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## FILING REQUIREMENTS UNDER THE MONTANA UNIFORM COMMERCIAL CODE

### I. INTRODUCTION

One of the main purposes of the Uniform Commercial Code<sup>1</sup> is to "simplify, clarify and modernize the law governing commercial transactions."<sup>2</sup> This purpose is well achieved in Article 9 of the UCC, which deals with secured transactions. To achieve the simplicity and clarity desired, the UCC adopted a complete new terminology and system for perfecting a security interest in personal property. Article 9 will introduce new words into lawyers legal vocabularies. Fine distinctions between chattel mortgages and conditional sales will no longer be of concern, and generally, in connection with security interests, the location of title will be immaterial.<sup>3</sup>

The fundamental purpose of any system that secures personal property is to confer upon a particular creditor a priority in certain property against the risk of insolvency and to provide a means of notifying third persons of that secured interest. The Uniform Commercial Code sets forth a non-complex system for obtaining these secured interests and for giving notice to third persons. On January 1, 1965, the effective date of the Montana Uniform Code,<sup>4</sup> this new system for obtaining priority on chattel security will confront Montana lawyers. The purpose of this paper is to summarize the changes in the filing requirements from the Montana law as it now exists to how it will exist under the new code.

In adopting the new terminology the UCC abolishes the distinctions between security instruments such as chattel mortgages, conditional sales contracts, trust receipts and factors' liens, between pairs of parties designated mortgagor and mortgagee, conditional vendor and conditional vendee, trustee and entruster, and substitutes a single set of terms of a "security agreement"<sup>5</sup> between a "debtor"<sup>6</sup> and a "secured party"<sup>7</sup> which contractually creates a "security interest"<sup>8</sup> in "collateral."<sup>9</sup> Where certain of these "security agreements" are themselves the subject of financing agreements, they are called "chattel paper."<sup>10</sup> The UCC recognizes for personal property the categories of "goods,"<sup>11</sup> "accounts receiv-

<sup>1</sup>Hereinafter the UNIFORM COMMERCIAL CODE is referred to, and cited as the U.C.C.

<sup>2</sup>U.C.C. § 1-102(2)(a).

<sup>3</sup>U.C.C. § 9-202.

<sup>4</sup>REVISED CODES OF MONTANA, 1947, § 87A-10-101. The Montana Uniform Commercial Code is designated Title 87A of the 1947 REVISED CODES OF MONTANA. This is merely a prefix added to the UNIFORM COMMERCIAL CODE standard numbering system. This system of numbering the Montana Code was adopted to facilitate comparison for research purposes with the official U.C.C. and with other states which have adopted the U.C.C. numbering system. Any discrepancy in numbering will be specifically noted. (Hereinafter REVISED CODES OF MONTANA will be cited R.C.M.)

<sup>5</sup>U.C.C. § 9-105(h).

<sup>6</sup>U.C.C. § 9-105(d).

<sup>7</sup>U.C.C. § 9-105(i).

<sup>8</sup>U.C.C. § 1-201(37).

<sup>9</sup>U.C.C. § 9-105(c).

<sup>10</sup>U.C.C. § 9-105(b).

<sup>11</sup>U.C.C. § 9-105(f).

able,"<sup>12</sup> "contract rights,"<sup>13</sup> "chattel paper,"<sup>14</sup> and a catch-all category of "general intangibles."<sup>15</sup> Under "goods" the UCC recognizes the categories of "consumer goods,"<sup>16</sup> "farm products,"<sup>17</sup> "inventory"<sup>18</sup> and a catch-all known as "equipment."<sup>19</sup>

The procedure for obtaining a secured interest in personal property under the UCC can be summarized in five steps: (1) The parties must reach an "agreement" that a security interest is to be created.<sup>20</sup> (2) The secured party must give "value", thus creating an obligation on the part of the one secured.<sup>21</sup> (3) The debtor must have, or later acquire, "rights in the collateral."<sup>22</sup> (4) The parties must satisfy the statute of frauds in order to make the security interest previously created "enforceable" against the debtor.<sup>23</sup> This can be done in two ways: (a) by the secured party taking possession of the collateral, or (b) the debtor signing a security agreement containing a description of the collateral. Also the security interest must be made in compliance with the existing local law.<sup>24</sup> (5) To perfect the secured interest against subsequent lien creditors, the parties must give or have given "public notice" of the security agreement.<sup>25</sup> Public notice is most commonly given through the filing in a public office of a "financing statement" which may, but need not, be a copy of the security agreement.<sup>26</sup> When the collateral is tangible, public notice can be given through physical possession of the collateral by or on behalf of the secured party.<sup>27</sup>

Each of the above steps deserve extensive discussion. However, the scope of this paper will be limited to a discussion of step 5.

