Revised Article 9 in South Dakota with Emphasis on Newly Included Agricultural Leins

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REVISED ARTICLE 9 IN SOUTH DAKOTA WITH EMPHASIS ON NEWLY INCLUDED AGRICULTURAL LIENS

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I. INTRODUCTION

Revised Article 9 of the Uniform Commercial Code came into effect in South Dakota and most other states on July 1, 2001.[1] It makes substantial changes to the law of secured lending and related transactions. The new law includes within its scope additional types of collateral and many now common forms of commercial financing transactions that were not previously covered by Article 9. In addition, it makes several improvements in the filing system and removes barriers to electronic filing and searches. The revision provides greater certainty of perfection by

1. S.D.C.L. Rev. § 57A-9-701 (Supp. 2000).

making the state of incorporation or registration of the debtor the appropriate state in which to file many financing statements. Moreover, the rules on default and foreclosure have been expanded providing debtors with greater protections and secured parties with more guidance. The resulting certainty should reduce costs and facilitate financing transactions.

Revised Article 9 requires that secured parties take certain actions within one year or risk that a security interest becomes unenforceable or unperfected.[2] The secured party may be required to make other changes when the current financing statement or continuation statement ceases to be effective.[3] This article is written to ease the transition to the new law for South Dakota practitioners. It will focus on the changes most relevant in South Dakota and will highlight South Dakota's non uniform provisions. It will emphasize the treatment of nonpossessory statutory agricultural liens, which are now included within the scope of Article 9.[4] The article assumes that the reader is familiar with the rules of former Article 9 and the concepts of attachment, perfection, and priority.

II. HOW TO MANEUVER THROUGH THE NEW LAW

Revised Article 9 does not retain the numbering of the former statute. This change will initially cause difficulty for the practitioner who is accustomed to the former law. The new law does provide useful tables listing the numbered provisions in former Article 9 and the corresponding provisions in Revised Article 9.[5] It also contains a table of contents and official comments to each section which explain the provisions. The tables and official comments are not available in the South Dakota Statutes. Any party using Revised Article 9 would be well advised to acquire a copy of the Code that includes the tables and official comments to each provision.[6] Although the comments are not law, they are especially helpful in explaining the changes and providing useful examples.[7]

The revision is divided into seven parts, each dealing with a specific area of the law. Part 1, 9-100s, supplies the definitions and sets forth the types of transactions and collateral that fall within the scope of the law. It

2. S.D.C.L. Rev. § 57A-9-700 et seq. (Supp. 2000).

3. S.D.C.L. Rev. § 57A-9-705(c) (Supp. 2000).

4. S.D.C.L. Rev. § 57A-9-109(a)(2) (Supp. 2000).

5. Table of Contents of Revised Article 9, Table indicating the Disposition of Sections in Former Article 9 and Other Code Sections, and the Table Indicating Sources or Derivations of New Article 9 Sections and Conforming Amendments.

6. A book that contains the tables, comments, and several useful articles on Revised Article 9 is THE NEW ARTICLE 9: UNIFORM COMMERCIAL CODE (Cooper, 2nd ed. 2000) published by the American Bar Association and available for sale on their web site at <http://www.abanet.org/>; SELECTED COMMERCIAL STATUTES (West 2000) may be even more useful, because it includes all UCC articles and comments as well as other relevant statutes. Selected Commercial Statutes is available directly through West at <http://www.store.westgroup .com/> or through the University of South Dakota bookstore.

7. Other books that provide excellent explanations of Revised Article, but which do not include the Code and the Official Comments are LAWRENCE, HENNING, AND FREYERMUTH, UNDERSTANDING SECURED TRANSACTIONS (2nd ed. 1999); WHITE & SUMMERS, UNIFORM COMMERCIAL CODE: SECURED TRANSACTIONS, 732-34 (5th ed. 2000).

also lists types of personal property or transactions that are specifically excluded under the new law. The practitioner must look to a very extensive definition section to find many provisions that were included in the substantive provisions of Former Article 9. Part 2, 9-200s, covers the attachment of a security interest, the security agreement, and the rights of the parties to the agreement. The concepts of perfection and priority are treated in Part 3, 9-300s, which delineates very detailed rules on the means of perfection for each type of collateral. Part 4, 9-400s, specifies the rights of third parties. Part 5, 9-500s explains the intricacies of filing. Part 6, 9-600s, provides specific rules for the default and enforcement of security interests, and Part 7, 9-700s, sets forth the transition rules. The redrafting of Article 9 also required conforming amendments to provisions in almost all other Articles of the Code.[8]

III. SCOPE OF REVISED ARTICLE 9

The scope of Revised Article 9 is expanded to cover additional types of collateral such as health-care-receivables,[9] commercial tort claims,[10] and interests in deposit accounts in non consumer transactions,[11] as well as other transactions including the sale of promissory notes and payment intangibles,[12] consignments as defined by Revised Article 9,[13] and nonpossessory statutory agricultural liens.[14] Creditors having a financial interest in these newly included forms of collateral or transactions may have to comply with Revised Article 9's rules of perfection or risk losing a priority dispute.

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8. *See* conforming amendments to S.D.C.L. §§ 57A-1-105, 57A-1-201(9)(32) & (37), 57A-2-103(3), 57A-2-210, 57A-2-312, 57A-2-326, 57A-2-502, 57A-2-716, 57A-2a-103, 57A-2a-303, 57A-2a-307, 57A-2a-309, 57A-4-210, 57A-5-118, 57A-6-102, 57A-6-103(3), 57A-7-503(1), 57A-8-102, 57A-8-103, 57A-8-106, 57A-8-110, 57A-8-301, 57A-8-302, 57A-8-502, 57A-8-510 (Supp. 2000).

9. S.D.C.L. Rev. § 57A-9-109(d)(8) (Supp. 2000); S.D.C.L. Rev. § 57A-9-102(a)(46) (Supp. 2000).

10. S.D.C.L. Rev. § 57A-9-109(d)(12) (Supp. 2000); S.D.C.L. Rev. § 57A-9-102(a)(13) (Supp. 2000).

11. S.D.C.L. Rev. § 57A-9-109(d)(13) (Supp. 2000); S.D.C.L. Rev. § 57A-9-102(a)(29) (Supp. 2000). A "consumer transaction" is defined as:

> a transaction in which (i) an individual incurs an obligation primarily for personal, family, or household purposes, (ii) a security interest secures the obligation, and (iii) the collateral is held or acquired primarily for personal, family, or household purposes. The term includes consumer-goods transactions.

S.D.C.L. Rev. § 57A-9-102(a)(26) (Supp. 2000).

12. S.D.C.L. Rev. § 57A-9-109(a)(3) (Supp. 2000). A "payment intangible" is defined as "a general intangible under which the account debtor's principal obligation is a monetary obligation." S.D.C.L. Rev. § 57A-9-102(a)(61) (Supp. 2000). South Dakota has one non-uniform exclusion to Revised Article 9. "[T]he pledging or segregating of collateral for public deposits as authorized by § 51-22-12, chapter 52-5, and chapter 4-6A." S.D.C.L. Rev. § 57A-9-109(d)(14).

13. S.D.C.L. Rev. § 57A-9-109(a)(4) (Supp. 2000); S.D.C.L. Rev. § 57A-9-102(a)(20) (Supp. 2000).

14. S.D.C.L. Rev. § 57A-9-109(a)(2) (Supp. 2000); S.D.C.L. Rev § 57A-9-102(a)(5) (Supp. 2000).

A. NEWLY INCLUDED FORMS OF COLLATERAL

Revised Article 9 has included within its scope additional forms of collateral now commonly accepted in financing transactions. For example, a doctor, clinic, pharmacy, HMO, or other medical facility may now grant an Article 9 security interest in its "health-care-insurance receivables."[15] A health-care-insurance receivable is "an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health-care goods or services provided."[16] Formerly, transfers of all interests or claims under insurance policies were excluded from Article 9.[17] Only insurance claims for the proceeds of collateral were within the scope of former Article 9.[18] Under the new law, a bank that lends money to an HMO, taking a security interest in the money owed the HMO by its patients' insurance companies, must comply with the relevant provisions of Revised Article 9.

"Commercial tort claims" now can serve as Article 9 collateral.[19] A commercial tort claim is a claim arising in tort made by an organization or by an individual arising out of that person's business or profession.[20] If the tort claim is made by an individual, it cannot include damage claims for personal injury or death.[21] Although a party is unlikely to lend money solely against a commercial tort claim, the party taking a security interest in the debtor's personal property would be well-advised to ask if there are any outstanding commercial tort claims and to then list each specific claim as collateral.[22] In case of default, the commercial tort claim could be another source of funds.

Another new form of acceptable collateral, in non-consumer transactions, is an interest in a deposit account that is taken as original collateral.[23] Formerly, a secured party could have an interest solely in the traceable proceeds of collateral that were deposited in an account.[24] A deposit account includes savings, passbook, or similar accounts at a bank.[25] It does not include a certificate of deposit, account receivable, or

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15. S.D.C.L. Rev. § 57A-9-109(d)(8) (Supp. 2000).

16. S.D.C.L. Rev. § 57A-9-102(a)(46) (Supp. 2000). Medicare and Medicaid rights are governed by federal law and are generally not assignable. There are exceptions.

17. S.D.C.L. Former § 57A-9-104(7) (repealed July 1, 2001).

18. *Id.*

19. S.D.C.L. Rev. § 57A-9-109(d)(12) (Supp. 2000). Other tort claims are still excluded from Revised Article 9. *Id.*

20. S.D.C.L. Rev. § 57A-9-102(a)(13) (Supp. 2000).

21. S.D.C.L. Rev. § 57A-9-102(a)(13) (Supp. 2000). Revised Article 9 does not include within its scope non-business tort claims made by natural persons or other bodily injury claims in tort. S.D.C.L. Rev. § 57A-9-102(d)(12) (Supp. 2000).

22. Commercial tort claims must be specifically described in the security agreement. *See* S.D.C.L. Rev. § 57A-9-108(c)(1) (Supp. 2000).

23. S.D.C.L. Rev. § 57A-9-109(d)(13) (Supp. 2000).

24. S.D.C.L. Former § 57A-9-104(l) (Repealed July 1, 2001). A secured party continues to have a security interest in the traceable proceeds of collateral in an account. S.D.C.L. Rev. § 57A-9-315(a)(2) (Supp. 2000).

25. S.D.C.L. Rev. § 57A-9-102(a)(29) (Supp. 2000).

investment property such as securities accounts.[26] The secured party should describe the deposit account in the security agreement. In a non consumer transaction, the secured party might also take an interest in "all deposit accounts" as additional collateral, although the secured party would not want to lend solely against unknown deposit accounts. A security interest in all deposit accounts will eliminate the need to trace proceeds if the debtor defaults, there are funds in an account, and there are no third parties involved. The secured party will not be perfected in unknown deposit accounts, however, because the security interest can only be perfected by control, which requires some act.[27]

Revised Article 9 also includes some software as collateral.[28] Not all software is treated separately as collateral. If the software is embedded in goods in such a way as to become part of the goods it falls under the definition of "goods."[29] For example, if the software is a chip embedded in an automobile to provide for the functioning of an automotive system the creditor need only take a security interest in the automobile. If the software maintains its independent character, however, it falls under the definition of "general intangible."[30] It may not be clear when the software is embedded and when it maintains its individual status, so, if there is any question, a careful creditor may want to add "software" or "general intangible" to the list of collateral.

B. NEWLY INCLUDED TRANSACTIONS

Revised Article 9 has included within its scope additional types of financing transactions. It has also clarified the rules relating to certain provisions that were not uniformly interpreted by the courts under the former law, which resulted in forum shopping.

1. THE SALE OF PAYMENT INTANGIBLES, PROMISSORY NOTES, ACCOUNTS AND CHATTEL PAPER: SECURITIZATIONS

The sale of payment intangibles and promissory notes and an expanded definition of accounts were incorporated into Revised Article 9 to facilitate "asset securitizations."[31] Asset securitization has become an increasingly important commercial financing transaction since the last

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26. *Id.*

27. S.D.C.L. Rev. § 57A-9-312(b) (Supp. 2000). *See infra* § IX.

28. S.D.C.L. Rev. § 57A-9-102(a)(75) (Supp. 2000). "Software" means:

> a computer program and any supporting information provided in connection with a transaction relating to the program. The term does not include a computer program that is included in the definition of goods.

Id.

29. S.D.C.L. Rev. § 57A-9-102(a)(44) (Supp. 2000).

30. S.D.C.L. Rev. § 57A-9-102(a)(42) (Supp. 2000).

31. S.D.C.L. Rev. § 57A-9-109(a)(3) (Supp. 2000). For a history of the inclusion of securitizations into Revised Article 9 *see generally* Paul M. Shupack, *Making Revised Article 9 Safe for Securitizations: A Brief History*, 73 AM. BANKR. L.J. 167 (1999).

major revision of Article 9. In a securitization, the creditor sells its rights to receive payments to a trustee.[32] The rights to payments may be represented by chattel paper, accounts, promissory notes or payment intangibles. The trustee then sells trust "participations" or "shares" to investors.[33] Revised 9 was expanded to include the sale of all the applicable types of payment rights, so that all securitizations would be within the scope of Revised Article 9.[34]

2. *NONPOSSESSORY AGRICULTURAL LIENS*

Revised Article 9 for the first time includes within its scope nonpossessory "agricultural liens."[35] An agricultural lien is a lien on farm products.[36] The revised definition of "farm products" includes crops, aquatic goods, livestock, supplies used or produced in farming, and the products of crops or livestock in their unmanufactured states.[37] The lien must be created by statute.[38] It cannot be a security interest that is voluntarily granted by the debtor or a common law lien established by the courts.[39] Moreover, the lien must be created in favor of a person, who in

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32. *See* WHITE & SUMMERS, UNIFORM COMMERCIAL CODE: SECURED TRANSACTIONS, *supra* note 7, at 732-34.

