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An Agricultural Law Research Article

**South Dakota's Article Nine:  
A Time for Change**

by

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## SOUTH DAKOTA'S ARTICLE NINE: A TIME FOR CHANGE

*In 1982, South Dakota amended considerable portions of S.D.C.L. chapter 57A-9 dealing with secured transactions. This comment addresses the 1982 amendments and attempts to identify the more significant changes with emphasis on agricultural transactions.*

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## INTRODUCTION

In 1982 the South Dakota Legislature adopted the 1972 version of the Uniform Commercial Code's (U.C.C.) Article nine dealing with secured transactions.<sup>1</sup> S.D.C.L. chapter 57A-9 embodies the 1972 version of Article Nine and becomes effective July 1, 1983.<sup>2</sup>

The 1982 version of S.D.C.L. chapter 57A-9 amends considerable portions of the rules governing secured transactions. Because the agricultural sector requires vast amounts of financing, these amendments particularly affect agricultural lenders.<sup>3</sup>

This comment identifies and analyzes the more significant changes in S.D.C.L. chapter 57A-9 with emphasis on agricultural transactions. First, the comment addresses the requirements for a valid and enforceable security agreement. Second, the comment examines the changes in methods of perfection, specifically, automatic perfection. Third, the comment addresses creditor priorities with emphasis on fixtures. Fourth, the comment presents an overview of the changes affecting filing requirements, transition provisions and default procedures. The comment concludes with a detailed analysis of the changes in multi-state transactions.

## VALIDITY OF A SECURITY AGREEMENT

Presently, two sections of S.D.C.L. chapter 57A-9 govern the validity of a security agreement; S.D.C.L. section 57A-9-204 and S.D.C.L. section 57A-9-203.<sup>4</sup> Pursuant to section 57A-9-204, a security agreement does not attach unless: (1) there is an agreement that it will attach; (2) value is given; and (3) the debtor has rights in the collateral.<sup>5</sup> A security interest is enforceable only if: (1) the conditions for attachment are met;<sup>6</sup> and (2) either the secured party has possession of the collateral or the debtor has signed a security agreement containing a description of the collateral.<sup>7</sup>

The 1982 version of S.D.C.L. chapter 57A-9 groups all the requirements for a valid security agreement under one section, S.D.C.L. section 57A-9-203.<sup>8</sup> The requirements for validity are essentially identical.<sup>9</sup> The new ver-

1. 1982 S.D. SESS. LAWS ch. 347.

2. S.D.C.L. § 57A-11-101 (Supp. 1982).

3. Total farm debt was estimated at 177 billion dollars on Jan. 1, 1981. Heitz, *Financing Agricultural Land Purchases in the 1980's*, THE AGRIC. L. J. 697, (1981-82).

4. (1980).

5. S.D.C.L. § 57A-9-204(1) (1980).

6. *See id.*

7. S.D.C.L. § 57A-9-203(1)(a)(b) (1980).

8. *See* S.D.C.L. § 57A-9-203 (Supp. 1982) and *cf.* S.D.C.L. §§ 57A-9-203,-204 (1980).

9. *Id.*

sion merely incorporates the validity requirements into one section rather than two. There have, however, been some changes made in section 57A-9-203. For example, the 1982 amendments add the words "per agreement" to the enforceability provision.<sup>10</sup> Presently, section 57A-9-203 states that a secured party must have possession of the collateral or the debtor must have signed a security agreement describing the collateral to enforce a security agreement.<sup>11</sup> Under amended section 57A-9-203, possession of the collateral alone will not render a security agreement enforceable. A secured party must have possession pursuant to an agreement.<sup>12</sup>

The 1982 amendments to section 57A-9-203 also change whether a security agreement covers proceeds when collateral is sold or otherwise disposed of. Pursuant to the present version of section 57A-9-203, a security agreement covers proceeds if the term "proceeds" is mentioned in the security agreement.<sup>13</sup> Amended section 57A-9-203 no longer requires the presence of the words "proceeds" in the security agreement. A security agreement is presumed to cover "proceeds" absent an agreement to the contrary.<sup>14</sup>

#### PERFECTION: ELIMINATION OF THE SECRET LIEN

Under the prior version of S.D.C.L. section 57A-9-302<sup>15</sup> purchase

10. S.D.C.L. § 57A-9-203(1)(a) (Supp. 1982).

11. S.D.C.L. § 57A-9-203(1)(a), (b) (1980).

12. S.D.C.L. § 57A-9-203(1)(a) (Supp. 1982).

13. S.D.C.L. § 57A-9-203(1)(b) (1980).

14. S.D.C.L. § 57A-9-203(3) (Supp. 1982). The South Dakota Legislature also deleted certain language from S.D.C.L. § 57A-9-203 pertaining to security agreements. Under the 1980 version, a security agreement has to contain a description of the land concerned if the collateral is crops, timber, oil, gas or minerals to be extracted or cut. S.D.C.L. § 57A-9-203(1)(b) (1980). The 1982 version requires a description of land only for crops and timber. S.D.C.L. § 57A-9-203(1)(a) (Supp. 1982). The reason for deleting oil, gas and minerals from the description requirements appears unknown. Nonetheless, there is a plausible answer. South Dakota adopted the 1972 version of U.C.C. § 9-203 and incorporated it into S.D.C.L. § 57A-9-203 (Supp. 1982). The 1972 version of U.C.C. § 9-203 deleted oil, gas and minerals from description requirements because pursuant to U.C.C. § 9-204(2)(b) (1972) a debtor has no rights in oil, gas or minerals until they were extracted. South Dakota, however, repealed S.D.C.L. § 57A-9-204 in 1978. 1978 S.D. SESS. LAWS ch. 358, § 4.

15. S.D.C.L. § 57A-9-302 (1980) provides in pertinent part:

When filing is required to perfect security interest—Security interests to which filing provisions of this chapter 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 § 57A-9-305;
- (b) A security interest temporarily perfected in instruments or documents without delivery under § 57A-9-304 or in proceeds for a ten-day period under § 57A-9-306;
- (c) A purchase money security interest in farm equipment having a purchase price not in excess of twenty-five hundred dollars; but filing is required for a fixture under § 57A-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 § 57A-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;

money security interests<sup>16</sup> in farm equipment having a purchase price not in excess of \$2500 were deemed perfected even where a financing statement was not filed.<sup>17</sup> Although a filing was required for all farm equipment destined to become a fixture or for motor vehicles required to be licensed, a purchase money security interest in moderately priced farm equipment which remained a chattel enjoyed automatic perfection. Thus, a subsequent creditor considering loaning against farm equipment in the \$2500 or less price range might be unable to discover any liens against it by searching public records. This resulted in the automatic perfection being dubbed a "secret lien."<sup>18</sup>

The automatic perfection provision of subsection 57A-9-302(1)(c) was not without its drawbacks to a secured party. A short hypothetical illustrates this problem. Secured party (SP) sells a used plow to farmer one (F1) for \$2500, takes a security interest, but does not file a financing statement. Several months later F1 sells the plow to his farmer neighbor (F2) for \$2200. F1 squanders the \$2200 on a Pacific cruise. F2 takes the plow free of SP's interest because F2 falls within the purchaser protection provisions of subsection 57A-9-307(2).<sup>19</sup> That is, he purchased the plow without knowledge of the SP's security interest, for value, and for use in his own farming operation. A secured party could avoid the possibility of losing priority to a subsection 57A-9-307(2) purchaser by filing a financing statement.<sup>20</sup> Thus, because filing was required to protect a secured party's interest against some subsequent purchasers, the automatic perfection of farm equipment having a purchase price of \$2500 or less was of only marginal value.

The automatic perfection accorded purchase money security interests in relatively inexpensive farm equipment seems to have been induced by the U.C.C. drafters' desire to give farmers preferential treatment.<sup>21</sup> Some com-

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(f) A security interest of a collecting bank (§ 57A-4-208) or arising under the chapter on sales (see § 57A-9-113) or covered in subsection (3) of this section. . . .

16. S.D.C.L. § 57A-9-107 (1980) provides:

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

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

17. See note 15 *supra* at (1)(c).

18. See note, *Secured Transactions: Old McDonalds Secret Lien*, 27 U. Fla. L. Rev. 151 (1974).

19. S.D.C.L. § 57A-9-307 (1980) provides:

- (1) A buyer in ordinary course of business (subsection (9) of § 57A-1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.
- (2) In the case of consumer goods and in the case of farm equipment having an original purchase price not in excess of twenty-five hundred dollars (other than fixtures, see § 57A-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.

20. *Id.* at (2).

21. See Sorelle, "Farm Products" Under the U.C.C.—Is a Special Classification Desirable?, 47 TEX. L. REV. 309, 309 (1969).

mentators suggest that the exception was designed to expedite farm credit.<sup>22</sup> Yet, this goal is anomolous when one considers the general Article Nine policy of giving public notice of chattel encumbrances.<sup>23</sup> Certainly, secret liens do not further that objective. Moreover, the secret lien causes lenders to become wary of accepting moderately priced farm equipment as collateral.<sup>24</sup> Therefore, the automatic perfection provision impedes rather than enhances the availability of farm credit. Although a single piece of farm equipment valued at \$2500 or less may be insignificant, ten or twelve pieces in that price range represents a considerable volume of collateral rendered suspect because of the possibility of secret liens. The problem was further exacerbated when some courts concluded that the \$2500 value limitation on automatic perfection was determined by the price of each individual item, not by the aggregate price of all the items on one contract.<sup>25</sup>

In contrast, the recently amended version of subsection 57A-9-302(1)<sup>26</sup> does not provide for automatic perfection of farm equipment with a purchase price of \$2500 or less. The provision's elimination is desirable since secret liens are inconsistent with the policy behind Article Nine, farm credit is negatively affected by the provision, and numerous states had already modified or eliminated the automatic perfection.<sup>27</sup> Subsection 57A-9-307(2), providing in part, protection for purchases of farm equipment covered by the secret liens, was also amended to reflect the elimination of the automatic perfection provisions of subsection 57A-9-302(1)(c).<sup>28</sup> Accordingly, filing is the only method available to a secured party who desires to

22. See Hawkland, *The Proposed Amendments to Article 9 of the U.C.C.—Part I: Financing the Farmer*, 76 COM. L. J. 416 (1971).

23. See *supra* note 16, at 153-54.

24. See U.C.C. app. I, at B-8 (1977).

25. *International Harvester Credit Corp. v. Am. Nat'l Bank of Jacksonville*, 296 So.2d 32 (Fla. 1974).

26. S.D.C.L. § 57A-9-302(1) (Supp. 1982) provides:

- (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 § 57A-9-305;
  - (b) A security interest temporarily perfected in instruments or documents without delivery under § 57A-9-304 or in proceeds for a ten-day period under § 57A-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 § 57A-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 (§ 57A-4-208) or arising under the chapter on sales (see § 57A-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.

The \$2500 exception was formerly contained in S.D.C.L. § 57A-9-302(1)(c).

27. See *supra* note 22.

28. See S.D.C.L. § 57A-9-307(2) (Supp. 1982).

perfect a security interest in farm equipment regardless of its value.<sup>29</sup>

The statutes governing the transition to amended chapter 57A-9, however, validate automatic farm equipment perfections arising under the old code and occurring before July 1, 1982.<sup>30</sup> This "grandfather" provision continues the perfection for three years after July 1, 1982.<sup>31</sup> Thereafter, the appropriate financing statement must be timely filed to maintain perfected status.<sup>32</sup> The old version of chapter 57A-9 applies to any questions of priority if the positions of the parties were fixed prior to July 1, 1982.<sup>33</sup> Presumably, these automatic perfections will retain their preferred status both in and outside of bankruptcy during the interim.<sup>34</sup>

### PRIORITIES

Amended S.D.C.L. chapter 57A-9 changes or clarifies several important priority issues that were resolved differently or were not directly addressed under old S.D.C.L. chapter 57A-9. This comment divides these priority changes into three areas: (1) clarifications under amended S.D.C.L. section 57A-9-312; (2) disputes between secured parties and non-S.D.C.L. section 57A-9 interests, and (3) priorities in fixtures under completely revamped section 57A-9-313. The analysis begins with several clarifications achieved under amended section 57A-9-312.

