Fixtures: A Commentary on the Officially Proposed Changes in Article 9

Ray D. Henson

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr
Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol52/iss2/1
FIXTURES: A COMMENTARY ON THE OFFICIALLY PROPOSED CHANGES IN ARTICLE 9

RAY D. HENSON*

In years past, the National Conference of Commissioners on Uniform State Laws promulgated various uniform acts, many of which were widely enacted, and simply left them on their own. There was no attempt to keep them up to date, nor was there any concerted effort to keep them uniform. In a simpler age this was presumably satisfactory. It no longer is, at least in the field of commercial law.

The Uniform Commercial Code was a joint product of the Commissioners and the American Law Institute,¹ and these two groups established a Permanent Editorial Board for the Code in 1961.² For some time the Board functioned through three subcommittees, each of which was concerned with assigned articles of the Code.³ Basically the Board considered and approved or disapproved various non-uniform amendments made by the various states,⁴ and attempted to keep the Code uniform. After the Code had been passed in every state except Louisiana, the Board decided in late 1966 to create an Article 9 Review Committee⁵ which could consider various criticisms of and changes in

---


³ Subcommittee No. 1 considered Articles 1, 2, 6 and 7; Subcommittee No. 2 considered Articles 3, 4, 5 and 8; Subcommittee No. 3 considered Article 9. PEB Report No. 1 at 8-9 (1962).

⁴ See PEB Report No. 2 (1964), in which approximately 300 pages are devoted to rejecting non-uniform variations, and PEB Report No. 3 (1967), in which some non-uniform amendments are approved but many are rejected.

⁵ See PEB Report No. 3 at x-xii (1967). Professor Robert Braucher of Harvard Law School is Reporter for the Review Committee; Professor Homer Kripke of New York University Law School is Associate Reporter; and Professor Soia Mentschikoff of the University of Chicago Law School is Associate Reporter ex officio. Members of the Review Committee are: Herbert Wechsler, Chairman, New York City; Joe C. Barrett, Jonesboro, Arkansas; Carl W. Funk, Philadelphia; The Honorable John S. Hastings, Chicago; Robert Haydock, Jr., Boston; Ray D. Henson, Chicago; Harold Marsh, Jr., Los Angeles; William Curtis Pierce, New York City; Millard H. Ruud, Austin, Texas; The Honorable Sterry R. Watterman, St. Johnsbury, Vermont.

---

* Member of the Illinois Bar, Chairman-Elect, Section of Corporation, Banking and Business Law, American Bar Association. The author is a member of the Article 9 Review Committee whose first report is discussed in this paper, but these comments are offered in a private and unofficial capacity.
Article 9. This Committee has now issued its Preliminary Draft No. 16 dealing with fixtures. This Draft is made public for purposes of review and criticism by the bar; it is not proposed for adoption by any state at this time.

I

The enactment of the Uniform Commercial Code brought about a renaissance of learning in the field of fixture law. It was the enactment of the Code, not its drafting or promulgation, which had this effect. This meant that lawyers learned old-fashioned fixture law at precisely the time when its importance reached its nadir. However, since fixture law was, generally speaking, purely common law in most of the United States, the Code's enactment provided an opportunity for endless discussions and often heated arguments which everyone or anyone could win since no one could provide definitive answers for some of the most elementary questions. That is, of course, a commentary on how important the problems were in fact. Be that as it may, fixtures exist. Quite often their acquisition must be financed on a purchase money basis. There should be some simple answers to common, everyday problems, or what are at least conceivable problems regardless of frequency of appearance in litigation or in fact.

It has often been said that the Code's fixture provisions will not be tested until we have another depression of 1930's dimensions. There may be something in that point of view. Nevertheless, the average number of nonfarm mortgage foreclosures per year during the period 1930-34 was 215,000; during 1935-39, 156,857; and during 1940-44, 43,709;7 while comparable figures for 1965 show 116,664 foreclosures and for 1966, 117,473.8 In 1945, total mortgage debt on one to four family dwellings was $18.6 billion; the figure rose steadily to $223.7 billion in 1966.9 The average construction cost of a private non-farm home was $8,675 in 1950 and $17,400 in 1967.10 It seems clear that if the current number of home mortgage foreclosures is not up to the 1930's level, it is still shockingly high, and in dollar amount is far in excess of any conceivable figures for the 1930's. Yet fixture litigation is rather sparse, especially in the home field.

One of the commonest criticisms of the 1962 Code was that it did

---

Consultants to the Review Committee are: Peter F. Coogan, Boston, and Professor Grant Gilmore of the University of Chicago Law School. See also Braucher, Report on the Work of the Article 9 Review Committee, 23 Bus. Law 890 (1968).


8 Savings and Loan Fact Book at 46 (1968).

9 Id. at 32.

10 Id. at 27.
not define the term "fixture."\(^{11}\) It simply said that its special fixture priority rules did not apply to "goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work and the like,"\(^{12}\) and further: "The law of this state other than this Act determines whether and when other goods become fixtures."\(^{13}\) The Code was concerned only with chattels which had lost their discrete quality but which could in appropriate circumstances become ordinary chattels once again. (There was no attempt to interfere with real estate transactions, and fixtures could continue to be mortgaged as part of the real estate.\(^{14}\) ) Aside from local vagaries in just what goods were separately financible as fixtures, there were states where the word "fixture" had a special meaning: goods were fixtures if they were attached to real estate in such a way that they were not considered to be removable,\(^{15}\) which is the opposite of the usual American usage of the term. The law of fixtures has been exceedingly varied and complicated and vague, and it was an audacious act to attempt a uniform treatment of the field—and to achieve a treatment which, despite gaps and criticisms, has worked remarkably well.

The 1968 Proposals,\(^{16}\) in the matter of definitions and otherwise, are extremely complicated, in my opinion. This may turn out to be unavoidable, in the interest of ultimate clarity and certainty, or it may not. Simplifications may turn out to be possible and desirable in the wake of criticism the drafts will provoke, and of course criticism is invited.

Where the 1962 Code did not make any attempt to define "fixture," the 1968 Proposals contain a definition for the purposes of section 9-313 which, in its generality, is in line with other definitions in Article 9. Basically goods are fixtures when, under other law, they would pass, without specific mention, as part of the real estate under a conveyance or mortgage of the real estate. This generality requires exceptions, or else everything attached to land would be a fixture, and the entire definition reads:


\(^{12}\) § 9-313(1). All references not otherwise identified are to the 1962 Official Text of the Uniform Commercial Code, except for certain references to §§ 60, 67, and 70 of the Bankruptcy Act.

\(^{13}\) § 9-313(1).

\(^{14}\) §§ 9-313(1), 9-501(4).

\(^{15}\) Perhaps the leading case supporting this view is Teaff v. Hewitt, 1 Ohio St. 511 (1853).

\(^{16}\) References to statutory changes proposed in Preliminary Draft No. 1 will be identified as the 1968 Proposals or as Proposed § 9-313 in Appendix, *infra.*
Goods are "fixtures" when they are so related to particular real estate that under the law of this state other than this Act an interest in goods would pass as part of the real estate under a conveyance or mortgage thereof without specific mention of the goods except as stated in this paragraph. Where ordinary building materials are incorporated in an improvement upon land, which improvement is itself not a fixture, the materials are real estate and not a fixture. An improvement upon land is not a fixture unless it is readily removable from the land. Readily removable factory and office machines and readily removable replacements of domestic appliances are not fixtures. Where the debtor is a tenant, goods which he has a right to remove are not fixtures but are personal property. Standing timber and growing crops and oil and minerals before severance are not fixtures.

The term "ordinary building materials" is defined to include "lumber, millwork, brick, tile, siding, roofing, cement, glass, wiring, piping and structural members, other than readily removable items of special value such as ornamental metal work, ornamental mantels, and carved paneling," and there can be no security interest in them after they are incorporated into a structure unless the structure is itself a fixture. Here the word "structure" is used rather than "improvement," although the referent is apparently the same.

As definitions go, the definition of a fixture is acceptable. Admittedly the referent of 'fixture" will not be obvious in every case, but it never has been and the ambiguity inherent in the concept insures that it never will be. The Proposal continues the necessary exclusion of goods integrally incorporated into a "structure," or an "improvement," as the case may be. The term "improvement," has a wide range of possible referents in real estate law and may, to those imbued with old learning, seem a trifle infelicitous, but it may be sufficiently restricted in possible application as not to be troublesome. Try figuring out what a fence is, as a test. A fence would surely pass under a real estate conveyance without specific mention, and yet is it a fixture or is it real estate? A fence, apart from its posts, may be made of "ordinary building materials" and in many instances will be readily removable, and it is certainly an "improvement," although doubtfully a "structure." So long as it is not erected by a tenant who has a right to remove it, an ordinary fence which can be readily removed probably

---

17 Proposed § 9-313(1) (b) (i).
18 Proposed § 9-313(1) (b) (ii).
19 Proposed § 9-313(1) (b) (i).
20 In varying circumstances, the following have been held to be "improvements": boilers, blowers, and light fixtures. Campbell v. Pollack, 221 A.2d 615 (R. I. 1966); cement block service building. E & E Elec. Co. v. Gold Coast 72nd St. Diner, Inc., 116 So. 2d 660 (Fla. App. 1959); summer fallowing. Leinweber v. Leinweber, 385 P.2d 556 (Wash. 1963); native pecan trees and pond. Cities Service Gas Co. v. Christian, 340 P.2d 929 (Okla. 1959).
is a fixture and one which cannot be readily removed may not be. There are visual differences between a brick or stone fence (which might be called a wall) and one made of California redwood nailed to posts or an antique fence of ornamental metal. There need be no legal difference between them, if the components are sold on time and the seller wishes to remove them on default, unless we wish to make one, and we apparently have made one, although the economics of removal might have caused the same result in most cases.

