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NEW ARTICLE 9 TRANSITION RULES

BRADLEY Y. SMITH*

INTRODUCTION

Consistent with the scope and detail of the proposed Revised Article 9 of the Uniform Commercial Code (“Revised Article 9”) itself, Part 7 of the statute provides a detailed set of rules governing the transition from prior law to the full implementation of Revised Article 9. This article addresses these transitional rules. First, it offers an overview of Part 7 and a description of its component sections. Second, it discusses the principal policy decisions reflected in the transition provisions. Finally, it addresses selected issues likely to arise in practice during the period of transition.

I. OVERVIEW OF TRANSITION PROVISIONS

Section 9-701 establishes the effective date of Revised Article 9, which in the uniform version is scheduled for July 1, 2001. This date reflects a significant delay from the time the statute was initially introduced for legislative action. This deferred effectiveness for Revised Article 9 has two principal objectives. First, it allows an additional period of almost three years following approval of the statute by the National Conference of Commissioners on Uniform State Laws for various affected parties to familiarize themselves with and adapt their practices to the requirements of the new law. Second, and more importantly, deferral makes it possible for Revised Article 9 to become effective simultaneously in a large number of jurisdictions. Both of these factors should mitigate transitional problems.

Section 9-702 (Savings Clause) states three general transitional rules. Under subsection (a), Revised Article 9 applies to a transaction or lien entered into or created prior to the effectiveness of Revised

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Article 9, *except as otherwise provided in Part 7*. Hence, any party wishing to defer or avoid a requirement of full compliance with Revised Article 9 immediately upon its effectiveness must identify a provision in Part 7 which enables it to do so. Subsection (b) states an exception to this general rule. Under subsection (b), transactions and liens outside the scope of the current version of UCC Article 9 (“Old Article 9”), which were validly entered into or created prior to effectiveness of Revised Article 9, remain valid and may be “terminated, completed, consummated, and enforced” either in accordance with prior law or under Revised Article 9. Subsection (b) is itself, however, subject to the further provisions of Part 7, which significantly limit the impact of its validation of existing non-Article 9 liens that are within the scope of Revised Article 9. Subsection (c) states the conventional rule that Revised Article 9 does not affect litigation or other proceedings pending at the effective date.

Sections 9-703 (Security Interest Perfected Before Effective Date) and 9-704 (Security Interest Unperfected Before Effective Date) deal with a security interest which is enforceable against the debtor under prior law immediately prior to the effective date and which is either perfected or unperfected under prior law at that time. In the case of a perfected security interest governed by section 9-703, subsection (a) states the unsurprising rule that it continues as a perfected security interest if the applicable requirements for enforceability and perfection under Revised Article 9 are satisfied at the effective date. If the Revised Article 9 requirements for either enforceability or perfection are not met at the effective date,¹ then subsection (b) affords a one-year grace period within which these new requirements may be met. This one-year grace period is subject to section 9-705, discussed below, which specifies special rules applicable to changes in perfection requirements. Although the drafting approach is slightly different, section 9-704 affords a substantially identical one-year grace period for the unperfected but enforceable security interest under prior law that fails to meet the enforceability

1. The Official Comments give as an example a perfected pre-effective-date security agreement in a consumer transaction which covers “all securities accounts.” *See* R. § 9-703 cmt. 2. This collateral description, while sufficient under existing law, is not enforceable under Revised Article 9 because it fails to meet the specificity requirements of section 9-108(e)(2) for consumer transactions. Note that such a security interest, since it was subject to Old Article 9, is not covered by the savings clause of section 9-702(b); however, section 9-703 would dictate the same result even if it were. Other examples include any transaction (e.g., a sale of a payment intangible) which, by virtue of the expanded scope of Revised Article 9, becomes subject to a Statute of Frauds type requirement under section 9-203 that may not have existed under prior law. *See id.* § 9-703 cmt. 2.

requirements of Revised Article 9. In addition, section 9-704 specifies when this unperfected security interest may become perfected under Revised Article 9. If action sufficient to perfect the security interest under Revised Article 9 is taken at or before the effective date, the security interest is perfected at the effective date. If such action is taken after the effective date, the security interest is perfected at that time.