#### *Amended S.D.C.L. Section 57A-9-312*

Section 57A-9-312<sup>35</sup> of amended chapter 57A-9 determines priorities

29. *Id.*

30. See S.D.C.L. § 57A-11-103 (Supp. 1982).

31. See S.D.C.L. § 57A-11-106(1) (Supp. 1982).

32. *Id.*

33. S.D.C.L. § 57A-11-107 (Supp. 1982).

34. See S.D.C.L. § 57A-9-312 (Supp. 1982) (addresses priorities among conflicting chapter 57A-9 parties); S.D.C.L. § 57A-9-301(3) (Supp. 1982) (trustee in bankruptcy given status of lien creditor under state laws); 11 U.S.C.A. § 544(a)(1) (1979) (trustee in bankruptcy given status of holder of judicial lien upon filing of bankruptcy petition).

35. S.D.C.L. § 57A-9-312 (Supp. 1982) provides:

- (1) The rules of priority stated in other sections of this part and in the following sections shall govern when applicable: § 57A-4-208 with respect to the security interests of collecting banks in items being collected, accompanying documents and proceeds; § 57A-9-103 on security interests related to other jurisdictions; § 57A-9-114 on consignments.
- (2) A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise take priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than 6 months before the crops become growing crops by planting or otherwise.
- (3) A perfected purchase money security interest in inventory has priority over a conflicting security interest in the same inventory and also has priority in identifiable cash proceeds received on or before the delivery of the inventory to a buyer if
  - (a) The purchase money security interest is perfected at the time the debtor receives possession of the inventory; and
  - (b) The purchase money secured party gives notification in writing to the holder of the conflicting security interest if the holder had filed a financing statement covering the same types of inventory (i) before the date of the filing made by the

among conflicting S.D.C.L. chapter 57A-9 security interests in the same collateral. The amended version of this statute is significantly different from its predecessor. In spite of this, however, both versions usually produce the same outcomes in similar circumstances.<sup>36</sup> Consequently, only those changes that might prescribe a different result will be emphasized in this comment. Specifically, these changes involve future advances,<sup>37</sup> priorities between accounts financiers and subsequent purchase money secured inventory financiers claiming proceeds,<sup>38</sup> and finally, disputes between those who file and those who perfect by a method other than filing under section 57A-9-312.<sup>39</sup>

#### a. *Future Advances*

A simple hypothetical best illustrates the impact of the future advance change. Secured party one (SP1) makes a loan to debtor (D) and perfects by filing. For example, assume secured party two (SP2) makes a loan to D and perfects his interest. Subsequently, SP1 makes another loan (advance) to D, either under the original security agreement or under a new one. Assuming that SP1's original security agreement does not mention future advances, the

- 
- purchase money secured party, or (ii) before the beginning of the twenty-one day period where the purchase money security interest is temporarily perfected without filing or possession (subsection (5) of § 57A-9-304); and
- (c) The holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory; and
  - (d) Such notification states that the person giving the notice has or expects to acquire a purchase money security interest in inventory of the debtor, describing such inventory by item or type.
- (4) A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral or its proceeds if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within twenty days thereafter.
  - (5) In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in subsection[s] (3) and (4) of this section), priority between conflicting security interests in the same collateral shall be determined according to the following rules:
    - (a) Conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection.
    - (b) So long as conflicting security interests are unperfected, the first to attach has priority.
  - (6) For the purposes of subsection (5) a date of filing or perfection as to collateral is also a date of filing or perfection as to proceeds.
  - (7) If future advances are made while a security interest is perfected by filing or the taking of possession, the security interest has the same priority for the purposes of subsection (5) with respect to the future advances as it does with respect to the first advance. If a commitment is made before or while the security interest is so perfected, the security interest has the same priority with respect to advances made pursuant thereto. In other cases a perfected security interest has priority from the date the advance is made.

36. J. WHITE AND R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 1036 (2d ed. 1980).

37. See Coogan, *The New U.C.C. Article 9*, 86 HARV. L. REV. 477, 505 (1973).

38. See *id.* at 514.

39. See J. WHITE AND R. SUMMERS, *supra* note 36, at 1041-42.



question becomes whether SP1 or SP2 has priority in the collateral in regard to SP1's second advance. Although the majority of courts that have confronted the issue have found for SP1 even under statutes similar to the old version of section 57A-9-312,<sup>40</sup> the decisions are split.<sup>41</sup> Amended section 57A-9-312(7) codifies the majority rule. Subsection 57A-9-312(7) now makes it clear that SP1's second advance relates back to his original filing for priority regardless of whether the subsequent advance was made under the original or a new security agreement.<sup>42</sup> Thus, the secured party who files or retains possession of the collateral maintains priority from the original date of his filing or possession.

The second sentence of subsection 57A-9-312(7), however, provides a narrower rule for those who make advances having originally perfected by a method other than filing or possession. Temporary perfection of an interest in instruments for twenty-one days under subsection 57A-9-304(4) is an example. Thus, future advances extended by secured parties who perfect by a method other than possession or filing, do not relate back unless made pursuant to a "commitment."<sup>43</sup> Therefore, absent a "commitment" during the time of the temporary perfection, priority for any advances dates only from the time of the advance. In short, in the rare case where a commitment is not made, the advances do not relate back.<sup>44</sup>

The rationale behind giving the first secured party priority in future advances from the date of original possession or filing is logical. The act of filing or possession puts subsequent parties on notice.<sup>45</sup> Because it is not uncommon for commercial financiers to make repeated advances, they should not be burdened with the duty of re-perfecting each advance. Commentators have even suggested that the first secured party to file or perfect should prevail where the initial advance is completely paid off, a competing interest arises, and a second advance is extended.<sup>46</sup>

### b. *Account Financiers and Purchase Money Security Interests in Inventory*

Amended S.D.C.L. section 57A-9-312 also resolves a priority conflict between one holding a purchase money security interest in inventory and its proceeds and one holding an earlier perfected security interest in accounts

40. See, e.g., *Household Fin. Corp. v. Bank Comm'r of Md.*, 248 Md. 233, 235 A.2d 732, 4 U.C.C. Rep. Serv. (Callaghan) 809 (1967); *Provident Fin. Co. v. Beneficial Fin. Co.*, 36 N.C. App. 401, 245 S.E.2d 510, 24 U.C.C. Rep. Serv. (Callaghan) 1332 (1978).

41. See, e.g., *Coin-o-Matic Serv. Co. v. Rhode Island Hosp. Trust Co.*, — A.2d —, 3 U.C.C. Rep. Serv. 1112 (1966).

42. U.C.C. § 9-312(7) (1977).

43. S.D.C.L. § 57A-9-105(1)(k) (Supp. 1982) provides:

(1) In this chapter unless the context otherwise requires:

(k) An advance is made pursuant to commitment if the secured party has bound himself to make it, whether or not a subsequent event of default or other event not within his control has relieved or may relieve him from his obligation; . . . .

44. U.C.C. § 9-312 comment 7 (1977).

45. See *id.*

46. J. WHITE AND R. SUMMERS, *supra* note 36, at 1039 n.15.

receivable arising from the same inventory.<sup>47</sup> The new statute resolves the largely academic conflict<sup>48</sup> in favor of the accounts receivable financier in new subsection 57A-9-312(3).<sup>49</sup> This section provides that the holder of the purchase money security interest in inventory has priority only in identifiable cash proceeds<sup>50</sup> and that party who filed earlier on the accounts receivable obtains priority under the first to file or perfect rule of revised subsection 57A-9-312(5).<sup>51</sup> The priority reverses, however, where the accounts financier files subsequent to the competing interest.<sup>52</sup> Amended subsections 57A-9-312(5) and (6), when read together, explicitly provide that the date upon which an interest in collateral is filed or perfected is also the date of filing or perfection as to the proceeds of the collateral. This scheme allows a secured party who is the first to file or perfect as to the inventory and its proceeds to obtain priority in accounts receivable over a party who subsequently files directly on the accounts.<sup>53</sup>

Finally, one should note that under revised subsection 57A-9-312(4) holders of non-inventory purchase money security interests obtain priority in all proceeds from that collateral.<sup>54</sup> Consequently, if the collateral is not inventory, the holder of an earlier filed security interest in accounts loses priority to the later purchase money security interest as to proceeds from that collateral. For example, the holder of a purchase money security interest in a portion of a debtor's farm equipment would take priority in any type of proceeds generated through the sale of that collateral over an earlier perfected interest in all of debtor's farm equipment present and after acquired.

### c. *Perfection by Filing v. Perfection by Other Methods*

The amended version of subsection 57A-9-312(5) produces a different result than its predecessor in at least one important situation. Prior to amendment, a lender who filed but did not perfect, could lose priority to a subsequent creditor who perfected by a means other than filing.<sup>55</sup> This type of situation could arise in a variety of situations including automatic perfection of purchase money security interests in consumer goods under subsection 57A-9-302(d)(1) and perfection by possession of instruments under section 57A-9-304. This result was reached by applying subsection 57A-9-312(5) of the old statute.<sup>56</sup>

The amended version of subsection 57A-9-312(5) eliminates the above

47. U.C.C. § 9-312 comment 3 (1977).

48. J. WHITE AND R. SUMMERS, *supra* note 36, at 1040 (academic because no litigation on the subject).

49. *See supra* note 35.

50. Coogan, *supra* note 37, at 517. *See* U.C.C. § 9-312 comment 8, example 6 (1977).

51. U.C.C. § 9-312 comment 8, example 7 (1977).

52. *Id.* at example 8.

53. *See id.*

54. J. WHITE AND R. SUMMERS, *supra* note 36, at 1041.

55. *Id.* at 1041-42.

56. *See* S.D.C.L. § 57A-9-312(5) (1980) provides:

In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in subsec-

distinction and applies the first to perfect or file rule regardless of whether a subsequent interest perfects by filing or by other means.<sup>57</sup> The amended statute achieves this result by eliminating the language contained in old subsection 57A-9-312(5). Accordingly, the first to file or perfect receives priority. A secured party should realize that priority will not necessarily be established merely because no prior financing statement is indexed when he files. This is because a competing secured party may have perfected by a method other than filing before the subsequent party examines the record.<sup>58</sup> Having discussed the priorities among chapter 57A-9 secured parties, this comment proceeds to discuss priorities among chapter 57A-9 security interests and nonchapter 57A-9 interests.