## II. WHEN PUBLIC NOTICE IS REQUIRED

The general filing rule for the UCC is set out in section 9-302: "A financing statement must be filed to perfect all security interests. . . ."<sup>28</sup>

<sup>12</sup>U.C.C. § 9-106.

<sup>13</sup>*Ibid.*

<sup>14</sup>U.C.C. § 9-105(b).

<sup>15</sup>U.C.C. § 9-106.

<sup>16</sup>U.C.C. § 9-109(1).

<sup>17</sup>U.C.C. § 9-109(3).

<sup>18</sup>U.C.C. § 9-109(4).

<sup>19</sup>U.C.C. § 9-109(2). For an expanded discussion of the new U.C.C. terminology see Kripke, *The Modernization of Concepts Under Article 9 of the Uniform Commercial Code*, 15 BUS. LAW. 645 (1960).

<sup>20</sup>U.C.C. § 9-204(1).

<sup>21</sup>*Ibid.*

<sup>22</sup>*Ibid.*

<sup>23</sup>U.C.C. § 9-203.

<sup>24</sup>U.C.C. § 9-203(2).

<sup>25</sup>The U.C.C. does not specifically use this term but here it stands for either filing or taking possession. The methods of giving "public notice" are set out in U.C.C. § 9-302.

<sup>26</sup>The requirements of a financing statement are set out in U.C.C. § 9-402. For a discussion of the financing statement see part III of this article.

<sup>27</sup>U.C.C. §§ 9-304, 305.

<sup>28</sup>U.C.C. § 9-302(1).

The real problems in regard to UCC filing arise from the exceptions to the above stated general rule.<sup>29</sup>

#### a. MAJOR EXCEPTIONS

There are only two major situations where a security interest can be permanently perfected without giving public notice. The first, a purchase money security interest in farm equipment having a purchase price not in excess of \$2,500, can be perfected without giving public notice.<sup>30</sup> The second, a purchase money security interest in consumer goods, can be perfected without giving public notice.<sup>31</sup> However, a filing is specifically required under these sections for either fixtures or a motor vehicle required to be licensed.<sup>32</sup> To fully understand the two major non-filing exceptions it is necessary to understand the meaning of the terms used therein.

The term "purchase money security interest" is an important UCC concept. Section 9-107 defines it as follows:

A security interest is a "purchase money security interest" to the extent that it is

- (a) taken or retained by the seller of the collateral to secure all or part of its price; or
- (b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact used.

The quoted language excludes from the purchase money category any security interests taken as security for or in satisfaction of a prior claim or antecedent debt. The UCC's "purchase money security interest" in equipment and consumer goods replaces the conditional sales device and the purchase money chattel mortgage used prior to the UCC's adoption.

Since Montana's economy relies heavily upon its agricultural interests, a clear understanding of the term "farm equipment" is essential before a security interest can be properly filed without giving public notice. The meaning of the term "farm equipment" as used in section 9-302(1)(c) is controlled by two earlier sections. Section 9-109 says:

<sup>29</sup>There are six exceptions to the general rule in U.C.C. § 9-302(1)(a) - (f) plus four more exceptions in § 9-302(2) - (4).

<sup>30</sup>U.C.C. § 9-302(1)(c). Several states have questioned the utility of such provisions: see MASS. ANN. LAWS ch. 106, § 9-302(1)(c) (Spec. Supp. 1958); R.I. GEN. LAWS ANN. § 9-302(1)(c) (Spec. Supp. 1961); OHIO REV. CODE § 1309.21(A)(3) (Anderson 1953). All three of these states have reduced the \$2,500 exemption to \$500.

<sup>31</sup>U.C.C. § 9-302(1)(d). The large number of items encompassed by this definition and the absence of any monetary limit make this section very important. See the discussion of "consumer goods" in text accompanying note 33.

<sup>32</sup>U.C.C. § 9-313(1) does not define a "fixture". This section is subject to local variance since the U.C.C. leaves the determination of what goods are fixtures and when they become fixtures to the local law of each adopting state. The U.C.C. specifically excludes goods such as building materials which are incorporated into a structure from the operation of this section. When the chattels are automobiles or other equipment subject to title certificate laws, the U.C.C. incorporates the statutory form of public notice. Thus, §§ 9-302(3)(b) and -302(4) make R.C.M. 1947, tit. 53 the exclusive method of filing such titles.

Goods are. . . (2) "equipment" if they are used or bought for use primarily in business (including farming) or by a debtor who is a non-profit organization . . . or if the goods are not included in the definition of inventory, farm products, or consumer goods.

Section 9-105(1)(f), in turn, states:

"Goods" include all things which are moveable at the time the security interest attaches or which are fixtures, but does not include money, documents, instruments, accounts, chattel paper, general intangibles, contract rights and other things in action. "Goods" also include the unborn young of animals and growing crops.

