debtor's inventory. To perfect its security interest, Secured Party files in all fifty states. Assume that Debtor's store in Pennsylvania runs out of televisions. Debtor then moves some televisions from its Delaware store or perhaps a warehouse in Delaware to the Pennsylvania store.

Since Secured Party had filed in Delaware one can assume that it had a perfected security interest in the televisions before removal to Pennsylvania. 97 It is also clear that before removal to Pennsylvania, the Pennsylvania filing was ineffective to perfect a security interest in the Delaware televisions. 98 The question, then, is what happens to Secured Party's perfected security interest once the televisions are removed to Pennsylvania.

If the relevant last event is an event other than movement of the televisions into Pennsylvania, perfection will lapse four months after arrival unless Secured Party files a new financing statement in Pennsylvania before expiration of that period. 99 Since the Secured Party will probably be unaware of this transaction, it will not file and its perfected security interest in these televisions will lapse after four months. If, on the other hand, the movement of the televisions is considered the last event, the televisions will be located in Pennsylvania when that event occurs. Hence, the law of Pennsylvania will apply. Since Secured Party has filed in Pennsylvania, it will have a perfected security interest in the televisions the moment they enter Pennsylvania which will not lapse after four months. As to these televisions, the ineffective Pennsylvania filing will be cured by the change in circumstances, i.e., the movement of the televisions into Pennsylvania. Unless this latter interpretation is accepted, a secured party will always run the risk that its perfected security interest in inventory will be lost by interstate shuffling of goods by the debtor. Such a result seriously impedes the use of inventory as collateral.

97. See U.C.C. § 9-103 (perfection of security interest in multiple state transactions).
98. Id.
A restrictive view of the last event test penalizes a secured party who anticipates a change in the collateral's location and files accordingly. For example, if a debtor notifies the secured party that the collateral will be relocated to another state, the filing in the new state will have to await the collateral's arrival. Filing in the new state before the collateral's arrival would result in the problems raised by the previous two hypotheticals. The secured party would be required to constantly monitor the collateral or risk reliance on the debtor's representation to determine if and when the collateral is relocated. If, however, the last event can be the relocation of the collateral, then pre-filing would be feasible. The pre-filed financing statement, initially ineffective, would be cured by the relocation of the collateral which becomes the last event. It is this view that permits an ineffective filing to be cured by interstate relocation; it is doubtful if any other view of the last event test can be justified.

As discussed previously, three tests exist for the purpose of establishing the time at which the secured party must determine the proper place to file under section 9-401(1): the time of filing test, the time of attachment test, and the last event test.\(^\text{100}\) But only the last event test is flexible enough to permit cure and then only if the relevant last event can be an event other than one of the statutory events required for perfection. The last event test is used to determine the proper state in which to file pursuant to section 9-103(1)(b). There is no reason to limit the permissible last event when the test is used to determine where in a state to file pursuant to section 9-401(1).

### B. AVAILABLE TESTS AND FILING PURPOSES

Because only the last event test permits cure, arguments critical of its use must be examined. Nonapplication of the last event test would be justified if it failed to serve the purpose of filing\(^\text{101}\) or unduly burdened the secured party.\(^\text{102}\)

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100. *See supra* text accompanying notes 67-77.  
101. The accepted purpose of filing is to enable a third party to obtain information concerning interests created by the debtor. *See* U.C.C. § 9-401, Official Comment 3 ("The policy of the subsection is to require filing in the place or places where a creditor would normally look for information concerning interests created by the debtor.").  
102. *See* Kripke, *supra* note 7, at 63-65 (convenience of the secured party in determining where to file was an important consideration in drafting the U.C.C.).  

Although the secured party's convenience is an important criterion, it should not necessarily mandate a particular rule when countervailing considerations exist, as recognized by Professor Wallach who states:

[The last event test may compel the secured party to contact the debtor or otherwise determine the facts when he would not otherwise have had to do so. The slightly in-
In *Hammons* the court believed that:

By requiring that the determination of the proper place to file be made at the time when the last event occurs upon which the perfection of the creditor's security interest is based, the last event rule ensures that the place in which the filing is made and the contents of the filing will reflect any changes made by the debtor between the time of attachment and the time of filing, regardless of which came first. The filing would be more likely to reflect the location and status of the debtor which exists at the time a subsequent creditor is searching the records to determine what prior security interests have been perfected against the debtor and therefore will be more likely to be found by such a subsequent creditor.\(^{103}\)

This view has been adopted by Professor Wallach who states that, "The test best suited to serving the purpose of filing is a last event test or last to occur test . . . ."\(^{104}\) Though the "last event" test is perhaps the best of the three tests, its real value arises only when the issue of cure is considered.