33. *See* WHITE & SUMMERS, UNIFORM COMMERCIAL CODE: SECURED TRANSACTIONS, *supra* note 7, at 732-34; LAWRENCE, HENNING, AND FREYERMUTH, UNDERSTANDING SECURED TRANSACTIONS, *supra* note 7, at 50-51.

34. The 1972 version of Article 9 included not only any transaction "that creates a security interest in personal property," but also additional transactions, such as the outright sale of accounts and chattel paper. S.D.C.L. Former § 57A-9-102(1)(b) (1997) (Repealed July 1, 2001). The forward to the official comments to Former 9-102 stated that "[i]n addition certain sales of accounts and chattel paper are brought within this Article to avoid difficult problems of distinguishing between transactions intended for security and those not so intended."

35. S.D.C.L. Rev.§ 57A-9-109(2) (Supp. 2000). Former Article 9 only applied to possessory statutory liens in which the creditor maintained possession of the collateral. S.D.C.L. Former §57A-9-310 (1997) (Repealed July 1, 2001). Revised Article 9 continues this treatment of possessory liens. Possessory liens do not qualify as "agricultural liens." S.D.C.L. Rev. § 57A-9-333 (Supp. 2000). For a history of statutory and common law liens on agricultural products, *see* Donald W. Baker, *Some Thoughts on Agricultural Liens Under the new U.C.C. Article 9*, 51 ALA. L. REV. 1417, 1421-1426 (2000).

36. S.D.C.L. Rev. § 57A-9-102(a)(5) (Supp. 2000). This provision provides:

> "Agricultural lien" means an interest, other than a security interest, in farm products:
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> (A) which secures payment or performance of an obligation for: (i) goods or services furnished in connection with a debtor's farming operation; or (ii) rent on real property leased by a debtor in connection with its farming operation; (B) which is created by statute in favor of a person that: (i) in the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operation; or (ii) leased real property to a debtor in connection with the debtor's farming operation; and (C) whose effectiveness does not depend on the person's possession of the personal property.

Id.

37. S.D.C.L. Rev. § 57A-9-102(a)(34) provides:

> "Farm products" means goods, other than standing timber, with respect to which the debtor is engaged in a farming operation and which are: (A) crops grown, growing, or to be grown, including: (i) crops produced on trees, vines, and bushes; and (ii) aquatic goods produced in aquacultural operations; (B) livestock, born or unborn, including aquatic goods produced in aquacultural operations; (C) supplies used or produced in a farming operation; or (D) products of crops or livestock in their unmanufactured states.

Id.

38. S.D.C.L. Rev. § 57A-9-102(a)(5) (Supp. 2000).

39. *Id.*

the ordinary course of business, furnished goods or services to the debtor or leased real property to the debtor in connection with the debtor's farming operation.[40] The lien must be created to secure payment for the goods, services, or land furnished.[41] Furthermore, the lien holder can not be in possession of the farm products or the lien will not qualify for agricultural lien treatment under Revised Article 9.[42] Agricultural liens are not security interests under Revised Article 9, and any provision that makes reference only to a "security interest" is not applicable to agricultural liens.[43]

Revised Article 9 does not attempt to bring agricultural liens completely within the province of the UCC. Under Revised Article 9, issues of the creation, scope, date of effectiveness of the lien, and, in certain circumstances, whether the lien has priority over other encumbrancers are still governed by the state statute that created the lien. Revised Article 9 specifies that regardless of the requirements of the statute that created the lien, known as the "enabling statute," agricultural liens are to be perfected by filing a UCC financing statement in the appropriate jurisdiction.[44] It also determines the priority of the agricultural lien in most instances and establishes the rules for enforcement of the lien.[45] Consequently, as between the farmer and the agricultural lien holder, the enabling statute solely controls. Revised Article 9 comes into play only when the question involves the right of third parties.

South Dakota has a limited number of statutory liens that qualify as Revised Article 9 agricultural liens. One such South Dakota agricultural lien is the veterinarian's lien, which provides that "[e]very duly licensed and registered veterinarian shall have a lien for vaccinating livestock . . . from the date of such vaccination upon all livestock so vaccinated."[46] This lien qualifies as an agricultural lien in that it: (1) grants the veterinarian a statutorily created lien; (2) on livestock, which qualify as farm products; (3)

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40. S.D.C.L. Rev. § 57A-9-102(a)(35) (Supp. 2000). "'Farming operation' means raising, cultivating, propagating, fattening, grazing, or any other farming, livestock, or aquacultural operation." *Id.*

41. S.D.C.L. Rev. § 57A-9-102(a)(5) (Supp. 2000).

42. *Id.*

43. Under the terminology of Revised Article 9, the farm products covered by the agricultural lien are termed the "collateral." S.D.C.L. Rev. § 57A-9-102(12) (Supp. 2000) provides that "'[c]ollateral' means the property subject to a security interest or *agricultural lien*" (Emphasis added). The person who holds the lien is referred to as the "secured party." S.D.C.L. Rev. § 57A- 9-102(a)(72)(B) (Supp. 2000). The person who owns or has an interest in the property subject to the agricultural lien is the "debtor." S.D.C.L. Rev. § 57A-9-109(28)(A) (Supp. 2000). The debtor's interest cannot include an interest arising under "a security interest or other lien." *Id.* The person who owes the debt is the "obligor." S.D.C.L. Rev. § 57A-9-102(a)(59) (Supp. 2000). Former Article 9 used the term "debtor" to mean both the person who had an interest in the property used as collateral and the person who owed the obligation. Revised Article 9 differentiates between these two possible persons, although the debtor and the obligor are usually the same party. These definitions coincide with those used for typical consensual security interests.

44. S.D.C.L. Rev. § 57A-9-310(a) (Supp. 2000).

45. S.D.C.L. Rev. § 57A- 9-322, 9-700 et seq. (Supp. 2000).

46. S.D.C.L. § 40-27-12 (1991).

to secure payment for the vaccine and service of vaccinating the livestock; (4) rendered in the ordinary course of the veterinarian's business; (5) to the farmer in connection with the raising of livestock which is a farming operation; and (6) the lien is not dependent on the veterinarian attaining possession of the livestock. Other South Dakota agricultural liens include the seed merchant's lien on a crop for seed furnished,[47] a federal agency's lien on a crop for furnishing seed or money,[48] and the thresher's and processor's lien on grain processed.[49]

3. *REVISED CONSIGNMENTS*

Revised Article 9 applies to consignments of goods. The definition of consignment, however, is so limited that many transactions that most people would think of as consignments do not fall under Revised Article 9.[50] A Revised Article 9 consignment is:

> a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and: (A) the merchant: (i) deals in goods of that kind under a name other than the name of the person taking delivery; (ii) is not an auctioneer; and (iii) is not generally known by its creditors to be substantially engaged in selling the goods of others; (B) with respect to each delivery, the aggregate value of the goods is $1,000 or more at the time of delivery; (C) the goods are not consumer goods immediately before delivery; and (D) the transaction does not create a security interest that secures an obligation.[51]

Consequently, if a person brings pre-owned clothing to a consignment store, the transaction will not fall under Revised Article 9, because the clothing is consumer goods and the store is generally known to be engaged in selling consigned goods. Even when a person brings a $10,000 boat to a used boat shop to be sold, it would not qualify if the boat were a consumer good before delivery to the shop.[52] Principally, the definition of consignment under Revised Article 9 covers those situations in which the store's creditors would not necessarily be aware that the store did not own items in its inventory.

The consignor[53] holds a purchase-money security interest in inventory

47. S.D.C.L. § 38-17-3 to 38-17-8 (1996).

48. S.D.C.L. § 38-17-10 to 38-17-11 (1996).

49. S.D.C.L. § 38-17-14 to 38-17-18 (1996). Other states have additional liens that qualify as agricultural liens. A passing familiarity with those liens may be helpful. Landlords may be granted liens on crops raised on leased land. Feedlots may be granted nonpossessory liens on the animals. A stud service may be granted a lien on the female and off spring. (A similar lien was repealed in South Dakota in 1984. Former S.D.C.L § 40-27-4.) Stable keepers, animal horseshoers, processors of farm products, and production suppliers of feed, fertilizer and chemicals may be granted liens.

50. S.D.C.L. Rev. § 57A-9-102(a)(20) (Supp. 2000).

51. *Id.*

52. *Id.*

53. A consignor is the person who delivers the goods for consignment. S.D.C.L. Rev. § 57A-9-102(a)(21) (Supp. 2000).

in the consigned goods.[54] The consignor must file a financing statement to perfect the security interest,[55] thereby protecting the goods from creditors of the consignee.[56] If the consignor is to have priority over earlier secured parties of the consignee, however, it must file the financing statement before the goods are delivered to the consignee, and the creditors of the consignee must receive notification of the consignment within five years of the delivery of the inventory.[57] The five year rule allows consignors to send one notice which covers subsequent like-kind deliveries for the next five years.

C. CLARIFICATIONS OF RULES APPLICABLE TO PURCHASE-MONEY SECURITY INTERESTS

Revised Article 9 specifies that purchase-money security interests[58] may only be taken in goods and related software.[59] Moreover, a purchase-money security interest exists in software only when the debtor's principal purpose is to acquire the software for use in goods that are also subject to a purchase-money security interest.[60]

Questions that arose under former Article 9 concerning cross-collateralization clauses, allocation of payments, and the extent to which a purchase-money security interest loses its status have been resolved under Revised Article 9 for non-consumer goods transactions.[61] South Dakota has adopted non-uniform variations on these provisions making them applicable to all transactions, including consumer goods transactions.[62] Revised Article 9 has codified the "dual-status" rule, which provides that a security interest may be only part purchase-money and still maintain its status, to that extent, as a purchase-money security interest.[63] Under this rule, a purchase-money security interest remains as such even if: (1) the purchase-money obligation has been refinanced, consolidated, renewed, or restructured;[64] (2) it also secures a non-purchase-money obligation; or (3) non-purchase-money collateral also secures the purchase-money obligation.[65] Revised Article 9 also provides rules for the allocation of

54. S.D.C.L. Rev. § 57A-1-201(37) and 57A-9-103(d) (Supp. 2000).
55. S.D.C.L. Rev. § 57A-9-319(b) (Supp. 2000).
56. S.D.C.L. Rev. § 57A-9-319 (Supp. 2000) and U.C.C. Rev. § 9-317(e) cmt 2.
57. S.D.C.L. Rev. § 57A-9-324(b) (Supp. 2000).
58. A "'purchase-money obligation' means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used." S.D.C.L. Rev. § 57A-9-103(a)(2) (Supp. 2000). For example, when a vender sells goods on credit and takes a security interest in those goods, the security interest is a purchase-money security interest. Likewise, if a lender makes the debtor a loan and takes a security interest in the goods that the debtor buys with the money lent, that is also a purchase-money security interest.
59. S.D.C.L. Rev. § 57A-9-103(a)(2); (c) (Supp. 2000).
60. U.C.C. Rev. § 9-324 cmt. 12.
61. U.C.C. Rev. § 9-103(e)-(h).
62. S.D.C.L. Rev. § 57A-9-103(e)-(g) (Supp. 2000).
63. S.D.C.L. Rev. § 57A-9-103(f) (Supp. 2000).
64. S.D.C.L. Rev. § 57A-9-103(f)(3) (Supp. 2000).
65. S.D.C.L. Rev. § 57A-9-103(f)(2) (Supp. 2000).

payments when the obligation secured is only part purchase-money security interest, if the parties have not agreed to a reasonable method of payment allocation.[66]

No changes have been made in the rules of perfection of purchase-money security interests. In general, purchase-money security interests are perfected in the same way as are any other security interests in goods: by filing or by taking possession.[67] Thus, if the John Deere dealer sells a farmer a tractor on credit and takes a security interest in that tractor, John Deere must file a financing statement to protect its interest in the tractor. The tractor is equipment in the hands of the debtor.[68] Only purchase-money security interests in consumer goods are automatically perfected, thus requiring no act on the part of the secured party for perfection.[69]

IV. ATTACHMENT OF A SECURITY INTEREST

A secured party's interest attaches to collateral and becomes enforceable against the debtor when three prerequisites are met: (1) the creditor gives value; (2) the debtor has rights or the power to transfer rights in the collateral; and (3) the parties have entered into a security agreement with evidence thereof.[70] The new law makes no change in the definition of "value" or, in most instances, in the principle that the debtor have rights in the collateral.[71] There are, however, changes in the third requirement that there must be evidence of the security agreement, when that requirement is met through debtor authentication of a security agreement that fulfills the requirements of Revised Article 9.[72]

A. SECURITY AGREEMENT

The security agreement is the contract between the secured party and the debtor which gives the secured party rights in the collateral if the debtor defaults under the terms of the agreement.[73] Both former Article 9 and Revised Article 9 give the parties wide latitude to structure their agreement to meet their particular needs, provided that certain minimum requirements are met.[74] Under Revised Article 9, these requirements are

66. S.D.C.L. Rev. § 57A-9-103(e) (Supp. 2000).
67. S.D.C.L. Rev. § 57A-9-310(a) (Supp. 2000); S.D.C.L. Rev. § 57A-9-313(a) (Supp. 2000).
68. S.D.C.L. Rev. § 57A-9-102(a)(33) (Supp. 2000).
69. S.D.C.L. Rev. § 57A-9-309(1) (Supp. 2000).
70. S.D.C.L. Rev. § 57A-9-203(b) (Supp. 2000).
71. S.D.C.L. Rev. § 57A-9-203(b)(2) (Supp. 2000). Except to the extent that a
> [c]onsignee of goods and seller of accounts, chattel paper, promissory note or payment intangibles does *not* have to have 'rights in the collateral' to grant a subsequent 'security interest' to a secured party of the consignee or to another buyer if the first consignor or buyer has not perfected *its* security interest.