II

The basic scheme of the 1962 Code's fixture provisions was to give priority to a purchase money financer of a fixture in a contest between the financer and the holder of an interest in real estate whose interest in the fixture was normally derivative. No filing—only attachment—was required for priority over existing real estate interests, which merely continued the old situation in those states where no filing was required in conditional sale transactions. Filing was required for priority over designated, subsequently acquired interests. In most situations these rules undoubtedly worked adequately. But, of course, the purchase money priority was, so to speak, absolute. It was available to a seller as against real estate interests even though the buyer was not even in the chain of title. This supposedly presented the title companies with a problem, even if it was not as new a problem as they may have thought, and in a number of states amendments were made to the Code requiring that the name of the record owner be shown on a fixture filing. Of more importance, theoretically at least, was the plight of the home owner who purchased his new home only to learn that a fixture supplier had reserved a good security interest when the bath tubs were sold to the contractor. Moreover, some filing officers refused to file fixture financing statements in the real estate records because they felt the language of the Code did not absolutely compel it.

21 § 9-313(2). See House v. Long, 244 Ark. 718, 426 S.W.2d 814 (1968); In re Royer's Bakery, Inc., 58 Lanc. L. Rev. 405 (E. D. Pa. 1963) (in bankruptcy). The term "attachment" will probably be dropped from the Code in the future but the concept, which is ingrained, will not, nor should it be.


23 § 9-313(4).

24 See, e.g., Wis. STAT. ANN. §§ 409.402(1), (3) (1964).

25 Apparently some country recorders construed the requirement of § 9-401(1) that a financing statement covering fixtures be filed "in the office where a mortgage on the real estate concerned would be filed or recorded" to be met if the filing were literally in the same office (perhaps in a convenient shoe box) but not in the same file. This kind of situation has been much commented on, but it is really a trivial variation in the kind of circumstances where it would occur, i.e., rural communities. So long as the person searching the files is aware of the convention, it is simply a matter of looking in two places rather than one and the inconvenience is minimal. Cf. Op. Atty. Gen. Iowa 4 U.C.C. REP. SERV. 125 (1967).
The 1968 Proposals introduce a new term "fixture filing," which means simply a financing statement covering fixtures which the filing officer is required to handle as if it were a real estate mortgage and which, when timely filed, gives priority over real estate interests. If the fixture financer is not concerned with real estate interests, he can make a simple, regular chattel filing, if any filing is needed for perfection, which will be good against any other third parties. Gone, however, is the concept of priority over existing real estate interests by attachment alone. "Real estate interest" is also a newly defined term, meaning, as one would suppose, an interest in goods, including fixtures, "held solely by virtue of an interest in real estate." In a contest between a purchase money security interest and a real estate interest (other than a construction mortgage), the security interest will win if the debtor has an interest of record in the real estate and there has been a fixture filing before or within ten days after the goods became a fixture. In the case of a construction mortgage where the mortgagee is financing the cost of the fixture and the mortgage is of record before the goods are affixed, the mortgagee will prevail over the security interest and if the construction mortgage is refinanced by a permanent lender, the priority goes along with the refinancing as long as the record indicates this fact of refinancing.

These provisions eradicate the problem in the 1962 Code where a fixture financer could come ahead of real estate interests even though the fixture debtor was not in the chain of title. They do not go so far as some real estate lenders would like, however. It appears that some mortgagees want every fixture attached to a building during the life of the mortgage to feed the mortgage. There may be nothing wrong in wanting this, but there would be a great deal wrong if it were allowed. This would, realistically, prevent most mortgagors from keeping their property in good condition through replacements of worn-out fixtures such as furnaces, since no one pays cash for anything anymore and most sellers of fixtures probably want some right, even if they never exercise it, to remove on default. This right has long existed in some states, whether or not it was exercised by conditional sellers and

---

26 Proposed § 9-313(1) (b) (v).
27 Proposed § 9-403 (7).
28 Proposed § 9-302 (1) (c), (d).
29 § 9-313 (2).
30 Proposed § 9-313 (1) (b) (iii).
31 Proposed § 9-313 (5) (b).
32 Ibid.
33 Ibid.; Proposed § 9-313 (1) (b) (iv).
whether or not mortgagees were aware of its existence.\(^{35}\) The exercise of the right is normally dependent on the economics of removal, aside from the possible "spite" case. When, as normally happens, the fixture seller is paid, the fixture will feed the mortgage, but in the meantime the mortgagees need to be restrained in their own (perhaps unrecognized) best interest.

III

In order to see how results under the 1968 Proposals differ, if they do, from the 1962 Code, some ordinary fact situations will be hypothesized and briefly analyzed.

1. A buys a new furnace, which we will assume becomes a fixture upon installation, from X Furnace Co. The purchase contract is a conditional sales contract which complies with local state law.\(^{36}\) X Furnace Co. installs this replacement furnace in A's home.

(a) No financing statement is filed.

(b) A fixture filing is made 15 days after the contract is signed and 9 days after the furnace is installed.

There is a mortgage on A's home. This mortgage was made 12 years ago to finance the construction of the home, and the mortgage covers "fixtures" and their replacements. The mortgagee makes no advances after the furnace is installed. A defaults in the mortgage and on the conditional sale contract. As between the mortgagee and X, who has priority?

Under the 1962 Code, it is clear that X has priority whether (a) or (b) is the case. The 1962 Code provides for priority of the purchase money security interest over existing real estate interests, such as this mortgage, without any filing for perfection but on the mere attachment of the security interest.\(^{37}\) For a third party to come ahead of such an

\(^{35}\) See, e.g., Nat'l. Bank of the Republic v. Wells-Jackson Corp., 358 Ill. 356, 193 N.E. 215 (1934), where the court said: "The general rule . . . [is] that where the parties to a contract of sale of personal property in which title is reserved in the vendor to the chattel sold, agree that by the annexation of such personal property to the real estate the chattel shall not lose its character of personal property, such contract is enforceable between the parties thereto and also against a purchaser or a prior mortgagee, or those occupying similar positions, where the chattel can be removed without material injury to the freehold or the usefulness of the chattel." Id. at 364, 193 N.E. at 219. See also Holt v. Henley, 232 U.S. 637 (1914); American Laundry Machinery Co. v. Miners Trust Co., 307 Pa. 395, 161 A. 306 (1932); Grupp v. Margolis, 153 Cal. App. 2d. 500, 314 P.2d 829 (1957).

\(^{36}\) While Article 9 will govern security aspects of the transaction some of the terms of the contract of sale may well be specified in a retail installment sales act, and in the event of a conflict between Article 9 and such act, the act will govern. § 9-203(2). Compare Uniform Consumer Credit Code, Revised Final Draft, § 1.103 (November, 1968). See, e.g., the Illinois Retail Installment Sales Act, where the term "goods" is defined to include "goods which are furnished or used, at the time of sale or subsequently, in the modernization, rehabilitation, repair, alteration, improvement, or construction of real estate so as to become a part of that real estate whether or not severable therefrom." Ill. Rev. Stat. ch. 121 1/2, § 502.1 (1967).

\(^{37}\) § 9-313(2).
interest, the third party must, without knowledge of the security interest and before its perfection, be a subsequent purchaser for value of an interest in the real estate, or a creditor with a lien on the real estate subsequently obtained by judicial proceedings, or a mortgagee who has made subsequent advances.38 (The 1962 Code speaks of "a creditor with a prior encumbrance of record on the real estate"39 but such a person would probably be a mortgagee in the usual terminology, and "encumbrance" is a defined term in the 1968 Proposals so its usage must be carefully controlled.) No one of the exceptions meets the facts of our hypothetical.

While there is a dearth of pre-Code cases on the point,41 the 1962 Code's resolution of this problem is probably in line with what would have happened in states like Illinois where the validity of conditional sales was recognized but no recording or filing was required as a condition precedent to enforceability.42 There is no reason why non-reliance third party creditors should get a wind-fall at the expense of purchase money financer of fixtures, regardless of filing.

The priority problem is somewhat differently resolved, however, under the 1968 Proposals. Proposed section 9-313(5) (b)43 will give our purchase money fixture financer priority over the real estate mortgagee if a “fixture filing” is made “before the goods become a fixture or within ten days thereafter,” but if no filing is made within this period, the mortgagee will prevail. This harmonizes with the present priority rule of section 9-312(4) dealing with collateral other than inventory.

Proposed section 9-302(1)(d)44 establishes a new rule of automatic perfection of security interests in consumer goods (and in Proposed section 9-302(1)(c) for lower-priced farm equipment) which become fixtures, but in determining priority between that kind of security interest and a conflicting “real estate interest,” filing is required for priority of the former.45 In the absence of filing, the security interest is perfectly good against the rest of the world. (The rule of Proposed section 9-313(5)(b) relates solely to priority and does not affect perfection.) If the consumer were to remove a fixture and sell it to a

---

38 §§ 9-313(4).
39 Ibid.
40 Proposed §§ 9-105(1)(f) : "'Encumbrance' includes real estate mortgages and other liens on real estate."
43 See note 16 supra.
44 (1) A financing statement must be filed to perfect all security interests except the following:
   (d) a purchase money security interest in consumer goods; but filing is required [for a fixture under section 9-313] for a motor vehicle required to be licensed and fixture filing is required for priority over a conflicting real estate interest in a fixture as provided in section 9-313.
[Deleted material is shown in brackets and new material is in italics.]
45 Proposed §§ 9-313(5).
fellow consumer, the purchaser would presumably, under the 1962 Code, take his interest subject to the interest of the fixture secured party if filed; otherwise he would take free of it.\textsuperscript{46} This is apparently thought to be the rule of the 1962 Code\textsuperscript{47} but on the basis of the present wording of the subsection, this result is not crystal clear.

Section 9-307(2) states:

In the case of consumer goods and in the case of farm equipment having an original purchase price not in excess of $2500 (other than fixtures, see Section 9-313), a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes or his own farming operations unless prior to the purchase the secured party has filed a financing statement covering such goods.

The parenthetical expression is apparently intended to remove fixtures from the operation of the subsection, but, if so, the reference to section 9-313 is not apt because that section determines priorities between fixture financers and real estate interests, not those between fixture financers and consumer buyers. If this possible conflict is not governed by this provision, then it presumably falls within section 9-301(1)(c) which subordinates an unperfected security interest in goods (which term includes fixtures)\textsuperscript{48} to the rights of a good faith buyer not in ordinary course of business who gives value and takes possession before "perfection." Since we now have a proposed new rule of automatic perfection which is applicable here, no consumer buyer could, presumably, take free of even an unfiled security interest in goods which had been fixtures prior to their removal.\textsuperscript{49} It should perhaps be pointed out that the consumer buyer in section 9-307(2) takes free of a security interest in the specified circumstances without the restriction in section 9-307(1) that the security interest be created "by his seller."\textsuperscript{50}

If the consumer buyer were to buy the fixture by a bill of sale, in connection with a purchase of the real estate, he would have priority over an unfiled fixture security interest under section 9-313(4)(a) of the 1962 Code. This should continue to be true under Proposed section 9-313(5) which grants priority to a "real estate interest in a fixture" over a conflicting security interest except in cases not here relevant.