Section 9-705 (Effectiveness of Action Taken Before Effective Date) deals generally with security interests as to which the steps relied upon to achieve perfection are taken prior to the effective date but which security interests attach and become enforceable after the effective date. Subsection (a) addresses perfection by steps other than filing which are sufficient under Old Article 9 or other applicable law but which are not sufficient under Revised Article 9. In this instance, the pre-effective-date perfection steps continue to be effective as to collateral to which the security interest attaches after the effective date for a period of one year. The bailee with notice cited in Example 2 in the Official Comments to section 9-703 could serve as well to illustrate the operation of section 9-705(a): to the extent the secured party is relying on a pre-effective-date notice to a bailee for perfection as to then existing and thereafter acquired collateral (as might be the case under certain mortgage warehousing arrangements), it benefits from the same one-year grace period as to both existing and future collateral within which period it must secure the bailee's authentication of a record acknowledging that it holds for the secured party.

Section 9-705(b) addresses pre-effective-date filings, stating that they are effective to the extent they satisfy the requirements for perfection by filing under Revised Article 9 even if they were not effective for that purpose when filed. Note that there are a variety of different reasons why a previously ineffective filing may become effective under Revised Article 9. The secured party may have consciously decided to "pre-file" in the filing jurisdiction mandated by Revised Article 9 before it was necessary or legally effective to do so. Alternatively, such a filing may simply have been made in error. In addition, descriptions of collateral which were ineffective either generally or as to particular types of collateral may become effective under Revised Article 9.² Subsection (b) gives effect to all such filings,

2. There are actually three different types of collateral descriptions that may fall into this category. First, Revised Article 9, unlike Old Article 9, permits perfection by filing as to

whether to the calculated or serendipitous benefit of the secured party.

Section 9-705(c) continues the effectiveness following the effective date of Revised Article 9 of a financing statement filed in the appropriate jurisdiction to achieve perfection under Old Article 9. Thus, a financing statement which satisfied applicable requirements for perfection under Old Article 9 operates to perfect a security interest for purposes of Revised Article 9 notwithstanding the fact that Revised Article 9 may require filing in a different jurisdiction. However, unless a longer period of effectiveness is provided for in subsection (d) or (e) of section 9-705 or in section 9-706, the pre-effective-date financing statement ceases to be effective at the earlier of the time it would have lapsed (absent continuation) under the law of the filing jurisdiction or June 30, 2006.

Section 9-705(d) deals with the filing of a continuation statement (as opposed to an initial financing statement filed as a continuation statement under section 9-706) after the effective date of Revised Article 9 with respect to an original financing statement filed prior to such effective date. Such a continuation statement is effective for purposes of Revised Article 9 if, and only if, it is filed to continue the effectiveness of a financing statement filed in the same office in the same jurisdiction as would be required for an initial filing under Revised Article 9. Thus, if Revised Article 9 does not result in a change in the applicable filing office, pre-effective-date filings may be continued through the filing of a conventional continuation statement; otherwise, if Revised Article 9 requires filing in a different jurisdiction or filing office, continuations may only be effected by filing an initial financing statement in accordance with section 9-706.

The following examples from the Official Comments illustrate the operation of subsection (d):

Example 2: On November 8, 2000, D, a State X corporation, creates a security interest in certain manufacturing equipment located in State Y. On November 15, 2000, the secured party perfects a security interest in the equipment under [Old] Article 9 by filing in office of the State Y [(location of the equipment)] Secretary of State. See [Old] Section 9-103(1)(b). [Revised Article 9] takes effect in States X and Y on July 1, 2001. Under Section

instruments. Compare *id.* § 9-312(a) with U.C.C. § 9-304(1). Second, Revised Article 9 validates a filing covering “all personal property” or the like, see R. § 9-504(2), which is insufficient under current case law. Finally, security interests in some new types of collateral brought within Revised Article 9 (e.g., commercial tort claims) may be perfected by filing. See *id.* § 9-109(d)(12).

9-705(c), the financing statement ceases to be effective in November, 2005, when it lapses. See Section 9-515. Under [Revised Article 9], the law of D's location (State X, see Section 9-307) governs perfection. See Section 9-301. Thus, the filing of a continuation statement in State Y after the effective date would not continue the effectiveness of the financing statement. . . .

Example 3: The facts are as in Example 2, except that D is a State Y corporation. Assume State Y adopted UCC Section 9-401(1) (second alternative). State Y law governs perfection under Part 3 of [Revised Article 9]. (See Sections 9-301, 9-307.) Under the second sentence of subsection (d), the timely filing of a continuation statement in accordance with the law of State Y continues the effectiveness of the financing statement.

