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NATIONAL AND INTERNATIONAL AUTOMATED
DATA COMPLICATIONS
IN PERFECTING A SECURITY INTEREST IN ACCOUNTS

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THE LENDER'S DILEMMA: NATIONAL AND INTERNATIONAL AUTOMATED
DATA COMPLICATIONS IN PERFECTING A SECURITY INTEREST IN ACCOUNTS*

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I. INTRODUCTION

This article considers some of the problems a secured lender may incur in determining where a debtor is located for purposes of the filing requirements of Article 9 of the Uniform Commercial Code¹ when that debtor processes and stores its data on a computer located in a jurisdiction other than the jurisdiction in which its chief executive office is located. The problem may become more severe if the debtor is a multinational company utilizing automated data processing facilities in a foreign country.

There are now two versions of Article 9 coexisting in the United States. One version was promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws (collectively, the "Commissioners") in 1962 (the "1962 Code").² In 1972 the Commissioners sponsored a revised version of Article 9 (the "1972 Code").³ While most states have now adopted the 1972 Code,⁴ the 1962 Code is still in effect in a few states.⁵

Both the 1962 Code and the 1972 Code (collectively, the "Codes") set forth rules governing perfection and the effect of perfection of security interests in assets of a debtor. Section 9-103 of both Codes sets forth specific rules which apply to transactions involving debtors which do not conduct all of their business activities in one state.⁶ Section 9-103 of the 1972 Code presents a set of rules governing perfection and the effect of perfection of a security interest in accounts which is different from the rules in the 1962 Code.⁷

A lender seeking to perfect a security interest against the accounts of a debtor keeping records in one state and maintaining its chief

executive office in another state will not necessarily be able to determine where to file its financing statement if that debtor conducts certain business activities in both 1962 and 1972 Code states.⁸ The 1972 Code provides that it is the law (including the conflict of laws rules) of the jurisdiction in which the debtor is located which governs perfection and the effect of perfection of a security interest in accounts, and that a debtor shall be deemed to be located at its chief executive office if it has more than one place of business.⁹ Thus, under the 1972 Code the lender must determine where the debtor's chief executive office is located in order to perfect a security interest in the accounts of the debtor.

The 1962 Code provides that it is the law (including the conflict of laws rules) of the jurisdiction where the office of the assignor of accounts or contract rights keeps its records concerning them that governs the validity and perfection of a security interest in accounts.¹⁰ Under the 1962 Code, the lender must therefore determine where the office in which the records concerning accounts is located in order to determine where to file its financing statement. The problem of determining where to file a financing statement becomes acute if the debtor maintains computer records in a jurisdiction which is separate from the jurisdiction in which its chief executive office is located, or which is separate from the jurisdiction in which its paper records are kept, particularly if that debtor maintains those computer records in a foreign country. Another complication could arise if the debtor changes computer companies, or changes from an outside computer company to an in-house system.

In order to analyze this problem, this article will first review the 1972 and the 1962 Code provisions governing perfection and the effect of

perfection of a security interest in accounts.¹¹ The 1972 and 1962 Code provisions will then be analyzed to determine where a financing statement should be filed in order to perfect a security interest in the accounts of a debtor if that debtor conducts business activities in both 1962 and 1972 Code states and if that debtor processes and maintains its data on a computer located in a jurisdiction other than the jurisdiction in which it maintains its chief executive office or its paper records. In this regard, a hypothetical situation will be presented in which a debtor conducts business activities in both 1962 and 1972 Code states. In addition, this article will consider the difficulties presented to a secured lender when the debtor requests permission to move its computer records to a foreign country.

II. 1972 CODE'S RULES FOR ACCOUNTS

Sections 9-103(3)(b) and (d) of the 1972 Code set forth rules governing perfection and the effect of perfection of a security interest in certain accounts.¹² These sections provide (in pertinent part):

(b) The law (including the conflict of laws rules) of the jurisdiction in which the debtor is located governs the perfection and the effect of perfection or non-perfection of the security interest.

. . . .

(d) A debtor shall be deemed located at his place of business if he has one, at his chief executive office if he has more than one place of business, otherwise at his residence¹³

If a court is interpreting the law of a 1972 Code state as to whether a lender properly perfected its security interest in accounts, it should determine, according to Section 9-103(b), that the law, including the

conflict of laws rules, of the jurisdiction where the debtor is located governs perfection and the effect of perfection of the security interest. Also according to the 1972 Code, the debtor should be deemed located at his place of business if he has only one or at his chief executive office if he has more than one place of business.¹⁴ Thus, if a lender seeks to perfect a security interest in the accounts of a debtor with more than one place of business, the 1972 Code requires the lender determine where the chief executive office of that debtor is located.¹⁵

III. 1962 CODE'S RULES FOR ACCOUNTS

Section 9-103(1) of the 1962 Code provides:

1. If the office where the assignor of accounts or contract rights keeps his records concerning them is in this state, the validity and perfection of a security interest therein and the possibility and effect of proper filing is governed by this Article; otherwise by the law (including the conflict of laws rules) of the jurisdiction where such office is located.¹⁶

If a court is interpreting the law of a 1962 Code state as to whether a lender properly perfected its security interest in accounts, it should determine, according to Section 9-103(1), that the law, including the conflict of laws rules, of the jurisdiction where the office in which the debtor keeps its records concerning accounts is located governs perfection and the effect of perfection of the security interest. Thus, according to the 1962 Code, a lender must determine where the debtor's records concerning accounts are located in order to determine which law governs perfection and the effect of perfection of a security interest in the accounts of the debtor.