As to the second exception, "goods" are "consumer goods" if they are used or bought primarily for personal, family, or household purposes.<sup>33</sup> Through this new concept of "consumer goods" the UCC has established a test by which it can distinguish between debtors that are business entities and those which are not. Thus, a farmer or businessman is classified differently than a nonbusiness consumer, and the collateral, in turn, is classified according to the character of the party using it. For instance, a truck may be "inventory" while in the hands of a manufacturer or dealer; it may be "equipment" when used in business; or it may be "consumer goods" if bought for individual or family use. The differences in the character of the debtors must be kept in mind when the exceptions to the UCC's general filing requirements are reviewed.<sup>34</sup> By classifying the collateral by the character of the debtor, the UCC further determines whether filing is required and, if so, where it is required.

Before a party uses these exceptions, he should be appraised of the fact that their use exposes his security to certain risks.<sup>35</sup> Due to the ease of filing, a party should generally file a financing statement covering the consumer goods or farm equipment, rather than risk losing his security.

#### b. MINOR EXCEPTIONS

Section 9-302(1)(a) excepts from filing a security interest perfected by delivering possession of the collateral either to the secured party or to one holding on his behalf. This exception covers both business and non-business entities.<sup>36</sup>

Another exception to the general filing rule arises when an "assignment of accounts or contract rights which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts or contract rights of the assignor."<sup>37</sup>

<sup>33</sup>U.C.C. § 9-109(1).

<sup>34</sup>For an excellent discussion of this see, Coogan, *Public Notice under the Uniform Commercial Code and Other Recent Chattel Security Laws, Including "Notice Filing"*, 47 IOWA L. REV. 289, 296 (1962).

<sup>35</sup>U.C.C. § 9-307(2).

<sup>36</sup>U.C.C. § 9-305.

<sup>37</sup>U.C.C. § 9-302(1)(e); U.C.C. § 9-106 defines "accounts" and "contract rights". U.C.C. § 9-302, comment 5. (Official Text 1962) discusses this distinction.

In three other situations public notice is temporarily excused. Section 9-304(4) and (5) permit certain types of transactions relating to secured interests in "instruments"<sup>38</sup> or "negotiable documents"<sup>39</sup> to be perfected without public notice for a period of twenty-one days. There is also a ten day perfection in "proceeds" under section 9-306(3)(b) without giving public notice. A similar provision in section 9-301(2) allows the holder of a purchase money security interest in collateral to file before or within ten days after the debtor gets possession of the collateral and this filing relates back to the time the security interest attached. It is important to remember that these sections do not excuse filing but merely allow its postponement for a specified period of time.

Thus, the general rule requiring a filing of a financing statement will cover the majority of situations. Only where the debtor is a non-business entity—a consumer, or a farmer purchasing low priced farm equipment—will the secured party be able to perfect a security interest without giving public notice. A business entity cannot avail itself of the non-filing exception for a purchase money security interest in "consumer goods" because such goods do not become "consumer goods" until they are purchased for personal, family or household purposes. The exception for lower priced farm equipment is similarly limited to farmers.

### III. WHAT TO FILE

To simplify the process of giving "public notice" the drafters of the UCC followed the system first used in the Uniform Trust Receipts Act of "notice filing" as contrasted to the traditional chattel mortgage type of filing. Notice filing is simpler and more rational than traditional filing systems because it only requires that a minimum of information be recorded. Also, one set of filing rules will replace at least four different schemes of pre-UCC chattel security filing.<sup>40</sup> The traditional requirements of unduly particularized descriptions<sup>41</sup> and other formalities such as acknowledgements or affidavits of good faith<sup>42</sup> will be eliminated.<sup>43</sup>

<sup>38</sup>U.C.C. § 9-105(1)(g).

<sup>39</sup>U.C.C. §§ 9-105(1)(e), 1-201(15).

<sup>40</sup>Montana has separate filing systems for the following categories of personal property:

Statutory Liens: R.C.M. 1947, tit. 45, ch. 11.

Chattel Mortgages: R.C.M. 1947, tit. 52, ch. 3.

Trust Receipts: R.C.M. 1947, tit. 65, ch. 2.

Conditional Sales: R.C.M. 1947, tit. 74, ch. 2.

All of these filing systems have been repealed, and chattel security agreements covering these chattels will be governed by the "notice filing" requirements of Article 9, Part 4 of the U.C.C.

<sup>41</sup>U.C.C. § 9-110 states: ". . . any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described."

<sup>42</sup>In *Reynolds v. Fitzpatrick*, 23 Mont. 52, 57 Pac. 452 (1899), a chattel mortgage was declared void for lack of the signature or seal of the officer before whom it was sworn.