Steven O. Weiss, *A Comparison of the Current Article 9 and the New Article 9, in* SELECTED COMMERCIAL STATUTES, *supra* note 6, at 1378.
72. S.D.C.L. Rev. § 57A-9-203(b) (Supp. 2000).
73. *See* S.D.C.L. Rev. § 57A-9-102(a)(73) (Supp. 2000).
74. U.C.C. Rev. § 9-601 cmt. 2 provides in relevant part that "[w]ith exceptions relating to

met if the debtor authenticates a security agreement that describes the collateral.[75] When the collateral is timber to be cut, the security agreement must also describe the land on which the timber is growing.[76]

1. AUTHENTICATED RECORD

A security agreement may now be in the form of an authenticated record rather than a signed writing.[77] This change was made to allow for electronic filing.[78] The debtor authenticates the record by signing it, executing or adopting a symbol, or in some way encrypting it.[79] The principle requirement is that the authentication be made with the intent to identify the debtor and to demonstrate an adoption or acceptance of the record.[80] Revised Article 9 clarifies that the debtor, who must authenticate the security agreement, is the person with the interest in the collateral.[81] Under former Article 9, the term "debtor" identified both the person who owed the obligation and the person who had an interest in the collateral, depending on the context of the provision in question.[82] Under Revised Article 9, the person who owes the obligation is the "obligor."[83] In most instances the party who incurs the debt also owns the collateral and is thus both the debtor and the obligor. If this is not the case, it is the party with the interest in the collateral who must authenticate the security agreement.[84] For example, Father agrees to put up his tractor to secure a loan that his son is receiving from the bank. In that case, Father is the debtor and Son is the obligor, and it is Father who must authenticate the security agreement.

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good faith, diligence, reasonableness, and care, immediate parties, as between themselves, may vary [UCC] provisions by agreement."

75. S.D.C.L. Rev. § 57A-9-203(b)(3)(A) (Supp. 2000).

76. *Id.*

77. S.D.C.L. Rev. § 57A-9-102(a)(7) (Supp. 2000). A record must be "information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form." S.D.C.L. Rev. § 57A-9-102(a)(69) (Supp. 2000).

78. *Id.*

79. S.D.C.L. Rev. § 57A-9-102(a)(7) (Supp. 2000).

80. *Id.*

81. S.D.C.L. Rev. § 57A-9-102(28) (Supp. 2000). Other parties that falls under the definition of "debtor" include the "seller of accounts, chattel paper, payment intangibles, or promissory notes; or a consignee." *Id.* Under former Article 9, where the debtor who owed the obligation was not the same party who owned the collateral, "the term 'debtor' meant the owner of the collateral in any provision of the Article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires." S.D.C.L. Former § 57A-9-105(d) (1997) (Repealed July 1, 2001).

82. S.D.C.L. Rev. § 57A-9-105(d) (Repealed July 1, 2001).

83. S.D.C.L. Rev. § 57A- 9-102(a)(59) (Supp. 2000). Under Revised Article 9, guarantors and accommodation parties are now referred to as "secondary obligors." S.D.C.L. Rev. § 57A-9-102(a)(71) (Supp. 2000).

84. S.D.C.L. Rev. § 57A-9-203(b)(3)(A) (Supp. 2000); S.D.C.L. Rev. § 57A-9-102(a)(28) (Supp. 2000).

2. DESCRIPTION OF THE COLLATERAL

The security agreement must contain a description of the collateral.[85] The description is sufficient if it "reasonably identifies what is described."[86] In most instances, a description of the collateral by type as defined in Revised Article 9, such as "equipment," "accounts," "instruments," or "documents," will suffice as a sufficient description.[87] Alternately, the secured party may describe the collateral by a specific listing, such as "Ethan Allan maple dining room set," by category, such as "all machinery," by quantity, as in "three printing presses," or by computational or allocational formula, as in "one-half of all the grain produced."[88]

The secured party may use any other method to describe collateral in the security agreement as long as that method is not prohibited by the Code.[89] The Code specifically prohibits the use of a supergeneric description, also called a dragnet clause, in a security agreement to identify the collateral.[90] Thus, a description such as "all the debtor's personal property" or "all the debtor's assets" would not suffice to satisfy the requirement that there be a description of the property.[91] A secured party may, however, simply list every type of collateral provided under Article 9 to legally reach the same result. The Code also prohibits description of the collateral solely by type in two instances.[92] First, a commercial tort claim must be described specifically, for example as "debtor's claim for interference with contract against GMT Computer, Inc."[93] Second, in consumer transactions,[94] when the debtor incurs an obligation primarily for consumer purposes and the collateral is primarily acquired or held for personal, household, or family purposes, the secured party cannot list the collateral simply as "consumer goods" or in general as a "securities account," "securities entitlement" or a "commodity account."[95] The description must be more specific such as "Maytag washer and dryer" or "TD Waterhouse Account No 555555."

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85. S.D.C.L. Rev. § 57A-9-203(b)(3) (Supp. 2000).
86. S.D.C.L. Rev. § 57A-9-108(a) (Supp. 2000).
87. S.D.C.L. Rev. § 57A-9-108(b)(3) (Supp. 2000).
88. S.D.C.L. Rev. § 57A-9-108(b) (Supp. 2000).
89. S.D.C.L. Rev. § 57A-9-108(b)(6) (Supp. 2000).
90. S.D.C.L. Rev. § 57A-9-108(c) (Supp. 2000). A dragnet clause is a clause that attempts to encumber all or most of the debtor's property.
91. *Id.* Note, that the description of the property in the financing statement may use general terms. .S.D.C.L. Rev. § 57A-9-504(2) provides that a description of the collateral in a financing statement is sufficient if it provides an "indication that the financing statement covers all assets or all personal property."
92. S.D.C.L. Rev. § 57A-9-108(e) (Supp. 2000).
93. S.D.C.L. Rev. § 57A-9-108(e)(1) (Supp. 2000).
94. S.D.C.L. Rev. § 57A-9-102(a)(26) provides that:

> '[c]onsumer transaction' means a transaction in which (i) an individual incurs an obligation primarily for personal, family, or household purposes, (ii) a security interest secures the obligation, and (iii) the collateral is held or acquired primarily for personal, family, or household purposes. The term includes consumer-goods transactions.

95. S.D.C.L. Rev. § 57A-9-108(e)(2) (Supp. 2000).

Revised Article 9 has eliminated the requirement that a security agreement, covering present or future crops, describe the land on which the crops are growing or will be grown.[96] Former Article 9 required that a security agreement that provided for an interest in crops, contain a description of the real estate on which the crops were growing or were to be grown.[97] Even though the secured party took an interest in all the debtor's growing crops, that interest was unenforceable due to the insufficiency of the description in the security agreement. The security agreement must still describe the land on which timber is located when the collateral is standing timber which is to be cut.[98]

The definitions of certain types of collateral have changed under Revised Article 9. Consequently, a secured party who describes the collateral by type, may find that specific collateral is no longer included in the definition of that type of collateral. This may result in a secured party not having an interest in the type of collateral intended. The greatest change is in the definition of "account" which is much broader under Revised Article 9.[99] Collateral that previously fell under the definition of "general intangible" may be categorized as an "account" under the new law.[100] Former Article 9 defined an account to primarily include only the right to payment for goods sold or services rendered or to be rendered.[101] Revised Article 9 expands that definition to include rights to payment for sales, and assignments or disposal of all types of property, including real estate, insurance policies, suretyship obligations, energy, charge cards, hire of a vessel, and lottery winnings.[102] Consequently, any security interest in a debtor's lottery winnings is an interest in the debtor's accounts rather than in general intangibles and the collateral description should state "lottery winnings" or "accounts." Also, although the definition of "farm products" has not necessarily expanded, it has been revised to be more detailed so there is no doubt that certain types of collateral are to be classified as farm products.[103] For example, farm products under Revised Article 9 specifically includes "crops grown on trees, vines, and bushes; and aquatic goods produced in aquacultural operations."[104]

3. *AFTER-ACQUIRED PROPERTY CLAUSES IN THE SECURITY AGREEMENT*

A secured party who intends to take an interest in property that the

96. S.D.C.L. Rev. § 57A 9-203(b)(3)(A).
97. *See* S.D.C.L. Former § 9-203(1)(a) (Repealed July 1, 2001).
98. S.D.C.L. Rev. § 57A-9-203(b)(3)(A) (Supp. 2000).
99. S.D.C.L. Rev. § 57A-9-102(a)(2) (Supp. 2000).
100. Rushmore State Bank v. Kurylas, Inc., 424 N.W.2d 649 (1988); In re O'Neill's Shannon Village, 750 F.2d 679 (1984) (holding that a liquor license is a general intangible under Article 9) is still good law under the Revision. *See also* Crystal Bar, Inc. v. Cosmic, Inc., 758 F. Supp. 543 (1991).
101. S.D.C.L. Former § 57A-9-106 (Repealed July 1, 2001).
102. S.D.C.L. Rev. § 57A-9-102(a)(2) (Supp. 2000).
103. S.D.C.L. Rev. § 57A-9-102(a)(34) (Supp. 2000).
104. *Id.*

debtor subsequently acquires must include an after-acquired property clause in the security agreement.[105] As under former Article 9, a secured party can not take an after-acquired property interest in consumer goods acquired more than ten days after the secured party gave value.[106] In addition, Revised Article 9 prohibits the secured party from taking an after-acquired interest in a debtor's commercial tort claims.[107]

V. EFFECTIVENESS OF AN AGRICULTURAL LIEN

Just as the term "attached" means that a security interest in the collateral is enforceable against the debtor,[108] the term "effective" signifies that an agricultural lien on farm products is enforceable against the debtor.[109] Revised Article 9 does not specify when an agricultural lien becomes effective. The effectiveness of the agricultural lien is governed by the statute that creates the lien. Certain agricultural liens clearly indicate at what point the lien becomes effective. For instance, in South Dakota, federal agencies that furnish seed or the money to purchase seed have a lien on the crops grown from the seed from the time that the lien is filed.[110] Harvesters and processors have a lien upon the farm products that are harvested or processed from the date of the harvesting or processing.[111] Not all state statutes, however, clearly specify when the lien becomes effective. The lack of an explicit effective date leads to inevitable confusion that is not resolved by Revised Article 9. When the agricultural

105. S.D.C.L. Rev. § 57A-9-204(a) (Supp. 2000). *See* U.C.C. Rev. § 9-204 cmt. 7 for statement that after-acquired property clauses and future advance clauses are not required in the financing statement. *See also* U.C.C. Rev. § 9-502, cmt. 2.

106. S.D.C.L. Rev. § 57A-9-204(b) (Supp. 2000) which exempts "an accession, when given as additional security." *Id.*

107. S.D.C.L. Rev. § 57A-9-204(c) (Supp. 2000).

108. S.D.C.L. Rev. § 57A-9-203(a) (Supp. 2000).

109. S.D.C.L. Rev. § 57A-9-308(b) provides that an agricultural lien is perfected when it becomes effective and all applicable filing requirements are satisfied.

110. S.D.C.L. § 38-17-10 (1996). Lien of federal agency furnishing seed or money.

> The United States of America or any agency or instrumentality thereof, including production credit associations organized under the Farm Credit Act of 1933, furnishing seed or loaning money for the purchase of seed, to any person within the State of South Dakota for the purpose of sowing or planting crops upon lands owned, used, occupied, rented, or contracted to be purchased by such person, shall have a lien from the time of filing the notice in the manner specified in §38-17-11 upon the seed so furnished or purchased, and upon the crop or crops produced from such seed, to secure payment for the seed so furnished or repayment of the money so loaned.

Id.

111. S.D.C.L. § 38-17-14 (1996). Thresher's and processor's lien on grain processed.

> Every person owning and operating a threshing machine, combine, cornsheller, cornhusker, corn shredder, silage cutter, seed huller, baler, mower, grinder, rake, or agricultural pulverizing machine, shall have a lien from the date of threshing, combining, shelling, husking, shredding, cutting, hulling, baling, mowing, grinding, raking or pulverizing, upon all grain threshed or combined, corn shelled, husked or shredded, silage cut, seeds hulled, or agricultural products baled, mowed, ground, raked or pulverized by him with such machine for the value of the services so rendered in doing such threshing, combining, shelling, husking, shredding, cutting or hulling, baling, mowing, grinding, raking, or pulverizing.