### *Secured Parties and Non-S.D.C.L. Section 57A-9 Interests*

The amended version of S.D.C.L. chapter 57A-9 addresses the conflict between chapter 57A-9 secured parties and non-57A-9 interests over future advances. Specifically, this conflict involves the lien creditor whose interest arises between a secured party's first and a subsequent advance,<sup>59</sup> and one who purchases between a secured party's first and a subsequent advance.<sup>60</sup>

#### *a. S.D.C.L. Chapter 57A-9 Interests v. Lien Creditors*

First, new S.D.C.L. subsection 57A-9-301(4) resolves the problem of the lien creditor whose interest arises between advances.<sup>61</sup> In essence, this subsection means that both the post-lien and pre-lien advances have priority over the lien creditor if any of the following conditions are met: (1) the post-lien advance is made within forty-five days from the creation of the lien; or (2) although the post-lien advance occurs more than forty-five days subsequent to the creation of the lien, the secured party has no knowledge of the lien at the time of the advance; or (3) the post-lien advance is made pursuant to the secured parties commitment entered into without knowledge of the

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tion[s] (3) and (4) of this section), priority between conflicting security interests in the same collateral shall be determined as follows:

- (a) In the order of filing if both are perfected by filing, regardless of which security interest attached first under § 57A-9-204(1) and whether it attached before or after filing;
- (b) In the order of perfection unless both are perfected by filing, regardless of which security interest attached first under § 57A-9-204(1) and, in the case of a filed security interest, whether it attached before or after filing; and
- (c) In the order of attachment under § 57A-9-204(1) so long as neither is perfected.

57. Cf. S.D.C.L. § 57A-9-312(5) (1980) and S.D.C.L. § 57A-9-312(5) (Supp. 1982).

58. See S.D.C.L. § 57A-9-302(1)(d) (Supp. 1982) (allowing automatic perfection of purchase money security interests in consumer goods); S.D.C.L. § 57A-9-304 (Supp. 1982) (prescribes certain temporary perfections); S.D.C.L. § 57A-9-305 (Supp. 1982) (perfection by possession).

59. Coogan, *supra* note 37, at 511-14.

60. *Id.*

61. S.D.C.L. § 57A-9-301(4) (Supp. 1982) provides:

A person who becomes a lien creditor while a security interest is perfected takes subject to the security interest only to the extent that it secures advances made before he becomes a lien creditor or within forty-five days thereafter or made without knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien.

lien.<sup>62</sup> Clearly, the prudent lien creditor should wait forty-five days and immediately give notice to the secured party. This strategy might prevent secured parties from making advances during the forty-five day period that otherwise would not be made.

b. *S.D.C.L. Chapter 57A-9 Interests v. Purchasers*

The conflict between secured parties and those who purchase collateral between advances is uncommon. The old version of subsection 57A-9-307(1), as well as the amended version, provide identical solutions<sup>63</sup> where the purchaser buys in the ordinary course of business.<sup>64</sup> In this situation, the purchaser not only takes priority over the future advance, but even defeats the earlier perfected security interest.<sup>65</sup>

The prior version of chapter 57A-9, however, did not address the problem of a non-ordinary course buyer<sup>66</sup> who purchases between the initial and a subsequent advance. Newly added subsection 57A-9-307(3) provides the needed guidance.<sup>67</sup> This subsection gives considerably less protection to the secured party than subsection 57A-9-301(4) provides in the case of the intervening lien creditor. Pursuant to subsection 57A-9-307(3), the secured party must meet two requirements to obtain priority over the purchaser. First, he must not know of the purchase at the time he extends the advance; and second, the advance must be made within forty-five days of the purchase.<sup>68</sup>

*Priorities in Fixtures Under S.D.C.L. Section 57A-9-313*

The 1982 amendments bring S.D.C.L. section 57A-9-313<sup>69</sup> dealing with

62. See R. HENSON, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 174-75 (2d ed. 1979).

63. Compare S.D.C.L. § 57A-9-307(1) (1980) with S.D.C.L. § 57A-9-307 (Supp. 1982).

64. S.D.C.L. § 57A-1-201(9) (1980) provides:

Buyer in ordinary course of business means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. Buying may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

65. U.C.C. § 9-307 (1977).

66. Compare S.D.C.L. § 57A-9-307 (1980) with S.D.C.L. § 57A-9-307(3) (Supp. 1982).

67. See *supra* note 63.

68. See R. HENSON, *supra* note 62 at 181-83.

69. S.D.C.L. § 57A-9-313 (Supp. 1982) provides:

- (1) In this section and in the provisions of Part 4 of this chapter referring to fixture filing, unless the context otherwise requires:
  - (a) goods are fixtures when they become so related to particular real estate that an interest in them arises under real estate law;
  - (b) a fixture filing is the filing in the office where a mortgage on the real estate would be filed or recorded of a financing statement covering goods which are or are to become fixtures and conforming to the requirements of subsection (5) of § 57A-9-402;
  - (c) a mortgage is a construction mortgage to the extent that it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates.
- (2) A security interest under this chapter may be created in goods which are fixtures or

priorities in fixtures into complete conformity with U.C.C. section 9-313. This portion of the comment emphasizes and analyzes the effect of these amendments by chronologically examining new section 57A-9-313. One should realize that a substantial portion of litigation involving fixtures deals with fixtures in the agricultural context. Grain bins,<sup>70</sup> barn cleaners,<sup>71</sup> irrigation sprinklers<sup>72</sup> and dairy equipment<sup>73</sup> are examples.

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may continue in goods which become fixtures, but no security interest exists under this chapter in ordinary building materials incorporated into an improvement on land.

- (3) This chapter does not prevent creation of an encumbrance upon fixtures pursuant to real estate law.
- (4) A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where
  - (a) The security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within ten days thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate; or
  - (b) the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate; or
  - (c) the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any method permitted by this chapter; or
  - (d) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this chapter.
- (5) A security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where
  - (a) the encumbrancer or owner has consented in writing to the security interest or has disclaimed an interest in the goods as fixtures; or
  - (b) the debtor has a right to remove the goods as against the encumbrancer or owner. If the debtor's right terminates, the priority of the security interest continues for a reasonable time.
- (6) Notwithstanding paragraph (a) of subsection (4) but otherwise subject to subsections (4) and (5), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.
- (7) In cases not within the preceding subsections, a security interest in fixtures is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor.
- (8) When the secured party has priority over all owner and encumbrancers of the real estate, he may, on default, subject to the provisions of §§ 57A-9-501 to 57A-9-507, 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 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 for 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.

70. See *Corning Bank v. Bank of Rector*, 265 Ark. 68, 576 S.W.2d 949, 26 U.C.C. Rep. Serv. (Callaghan) 1367 (1979).

71. *Kibbe v. Ronde*, 285 Pa. Super. 379, 427 A.2d 1163, 31 U.C.C. Rep. Serv. (Callaghan) 701 (1981).

72. *Duff v. Draper*, 98 Idaho 379, 565 P.2d 572 (1977).

73. *Peoples State Bank of Cherryvale v. Clayton*, 2 Kan. App.2d 438, 580 P.2d 1375 (1978).

*a. Defining Fixtures—A Fixture Filing*

By its very title, section 57A-9-313 applies only to the priority of security interests in fixtures. Therefore, the first step in any analysis is to determine whether a fixture is involved.<sup>74</sup> Whether or not a good is a fixture is a question of fact which is determined on a case by case basis.<sup>75</sup> Any doubts about whether goods are fixtures should be resolved by making a double filing—fixture and chattel.<sup>76</sup>

Assuming collateral is determined to be a "fixture" one turns to amended section 57A-9-313 to determine the priority of competing interests in fixtures. The revised statute introduces the concept of a "fixture filing" and defines it as: "the filing in the office where a mortgage on the real estate would be filed or recorded of a financing statement covering goods which are or are to become fixtures and conforming to the requirement of subsection (5) of § 57A-9-402."<sup>77</sup> In essence, this is a refinement of subsection 57A-9-313(4)(B) of the old statute.<sup>78</sup> The language of the old statute appears to be South Dakota's attempt to implement its own version of a fixture filing. The statute seems to indicate that both a filing as to the goods and a filing on the realty records are needed to perfect against realty interests. The revised statute, however, requires only one filing—a "fixture filing."<sup>79</sup>

*b. Chattel and Real Estate Interests*

Subsection 57A-9-313(3) of the revised statute states the obvious: attached fixtures can be encumbered under state realty laws. This is the very reason why section 57A-9-313 exists; it determines the priority of competing chattel and realty interests in fixtures. Section 57A-9-313 would be unnecessary if encumbrances upon fixtures were not possible under state realty laws.

*c. Purchase Money Priority Over Prior Interests*

Subsection 57A-9-313(4) is the first of four sections that actually determine priorities in fixtures.<sup>80</sup> Subsection 57A-9-313(4)(a) is best characterized

74. U.C.C. § 9-313 comment 3 and 4 (1977).

75. *See* Metropolitan Life Ins. Co. v. Jensen, 67 S.D. 225, 226, 9 N.W.2d 140, 141 (1943).

76. R. HENSON, *supra* note 62, at 299.

77. S.D.C.L. § 9-313(1)(b) (Supp. 1982).

78. S.D.C.L. § 9-313(4)(B) (1980).

79. *See* S.D.C.L. § 9-313(1)(b) (Supp. 1982).

80. S.D.C.L. § 57A-9-313(4) (Supp. 1982) provides:

A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where

- (a) The security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within ten days thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate; or
- (b) the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate; or

as a purchase money exception to the general first in time thread that runs throughout chapter 57A-9.<sup>81</sup> Thus, the concept behind the exception is roughly comparable to the purchase money priority recognized in subsection 57A-9-312(4).<sup>82</sup> It is important to realize that a subsection 57A-9-313(4)(a) purchase money security interest obtains priority only over prior real estate interests.<sup>83</sup> This is true, however, only if the interest arises before the goods become fixtures or within ten days thereafter, and the debtor has an interest of record or is in possession of the realty. Although the old version of section 57A-9-313 merely required attachment of a security interest for perfection, the amended statute requires perfection by "filing."<sup>84</sup>

A hypothetical illustrates the effect of subsection 57A-9-313(4)(a). Assume bank has a properly recorded interest in all of farmer's realty. Subsequently, farmer finances a dairy barn cleaner through the Production Credit Association (PCA). PCA makes a proper fixture filing eight days after the cleaner is affixed to the property. By virtue of the ten day grace period prescribed in subsection 57A-9-313(4)(a), PCA has priority over the bank in the barn cleaner.

#### *d. Priority Over Subsequently Arising Interests*

Subsection 57A-9-313(4)(b) outlines the general priority principles of section 57A-9-313.<sup>85</sup> This section embodies the familiar first to file or record rule. Thus, the secured party who makes a valid fixture filing has priority over subsequently arising conflicting real estate interests.<sup>86</sup> The requirement that the security interest have priority over any conflicting interest of a predecessor in title of the encumbrancer or owner merits explanation. If a fixture security interest is subordinate to a mortgage, it is also subordinate to an assignee of the mortgagee even if the assignment is not filed.<sup>87</sup> Moreover, any fixture interest that is subordinate to the interest of a real estate owner is also subordinate to the owner's grantee or mortgagee.<sup>88</sup> The requirement that the debtor or owner of record be in possession prevents a fixture sup-

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- (c) the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any method permitted by this chapter; or
  - (d) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this chapter.

81. J. WHITE AND R. SUMMERS, *supra* note 36, at 1058.

82. See U.C.C. § 9-313 comment 4(a) (1977).

83. *Id.*

84. R. HENSON, *supra* note 62 at 297.

85. S.D.C.L. § 9-313(4)(b) (Supp. 1982) provides:

A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where . . .

- (b) the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate.

86. U.C.C. § 9-313 comment 4(b) (1977).

87. *Id.*

88. *Id.*

plier from obtaining a security interest through a contractor to the surprise of real estate interests.<sup>89</sup>

At this juncture, the interplay between subsection (4)(a) and (b) should be emphasized. Although a purchase money security interest in fixtures under subparagraph (a) establishes priority over prior interests in the real estate if filed within ten days of affixation, this is not the case for subsequent interests.<sup>90</sup> Subparagraph (b) requires one to perfect by filing before his interest obtains priority over subsequently arising interests. Consequently, a purchase money secured party should file immediately to insure priority over subsequently arising interests. This is because any interest that is recorded during the ten day gap between affixation and filing takes priority over the fixture financier.<sup>91</sup> In short, the ten day grace period of subparagraph (a) is not effective against subsequently filed interests recognized under subparagraph (b). Only an immediate fixture filing will assure the purchase money secured party of priority over both prior and subsequent interests.