IV. PERFECTING A SECURITY INTEREST AGAINST THE ACCOUNTS OF A DEBTOR WITH ACTIVITIES IN BOTH 1972 AND 1962 CODE STATES.

Suppose hypothetical Company X has places of business in several states, having its headquarters in South Carolina, a 1962 Code state.¹⁷ Company X conducts all of its billing from offices in South Carolina but leases computer equipment located in Tennessee, a 1972 Code state,¹⁸ for processing its data. All data are input into the computer from terminals located in South Carolina. All computer output is printed from printers located in South Carolina. All paper records are located in South Carolina. A lender has agreed to make a loan to Company X, provided that Company X grants the lender a first priority security interest in its accounts.

A. 1972 Code and the Chief Executive Office

According to Sections 9-103(3)(b) and (d) of the 1972 Code, a lender must determine the location of the chief executive office of Company X to determine which state law governs perfection and the effect of perfection of a security interest in accounts.¹⁹ It is proposed by the author that the lender should determine that the chief executive office of Company X is located in South Carolina given the maintenance by Company X of its headquarters in South Carolina, the conduct of its billing from South Carolina and the storage of its paper records in South Carolina.²⁰

According to the Official Commentary to the 1972 Code, the place to file a financing statement should be the place which creditors would normally associate with the debtor²¹ because the purpose of filing is to allow subsequent creditors of the debtor to determine the true status of the affairs of the debtor,²² the place which can be determined with the

least possible risk of error,²³ and the place where persons dealing with the debtor would normally look for credit information.²⁴ Utilizing such criteria, it would seem that creditors familiar with Company X would most likely associate Company X with South Carolina. Company X maintains its headquarters in South Carolina, conducts its billing from South Carolina and stores its paper records in South Carolina. It seems unlikely that creditors would associate Company X with Tennessee when Company X merely leases computer equipment in Tennessee for processing data.²⁵

If South Carolina is found to be the location of the chief executive office of Company X, the law, including the conflict of laws provisions, of South Carolina should govern perfection and the effect of perfection of the security interest in accounts. Thus, to determine where to file a financing statement against the accounts of Company X, the lender must review the law, including the conflict of laws rules, of South Carolina, a 1962 Code state.²⁶

B. 1962 Code and the Location of Records

Applying Section 9-103(1) of the 1962 Code to hypothetical Company X described above, a determination must be made as to whether Company X keeps its records concerning accounts in either South Carolina, the jurisdiction in which the output from the computer is printed and its paper records are stored or Tennessee, the jurisdiction in which the computer processing of records occurs and the computer records are stored.²⁷ The 1962 Code does not define the term "records" for purposes of Section 9-103(1).

Official Comment (2) to Section 9-103(1) of the 1962 Code addresses the question of where records are kept. Official Comment (2) provides, in pertinent part:

For the multi-state business there is no easy solution. The office where the assignor keeps his records of accounts or contract rights will be typically the principal financial office of the enterprise. Frequently records of an account may be kept in several offices: for example, in the branch office where the account debtor placed his order and in the warehouse from which the goods were shipped as well as in the principal financial office: in such a case, it is the internal practice of the assignor - i.e., which of the various records is controlling for general accounting purposes of the enterprise - that determines whether the law of this state or of some other jurisdiction shall apply. In the great majority of cases the test of subsection (1) is easy to apply; some situations remain, which will have to be worked out on a case by case basis, and which neither this nor any other statutory formula can settle in advance beyond the possibility of a doubt. There is one easy answer: if there might be more than one state in which it could be claimed that the assignor keeps his records, let the assignee file in all such states. Filing is simple and inexpensive, and the entire problem can thereby be avoided.²⁸

If the analysis of Official Comment 2 were applied, the solution for the secured lender taking a security interest in the accounts of Company X would be to file financing statements in both Tennessee and South Carolina. The Official Comment implies that whenever there is doubt, the lender should file in every relevant jurisdiction. This rule, however, is not helpful to a court which is confronted with a situation in which the lender has filed in only one jurisdiction and in which unsecured creditors are challenging that lender's status as a secured lender. In such a case, the court must determine whether the lender properly perfected its security interest and determine which state's law is applicable.

In addition, it is not necessarily true that filing will be simple and inexpensive. Suppose several months after a lender enters into a secured transaction with Company X and has properly filed its financing statements, Company X requests permission from the lender to utilize computer facilities located in another state or even a foreign country.²⁹ It may be quite expensive to engage special counsel to determine the filing

requirements of that state or country. It is also possible that applicable foreign filing deadlines may have expired.

If, for example, Company X requested permission to move its computer processing and computer records to England because it could lease computer equipment more economically in England, the lender would need to consider the laws of England if it were determined that the computer records were the relevant records for purposes of Section 9-103 of the 1962 Code. Presumably the lender would need to consult with English counsel as to whether under English laws, its security interest would remain perfected. Particularly if such an opinion would require the English solicitor to review all of the loan and security documentation, such advice could be quite costly.