It is suggested that for the purpose of giving notice to a third party, it matters little which test is adopted. For example, assume that in order to perfect its security interest the secured party must file in County A, the county of the debtor's residence. The security interest attaches when the debtor resides in County A. The debtor subsequently moves to County B. The time of attachment rule would require that a filing be made in County A. Since it would be impossible for a prospective creditor to determine the debtor's residence at the time a security interest may have attached, to be safe the creditor must search the records of each county in which the debtor lived during the life of the collateral. The potential unreliability of a debtor's representation regarding residency requires that the creditor check the records of every county within the state.

Similarly, an extensive search also would be required if the time of filing test were adopted. Since the U.C.C. permits a secured party to file prior to attachment,\(^{105}\) a filing would be proper under this test if made in the county of the debtor's residence regardless of whether, before the security interest attaches, the debtor acquires a residence in a

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\(^{105}\) Wallach, *supra* note 68, at 453.
different county. A prospective creditor, again unwilling to rely on the
debtor's representation regarding residency, would have to check the
records of every county within the state.

The burden on the prospective creditor is not significantly lessened
by adoption of the last event test. Though it is true that the filing will
reflect any change in debtor's residency between the time of attachment
and the time of filing, the prospective creditor cannot determine where
the debtor resided when the last event occurred. So, once again, a
search of the records of every county is necessary.

In determining which test best reduces the filing burden on the
secured party, it is interesting to note that essentially the same argu­
ment has been advanced in favor of both the time of filing test and time
of attachment test. The argument in favor of adopting the time of filing
test is that a filing should not be rendered ineffective by a change in
circumstances between the time of filing and the subsequent attach­
ment. The argument in favor of the time of attachment test is that
the time the security interest attaches occurs "on the occasion of the
final contact or communication between the parties to the transaction,
thereby affording a final opportunity for careful verification." Each
argument, however, assumes that the transaction between the debtor
and creditor proceeds in a particular order. Unfortunately, this is not
the case. If filing precedes attachment, the time of attachment test re­
quires that the secured party remain alert to changes between filing and
attachment. If attachment precedes filing, the secured party must re­
main alert to changes between the time of attachment and filing.
Hence, neither the time of filing test nor the time of attachment test is
inherently superior.

The burden of alertness imposed upon the secured party by the
time of filing test or the time of attachment test is neither necessarily
reduced nor increased by the last event test. Professor Kripke, arguing
in favor of the time of filing test, states that "the imposition, under a
last event test, of a duty to remain alert after filing to intrastate remov­
als is a burden that cannot be justified." This assumes, however, that
filing precedes attachment. If filing occurs after attachment, the burden

108. A creditor, however, would be wise to take the necessary steps for perfection, if possible,
before the security interest attaches. The security interest cannot attach until the creditor gives
value; therefore, value should be withheld until the creditor is certain of his priority. See supra
text accompanying notes 81-86.
109. Kripke, supra note 7, at 69.
on the secured party will remain the same under the time of filing test or last event test because the time of filing will be the last event. Similarly, the burden on the secured party will be identical regardless of whether the time of attachment test or the last event test is used unless attachment precedes filing. If attachment occurs after filing, the moment the security interest attaches will be when the last event occurs. The last event test, therefore, is identical to the other tests when determining the effect on the secured party's burden of alertness; increases or decreases in the burden on the secured party depend solely on the order in which the transaction proceeds. Even if it could be shown that a burden results from application of the last event test, it is slight. Professor Kripke admits that a change of circumstances, making the filing ineffective and occurring between the time of filing and the time of attachment, would be unlikely to occur.\textsuperscript{110} Also, any slightly increased burden is more than justified because only the last event test permits an ineffective filing to be cured.

C. \textbf{Benefits of Allowing Cure}

A number of benefits are gained by the adoption of a filing rule allowing cure. It has long been a legal axiom that one should not be required to perform a purposeless act.\textsuperscript{111} If cure is not permitted, a secured party would be required to refile a financing statement for the sole reason that the first filing was "initially" ineffective. The question remains whether such a requirement serves any valid purpose.