Id.

lien becomes effective, it is then subject to Revised Article 9 for the purposes of perfection against third parties,[112] priority of the lien upon default by the debtor,[113] and enforcement procedures.[114]

VI. PERFECTION BY FILING

Perfection provides public notice that the debtor's property is encumbered. Article 9 provides various means of perfecting a security interest depending on the type of collateral. Methods of perfection include filing, possession, control, noting a lien on a certificate of title, and delivery. The most common form of perfection is by filing a financing statement. Revised Article 9 makes far-reaching changes to the rules governing perfection by filing. The revised filing procedures are simplified, and consequently reduce the costs of compliance and the risk of errors.[115]

A. FILING TO PERFECT A SECURITY INTEREST

Accounts and general intangibles must be perfected by filing an initial financing statement.[116] Goods, negotiable documents, chattel paper, investment property, commercial tort claims, and instruments may be perfected by filing or by another means.[117] Perfection by filing is not permitted when the collateral is money, deposit accounts, letter of credit rights, or collateral covered by a certificate of title statute that requires notation of a lien.[118] The major additions in this area are that agricultural liens[119] and commercial tort claims must be perfected by filing. Additionally, instruments, which formerly could be perfected only by possession, may also now be perfected by filing.[120] Filing is not the preferred form of perfecting a security interest in instruments, because certain parties, including subsequent secured parties who perfect by possession, will have priority over a security interest in instruments perfected by filing.[121] It is also not the preferred form of perfecting in

112. S.D.C.L. Rev. § 57A-9-310(a) (Supp. 2000).

113. S.D.C.L. Rev. § 57A-9-322 (Supp. 2000).

114. S.D.C.L. Rev. § 57A-9-601 (Supp. 2000). This section is written in terms of the rights of the secured party upon the default of the debtor. It is, however, also applicable to the rights of a party holding an agricultural lien. The term "secured party" in Revised Article 9 includes a party holding an agricultural lien. S.D.C.L. Rev. § 57A-9-102(a)(72)(B) (Supp. 2000).

115. Weiss, *A Comparison of the Current Article 9 and the New Article 9, supra* note 71, at 1372.

116. S.D.C.L. Rev. §57A-9-330(d) (Supp. 2000).

117. S.D.C.L. Rev. §57A-9-312(a) (Supp. 2000).

118. S.D.C.L. Rev. §57A-9-312(b) (Supp. 2000).

119. S.D.C.L. Rev. §57A-9-310(a) (Supp. 2000).

120. S.D.C.L. Rev. §57A-9-312(a) (Supp. 2000).

121. S.D.C.L. Rev. §57A-9-330(d) (Supp. 2000) which reads:

> [e]xcept as otherwise provided in Section § 57A-9-331(a), a purchaser of an instrument has priority over a security interest in the instrument perfected by a method other than possession if the purchaser gives value and takes possession of the instrument in good faith and without knowledge that the purchase violates the rights of the secured party.

The term "purchaser" in the UCC includes anyone who takes in a "voluntary transaction creating an interest in property." S.D.C.L. §57A-1-201(32) & (33) (Supp. 2000).

investment property.[122] A security interest in investment property perfected by control will have priority over a security interest perfected by filing, even if the financing statement was filed before the secured party obtained control of the investment property.[123]

A financing statement must be filed in accordance with Revised Article 9 to perfect all agricultural liens created as of July 1, 2001, despite any wording to the contrary in the statutes that created the agricultural lien.[124] Consequently, although the South Dakota statute that establishes a seed lien on crops specifies that the lien must by filed in the register of deeds office in the "county where the crop is to be planted," under Revised Article 9, the secured party must instead file a financing statement in the Secretary of State's office in Pierre.[125] The lien holder may file the financing statement before the lien becomes effective, in which case the lien will be perfected when it becomes effective.[126]

B. INITIAL FINANCING STATEMENT

An initial financing statement, also called a UCC-1, should contain the names and mailing addresses of the debtor and secured party, a description of the collateral, and information stating whether the debtor is an individual or an organization.[127] If the debtor is an organization, the UCC-1 should also specify its type, organizational identification number, and jurisdiction of organization.[128] In addition, South Dakota has a non-uniform requirement that the financing statement must contain the social security number or internal revenue number of the debtor.[129] There is no longer a requirement that the financing statement be signed by the debtor.[130] Revised Article 9 specifies that the filing office must refuse to file a financing statement unless it contains these requisites and is accompanied by the appropriate filing fee.[131] If the collateral is timber to be cut, as-extracted collateral, or goods which are or will be fixtures covered by a fixture filing, certain additional requirements must be met.[132]

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122. S.D.C.L. Rev. § 57A-9-328(1) (Supp. 2000).

123. *Id.*

124. S.D.C.L. Rev. § 57A-9-310(a) (Supp. 2000). If the lien was created before July 1, 2001, however, the lien is still perfected for one year if it was filed in the location provided in the enabling statute. S.D.C.L. Rev. §57A-9-702(b)(1) (Supp. 2000).

125. S.D.C.L. § 38-17-5 (1996).

126. S.D.C.L. Rev. § 57A-9-308(b) (Supp. 2000).

127. S.D.C.L. Rev. § 57A-9-502 & 516(b)(5) (Supp. 2000).

128. S.D.C.L. Rev. § 57A-9-516(b)(5)(C) (Supp. 2000).

129. S.D.C.L. Rev. § 57A-9-502(a)(1) (Supp. 2000).

130. *See* S.D.C.L. Former § 57A-9-203(1)(a) (Repealed July 1, 2001).

131. S.D.C.L. Rev. § 57A-9-520(a); 9-516(b) (Supp. 2000).

132. S.D.C.L. Rev. § 57A-9-502(b) provides that in addition the financing statement must:

> (1) indicate that it covers this type of collateral; (2) indicate that it is to be filed [for record] in the real property records; (3) provide a description of the real property to which the collateral is related [sufficient to give constructive notice of a mortgage under the law of this State if the description were contained in a record of the mortgage of the real property]; and (4) if the debtor does not have an interest of record in the real property, provide the name of a record owner.

S.D.C.L. Section 57A-9-521 sets forth a UCC-1 form, which, if properly completed, must be accepted by filing offices that accept written records.[133]

Revised Article 9 includes a complex interplay of provisions dealing with the legal effect of incomplete or inaccurate financing statements and wrongfully rejected financing statements. If the filing office rejects an incomplete UCC-1, the secured party should supply the additional information and resubmit it for filing. Alternately, if the filing office accepts the incomplete UCC-1 for filing, it is effective to perfect the security interest, provided that it contains at least the names of the debtor and secured party and indicates the collateral covered.[134] Should the filing office mistakenly accept for filing a UCC-1 that is missing the names of the secured party and debtor and a description of the collateral, however, the UCC-1 will not be effective, and the security interest will not be perfected.[135] If the filing office unjustifiably refuses to file a financing statement or other record, the unfiled financing statement is effective to perfect the security interest "except as against a purchaser of the collateral which gives value in reasonable reliance upon the absence of the record from the files."[136] If the filing office accepts for filing a financing statement containing non-essential information, such as the debtor's address, jurisdiction of organization, or type of organization, and that information is inaccurate at the time of filing, the security interest or agricultural lien may lose in a priority contest to a party that gave value in reliance on the misinformation.[137] The secured party is, however, perfected for the purposes of bankruptcy.

1. DEBTOR'S SIGNATURE IS NOT REQUIRED ON THE FINANCING STATEMENT

One major change in the filing provisions of Revised Article 9 is that the debtor's signature is no longer required on the financing statement. This change facilitates electronic filing. It is still necessary, however, for

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Id.

133. S.D.C.L. Rev. § 57A-9-521 (Supp. 2000).

134. U.C.C. Rev. § 57A-9-502(a) (Supp. 2000).

135. S.D.C.L. Rev. § 57A-9-520(c) (Supp. 2000).

136. S.D.C.L. Rev. § 57A-9-516(d) (Supp. 2000). The legitimate reasons for which the filing office can refuse to accept a financing statement for filing are listed in S.D.C.L. Rev. § 57A-9-516(b). *Id.*

137. S.D.C.L. Rev. § 57A-9-338 (Supp. 2000) provides that:

> [i]f a security interest or agricultural lien is perfected by a filed financing statement providing information described in Section 9-516(b)(5) which is incorrect at the time the financing statement is filed: (1) the security interest or agricultural lien is subordinate to a conflicting perfected security interest in the collateral to the extent that the holder of the conflicting security interest gives value in reasonable reliance upon the incorrect information; and (2) a purchaser, other than a secured party, of the collateral takes free of the security interest or agricultural lien to the extent that, in reasonable reliance upon the incorrect information, the purchaser gives value and, in the case of chattel paper, documents, goods, instruments, or a security certificate, receives delivery of the collateral.

Id.

the debtor to authorize the filing of the financing statement.[138] Revised Article 9 provides that the debtor's authentication of a security agreement suffices as the authorization for filing.[139] Thus, when the security agreement is in the form of a signed writing or other authenticated record nothing further need be done to authorize the filing of the financing statement.

It is advisable, however, for the secured party to take an additional step to avoid any possible future problems. Uniform Law Commissioner William Henning suggests that the secured party make a copy of the financing statement for the files and have the debtor sign an affirmation at the bottom of the copy which provides "I authorize the filing of this record. Signed (debtor)."[140] In the event that the secured party has inadvertently added collateral, thereby overstepping the authorization of the debtor in the security agreement, the signed copy of the financing statement will avoid a possible claim of slander of title and damages. It could also be suggested that the secured party include a clause in the loan agreement stating that the debtor's signature on the loan agreement also constitutes the debtor's authorization to file a financing statement. When the security agreement is oral, it is essential that the secured party have the debtor sign a special authorization form or have the debtor sign a written financing statement for the secured party's files.[141]

A filed financing statement is not effective to perfect a security interest unless it is authorized by the debtor.[142] A person who files an unauthorized financing statement is liable for damages.[143] Revised Article 9 includes a provision that adds statutory damages of $500 in addition to compensatory damages[144] to prevent the bogus filings that have been made against many judges and public officials.[145] South Dakota, however, did not adopt the provision providing for statutory damages.

Another caveat for the secured party is that the federal Effective Financing Statement, which protects the secured party from buyers in ordinary course, is combined with the UCC-1 in South Dakota. If the secured party is perfecting its interest in farm products and also fills out the EFS portion of the South Dakota UCC-1, it is a requirement of federal law that paper copies of the EFS be signed by both the debtor and the secured party.[146] Electronically filed copies of the EFS do not require signatures of

138. S.D.C.L. Rev. § 57A-9-509(b) (Supp. 2000).
139. *Id.*
140. Presentation on Effective Compliance with the New Article Nine of the UCC: Loan Documentation, Conference sponsored by South Dakota Banker's Association, May 23, 2001.
141. *See* Harry C. Sigman, *The Filing System Under Revised Article 9*, 73 AM. BANKR. L.J. 61, 70 (1999).
142. S.D.C.L. Rev. § 57A-9-510(a); 57A-9-509(a)(1) (Supp. 2000).
143. S.D.C.L. Rev. § 57A-9-625 (Supp. 2000); U.C.C. Rev. § 9-509 cmt 3.
144. S.D.C.L. Rev. § 57A-9-625(b) (Supp. 2000).
145. U.C.C. Rev. § 9-625(e).
146. Food Security Act of 1985, §1631(c)(4)(B)(C).

the debtor and the secured party.[147]

2. *NEITHER DEBTOR'S SIGNATURE NOR AUTHORIZATION IS REQUIRED TO FILE AGRICULTURAL LIEN*

Neither the debtor's signature nor authorization is required for the lien holder to file a financing statement covering an agricultural lien.[148] The debtor's consent to the filing is not necessary, because the agricultural lien is not consensual; it arises as a matter of law.[149] Dispensation of the debtor's authorization for the filing of a financing statement for an agricultural lien limits the collateral that can be covered by the unauthorized financing statement. A financing statement covering collateral subject to the agricultural lien may not also include collateral subject to a consensual security interest,[150] because the debtor must authorize the filing of financing statements for security interests.[151] If the secured party is perfecting both a security interest and an agricultural lien, the secured party must file two financing statements, one for the collateral subject to the agricultural lien and the other for the collateral subject to the security interest.

3. *DEBTOR'S NAME*

Under Revised Article 9 it is critical that the secured party specify the exact debtor's name on the financing statement. A financing statement that "fails sufficiently" to give the name of the debtor in accordance with the statute will be "seriously misleading."[152] It will be ineffective to perfect the security interest, unless a search of the records in the debtor's correct name "using the filing office's standard search logic" would disclose the financing statement.[153] Therefore, if the filing office searches its records

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147. *Id.* §1631(c)(4)(A).

148. S.D.C.L. Rev. § 57A-9-509(a)(2) (Supp. 2000).

149. S.D.C.L. Rev. § 9-509(a)(2) (Supp. 2000). *See also* U.C.C. Rev. § 9-509 cmt. 5 which reads:

> Agricultural liens. Under subsection (a)(2), the holder of an agricultural lien may file a financing statement covering collateral subject to the lien without obtaining the debtor's authorization. Because the lien arises as [a] matter of law, the debtor's consent is not required. A person who files an unauthorized record in violation of this subsection is liable under Section 9-625(e) for a statutory penalty and damages.

Id.