The first issue under English law would be whether the lender had created a valid charge.³⁰ It is possible that the documentation which established the security interest also established a valid charge.³¹ Next, assuming a valid charge had been established, the lender would find that it had missed the deadline for registering its charge in England. Under English law, the charge must be delivered to or received by the Registrar of Companies within twenty-one days of the date of creation of the charge.³² The twenty-one day time period begins to run from the date of execution of the charge even if no money has then been advanced.³³

It might be possible to obtain a court order extending the time period for registration if the extension would not prejudice the rights of any third party which might have arisen in the interim.³⁴ However, such relief would be a matter of discretion for the court.³⁵

Thus, filing in every potentially relevant jurisdiction may not be feasible. If filing in the foreign jurisdiction is not feasible, the lender may be forced to either refuse to permit the debtor to utilize other computer processing facilities or risk the loss of its perfected security interest unless it can be assured that the conflict of laws rules of the foreign jurisdiction would require application of the internal laws of a jurisdiction in which it is able to perfect its security interest.³⁶ It is not in either the lender's or the debtor's interest to impose a more costly data processing system on the debtor. It may very well be necessary to determine which jurisdiction governs perfection and the effect of a security interest in accounts.

C. Where Records Should be Deemed Located for Purposes of Section 9-103 of the 1962 Code.

One obvious solution to this problem would be the adoption of Section 9-103 of the 1972 Code by the 1962 Code states.³⁷ If the 1962 Code states were to adopt Section 9-103 of the 1972 Code, the lender need not be concerned with the location of the debtor's records concerning accounts when attempting to perfect its security interest. Instead, Section 9-103 of the 1972 Code provides that the law, including the conflict of laws rules of the jurisdiction in which the debtor maintains its chief executive office govern perfection and the effect of perfection of the security interest in accounts.³⁸ This solution would not only eliminate the need to decide whether the term "records" as used in the 1962 Code should be defined as paper records or computer records but would promote uniformity among nearly all of the states.³⁹ However, given that a few states⁴⁰ have not adopted the 1972 version of Article 9, it is proposed by the author

that the term "records" as used in Section 9-103 of the 1962 Code be defined as the paper records of the debtor as opposed to its computer records.

Looking to the purpose of filing as expressed in the Official Commentary to the 1972 Code, the place to file a financing statement should be the place where creditors would normally associate with the debtor because the purpose of filing is to allow subsequent creditors of the debtor to determine the true status of the debtor's affairs.⁴¹ One would not expect creditors to associate a debtor with the location in which computer records are stored and processed if that debtor conducts no other business activities from that location. Creditors would probably associate a debtor with the jurisdiction in which its headquarters is located or from which its business activities are regularly conducted.

The Official Commentary to the 1962 Code suggests that it is the internal practice of the debtor that should be considered in determining the location of the debtor's records concerning accounts.⁴² The Official Commentary further suggests that the records which control for general accounting purposes should be considered the relevant records for purposes of Section 9-103 of the 1962 Code.⁴³ This, however, may not be an easy test to apply. Presumably the records which are printed on paper are the same records which are stored in the computer, thus, they might both be said to control for general accounting purposes. One might argue that it is only the hard copy output which governs for general accounting purposes because neither management nor the company's auditors can utilize the data until it is printed out. Contrariwise, it may be asserted that if the computer records are more current, the computer records should be the controlling records.

The place to file should be one which the creditors will be able to determine with the least possible risk of error.⁴⁴ Creditors will probably have more ready access to information on where business and management activities take place and where paper records are located than to information on where computer processing occurs and where computer records are stored. Creditors will probably require the debtor to provide paper records for credit analysis and may also require ready access to information regarding the company's business locations and headquarters for a similar purpose. Unless creditors are specifically required by law to obtain information regarding the location of the computer processing of records in order to perfect their security interest (or for any other purpose), a creditor might not be concerned with such information.

One might argue that the location of computer records is a location which could be determined with the least risk of error because either the computer records are located at a particular location or they are not. Information as to the location of the computer processing of records may also be very important to a secured lender in the event of default. A secured lender might require access rights to computer hardware and software utilized by the debtor to process its records so that if the debtor should default on its obligations to the lender, the lender would have the ability to process the debtor's records to facilitate the collection of debtor's accounts.

If, however, it were decided that the term "records" in Section 9-103 of the 1962 Code should refer to the location where computer records are stored, the lender would be forced to determine this location and to prohibit the debtor from changing this location without its permission.

Such permission would presumably not be forthcoming if a lender would risk the loss of perfection of its security interest or if it would not be cost effective for the lender to determine whether such a change might impair its status as a secured lender. A debtor may therefore be prohibited from entering into a business transaction which could provide tremendous cost savings because a risk would be imposed upon the lender. There seems to be no reason for the Uniform Law Commissioners to have intended such a result. It should be to both the debtor's and the lender's advantage to permit the debtor to relocate its computer processing functions because the cost savings to the debtor would presumably strengthen its ability to repay its debt to the lender. If records are deemed located in the jurisdiction in which computer records are located, a creditor otherwise amenable to a debtor's request to relocate its computer processing might be forced to deny such a request based upon Section 9-103 of the 1962 Code.