#### *e. Exceptions to the Fixture Filing Requirements*

Subsequent provisions of S.D.C.L. section 57A-9-313 qualify the rules of subparagraphs (a) and (b). Both subparagraphs (a) and (b) require fixture filings. Subparagraph (c), however, clearly precludes the necessity of making a fixture filing for certain readily removable factory or office machines and replacement appliances that are consumer goods.<sup>92</sup> Subparagraph (c) merely requires that the security interest be perfected by any method permitted by chapter 57A-9.<sup>93</sup> Therefore, a proper chattel filing for qualifying machines or even the automatic perfection accorded consumer goods under subsection 57A-9-302(1)(d) enable the secured party to prevail over conflicting realty interests, both prior and subsequent.<sup>94</sup> This is true if the perfection occurs before the goods become fixtures.<sup>95</sup>

Subparagraph (d) does not define these "readily moveable goods" and neither do the drafters of the Uniform Commercial Code.<sup>96</sup> Given the nebulous demarcation between a fixture and non-fixture, the "readily removable" distinction is of dubious guidance.

Subparagraph (c)'s reference to readily removable replacement appliances is at best a narrow exception. First, it applies only to replacement appliances, not new ones.<sup>97</sup> Second, the replacement appliances must be

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89. U.C.C. § 9-313 comment 5 (1977).

90. Coogan, *supra* note 37, at 493-94.

91. *Id.* at 493.

92. U.C.C. § 9-313 comment 4(d) (1977).

93. *Id.*

94. *Id.*

95. *Id.*

96. *See* Coogan, *supra* note 37, at 495-97.

97. U.C.C. § 9-313 comment 4(d) (1977).



consumer goods in the hands of the debtor.<sup>98</sup> This provision eliminates the necessity of a secured party making a fixture filing with its incumbent property descriptions for replacement appliances in the non-commercial owner occupied context.<sup>99</sup> A hypothetical shows just how narrow the exception is. For example, assume that debtor (D) owns a duplex. He lives in one apartment and rents the other. D purchases two new built-in ovens from a local appliance retailer and the ovens are installed in the duplex, one in each apartment. Under subsection 57A-9-302(4)(c) the appliance retailer obtains a perfected security interest in the oven installed in D's apartment even though he has not filed a financing statement. Because the oven is a consumer good, perfection is automatic under subsection 57A-9-302(1)(d). The oven installed in the other apartment is not a consumer good in the hands of the debtor. Consequently, the appliance retailer loses priority in the second oven to real estate interests.

Subsection 57A-9-313(4)(d) eliminates the fixture filing requirements of subsection 57A-9-302(4)(a) and (b) when there is a conflict between a lien creditor and a secured party.<sup>100</sup> The secured party does not escape the necessity of perfecting, subparagraph (d) merely provides the option of perfecting by "any method permitted by this article." Therefore, even a prior chattel filing or automatic perfection is sufficient to protect the secured party against a lien creditor.<sup>101</sup> The rationale behind this exception to the requirement of making a fixture filing stems from the assumption that a lien creditor is not a reliance creditor who would ordinarily search realty records.<sup>102</sup> This exception is designed with the "acid test" of bankruptcy in mind.<sup>103</sup> Doubtless, section 547(e)(1)(B)<sup>104</sup> of the new bankruptcy code specifically recognizes the subsection 57A-9-313(d) perfected secured party's priority over a trustee in bankruptcy.<sup>105</sup> In addition, the so called "strong arm" clause of section 544(a)<sup>106</sup> creates no problems for one who perfects relying

98. *Id.*

99. *Id.*

100. U.C.C. § 9-313 comment 4(c) (1977).

101. *Id.*

102. *Id.*

103. *Id.*

104. 11 U.S.C.A. § 547(e)(1)(B) (1979) provides: "A transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee."

105. See J. WHITE AND R. SUMMERS, *supra* note 34, at 1062.

106. 11 U.S.C.A. § 544(a) (1979) provides:

The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; and

(3) a bona fide purchaser of real property from the debtor, against whom applicable

on the "perfection by any means available under this chapter" language. This is because the trustee in bankruptcy automatically becomes a hypothetical judgment lien creditor under state law upon the filing of a bankruptcy petition.<sup>107</sup> The very language of subsection 57A-9-313(4)(d) subordinates the trustee if the holder of the fixture interest perfects first using any acceptable method under chapter 57A-9.<sup>108</sup>

Upon the filing of a bankruptcy petition, however, the trustee also obtains the position of a hypothetical bona fide purchaser of real property from the debtor. This position arises by virtue of section 544(a)(3).<sup>109</sup> Section 57A-9-313 subordinates one who has not made a fixture filing to real estate purchasers in a variety of circumstances under section 57A-9-313.<sup>110</sup> In spite of the literal meaning of section 544(a)(3), some commentators have suggested that the proper test to apply to fixture priority questions is the chattel test prescribed in section 547 of title 11 of the United States Code where the fixture problem is directly dealt with.<sup>111</sup>

*f. Priority Through Permission or Disclaimer.*

S.D.C.L. subsection 57A-9-313(5)(a) is nearly self-explanatory.<sup>112</sup> Under this subsection one who obtains written permission from the owner or encumbrancer of real estate need not perfect to obtain priority over the prior interest.<sup>113</sup> Thus, a secured party selling dairy equipment to be installed as fixtures in a new milking barn could obtain priority in the goods as fixtures over the real estate owner and construction mortgagee by obtaining their written permission or disclaimer.

Subsection 57A-9-313(5)(a) has some obvious drawbacks. First, consent is needed from existing interests. Second, no priority is established as to interests not giving consent, nor to subsequently arising interests. Assuming that the real estate owner and mortgagee are the only prior interests, a disclaimer or consent from those parties, coupled with a filing under subsection 57A-9-313(4)(b) would give the secured party priority over all prior and subsequent interests.<sup>114</sup>

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law permits such transfer to be perfected, that obtains the status of a bona fide purchaser at the time of the commencement of the case, whether or not such a purchaser exists.

107. *Id.* at (a)(1).

108. See S.D.C.L. § 57A-9-313(4)(d) (Supp. 1982).

109. 11 U.S.C.A. § 544(a)(3) (1979).

110. J. WHITE AND R. SUMMERS, *supra* note 36, at 1062.

111. *Id.* at 1062.

112. S.D.C.L. § 57A-9-313(5)(a) (Supp. 1982) provides:

A security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the estate where

(a) the encumbrancer or owner has consented in writing to the security interest or has disclaimed an interest in the goods as fixtures. . . .

113. Coogan, *supra* note 37, at 495.

114. See *id.* at 498-99.

*g. Stepping into the Debtor's Shoes*

S.D.C.L. subsection 57A-9-313(5)(b)<sup>115</sup> allows the secured party to step into the shoes of his debtor and use the debtor's rights against a third party real estate owner or encumbrancer.<sup>116</sup> Therefore, if a lessee, or the holder of a similar interest, has the right to remove a fixture from real estate, the secured party has the same right.<sup>117</sup> The function of this provision is easily illustrated. Assume that debtor (D) leases a farm from landowner (L). In addition, secured party (SP) holds a properly perfected security interest in D's mobile home which we will assume is a fixture on L's property. The lease between D and L recognizes D's right to remove the mobile home at any time during the lease. D defaults on his mobile home payments. SP steps into D's position under the lease and may remove the mobile home from the real estate during the lease or a reasonable time thereafter.

*h. Construction Mortgages*

Subsection 57A-9-313(6) embodies the most significant change under amended S.D.C.L. section 57A-9-313.<sup>118</sup> This section essentially provides that the construction mortgagee who records his mortgage will have priority over any subsequently arising interest in fixtures if the goods become fixtures during the construction period. The official comments to U.C.C. section 9-313 indicate that this priority exists regardless of whether the advances under the construction mortgage are optional or obligatory.<sup>119</sup> Some states, however, have long standing statutory and common law rules allowing priority only to the extent that the advances are obligatory.<sup>120</sup> The official comments, not having the force of law, may fair poorly where existing state law prescribes a different result. Therefore, the high priority accorded construction mortgages may not reach the level sought by the U.C.C. drafters.

It is important to notice that earlier filed construction mortgages achieve priority over the purchase money provisions of subsection 57A-9-313(4)(a) if the goods become fixtures during the construction period.<sup>121</sup> Be-

115. S.D.C.L. § 57A-9-313(5)(b) (Supp. 1982) provides:

A security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the estate where . . .

(b) the debtor has a right to remove the goods as against the encumbrancer or owner. If the debtor's right terminates, the priority of the security interest continues for a reasonable time.

116. U.C.C. § 9-313 comment 6 (1977).

117. *Id.*

118. S.D.C.L. § 57A-9-313(6) (Supp. 1982) provides:

Notwithstanding paragraph (a) of subsection (4) but otherwise subject to subsections (4) and (5), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.

119. U.C.C. § 9-313 comment 4(e) (1977).

120. P. GOLDSTEIN, REAL ESTATE TRANSACTIONS: CASES AND MATERIALS ON LAND TRANSFER, DEVELOPMENT AND FINANCE 320-38 (1980).

121. *See* U.C.C. § 9-313 comment 4(e) (1977).

cause construction mortgages are almost always filed before construction begins, the possibility of a fixture filing preceding the mortgage recording is slight.<sup>122</sup> Consequently, the fixture financier is left with only two viable options to obtain priority over a competing construction mortgagee. First, he may obtain the mortgagee's written disclaimer or consent under subsection 57A-9-313(5)(a); or second, he can wait until the construction period has concluded and perfect by any method allowed under subsection 57A-9-313.<sup>123</sup>

The construction mortgagee's priority is not all pervasive. As discussed above, it may be circumvented by obtaining consent or a disclaimer from the mortgagee. Moreover, it does not extend to certain readily removable fixtures meeting the requirements of subsection 57A-9-313(4)(c), whether arising prior or subsequent to the recording of the construction mortgage.<sup>124</sup>

### *1. Catch-All Priority*

Subsection 57A-9-313(7)<sup>125</sup> is a catch-all provision which provides that any security interest not specifically covered by any of the provisions of section 57A-9-313 is subordinate to a competing real estate interest. This merely means that if the competing real estate interest is not that of the secured party's debtor, the secured party loses to the real estate interest unless priority is achieved under another provision of section 57A-9-313.<sup>126</sup>

### *j. Default and Removal*

Subsection 57A-9-313(8)<sup>127</sup> has received some facial revisions, but the substantive rules governing a secured party's right to remove fixtures from realty remain substantially unchanged. This subsection balances the rights of the debtor, the real estate owner, and the fixture secured party. Priority over all owners and encumbrancers of the real estate is a prerequisite to removal and the debtor's rights as governed by sections 57A-9-501 to -507<sup>128</sup> must be complied with. Finally, any party with an interest in the real estate

122. *Id.*

123. See Coogan, *supra* note 37, at 498.

124. U.C.C. § 9-313 comment 4(d) (1977).

125. S.D.C.L. § 57A-9-313(7) (Supp. 1982) provides that "In cases not within the preceding subsections, a security interest in fixtures is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor."

126. *Id.*

127. S.D.C.L. § 57A-9-313(8) (Supp. 1982) provides:

When the secured party has priority over all owner and encumbrancers of the real estate, he may, on default, subject to the provisions of §§ 57A-9-501 to 57A-9-507, 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 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 for 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.