150. S.D.C.L. Rev. § 57A-9-509(a)(2) (Supp. 2000).

151. S.D.C.L. Rev. § 57A-9-510(a) & 509(a)(1) (Supp. 2000).

152. S.D.C.L. Rev. § 57A-9-506(b) (Supp. 2000).

153. S.D.C.L. Rev. § 57A-9-506(c) (Supp. 2000). The standardized search logic used by the Office of the South Dakota Secretary of State is comprised of the following rules:

> (1) There is no limit to the number of matches that may be returned in response to the search criteria; (2) No distinction is made between upper and lower case letters; (3) Punctuation marks and accents are disregarded; and (4) Words and abbreviations at the end of a name that indicate the existence or nature of an organization as set forth in the Ending Noise Words . . .are ignored in a UCC search [list of words including Inc, Ltd, LLC, Partnership, Trust]. . . .(5) The word 'the' at the beginning of the search criteria is disregarded; (6) All spaces are disregarded; (7) For first and middle names of individuals, initials are treated as the logical equivalent of each name that begins with such initial, and

electronically, which requires that the debtor's surname be spelled correctly, a slight variation in the spelling would result in an ineffective financing statement.

The new law provides detailed instructions on the correct debtor's name to be used.[154] When the debtor is a registered organization such as a corporation, limited liability company, or limited partnership, the secured party must use the name listed "on the public record of the debtor's jurisdiction of organization."[155] The secured party should require that the debtor provide it with a copy of its organizational documents if there is any question as to the debtor's correct name. Alternately, the secured party could contact the Secretary of State's office to determine the exact name from the public records. A trade name is not sufficient.[156] If the secured party also wishes to list the debtor's trade name, the secured party should list the trade name as a second debtor and pay the additional filing fee. If the debtor is not a registered corporation and has a name, the financing statement must list the debtor's organizational or individual name.[157] The financing statement must also specify which is the last name of an individual debtor.[158] For instance, if the debtor's name is George Henry, it must be clear that "Henry" is the surname.

4. *DESCRIPTION OF COLLATERAL IN THE FINANCING STATEMENT*

In general, the description of the collateral in the financing statement is the same as the description required in the security agreement, with one major exception.[159] Whereas in the security agreement the secured party cannot use a dragnet clause to take an interest in all the debtor's assets or personal property, it is now permissible for the secured party to use a

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first name and no middle name or initial is equated with all middle names and initials. For example, a search request for 'John A. Smith' shall cause the search to retrieve each filing against each individual debtor with 'John' or the initial 'J' as the first name, 'Smith' as the last name, and with the initial 'A' or any name beginning with 'a' in the middle name field. If the search request were for 'John Smith' (first and last names with no designation in the middle name field), the search shall retrieve each filing against an individual debtor with 'John' or the initial 'J' as the first name, 'Smith' as the last name and with any name or initial or no name or initial in the middle name field; and (8) After using the preceding rules to modify the name to be searched the search shall reveal only the name of each debtor that is contained in unlapsed financing statements and, exactly matches the name requested, as modified.

Chapter 5:04:04:29 Unofficial Draft Copy of Official Rules of the Office of the Secretary of State, presented for public hearing on May 23, 2001. The official rules are posted on the Secretary of State's website at <www.state.sd.us/sos/sos.htm>

154. S.D.C.L. Rev. § 57A-9-503 (Supp. 2000). The filing office indexes the financing statement under the name of the debtor. S.D.C.L. Rev. § 57A-9-519(c)(1) (Supp. 2000). Potential creditors search under the debtor's name in the UCC filing records to determine if the proposed collateral is already encumbered. It is, therefore, particularly important that the debtor's name be correct.

155. S.D.C.L. Rev. § 57A-9-503(a)(1) (Supp. 2000).

156. S.D.C.L. Rev. § 57A-9-503(c) (Supp. 2000).

157. S.D.C.L. Rev. § 57A-9-503(a)(4)(A) (Supp. 2000).

158. S.D.C.L. Rev. § 57A-9-516(b)(3)(C) (Supp. 2000).

159. S.D.C.L. Rev. § 57A-9-504(1) (Supp. 2000).

dragnet clause in the financing statement.[160] Therefore, a description of the collateral in the financing statement as "all debtor's personal property" is acceptable under Revised Article 9, if it is authorized by the debtor.[161] Also, under Revised Article 9 it is no longer necessary for the financing statement to describe the real estate when the collateral is crops which are growing or to be grown, as was required under former Article 9.[162] This change will avoid the inadvertent failure of perfection when the collateral is growing crops.

C. CONTINUATION STATEMENTS

If the secured party wishes to remain perfected beyond the five year period of effectiveness of most financing statements,[163] the secured party must file a continuation statement.[164] Revised Article 9 has eliminated the requirement that the debtor sign a continuation statement. The continuation statement must be filed within the six month period before the expiration of the financing statement.[165] If it is filed one day before the six month period or one day after the lapse of the financing statement, it is ineffective.[166] South Dakota has non-uniform provisions to cover continuation statements that are filed to continue those financing statements filed before July 1, 1997, when South Dakota financing

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160. S.D.C.L. Rev. § 57A-9-504(2) (Supp. 2000).

161. *Id.* The South Dakota Fast File Training Manual provides a sample description of collateral in the financing statement:

> All of Debtor's farm products, accounts, inventory, chattel paper, general intangibles, documents and instruments, including, but not limited to: all annual and perennial crops of whatever kind, whether heretofore grown, now growing or hereafter grown and whether harvested or unharvested (including, but not limited to corn, soybeans, wheat, alfalfa, milo, rice, cotton and sunflowers), all product of such crops in their unmanufactured states and all warehouse receipts or other documents (negotiable or non-negotiable) issued for storage of such crops; all feed, seed, chemicals, fertilizer and other supplies; and all entitlements and payments (whether in cash or in kind) arising under governmental agricultural subsidy, deficiency, diversion, disaster, conservation, or similar or related programs; all crop insurance payments and indemnities; all rebate and patronage dividends.

The South Dakota Fast Training Manual at 23 <http://www.state.sd.us/sos/ucc.htm>.

162. S.D.C.L. Former § 57A-9-402(1) (1997) (Repealed July 1, 2001).

163. S.D.C.L. Rev. § 57A-9-515(a) (Supp. 2000). Exceptions to the five year period of effectiveness include initial financing statements covering public-finance transactions or manufactured-home transactions which may be valid for 30 years (S.D.C.L. Rev. § 57A-9-515(b) (Supp. 2000)) and financing statements covering transmitting utilities which remain effective until a termination statement is filed. (S.D.C.L. Rev. § 57A-9-515(f) (Supp. 2000)).

164. S.D.C.L. Rev. § 57A-9-515(c) (Supp. 2000). A continuation statement is an amendment to a financing statement that is filed to extend the period of effectiveness of the initial financing statement for an additional five years. S.D.C.L. Rev. § 57A-9-102(27) (Supp. 2000).

> 'Continuation statement' means an amendment of a financing statement which: (A) identifies, by its file number, the initial financing statement to which it relates; and (B) indicates that it is a continuation statement for, or that it is filed to continue the effectiveness of, the identified financing statement.

S.D.C.L. Rev. § 57A-9-515(e) (Supp. 2000). The secured party may file successive continuation statements every five years, during the proscribed period to maintain perfection until the security interest is terminated. *Id.*

165. S.D.C.L. Rev. § 57A-9-515(d) (Supp. 2000).

166. S.D.C.L. Rev. § 57A-9-515(c) (Supp. 2000).

statements were effective for five years and sixty days.[167] These provisions provide that only "for financing statements filed before July 1, 1997, a continuation statement may be filed within 6 months before and 60 days after the expiration of the five-year period."[168] The filing office must refuse to accept a continuation statement that is not filed within the proscribed period.[169] If the filing office should accidently accept an untimely continuation statement for filing, however, it is ineffective to maintain perfection.[170] The practitioner should note that during the transition to Revised Article 9 if a pre-effective date financing statement is filed in an office that is no longer the correct office under the revision, a continuation statement will not maintain the effectiveness of a financing statement.[171]

A security agreement or agricultural lien that lapses due to the secured party's failure to file a timely continuation statement is retroactively unperfected against a purchaser, including a secured party,[172] who gave value for the collateral.[173] Therefore, an earlier perfected secured party who gave value and maintained perfection will have priority over a lapsed security interest. Former Article 9 contained a broader provision that made a security interest retroactively unperfected as against a purchaser or lien creditor when the financing statement lapsed.[174] Under Revised Article 9, this provision has been narrowed. Lien creditors and those who did not give value before the lapse of the financing statement will no longer have priority over a secured party who allows a financing statement to lapse.[175]

D. TERMINATION STATEMENTS

When a debtor has paid off the debt to the secured party, and there is no financing relationship between them, the debtor may want the public records to reflect that there is no longer an encumbrance on the property. This may be accomplished before the financing statement's natural five year expiration date by the filing of a termination statement.[176] A termination statement is filed on a UCC-3, also called a UCC Financing Statement Amendment, by checking the "termination" box.

There are different rules for termination statements depending on

167. S.D.C.L. Rev. § 57A-9-515(d) & (e) (Supp. 2000).
168. S.D.C.L. Rev. § 57A-9-515(d) (Supp. 2000).
169. S.D.C.L. Rev. § 57A-9-520(a) & 516(b)(7) (Supp. 2000).
170. S.D.C.L. Rev. § 57A-9-510(c) (Supp. 2000).
171. S.D.C.L. Rev. § 57A-9-706 (Supp. 2000). *See infra* section XIII.B.3, for explanation of the proper actions to be taken during the transition.
172. S.D.C.L. Rev. § 57A-1-201(32) & (33) (Supp. 2000).
173. S.D.C.L. Rev. § 57A-9-515(c) (Supp. 2000).
174. S.D.C.L. Former § 57A-9-403(2) (Repealed July 1, 2001).
175. S.D.C.L. Rev. § 57A-9-515(c) (Supp. 2000).
176. S.D.C.L. Rev. § 57A-9-513 (Supp. 2000). 'Termination statement' means
> an amendment of a financing statement which: (A) identifies, by its file number, the initial financing statement to which it relates; and (B) indicates either that it is a termination statement or that the identified financing statement is no longer effective.

S.D.C.L. Rev. § 57A-9-102(79) (Supp. 2000).

whether the collateral is consumer goods or non-consumer goods. When the collateral is consumer goods, Revised Article 9 requires that the secured party file a termination statement within a maximum period of one month after the conclusion of the financing relationship or if the debtor did not authorize the filing of the financing statement.[177] That period may be shortened to twenty days after the secured party receives an authenticated (usually signed) demand from the debtor.[178] When the collateral is not consumer goods, there is no obligation for the secured party to file a termination statement unless the debtor so demands.[179] If the debtor justifiably demands a termination statement, the new law allows the creditor twenty days to comply.[180] The secured party may send the termination statement directly to the filing office or to the debtor.[181] If the secured party sends the termination statement to the debtor, the debtor is authorized to file it.[182] The debtor is also authorized to file a termination statement when the secured party fails to comply with its obligation to file or send a termination statement.[183] In either case, the termination statement will have the legal effect of terminating the filing.[184] A termination statement, filed by a debtor who was not entitled to file it, has no legal effect.[185] In general, despite the filing of a termination statement, in South Dakota the financing statement will remain active in the filing system until one year after its normal lapse.[186] Any party who considers making a loan and finds a termination statement in the files from a previous secured party should always check to be certain that the security interest, in fact, has terminated.

E. CORRECTION STATEMENT

A person may file a correction statement in the UCC filing office if that person believes that the public record was wrongfully filed or is

177. S.D.C.L. Rev. § 57A-9-513(a) (Supp. 2000). The secured party must have no further commitments to the debtor. *Id.* The secured party is required to send the termination statement even without a demand when the debtor is a consumer, because the consumer may not be aware of the importance of clearing the public record. U.C.C. Rev. § 9-513 cmt. 2.

178. *Id.*

179. U.C.C. Rev. § 9-513 cmt. 2. The financing statement will lapse on its own accord after a five year period, so except when the Code requires, a termination statement is not necessary. *Id.*

180. S.D.C.L. Rev. § 57A-9-513(b)(2) & (c) (Supp. 2000). Previously, the secured party was only allotted ten days to comply with the demand. S.D.C.L. Former § 57A-9-404(1) (Repealed July 1, 2001).

181. S.D.C.L. Rev. § 57A-9-513(c) (Supp. 2000).

182. S.D.C.L. Rev. § 57A-9-509(d)(1) (Supp. 2000).

183. S.D.C.L. Rev. § 57A-9-509(d)(2) (Supp. 2000).

184. S.D.C.L. Rev. § 57A-9-510(a) (Supp. 2000).

185. *Id. citing* S.D.C.L. Rev. § 57A-9-509(d)(2) (Supp. 2000) which provides that:

> a person may only file a termination statement if the secured party authorizes the filing or the secured party failed to file or send a termination statement as required by the statute and the debtor authorizes the filing of the termination statement and indicates that fact on the termination statement.

Id.