Example 4: The facts are as in Example 3, except that the collateral is equipment used in farming operations and, in accordance with [Old] Section 9-401(1) (second alternative) as enacted in State Y, the financing statement was filed in State Y, in the office of the Shelby County Recorder of Deeds. Under [Revised Article 9], a continuation statement must be filed in the office of the State Y Secretary of State. See Section 9-501(a)(2). Under the second sentence of subsection (d), the timely filing of a continuation statement in accordance with the law of State Y operates to continue a pre-effective-date financing statement only if the continuation statement is filed in the same office as the financing statement. Accordingly, the continuation statement is not effective in this case, but the financing statement may be continued under Section 9-706.

Example 5: The facts are as in Example 3, except that State Y enacted [Old] Section 9-401(1) (third alternative). As required by former Section 9-401(1), SP filed financing statements in both the office of the State Y Secretary of State and the office of the Shelby County Recorder of Deeds. Under [Revised Article 9], a continuation must be filed in the office of the State Y Secretary of State. See Section 9-501(a)(2). The timely filing of a continuation statement in that office after [Revised Article 9] takes effect would be effective to continue the effectiveness of the financing statement (and thus continue the perfection of the security interest), even if the financing statement filed with the County Recorder lapses.³

Section 9-705(e) deals with financing statements filed against a transmitting utility under Old Article 9. Under both Old section 9-403(6) and Revised section 9-515(f), a financing statement filed against a debtor identified as a transmitting utility is effective until a termination statement is filed, and has no scheduled lapse date. Subsection (e) of section 9-705 gives effect to this rule by making subsection (c)(2), which establishes June 30, 2006 as the outside date

3. R. § 9-705 cmt. 5.

for continued perfection of pre-effective-date filings, applicable to a financing statement filed against a transmitting utility only if Revised Article 9 would require filing in a different jurisdiction.

Section 9-705(f) states the rule that a financing statement comprising both an initial filing made prior to the effective date of Revised Article 9 and a continuation statement filed after such effective date “is effective only to the extent that it satisfies the requirements of Part 5 [of Revised Article 9] for an initial financing statement.” In other words, to the extent that the pre-effective-date filing does not itself satisfy those requirements, the continuation statement must remedy the deficiency. The Official Comments give as an example collateral consisting of the right to payment for real property sold which is a “general intangible” under Old Article 9 but an “account” under Revised Article 9.⁴ To continue perfection as to this collateral, a continuation statement must contain an indication of collateral that satisfies the requirement of section 9-502(a).⁵ Assuming that the pre-effective-date filing identified the collateral only as “general intangibles” and that this description was not supplemented or corrected by the continuation statement, perfection would lapse at the time the pre-effective-date filing would, in the absence of continuation, cease to be effective under section 9-705(c).⁶ Similarly, the requirements of Revised Article 9 as to sufficiency of the names of the debtor and secured party must be met upon filing of the continuation statement.

As noted above, section 9-705(d) governs situations in which a pre-effective-date financing statement may be continued through the filing of a continuation statement in the same filing office. In situations where Revised Article 9 mandates a filing in a different jurisdiction or filing office, a pre-effective-date financing statement may be continued only pursuant to section 9-706 (When Initial Financing Statement Suffices to Continue Effectiveness of Financing Statement). As the title implies, this section contemplates the filing of

4. *See id.* § 9-705 cmt. 6.

5. *See id.*

6. The language of section 9-705(f) on its face suggests that perfection would lapse upon the filing of the continuation statement, but this seems inconsistent with section 9-705(c). Note the difference in treatment for purposes of a financing statement on the one hand, and a security agreement on the other hand, of terms defined differently in Revised Article 9. For purposes of financing statements, the terms are presumed to have their new defined meanings, *see id.* § 9-705 cmt. 6; for purposes of security agreements, the question is one of intent of the parties under the circumstances, which will probably mean that the old definitions remain applicable for pre-effective-date security agreements, *see id.* § 9-703 cmt. 3.

an initial financing statement, containing all the information that would be required for an initial financing statement under Revised Article 9 and, in addition, identifying the pre-effective-date financing statement to be continued.⁷ Such a filing continues the effectiveness of the pre-effective-date financing statement for the period applicable to an initial financing statement, as specified in Old section 9-403 if the continuation filing is made prior to the effective date of Revised Article 9 and for the period specified in section 9-515 if the continuation filing is made after the effective date.⁸ Note that an initial financing statement filed pursuant to section 9-706 need not be filed within the six-month period prior to scheduled lapse of the prior filing as would be required for a continuation statement.⁹