In addition, with respect to hypothetical Company X, if it were decided that the records of Company X were located in Tennessee, the jurisdiction in which its computer records were located, the law, including the conflict of laws provisions of Tennessee, would govern perfection and the effect of perfection of the security interest in accounts. As noted above, Tennessee is a 1972 Code state.⁴⁵ Tennessee law requires application of the law, including the conflict of laws provision of the jurisdiction in which the chief executive office of the company is located.⁴⁶ The chief executive office of Company X is located in South Carolina, a 1962 Code state.⁴⁷ Thus, the laws of Tennessee require application of the laws (including the conflict of laws provisions) of South Carolina and the laws of South Carolina require application of the

laws (including the conflict of laws provisions) of Tennessee. Neither the 1962 Code nor the 1972 Code provides guidance as to whether the 1972 Code provisions or the 1962 Code provisions should govern when such a conflict of laws problem is presented. As long as some states adhere to the 1962 Code while other states have adopted the 1972 Code, this conflict of laws problem could arise.⁴⁸

If the 1962 Code is interpreted such that records are deemed located in the jurisdiction in which paper records are located, the 1962 Code and the 1972 Code may very well require application of the law of the same jurisdiction. The 1972 Code provides that the law of the debtor's place of business (and if it has more than one place of business, of its chief executive office) shall govern perfection and the effect of perfection of a security interest in accounts.⁴⁹ Presumably, while a debtor may utilize computer processing facilities in a jurisdiction other than the jurisdiction in which its chief executive office is located, it will probably store its paper records (at least those which control for general accounting purposes) at its chief executive office. The difficult conflict of laws question concerning issues of renvoi might therefore be avoided.

If it were decided that paper records control for purposes of Section 9-103 of the 1962 Code, and assuming that paper records of accounts are generally stored at a debtor's chief executive office, creditors would be required to file their financing statements in the same jurisdiction in which they would probably be consulting with management. Lenders may be quite familiar with the laws of this jurisdiction because it may govern their credit practices with respect to the debtor. While the lender may require the debtor to obtain its approval before moving its computer

processing of data so that it can obtain adequate access rights should it need to process data upon default, it need not be concerned that its perfected status with respect to the debtor's accounts would be impaired by relocation of the computer processing.

V. CONCLUSION

Section 9-103 of the 1972 Code requires a lender to determine the location of the chief executive office of a debtor with more than one place of business in order to determine the jurisdiction which governs perfection and the effect of perfection of a security interest in accounts.⁵⁰ This jurisdiction should be one in which persons dealing with the debtor would normally look for credit information.⁵¹ If a debtor processes its data in a jurisdiction in which it conducts no other business activities, such a jurisdiction would probably not be considered its chief executive office and would presumably not be a jurisdiction in which persons dealing with the debtor would normally look for credit information. Thus, under the 1972 Code, a lender would not be concerned with the physical location of the automated data processing activities of a debtor, if no other business activities of the debtor are performed there, for purposes of determining where to file a financing statement against the debtor's accounts.

Section 9-103 of the 1962 Code, however, requires a lender to determine the location of the debtor's records concerning accounts in order to determine which jurisdiction governs perfection and the effect of perfection of a security interest in accounts.⁵² The 1962 Code does not define the term "records" for purposes of Section 9-103. If the debtor

stores paper records concerning accounts in one location and computer records regarding those same accounts in another, the lender would not be able to ascertain with certainty which jurisdiction governs perfection and the effect of perfection of its security interest in accounts. Although a lender could protect its perfected status by filing in all jurisdictions in which either paper or computer records regarding accounts are stored,⁵³ such a solution may not always be feasible. For example, a debtor may wish to move its computer processing and therefore its computer records to a foreign jurisdiction in order to take advantage of cost savings. Applicable filing deadlines may have expired in this foreign jurisdiction.

Unless the states subscribing to the 1962 Code version of Article 9 are willing to adopt the 1972 version of Section 9-103, it is proposed by the author that the relevant jurisdiction for purposes of Section 9-103 of the 1962 Code should be the jurisdiction in which the paper records regarding the debtor's accounts are located rather than the jurisdiction in which such computer records are located. This jurisdiction should be one with which lenders are most familiar because other business activities of the debtor are probably conducted from there and because the lender has probably made requests for access to the debtor's paper records in assessing the debtor's creditworthiness.

Additionally, this jurisdiction will most likely be the same jurisdiction which is relevant to perfection issues in 1972 Code states. The paper records which control for general accounting purposes are probably located in the chief executive office of the debtor. Thus, issues of renvoi which may occur if the debtor maintains its chief executive office in one jurisdiction and its automated data processing in another may

be avoided. Furthermore, even though complete uniformity among the states will not exist if some jurisdictions have adopted the 1962 Code while others subscribe to the 1972 Code, the proposed analysis of the 1962 Code might serve to promote uniformity because, at least to the extent that paper records are stored in the debtor's chief executive office, the jurisdiction which governs perfection issues relating to accounts in a 1962 Code state will be the same jurisdiction which governs such issues in a 1972 Code state.

In the meantime, until the legal uncertainty is resolved, a lender seeking to perfect a security interest in accounts should heed the advice of the Official Comment to Section 9-103 of the 1962 Code⁵⁴ and file a financing statement in every jurisdiction in which records concerning those accounts are stored, whether such records are paper records or computer records. In addition, the lender should require the debtor to obtain its permission before any records regarding accounts subject to a security interest are moved to any other jurisdiction so that the lender will be able to take all required steps to ensure that its security interest remains perfected. If the debtor requests permission to move any records, including computer records, which might be construed as records which control for the debtor's general accounting purposes to a foreign jurisdiction in which applicable filing deadlines have expired, the lender might be forced to deny such a request if it wishes to be free of any risk of impairment of its security interest. The lender should not risk impairment of its secured status, however, if the conflict of laws rules in the applicable foreign jurisdiction clearly require application of the internal laws of jurisdiction in which the lender is either already perfected or is able to perfect.

1. U.C.C. Art. 9 (1972) is entitled "Secured Transactions; Sales of Accounts and Chattel Paper." U.C.C. Art. 9 (1962) is entitled "Secured Transactions, Sales of Accounts, Contract Rights and Chattel Paper." Article 9 sets out a comprehensive scheme for the regulation of security interests in personal property and fixtures. U.C.C. Section 9-101 Official Comment (1972).