\textsuperscript{46} §§ 9-307(2), 9-301(1)(c).

\textsuperscript{47} See Comment 3 to § 9-307 in the 1962 Official Text.

\textsuperscript{48} §§ 9-105(1)(f).

\textsuperscript{49} This problem is not resolved by Proposed § 9-313(4) which provides: "Any security interest in goods which are not fixtures under this section (other than goods wrongfully removed from real estate) has priority over any real estate interest in the goods."

\textsuperscript{50} A particularly interesting discussion of these matters may be found in Vernon, Priorities, The Uniform Commercial Code and Consumer Financing, 4 B. C. Ind. & Com. L. Rev. 531 (1963). See Everett Nat'l Bank v. Deschuteneer, 244 A.2d 196 (N.H. 1968).
This result requires interpreting the definition of "real estate" factually rather than, perhaps, literally, since this interest must be held "solely by virtue of an interest in the real estate." There would be a slight difficulty with this terminology if the interest in the fixtures purportedly were passed by a bill of sale where in fact goods are defined to be fixtures only where an "interest" in them would pass as part of the real estate under a conveyance or mortgage without specific mention of them.\footnote{Proposed § 9-313(1) (b) (i).} (This is, of course, nit-picking, but it is exactly the kind of criticism substantially every line of the Code has had at one time or another.) "Readily removable replacements of domestic appliances"—an undefined class of goods—are not fixtures,\footnote{Ibid.} however, so whatever they are, we are not discussing them here.

2. C Development Co. owns a tract of land which is mortgaged to X Bank. The Bank has agreed to finance the construction of a new office building, making construction advances as the work progresses. When the construction has been completed, Y Insurance Co. has committed itself to make a permanent mortgage. H Construction Co., as the contractor, has subcontracted with J Plumbing Fixtures, Inc. to supply the plumbing fixtures, with K Lumber Co. to supply cement and lumber for the building construction, and with L Wood Co. to supply both ordinary wall paneling and some antique wall paneling for offices of differing quality.

Without making dire assumptions of developments, how are some potential problems resolved?

Under the 1962 Code, the suppliers could apparently retain purchase money security interests good against both the construction and permanent mortgagees\footnote{"A security interest which attaches to goods before they become fixtures takes priority as to the goods over the claims of all persons who have an interest in the real estate. . . ." § 9-313(2) (emphasis added). An appealing alternative theory leading to a different result has been proposed by Fairfax Leary, Jr., Esq., of the Philadelphia Bar in a letter to the author dated February 7, 1969. (Copy on file in the offices of the Marquette Law Review.) Basically Mr. Leary suggests that the suppliers cannot retain purchase money security interests good against the owner and mortgagees in these circumstances for three reasons. (1) A supplier of fixtures to a contractor knows that the ownership of the fixtures is intended to pass to the owner of the premises, and therefore under section 9-306(2) the security interest does not continue in the goods because they have been disposed of by the contractor-debtor pursuant to the intention of the supplier who has at least "otherwise" agreed to this, even if it is not specifically authorized in the security agreement. (2) The owner of the realty, when the contractor is paid, is really a "buyer in ordinary course" under section 9-307(1) who takes free of a security interest created by his seller; the definition of "buyer in ordinary course of business" in section 1-201(5) does not absolutely rule out this construction. (3) The owner of the real estate is intended by the supplier and the contractor to be the owner of the goods when they are installed, and therefore the owner is a "debtor" under section 9-105(1)(d) even though not the person owing pay-} except for "goods incorporated into a structure
in the matter of lumber, bricks . . . and the like." However, the construction mortgagee would have priority to the extent of advances made without knowledge of the security interest and before filing, and presumably this priority would be available to the permanent lender. Attachment alone would give the supplier priority over the mortgagee in the absence of fixture advances, and, of course, over the owner.

The goods while held in the suppliers' stock would be inventory and could be subject to inventory security interests which would be cut off on a sale to the contractor, even though purchase money security interests might be retained by the suppliers. Because of the intended use of the goods by the contractor, a filing would probably be made, assuming that this is not a cash sale, and the filing would be for fixtures. (Depending on additional facts, the filing might be for equipment or inventory, but in most states it would not matter which the goods were considered since the filing would be central in any case and the goods would not be categorized. Under the 1962 Code but not under the 1968 Proposals, if such a filing were properly made, it should continue to be effective even though the goods subsequently became fixtures. Assuming that the real estate to which the goods are to be affixed is known and a suitable description is available, it would be shown on the financing statement, but the contractor would be shown as the debtor, and C Development Co. would not be shown at all, even though C is the owner of the land. This would comply with the official version of the 1962 Code, although many states by amendment have required that the name of the record owner be shown on a fixture financing statement, and other states have suggested on officially approved financing statement forms that this information be given.

Under the 1968 Proposals, any security interests retained by the suppliers would be subordinate to the mortgagee's interest. This is

---

55\[\text{§ 9-313(1).}\]
56\[\text{§ 9-313(4). See House v. Long, 244 Ark. 718, 426 S.W.2d 814 (1968).}\]
57\[This would be true in states where it is customary to assign an existing mortgage rather than discharge the old mortgage and execute a new one, but it would be elevating form over substance to reach any other result in any event. Of course a permanent lender should be considered a "subsequent purchaser for value of (an) interest in the real estate," under § 9-313(4), in view of the definitions in §§ 1-201(32), (33).\]
58\[§ 9-313(2).\]
59\[§ 9-109(4).\]
60\[§ 9-307(1).\]
61\[§ 9-401(3) provides that a proper filing continues to be effective even though the use, if that controlled the original filing, changes. This provision is not changed in the 1968 Proposals, but Proposed § 9-313(5)(b) requires that the debtor have an interest of record in the real estate and that a fixture filing be made for the security interest to have priority over the real estate interest.\]
62\[See Kratovil, Financing Statements for Fixture Filings, 21 Bus. Law. 1210 (1968).\]
spelled out in Proposed section 9-313(5). Of course, neither under the
1962 Code nor under the 1968 Proposals could a security interest be re-
tained by the seller in goods which are incorporated into the structure
and hence become part of the real estate. This would probably eliminate
any security interest of K Lumber Co. in cement and lumber, and it
would preclude an effective security interest in ordinary wall paneling;
antique wall paneling would become part of the real estate and probably
could not be removed under the 1962 Code but it can be taken out on
default under the 1968 Proposals. Such paneling should be one of those
"readily removable items of special value" which are excluded from
"ordinary building materials" which become part of the real estate on
incorporation, although it might not fit precisely into the enumerated
examples of "ornamental metal work, ornamental mantels and carved
paneling." Surely plumbing "fixtures" would be fixtures under either
version.

Proposed section 9-313(5) clearly gives the real estate interest in
a fixture priority over a conflicting chattel security interest in a case
like ours. We have here a construction mortgagee who is financing the
ercation of improvements and who has every right to expect that its
lien will be superior to any claimed security interests of suppliers, who
will probably have to rely on mechanics' liens to enforce their claims.
The construction mortgage (which must be identified as such on the
record, and so must the refinancing mortgage\textsuperscript{64}) was of record before
the goods were supplied, and in any event the debtor did not have an
interest of record in the real estate.

If we were to vary the fact situation and put the problem in terms
of a blanket mortgage for the construction of 100 houses on a sub-
divided tract with individual, unrelated home mortgages subsequently
made, the permanent mortgagee would still prevail over the fixture
secured party because the debtor (i.e., the contractor) would not have
an interest of record in the real estate.

3. X Railroad decides to install a new microwave transmitting
system along its extensive trackage in seven states. How can this
be handled on a secured basis?

It may be assumed that the real property of any railroad is subject
to a long-term mortgage covering everything that it is possible to
cover. Of course a purchase money security interest in the kind of
antennas and related equipment involved in a microwave system might
well be effective against the mortgagee simply because of attachment
and without filing,\textsuperscript{65} assuming fixture status, but if security is required
at all, then filing will also be required by prudent counsel to obviate
possible problems which could arise on a sale of the real estate con-

\textsuperscript{63} Proposed § 9-313(1) (b) (ii).
\textsuperscript{64} Proposed § 9-313(1) (b) (iv).
\textsuperscript{65} § 9-312(2).
FIXTURES: PROPOSED CHANGES IN UCC

cerned, or on the acquisition of liens by creditors through judicial proceedings, or on the making of subsequent advances by the mortgagee. As to the last problem, there is no requirement in the Code that the future advances by the mortgagee be made against the fixtures; it is sufficient that the advances be made without knowledge of the security interest and before perfection. If fixture filing is required, where does one file?

Under the 1962 Code fixture filing in these circumstances is extremely troublesome. There is an open question about what kind of description of the real estate is required. Multiple filings are unavoidable. Filing in every county where a fixture is located is necessary.

This is the only answer provided by the Code. However, many states have long had separate statutes governing filings for security interests in the property of public utilities, and in a number of states modifications to this end were made in various sections of the Code.

There was also a Transmitting Utility Place of Filing Act which tied in with the Code without expressly amending it. In the absence of any extra-Code solution, the transaction can be cast in less traditional terms, of course, and at least the fixture filing problem can be eliminated, but such imaginative devices are beyond the scope of this paper.

The 1968 Proposals introduce a new term, "Transmitting utility," whose definition is basically borrowed from the Transmitting Utility Place of Filing Act. A railroad is included in the definition. Under Proposed section 9-401(5), the proper place to file to perfect a security interest in collateral, including fixtures, of a transmitting utility is the state's central filing office. This central filing constitutes a fixture filing for goods which are or are to become fixtures. No description of the real estate is required, and the financing statement is effective until a termination statement is filed, which eliminates the necessity of periodic re-filings. This is a neat solution for a specialized but troublesome problem.

4. A buys new bathroom fixtures for his home under a conditional sales contract from Z Plumbing Supply Co. The home is subject to a mortgage held by Z Bank.

(a) Z makes no filing.