Section 9-707 (Persons Entitled to File Initial Financing Statement or Continuation Statement) confirms the authority of the secured party of record to authorize such a filing (or any other filing necessitated by the requirements of Part 7 in order to perfect or continue the perfection of a security interest), without further authorization from the debtor.¹⁰

Section 9-708 (Priority) deals with priority contests. The base line rule, stated in subsection (a), is that Revised Article 9 determines the priority of conflicting claims to collateral unless the relative priorities of the parties were established before its effective date. In the latter cases, Old Article 9 will determine priority. The following examples from the Official Comments illustrate the operation of this rule:

Example 1: In 1999, SP-1 obtains a security interest in a right to payment for goods sold ("account"). SP-1 fails to file a financing statement. [Revised Article 9] takes effect on July 1, 2001. Thereafter, on August 1, 2001, D creates a security interest in the same account in favor of SP-2, who files a financing statement. [Revised Article 9] determines the relative priorities of the claims. SP-2's security interest has priority under Section 9-322(a)(1).

Example 2: In 1999, SP-1 obtains a security interest in a right to payment for goods sold ("account"). SP-1 fails to file a financing statement. In 2000, D creates a security interest in the same account in favor of SP-2, who likewise fails to file a financing statement. [Revised Article 9] takes effect on July 1, 2001. Because the relative priorities of the security interests were established before the effective date of [Revised Article 9], [Old] Article 9 governs

7. *See id.* § 9-706(c).

8. *See id.* § 9-706(b).

9. *See id.* § 9-706 cmt. 1.

10. *See id.* § 9-707 cmt.

priority, and SP-1's security interest has priority under [Old] Section 9-312(5)(b).

Example 3: The facts are as in Example 2, except that, on August 1, 2001, SP-2 files a proper financing statement under [Revised Article 9]. Until August 1, 2001, the relative priorities of the security interests were established before the effective date of this Article, as in Example 2. However, by taking the affirmative step of filing a financing statement, SP-2 established anew the relative priority of the conflicting claims after the effective date. Thus, [Revised Article 9] determines priority. SP-2's security interest has priority under Section 9-322(a)(1).

As Example 3 illustrates, relative priorities that are "established" before the effective date do not necessarily remain unchanged following the effective date. Of course, unlike priority contests among unperfected security interests, some priorities are established permanently, e.g., the rights of a buyer of property who took free of a security interest under [Old] Article 9.

....

Example 4: In 1999, SP-1 obtains a security interest in a right to payment for lottery winnings (a "general intangible" as defined in [Old] Article 9 but an "account" as defined in [Revised Article 9]). SP-1's security interest is unperfected because its filed financing statement covers only "accounts." In 2000, D creates a security interest in the same right to payment in favor of SP-2, who files a financing statement covering "accounts and general intangibles." Before this [Revised Article 9] takes effect on July 1, 2001, SP-2's perfected security interest has priority over SP-1's unperfected security interest under [Old section] 9-312(5). Because the relative priorities of the security interests were established before the effective date of [Revised Article 9], [Old] Article 9 continues to govern priority after [Revised Article 9] takes effect. Thus, SP-2's priority is not adversely affected by [Revised Article 9's] having taken effect.

Note that were [Revised Article 9] to govern priority, SP-2 would become subordinated to SP-1 under Section 9-322(a)(1), even though nothing changes other than [Revised Article 9's] having taken effect. Under section 9-704, SP-1's security interest would become perfected; the financing statement covering "accounts" adequately covers the lottery winnings and complies with the other perfection requirements of [Revised Article 9], e.g., it is filed in the proper office.