2. American Law Institute, Nat'l Conf. of Commissioners on Uniform State Laws, Uniform Commercial Code: 1962 Official Text with Comments.

3. American Law Institute, Nat'l Conf. of Commissioners on Uniform State Laws, Uniform Commercial Code: 1972 Official Text with Comments.

4. All states except Louisiana, Missouri, South Carolina and Vermont have adopted the 1972 version of Article 9. Louisiana has not adopted any version of Article 9. The District of Columbia and Guam have also adopted the 1972 version.

5. The 1962 version of Article 9 is still in effect in Missouri, Mo. Rev. Stat. Section 400.9-103 (1986); South Carolina, S.C. Code Ann. Section 36-9-103 (Law. Co-op. 1976); and Vermont, Vt. Stat. Ann. tit. 9A, Section 9-103 (1966). The 1962 version is also in effect in the Virgin Islands, V.I. Code Ann. tit. 11A, Section 9-103 (1965).

6. U.C.C. Section 9-103 (1972) is entitled "Perfection of Security Interests in Multiple State Transactions." U.C.C. Section 9-103 (1962) is entitled "Accounts, Contract Rights, General Intangibles and Equipment Relating to Another Jurisdiction; and Incoming Goods Already Subject to a Security Interest."

7. The rules of the 1972 Code governing perfection and the effect of perfection of a security interest in accounts are discussed in Section II. The rules of the 1962 Code governing perfection and the effect of perfection of a security interest in accounts are discussed in Section III.

8. U.C.C. Section 9-302(1) (1972) requires that a financing statement be filed to perfect all security interests except:

- (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 security interest created by an assignment of a beneficial interest in a trust or a decedent's estate;
- (d) a purchase money security interest in consumer goods; but filing is required for a motor vehicle required to be registered; and fixture filing is required for priority over conflicting interests in fixtures to the extent provided in Section 9-313;
- (e) an assignment of accounts which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts 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;

- (g) an assignment for the benefit of all the creditors of the transferor, and subsequent transfers by the assignee thereunder.

U.C.C. Section 9-302(1) (1962) requires that a financing statement be filed to perfect all security interests except:

- (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;
- (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;
- (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.

9. U.C.C. Sections 9-103(3)(b) and (d) (1972). These provisions are further discussed in Section II.

10. U.C.C. Section 9-103(1) (1962). This provision is further discussed in Section III.

11. The term "account" is defined in U.C.C. Section 9-106 (1972) as "any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance." The term "account" is defined in U.C.C. Section 9-106 (1962) as "any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper." The term "contract right" is defined in U.C.C. Section 9-106 (1962) as "any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper." Thus, the term "account" as defined in the 1972 Code incorporates both the terms "account" and "contract right" as defined in the 1962 Code.

12. U.C.C. Sections 9-103(3)(b) and (d) (1972) also apply to general intangibles and mobile goods and provide that the law, including the conflict of laws rules of the jurisdiction in which the debtor is located governs perfection and the effect of perfection of security interests in general intangibles and mobile goods. The debtor is considered located at his chief executive office if it has more than one place of business. Under U.C.C. Section 9-103(2) (1962), the validity and perfection of a security interest in general intangibles and of goods of a type which are normally used in more than one jurisdiction are governed by the law of the jurisdiction where the chief place of business of the debtor is located. This article focuses on the rules governing accounts because it is the interplay between the 1972 and the 1962 Code provisions concerning accounts which presents the conflict of laws problems. There is no such problem presented in applying the 1962 and the 1972 Code provisions regarding

perfection of security interests in general intangibles and mobile goods because both Codes require application of the law of the place where the debtor is located (either its chief executive office if under the 1972 Code or its chief place of business under the 1962 Code). The 1962 Code and the 1972 Code provisions relating to accounts creates a conflict of laws problem because, as discussed above, the 1972 Code requires application of the law of the jurisdiction in which the debtor's chief executive office is located whereas the 1962 Code requires application of the law of the jurisdiction in which the debtor's records are located.

13. U.C.C. Sections 9-103(3)(b) and (d) (1972). The 1972 Code continues with the following provision regarding air carriers: "If, however, the debtor is a foreign air carrier under the Federal Aviation Act of 1958, as amended, it shall be deemed located at the designated office of the agent upon whom service of process may be made on behalf of the foreign air carrier." U.C.C. Section 9-103(3)(d) (1972) (in pertinent part).

14. U.C.C. Section 9-103(3)(d) (1972).

15. The 1972 Code contains an additional provision applicable when the debtor is located in a jurisdiction which is not part of the United States:

(c) If, however, the debtor is located in a jurisdiction which is not a part of the United States, and which does not provide for perfection of the security interest by filing or recording in that jurisdiction, the law of the jurisdiction in the United States in which the debtor has its major executive office in the United States governs the perfection and the effect of perfection or non-perfection of the

security interest through filing. In the alternative, if the debtor is located in a jurisdiction which is not a part of the United States or Canada and the collateral is accounts or general intangibles for money due or to become due, the security interest may be perfected by notification to the account debtor. As used in this paragraph, "United States" includes its territories and possessions and the Commonwealth of Puerto Rico.

U.C.C. Section 9-103(3)(c) (1972).