(b) Z makes a timely fixture filing.

(c) Z files in the chattel records.

66 See § 9-312(4).
67 § 9-401(1)(a) or (b), depending on which alternative section (1) is adopted by a particular state.
68 See, e.g., ILL. REV. STAT. ch. 95, § 51 (1957).
70 See, e.g., MONT. REV. CODES ANN. § 87A-9-302.1; 87A-9302.3 (Supp. 1967).
71 Proposed § 9-105(1)(1).
72 Proposed § 9-402(6).
73 Proposed § 9-403(6).
A goes into bankruptcy a month after the plumbing fixtures are installed.

As between $Z$ and the trustee in bankruptcy, does the trustee prevail?

Under the 1962 Code, a purchase money fixture financer has priority over certain existing third party interests simply by attachment, but filing is required for priority over real estate interests subsequently arising. In the absence of filing, the trustee could attack the security interest under section 70c of the Bankruptcy Act as a creditor who, upon the date of bankruptcy, obtained a lien by judicial proceedings, and who therefore takes priority over the security interest. Presumably the security interest would be preferential under section 60 in the absence of filing, if the other elements of a preference were present. If there were a fixture filing within 21 days after the property was transferred to the debtor, there would be no preference because the 1962 Code has no stated time within which a filing must be made for perfection; and any fixture filing made before the date of bankruptcy would preempt the trustee's rights under section 70. A filing in the chattel records would probably not, however, be effective in either case. Bathroom fixtures could not be sold to a consumer for any reasonable purpose other than use as "fixtures" so that the filing would have to be for fixtures to be effective; the possibility of a proper filing as a chattel followed by a change of use to a fixture, with continued effectiveness of the filing, seems remote.

Where the 1962 Code required filing, and a correct filing in the real estate mortgage office, for perfection of a security interest in a consumer's fixture, the 1968 Proposals do not. The 1968 Proposals give automatic perfection to purchase money security interests in consumer goods, requiring a fixture filing only for priority over conflicting real estate interests.

---

74 §§ 9-313(2), (4).
75 The citation to the Bankruptcy Act is 11 U.S.C. § 1 et seq. (1959), but this information has limited value in discussions of the Act because of differing section numbers between the Bankruptcy Act as always cited and U.S.C.
76 Eight elements are required to set aside a transfer as preferential: (1) a transfer (by way of security) of (2) the debtor's property (3) to a creditor (4) made by the debtor while insolvent and (5) within four months of bankruptcy (6) on account of an antecedent debt (7) with the effect of enabling the creditor to obtain a greater percentage of his debt than some other creditor of the same class; if these seven elements exist, the transfer may be set aside if (8) the creditor had reasonable cause to believe the debtor was insolvent when the transfer was made. Bankruptcy Act, §§ 60a(1), 60(b).
77 In substance, under § 60(a) (7) of the Bankruptcy Act, where filing is required for priority of the security interest as against subsequent liens, the transfer is deemed to take place at the time it was made if an applicable statute requiring filing within 21 days is complied with, or in the absence of a stated time period, if the filing is made within 21 days after the transfer. The only specified time periods for filing in Article 9 relate to priority, not perfection. See, e.g., §§ 9-301(2), 9-312(4).
78 § 9-401(3).
79 § 9-302(1)(d).
estate interests in the fixture. In the context of our problem, the automatic perfection provision should be helpful. Proposed section 9-312(5)(a) provides: "The security interest has priority over a lien upon the fixture by legal or equitable proceedings obtained after the security interest is perfected by fixture filing or otherwise."

Grammatically the sentence would read better if "obtained" followed "lien" or "fixture" rather than "proceedings," since it is the lien which is obtained and not the proceedings. However, the meaning is reasonably clear: the security interest, if perfected, comes ahead of subsequently acquired judicial liens.

Three methods of perfection are available for fixtures under the 1968 Proposals. First, automatic perfection for purchase money security interests in a consumer's fixtures; second, perfection by a fixture filing to gain priority over conflicting real estate interests; and third, perfection by a chattel filing where the secured party is willing to take his chances against competing real estate interests but wants perfection against the rest of the world. In our example, in any of the three circumstances, the security interest should be good against the trustee. Perfection by attachment has always been a feature of the Code in the case of consumer goods, aside from motor vehicles and fixtures, and there is no policy reason for not including fixtures within this ambit. No lien creditor could upset the transaction, under section 60 or section 70c, nor could a bona fide purchaser take free of the interest as required by section 67c. The bona fide purchaser test applicable to real property in section 60a(2) is not relevant to a chattel which has become a fixture but is financible as a chattel rather than as real estate.

If the debtor in our example were a business corporation buying new bathroom fixtures for an office building which is subject to a mortgage, there would be no automatic perfection on attachment, under the 1968 Proposals, and either a fixture filing or a chattel filing would be necessary if the secured party is to prevail over the trustee; either should be adequate. Proposed section 9-313(5)(b) requires a fixture filing before or within ten days after the goods become fixtures for the security interest in them to prevail over a real estate interest (other than a construction mortgage), but subsection (a) has no time limitation. So long as the judicial lien is obtained after perfection, the security interest has priority.

5. A has leased a one-story building from B for use as a store. The term of the lease is 25 years. All maintenance and replacements of equipment are A's responsibility. The lease is expressly subordinate to the existing mortgage. A installs display counters

---

60 Proposed § 9-302(1) (d).
62 See text at notes 43-46.
which are bolted to the floor; X, their seller, has reserved a pur-
chase money security interest in them to secure payment of the 
balance of the purchase price. Within six months after taking 
possession of the premises, the furnace must be replaced, and a new 
furnace is bought on time from Y Furnace Co. which reserves a 
security interest.
B defaults on the mortgage, and the mortgagee institutes fore-
closure proceedings.

As between the mortgagee and the conditional sellers, who is 
ettitled to priority?

In so far as the 1962 Code provides for these situations, both sellers 
have priority over the real estate mortgagee, even in the absence of 
filing. This is clearly so as to the furnace, which is a fixture, and it is 
true as to the display counters whether or not they are fixtures. As to 
fixtures, attachment alone gives priority over existing real estate inter-
ests. If the display counters are not fixtures, then the real estate 
mortgagee probably has no claim to them, but even if he does, the 
seller's interest surely attached first and thus would have priority under 
section 9-312(5)(c). Of course, the draftsmanship of leases varies 
considerably—although merely putting some provisions in writing does 
not make them automatically enforceable, contrary to some lawyers' 
opinions—and the results might hinge on non-Code law as it impinges 
on the congeries of contracts and what may be called the "intention of 
the parties," which is in most circumstances a rather meaningless cliché.

The 1968 Proposals clearly state that goods which a tenant has a 
right to remove are personal property and not fixtures. A normal 
lease would give the tenant the right to remove his "store fixtures," at 
least if the tenant is not in default when the lease terminates, but 
surely not a furnace. As to the furnace, the seller's security interest 
would have to be perfected by a fixture filing before or within ten days 
after the furnace was installed, and even then the seller would not have 
priority unless the tenant had an interest of record in the real 
estate. This would require that the lease, or a memorandum of lease, be 
recorded. The store counter seller would have priority over the mort-
gagee, because the mortgagee would have no claim to the counters 
simply by virtue of a mortgage to which the tenant was not a party.

IV

It seemed to me at one time that many of our problems—and a 
lot of obsolete learning—could be dispensed with by eliminating the 
term "fixture." This would, at the minimum remove the theoretical 
problems raised in states in which "fixtures" were said not to be re-

83 § 9-312(2).
84 Proposed § 9-313(1)(b)(i).
85 Proposed § 9-312(5)(b).
movable, for by continuing to use the same word we at least pose a semantic dilemma for some courts.\textsuperscript{86} However, no alternative term of peculiar aptness came to mind: "attached goods" was adequate but not inspired. And, as a practical matter, the problems are much the same regardless of the label, although new labels may cause new responses and this can be all to the good. The purpose in using the term "fixture" or a synonym is simply to aid in identifying certain kinds of goods which, though attached to real estate in some fashion,\textsuperscript{87} are separately financible and removable on the debtor's default, basically in the same manner as "pure" chattels. There is no compelling reason for recognizing this special category of goods; the only excuse for it is history.

The basic issue in the field of fixtures is how to resolve conflicts between real estate mortgagees and chattel financers when the chattels are attached to real estate in a relatively permanent, or perhaps a visually connected, fashion. The chattel financing in essentially every instance of importance will be purchase money financing. In the interest of future simplification, it would seem possible to recognize and give priority to a perfected purchase money chattel security interest even though the goods became attached to the real estate in the manner of furnaces, built-in stoves, and the like, so long as the debtor has an interest of record in the real estate, but to give priority to the real estate mortgagee, or in general to allow added attached goods to feed the real estate mortgage, in the absence of such purchase money financing. (A security interest in attached goods in place would continue to require the consent of the mortgagee of the real estate if it is to have priority.) Regardless of the degree of attachment of the chattels, unless they are incorporated into a structure as cement and windows are, the secured party would have a general right to repossess them on default, which section 9-503 gives, subject only to the already ingrained concept of reimbursement for physical damage to the real property, if there is any damage.\textsuperscript{88} This would leave a certain number of problems to the economic realities of individual situations.

In other words, we could eliminate the muddled concept of fixtures. Instead of a disagreeable accommodation to the law as it is, or is thought to be, we could make something of a fresh beginning. There is no need to require a filing in the real estate records to perfect a security interest in goods as against real estate interests. In our ignorance in

\begin{footnotesize}
\begin{itemize}
\item[86] This should be no great problem, however. See 2 Gilmore, Security Interests in Personal Property, 814-16 (1965).
\item[87] Notoriously, beer barrels and the like may be fixtures in Pennsylvania. But who cares? See generally 2 Gilmore, Security Interests in Personal Property 767-770 (1965). Surely the aberrations of one or two states should not dictate national adoption of their local peculiarities, and the attention of non-Pennsylvania lawyers to a purely local problem must be a source of tolerant amusement for at least some members of the Pennsylvania bar.
\item[88] § 9-313(5) and Proposed § 9-313(6).
\end{itemize}
\end{footnotesize}
Illinois, at least, we got along satisfactorily before the Code by a dual system of fixture financing, either conditional sales which were not filed or recorded, or chattel mortgages which are filed or recorded but not in the real estate records. This situation was not uncommon in the United States and, so far as is known, it created no great problems for anyone in fact, regardless of theory.\textsuperscript{89} A deed or mortgage can do double duty as a "bill of sale" for whatever the parties wish to transfer in addition to what might ordinarily pass with the conveyance. This is a drafting matter, and it involves nothing new. This suggestion may not, at first glance, give the real estate interests everything they have for some years been asking for, but many demands of mortgagees are politically and economically unrealistic, as well as unenlightened even from the standpoint of their own self-interest.