128. See *supra* notes 166 to 183 and accompanying text.

may require the secured party to post adequate security to cover the cost of any physical injury which might result during the removal of the fixture.

### FILING

Substantial changes have been made in part four of S.D.C.L. chapter 57A-9 dealing with filing. An attempt will be made to highlight the most significant substantive revisions; however, this is only a summary, and is not intended to supplant a thorough reading of the amended statutes themselves. The analysis begins with section 57A-9-401 and continues chronologically throughout.

Section 57A-9-401<sup>129</sup> contains a new provision (subsection five) prescribing central filing for all collateral owned by a transmitting utility and financed under chapter 57A-9. "Transmitting utility" is a new term which is defined in 57A-9-105(1)(n).<sup>130</sup>

A number of changes affect various subsections of section 57A-9-402.<sup>131</sup> Since, under subsection (1), only the debtor's signature is required on a financing statement, the secured party's signature is no longer needed. In addition, the requirements for a fixture filing have been refined and certain photographic copies of financing statements and security agreements are now acceptable under the proper circumstances. Subsection (3) provides a slightly amended financing form which emphasizes describing the realty where fixtures are or are to be attached. Subsection (4) now requires both the debtor and the secured party to sign an amendment to a financing statement. Subsection (5) outlines the requirements for financing statements which cover standing timber to be cut, minerals and fixtures. More specifically, complying statements must contain the type of collateral to be covered (i.e. fixtures), must indicate that they are to be recorded in the real estate records, and the real estate description must be consistent with that required for a mortgage under state law. Further, if the debtor does not have an interest of record in the real estate, the statement must show the name of the record owner.

Subsection 57A-9-402(6) states the requirements necessary for a mortgage to be effective as a financing statement covering fixtures. Subsection (7) addresses a number of problems. It contemplates filing only in individual or partnership names as is appropriate, but not in trade names which can change rapidly.<sup>132</sup> Further, it requires a new financing statement to be filed whenever the name of the debtor changes and this change is seriously misleading. Corporate mergers and the like are contemplated here.<sup>133</sup> If a seriously misleading change in a debtor's name occurs, the secured party has four months to file a financing statement under the debtor's new name.

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129. S.D.C.L. § 57A-9-401 (Supp. 1982).

130. S.D.C.L. § 57A-9-105(1)(n) (Supp. 1982).

131. S.D.C.L. § 57A-9-402 (Supp. 1982).

132. U.C.C. § 9-402 comment 7 (1977).

133. *Id.*

Failure to make a new filing leaves the secured party unperfected as to new collateral acquired more than four months after the name change.<sup>134</sup> The last sentence of subsection (7) precludes the necessity of making a new filing when collateral is transferred from one debtor to another.<sup>135</sup> Finally, subsection (5) of the old statute has been transposed to subsection (8) of the amended version.<sup>136</sup>

Section 57A-9-403<sup>137</sup> contains some important revisions. For example, subsection (2) of this section makes all financing statements effective for five years unless terminated sooner. It also prevents financing statements from lapsing during bankruptcy or insolvency proceedings. Pursuant to this subsection, the secured party now receives at least sixty days beyond termination of the bankruptcy or insolvency proceeding to file a new statement. More importantly, subsection (2) unequivocally subordinates lapsed security interests to those buyers and secured parties who were secondary prior to the lapse.<sup>138</sup> Subsection (3) allows filing officers to preserve financing statements on microfilm, requires the physical attachment of financing statements and related termination statements, and provides for the retention of financing statements after termination.

Subsection (5) prescribes a higher filing fee for filings that do not meet the filing officer's specifications, while subsection (6) provides two exceptions to the general rule that all financing statements are effective for five years. Under the first exception, filings against transmitting utilities are effective until a termination statement is filed. According to the second exception, mortgages filed as financing statements covering fixtures are effective until the mortgage is released. Finally, subsection (7) instructs the filing officer to file financing statements covering timber to be cut, minerals, or fixtures under the names of the debtor, the secured party and the names of any recorded owners of the real estate in the same manner as a real property mortgage.

Subsection 57A-9-404(1)<sup>139</sup> obligates the secured party to terminate a financing statement covering consumer goods within one month or ten days following written notice from the debtor when the filing secures no past or contemplates no future obligation. Failure to comply can result in a \$100 fine and consequential damages. It is important to realize that the secured party is automatically in violation of the statute one month following the elimination of the obligation, whether the consumer demands termination or not.<sup>140</sup>

Section 57A-9-408<sup>141</sup> makes it clear that a consignor or lessor may file a

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134. *Id.*

135. U.C.C. § 9-402 comment 8 (1977).

136. Compare S.D.C.L. § 57A-9-402(5) (1980) with S.D.C.L. § 57A-9-402(8) (Supp. 1982).

137. S.D.C.L. § 57A-9-403 (Supp. 1982).

138. U.C.C. § 9-403 comment 3 (1977).

139. S.D.C.L. § 57A-9-404 (Supp. 1982).

140. See U.C.C. § 9-404(1) comment 1 (1977).

141. S.D.C.L. § 57A-9-408 (Supp. 1982).

financing statement covering a consignment or lease. The act of filing is not dispositive in determining whether or not the consignment or lease is a security agreement and therefore, subject to the provisions of chapter 57A-9.<sup>142</sup> However, if the consignment or lease is determined to be a security interest, the filing is effective if a security interest has attached to the particular goods.

### TRANSITION PROVISIONS

S.D.C.L. chapter 57A-11 prescribes the effective date and transition provisions for amended chapter 57A-9. Section 57A-11-101<sup>143</sup> sets 12:01 A.M. on July 1, 1983, as the effective date of the 1982 amendments to chapter 57A-9. This involves over a one year delay between enactment and the effective date of the amendments. It is consistent with the U.C.C. drafters' recommendation that a substantial amount of time be allowed to facilitate making required refilings.<sup>144</sup>

Section 57A-11-102<sup>145</sup> establishes the principle that amended chapter 57A-9 governs transactions entered into under old chapter 57A-9 with only minor exceptions. Section 57A-11-103<sup>146</sup> primarily reinforces this principle.

Section 57A-11-104<sup>147</sup> recognizes changes in fixture filings and priorities as reflected in amended section 57A-9-313.<sup>148</sup> Essentially, section 57A-11-104 covers purchase money security interests in consumer goods which require a filing for perfection under old chapter 57A-9 because they were fixtures. Under amended chapter 57A-9 those security interests are deemed perfected without a filing, subject to the rights of real estate parties.<sup>149</sup> This is consistent with their otherwise automatically perfected status.<sup>150</sup> Moreover, section 57A-11-104 also covers the case of readily removable office or factory machinery or replacement consumer appliances where a chattel filing was invalid under old chapter 57A-9 because the goods were fixtures; however, under amended 57A-9-313(4)(c), the chattel filing is effective.<sup>151</sup>

Section 57A-11-105<sup>152</sup> addresses transition problems that relate to changes in the place of filing. Subsection (1) merely extends all financing statements filed prior to July 1, 1982 with an original duration of less than five years to a full five years.<sup>153</sup> Subsection (2) provides that all financing and continuation statements existing prior to July 1, 1982, remain valid for

142. U.C.C. § 9-408 (1977).

143. S.D.C.L. § 57A-11-101 (Supp. 1982).

144. U.C.C. app. I, § 11-101 discussion (1977).

145. S.D.C.L. § 57A-11-102 (Supp. 1982).

146. S.D.C.L. § 57A-11-103 (Supp. 1982).

147. S.D.C.L. § 57A-11-104 (Supp. 1982).

148. S.D.C.L. § 57A-9-313 (Supp. 1982) is discussed in detail *supra* notes 69 to 128 and accompanying text.

149. U.C.C. app. I, § 11-104 discussion (1977).

150. See S.D.C.L. § 57A-9-302(1)(d) (Supp. 1982).

151. U.C.C. app. I, § 11-104 discussion (1977).

152. S.D.C.L. § 57A-11-105 (Supp. 1982).

153. U.C.C. app. I, § 11-105 discussion (1977).

the remainder of their five-year duration *as to existing collateral*.<sup>154</sup> This is true although amended chapter 57A-9 may have changed the proper place to file on this type of collateral. Therefore, a valid filing made prior to July 1, 1982, is effective only as to property acquired after that date if the filing is filed pursuant to amended chapter 57A-9.<sup>155</sup> Accordingly, one should re-examine existing financing statements that cover after acquired property and proceeds to determine if refiling is necessary under amended chapter 57A-9.

Subsection 57A-11-105(3) merely states that continuation statements may be filed after July 1, 1982, but a new financing statement is required if a different filing location is mandated under amended chapter 57A-9.<sup>156</sup> Subsection 57A-11-105(4) retroactively validates real estate mortgages that meet the requirements of a fixture filing.<sup>157</sup>

Section 57A-11-106<sup>158</sup> is important. It specifically identifies when existing financing statements must be refiled under new chapter 57A-9. Subsection (1) of this section makes certain automatically perfected purchase money security interests in farm equipment under old subsection 57A-9-301(1)(c) effective without a filing until July 1, 1985.<sup>159</sup> After this date, a financing statement must be filed to maintain perfection. Under subsections (2) and (3) all filings against a transmitting utility must be filed centrally by July 1, 1986.<sup>160</sup> Finally, subsection (4) makes clear the necessity of filing a completely new financing statement when an ordinary continuation statement is precluded under amended chapter 57A-9 because the filing must be made in a different location.<sup>161</sup>

Section 57A-11-107<sup>162</sup> states the general rule that amended chapter 57A-9 applies to priority questions unless the rights of both parties were fixed under old section 57A-9. Section 57A-11-108<sup>163</sup> provides that amended chapter 57A-9 is to be interpreted the same as old chapter 57A-9 except where a clear change in meaning is intended in the amended version.<sup>164</sup> This is an effort by the U.C.C. drafters to minimize transitional problems.<sup>165</sup>

#### DEFAULT

The 1982 amendments change portions of S.D.C.L. chapter 57A-9 dealing with the remedies and duties of a debtor and a secured party upon de-

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. S.D.C.L. § 57A-11-106 (Supp. 1982).

159. See U.C.C. app. I, § 11-106 discussion (1977); S.D.C.L. § 57A-11-106 (Supp. 1982); see also *supra* text accompanying notes 15 to 34.