Example 5: In 1999, SP-1 obtains a security interest in a right to payment for lottery winnings—a "general intangible" (as defined under [Old] Article 9). SP-1's security interest is unperfected because its filed financing statement covers only "accounts." In 2000, D creates a security interest in the same right to payment in favor of SP-2, who makes the same mistake and also files a financing statement covering only "accounts." Before [Revised

Article 9] takes effect on July 1, 2001, SP-1's unperfected security interest has priority over SP-2's unperfected security interest, because SP-1's security interest was the first to attach. See [Old] Section 9-312(5)(b). Because the relative priorities of the security interests were established before the effective date of [Revised Article 9], [Old] Article 9 continues to govern priority after [Revised Article 9] takes effect. Although Section 9-704 makes both security interests perfected for purposes of [Revised Article 9], both are unperfected under [Old] Article 9, which determines their relative priorities.¹¹

Section 9-708(b) provides a special priority rule for certain party contests that in accordance with subsection (a) are governed by Revised Article 9. Under subsection (b), the first-to-file-or-perfect rule of section 9-322(a) is modified in its application to a security interest that becomes enforceable under Revised Article 9 and is perfected by a pre-effective-date filing that is effective under Revised Article 9 but that would not have been effective under Old Article 9. For purposes of section 9-322(a), the priority of such a security interest dates from the effective date of Revised Article 9 rather than from the date of filing.¹² This rule, however, does not apply to two competing security interests each of which was perfected by such a filing. The following examples from the Official Comments illustrate the operation of subsection (b):

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

....

Example 7: In 1999, SP-1 obtains a security interest in D's existing and after-acquired instruments and files a financing statement covering "instruments." In 2000, D grants a security interest in its

11. *Id.* § 9-708 cmt. 1.

12. *See id.* § 9-708 cmt. 2.

existing and after-acquired instruments in favor of SP-2, who files a financing statement covering "instruments." After [Revised Article 9] takes effect on July 1, 2001, one of D's account debtors gives D a negotiable note to evidence its obligation to pay an overdue account. Under the first-to-file-or-perfect rule in Section 9-322(a), SP-1 would have priority in the instrument. Both filings are effective under [Revised Article 9], see Section 9-705(b), and SP-1's filing in 1999 was earlier than SP-2's in 2000. Subsection (b) does not change this result.¹³

II. POLICY CONSIDERATIONS

The most significant issues addressed in Part 7 relate to circumstances where steps sufficient to achieve perfection of a security interest under Old Article 9 or other prior law are not sufficient under Revised Article 9. The transition provisions reflect a policy that such changes should not unfairly defeat the rights of a secured party. This policy, however, is tempered by the need ultimately for all parties to be playing by the same set of rules—i.e., the uniform application of the requirements of Revised Article 9. The transition provisions strike a balance between these competing considerations.

Empirically, the change in perfection requirements under Revised Article 9 which will affect the most transactions is a change in the required filing jurisdiction. Revised Article 9 makes two significant changes in the rules which determine the appropriate filing jurisdiction. First, *all* filings are now to be made in the jurisdiction where the debtor is located.¹⁴ Under Old Article 9, filings as to goods (e.g., inventory and equipment) are to be made in the jurisdiction where the goods are located.¹⁵ Second, the location of a debtor which is a registered entity is the jurisdiction under whose law it is registered (e.g., Delaware for a Delaware corporation or limited liability company) rather than its principal place of business as under existing law.¹⁶ This will in many cases result in a new filing jurisdiction even for collateral which is currently perfected by filing in the jurisdiction where the debtor is located.¹⁷ While one could in theory have

13. *Id.*

14. *See id.* § 9-301(1). There are, of course, limited exceptions to this rule, most notably for fixture filings, security interests in timber to be cut, and security interests in as-extracted collateral. *See id.* § 9-301(3)-(4).

15. *See* U.C.C. § 9-103(1).

16. *Compare* R. § 9-307(e) with U.C.C. § 9-103(3)(d).

17. It is not clear how large a volume of transactions will be affected by this change. While no doubt a popular corporate domicile such as Delaware will see some increase in UCC filings

required new filings to have been completed not later than the effective date of Revised Article 9, that approach was rejected by the Drafting Committee. Instead, similar to the transition provisions adopted for the 1972 amendments to Article 9, pre-effective-date filings remain effective until their scheduled lapse date.¹⁸ This approach reflects a belief that the need to continue a financing statement is a natural occasion to require the secured party to consider whether filing in a different jurisdiction may be called for and will contribute to an orderly transition to the new filing regime. While this will mean a need to search in two or more jurisdictions during the transitional period, this is probably not a materially greater amount of searching than that routinely done under existing law. By virtue of clause (2) to section 9-705(c), this period is limited to a maximum of five years and would not be extended in those jurisdictions which provide for non-uniform periods of effectiveness longer than five years for initial financing statements. Furthermore, the transition provisions encourage early compliance with Revised Article 9 filing requirements by validating pre-effective-date filings in the new filing jurisdiction.¹⁹