<sup>43</sup>U.C.C. § 9-402, comment 3 (Official Text 1962) shows what is required under the U.C.C. and states: "This Section departs from the requirements of many chattel mortgage statutes that the instrument filed be acknowledged or witnessed or accompanied by affidavits of good faith. Those requirements do not seem to have been

Where filing is necessary for the perfection of a security interest, the secured party will file a "financing statement." The requisites of a financing statement are set out in section 9-402(1). It must be signed by both the secured party and the debtor, contain their addresses and a description of the collateral. The degree of particularity with which the collateral must be described in a financing statement has not been sufficiently litigated to establish any standards.<sup>44</sup> The UCC does require that the collateral be described by type or item. The explanation of this requirement is set out in the comment to section 9-110 which states:

The requirement of the description of collateral is evidentiary. The test of sufficiency of a description laid down by this Section is that the description do the job assigned to it—that it make possible the identification of the thing described.

Highly abbreviated descriptions should be avoided but a description is sufficient when it gives a third party notice to the extent that he can obtain the exact description from the debtor or secured party.<sup>45</sup> Courts in construing this requirement have followed the liberal intent of the section. Thus section 9-110 establishes a test of reasonableness based on the type of collateral required to be described.<sup>46</sup>

Contrary to the strict approach used in the chattel mortgage statutes, section 9-402(5) states that a financing statement substantially complying with the above requisites is effective even though it contains minor errors.

To avoid a complete break with the past and for some instances when it may be more convenient, the UCC allows the filing of the "security agreement" itself.<sup>47</sup> The security agreement is defined as "an agreement which creates or provides for a security interest."<sup>48</sup> It may be in the form of any of the older chattel mortgage or conditional sales agreements so long as it contains all the elements of a financing statement.<sup>49</sup>

There are a few variations on the requirements of a financing statement. If the financing statement covers crops or fixtures then it

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successful as a deterrent to fraud; their principal effect has been to penalize good faith mortgagees who have inadvertently failed to comply with the statutory niceties."

<sup>44</sup>The few cases decided on this question are cited in 2 ANDERSON'S UNIFORM COMMERCIAL CODE § 9-110 (1963).

<sup>45</sup>*In re Drane*, 202 F. Supp. 221 (D.C. Ky. 1962).

<sup>46</sup>The description of automobiles need no longer follow the exact, detailed "serial number" test used under the old chattel mortgage statutes. A description of the collateral as "passenger and commercial automobiles" was held sufficient in *Girard Trust Corn Exch. Bank v. Warren Lepley Ford Inc.*, 13 Pa. D. & C.2d 119 (1957) reported in DEL DUCA, COMMERCIAL CODE LITIGATION (1960). A description of goods as "inventory" rather than requiring a detailed enumeration of the items involved was held to be a sufficient description in *Thomas v. O. M. Scott Credit Corp.*, 10 Chester Co. 405 (Pa.) cited in 2 ANDERSON'S UNIFORM COMMERCIAL CODE 61 (Supp. 1963).

<sup>47</sup>U.C.C. § 9-402(1) says: "A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by both parties."

<sup>48</sup>U.C.C. § 9-105(1)(h).

<sup>49</sup>U.C.C. § 9-402(1).

must also contain a description of the real estate involved.<sup>50</sup> The signature of the debtor is not required if the financing statement shows that the collateral was brought into the state subject to a security interest already perfected under the laws of another state.<sup>51</sup> Neither is the signature of the debtor required if the financing statement describes a security interest in original collateral already perfected and covers only the "proceeds" of such collateral.<sup>52</sup> The reason for dispensing with the debtor's signature in the above instances is that the necessity for refileing arises from actions of the debtor which may have been unauthorized or fraudulent. The secured party should not be penalized for failure to make a timely refileing by reason of difficulty in procuring the signature of a reluctant or hostile debtor.

Probably the most important single change which the UCC makes is the provision which allows a financing statement to be filed before the security agreement is made or before the security interest otherwise attaches.<sup>53</sup> This provision simplifies both the substantive and procedural filing processes.

The drafters of the UCC anticipated that generally, it will be more desirable to file a financing statement than to file a copy of the security agreement itself. The two most prominent reasons for this are that (1) a financing statement does not disclose any details of the transaction. This makes it especially desirable from the standpoint of a debtor who does not want his financial condition disclosed, and (2) a financing statement need not contain a maturity date, therefore, it is effective for five years from the date of filing.<sup>54</sup> Notice filing is especially valuable in transactions involving inventory, accounts, and chattel paper since it obviates the necessity of refileing on each of a series of transactions in a continuing arrangement where the collateral changes from day to day.<sup>55</sup> The alternative procedure of filing a signed copy of the security agreement itself may be the best solution when other types of collateral are involved.