160. See U.C.C. app. I, § 11-106 discussion (1977); S.D.C.L. § 57A-11-106(2), (3) (Supp. 1982).

161. See U.C.C. app. I, § 11-106 discussion (1977).

162. S.D.C.L. § 57A-11-107 (Supp. 1982).

163. S.D.C.L. § 57A-11-108 (Supp. 1982).

164. U.C.C. app. I, § 11-108 discussion (1977).

165. *Id.*



fault.<sup>166</sup> Like the 1980 version of S.D.C.L. chapter 57A-9, the amended chapter provides the secured party with three sets of remedies upon default: those provided in S.D.C.L. chapter 57A-9, those provided in the security agreement, and the foreclosure and other enforcement actions available under state law.<sup>167</sup> Pursuant to the remedies provided in chapter 57A-9, a secured party can elect to repossess the collateral. If a secured party chooses to repossess the collateral, he can either retain the collateral in satisfaction of the debt<sup>168</sup> or dispose of the collateral in accordance with section 57A-9-504.<sup>169</sup>

The major difference between the 1980 and 1982 provisions of chapter 57A-9 dealing with default involves the notice requirements imposed upon secured parties desiring to dispose of collateral or retain collateral in satisfaction of a debt.<sup>170</sup> Presently, S.D.C.L. subsection 57A-9-504(3) requires secured parties intending to dispose of collateral to notify various persons of the time and place of any public sale.<sup>171</sup> These persons include: (1) the debtor, (2) persons holding security interests in the collateral who have filed financing statements, and (3) any other persons known by the secured party to have a security interest in the collateral.<sup>172</sup> Subsection 57A-9-504(3) also requires notification of the time of any private sale.<sup>173</sup>

Amended subsection 57A-9-504(3) has substantially reduced notice requirements.<sup>174</sup> For example, subsection 57A-9-504(3) now allows a debtor to waive his rights to notice of sale.<sup>175</sup> Moreover, a secured party is no longer obligated to notify other persons having a security interest in the collateral unless the secured party has received written notices of an interest in the collateral prior to sending notification to the debtor or before the debtor waived his rights to notice.<sup>176</sup>

A similar relaxation in notice requirements has occurred with respect to secured creditors desiring to retain collateral in satisfaction of a debt.<sup>177</sup> Presently, subsection 57A-9-505(2) requires secured creditors to give written notice of their intention to retain collateral to the debtor, and any other parties having a security interest in the collateral who have either filed a financing statement or who are known by the secured party to have an interest. If a secured party receives written objection from the debtor or any other person entitled to notification within thirty days of receipt of notification, subsection 57A-9-505(2) requires the secured party to dispose of the collateral in

166. See S.D.C.L. §§ 57A-9-501 to -505, (Supp. 1982).

167. S.D.C.L. § 57A-9-501(1) (Supp. 1982).

168. S.D.C.L. § 57A-9-505 (1980).

169. S.D.C.L. § 57A-9-504 (1980).

170. See S.D.C.L. § 57A-9-504, 505 (Supp. 1982).

171. S.D.C.L. § 57A-9-504(3) (1980).

172. *Id.*

173. *Id.*

174. See S.D.C.L. § 57A-9-504(3) (Supp. 1982).

175. *Id.*

176. *Id.*

177. See S.D.C.L. § 57A-9-505(2) (Supp. 1982).

accordance with section 57A-9-504.<sup>178</sup>

Amended section 57A-9-505 relaxes these notice requirements.<sup>179</sup> Like subsection 57A-9-504(3), subsection 57A-9-505(2) allows a debtor to waive his rights to notice.<sup>180</sup> In addition, a secured party is no longer obligated to notify any other party having an interest in the collateral unless the secured creditor has received written notification of such interest prior to notifying the debtor or before the debtor waived his rights to notice.<sup>181</sup> If the secured party receives a written objection to his or her retention of the collateral within twenty-one days after notice was sent from a person entitled to receive notice, the collateral must be disposed of pursuant to section 57A-9-504.<sup>182</sup> If a secured party does not receive a written objection within twenty-one days, the secured party may retain the collateral in satisfaction of the debt.<sup>183</sup>

### MULTI-STATE TRANSACTIONS

Three sections of the 1980 version of S.D.C.L. chapter 57A-9 govern multi-state transactions: section 57A-1-105,<sup>184</sup> section 57A-9-102,<sup>185</sup> and section 57A-9-103.<sup>186</sup> Section 57A-1-105 does not specifically apply to secured transactions. Sections 57A-9-102 and 57A-9-103 pertain to secured transactions.<sup>187</sup> Section 57A-9-102 is a general situs rule which applies to all situations not governed by section 57A-9-103.<sup>188</sup> Section 57A-9-103 specifies which jurisdiction's law governs the creation, perfection and priorities in multi-state transactions.<sup>189</sup> This section, however, does not provide rules for all situations. For example, section 57A-9-103 does not designate which state's law will apply upon default.<sup>190</sup> Consequently, courts must look to section 57A-9-102 for the answer.<sup>191</sup>

The 1982 amendments to chapter 57A-9 substantially change the rules governing multi-state transactions. For example, the 1982 amendments abolish the general situs rule in section 57A-9-102.<sup>192</sup> Moreover, the 1982

178. S.D.C.L. § 57A-9-505(2) (1980).

179. S.D.C.L. § 57A-9-505(2) (Supp. 1982).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. S.D.C.L. § 57A-9-105 (1980).

185. S.D.C.L. § 57A-9-102 (1980).

186. S.D.C.L. § 57A-9-103 (1980).

187. S.D.C.L. § 57A-1-105(b) (1980) stated that if other provisions specify the applicable laws then those provisions govern rather than section 57A-1-105(b). Included in those provisions are sections 57A-9-103 and 57A-9-102 which govern the policy and scope chapters on secured transactions.

188. S.D.C.L. § 57A-9-102 (1980). This section was intended as a choice of law rule that the substantive law of the place of situs governs without regard to possible contact in other jurisdictions. J. WHITE AND R. SUMMERS, *supra* note 36, at 895.

189. S.D.C.L. § 57A-9-103 (1980).

190. *See id.*

191. Compare S.D.C.L. § 57A-9-102 (1980) and S.D.C.L. § 57A-9-103 (1980). *See generally* J. WHITE AND R. SUMMERS, *supra* note 36, at 895-96.

192. S.D.C.L. § 57A-9-102(1) (Supp. 1982).

version completely changes section 57A-9-103. Section 57A-9-103 now pertains solely to the issue of perfection.<sup>193</sup> Section 57A-1-105 governs all other multi-state secured transactions previously covered by sections 57A-9-102 and 57A-9-103.<sup>194</sup> Section 57A-1-105 allows the parties to a security agreement to stipulate the rules governing their transaction, provided the rules do not affect the rights of third parties. Section 57A-1-105 provides that the parties to a security agreement may agree that the law of a particular state will apply so long as the "transaction bears a reasonable relation to . . . [that] state."<sup>195</sup> If the parties fail to make such an agreement, the law of a state will apply to any transaction having an "appropriate" relation to the state.<sup>196</sup>

The 1982 amendments completely overhaul S.D.C.L. section 57A-9-103.<sup>197</sup> Section 57A-9-103 specifies which jurisdiction's law governs perfection, the effect of perfection and nonperfection.<sup>198</sup> The rules in section 57A-9-103, however, unlike section 57A-1-105, cannot be altered by agreement.<sup>199</sup>

Section 57A-9-103 is organized according to types of collateral. Subsection (1) applies to documents, instruments and ordinary goods.<sup>200</sup> Subsection (2) applies to goods covered by a certificate of title.<sup>201</sup> Subsection (3) pertains to accounts, general intangibles and goods which are mobile,<sup>202</sup> while subsection (4) pertains to chattel paper.<sup>203</sup> Finally, subsection (5) deals with minerals.<sup>204</sup> Since section 57A-9-103 groups its rules according to types of collateral this comment will examine each subsection by types of collateral.

### *Documents, Instruments and Ordinary Goods*

S.D.C.L. section 57A-9-103(1) covers documents, instruments and ordinary goods.<sup>205</sup> Because subsection 57A-9-103(3) applies to mobile goods and subsection 57A-9-103(2) applies to goods covered by a certificate of title, it logically appears that subsection 57A-9-103(1) pertains to goods that have a relatively fixed location. Consequently, "ordinary goods" includes "goods

193. S.D.C.L. § 57A-9-103 (Supp. 1982).

194. S.D.C.L. § 57A-1-105 (Supp. 1982). This section applies to all transactions except where certain other provisions specify the particular law. S.D.C.L. § 57A-1-105(1) (Supp. 1982). The only other provision relating to secured transactions is S.D.C.L. § 57A-9-103 (Supp. 1982) relating to perfection. S.D.C.L. § 57A-1-105(2) (Supp. 1982). Consequently, S.D.C.L. § 57A-1-105 governs all other multi-state issues.

195. S.D.C.L. § 57A-1-105(1) (Supp. 1982).

196. *Id.*

197. S.D.C.L. § 57A-9-103 (Supp. 1982).

198. *Id.*

199. *In re L.M.S. Assoc.*, 18 Bankr. 425, 33 U.C.C. Rep. Serv. (Callaghan) 1098 (S.D. Fla. 1982). Compare S.D.C.L. § 57A-1-105(2) (Supp. 1982) and S.D.C.L. § 57A-9-103 (Supp. 1982).

200. S.D.C.L. § 57A-9-103(1) (Supp. 1982).

201. S.D.C.L. § 57A-9-103(2) (Supp. 1982).

202. S.D.C.L. § 57A-9-103(3) (Supp. 1982).

203. S.D.C.L. § 57A-9-103(4) (Supp. 1982).

204. S.D.C.L. § 57A-9-103(5) (Supp. 1982).

205. S.D.C.L. § 57A-9-103(1) (Supp. 1982).

that usually stay put in one place once the debtor has bought them: lathes, printing presses, washing machines, air conditioners, etc."<sup>206</sup>

Subsection 57A-9-103(1) sets forth three rules governing perfection: the last event rule, the thirty-day rule, and the four-month rule.<sup>207</sup> The "last event" rule specifies the state law that will govern initial perfection or nonperfection.<sup>208</sup> The thirty-day rule covers purchase money security interests in goods wherein the parties understand at the time of attachment that the goods will be kept in another jurisdiction.<sup>209</sup> The four-month rule specifies the effect of a perfected security interest in collateral when the collateral is moved to another state.<sup>210</sup>

#### a. *The Last Event Rule*

Subsection 57A-9-103(1)(b) sets forth the "last event" rule stating: "perfection and the effect of perfection or nonperfection of a security interest are governed by the law of the jurisdiction where the collateral is when the *last event* occurs on which is based the assertion that the security interest is perfected or unperfected."<sup>211</sup> Perfection may be achieved by a variety of methods including automatic perfection,<sup>212</sup> temporary perfection,<sup>213</sup> perfection by possession<sup>214</sup> and perfection by filing.<sup>215</sup> Frequently, the last event is the filing of a financing statement.<sup>216</sup>

*In re Lucasa International Ltd.*<sup>217</sup> illustrates how subsection 57A-9-103(1) operates. In this case, Republic National Factors Corporation (Republic) entered into a factoring agreement with Lucasa International Ltd. (Lucasa). The agreement gave Republic a security interest in Lucasa's inventory and Republic filed a financing statement in New Jersey on December 4, 1978.<sup>218</sup>

In October of 1979, Lucasa made a bulk sale of the inventory to Tandy Brands Inc. (Tandy) wherein Tandy sent its payment for the inventory directly to Republic. At the time of the sale, the inventory was in New Jersey. Subsequent to the sale, Lucasa declared bankruptcy.<sup>219</sup>

The trustee in bankruptcy claimed that Republic's interest was unperfected and, as a result, the payment made to Republic was voidable. Re-

206. J. WHITE AND R. SUMMERS, *supra* note 36, at 965-66.

207. Several commentators have used the terminology set forth in the text to describe the rules in U.C.C. § 9-103(1). See J. WHITE AND R. SUMMERS, *supra* note 36, at 966; Coogan, *The New U.C.C. Article 9*, 86 HARV. L. REV. 477, 532-544 (1973).

208. S.D.C.L. § 57A-9-103(1)(b) (Supp. 1982).

209. S.D.C.L. § 57A-9-103(1)(c) (Supp. 1982).

210. S.D.C.L. § 57A-9-103(1)(d) (Supp. 1982).

211. S.D.C.L. § 57A-9-103(1)(b) (Supp. 1982).

212. S.D.C.L. § 57A-9-302 (Supp. 1982).

213. S.D.C.L. § 57A-9-304 (Supp. 1982).

214. S.D.C.L. § 57A-9-305 (Supp. 1982).

215. S.D.C.L. § 57A-9-302 (Supp. 1982).

216. *In re Lucasa Int'l, Ltd.* 13 Bankr. 600, 603, 32 U.C.C. Rep. Serv. (Callaghan) 622, 625 (S.D.N.Y. 1981).