186. South Dakota Official Rule 5:04:04:25.

inaccurate.[187] The correction statement must identify the original financing statement and indicate that it is a correction statement.[188] It must also "provide the basis for the person's belief that the record is inaccurate and indicate the manner in which the person believes the record should be amended to cure any inaccuracy or provide the basis for the person's belief that the record was wrongfully filed."[189] The correction statement becomes part of the record, but it has no legal effect on the filing.[190] It does not undermine an otherwise correctly perfected security interest. Commissioner Henning refers to it as merely a "feel good" statement.[191]

F. WHERE TO FILE IN SOUTH DAKOTA

The new law makes no change in the location at which to file financing statements or fixture filings in South Dakota. When South Dakota law governs the perfection of the security interest, the Office of the Secretary of State in Pierre is the correct place to file most financing statements.[192] Only financing statements covering timber to be cut, as-extracted collateral, and fixture filings are to be made in the county offices where real property mortgages are filed.[193] Fortunately South Dakota has always had a central filing office for most types of collateral. Now, all states that adopt the uniform provisions of Revised Article 9 will have the same rules for where to file.

G. HOW TO FILE WITH THE SOUTH DAKOTA SECRETARY OF STATE

In South Dakota, a secured party can file paper copies of UCC records or utilize South Dakota's innovative, comprehensive electronic filing system, which is much faster and more efficient.[194] Paper copies can be delivered personally or by postal or courier service.[195] Records may not be sent by fax or electronic mail.[196] Fifty percent of South Dakota's filings are electronic.[197] Under Dakota Fast File, South Dakota's electronic filing system, a subscribing secured party can immediately conduct a computerized search under the prospective debtor's name. The secured

187. S.D.C.L. Rev. § 57A-9-518(b). The uniform code provides two alternatives from which the state was to choose. South Dakota chose Alternative B which requires that the correction statement include additional information.

188. *Id.*

189. *Id.*

190. S.D.C.L. Rev. § 57A-9-518(c).

191. *See supra* note 140.

192. S.D.C.L. Rev. § 57A-9-501(a)(2) (Supp. 2000). UCC Division, Secretary of State, Capitol Building, 500 East Capital Avenue, Ste 204, Pierre, S.D. 57501-5070. Tel: 605-773-4422. Electronic Filing: <http://www.state.sd.us/sos/ucc.htm>. Secured parties must have an account with the Secretary of State's office to file electronically.

193. S.D.C.L. Rev. § 57A-9-501(1) (Supp. 2000).

194. *See* South Dakota Fast File Training Manual <http://www.state.sd.us/sos/ucc.htm> at 33.

195. South Dakota Official Rules 5:04:04:02.

196. *Id.*

197. Telephone conversation with Thomas Lecky, Deputy Secretary of State (December, 2000).

party can then file the financing statement on line, and check to see that it is accurately indexed.[198] The charge for the filing is automatically deducted from the secured party's account, and the secured party receives a receipt and verification of filings that can be printed out and retained for the records.[199] The secured party can also file amendments, assignments, continuation statements, partial releases, and terminations online and conduct searches of South Dakota's effective financing statement (EFS) filings for farm products under the federal Food Security Act.[200] In addition, South Dakota will provide a tickler system for the secured party to inform it when it is time to file a continuation statement.[201] Moreover, if the secured party attempts to file the continuation statement too early when it would be ineffective, the system will provide an error message and will refuse to accept the filing.[202]

H. THE LOCATION OF THE DEBTOR RULE IN MULTISTATE TRANSACTIONS

When a secured transaction involves more than one state, the general rule under Revised Article 9 is that the secured party must file in the state where the debtor is located, except when the collateral is timber to be cut, as-extracted collateral, or a fixture that is perfected by a fixture filing.[203] When the debtor is an individual, the proper place to file is the state of the individual's principle residence.[204] If the debtor is a registered organization, such as a corporation, limited partnership, or limited liability company, the organization is deemed to be located in the state in which it is registered.[205] For example, a corporate debtor that is incorporated in Delaware is located in Delaware for the purposes of Revised Article 9. Consequently, Delaware is the appropriate state in which to file a financing statement. A secured party would be well advised to require in the security agreement that an organizational debtor provide a copy of the articles of incorporation, so the secured party will be certain in which state to file.

If the debtor is an unregistered organization with only one place of business, filing must be in the state where the place of business is located.[206] If the debtor is an unregistered organization with more than one place of business, the secured party must file in the state where the debtor has its chief executive office.[207] The UCC does not define the term "chief

198. Electronic filing reportedly saves 30 to 40% of the administrative costs of filing. Telephone conversation with Thomas Lecky, Deputy Secretary of State (December, 2000).
199. *See* South Dakota Fast File Training Manual <http://www.state.sd.us/sos/ucc.htm> at 33.
200. *Id. at* 10.
201. *Id.* at 38-44.
202. *Id.* at 44.
203. S.D.C.L. Rev. § 57A-9-301(1), (3), & (4) (Supp. 2000).
204. S.D.C.L. Rev. § 57A-9-307(b)(1) (Supp. 2000).
205. S.D.C.L. Rev. § 57A-9-307(e) (Supp. 2000).
206. S.D.C.L. Rev. § 57A-9-307(b)(2) (Supp. 2000).
207. S.D.C.L. Rev. § 57A-9-307(b)(3) (Supp. 2000).

executive office." The official comments to Revised Article 9, however, clarify that the chief executive office is the office from which creditors would normally get credit information and the office from which the business operates the main part of its affairs.[208] If the debtor has offices in more than one state, and it is not clear which is the chief executive office, the secured party would be advised to file in each state. When the debtor is foreign, the secured party should file in the jurisdiction (country) where the debtor is located only if there is a public filing, recording, or registration system for nonpossessory security interests in that state.[209] The secured party should note that a foreign organization that is registered in a foreign nation is not registered under the law of a "State" for the purposes of Revised Article 9.[210] It is, therefore treated like an unregistered organization, and the correct place to file would be at the location of its principle place of business if it has only one, or at its chief executive office.[211] If the foreign debtor's location does not have a public recording system for security interests, the financing statement should be filed in the District of Columbia.[212] A foreign judge, however, may not apply Revised Article 9, and if not, would likely find that a filing in the District of Columbia would not protect the secured party from third parties. It would, therefore, be prudent for the secured party to employ foreign counsel where the debtor is located to take the necessary steps to protect the security interest under that law.

Financing statements which were effective prior to revised Article 9 continue to be effective until their original lapse date or June 30, 2006, whichever is earlier.[213] Consequently, a potential creditor must check the office where the financing statement would have been filed under former Article 9 until June 30, 2006, and also check the office in which the statement should be filed under the revision to be certain that there is not an effective financing statement covering the collateral already on file. Also, when collateral that is subject to a security interest is transferred to a party who is located in different state than the previous debtor, the secured party has one year in which to refile so as to remain perfected in the collateral.[214]

One complicating factor in a multistate secured transaction under Revised Article 9 is that for certain types of collateral, the state where the

208. U.C.C. Rev. § 9-307 cmt. 2.

209. S.D.C.L. Rev. § 57A-9-307(c) (Supp. 2000).

210. S.D.C.L. Rev. § 57A-9-102(a)(76) (Supp. 2000). For the purposes of Revised Article 9, A '[s]tate' means "a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States." *Id.*

211. S.D.C.L. Rev. § 57A-9-307(b) (Supp. 2000).

212. *Id.*

213. S.D.C.L. Rev. § 57A-9-705(c) (Supp. 2000).

214. S.D.C.L. Rev. § 57A-9-316(a)(3) (Supp. 2000). The security interest continues in the collateral after its disposition unless there is an applicable exception in Article 9 or the secured party consents to the disposition free and clear of the security interest. S.D.C.L. Rev. § 57A-9-507(a) (Supp. 2000).

financing statement is filed is not the state whose law subsequently controls the effects of perfection or the priority of the security interest.[215] When the collateral is money, goods, instruments, negotiable documents, or tangible chattel paper,[216] the state in which to file is the state of the debtor's location.[217] The law that governs the "effect of perfection or nonperfection and the priority" of the security interest, however, is the state where the collateral is located.[218] For example, the debtor, an individual whose principal place of residence is in Iowa grants the bank a security interest in an expensive painting that is hanging in its summer home in the Black Hills of South Dakota as collateral for a loan used for consumer purposes. The appropriate state for the bank to file a financing statement is in Iowa, where the debtor is located. If the debtor defaults on its obligation, however, the bank must proceed under the law of the state where the collateral is located, in this case, South Dakota. If the bank seizes the painting and its foreclosure sale is commercially unreasonable, South Dakota's non-uniform provision which makes the rebuttable presumption rule applicable to all transactions, including consumer transactions, will be applicable, even if Iowa has not adopted this non-uniform provision.

I. FILING WHERE THE COLLATERAL IS LOCATED

Perfection of an agricultural lien is accomplished by filing a financing statement in the state in which the farm products are located.[219] This is an exception to Revised Article 9's general rule that financing statements must be filed in the state where the debtor is located.[220] Consequently, lenders will have to check the UCC filings in the state where the debtor is located as well as in the state where the farm products are located to be certain that the farm products are not encumbered by either a security interest or an agricultural lien. When the farm products are located in South Dakota, the agricultural lien holder must file the financing statement at the Office of the Secretary of State in Pierre.[221]

An additional problem for the creditor may arise if the collateral subject to an agricultural lien is moved to another state. If the farm products subject to the lien are moved, the lien holder must file in that state in order to maintain perfection. The lien holder loses protection against third parties as soon as collateral subject to an agricultural lien is moved to a state in which the lien holder has not filed. Normally, when collateral is subject to a security interest rather than to an agricultural lien,

215. S.D.C.L. Rev. § 57A-9-301(3)(A) & (B) (Supp. 2000).
216. Electronic chattel paper is defined as "chattel paper evidenced by a record or records consisting of information stored in an electronic medium." S.D.C.L. Rev. § 57A-9-102(a)(31) (Supp. 2000).
217. S.D.C.L. Rev. § 57A-9-301(1) (Supp. 2000).
218. S.D.C.L. Rev. § 57A-9-301(3)(C) (Supp. 2000).
219. S.D.C.L. Rev. § 57A-9-302 (Supp. 2000).
220. S.D.C.L. Rev. § 57A-9-301(1) (Supp. 2000).
221. S.D.C.L. Rev. § 57A-9-501(2) (Supp. 2000).

the secured party is allowed a maximum of four months to learn of a change in the debtor's location or the location of the collateral before the secured party loses perfection,[222] but that provision does not apply to agricultural liens.[223] The failure of Revised Article 9 to provide for a commensurate period of time for parties who hold an agricultural lien to learn of the change in location of the collateral means that these lien holders must be ever vigilant to avoid becoming unperfected.

Revised Article 9 continues the rule that the secured party must make fixture filings in the office where mortgages are filed on the real property to which the personal property is or will be attached.[224] This office is generally the county register of deeds. The appropriate jurisdiction in which to file a filing statement covering timber to be cut or as-extracted collateral is also where the collateral is located.[225] When the security interest is perfected by possession, the law of the jurisdiction where the collateral is located also governs the effects of perfection, nonperfection, and priority conflicts.[226]

VII. PERFECTION BY POSSESSION

A secured party may perfect a security interest by taking possession of goods,[227] instruments,[228] money, negotiable documents, or tangible chattel paper.[229] Perfection by possession is not permitted, however, when the collateral is accounts, general intangibles, commercial tort claims, deposit accounts, letter-of-credit rights, letters of credit, investment property, and

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222. S.D.C.L. Rev. § 57A-9-316(a) (Supp. 2000).

223. U.C.C. Rev. § 9-317 cmt. 7 provides the following example:

> Supplier holds an agricultural lien on corn. The lien arises under an Iowa statute. Supplier perfects by filing a financing statement in Iowa, where the corn is located. See Section 9-302. Debtor stores the corn in Missouri. Assume the Iowa agricultural lien survives or an agricultural lien arises under Missouri law (matters that this Article does not govern). Once the corn is located in Missouri, Missouri becomes the jurisdiction whose law governs perfection. See Section 9-302. Thus the agricultural lien will not be perfected unless Supplier files a financing statement in Missouri.

Id.

224. S.D.C.L. Rev. § 57A-9-501(1)(b) (Supp. 2000).

225. S.D.C.L. Rev. § 57A-9-301(3) & (4) (Supp. 2000).

226. S.D.C.L. Rev. § 57A-9-301(2) (Supp. 2000).

227. S.D.C.L. Rev. § 57A-9-313(b) (Supp. 2000). A secured party cannot normally perfect a security interest by possession when the goods are covered by a certificate of title. *Id.*

228. S.D.C.L. former § 9-57A-9-304(1) (Repealed July 1, 2001). Under former Article 9, possession was the only means of perfecting a security interest in instruments. *Id.* Revised Article 9 permits perfection by filing for instruments but gives priority to perfection by possession. S.D.C.L. Rev. § 57A-9-313 (Supp. 2000). A secured party who perfects a security interest in an instrument by possession rather than by filing will eliminate the possibility that a purchaser of the instrument could defeat the security interest by becoming a holder-in-due-course, who would take priority over a secured party. S.D.C.L. Rev. § 57A-9-331(a) (Supp. 2000).