16. U.C.C. Section 9-103(1) (1962).

17. S.C. Code Ann. Section 36-9-103 (Law. Co-op. 1976).

18. Tenn. Code Ann. Section 47-9-103(3)(b) (Cum. Supp. 1985).

19. Supra Section II.

20. In In re Astrocade Inc., 31 Bankr. 245, 250-251 (Bankr. S.D. Ohio 1983), the court considered nineteen factors in determining the location of the chief executive office of the debtor. While none of the factors included the location of computer processing or data stored on computer hardware, one factor, number 13, was the location of paper records. The nineteen factors reviewed by the Astrocade court were the locations of the following activities:

1. Auditing functions by outside accountants.
2. Dunn & Bradstreet reports stating principal office.

3. Location which creditors were led to expect were primary operating offices.
4. Bookkeeping, accounting, invoicing, collection.
5. Place where presidents spent time.
6. Payroll activities.
7. Financing and banking.
8. Incoming telephone calls with daily operations.
9. Vast majority of administrative functions.
10. Where management team selected to analyze operations spent most of its time and energy.
11. Where inventory production and management were handled.
12. Significant corporate planning and management decisions.
13. Where all significant books, records and financial documents were kept.
14. Where accounts payable and company checks are kept.
15. Where federal, state and local tax returns were prepared and mailed from.
16. Where finished goods were shipped from.
17. Quality control headquarters.
18. Where equipment returns and repairs were handled.
19. Where meetings regarding significant advances of capital took place.

See also In re Ramco Well Service, Inc. 32 Bankr. 525, 527 (Bankr. W.D. Okla. 1983), wherein oil and gas workover rigs were employed in Texas, notes and security instruments indicated an Oklahoma address, and the debtor's president testified that the home office was in Oklahoma City, that records were kept in Oklahoma City and that the ultimate supervision

was from Oklahoma City. The debtor's chief executive office was found to be in Oklahoma. As in Astrocade, none of the factors considered in Ramco Well included the location of computer processing or data stored on computer hardware. The Ramco Well court did, however, consider the location of records as a factor in determining the location of the debtor's chief executive office.

21. U.C.C. Section 9-103 Official Comment 5(a) (1972).

22. Id.

23. Id.

24. U.C.C. Section 9-103 Official Comment 5(c) (1972).

25. The phrase "chief executive office" as used in the 1972 Code replaced the phrase "chief place of business" as used in the 1962 Code. U.C.C. Section 9-103 App. I: 1972 Official Text Showing Changes Made in Former Text of Article 9, Secured Transactions and of Related Sections and Reasons for Changes Comment 3 (1972). For authority interpreting the phrase "chief place of business" and other similar phrases see generally *In re J.A. Thompson & Son*, 665 F.2d 941, 950 (9th Cir. 1982) (A two-fold inquiry was conducted in determining the chief place of business of the debtor for purposes of Section 9-103 of the California Commercial Code. This inquiry concerned the reasonable expectation of creditors and the place of management. The place of management "focuses on the location

which serves as executive headquarters for the debtor's multi-state operation, and not on the location which generates the largest business volume.); In re Golf Course Builders Leasing, Inc., 768 F.2d 1167, 1170 (10th Cir. 1985) (applied the J.A. Thompson two-fold inquiry); Ford Motor Credit Co. v. Weaver, 680 F.2d 451, 460 (6th Cir. 1982) (Place of business tests include a test which measures the quantity of work accomplished at a particular place, a notoriety test which is the extent to which others know that the debtor does business at the location in question, and a test which focuses on whether the debtor actually conducts manufacturing and commercial activities in a particular place.); In re Dobbins, 371 F. Supp. 141, 145 (D. Kan. 1973) (The bankrupts at all times resided in and conducted their business affairs in Hutchinson, Kansas, where the truck was garaged and not in interstate travel. The chief place of business was therefore in Kansas.); In re Carmichael Enterprises, Inc., 334 F. Supp. 94, 102 (N.D. Ga. 1971), aff'd, 460 F.2d 1405 (5th Cir. 1972) (Principal place of business as used in Article 9 of the Georgia Uniform Commercial Code is the factual principal place of business as opposed to that stated in the debtor's charter as the site of its principal office); Westinghouse Credit v. Rovi Property & Management Corp., 607 S.W.2d 682, 683 (Ky. App. 1980) ("The determination that the debtor had equipment in and had done excavating in Kentucky is not sufficient evidence upon which to base the determination that Kentucky is the seat of operations for the debtor."); Tatelbaum v. Commerce Investment Co., 262 A.2d 494, 498 (Md. App. 1970) ("Chief place of business' . . . means the county in which the corporate debtor conducts its greatest volume of business activity."); Associates

Financial Services Co. v. First National Bank, 82 Mich. App. 495, 266 N.W.2d 490 (1978) (The debtor gave an Indiana address at the time the sale was made, the property was delivered in Indiana, the debtor was authorized to do business in Indiana and its primary concern was the development of Indiana property. The debtor was a Michigan corporation and at the time of the sale was doing odds jobs in Michigan. The debtor's chief place of business was found to be in Indiana.)

26. S.C. Code Ann. Section 36-9-103 (Law. Co-op. 1976).

27. In *Community State Bank of Hayti v. Midwest Steel Erection, Inc.*, 22 U.C.C. Rep. Serv. (Callaghan) 1059 (D.S.D. 1977), the court stated that the location of records is a question of fact that it would not decide on a summary judgment motion. The court in Community State Bank, however, was not deciding whether computer records were the relevant records for purposes of Article 9.