#### IV. CONTINUATION AND TERMINATION

##### a. CONTINUATION

A perfected security interest will lapse with the expiration of time and become unperfected. Provisions, therefore, are made in the UCC for the filing of continuation statements. Sections 9-403(2) and (3), respectively quoted below, are self-explanatory of the duration of a financing statement and the period in which a continuation statement may be filed:<sup>56</sup>

<sup>50</sup>*Ibid.*

<sup>51</sup>U.C.C. § 9-402(2)(a).

<sup>52</sup>U.C.C. § 9-402(2)(b).

<sup>53</sup>U.C.C. § 9-402(1). See part IV of this paper as to the effect of this provision on priority.

<sup>54</sup>U.C.C. § 9-403(2).

<sup>55</sup>U.C.C. § 9-402, comment 2 (Official Text 1962).

<sup>56</sup>For an excellent brief discussion of the U.C.C. filing technique see Silin, *Filing Re-*

A financing statement which states a maturity date of the obligation secured of five years or less is effective until such maturity date and thereafter for a period of sixty days. Any other filed financing statement is effective for a period of five years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of such sixty-day period after a stated maturity date or on the expiration of such five year period, as the case may be, unless a continuation statement is filed prior to the lapse. Upon such lapse the security interest becomes unperfected. A filed financing statement which states that the obligation secured is payable on demand is effective for five years from the date of filing.

A continuation statement may be filed by the secured party (i) within six months before and sixty days after a stated maturity date of five years or less, and (ii) otherwise within six months prior to the expiration of the five year period specified in subsection (2) . . . .

No limitation is set by the UCC as to the length of time which a financing statement may be continued.

#### b. TERMINATION

A perfected security interest may be terminated if there is no outstanding secured obligation and no commitment to make advances, incur obligations, or otherwise give value on the part of the secured party. The debtor may make a written demand on the secured party to remit a termination statement. The statement shows that the secured party no longer claims a security interest under the financing statement which is identified by file number.<sup>57</sup> Failure of the secured party to send a termination statement within ten days after proper demand makes the secured party liable to the debtor for one hundred dollars plus any losses caused the debtor by such failure.<sup>58</sup> Upon receipt of the termination statement the debtor presents it to the filing officer who notes the termination in the index. The filing officer then marks the financing statement "terminated" and sends it to the secured party.<sup>59</sup>

### V. RELEASE AND ASSIGNMENT

#### a. RELEASE

The UCC provides for the "release" of all or part of the collateral covered by a filed financing statement. The statement of release satisfies the requirements of section 9-406 if it contains the following items: (1) a description of the collateral being released; (2) names and addresses of the secured party and debtor; (3) file number of the financing statement; and (4) the signature of the secured party. There is no absolute requirement that the statement of release be filed when

<sup>57</sup>U.C.C. § 9-404(1).

<sup>58</sup>*Ibid.*

<sup>59</sup>U.C.C. § 9-404(2).

the collateral is released. Section 9-406, however, permits the filing of a release and notation of such in the margin of the index of the filing of the financing statement. This is permitted to make the record reflect the true state of affairs.

#### b. ASSIGNMENT

The UCC also provides for the assignment of security interests.<sup>60</sup> This may be shown on either the filed financing statement or on a separate statement of assignment. If this is done on the filed financing statement, merely adding the name and address of the assignee and a description of the collateral will suffice. The secured party signs and the assignee becomes the secured party of record. When a separate statement of assignment is used, it must be signed by the secured party of record and set forth the name of the secured party, the debtor, the file number, and the date of filing the financing statement; the name and address of the assignee, and a description of the collateral assigned.<sup>61</sup> After the disclosure or filing of an assignment, the assignee becomes the secured party of record.<sup>62</sup> The recording of an assignment is permissive, not mandatory. No filing of an assignment is required as a condition of continuing the perfected status of the security interest against creditors and transferees of the original debtor.<sup>63</sup> Recording the assignment keeps the record clear and gives notice to interested parties that the assignee is the proper party to seek information from.

### VI. WHEN TO FILE

The UCC does not establish a fixed time within which a filing must occur. Its approach is to make filing a matter of credit risk based on the idea that prompt filing will result from the secured party's desire to protect his unperfected interest. Filing thus becomes more than a mechanical process. The substantive rights of a secured party are determined in large measure by the relation between the UCC's filing and priority provisions.<sup>64</sup> For example, as between two security interests both perfected through filing, the UCC gives priority to the one perfected under the earlier filing, not to the interest which was first perfected.<sup>65</sup> Thus, the holder of an unperfected security interest may have his security defeated by an intervening lien creditor,<sup>66</sup> another secured party,<sup>67</sup> or a buyer without knowledge of the security interest.<sup>68</sup> Therefore, from a priority view point, the time of giving public notice becomes very crucial.