229. S.D.C.L. Rev. § 57A-9-313(a) (Supp. 2000). *See* U.C.C. Rev. § 9-313 cmt. 2. There is no requirement of a signed writing to evidence a security agreement when perfection is by possession. S.D.C.L. Rev. § 57A-9-203(b)(3)(B) (Supp. 2000). Possession of the collateral fulfills one of the requisites of attachment and the requirement for perfection. S.D.C.L. Rev. § 57A-9-203(b)(3)(B) & § 57A-9-313 (Supp. 2000).

oil, gas, or other minerals before extraction.[230] The secured party is perfected by possession only from the time the secured party has possession, and perfection continues only while the secured party maintains possession,[231] unless an applicable exception provides for a twenty day period of temporary perfection.[232]

The secured party need not take possession personally or through an agent to be deemed to have perfected an interest in collateral by possession. The law may attribute possession to the secured party when the collateral is in the hands of a third party bailee, such as a grain elevator or a shipping company, if the secured party takes the proper steps.[233] Revised Article 9 has made no change when the collateral is in the possession of a third party bailee that has issued a negotiable document[234] or a nonnegotiable document.[235] A document is a receipt for the bailment of the goods, generally a warehouse receipt or a carrier's receipt, such as a bill of lading or an airbill.[236] If the third party bailee issues a negotiable document for the goods, then the methods for the secured party to perfect a security interest in the goods is by taking possession of the negotiable document or by filing and listing the negotiable document as the collateral.[237] If the third party issued a nonnegotiable document covering the goods, there are three methods by which the secured party may perfect in the goods.[238] First, the bailee may issue the nonnegotiable document in the secured party's name.[239] Second, the bailee may receive notification of the interest of the secured party.[240] Third, the secured party may file a UCC-1 listing the goods as collateral.[241] Revised Article 9 has changed only the requirement for perfection when the goods are held by a third party that has not issued a document.[242] It is no longer sufficient that the third party merely receive notification of the interest of the secured party.[243] The new law now requires that the third party must "authenticate a record acknowledging that it holds possession of the collateral for the secured party's benefit."[244] A simple one sentence authenticated statement which reads something to the effect of "I, (bailee's name) acknowledge that I am holding (type of collateral) for the benefit of (name of secured party), the

230. *See* U.C.C. Rev. § 9-313 cmt. 2.
231. S.D.C.L. Rev. § 57A-9-313(d) (Supp. 2000).
232. S.D.C.L. Rev. § 57A-9-312(f) (Supp. 2000).
233. S.D.C.L. Rev. § 57A-9-312(c) & (d); S.D.C.L. Rev. § 57A-9-313 (c) (Supp. 2000).
234. S.D.C.L. Rev. § 57A-9-312(c) (Supp. 2000).
235. S.D.C.L. Rev. § 57A-9-312(d) (Supp. 2000).
236. S.D.C.L. Rev. § 57A-9-102(a)(30) (Supp. 2000).
237. S.D.C.L. Rev. § 57A-9-312(c)(1) (Supp. 2000).
238. S.D.C.L. Rev. § 57A-9-312(d) (Supp. 2000).
239. S.D.C.L. Rev. § 57A-9-312(d)(1) (Supp. 2000).
240. S.D.C.L. Rev. § 57A-9-312(d)(2) (Supp. 2000).
241. S.D.C.L. Rev. § 57A-9-312(d)(3) (Supp. 2000).
242. S.D.C.L. Rev. § 57A-9-313(c) (Supp. 2000).
243. S.D.C.L. Former § 57A-9-305 (Repealed July 1, 2001).
244. S.D.C.L. Rev. § 57A-9-313(c)(1) (Supp. 2000). *See supra* text at n. 79 for explanation of "authenticate a record."

secured party" should be sufficient.

VIII. AUTOMATIC PERFECTION

In most instances the secured party must give some type of public notice to third parties that there is a security interest in the debtor's property. That notice is usually provided by filing, possession, control, delivery, or noting the lien on a certificate of title. For certain types of collateral or transactions, however, the Code provides for automatic perfection, meaning that once the security interest attaches the secured party need not do anything to have a perfected security interest.[245] Revised Article 9 continues to grant automatic perfection to purchase-money security interest in consumer goods.[246] Newly included sales of payment intangibles and promissory notes are automatically perfected[247] as are security interests in health-care-insurance receivables granted to the health care provider.[248] A bank that has a security interest in a deposit account maintained at the bank has control over that account and is automatically perfected in the account.[249] Also, a security interest in a supporting obligation[250] is automatically perfected, and a mortgage underlying the collateral for a security interest is automatically perfected when the security interest in the collateral it supports is perfected.[251] The practitioner should note that a beneficial interest in a trust is no longer automatically perfected. It is now necessary to file to perfect the beneficial interest in a trust.[252] Automatic perfection continues to apply to a

245. S.D.C.L. Rev. § 57A-9-309 (Supp. 2000).

246. S.D.C.L. Rev. § 57A-9-309(1) (Supp. 2000).

247. S.D.C.L. Rev. § 57A-9-309(3) & (4) (Supp. 2000). Commissioner Henning suggests that the buyer of payment intangibles file a financing statement to protect against the possibilities that a court will hold the transaction was actually a security interest disguised as a sale. Security interests in payment intangibles must be perfected by filing. Presentation on Effective Compliance with the New Article Nine of the UCC: Loan Documentation, Conference sponsored by South Dakota Banker's Association, May 23, 2001.

248. S.D.C.L. Rev. § 57A-9-309(5) (Supp. 2000).

249. S.D.C.L. Rev. § 57A-9-104(1) (Supp. 2000). *See* U.C.C. Rev. § 9-104 cmt. 3 which states in relevant part:

> Under subsection (a)(1), the bank with which the deposit account is maintained has control. The effect of this provision is to afford the bank automatic perfection. No other form of public notice is necessary; all actual and potential creditors of the debtor are always on notice that the bank with which the debtor's deposit account is maintained may assert a claim against the deposit account.

Id.

250. S.D.C.L. Rev. § 57A-9-102(a)(77) (Supp. 2000). "Supporting obligation" is defined as "a letter-of-credit right or secondary obligation that supports the payment or performance of an account, chattel paper, a document, a general intangible, an instrument, or investment property." *Id.*

251. S.D.C.L. Rev. § 57A-9-308(d) & (e) (Supp. 2000). S.D.C.L. Rev. § 57A-9-308(e) (Supp. 2000) provides that:

> perfection of a security interest in a right to payment or performance also perfects a security interest in a security interest, mortgage, or other lien on personal or real property securing the right.

Id. The South Dakota non uniform provision further provides that "[a]ny statute conflicting with this subsection is expressly subject to this subsection." *Id.*

252. S.D.C.L. Rev. § 57A-9-310(a) (Supp. 2000).

beneficial interest in a decedent's estate.[253]

IX. PERFECTION BY CONTROL

A security interest in deposit accounts and letter of credit rights must be perfected by control, except in certain limited instances.[254] A security interest in electronic chattel paper and investment property,[255] meaning securities such as stocks, bonds, commodity accounts, and security entitlements[256] may be perfected by control.[257] When intangible collateral is put under the "control" of the secured party, it is analogous to the secured party's exercise of possession of tangible collateral.[258] The secured party's exercise of control, for the purposes of perfection, is accomplished in a different manner with each type of collateral.

A secured party gains control of investment property by the specific means set forth for each type of security in UCC Article 8 on Investment Securities.[259] The concept of perfection by control has been part of Article 9 since an amendment in 1994, but it formerly applied only to investment property.[260] The provisions of the 1994 amendment comply with Article 8 and remain substantially unchanged under Revised Article 9.[261] The secured party that perfects by control over investment property generally has priority over a secured party that perfects the security interest only by

253. S.D.C.L. Rev. § 57A-9-309(13) (Supp. 2000).
254. S.D.C.L. Rev. § 57A-9-314 (Supp. 2000).
255. S.D.C.L. Rev. § 57A-9-102(a)(49) (Supp. 2000).
256. *Id.*
257. *Id.*
258. *See* WHITE & SUMMERS, UNIFORM COMMERCIAL CODE: SECURED TRANSACTIONS, *supra* note 7, at 775. Control serves as both the evidentiary step for attachment in place of an authenticated record (S.D.C.L. Rev. § 57A-9-203(b)(3)(D) (Supp. 2000)) and as the step required for perfection. S.D.C.L. Rev. § 57A-9-314 (Supp. 2000).
259. S.D.C.L. Rev. § 57A-9-106(a) (Supp. 2000) which provides that "[a] person has control of a certificated security, uncertificated security, or security entitlement as provided in § 57A-8-106." S.D.C.L. Rev. § 57A-8-106 specifies that:

> (a) A purchaser has "control" of a certificated security in bearer form if the certificated security is delivered to the purchaser. (b) A purchaser has "control" of a certificated security in registered form if the certificated security is delivered to the purchaser, and: (1) the certificate is indorsed to the purchaser or in blank by an effective indorsement; or (2) the certificate is registered in the name of the purchaser, upon original issue or registration of transfer by the issuer. (c) A purchaser has "control" of an uncertificated security if: (1) the uncertificated security is delivered to the purchaser; or (2) the issuer has agreed that it will comply with instructions originated by the purchaser without further consent by the registered owner. (d) A purchaser has "control" of a security entitlement if: (1) the purchaser becomes the entitlement holder; or (2) the securities intermediary has agreed that it will comply with entitlement orders originated by the purchaser without further consent by the entitlement holder. (e) If an interest in a security entitlement is granted by the entitlement holder to the entitlement holder's own securities intermediary, the securities intermediary has "control."

Id.
260. S.D.C.L. Former § 57A-9-115 (Repealed July 1, 2001).
261. *See generally* Penelope L. Christophorou, *Addendum Summarizing Changes Affecting Investment Property Under Revised Article 9*, SD76 ALI-ABA 139 (1999). An additional provision of Revised Article 9 clarifies that a secured party maintains control of the collateral even in a repledge transaction, which occurs in securities markets. S.D.C.L. Rev. § 57A-9-314 (Supp. 2000) & U.C.C. Rev. § 9-207 cmt. 5 & 6.

filing a financing statement.[262] Furthermore, conflicting security interests perfected by control generally rank in priority by time of obtaining control.[263]

In general, a security interest in a deposit account may be perfected only by control of the deposit account.[264] Revised Article 9 provides three means by which the secured party can acquire control of a deposit account.[265] First, if the secured party is the bank in which the debtor maintains the deposit account, the bank is deemed to have control over the account.[266] Second, all parties, including the bank, debtor, and secured party can agree, in an authenticated record, that the bank will act on the secured party's instructions directing the disposition of funds in the account, without the debtor's additional consent.[267] Third, the secured party can become the account holder, usually by becoming a signer or cosigner on the account.[268]

The only direct means of perfecting an interest in letter-of-credit rights is by obtaining control.[269] A secured party obtains control by taking an assignment of the proceeds of the letter of credit[270] and obtaining the consent of the issuer or any nominated person.[271] A secured party with control of letter-of-credit rights remains perfected while he or she retains control.[272] Electronic chattel paper is chattel paper in the form of records of information maintained in an electronic medium.[273] A secured party may perfect a security interest in electronic chattel paper by control[274] or by filing.[275]

X. PERFECTION IN PROCEEDS

When the collateral is sold, exchanged, leased, licensed, or otherwise disposed of, whatever is received in return is the "proceeds" of that

262. S.D.C.L. Rev. § 57A-9-328(1) (Supp. 2000).

263. S.D.C.L. Rev. § 57A-9-328(2) (Supp. 2000).

264. S.D.C.L. Rev. § 57A-9-312(b) (Supp. 2000) which states that "[e]xcept as otherwise provided in § 57A-9-315(c) and (d) for proceeds: (1) a security interest in a deposit account may be perfected only by control under § 57A-9-314." *Id.*

265. S.D.C.L. Rev. § 57A-9-104 (Supp. 2000).

266. S.D.C.L. Rev. § 57A-9-104(1) (Supp. 2000).

267. S.D.C.L. Rev. § 57A-9-104(2) (Supp. 2000).

268. S.D.C.L. Rev. § 57A-9-104(3) (Supp. 2000).

269. S.D.C.L. Rev. § 57A-9-312(b)(2); § 57A-9-314(a) (Supp. 2000). In general, letters of credit are governed by UCC Article 5. S.D.C.L. § 57A-5-114(b) specifies that a beneficiary of a letter of credit may assign the right to the proceeds of the letter of credit.

270. S.D.C.L. § 57A-5-114(a) (Supp. 2000) provides in part that "'proceeds of a letter of credit' means the cash, check, accepted draft, or other item of value paid or delivered upon honor or giving of value by the issuer or any nominated person under the letter of credit." *Id.*

271. S.D.C.L. Rev. § 57A-9-107 (Supp. 2000). *See* U.C.C. Rev. § 9-329 cmt. 2. The consent of the issuer or nominated person is governed by S.D.C.L. § 57A-5-114(c) (Supp. 2000).