In adopting the same policy as that reflected in the 1972 transition provisions, however, the Drafting Committee made one significant change. Despite the general rule that filings of record on the effective date of the 1972 amendments remained effective until their scheduled lapse date, this rule did not apply to collateral acquired by the debtor after the effective date of the statutory amendments.²⁰ As a result, secured parties relying on a floating pool of collateral such as accounts or inventory were as a practical matter required to refile immediately. Part 7 of Revised Article 9, however, applies the same rule to both existing and after-acquired collateral. As to after-acquired collateral, this result is mandated by section 9-705(c); as to existing collateral, this result is mandated by section 9-703(b), which in turn defers to section 9-705 to the extent applicable.

Beyond such changes in the applicable filing jurisdiction, Revised

under this rule, such limited empirical study as has been made suggests that the overwhelming majority of filings will continue to be made in the same jurisdiction as under Old Article 9. See Lynn M. LoPucki, *Why the Debtor's State of Incorporation Should Be the Proper Place for Article 9 Filing: A Systems Analysis*, 79 MINN. L. REV. 577, 581, 605-11 (1995).

18. See U.C.C. § 11-105(1) (1972).

19. See R. §§ 9-705(b), 9-706(b).

20. See U.C.C. § 11-105(2).

Article 9 imposes a requirement of filing in order to achieve perfection in a number of transactional contexts where there is no such requirement under existing law. In some cases, this results from the inclusion in the scope of Revised Article 9 of collateral previously excluded, notably commercial tort claims and certain medical insurance claims.²¹ In other cases, this results from the inclusion in Revised Article 9 of types of transactions previously not covered, including “true” consignments and sales of assets which are “general intangibles” under Old Article 9 but “accounts” under Revised Article 9.²² Finally, Revised Article 9 requires filing for agricultural liens.²³

The 1972 transition provisions generally allowed a three-year grandfathering period during which a secured party perfected without a UCC filing under prior law could file under the amended UCC and retain its priority.²⁴ The recently adopted Article 8 amendments, on the other hand, reduced the analogous grace period to four months.²⁵ The New York version of the recently adopted Article 8 amendments extended the grace period to twelve months.²⁶ Similarly, the transition provisions as enacted in New York, California, and a number of other leading commercial states in connection with the original adoption of the 1962 UCC incorporated an analogous one-year grace period, although interestingly the uniform law recommended at that time would have afforded a perpetual grace period for security arrangements perfected under pre-UCC law.²⁷

The new statute opts for a one-year grace period rather than a longer or shorter period. Particularly given the delay in the initial effectiveness of Revised Article 9, it does not appear that a longer grace period is necessary in order that secured parties have a reasonable opportunity to learn of the change in law. As discussed above in connection with the change in filing office, the same one-year grace period is made applicable to both existing and after-acquired collateral through the operation of sections 9-703 and 9-705. This same one-year grace period is similarly made applicable to various other changes in perfection requirements imposed by the

21. See R. § 9-109(d)(8), (12).

22. See *id.* § 9-109(a)(4). Compare *id.* § 9-102(a)(2) with U.C.C. § 9-106.

23. See R. §§ 9-109(a)(2), 9-310.

24. See U.C.C. § 11-106(1)-(2).

25. See U.C.C. § 8-603(b) (1994).

26. See N.Y. U.C.C. LAW § 8-601(c) (McKinney 1997).

27. See U.C.C. § 10-102(2) (1962).

Revised Article 9, including the necessity that possession by a bailee be accompanied by the bailee's acknowledgment that it holds on behalf of the secured party in order for the bailee's possession to result in perfection, as well as the requirement of perfection by control over deposit accounts, which is an incremental requirement in those states whose version of the UCC currently covers deposit accounts.²⁸ Finally, sections 9-703 and 9-704 adopt the same one-year grace period for compliance with new requirements for enforceability.

Beyond the grandfathering and grace periods described above, the transition provisions make Revised Article 9 fully effective on its effective date, reflecting the policy judgment that there was no need to further defer its application.