To suggest desirability of a simpler system for regulating rights in chattels attached to real estate, \textit{i.e.}, fixtures, and by treating the financing of all chattels in basically the same fashion (unless they are physically incorporated into a structure), is not to denigrate the accomplishment of the Review Committee in its Preliminary Draft No. 1. The known problems are all solved in reasonably fair and satisfactory ways by the 1968 Proposals, once the basic difficulty of new terminology and concepts is surmounted. There is, however, no over-riding reason from a policy point of view for preferring a construction mortgagee to a chattel (fixture) supplier, and to relegate the supplier to lien rights may be to leave him without an effective remedy.\textsuperscript{90} In fact, the trend is probably toward making the construction mortgagee assume more far-reaching risks\textsuperscript{91} and, at least to those who are not mortgagees, there may be much to be said in favor of this apportionment of business risks. Some respected students of these problems would give priority to the purchase money chattel (fixture) supplier as against any real estate interests, whether or not the buyer had an interest of record in the real estate, if the seller has parted with goods, he has not been paid, and he has done all he could reasonably do when he perfected his security interest against his buyer. This point of view merits serious consideration. Any resolution of these conflicts will be an arbitrary decision in which one appealing claim must lose.

\textsuperscript{89} A disproportionate drafting deference has been and still is being paid to the Uniform Conditional Sales Act, which was never widely adopted. This Act was, of course, a noteworthy development for its time, but its time may be past in many respects. Perhaps its influence ought to be as great these days as that of the Uniform Chattel Mortgage Act, which was never enacted by any state and consequently has been conveniently forgotten.

\textsuperscript{90} See, \textit{e.g.}, ILL. REV. STAT. ch. 82, § 21 (1967), which provides: "If the legal effect of any contract between the owner and contractor is that no lien or claim may be filed or maintained by any one, such provision shall be binding" if certain procedures are followed, and a subcontractor's right to a lien will be cut off.

\textsuperscript{91} See Connor \textit{v.} Great Western Savings and Loan Ass'n, -Cal.-, 73 Cal. Rptr. 369, 447 P.2d 609 (1968).
APPENDIX

Permanent Editorial Board for the Uniform Commercial Code

REVIEW COMMITTEE FOR ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE

Preliminary Draft No. 1

SUBJECT COVERED:

Fixtures

November 20, 1968
MARQUETTE LAW REVIEW

PREFATORY CAUTION

The enclosed draft deals basically with proposed changes in Article 9 of the Uniform Commercial Code related to fixtures and fixture filing. It was also necessary to deal to some extent with problems of signing and indexing financing statements. So far as was possible, in the preparation of the attached draft there was omitted any change in Article 9 for other purposes.

Every section affected is shown complete, so that the proposed change may be seen in context. There are brackets around deleted material. New material is italicized. This results in reprinting material included in the present sections as to which no changes are indicated. It must not be thought that the Review Committee is affirming this material and indicating that changes therein are not required. Rather, the Review Committee is not yet prepared to publish for comment its proposed changes on other topics covered by Article 9. In particular, material affecting security interests in crops, timber, oil, gas, and other minerals appears in the sections printed, and is set out intact in its present form without change. The Review Committee may in the future publish proposals on these matters, and no conclusions with respect thereto should be drawn from the repudiation of the existing material in these drafts.

Section 9—105. Definitions and Index of Definitions.

1. In this Article unless the context otherwise requires:

(a) “Account debtor” means the person who is obligated on an account, chattel paper, contract right or general intangible;

(b) “Chattel paper” means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper;

(c) “Collateral” means the property subject to a security interest, and includes accounts, contract rights and chattel paper which have been sold;

(d) “Debtor” means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts, contract rights or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term “debtor” means the owner of the collateral in any pro-
vision of the Article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires;

(e) "Document" means document of title as defined in the general definitions of Article 1 (Section 1—201);

(f) "Encumbrance" includes real estate mortgages and other liens on real estate;

[(f)] "Goods" includes all things which are movable at the

g) time the security interest attaches or which are fixtures (Section 9—313), 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;

[(g)] "Instrumental" means a negotiable instrument (defined in

(h) Section 3—104), or a security (defined in Section 8—102) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment;

(i) "Mortgage" means a real estate mortgage or a similar consensual interest such as a trust deed on real estate, however denominated;

[(h)] "Security agreement" means an agreement which creates or

(j) provides for a security interest;

[(i)] "Secured party" means a lender, seller or other person in

(k) whose favor there is a security interest, including a person to whom accounts, contract rights or chattel paper have been sold. When the holders of obligations issued under an indenture of trust, equipment trust agreement or the like are represented by a trustee or other person, the representative is the secured party;

[(j)] "Transmitting utility" means any person primarily engaged

(l) in the railroad or street railway business, the electric or electronics communications transmission business, the transmission of goods by pipeline, or the transmission or the production and transmission of electricity, steam, gas or water, or the provision of sewer service.
(2) Other definitions applying to this Article and the sections in which they appear are:

- "Account". Section 9—106.
- "Consumer goods". Section 9—109(1).
- "Contract right". Section 9—106.
- "Equipment". Section 9—109(2).
- "Farm products". Section 9—109(3).
- "Fixtures". Section 9—313.
- "Fixture filing". Section 9—313.
- "General intangibles". Section 9—106.
- "Inventory". Section 9—109(4).
- "Lien creditor". Section 9—301(3).
- "Proceeds". Section 9—306(1).
- "Purchase money security interest". Section 9—107.
- "Real estate interest". Section 9—313.

(3) The following definitions in other Articles apply to this Article:

- "Check". Section 3—104.
- "Contract for sale". Section 2—106.
- "Holder in due course". Section 3—302.
- "Note". Section 3—104.
- "Sale". Section 2—106.

(4) In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this Article.

COMMENT

Reporters' Note: The prior Comment remains substantially unchanged.

Reason for Change: The new definitions relating to fixtures and to filing are used in other sections.

Section 9—110. Sufficiency of Description.

[For the purpose of this article any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described.]
[Except as provided in Section 9-402 on formal requirements of a financing statement,] any description of personal property or real estate whether or not it is specific is sufficient for the purposes of this Article if it reasonably identifies what is described.

Note: The language in double brackets should be used if the language in double brackets is Section 9-402(6) is used.

**COMMENT**

This section covers two different points—a description adequate for a security agreement (Section 9-203) and description adequate for a financing statement (Section 9-402). As applied to a security agreement, [T] 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. Under this rule courts should refuse to follow the holdings, often found in the older chattel mortgage cases, that descriptions are insufficient unless they are of the most exact and detailed nature, the so-called "serial number" test. For a financing statement a different standard is applicable. The financing statement is only required to describe the collateral by item or style (Section 9-402). As to the description of real estate, see Section 9-402 and Comment thereto.

**Reason for Change:** The purpose of this change is to make clear the double task of description, and to refer to Section 9-402 for the special problems of real estate descriptions in financing statements.

**Section 9-302. When Filing Is Required to Perfect Security Interest; Security Interests to Which Filing Provisions of This Article Do Not Apply.**

(1) A financing statement must be filed to perfect all security interests except the following:

(a) a security interest in collateral in possession of the secured party under Section 9-305;

(b) a security interest temporarily perfected in instruments or documents without delivery under Section 9-304 or in proceeds for a 10 day period under Section 9-306;

(c) a purchase money security interest in farm equipment having a purchase price not in excess of $2500; but filing is required [for a fixture under Section 9-313 or] for a motor vehicle required to be licensed and fixture filing is required for priority over a conflicting real estate interest in a fixture as provided in Section 9-313;
(d) a purchase money security interest in consumer goods; but filing is required [for a fixture under Section 9—313 or] for a motor vehicle required to be licensed and fixture filing is required for priority over a conflicting real estate interest in a fixture as provided in Section 9—313;

(e) 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;

(f) a security interest of a collecting bank (Section 4—208) or arising under the Article on Sales (see Section 9—113) or covered in subsection (3) of this section.

(2) If a secured party assigns a perfected security interest, no filing under this Article is required in order to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

(3) The filing provisions of this Article do not apply to a security interest in property subject to a statute

(a) of the United States which provides for a national registration or filing of all security interests in such property; or

Note: States to select either Alternative A or Alternative B.

Alternative A—

(b) of this state which provides for central filing of, or which requires indication on a certificate of title of, such security interests in such property.

Alternative B—

(b) of this state which provides for central filing of security interests in such property, or in a motor vehicle which is not inventory held for sale for which a certificate of title is required under the statutes of this state if a notation of such a security interest can be indicated by a public official on a certificate or a duplicate thereof.

(4) A security interest in property covered by a statute described in subsection (3) can be perfected only by registration or filing under that statute or by indication of the security interest on a certificate of title or a duplicate thereof by a public official.
Reporters' Note: The prior Comment remains substantially unchanged.

Reason for Change: The purpose of the changes in paragraphs (c) and (d) of subsection (1) is to provide that the exemption from filing for perfection of purchase money security interests in consumer goods and certain farm equipment may be applicable even though the goods are or may be fixtures. If the secured party is willing to take the risk of a conflict with a real estate interest in the fixture (Section 9—313) and omit fixture filing, he should be able to do so without forfeiting the perfected character of his security interest for other purposes.

Section 9—313. Priority of Security Interests in Fixtures.

[(1) The rules of this section do not apply to goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work and the like and no security interest in them exists under this Article unless the structure remains personal property under applicable law. The law of this state other than this Act determines whether and when other goods become fixtures. This Act does not prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate.]

[(2) A security interest which attaches to goods before they become fixtures takes priority as to the goods over the claims of all persons who have an interest in the real estate except as stated in subsection (4).]

[(3) A security interest which attaches to goods after they become fixtures is valid against all persons subsequently acquiring interests in the real estate except as stated in subsection (4) but is invalid against any person with an interest in the real estate at the time the security attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as fixtures.]