<sup>60</sup>U.C.C. § 9-405.

<sup>61</sup>U.C.C. § 9-405(2).

<sup>62</sup>U.C.C. § 9-405(3).

<sup>63</sup>U.C.C. § 9-302(2).

<sup>64</sup>The priority rules for the U.C.C. are contained in Article 9, section 3. See particularly section 9-312 which is the U.C.C.'s general priority provision for perfected security interests.

<sup>65</sup>This is the U.C.C.'s "first to file" rule set out in section 9-312(5)(a).

<sup>66</sup>However the relation-back period on purchase money security interests under section 9-301(2) would not be defeated within ten days.

<sup>67</sup>Under section 9-312(5)(a) a party with a later interest might prevail.

The best rule to follow is to file before the secured party gives value. By this method there can be no interval between the attachment and perfection of the security interest. Thus, there will never be a late filing. This system for obtaining maximum priority is made possible by the UCC's clear permission to file in advance of the creation of the security interest.<sup>69</sup> The permission to file before the creation of the security interest solves many of the problems posed by pre-UCC law.

## VII. WHERE TO FILE

Section 9-401 states the rules which govern the proper place to file in order to perfect a security interest: (1) On consumer goods, farm products and farm equipment, or accounts, contract rights or general intangibles arising from the sale of farm products, file in the office of the county clerk and recorder in the county of the debtor's residence, or if the debtor is not a resident of the state then in the office of the county clerk and recorder where the goods are kept.<sup>70</sup> Similarly, when the collateral is crops, file in the county where the land on which the crops are to be grown is located.<sup>71</sup> (2) If the collateral is or will become a fixture, file in the office where real estate mortgages would be filed.<sup>72</sup> (3) In all other cases, file in the office of the secretary of state.<sup>73</sup>

In order to determine where to file, it will be necessary to decide into which of the above categories the collateral falls. The choice of categories will not always be easy. Difficulties will arise with category number two, "goods which are to become fixtures." This language is not as clear as it seems because the UCC leaves the determination of what are fixtures to the local law of each adopting state.<sup>74</sup> This determination is, many times, a factual question which cannot be answered either way with certainty.

When a secured party has in good faith attempted to comply with the filing requirements but has not done so correctly, section 9-401(2) makes his filing effective in so far as it was proper, and also makes it good for all collateral covered by the financing statement against any person who has knowledge of the contents of the improperly filed statement.

Under section 9-401(3) a change of the debtor's residence, place of business, or location of collateral, whichever controlled the original filing, does not require a new filing. This section only applies after a proper filing has been made and only covers changes between local filing units within the state. When collateral is brought into Montana from another state, section 9-103 will determine whether a new filing is necessary.<sup>75</sup>

<sup>69</sup>U.C.C. § 9-301(1)(c) & (d).

<sup>70</sup>U.C.C. § 9-402(1) "A financing statement may be filed before a security agreement is made or a security interest otherwise attaches."

<sup>71</sup>U.C.C. § 9-401(1)(a).

<sup>72</sup>*Ibid.*

<sup>73</sup>U.C.C. § 9-401(b).

<sup>74</sup>U.C.C. § 9-401(c).

<sup>75</sup>U.C.C. § 9-313(1).

<sup>76</sup>U.C.C. § 9-401(4).

Section 9-401 does not attempt to resolve the controversy between the advocates of completely centralized filing and those of local filing. Instead, the section is drafted in a series of alternatives. Local considerations of policy determine the alternatives to be used. Montana and most of the states adopting the UCC chose both local and central filing depending on the nature of the chattel covered.

### VIII. THE RECORD

Filing statements are indexed according to the name of the debtor.<sup>76</sup> The filing officer marks each statement with a consecutive file number and with the date and hour of filing. He will also note in the index the file number of the statement and the address of the debtor.<sup>77</sup> When the security agreement itself is filed, it will usually be placed in an "over-size" file and reference to it will be noted in the index to financing statements. Thus, one index will replace at least three indexes used in Montana prior to the UCC.<sup>78</sup> This one index will simplify both recording and searching the record.