217. *Id.*

218. *Id.* at 602, 32 U.C.C. Rep. Serv. (Callaghan) at 624.

219. *Id.*

public, on the other hand, argued it had a perfected security interest in the inventory.<sup>220</sup> Because Lucasa's principal place of business was New York, the court looked to New York's version of U.C.C. section 9-103(1)(b) to determine whether New York law or New Jersey law governed perfection. New York's version of U.C.C. section 9-103(1)(b) contained the "last event rule."<sup>221</sup> Moreover, the last event upon which Republic based its assertion of perfection was the filing of a financing statement. Since the collateral was located in New Jersey when Republic filed its financing statement, New Jersey law was held to apply.<sup>222</sup> Because New Jersey law required a New Jersey filing, Republic had perfected its security interest.<sup>223</sup>

### b. *The Thirty-Day Rule*

S.D.C.L. section 57A-9-103(1)(c) sets forth the thirty-day rule. This section provides:

If the parties to a transaction creating a purchase money security interest in goods in one jurisdiction understand at the time that the security interest attaches that the goods will be kept in another jurisdiction, then the law of the other jurisdiction governs the perfection and the effect of non-perfection of the security interest from the time it attaches until thirty days after the debtor receives possession of the goods and thereafter if the goods are taken to the other jurisdiction before the end of the thirty-day period.<sup>224</sup>

A simple hypothetical illustrates the effect of S.D.C.L. subsection 57A-9-103(1)(c). Assume a South Dakota debtor (D) obtains financing for farm equipment from a Nebraska bank (B) and that both D and B realize that the equipment will be kept in South Dakota. Pursuant to subsection 57A-9-103(1)(c), B must perfect its security interest by filing in South Dakota. If B files in South Dakota and the equipment reaches South Dakota within thirty days after D receives possession of the equipment, B has a perfected security interest. If, however, the equipment does not reach South Dakota within thirty days after D receives possession, subsection 57A-9-103(1)(c) no longer applies. In this event, "the law of the jurisdiction where the collateral is controls perfection . . . [the "last event" rule]."<sup>225</sup>

As some commentators have pointed out, subsection 57A-9-103(1)(c) will rarely apply.<sup>226</sup> "First, it applies only to 'ordinary' goods."<sup>227</sup> Consequently, the rule may not govern perfection because S.D.C.L. sections 57A-9-103(2) and (3) cover mobile goods and goods covered by a certificate of

220. *Id.* at 602, 32 U.C.C. Rep. Serv. (Callaghan) at 623.

221. *Id.* at 603, 32 U.C.C. Rep. Serv. (Callaghan) at 624.

222. *Id.* at 603, 32 U.C.C. Rep. Serv. (Callaghan) at 625.

223. *Id.* There was some argument as to whether Republic's financing statement complied with New Jersey law. The court found, however, that Republic's omissions were minor errors and held the filing valid. *Id.* at 603-04, 32 U.C.C. Rep. Serv. (Callaghan) at 625-27.

224. S.D.C.L. § 57A-9-103(1)(c) (Supp. 1982).

225. U.C.C. § 9-103 comment 3 (1972).

226. J. WHITE AND R. SUMMERS, *supra* note 36, at 969.

227. *Id.*

title.<sup>228</sup> Second, for subsection 57A-9-103(1)(c) to apply the parties must have executed a purchase money security agreement.<sup>229</sup> Third, the parties must both understand at the time of attachment that the goods will be kept in a particular jurisdiction.<sup>230</sup> Finally, the goods must be "taken to the other jurisdiction before the end of the thirty-day period."<sup>231</sup>

### c. *The Four-Month Rule*

S.D.C.L. section 57A-9-103(1)(d) sets forth the four-month rule.<sup>232</sup> This section provides:

When collateral is brought into and kept in this state [South Dakota] while subject to a security interest perfected under the law of the jurisdiction from which the collateral was removed the security interest remains perfected, but if action is required by Part 3 of this chapter to perfect the security interest,

[and](i) if the action is not taken before the expiration of the period of perfection in the other jurisdiction or the end of four months after the collateral is brought into this state whichever period first expires, the security interest becomes unperfected at the end of that period. . . .<sup>233</sup>

Generally, Part 3 of S.D.C.L. chapter 57A-9 requires a secured creditor to take action either by filing or by obtaining possession of the collateral.<sup>234</sup> Thus, a secured creditor having perfected a security interest in another state must take action to re-perfect in South Dakota within four months after the collateral reaches South Dakota. Moreover, subsection 57A-9-103(1)(d) will not apply unless the collateral is "brought into and kept in this state."<sup>235</sup> As a result, the collateral must be within the state on a permanent basis.<sup>236</sup> If the collateral is merely in transit, subsection 57A-9-103(1)(d) does not apply.<sup>237</sup>

*In re Potomac School of Law Inc.*,<sup>238</sup> illustrates how subsection 57A-9-103(1)(d) operates. In this case, West Publishing Company (West) had a security interest in the Potomac Law School's library (Potomac). West perfected its interest by recording a financing statement with the District of Columbia's Recorder of Deeds on November 5, 1979.<sup>239</sup> Subsequently, Potomac changed location and during the move, the law library was placed in

228. S.D.C.L. § 57A-9-103(2), (3) (Supp. 1982).

229. S.D.C.L. § 57A-9-103(1)(c) (Supp. 1982).

230. *Id.*

231. *Id.*

232. S.D.C.L. § 57A-9-103(1)(c) (Supp. 1982).

233. S.D.C.L. § 57A-9-103(1)(d) (Supp. 1982).

234. *See* S.D.C.L. §§ 57A-9-302, 305 (Supp. 1982).

235. S.D.C.L. § 57A-9-103(1)(d) (Supp. 1982).

236. U.C.C. § 9-103 comment 3 (1972); *In re Potomac School of Law, Inc.*, 16 Bankr. 102, 104-05, 32 U.C.C. Rep. Serv. (Callaghan) 1598, 1600-01 (D.D.C. 1981).

237. U.C.C. § 9-103 comment 3 (1972); *In re Potomac School of Law, Inc.*, 16 Bankr. 102, 104-05, 32 U.C.C. Rep. Serv. (Callaghan) 1598, 1600-01 (D.D.C. 1981).

238. 16 Bankr. 102, 32 U.C.C. Rep. Serv. (Callaghan) 1598 (D.D.C. 1981).

239. *In re Potomac School of Law Inc.*, 16 Bankr. 102, 104, 32 U.C.C. Rep. Serv. (Callaghan) 1598, 1600 (D.D.C. 1981).

storage with Northern Virginia Van Company (Northern). Since the library was in Virginia, Northern filed a financing statement in Virginia in February, 1981. On June 15, 1981, Potomac filed a Chapter 11 petition for bankruptcy.<sup>240</sup>

During the bankruptcy proceedings, Northern claimed, invoking Virginia Code section 8.9-103(1)(d), that its security interest in the law library took priority over West's interest. Apparently, Northern premised its claim of priority upon two facts: first, the collateral was moved to Virginia, and second, West failed to file a financing statement in Virginia within four months after removal.<sup>241</sup> Nonetheless, the *Potomac* court concluded that Virginia Code section 8.9-103(1)(d) did not apply in this situation because the law library was merely in transit. Therefore, the court awarded West priority.<sup>242</sup> West's interest took priority because of the "last event" rule. Since Virginia Code section 8.9-103(1)(d) did not apply, the "last event" rule was applicable. The last event in which West asserted its perfected interest was the filing of a financing statement in the District of Columbia.<sup>243</sup> Because the collateral was located in the District of Columbia when the filing occurred,<sup>244</sup> the law of the District of Columbia applied. Since West filed first, West took priority.<sup>245</sup>

### *Goods Covered by Certificate of Titles*

South Dakota, like many other states, requires the issuance of certificates of title for motor vehicles.<sup>246</sup> If a motor vehicle is covered by a certificate of title, a secured creditor need not file a financing statement in order to perfect his interest.<sup>247</sup> A secured creditor need only note the lien upon application for a certificate of title.<sup>248</sup> Problems arise, however, when vehicles are moved from one state to another. This is particularly true when one state does not require the issuance of certificates of title for motor vehicles.<sup>249</sup>

S.D.C.L. section 57A-9-103(2)<sup>250</sup> attempts to resolve these problems by setting forth rules governing the perfection of security interests in goods covered by a certificate of title. Subsection 57A-9-103(2) applies in essentially three situations: (1) when goods are moved from a state requiring a certifi-

240. *Id.*

241. *Id.*

242. *Id.* at 104-05, 32 U.C.C. Rep. Serv. (Callaghan) at 1600-01.

243. *Id.* at 104-05, 32 U.C.C. Rep. Serv. (Callaghan) at 1601-02.

244. *Id.* at 104, 32 U.C.C. Rep. Serv. (Callaghan) at 1600.

245. *Id.* at 105, 32 U.C.C. Rep. Serv. (Callaghan) at 1602. Apparently, Northern had also filed in the District of Columbia but at a later date. *Id.* at 104, 32 U.C.C. Rep. Serv. (Callaghan) at 1600.

246. See S.D.C.L. ch. 32-3 (1976 & Supp. 1982). In South Dakota certain farm vehicles are exempt from the certificate of title requirements contained in S.D.C.L. ch. 32-3. S.D.C.L. § 32-3-2.4 (Supp. 1982).

247. S.D.C.L. § 57A-9-302(3) (Supp. 1982).

248. *Id.*

249. See, e.g., *Venn v. Fin. Am. Corp.*, 19 Bankr. 155, 33 U.C.C. Rep. Serv. (Callaghan) 1491 (N.D. Fla. 1982).

250. (Supp. 1982).

cate of title into a different state also requiring a certificate of title;<sup>251</sup> (2) when goods are moved from a state requiring a certificate of title into a non-certificate state;<sup>252</sup> and (3) when goods are moved from a non-certificate state into South Dakota which requires a certificate of title.<sup>253</sup> This section addresses each situation individually.

a. *Goods Moving from a Certificate State into Another Certificate State*

S.D.C.L. section 57A-9-103(2)(b) specifies which state's law governs the perfection of goods, covered by a certificate of title in one state, which are subsequently removed to another certificate state. Subsection 57A-9-103(2)(b) provides:

perfection and the effect of perfection or nonperfection of the security interest are governed by the law (including the conflict of law rules) of the jurisdiction issuing the certificate until four months after the goods are removed from the jurisdiction and thereafter until the goods are registered in another jurisdiction, but in any event not beyond the surrender of the certificate. After the expiration of that period the goods are not covered by the certificate of title within the meaning of this section.<sup>254</sup>

Consequently, pursuant to this section, the law of the first state will govern perfection for at least four months after the collateral is taken into the second state. Moreover, the law of the first state will govern beyond the four month period if the debtor fails to register the goods in the second state. If, however, the debtor does register the goods in the second state, perfection ceases once the four-month period expires.

*In re Hrbek*<sup>255</sup> presents a good example of how subsection 57A-9-103(2)(b) operates. *In re Hrbek*, involved the validity of a creditor's lien upon a debtor's motor vehicle. The debtor purchased a motor vehicle and executed a purchase money security agreement. The agreement was subsequently assigned to a finance company.

Initially, the debtor registered and titled the vehicle in the state of Nebraska. The debtor subsequently surrendered the title to the Colorado Department of Motor Vehicles and a Colorado title was issued. Approximately three months later the finance company applied for and received a Colorado title noting its lien.<sup>256</sup>

On July 23, 1979, the debtor applied for a duplicate of his original Nebraska title. Upon his application, the debtor stated that he had lost his original certificate of title and that the vehicle was not encumbered by any

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251. S.D.C.L. § 57A-9-103(2)(b) (Supp. 1982).