Perhaps a valid purpose for requiring a second filing can be gathered from the effect of such a rule. First, the secured party, upon refileing, might have a second stamp placed upon the original statement by once again paying the filing fee. At least one court has recognized that "such a requirement would be to simply ignore the realities of life and the intent and purpose of the Uniform Commercial Code."\textsuperscript{112} The secured party could simply file a new financing statement.\textsuperscript{113} Second, refileing would put any third party on notice that the original filing, when made, was ineffective. Clearly, no useful reason exists for putting third parties on notice of this fact.\textsuperscript{114} A third possible consequence of such a rule would be that the secured party, if there is no refileing, re-

\begin{footnotesize}
\textsuperscript{110} Id.
\textsuperscript{111} See U.C.C. § 3-511, Official Comment 7 (excusing presentment, protest, or notice of dishonor of commercial paper when to require it would serve no useful purpose).
\textsuperscript{113} Haydock, supra note 88, at 188-89.
\textsuperscript{114} See id. at 189 ("Obviously, this [third party notice] would serve no useful purpose.").
\end{footnotesize}
mains unperfected. No commercial justification exists, however, for relegating the secured party to the permanent status of "unperfected." Since a third party would assume that the original filing was in the correct office, he would undoubtedly check that office for filings against the debtor and would discover the secured party's filing. Thus, the original filing would fulfill the U.C.C. purpose by giving "constructive notice to the world and actual notice to those who would take the trouble to look."\(^{115}\)

A rule prohibiting cure, therefore, cannot be justified by its consequences. In fact, the consequences support the argument in favor of cure since they eliminate the need to perform useless acts that potentially prejudice secured parties.

Other advantages exist for permitting cure. In re Kalamazoo Steel Process, Inc.,\(^{116}\) although not a case involving cure, illustrates one of these benefits. In that case, the secured party knew at the time the security agreement was executed that the debtor intended to change its name. The financing statement, however, did not reflect the anticipated name change. The court, relying on the U.C.C. imposed duty of good faith,\(^{117}\) held that

\[\text{[w]hen a secured party has knowledge at the time the security agreement is executed that the debtor intends to change its name, and the new name is known to him, the secured party must act in good faith to insure that the filing under the Code not only discloses the current and correct name of the debtor but also reflects the pending name change of which the parties are aware.}\(^{118}\)

To accomplish this, the court suggested that the original financing statement be drafted to indicate the contemplated name change by including both the debtor's current name and the anticipated name.\(^{119}\) Implicit in such a suggestion is the court's acceptance of the cure doctrine. If a statement with only the anticipated name were filed, it clearly would be an ineffective filing because of the absence of the debtor's actual name, and thus, the financing statement would be seriously misleading. The statement would only become effective and, hence, cured when the debtor changed its name. The name change would be the last event. If cure were not recognized in such a case, the secured party would be required to wait until after the name change to

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116. 503 F.2d 1218 (6th Cir. 1974).
117. U.C.C. § 1-203.
118. 503 F.2d at 1222.
119. Id. at 1222-23.
file. Such a requirement would pose serious difficulties for the secured party, as in the case of interstate relocation of collateral.\(^{120}\) The secured party would have to constantly monitor the collateral or rely on the debtor's representation as to when the name change occurs.\(^{121}\)

The problem of an anticipatory refiling also arises in those states that have adopted the alternative section 9-401(3).\(^{122}\) Only if cure is recognized can a secured party safely file in advance of a change that would necessitate a refiling. Thus, to recognize and allow anticipatory refiling is the only sensible position.

The problem of cure raised by an anticipatory refiling is not identical to the issue of cure raised in *In re G. G. Moss Co.*\(^{123}\) and *Sorensen.*\(^{124}\) When the issue arises because of an anticipatory refiling, it is assumed that the initial filing was originally effective under the test used by the particular jurisdiction. It is therefore theoretically possible for a court to adopt the time of filing test or time of attachment test for initial perfection, but to permit cure of an anticipatory refiling nevertheless, even though the initial filing could never be cured. Such a position, though theoretically possible, is logically inconsistent. It would be anomalous to hold that an initially improper filing remains ineffective no matter what subsequently occurs, but that an anticipatory refiling, ineffective and not required when made, can nevertheless be cured and become effective by a subsequent change in conditions. Unless courts adopt the last event test to determine initial perfection, which would permit cure, one of two results will follow: first, for logical consistency courts will refuse to recognize and give effect to an anticipatory

\(^{120}\) See supra text accompanying notes 96-99.

\(^{121}\) This problem can be particularly acute if the secured party intends to claim a security interest in the property acquired by the debtor after the execution of the security agreement. U.C.C. § 9-402(7) provides that:

Where the debtor so changes his name or in the case of an organization its name, identity or corporate structure that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless a new appropriate financing statement is filed before the expiration of that time.