The file searcher is interested in learning whether any financing statements are on file under the debtor's name relating to the class of collateral in which the searcher is interested. The nature of the collateral will determine where the searcher will look. Thus, section 9-401(1) not only dictates where to file but also where to search. If the collateral is farm equipment or farm products, accounts, contract rights or general intangibles arising from the sale of farm products by a farmer, or consumer goods, then the office of the county clerk and recorder in the county of the debtors residence would be the proper place to search.<sup>79</sup> If the debtor is not a resident of the state then the search would be in the office of the county clerk and recorder in the county where the goods are kept.<sup>80</sup> If the collateral is crops, then the search would be in the office of the county clerk and recorder in the county where the land is found, on which the crops are to be grown.<sup>81</sup> When the collateral is goods which are to become fixtures, the searcher would look in the office where a mortgage on the real estate concerned would be filed.<sup>82</sup> In all other cases the searcher would look in the office of the secretary of state.<sup>83</sup>

When looking at the index of financing statements it is important to keep in mind the fact that the notice itself merely indicates that a secured party has an interest in the collateral described. The record does

<sup>76</sup>U.C.C. § 9-403(4).

<sup>77</sup>*Ibid.*

<sup>78</sup>R.C.M. 1947, § 16-2905 lists the indexes to be kept in Montana. The 1963 amendment of this section deleted provisions in paragraphs 3, 4, and 5 for indexes to be labelled "Mortgages of Personal Property" and "Releases of Mortgages of Personal Property-Mortgage"; and inserted paragraph 27 "Index to Financing Statements." These amendments will be effective January 1, 1965.

<sup>79</sup>U.C.C. § 9-401(1)(a).

<sup>80</sup>*Ibid.*

<sup>81</sup>*Ibid.*

<sup>82</sup>U.C.C. § 9-401(1)(b).

<sup>83</sup>U.C.C. § 9-401(1)(c).

not indicate whether the debtor has possession of the collateral, or whether he has already created a possessory security interest in the same collateral, nor will it disclose an interest perfected without either filing or possession under certain provisions in sections 9-302 and 9-304.<sup>84</sup> Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs. Section 9-208 provides a statutory procedure by which a secured party, at the debtor's request, may be required to make a disclosure. Failure of the secured party to reply within two weeks makes him liable for any loss suffered by the debtor.<sup>85</sup>

While this section may be completely satisfactory to the debtor, it leaves much to be desired from the stand-point of a prospective creditor. A later creditor who is extending credit to the debtor has no method of obtaining information directly from the secured party. The prospective creditor may have the debtor obtain the information for him. However, there may be instances when the debtor, due to his financial condition, would refuse to obtain such information. This places the prospective creditor in a very awkward position. The drafters of the UCC took the view that the secured party should not be under a duty to disclose the details of his business operations to competitors. This view allows convenience to overrule sound business judgment.<sup>86</sup> The problem could be solved by adding to section 9-208 a provision allowing prospective or subsequent creditors to obtain the required information directly from the secured party. However, the added provision should be strictly worded to exclude inquiries from intermeddlers and casual inquirers. As the section now stands, a prospective creditor is required to act at the risk of grave detriment to himself.

#### IX. POSSIBLE PROBLEMS AT THE EFFECTIVE DATE OF THE UCC IN MONTANA

For a short time after the UCC goes into effect in Montana one of the most frequently consulted sections will be section 10-102.<sup>87</sup> This section sets out the rule as to when the pre-UCC law ceases and the UCC law takes over. Section 10-102 reads:

Transactions validly entered into before the effective date . . . and the rights, duties and interests flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this act as though such repeal or amendment had not occurred.

<sup>84</sup>See notes 27 & 29 *supra* and accompanying text.

<sup>85</sup>U.C.C. § 9-208(2).

<sup>86</sup>There seems to be a conflict between subsections (2) and (3) of U.C.C. § 9-208. In subsection (2) the U.C.C. implies that a prospective creditor must obtain all credit information from the debtor, the only person who can obtain such information from the secured party. Yet, in subsection (3) the debtor can only obtain such information from the secured party once every six months without paying a fee to the secured party. Thus, if the debtor has three or more prospective creditors a year he must pay a penalty up to ten dollars to obtain credit information. See U.C.C. § 9-208, comment 2 (Official Text 1962).

<sup>87</sup>R.C.M. 1947, § 87A-10-102. just states subsection (2) of the Official Code; subsection (1) is in the nature of a compiler's note rather than a formal U.C.C. section.

The language of the quoted section seems quite clear when read with section 10-101 which states that the UCC applies to transactions entered into and events occurring after January 1, 1965, in Montana. Section 10-102 was designed to provide the transition from the old law to the UCC. However, problems will arise under this section because it is not sufficiently comprehensive. It attempts to solve in a single sentence the multitude of problems that will arise on the UCC's effective date. In a one-shot transaction like a chattel mortgage which is to be discharged voluntarily by the debtor's performance or involuntarily through realization on the collateral, it is clear that the pre-UCC law will govern. If, however a pre-UCC security agreement provides for a security interest to attach in the future when new property or a new debt is placed in the security agreement, a different problem arises.<sup>88</sup> A new UCC security interest arises when a new debt is created or new collateral is added to the security agreement. This would be a "transaction" under section 9-102 and once a "transaction" occurs a filing under the UCC will be necessary. Prudence would call for some kind of written agreement in which the parties acknowledge that they are now operating under the UCC. In the absence of such an agreement, the security interests created under one agreement but at different times might be governed by both the old and the new law. Thus a supplementary agreement explaining the transition would be advantageous to all of the parties.