III. PRACTICE DURING THE TRANSITION

During the transition from existing law to Revised Article 9, which for practical purposes has already begun, parties will need to address perfection and priority issues under both Old Article 9 and Revised Article 9. As to Old Article 9, it will of course be necessary to continue to perfect security interests in accordance with existing law until the July 1, 2001 effective date of Revised Article 9. Furthermore, for a transitional period continuing until at least June 30, 2006, it will be necessary to conduct searches in filing jurisdictions determined under Old Article 9, since pre-July 1, 2001 filings in those jurisdictions will continue to be effective even without continuation under Revised Article 9.²⁹

Practice under Revised Article 9, conversely, will likely commence prior to July 1, 2001, and indeed the statute and Part 7 in particular have been crafted to encourage early compliance. Filings made in a Revised Article 9 filing jurisdiction will become effective upon the effectiveness of the new statute, even though the statute was not effective when the filing was made and, indeed, even though the statute may not have been enacted at the time of filing. Hence, because of the inherent efficiency, it will likely become common practice in connection with transactions entered into prior to July 1, 2001, for filings to be made in the Revised Article 9 filing jurisdiction simultaneously with the filings under Old Article 9. Note that the

28. See R. § 9-703(b).

29. See *id.* § 9-705 cmt. 4.

initial filing in the Revised Article 9 jurisdiction should be drafted as a continuation of the contemporaneous filing under Old Article 9 so as to preserve the priority associated with the filing date of the latter. To the extent the Revised Article 9 filing operates solely as an initial filing rather than as a continuation, its priority will generally date from the effectiveness of Revised Article 9 rather than from its date of filing in circumstances where priority is governed by Revised Article 9.³⁰

Revised Article 9 also encourages the continuation of pre-existing filings at an early time, and secured parties may wish to take advantage of this opportunity. Note, as highlighted in the comments, that it is possible for a single financing statement filed as a continuation statement under Revised Article 9 to continue a number of prior filings under Old Article 9 so long as the requisite data as to each of the filings to be continued are included.³¹ However, perfection by filing under Old Article 9 must not lapse prior to the effective date of Revised Article 9.³² One caveat here is that it would probably not be advisable to attempt an early continuation of an existing filing under Old Article 9 that is scheduled to lapse prior to the effectiveness of Revised Article 9. Since, under section 9-706, the continuation filing under Revised Article 9 must identify the most recent continuation of the Old Article 9 filing, it is at least arguable that the continuation to be identified must be the one that is most recent at the time of effectiveness of Revised Article 9 rather than at the time of the continuation filing under Revised Article 9. Under this interpretation, it would be impossible for a filing under Revised Article 9 to comply with the statute if that filing preceded the continuation statement required to be filed under Old Article 9.

The transition rules are drafted on the general assumption that Revised Article 9 will become effective in all relevant jurisdictions at the same time. If the history of prior Article 9 amendments is any indication, this assumption is unlikely to prove universally true. The

30. *See id.* § 9-708(b). It may be argued that, even when the filing under Revised Article 9 does not operate to continue the prior filing, the date of the prior filing should nonetheless be used for purposes of the first-to-file-or-perfect rule of section 9-322(a) when there has been no lapse of perfection. This argument, however, has been rejected in analogous circumstances under Old Article 9, *see In re Hilyard Drilling Co.*, 840 F.2d 596, 600-01 (8th Cir. 1988); *Bostwick-Braun Co. v. Owens*, 634 F. Supp. 839, 840 (E.D. Wis. 1986), and is not likely to prevail under Revised Article 9.

31. *See* R. § 9-706 cmt. 2.

32. *See id.* § 9-706 cmt. 1. While Revised Article 9 would upon its effectiveness make the filing effective as an initial financing statement, nothing in Revised Article 9 would cure the consequences of lapse so as to permit its priority to relate back. *See id.*

likely circumstance that at least some jurisdictions will continue to be governed by Old Article 9 for some period of time after July 1, 2001 creates a different kind of transition—one which is not addressed, and indeed could not be effectively addressed, in Revised Article 9.

Consider the following hypothetical: *D* is a corporation organized under the law of State *X* with its chief executive office located in State *Y*. The collateral is accounts. Litigation concerning perfection of the security interest is commenced in 2002. At that time, Revised Article 9 is in effect in State *X* but Old Article 9 is in effect in State *Y*. The applicable law governing perfection depends upon the selection of the forum state. If the forum is in State *Y* (or any other state in which Old Article 9 is in effect), then Former section 9-103(3) will make the law of State *Y* the law governing perfection with a consequent requirement to file in State *Y*. If, however, the forum is located in State *X* (or any other state in which Revised Article 9 is in effect), perfection will be governed by the law of State *X* with a consequent requirement for filing in that jurisdiction. The disparity in result obviously creates a potentially huge incentive for forum shopping so long as Old Article 9 remains in effect in any relevant jurisdiction.