[(4) The security interest described in subsections (2) and (3) do not take priority over

(a) a subsequent purchaser for value of any interest in the real estate; or

(b) a creditor with a lien on the real estate subsequently obtained by judicial proceedings; or

(c) a creditor with a prior encumbrance of record on the real estate to the extent that he makes subsequent advances]
if the subsequent purchase is made, the lien by judicial proceedings is obtained, or the subsequent advance under the prior encumbrance is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the real estate at a foreclosure sale other than an encumbrancer purchasing at his own foreclosure sale is a subsequent purchaser within this section.]

(1) (a) This section governs the priority between a security interest in goods, excluding fixtures, and a real estate interest in goods. The declaration in this section that certain goods are not fixtures is only for the purpose of the priority rules stated in this section, and does not determine whether an interest in the goods passes under a conveyance or mortgage of the real estate or whether the goods are part of real estate under the law of this state other than this Act.

(b) For the purpose of this section and the provisions in Part 4 of this Article referring to fixture filing, the following definitions apply:

(i) Goods are “fixtures” when they are so related to particular real estate that under the law of this state other than this Act an interest in the goods would pass as part of the real estate under a conveyance or mortgage thereof without specific mention of the goods, except as stated in this paragraph. Where ordinary building materials are incorporated in an improvement upon land, which improvement is itself not a fixture, the materials are real estate and not a fixture. An improvement upon land is not a fixture unless it is readily removable from the land. Readily removable factory and office machines and readily removable replacements of domestic appliances are not fixtures. Where the debtor is a tenant, goods which he has a right to remove are not fixtures but are personal property. Standing timber and growing crops and oil, gas and minerals before severance are not fixtures.

(ii) The term “ordinary building materials” includes lumber, millwork, brick, tile, siding, roofing, cement, glass, wiring, piping and structural members, other than readily removable items of special value such as ornamental metal work, ornamental mantels and carved panelling.
(iii) A "real estate interest" in goods including a fixture is an interest held solely by virtue of an interest in real estate and is not a security interest under this Article.

(iv) A mortgage of real estate is a "construction mortgage" if it secures an obligation incurred for the construction or improvement of real estate or to the extent that it is a refinancing of a construction mortgage, and the record so indicates.

(v) A "fixture filing" is the filing of a financing statement in the office where a mortgage on the related real estate would be filed or recorded, which conforms to the requirements of subsection (6) of Section 9-402.

(2) Nothing in this Act prevents the creation of a real estate interest in a fixture pursuant to the law of this state other than this Act. A writing which as a real estate mortgage creates a real estate interest in a fixture may also provide for a security interest in the fixture, but the validity, perfection and priority of the security interest are governed by the provisions of this Article.

(3) There can be no security interest in ordinary building materials after they become so related to real estate as to be a part thereof, unless the structure of which they form a part is a fixture.

(4) Any security interest in goods which are not fixtures under this section (other than goods wrongfully removed from real estate) has priority over any real estate interest in the goods.

(5) A real estate interest in a fixture of any encumbrancer or owner of the real estate who is not the debtor has priority over a conflicting security interest except as follows:

(a) The security interest has priority over a lien upon the fixture by legal or equitable proceedings obtained after the security interest was perfected by fixture filing or otherwise.

(b) The security interest has priority over the real estate interest (other than a construction mortgage to finance a construction or improvement including the fixture which is of record before the goods become a fixture) if the security interest is a purchase money security interest, the debtor has an interest of record in the real estate, and the security interest is perfected by a fixture filing before the goods become a fixture or within ten days thereafter.
(c) The security interest has priority over an encumbrance if the debtor has an interest of record in the real estate and the security interest is perfected by a fixture filing before the encumbrance is recorded.

(6) When a secured party has a security interest in a fixture and the security interest has priority over all real estate interests in the fixture, [(5) When under subsections (2) or (3) and (4) a secured party has priority over the claims of all persons who have interests in the real estate] he may, on default, subject to the provisions of Part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.

COMMENT

Reporters' Note: Paragraphs 1, 2, 3, 4 and 6, of prior Comment are to be deleted and replaced by new paragraphs 1, 2, 3, 4 and 6, following. Paragraph 5 of old Comment remains substantially unchanged.

1. The problem with which this section deals is that certain goods which are the subject of chattel financing become so affixed or otherwise so related to real estate that they become part of the real estate in the sense that they would pass by a real estate deed or mortgage. Such goods (with exceptions set forth in the definition) are called "fixtures".

An interest in goods existing solely through an interest in the real estate to which the goods are related is called a "real estate interest" and it is not a security interest in a fixture within the meaning of this Article. A real estate mortgage, however, may by express provision deal with goods both in their character as part of the real estate and also as goods subject to this Article.

Despite the fact that they may be treated as part of real estate for certain purposes, the goods, unless their identity is substantially lost, retain their chattel nature to the extent that a chattel financing with respect to them may exist and may continue to be recognised and to the extent that their separate chattel character can be restored.

This section recognizes three classes of goods: (1) those which retain their chattel character entirely and are not part of the real estate; (2) those like ordinary building materials which have become an integral part of the real estate and cannot retain their chattel character for the purpose of financing; and (3) an intermediate class called fixtures in this Article, which are part of the real estate for certain purposes and yet retain their chattel nature for purposes of chattel financing. The demarcation between these classifications is not dictated by this Article, except that this Article provides that certain machinery and replacement domestic appliances are not fixtures, and ordinary building materials after incorporation are exclusively real estate.
The provision that no security interest may be maintained in ordinary building materials after they become part of the real estate is only for the operation of the priority provisions of this section. It is without prejudice to any rights which the secured party may have against the debtor himself if he incorporated the goods into real estate or against any party guilty of wrongful incorporation thereof in violation of the secured party's rights.

In the case of appliances and machinery, the declaration that they are not fixtures is also solely for the purposes of this Article. This declaration determines that any security interest in these goods has priority over any real estate interest. It also determines that ordinary chattel filing and not fixture filing (Section 9-401) will perfect the security interest, thus eliminating a source of doubt and the precautionary double filing expense which apparently was incurred under the 1962 Code by filing financing statements as to such goods in both the chattel and the real estate records. Yet the declaration that these types of goods are not fixtures is not intended to change the rights of real estate parties between themselves. The declaration leaves to other law of this state the question whether machinery and appliances of these types pass by a deed or mortgage, and whether they are real estate or personal property for tax purposes, rights of landlord and tenant therein, and so forth.

As to domestic appliances, the declaration is limited to readily removable replacements. This is intended to facilitate modernization and rehabilitation by short-term chattel financing, which on balance can only prove helpful to long-term real estate encumbrancers. The declaration does not deal with original installations of appliances; this Article leaves to other law of the state the question whether original installations are fixtures to which the protection accorded by this Article to construction mortgages would be applicable. See the next Comment.

Likewise, this Article does not deal with wrongful removal of property in which one other than the debtor has a real estate interest; this question is left to the real estate law of waste.

2. This Article recognizes that while fixture financing is ordinarily purchase-money financing, a mortgage of the real estate intended to finance construction including the fixture is also purchase-money financing as to the fixture. The usual preference accorded by the law to purchase-money financing, therefore, does not resolve this type of conflict. This Article accords priority to the construction mortgage for the reason that the supplier of fixtures has mechanic's lien rights like any other materialman, and there is no reason to give him an overlapping set of rights against a construction mortgagee.

3. The prior uniform provisions seemed to make it possible for a fixture supplier to retain a security interest against a contractor, to the possible surprise and deception of real estate interests. Subsections (5) (b) and (c) preclude such retention by a fixture supplier by denying priority to the security interest unless the debtor has an interest of record in the real estate.

4. Apart from the subordination of security interests in fixtures to construction mortgages, the rules of priority between the fixture security interest and real estate interests conform basically to the rules of priority between security interests in Section 9-312 and are as follows:

(a) The general rule is first in time, first in right. Subsection (5) (c). This corresponds generally to Section 9-312(5). For example, if the security interest is perfected by a fixture filing before a real estate mortgage is recorded, the fixture security interest has priority. Thus, a security interest perfected by a fixture filing has priority over subsequent real estate mortgages. But if the mortgage was recorded first, any assignee of the mortgage has priority over the fixture security interest, even though the assignment may have occurred and been recorded after the fixture filing. The fee ownership of real
estate may attach automatically to a fixture, and will ordinarily have existed and been recorded before the fixture security interest is perfected; therefore, if a fixture security interest does not have priority against the fee interest under the rule stated in the next paragraph, and the owner of the fee is not the debtor and does not otherwise agree, the security interest may be subordinate to the rights of the fee owner and his successors, even though a subsequent owner purchases after the security interest is perfected by a fixture filing and has actual knowledge of it. This rule is necessary in order to enable an owner of the fee to transfer what he has.

(b) To the rule stated in the preceding paragraph, there is an exception granting priority to a purchase money security interest in a fixture, corresponding to Section 9-312(4). Subsection (5) (b). In the ordinary case of purchase money financing of fixtures, if the security interest therein is perfected by a fixture filing before the goods become part of the real estate, or within 10 days thereafter, the fixture security interest is superior to all real estate interests.

(c) The phrase "lien by legal or equitable proceedings" is taken from Section 70c of the Bankruptcy Act, and is intended to encompass all of the three ways in which judgment liens are there described. A judgment lien on real estate is not a reliance interest and, therefore, one further provision is made in favor of the fixture security interest, namely, that the security interest meets the test of priority against a judgment lien (which is the test by which the rights of a trustee in bankruptcy are measured under Section 70c) whether the security interest is perfected by a fixture filing or is otherwise perfected, i.e., by a filing in the ordinary chattel records.

The secured party may be unconcerned with real estate interests because the fee owner is the debtor or because the fee owner and encumbrancers have waived any claim or subordinated to the secured party. It, therefore, seems appropriate to have the fixture security interest good against a judgment creditor and also against a trustee in bankruptcy without the extra burdens of fixture filing.

Reporters’ Note: Comment 5 is substantially unchanged.