28. U.C.C. Section 9-103(1) Official Comment 2 (1962). It has been recognized that Section 9-103(1) of the 1962 Code is unsatisfactory in situations in which the company's records are stored in a computer in a state other than where its paper records are located. See, e.g., A Second Look at the Amendments to Article 9 of the Uniform Commercial Code, 29 Bus. Law. 973 (1974), wherein it was stated:

The old Code had a rule for accounts which was the place where the records were kept. We thought that that was a bad rule because a third party might not know where the records were kept; also, now that we are in the computer society, the records

may be the inner works of a computer and we have remote terminals, and no one could be sure of the facts under that kind of a rule, so we changed it to the location of the debtor.

Id. at 979. See also Coogan, The New UCC Article 9, 1 U.C.C. Service, Secured Transactions (MB), Section 3A.06 [4] (1973)("When . . . the accounts are kept in someone else's computer in a state . . . where the debtor company has no activities of its own, a rule which requires filing as to the accounts in the state where the record concerning them is kept is nonsensical."); Coogan, McDonnell, Gordon, The Effect of the Uniform Commercial Code upon Receivables Financing - a 1983 Perspective, 1B U.C.C. Service, Secured Transactions (MB) Ch. 15 (1983):

In this electronic age when much data is stored in the memory machines, how shall we deal with the case where the assignor (a corporation doing business chiefly in State A) uses the bookkeeping machines of a company located in nearby State B? Will a court simply disregard the language of Section 9-103(1) and say that State B has no interest in regulating the conduct of the assignor and the rights of his creditors with respect to the assignor's accounts receivable? . . . The place where the "records" are kept may be of no importance to the assignor's creditors.

Id. at Section 15.06[2]. For other similar comments, see Adams, The 1972 Official Text of the Uniform Commercial Code: Analysis of Conflict of Laws Provisions, 45 Miss. L.J. 281, 312 (1974); Bailey, The New UCC Article 9 in Oregon: Choice-of-Law and Filing Problems, 12 Willamette L.J. 207 (1976); Hawkland, The Proposed Amendments to Article 9 of the UCC - Part 6: Conflict of Laws and Multistate Transactions, 77 Com. L.J. 145, 150 (1972); R. Henson, Handbook on Secured Transactions under the Uniform Commercial Code, 321-324 (2d Ed. 1979); Kripke, Suggestions for Clarifying

Article 9: Intangibles, Proceeds and Priorities, 41 N.Y.U. L. Rev. 687, 701 (1966); Petit, Choice of Law under Article Nine of the UCC, 7 Loy. U. Chi. L.J., 641, 650-651 (1976); Weintraub, Choice of Law in Secured Personal Property Transactions: The Impact of Article 9 of the Uniform Commercial Code, 68 Mich. L. Rev. 683, 709 (1970); Comment, Section 9-103 of the UCC: Its Present Problems and Future Prospects as Redrafted by the Review Committee for Article 9, 18 Wayne L.R. 737, 742-743 (1972).

29. "If the record-keeping office is moved into 'this state' after a security interest has been perfected under the law of another jurisdiction, the secured party should file in this state, since Section 9-401(3) is inapplicable." U.C.C. Section 9-103 Official Comment 2 (1962); see Petit, supra note 28, at 651-652.

30. Companies Act, 1985, Part XII, Ch. 1 [hereinafter Companies Act], Section 395-409; R.M. Goode, Commercial Law, 714, 735-756 (1982).

31. Goode, supra note 30, at 738.

32. Companies Act, Section 395; Goode, supra note 30, at 770.

33. Supra note 32.

34. Companies Act, Section 404 provides:

(1) The following applies if the court is satisfied that the omission to register a charge within the time required by this Chapter or that the omission or mis-

statement of any particular with respect to any such charge or in a memorandum of satisfaction was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief.

(2) The court may, on the application of the company or a person interested, and on such terms and conditions as seem to the court just and expedient, order that the time for registration shall be extended or, as the case may be, that the omission or mis-statement shall be rectified.

Companies Act at Section 404; see *In re Tingri Tea Co.*, [1901] W.N. 165; see also W.J. Gough, *Company Charges*, 342-343 (1978).

35. *Supra* note 34; *In re Heathstar Properties Ltd.*, [1966] 1 W.L.R. 993, 1002; *In re Kris Cruisers, Ltd.*, [1949] 1 Ch. 138, 140.

36. Therefore, before the lender to hypothetical Company X permits Company X to move its computer processing of accounts to England, it must be given adequate assurance, presumably by English counsel, that under English conflict of laws rules, the substantive law of a jurisdiction in which the lender is able to perfect its security interest should apply. English conflict of laws rules applicable to the sale of debts appear somewhat unclear. "[I]t is hard to predict with confidence how an English court would decide a conflicts problem relating to transfer of a debt. This aspect of the conflict of laws is perhaps the most obscure and least developed of the whole subject." Goode, supra note 30, at 933 (footnote omitted). For example, one commentator has suggested that the proprietary effect of the assignment of accounts, as between assignor and assignee,

should be governed by the lex situs of the debt, the law of the place where the debtor resides. Id. at 933. The rights of the assignee against the debtor seem to be matters of the proper law of the contract under which the debt arises. Id. Conflicting claims as to priority are apparently governed by the lex situs of the debt although they may be governed by the lex fori. Id. at 934; J.H.C. Morris, *The Conflict of Laws* 307 (2d ed. 1980). If all of the applicable choices of law under English conflict of laws rules lead the lender to Company X back to the substantive law of the 1962 Code state, the lender should still have a valid perfected security interest in the accounts of the debtor even if a 1962 Code court ruled that the records are located in England. If however, the lender cannot be assured that the conflict of laws rules of England or of any jurisdiction in which the debtor seeks to relocate its computer processing of records relating to accounts, will require application of the law of a jurisdiction in which the lender is able to perfect its security interest in accounts, and if applicable filing deadlines in the foreign jurisdiction have expired, the lender may be forced to deny the debtor's request to relocate computer records or risk losing its perfected status in the 1962 Code state. Such perfected status could be lost if the 1962 Code state court considers the law, including the conflict of laws rules of the jurisdiction in which the computer records relating to accounts are located as the law governing perfection and the effect of perfection of the security interest.