\(^{122}\) U.C.C. § 9-401 (Alternative Subsec. (3)) states that:

A filing which is made in the proper county continues effective for four months after a change to another county of the debtor's residence or place of business or the location of the collateral, whichever controlled the original filing. It becomes ineffective thereafter unless a copy of the financing statement signed by the secured party is filed in the new county within said period. The security interest may also be perfected in the new county after the expiration of the four-month period; in such case perfection dates from the time of perfection in the new county. A change in the use of the collateral does not impair the effectiveness of the original filing.

\(^{123}\) See supra notes 44-57 and accompanying text.

\(^{124}\) See supra note 34 and accompanying text.
refiling; or, second, courts must abandon all logical consistency and give effect to anticipatory refiling. Neither of these results is desirable.

D. JUDICIAL GLOSS TO PREVENT UNDESIRABLE RESULTS

Although it is urged here that courts adopt the last event test for the purpose of testing the effectiveness of a financing statement, its application can create a statutory interpretation problem that should be addressed.

The case of In re Miller is illustrative.125 If the court had explicitly ruled that the lapsed filing by the credit company had been cured when the collateral was returned to California, the priority contest between the credit company and the lender would be a contest between two perfected parties. Since both parties' interests were perfected by filing, priority would be determined pursuant to U.C.C. section 9-312(5)(a).126 If that section were applied literally the credit company would have priority since it had originally filed before the lender.127 Such a result, however, seems clearly unjust and would certainly come as a surprise to the lender. If the collateral had remained in Oregon, the lender's security interest would have had priority since it would have been perfected, whereas the credit company's security interest would have been unperfected. When the collateral was returned to California, the lender followed the mandate of the U.C.C. and refiled there.128 Why, then, should the lender lose its priority when it did everything required by the U.C.C. to maintain priority? The answer is that the lender should not lose its priority. To prevent such a result, section 9-312(5) must receive a thin coating of judicial gloss.129

The theory behind the "first to file or perfect" rule of section 9-
312(5) is that the second secured party, before making a loan to the
debtor, could have found any prior secured party's competing interest
by checking the public files, or by investigating the reason for the
debtor's lack of possession of the collateral. Whenever a financing
statement is found to be cured, it inevitably follows that the filing was
ineffective prior to the event or events resulting in cure. Regardless of
the basis for the financing statement's ineffectiveness, the fact that it
was ineffective means that it would not put an interested third party on
notice of the prior security interest. Under most circumstances, there­
fore, an ineffective filing is equivalent to the complete absence of any
filing. Consequently, an ineffective financing statement should be
treated as if no filing had occurred during its period of ineffectiveness.
A secured party should not be permitted to rely on the date of the inef­
fective filing for the purpose of establishing priority under section 9­
312(5). The date of cure, therefore, should be considered to be the date
of filing. This approach, applied to the facts of Miller, would result in
the lender having priority over the credit company. The lender's filing
date would be the date of the Oregon filing which would be continued
by a timely refiling in California. The credit company's filing date
would be the date upon which the collateral was returned to California,
\textit{i.e.}, the date of cure.

The courts should apply section 9-312(5) in the manner suggested
because of the inequities that result from a literal application of that
section. Only by using the suggested approach can a court allow for
cure without upsetting the order of priority intended by the U.C.C.'s
drafters.

**CONCLUSION**

The possibility of an ineffective financing statement being cured by a
subsequent change in conditions depends on the test adopted for deter­
mining initial ineffectiveness. Both the time of filing test and the time
of attachment test preclude the opportunity for cure, because both re­
quire a determination of effectiveness at a particular point in time. The
last event test, however, if properly interpreted, is flexible enough to
accommodate the concept of cure since the event resulting in cure
would be the last event upon which the perfection of the security inter­
est is based.

This Article demonstrates that if cure is excluded from considera­

\begin{footnotesize}
130. \textit{B. Clark, supra} note 129, at \textit{\S} 3.8(1).
131. \textit{See supra} note 4.
\end{footnotesize}
tion, it matters little which of the three tests a court chooses to adopt. But when the benefits of permitting cure are considered, the choice of tests becomes crucial. The last event test should be chosen simply because it allows for cure. Furthermore, by adopting a flexible approach to the first to file rule of section 9-312(5), cure will not disrupt third party expectations. Although a number of courts have flirted with the issue of cure, few were aware of doing so. It is hoped that this Article will help create such an awareness.\(^\text{132}\)

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\(^{132}\) The U.C.C. only recognizes the concept of "cure" in an entirely different context. See, e.g., U.C.C. § 2-508 (rejected delivery due to nonconformity may be "cured" with a conforming delivery).