6. Under this Article as under the Uniform Conditional Sales Act the place of filing with respect to [goods affixed or to be affixed to realty] fixtures, if the secured party desires protection against real estate interests (other than a judgment lien), is with the real estate records and not with the chattel records. The secured party may, however, choose not to perfect against real estate interests, in which case he may perfect by filing as in the case of ordinary chattels. See Section 9-401 on the place of filing and Section 9-402 on the form of financing statement, and the Comment thereto.

Reason for Change: Real estate interests have complained vigorously about the original Section 9—313 and related filing provisions, with the result that one state never adopted a Section 9—313 and other states have made material changes by non-uniform amendments. The lack of consensus reflects the sharp divergence of law prior to the Code, but some of the criticism seems justified because the 1962 Code did not adequately integrate fixture filing with the real estate recording system. Effort has been made by a fresh approach to meet this difficulty, and to provide substantive rules that should satisfy the legitimate interests of all parties. The draft
does not, however, go as far as some of the non-uniform amendments, which would subject fixture filing to the burden of obtaining full "legal descriptions" of real estate (see Comment to Section 9—401) and would deny fixture security interests priority against existing real estate parties who had not consented thereto, thus negating the purchase money concept.

The principal proposed changes are the following:

1. The difficulty asserted by real estate lenders and title companies in locating relevant fixture security interests applicable to particular parcels of real estate has been cured by the new provisions as to real estate description in fixture filings, the indexing thereof, and other related provisions in Part 4. See the changes in Part 4 and the revised Comments and Reasons for Change in the several sections of Part 4.

2. It is believed that the weightiest objection of the real estate lenders was to the possibility that fixtures constituting material portions of the value of a building might come into the building subject to fixture security interests which might have priority over the rights of a construction mortgagee, even though the mortgage was recorded long before the fixtures were installed and was intended to finance a construction program which included the fixtures. Recognizing that a construction mortgagee who expects to finance the fixture is a purchase money party with as much claim to favorable recognition as the fixture secured party, the section reverses the position of the 1962 Code and accords priority to the construction mortgagee. The term "construction mortgage" includes a refinancing of the mortgage, thus taking into consideration the situations where a construction lender lends against a takeout commitment by an insurance company or other permanent lender. The takeout is accorded the priority of the construction mortgage.

3. The possibility that a supplier could reserve a security interest in fixtures against a contractor not in the chain of title to real estate and file it under the name of the contractor as debtor, thus having a filing outside the real estate chain of title, has been obviated by a provision that the fixture security interest does not have priority unless the debtor therein has an interest of record in the real estate.

4. Subject to the important change in favor of construction mortgages, this section preserves the essence of the original Section 9—313 and of the Uniform Conditional Sales Act which preceded it by the provision that the secured party can obtain an interest
which has priority against all real estate interests if the security interest is perfected by a fixture filing before the goods become part of the real estate.

The 1962 Code further provided that a fixture security interest had priority over earlier real estate interests even without filing. This rule has been abandoned in favor of a requirement of filing, and has been combined with the first rule stated in this paragraph, Subsection (5) (b). To conform this rule to a corresponding provision in Section 9—312(4), the secured party has been allowed 10 days after the goods become part of the real estate within which to perfect by fixture filing. It is important to coordinate this rule with that of Section 9—312 (4) to prevent any tactical advantages between a real estate lender and a fixture secured party depending on whether the real estate mortgage has also been perfected as a fixture security interest (see Section 9—402(7)) and depending on whether the real estate party asserts his claim to the fixture as part of the real estate or under the fixture filing.

The proposed Section 9—313 and the changes in Part 4 on filing move very substantially in favor of the views of real estate interests, but do not go all the way. There remains a necessity to preserve the possibility of purchase money fixture financing notwithstanding the existence of mortgages on the real property. Real estate lending is typically long-term, and is usually done by institutional investors who can afford to take a long view of the matter rather than concentrating on the results of any particular case.

It is apparent that a rule which permits and encourages purchase money fixture financing, which is in contrast typically short term, will result in the modernization and improvement of real estate rather than in its deterioration and will on balance benefit long-term real estate lenders. Because of the short-term character of the chattel financing, it will rarely produce any conflict in fact with the real estate lender. The contrary rule chills the availability of short-term credit for modernization of real estate by installation of new fixtures and in the long run could not help real estate lenders.

It is recognized that some of the legislative effort by real estate interests has been for the purpose of making possible open-end real estate mortgages which could be the basis for the subsequent financing of fixtures. Nothing in the present draft precludes the availability of this technique, or interferes with its competitive effort against purchase-money fixture finan-
cencing. Admittedly, the present end mortgage had this monopoly in most states before the Code or that this monopoly is desirable.

Section 9—401. Place of Filing; Erroneous Filing Removal of Collateral

First Alternative Subsection (1)

(1) The proper place to file in order to perfect a security interest is as follows:

(a) when the financing statement is filed as a fixture filing (Section 9—313) and the collateral is goods which [at the time the security interest attaches] are or are to become fixtures, then in the office where a mortgage on the real estate concerned would be filed or recorded.

(b) in all other cases, in the office of the [Secretary of State].

Second Alternative Subsection (1)

(1) The proper place to file in order to perfect a security interest is as follows:

(a) when the collateral is equipment used in farming operations, or farm products, or accounts, contract rights or general intangibles arising from or relating to the sale of farm products by a farmer, or consumer goods, then in the office of the . . . . in the county of the debtor's residence or if the debtor is not a resident of this state then in the office of the . . . . in the county where the goods are kept, and in addition when the collateral is crops, as provided in clause (b) of this subsection; [in the office of the . . . . in the county where the land on which the crops are growing or to be grown is located;]

(b) when the collateral is [goods which at the time the security interest attaches are or are to become fixtures] crops growing or to be grown, or when the financing statement is filed as a fixture filing (Section 9—313) and the collateral is goods which are or are to become fixtures, then in the office where a mortgage on the real estate concerned would be filed or recorded;

(c) in all other cases, in the office of the [Secretary of State].
(1) The proper place to file in order to perfect a security interest is as follows:

(a) when the collateral is equipment used in farming operations, or farm products, or accounts, contract rights or general intangibles arising from or relating to the sale of farm products by a farmer, or consumer goods, then in the office of the . . . . in the county of the debtor's residence or if the debtor is not a resident of this state then in the office of the . . . . in the county where the goods are kept, and in addition when the collateral is crops as provided in clause (b) of this subsection; [in the office of the . . . . in the county where the land on which the crops are growing or to be grown is located;]

(b) when the collateral is [goods which at the time the security interest attaches are or are to become fixtures] crops growing or to be grown, or when the financing statement is filed as a fixture filing (Section 9—313) and the collateral is goods which are or are to become fixtures, then in the office where a mortgage on the real estate concerned would be filed or recorded;

(c) in all other cases, in the office of the [Secretary of State] and in addition, if the debtor has a place of business in only one county of this state, also in the office of . . . . of such county, or, if the debtor has no place of business in this state, but resides in the state, also in the office of . . . . of the county in which he resides.

Note: One of the three alternatives should be selected as subsection (1).

(2) A filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this Article and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement.

(3) A filing which is made in the proper place in this state continues effective even though the debtor's residence or place of business or the location of the collateral or its use, whichever controlled the original filing, is thereafter changed.
Language in double brackets is Alternative Subsection (3)

[(3) 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.]

(4) If collateral is brought into this state from another jurisdiction, the rules stated in Section 9-103 determine whether filing is necessary in this state.

(5) Notwithstanding the preceding subsections, and subject to subsection (3) of Section 9-302, the proper place to file in order to perfect a security interest in collateral, including fixtures, of a transmitting utility is in the office of the [Secretary of State]. This filing constitutes a fixture filing (Section 9-313) as to the collateral described therein which is or is to become fixtures.

COMMENT

Reporters’ Note: The prior Comment is retained with the following additions:

Addition to Comment 2:

The section is so drawn, however, that a filing in the chattel records will be effective except against holders of real estate interests. Compare Section 9-302(1)(c) and (d), which preserve the validation of purchase money security interests in farm equipment and consumer goods which are fixtures without filing unless protection is desired against real estate interests.

The fixture-secured party may thus choose to take his chances with respect to real estate interests (or obtain waivers or subordinations from them) and file as for ordinary chattels. It is believed that in such event, upon timely filing, his security interest should be good in bankruptcy, because the ordinary chattel filing will be sufficient for Code perfection and subsequent judgment liens on the real estate are not among the subsequent real estate interests that defeat a security interest not perfected as a security interest in fixtures. See Section 9-313(5)(a). (It is recognized, however, that the bankruptcy courts might apply the purchaser test which applies to transfers of real property on the theory that fixtures are real property, rather than the judgment creditor test applicable to other property under Section 60a(2) of the Bankruptcy Act. It is believed that there is no appropriate substantive provision that could be adopted in this Article that would guard against this possible reading of the Bankruptcy Act, which would be extreme in the light of the fact that it would be a chattel financing that
was being tested.) On the other hand, if there is a judgment lien on the real estate at the time the fixture is affixed, a timely fixture filing will give the fixture security interest priority over the judgment lien along with existing real estate interests. See Section 9—313(5)(b).

If the fixture-secured party perfects by a fixture filing as provided in this section and Section 9—402(6), he gets all of the advantages resulting from the perfection just described, and also gets the benefit of any applicable rules of priority against real estate interests described in Section 9—313.

New Comment 7:

7. The provisions as to a "transmitting utility", which are to be read along with related material in Section 9—403, are necessary because secured parties would have difficulty with local fixture filing including real estate descriptions for such companies with their far-flung properties. A central filing system is therefore provided, somewhat related to the central filing systems as to railroad rolling stock in pre-Code law. No disruption of the regular filing scheme of this Article will result, for the nature of the debtor will be the lead enabling anyone concerned to know where to search.

These provisions are intended to satisfy the need which was evidenced by numerous non-uniform amendments made by various states in Section 9—302 or in Part 4 or in both.

Reason for Change: The principal change is to make it optional with the secured party whether he obtains an adequate real estate description (Section 9—402) and files in the real estate records, or takes his chances as to real estate interests and makes only a regular chattel filing or no filing, in the case of purchase-money security interests in consumer goods and lower-priced farm equipment. See the change in Section 9—302(1)(c) and (d). This contrasts with the situation under the 1962 Code, under which a person who guessed wrong as to whether goods were fixtures would lose his security interest in the fixture because of the improper filing, in the event of the debtor’s bankruptcy. A timely filing in either fashion should make the security interest good in bankruptcy, unless the creation of the security interest is treated as a transfer of real property under Section 60a (2) of the Bankruptcy Act.