The 1962 Code contains an optional subsection 5 which provides:

(5) Notwithstanding subsection (1) and Section 9-302, if the office where the assignor of accounts or contract rights keeps his records concerning them is not located

in a jurisdiction which is a part of the United States, its territories or possessions, and the accounts or contract rights are within the jurisdiction of this state or the transaction which creates the security interest otherwise bears an appropriate relation to this state, this Article governs the validity and perfection of the security interest may only be perfected by notification to the account debtor.

U.C.C. Section 9-103(5) (1962). If a 1962 Code state had adopted optional subsection 5, presumably the lender would remain perfected even though the debtor's accounts are moved to a foreign county if the lender notifies all of the debtor's account debtors. See Heller v. Buchbinder, 399 A.2d 850 (D.C. Cir. 1979); see also Adams, supra note 28, at 312. Subsection 5 is not, however, currently in effect in any 1962 Code state. Subsection 5 is in effect in the Virgin Islands. V.I. Code Ann. tit. 11A, Section 9-103(5) (1965).

37. Kentucky is the most recent state to adopt the 1972 Code version of Section 9-103, effective July 1, 1987. Ky. Rev. Stat. Ann. Section 355.9-103 (Michie/Bobbs-Merrill Cum. Supp. 1986).

38. U.C.C. Section 9-103(3)(b) and (d) (1972). See Comment, Multistate Accounts Receivable Financing: Conflicts in Context, 67 Yale L.J. 402 (1958), wherein it was argued that the law of the state in which the assignor conducts its business activities should govern accounts receivable financing.

39. Louisiana is the only state which has not adopted Article 9 of either the 1962 Code or the 1972 Code.

40. Supra note 5.

41. U.C.C. Section 9-103 Official Comment 5(a) (1972).

42. U.C.C. Section 9-103 Official Comment 2 (1962).

43. Id.

44. U.C.C. Section 9-103 Official Comment 5(a) (1972).

45. Tenn. Code Ann. Section 47-9-103(3)(b) (Cum. Supp. 1985).

46. Id.

47. S.C. Code Ann. Section 36-9-103 (Law. Co-op. 1976).

48. White and Summers have concluded that there is no way to tell which state's law a court would apply here. J.J. White & R.S. Summers, Uniform Commercial Code, 988 note 335 (2d ed. 1980). See also Coogan, supra note 28, at Section 3A.06; Murray, Choice of Laws and Multistate Transactions under Article 9 - 1962, 1972 and a Proposal for 1982, 1 U.C.C. Service, Secured Transactions (MB) Section 5B.04[1][b] (1983); Petit, supra note 28, at 655-656, 677-679; Ruud, Part 1 - Secured Transactions: Article

IX, 16 Ark. L.R. 108, 120-121 (Winter 1961-1962); Comment, supra note 38, at 439-441.

At the time the Tenth Circuit decided United States v. Ed Lusk Construction Co., 504 F.2d 328 (10th Cir. 1974), the 1962 version of Section 9-103 of the Uniform Commercial Code was in effect in Oklahoma. Oklahoma law therefore required application of the law including the conflict of laws rules of the state in which the debtor's records were kept, Arkansas. Id. at 330. Arkansas law required a secured party to file a financing statement in the Office of the Secretary of State of Arkansas and if the debtor has a place of business in only one county in Arkansas with the circuit court and ex-officio officer of such county. Id. However, there was no renvoi problem for the Ed Lusk Construction court to address because Arkansas law did not refer back to the conflict of laws rules of any other state.

The Restatement (Second) of Conflict of Laws (1971) [hereinafter Restatement] Section 8(1) Comment e states that Section 9-103(3) of the Uniform Commercial Code is an example of a rare occasion when the applicable choice-of-law rule of the forum is explicit on the question of whether the reference to the law of another jurisdiction should also include the choice-of-law rules of that jurisdiction. Comment e further states that "[w]hen applying such a rule, the forum need only follow its explicit terms." Id. However, there will be occasions when application of the choice-of-law rule of another state will not permit the forum to arrive at a solution of the case. Restatement Section 8(2) Comment j. "This will be so, when the rule of the forum refers to the choice-of-law rules of

another state and the applicable choice-of-law rule of this other state refers back to the choice-of-law rules of the forum" Id. Comment j suggests that the forum must abandon the attempt to apply the choice-of-law rules of the other state and decide the case by applying the local law of the state of its selection. Id.

49. U.C.C. Sections 9-103(3)(b) and (d) (1972).

50. Id.

51. U.C.C. Section 9-103 Official Comment 5(c) (1972).

52. U.C.C. Section 9-103(1) (1962).

53. U.C.C. Section 9-103 Official Comment 2 (1962).

54. U.C.C. Section 9-103 Official Comment 2 (1962).