The most difficult problems will arise when an instrument, filed under the old law, expires after the UCC effective date and the secured party wishes to refile. The question then becomes—which law controls the refile? The answer hinges on whether a refile, without more, is a "transaction" under the UCC. A mere refile would seem to be a continuation of the period of perfection of an already existing security interest. Thus it would not require a new filing under the UCC. However, the question still remains as to which law will control the refile process.

It could be argued that section 10-102 permits the continuation of all the old filing systems for chattel mortgages and the like.<sup>89</sup> This view is very undesirable because it would impose difficult tasks on those searching the records and would perpetuate the multifarious indexes and filing systems which the UCC attempts to do away with. In many cases, as a practical matter, refile under the old law may be impossible.<sup>90</sup> Thus, the intention of the legislature must have been that the new mechanics for refile should be substituted for the old. Then a refile

<sup>88</sup>This situation would arise under R.C.M. 1947, § 52-110. Under this section, title subsequently acquired by the mortgagor inures to the benefit of the mortgagee. This section applies to both real and personal property. See *Bank of Cal. v. McCoy*, 23 Cal. App. 2d 192, 72 P.2d 923 (1937) (after-acquired livestock); *Mason v. Citizens' Nat'l Trust & Savings Bank*, 71 F.2d 246 (9th Cir. 1934) (after-acquired personal property).

<sup>89</sup>The Kentucky Attorney General so construed section 10-102. See Auerbach & Goldston, *Variations in the Ohio Enactment of the Uniform Commercial Code*, 14 W. RES. L. REV. 22, 49 (1962) and Ops. KY. ATTY. GEN. § 60-609 (July 13, 1960) cited therein.

<sup>90</sup>With the amendment to R.C.M. 1947, § 16-2905, there will not be any of the old indexes in which to record such a continuation statement. See note 73 *supra*.

in the place designated by the UCC would continue the perfection of the old security interest. This interpretation gives full effect to section 10-102 as the true UCC transition section.

Some states have attempted to spell out the transition by adding provisions to section 10-102.<sup>91</sup> These supplemental provisions have met with mixed success.<sup>92</sup>

The answer to the problem posed by section 10-102 lies in the enactment of detailed provisions which will allow security interests filed before the UCC effective date to be continued after that date through the use of the simplified UCC provisions.<sup>93</sup> New York has effected the transition in a well organized statutory solution which provides: (1) liens filed under a former law which required refiling lapse at the date such refiling is due; (2) liens filed under a former law which required no refiling lapse twelve months after the effective date of the Uniform Commercial Code; and (3) liens good under a former law without any filing lapse twelve months after the effective date of the Uniform Commercial Code; unless, in each case, a continuation statement is filed by the secured party within twelve months before the perfection of the security interest would otherwise lapse.<sup>94</sup>

By thus eliminating the old filing systems and at the same time stating with precision when, where, and what to do under the new system, New York has established a pattern which Montana should follow, preferably after the Permanent Editorial Board has adopted the solution or some variant of it as part of the Official Text.

## X. CONCLUSION

The whole aim of Article 9 of the Uniform Commercial Code is to recognize that personal property security transactions are a well established part of American economic life and should be made as simple, effective, fair and uniform as possible. With these aims in mind the drafters of the UCC adopted the system of "notice filing" for personal property security transactions. If this new method of filing is intelligently used, the UCC will make a great contribution toward achieving these aims. Wholesale and unintelligent exploitation of the full liberties to use the briefest possible form of filing permitted under the UCC may create priority problems which did not exist under the older chattel security laws. These problems can only arise if the choice of filing methods is conceived as a mechanical problem of keeping down the "paper work". The problems can be avoided by a general understanding of the substantive effects that follow from the new method of filing. A working knowledge of Article 9 of the Uniform Commercial Code will show that it is a vast improvement over the older chattel security laws.

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<sup>91</sup>These states include California, Connecticut, Ohio, New Jersey, and New York.

<sup>92</sup>The Ohio variation due to its brevity was unsuccessful. See the excellent discussion of the Ohio variation and its weakness in Auerbach & Goldston, *Variations in the Ohio Enactment of the Uniform Commercial Code*, 14 W. RES. L. REV. 22, 48-55 (1962).

<sup>93</sup>U.C.C. § 9-403(3).

<sup>94</sup>N.Y. UNIFORM COMMERCIAL CODE § 10-102(2).