Section 9—402. Formal Requisites of Financing Statement; Amendments; Mortgage as Financing Statement.

(1) A financing statement is sufficient if it is signed by the debtor [and the secured party], 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. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown [or goods which are or are to become fixtures, the statement must also contain a description of the real estate concerned.] or when the financing statement is filed as a fixture filing (Section 9—313) and the collateral is goods which are or are to become fixtures,
the statement must also comply with subsection (6). A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by [both parties.] the debtor.

(2) A financing statement which otherwise complies with subsection (1) is sufficient [although] when it is signed [only] by the secured party instead of the debtor if it is filed to perfect a security interest in

(a) collateral already subject to a security interest in another jurisdiction when it is brought into this state. Such a financing statement must state that the collateral was brought into this state under such circumstances.

(b) proceeds under Section 9—306 if the security interest in the original collateral was perfected. Such a financing statement must describe the original collateral.

(c) collateral as to which a security interest once perfected by filing has lapsed, or is about to lapse, if it is still effective between the parties.

(3) A form substantially as follows is sufficient to comply with subsection (1):

Name of debtor (or assignor) ...........................................
Address ..........................................................................
Name of secured party (or assignee) .................................
Address ..........................................................................

1. This financing statement covers the following types (or items) of property:
   (Describe) .............................................................

2. (If collateral is crops)
   The above described crops are growing or are to be grown on:
   (Describe Real State) ..............................................

3. (If [collateral is goods which are or are to become fixtures] the financing statement is to be filed as a fixture filing) The above described goods are affixed or to be affixed to:
   (Describe Real Estate) ..............................................

4. (If proceeds or products of collateral are claimed) Proceeds—Products of the collateral are also covered.

   (use whichever is applicable)  ........................................
   Signature of Secured Party (or Assignee)

   Signature of Debtor (or Assignor)
(4) The term "financing statement" as used in this Article means the original financing statement and any amendments but if any amendment adds collateral, it is effective as to the added collateral only from the filing date of the amendment.

(5) A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading.

(6) A financing statement covering crops growing or to be grown or a financing statement filed as a fixture filing (Section 9-313) must show that it covers crops or fixtures and where the debtor is not a transmitting utility the financing statement must contain a description of the real estate ["sufficient if it were contained in a mortgage of the real estate to give constructive notice of the mortgage under the law of this state"].

Note: Language in double brackets is optional (see Comment 6).

(7) If (a) goods are or are to become fixtures related to the real estate described in a mortgage of the real estate, (b) the goods are described in the mortgage by item or type and the mortgage provides for a security interest in the goods, (c) the mortgage complies with the requirements for a financing statement in this section, and (d) the mortgage is duly recorded, the mortgage is effective from the date of recording as a financing statement filed as a fixture filing. No fee with reference to the financing statement is required other than the regular recording and satisfaction fees with respect to the mortgage.

Note: Where the state has any special recording system for real estate other than the usual grantor-grantee index (as, for instance, a tract system or a title registration or Torrens system) local adaptations of subsection (7) and Section 9-403(7) may be necessary. See Mass. Gen. Laws Chapter 106, Section 9-409.

COMMENT

Reporters' Note: The prior Comment is retained substantially unchanged with the following additions:

6. A description of real estate must be sufficient to identify it. See Section 9-110. This formulation rejects the view that the real estate description must be by metes and bounds, or otherwise conforming to traditional real estate practice in conveyancing. But a description of real estate must be sufficient so that the fixture financing statement will fit into the real estate search system and the financing statement be found by a real estate searcher. Optional language has been added by which the test of adequacy of the description is whether it would be adequate in a mortgage of the real estate. As suggested in the Note, more detail may be required if there is a tract indexing system or a land registration system.
7. A real estate mortgage may provide that it constitutes a security agreement with respect to fixtures (or other goods) in conformity with this Article. Combined mortgages on real estate and chattels are common and useful for certain purposes. This section goes further and makes provision that the recording of the real estate mortgage (if it complies with the requirements of a financing statement) shall constitute the filing of a financing statement as to the fixtures (but not, of course, as to the other goods). Section 9-403(6) makes the usual five-year maximum life for financing statements inapplicable to real estate mortgages which operate as financing statements under Section 9-402(7), and they are effective for the duration of the real estate recording.

Of course, if a combined mortgage covers chattels which are not fixtures, a regular chattel filing is necessary, and subsection (7) is inapplicable to such chattels. Likewise, the optional filing method as to fixtures provided in Section 9-401 does not apply to true chattels.

Reason for Change: Persons interested in real estate have complained with some justice that the provisions of the Code prior to the present changes failed in several ways to tie the fixture filings to the real estate search system. Among these was the absence of clear specification that the fixture security interest was to be indexed in the real estate records. On this point, a responsive change has been made in Section 9-403. Other objections related to the adequacy of the real estate description and to the fact that the debtor might not be an owner of an interest of record in the real estate. The optional language in subsection (6) is designed to meet the objection as to real estate descriptions but without imposing on a fixture-secured party the duty of obtaining a "legal description" unless the state's recording system requires it. While no doubt a full "legal description" is proper practice in conveyancing, it is believed that something significantly less, like a street address, would be adequate in most states, and would frequently be a guide to a recorded map. Where a state has a tract index system or other special system not dependent on a grantor-grantee index, special adaptations may be required and no attempt is made in the Code to deal with all such situations.

Another objection of real estate parties has been that the name of the debtor might not be in the real estate chain of title and there have been numerous non-uniform amendments to Sections 9-401, 9-402, or 9-403 designed to require the showing of the name of the record owners of the real estate in the financing statement. The justice of these objections in the past is recognized, but it is believed that the necessity for the amendments has been obviated by the provisions in Section 9-313 that for a fixture security interest to have priority over real estate interests, the debtor must be a person having an estate of record in the real estate. The result of this provision is that the debtors named and the fixture filing will
be shown in the chain of title. For states having a title certificate or Torrens system, it may still be necessary to require a showing of the name of the record owner in order to locate the applicable title certificate.

Subsection (7) makes it possible for a real estate mortgage to serve as a financing statement, and a related change in Section 9—403(6) makes it unnecessary to file continuation statements for such a financing statement.

Section 9—403 What Constitutes Filing; Duration of Filing; Effect of Lapsed Filing; Duties of Filing Officer.

(1) Presentation for filing of a financing statement and tender of the filing fee or acceptance of the statement by the filing officer constitutes filing under this Article.

(2) Except as provided in subsection (6) a filed 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.

(3) 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). Any such continuation statement must be signed by the secured party, identify the original statement by file number and state that the original statement is still effective. Upon timely filing of the continuation statement, the effectiveness of the original statement is continued for five years after the last date to which the filing was effective whereupon it lapses in the same manner as provided in subsection (2) unless another continuation statement is filed prior to such lapse. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the original statement. Unless a statute on disposition of public records provides otherwise, the filing officer may remove a lapsed statement from the files and destroy it.

(4) Except as provided in subsection (7) a filing officer shall mark each statement with a consecutive file number and with the
date and hour of filing and shall hold the statement for public inspection. In addition the filing officer shall index the statements according to the name of the debtor and shall note in the index the file number and the address of the debtor given in the statement.

(5) The uniform fee for filing, indexing and furnishing filing data for an original or a continuation statement shall be $\ldots\ldots\ldots\ldots$

(6) If the debtor is a transmitting utility (subsection (5) of Section 9—401) and a filed financing statement so states, it is effective until a termination statement is filed. A real estate mortgage which is effective as a fixture filing under subsection (7) of Section 9—402 remains effective as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real estate.

(7) The filing officer shall index a financing statement filed as a fixture filing under the name of the debtor in the same fashion as if he were the mortgagor in a mortgage of the real estate described, and, to the extent that the law of this state provides for indexing of mortgages under the name of the mortgagor, under the name of the mortgagee, under the name of the secured party as if he were the mortgagee thereunder, or where indexing is by description in the same fashion as if the financing statement were a mortgage of the real estate described.

COMMENT

Reporters' Note: The prior Comment remains substantially unchanged.

Reason for Change: These nate with those in Sections 9—
changes are designed to coordi—

Section 9—405. Assignment of Security Interest; Duties of Filing
Officer; Fees.

(1) A financing statement may disclose an assignment of a security interest in the collateral described in the statement by indication in the statement of the name and address of the assignee or by an assignment itself or a copy thereof on the face or back of the statement. Either the original secured party or the assignee may sign this statement as the secured party. On presentation to the filing officer of such a financing statement the filing officer shall mark the same as provided in Section 9—403(4). The uniform fee for filing, indexing and furnishing filing data for a financing statement so indicating an assignment shall be $\ldots\ldots\ldots\ldots$. 
(2) A secured party may assign of record all or part of his right under a financing statement by the filing in the place where the original financing statement was filed of a separate written statement of assignment signed by the secured party of record and setting forth the name of the secured party of record and the debtor, the file number and the date of filing of the financing statement and the name and address of the assignee and containing a description of the collateral assigned. A copy of the assignment is sufficient as a separate statement if it complies with the preceding sentence. On presentation to the filing officer of such a separate statement, the filing officer shall mark such separate statement with the date and hour of filing. He shall note the assignment on the index of the financing statement, or in the case of a fixture filing, index the assignment under the name of the assignor as grantor and, to the extent that the law of this state provides for indexing the assignment of a mortgage under the name of the assignee, he shall index the assignment of the financing statement under the name of the assignee. The uniform fee for filing, indexing and furnishing filing data about such a separate statement of assignment shall be $............ Notwithstanding the provisions of this subsection, an assignment of record of a security interest in a fixture contained in a mortgage effective as a fixture filing (subsection (7) of Section 9-402) may be made only by an assignment of the mortgage in the manner provided by the law of this state other than this Act.

(3) After the disclosure or filing of an assignment under this section, the assignee is the secured party of record.

COMMENT

Reporters' Note: The prior Comment remains substantially unchanged.

Reason for Change: This changecoordinates with the addition of subsection (7) to Section 9-402.*

* Editor's note: This proposed draft has recently been adopted by the legislature of North Dakota. It is not known whether the Governor has signed the bill at the date of this printing.