The forum shopping risk is somewhat mitigated by the fact that Old section 9-103(3) refers one to the law, *including the conflict of laws rules*, of the designated jurisdiction. Hence, in a post-2001 environment in which Revised Article 9 is in effect in most jurisdictions, the choice of a forum state governed by Old Article 9 will change the result in our hypothetical only if the jurisdiction determined pursuant to Former section 9-103(3) is also governed by Old Article 9. To illustrate this point, assume that the respective versions of Article 9 in effect in State *X* and State *Y* were reversed, with Old Article 9 in effect in State *X* and Revised Article 9 in effect in State *Y*. In this case, the local law of State *X* governs perfection irrespective of the choice of forum. A Revised Article 9 forum will refer one directly to State *X* law; an Old Article 9 forum will refer one to State *Y* initially, whose conflict of laws rules (i.e., section 9-301 of Revised Article 9) will in turn refer to State *X*. If the collateral were inventory or equipment rather than accounts, however, this mitigating factor is not present, since Old section 9-103(1) does not contain the same reference to “conflict of laws rules” of the indicated jurisdiction. It is possible that such a gloss could be put on the statute by a court, particularly if in doing so it would avoid egregious forum shopping. Alternatively, section 1-105 may afford a court grounds for

declining to apply section 9-103 of the forum state so as to curtail forum shopping.³³

Note under the foregoing variation on our hypothetical, perfection would depend on a filing in State *X* which would not be effective under the law of State *X* considered in isolation, since it was not filed in the jurisdiction contemplated by Old Article 9. Furthermore, if the filing in State *X* were an initial financing statement filed as a continuation pursuant to section 9-706, questions could be raised as to the validity of or authorization for that filing since sections 9-706 and 9-707 are by hypothesis not in effect in State *X*. It is to be hoped, however, that a court, in the interests of uniformity and commercial certainty, would conclude that such filings were valid and effective.

The foregoing hypotheticals involving the appropriate filing jurisdiction at least admit of a practical solution for the secured party: file in both the Revised Article 9 and Old Article 9 filing jurisdictions. That solution, however, is probably not available for analogous issues involving collateral as to which one can perfect by filing a financing statement under Revised Article 9 but not under Old Article 9. This difference may result either from collateral included within the scope of Revised Article 9 but not Old Article 9 (e.g., commercial tort claims) or from collateral as to which one can perfect by filing under Revised Article 9 but not Old Article 9 (e.g., instruments). Consider the following hypothetical: *D* is a corporation organized under the law of State *X*. The collateral is a promissory note located at *D*'s office in State *Y*. Litigation concerning perfection of the security interest is commenced in 2002. At that time Revised Article 9 is in effect in State *X* but Old Article 9 is in effect in State *Y*. SP has filed a financing statement in State *X* to perfect its security interest. As with the hypothetical concerning accounts, the result turns on the choice of forum. A forum in State *X* will apply Revised Article 9 and conclude that the security interest is perfected. A forum in State *Y* will apply Old Article 9 reaching the opposite conclusion. Note that even if SP filed a financing statement in State *Y* as well as State *X*, it would not change the result under Old Article 9. Furthermore, if we reverse the versions of Article 9 in effect in States *X* and *Y*, SP loses in both forums. As with the analogous hypothetical above, State *X* law (Old

33. In such circumstances, the court might conclude that the forum state's UCC, including Old section 9-103, was inapplicable because the transaction did not bear an appropriate relation to the forum state. *Cf. id.* § 9-307 cmt. 3.

Article 9) governs perfection in either case; since the security interests cannot be perfected by filing under Old Article 9, it is unperfected unless SP has also perfected by possession.

The foregoing are only a few of the hypothetical conflicts which may arise between Revised Article 9 and Old Article 9, and indeed are among the simpler examples. As noted in the Official Comments, the potential complications from the coexistence of these bodies of law are “horrendous.”³⁴ This is in itself a compelling reason for state legislatures to enact Revised Article 9 before July 1, 2001. The adverse consequences of a lack of uniformity should outweigh any plausible perceived benefit of a rule of existing law as compared with Revised Article 9.

34. *Id.* § 9-701 cmt.