252. *Id.*

253. S.D.C.L. § 57A-9-103(2)(c) (Supp. 1982).

254. S.D.C.L. § 57A-9-103(2)(b) (Supp. 1982).

255. 18 Bankr. 631, 33 U.C.C. Rep. Serv. (Callaghan) 1112 (D. Neb. 1982).

256. *Id.*



liens.<sup>257</sup> Thereafter, the debtor filed a petition for bankruptcy.<sup>258</sup> During the bankruptcy proceedings, the trustee claimed that the finance company's security interest was unperfected.<sup>259</sup>

At the time of the proceedings, both Colorado and Nebraska had adopted U.C.C. section 9-103. Accordingly, the court looked to section 9-103 to determine whether the finance company's security interest was perfected. If Colorado law applied, the security interest was perfected since the finance company noted its lien on the Colorado certificate of title. If Nebraska law applied, the security interest was unperfected since the Nebraska certificate contained no notation of a lien.<sup>260</sup> The court stated that Colorado law applied if either of two conditions were met: (1) the four month period of removal had not lapsed or (2) the debtor had not registered the vehicle in Nebraska. Because the court lacked necessary information, the court remanded the case to determine whether either of the above two requirements were met.<sup>261</sup>

b. *Goods Moving from a Certificate State into a Non-certificate State*

S.D.C.L. section 57A-9-103(2)(b) also specifies which state's law governs perfection when goods are moved from a certificate state into a non-certificate state.<sup>262</sup> According to this subsection, the state law of a certificate state will govern perfection for four months after the goods are removed from the certificate state.<sup>263</sup> If a secured creditor fails to perfect according to the law of the non-certificate state within four months after removal, he will lose perfected status.<sup>264</sup> The certificate state's law, however, will govern perfection beyond the four month period if the debtor does not register the goods in the non-certificate state.<sup>265</sup>

c. *Goods Moving from a Non-Certificate State into South Dakota, a Certificate State*

S.D.C.L. section 57A-9-103(2)(c) specifies which state's law governs perfection when goods are moved from a non-certificate state into South Dakota which requires a certificate of title to perfect a security interest in such goods. Subsection 57A-9-103(2)(c) provides: "a security interest, perfected in another jurisdiction otherwise than by notation on a certificate of title, in goods brought into this state and thereafter covered by a certificate of title issued by this state is subject to the rules stated in paragraph (d) of

257. *Id.* at 631, 33 U.C.C. Rep. Serv. (Callaghan) at 1112-13.

258. *Id.* at 631-02, 33 U.C.C. Rep. Serv. (Callaghan) at 1113.

259. *Id.* at 632, 33 U.C.C. Rep. Serv. (Callaghan) at 1113-14.

260. *Id.* at 633, 33 U.C.C. Rep. Serv. (Callaghan) at 1114-15.

261. *Id.*

262. S.D.C.L. § 57A-9-103(2)(b) (Supp. 1982).

263. *Id.*

264. *Id.*

265. *Id.* For a good example of how S.D.C.L. § 57A-9-103(2)(b) applies in a certificate-non-certificate movement situation see *Strick Corp. v. Eldo-Craft Boat Co.*, 479 F. Supp. 720, 28 U.C.C. Rep. Serv. (Callaghan) 514 (W.D. Ark. 1979).

subsection (1).<sup>266</sup> By reference to subsection 57A-9-103(1)(d), subsection 57A-9-103(2)(c) gives a secured creditor four months to perfect a security interest in South Dakota.<sup>267</sup> Consequently, a secured creditor, who has perfected a security interest in collateral by filing in another state, has four months within which to perfect the interest in South Dakota by notation on a certificate of title. The creditor perfects the interest by noting the lien on a South Dakota certificate of title. In other words, the law of the first state governs perfection for four months after the collateral reaches South Dakota. Once the four month period has lapsed, South Dakota law applies.

*Venn v. Finance America Company*<sup>268</sup> presents a good example of how subsection 57A-9-103(2)(c) operates. In *Venn*, the debtors purchased an out-board boat and executed a retail installment contract. The contract was assigned to a finance company and the company filed a financing statement in Virginia.<sup>269</sup> Subsequently, the debtors moved their boat to Florida and seventeen months later applied for and obtained a certificate of title as required by Florida law. The title did not note the finance company's lien. Thereafter, the debtors filed for bankruptcy.<sup>270</sup>

During the bankruptcy proceedings, the finance company filed a secured claim. The trustee objected to the claim asserting that the finance company had failed to perfect its security interest.<sup>271</sup> At the time of the proceedings, Florida had enacted a statute equivalent to U.C.C. section 9-103(2)(c).<sup>272</sup> As a result, the court denied the finance company secured status because it had failed to note its lien upon the Florida certificate within four months after the collateral reached Florida.<sup>273</sup>

### *Accounts, General Intangibles and Mobile Goods*

S.D.C.L. section 57A-9-103(3) specifies which state's law governs perfection when the collateral includes accounts, general intangibles or mobile goods.<sup>274</sup> To qualify goods must be:

of a type normally used in more than one jurisdiction, such as motor vehicles, trailers, rolling stock, airplanes, shipping containers, road building and construction machinery and commercial harvesting machinery and the like . . . [either] equipment or . . . inventory leased or held for lease by the debtors to others, and . . . not covered by a certificate of title described in subsection (2).<sup>275</sup>

Mobility is not measured by whether or not goods are actually moved from

266. S.D.C.L. § 57A-9-103(2)(c) (Supp. 1982).

267. Compare S.D.C.L. § 57A-9-103(1)(d) (Supp. 1982) and S.D.C.L. § 57A-9-103(2)(c) (Supp. 1982).

268. 19 Bankr. 155, 33 U.C.C. Rep. Serv. (Callaghan) 1491 (N.D. Fla. 1982).

269. *Id.* at 156, 33 U.C.C. Rep. Serv. (Callaghan) at 1491-92.

270. *Id.* at 156, 33 U.C.C. Rep. Serv. (Callaghan) at 1492.

271. *Id.*

272. *Id.*

273. *Id.*

274. See S.D.C.L. § 57A-9-103(3)(e) (Supp. 1982).

275. S.D.C.L. § 57A-9-103(3)(a) (Supp. 1982).

state to state.<sup>276</sup> Goods need not be used in more than one state to qualify as mobile goods.<sup>277</sup> Goods are mobile merely if they are of a type normally used in more than one jurisdiction.<sup>278</sup>

Subsection 57A-9-103(3)(b) sets forth the choice of law rule for accounts, general intangibles and mobile goods. Subsection 57A-9-103(3)(b) provides that "[t]he law . . . of the jurisdiction in which the debtor is located governs the perfection and the effect of perfection or non-perfection of the security interest."<sup>279</sup> Furthermore, a debtor is deemed to be located at his place of business.<sup>280</sup> If the debtor has more than one place of business, the debtor's location is his or her chief executive office.<sup>281</sup> If the debtor does not have a place of business, location is the debtor's residence.<sup>282</sup>

S.D.C.L. section 57A-9-103(3) also specifies which state's law governs perfection when the debtor changes locations.<sup>283</sup> A security interest which is perfected under the law of a state where the debtor is located remains perfected for at least four months after the debtor changes his location.<sup>284</sup> If a secured creditor fails to perfect the security interest according to the law of the new state within the four month period, the security interest is deemed unperfected.<sup>285</sup>

*Farina v. Ford Motor Credit Co.*,<sup>286</sup> demonstrates the effects of S.D.C.L. section 57A-9-103(3). In *Farina*, a debtor purchased a tractor from Thompsen Machine and executed a security agreement. Thompsen Machine assigned the agreement to Ford Motor Credit Company (Ford). Ford filed a financing statement in Maine on December 20, 1979.<sup>287</sup>

The debtor intended to use the tractor in the states of Maine and New Hampshire. The debtor claimed that Ford failed to perfect its security interest because Ford did not file in New Hampshire. Since the debtor's business extended into both Maine and New Hampshire, the debtor claimed that Ford had to file in both states.<sup>288</sup>

The *Farina* court found that U.C.C. section 9-103(3) applied because the tractor was mobile and was classified as equipment.<sup>289</sup> Accordingly, the court ruled that the state law where the debtor was located controlled perfection.<sup>290</sup> Since the essential functions of the debtor's business occurred in

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276. *Ingersoll-Rand Fin. Corp. v. Hunley*, 11 Bankr. 528, 532, 31 U.C.C. Rep. Serv. (Callaghan) 1114, 1119-20 (W.D. Va. 1981).

277. *Id.*

278. U.C.C. § 9-103 comment 5 (1972).

279. S.D.C.L. § 57A-9-103(3)(b) (Supp. 1982).

280. S.D.C.L. § 57A-9-103(3)(d) (Supp. 1982).

281. *Id.*

282. *Id.*

283. S.D.C.L. § 57A-9-103(3)(e) (Supp. 1982).

284. *Id.*

285. *Id.*

286. 9 Bankr. 726, 31 U.C.C. Rep. Serv. (Callaghan) 271 (D. Me. 1981).

287. *Fariner v. Ford Mtr. Credit Co.*, 9 Bankr. 726, 728, 31 U.C.C. Rep. Serv. (Callaghan) 271, 272 (D. Me. 1981).

288. *Id.* at 728, 31 U.C.C. Rep. Serv. (Callaghan) at 272-73.

289. *Id.* at 729, 31 U.C.C. Rep. Serv. (Callaghan) at 274.

290. *Id.*

Maine, the court found that the debtor's principal place of business was located in Maine.<sup>291</sup> Consequently, Maine's law governed perfection. Because Maine law requires a Maine filing, Ford had perfected its interest.<sup>292</sup>

### *Chattel Paper*

S.D.C.L. section 57A-9-103(4) sets forth the rules governing the perfection of security interests in chattel paper. Subsection 57A-9-103(4) states that the rules set forth in S.D.C.L. section 57A-9-103(1) apply for secured parties perfecting by possession.<sup>293</sup> If a secured party perfects a security interest in some other manner other than by possession, the rules set forth in S.D.C.L. section 57A-9-103(3) apply.<sup>294</sup> Consequently, the "last event" rule governs the perfection of a security interest in chattel paper perfected by possession. The debtor's location, however, determines perfection when the secured party perfects by methods other than possession.

### *Minerals*

S.D.C.L. section 57A-9-103(5) contains the rules governing the perfection of interests in minerals. This section, however, applies only to security interests created in minerals "before extraction and which attaches thereto as extracted or which attaches to an account resulting from the sale thereof at the wellhead or minehead."<sup>295</sup> Consequently, if a security interest arises after the time of extraction, subsection 57A-9-103(5) does not apply. Subsection 57A-9-103(5) states that perfection, the effect of perfection or nonperfection of a security interest in minerals is governed by the law of the jurisdiction wherein the wellhead or minehead is located.<sup>296</sup>

## CONCLUSION

In 1982, the South Dakota Legislature enacted significant amendments to S.D.C.L. chapter 57A-9 dealing with secured transactions. This comment has identified and analysed the major changes initiated by the 1982 amendments. Because South Dakota's large agricultural sector demands a considerable volume of credit, particular emphasis was placed on secured transactions in the agricultural context.

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291. The debtor's buying, selling, planning, billing, accounting, and taxing occurred in Maine. *Id.*

292. *Id.* at 729, 31 U.C.C. Rep. Serv. (Callaghan) at 275.

293. S.D.C.L. § 57A-9-103(4) (Supp. 1982).

294. *Id.*

295. S.D.C.L. § 57A-9-103(5) (Supp. 1982).

296. *Id.*