272. S.D.C.L. Rev. § 57A-9-314(b) (Supp. 2000).

273. S.D.C.L. Rev. § 57A-9-102(a)(31) (Supp. 2000).

274. S.D.C.L. Rev. § 57A-9-314(a) & § 57A-9-105 (Supp. 2000).

275. S.D.C.L. Rev. § 57A-9-312 (Supp. 2000).

collateral.[276] For instance, if grain is sold, the cash or the check received for the grain is considered to be proceeds of the grain. If the cash or check is then used to buy cattle, the cattle are considered to be proceeds of the proceeds of the grain. Insurance payments for the loss or damage to collateral are proceeds of that collateral when they are payable to the secured party or the debtor.[277] The definition of "proceeds" has been expanded by Revised Article 9 to include licensing fees and distributions on securities.[278] A secured party who can trace the proceeds of the collateral has a security interest in those proceeds.[279] Revised Article 9 leaves the method of tracing to non-Code law. An official comment does endorse the "lowest intermediate balance rule" as a possible method of tracing commingled money in an account.[280] The security interest in the proceeds is perfected if the security interest in the original collateral was also perfected.[281] The secured party, however, may need to take additional steps to continue perfection in the proceeds beyond a twenty day period or the lapse of the financing statement, whichever occurs first.[282] If the secured party is required to file an initial financing statement to continue perfection in the proceeds beyond the twenty day period, Revised Article 9 specifies that no additional authorization from the debtor is necessary.[283]

Inexplicably, Revised Article 9 does not accord the agricultural lien holder the same rights in proceeds that it accords to the holder of a security interest. The proceeds of an agricultural lien are the money or property that is acquired by the debtor upon the disposition of the farm products that are subject to the lien.[284] Revised Article 9 does not determine whether an agricultural lien extends to the proceeds of the farm products that were encumbered by the lien.[285] The enabling statute that established the agricultural lien must specify whether the lien holder also has a lien on

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276. S.D.C.L. Rev. § 57A-9-102(a)(64) (Supp. 2000).

277. *Id.* at (E). It is advisable that the secured party be the loss payee on the insurance policy, either solely or jointly with the debtor, so as to be in a position to negotiate with the insurance company if the collateral is damaged or destroyed.

278. *Id.* at (B).

279. S.D.C.L. Rev. § 57A-9-315(a)(2) (Supp. 2000).

280. U.C.C. Rev. § 9-315 cmt. 3.

281. S.D.C.L. Rev. § 57A-9-315(c) (Supp. 2000).

282. S.D.C.L. Rev. § 57A-9-315(d) & (e) (Supp. 2000).

283. S.D.C.L. Rev. § 57A-9-509(b)(2) (Supp. 2000). This section provides that:

> [b]y authenticating or becoming bound as debtor by a security agreement, a debtor or new debtor authorizes the filing of an initial financing statement, and an amendment, covering: (2) property that becomes collateral under § 57A-9-315(a)(2), whether or not the security agreement expressly covers proceeds.

Id.

284. *See* S.D.C.L. Rev. § 57A-9-102(a)(64) (Supp. 2000).

285. U.C.C. Rev. 9-315 cmt. 9 provides that:

> [t]his Article does not determine whether a lien extends to proceeds of farm products encumbered by an agricultural lien. If, however, the proceeds are themselves farm products on which an "agricultural lien" (defined in Section 9-102) arises under other law, then the agricultural-lien provisions of this Article apply to the agricultural lien on the proceeds in the same way in which they would apply had the farm products not been proceeds.

Id.

the proceeds of the farm products that were subject to the lien.[286] If the enabling statute does extend the lien to the proceeds and the lien is perfected by the filing of a UCC financing statement, then the comments conclude that a court should "award priority in the proceeds to the holder of the perfected agricultural lien."[287] When the enabling statute does not specify that the lien holder has priority in the proceeds of the collateral, the lien holder can still sue for a judgment against the debtor. If the debtor has filed for bankruptcy, however, the lien holder will have only the status of an unperfected creditor.

XI. PRIORITIES

Priority conflicts occur when two or more parties assert claims to the same collateral. Article 9 applies to priority conflicts when one of the parties is an Article 9 secured party, which includes within its definition a party holding an agricultural lien on the collateral.[288] The conflicting parties may include another secured party, such as a bank, an unsecured creditor who levies a judgment lien on the secured party's collateral, the commercial harvester who has an agricultural lien, the trustee in bankruptcy, a lessee, licensee, or innocent buyer of the collateral. Each Article 9 priority rule applies specifically to conflicts between certain classifications of parties. This article can not discuss every possible priority conflict. It will, however, analyze those to which Revised Article 9 has made changes or those dealing with forms of collateral or transactions that were not covered under former Article 9. It should be noted that Revised Article 9 explicitly provides that parties having priority under the Code may contractually agree to subordinate their rights.[289]

A. SECURED PARTY V. JUDGMENT LIEN CREDITOR

Under former Article 9, a judgment lien creditor always had priority over an unperfected non-purchase-money secured party.[290] Revised Article

286. U.C.C. Rev. § 9-322 cmt. 12.

287. *Id.* which provides in part that:

> Inasmuch as no agricultural lien on proceeds arises under this Article, subsections (b) through (e) do not apply to proceeds of agricultural liens. However, if an agricultural lien has priority under subsection (g) and the statute creating the agricultural lien gives the secured party a lien on proceeds of the collateral subject to the lien, a court should apply the principle of subsection (g) and award priority in the proceeds to the holder of the perfected agricultural lien.

Id.

288. S.D.C.L. Rev. § 57A-9-102(a) (72) (Supp. 2000). The term "secured party" includes not only the person having a security interest but also a person holding an agricultural lien, a person who buys accounts, payment intangibles, promissory notes, or chattel paper, a consignor, and a person holding a security interest under another article of the UCC. *Id.*

289. S.D.C.L. Rev. § 57A-9-339 (Supp. 2000). "Only the person entitled to priority may make such an agreement: a person's rights cannot be adversely affected by an agreement to which the person is not a party." U.C.C. Rev. § 9-339 cmt. 2.

290. S.D.C.L. Former § 57A-9-301(1)(b) (Repealed July 1, 2001). In South Dakota, under both former and Revised Article 9, a purchase-money secured party who files a financing statement within 20 days of when the debtor receives possession has priority over an intervening

9 has made an important change in this area. A non-purchase-money secured party, who has filed a financing statement and who has an authenticated security agreement or has taken another step required for evidentiary purposes,[291] will now have priority over a creditor who obtains a judgment lien subsequent to the secured creditor's filing but before the secured party is perfected.[292] For example, the debtor requests a loan from the bank. He puts up his tractor as collateral for the loan. The bank has the debtor sign a security agreement and it files a financing statement on Monday morning, but it does not make a commitment to lend the money at that time. On Monday afternoon, without the bank's knowledge, a judgment lien creditor levies on the tractor. On Tuesday, the bank pays the debtor the amount of the loan. Under former Article 9, the judgment lien creditor would have had priority. Under Revised Article 9, the secured party has priority.

A secured party that has priority over the judgment lien creditor as to the initial value it gives to the debtor will also have priority over subsequent advances based on the same collateral made within 45 days after the judgment lien arises.[293] It is irrelevant whether the secured party had knowledge that a judgment lien had been levied during the 45 days.[294] The secured party will continue to have priority over an intervening judgment lien after the 45 days, if it makes an advance without knowledge of the lien or under a commitment made before it had knowledge of the judgment lien.[295]

B. CONFLICTING SECURITY INTERESTS AND AGRICULTURAL LIENS

The priority rules for conflicts between competing security interests in the same collateral remain unchanged.[296] The only addition is that agricultural liens now generally have the same priority status as security interests,[297] unless the statute that created the lien provides otherwise.[298] Thus, under this provision the priority conflict may be between two agricultural liens, two security interests, or an agricultural lien and a security interest.[299] For example, the holder of a seed lien on crops may have a priority conflict with the holder of a thresher's lien on the same crops. Alternately, the holder of either a seed lien or a thresher's lien may

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judgment lien creditor. S.D.C.L. Former § 57A-9-301(2) (Repealed July 1, 2001) & Rev. § 57A-9-317(e) (Supp. 2000).

291. S.D.C.L. Rev. § 57A-9-203(b) (Supp. 2000).

292. S.D.C.L. Rev. § 57A-9-317(a)(2)(B) (Supp. 2000). Note that if the "secured party" never gives value, he is not a secured party, because the interest has not attached. In that case, the judgment lien creditor would be the only party with an interest in the collateral.

293. S.D.C.L. Rev. § 57A-9-323(b) (Supp. 2000).

294. S.D.C.L. Rev. § 57A-9-323(b) (Supp. 2000).

295. *Id.*

296. S.D.C.L. Rev. § 57A-9-322 (Supp. 2000).

297. *Id.*

298. S.D.C.L. Rev. § 57A-9-322(g) (Supp. 2000).

299. S.D.C.L. Rev. § 57A-9-322 (Supp. 2000).

be in a priority conflict with the bank that holds a security interest in those crops. A perfected agricultural lien or security interest has priority over a conflicting unperfected agricultural lien or security interest in the same collateral.[300] Thus, if the holder of an agricultural lien is properly perfected by filing a financing statement at the Office of the Secretary of State, and the conflicting secured party has not perfected its interest, the perfected agricultural lien holder has priority.[301] If all interests are unperfected, then the first to attach or become effective has priority in the collateral.[302] Therefore, if the priority battle is between two secured parties holding agricultural liens on the same farm products and neither has filed a financing statement with the Secretary of State's office in South Dakota, both would be unperfected, and the court would look to the enabling statutes to determine which lien was the first to become effective.[303] If the priority conflict is between the unperfected agricultural lien holder and a secured party with an unperfected security interest in the farm products, the comparison would be between the date of effectiveness of the agricultural lien as established by the enabling statute and the date of attachment of the security interest.[304] When both agricultural liens or security interests are perfected, the secured party who first files its security interest or agricultural lien or perfects its security interest by other means and remains perfected, has priority unless there is an applicable exception.[305]

1. AGRICULTURAL LIEN STATUTORY EXCEPTION TO THE FIRST TO FILE OR PERFECT RULE

The "first in time, first in right" rule is inapplicable when the agricultural lien statute provides that the lien holder has priority.[306] Under this exception to the pure race provision, "[a] perfected agricultural lien on collateral has priority over a conflicting security interest in or agricultural lien on the same collateral if the statute creating the agricultural lien so provides."[307] Therefore, unless the enabling statute provides otherwise, the holder of a thresher's lien on crops who filed a financing statement in the

300. S.D.C.L. Rev. § 57A-9-322(a)(2) (Supp. 2000).

301. *Id.*

302. S.D.C.L. Rev. § 57A-9-322(a)(3) (Supp. 2000).

303. S.D.C.L. Rev. § 57A-9-322(a)(3) (Supp. 2000); S.D.C.L. Rev. § 57A-9-308(b) (Supp. 2000). "[A]n agricultural lien is perfected when it becomes effective and all applicable requirements for perfection in §57A-9-310 are satisfied." *Id.*

304. S.D.C.L. Rev. § 57A-9-322(a)(3) (Supp. 2000).

305. S.D.C.L. Rev. § 57A-9-322(a)(1) (Supp. 2000).

306. S.D.C.L. Rev. § 57A-9-322(g) (Supp. 2000). U.C.C. Rev. § 9-322(g) cmt 12 states in part,

> [u]nder subsection (g), if another statute grants priority to an agricultural lien, the agricultural lien has priority only if the same statute creates the agricultural lien and the agricultural lien is perfected. Otherwise, subsection (a) applies the same priority rules to an agricultural lien as to a security interest, regardless of whether the agricultural lien conflicts with another agricultural lien or with a security interest.

Id.

307. S.D.C.L. Rev. § 57A-9-322(g) (Supp. 2000).

Office of the Secretary of State on August 1, 2001, would have priority over a Bank having a security interest in those same crops that filed its financing statement on August 5, 2001, because the agricultural lien was the first to be filed. When the enabling statute does specify that the perfected lien holder has priority over a conflicting perfected security interest or perfected agricultural lien, then Revised Article 9 defers to the relative priorities established by the enabling statute.[308] If the statutory provision does not mention priority or explicitly states that the lien holder does not have priority, then in a priority contest the first to file or perfect by other means has priority.[309]

2. *PURCHASE-MONEY SECURITY INTEREST EXCEPTION TO THE FIRST TO FILE OR PERFECT RULE*

One of the principle exceptions to the first to file or perfect rule is for subsequent purchase-money security interests.[310] A debtor who has granted a security interest in collateral to a secured party that has an after-acquired property clause in the security agreement could have difficulty finding another creditor to lend additional funds for the purchase of needed inventory,[311] equipment or other goods. Therefore, Article 9 has provided a means by which a purchase-money secured party, such as a lender who provides financing to buy goods and takes a security interest in those goods, or a vender who sells the goods on credit to the debtor and takes a security interest in the goods, can have priority.[312] A purchase-money secured party can gain priority over a prior perfected secured party with an after-acquired property interest in the same collateral, by following a few simple rules.[313] These rules have not changed substantially, except for the addition of a special rule for livestock that qualify as farm products,[314] a provision governing conflicting purchase-money security interests,[315] and the elimination of the unworkable rule providing for priority of a purchase-money security interest in crops.[316] Revised Article 9 also contains an optional non-uniform production-money priority model rule for crops, which has not been adopted in South Dakota.[317]

When the collateral is any type of goods other than inventory or livestock, the purchase-money secured party will have priority if it perfects the security interest before the debtor receives possession or within twenty

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308. *Id.*
309. S.D.C.L. Rev. § 57A-9-322(a) (Supp. 2000).
310. S.D.C.L. Rev. § 57A-9-324 (Supp. 2000).
311. *See generally* Earl F. Leitess & Steen N. Leitess, *Inventory Financing Under Revised Article 9*, 73 AM. BANKR. L.J. 119 (1999).
312. *See* S.D.C.L. Rev. § 57A-9-324 (Supp. 2000).
313. *See* S.D.C.L. Rev. § 57A-9-324 (Supp. 2000).
314. S.D.C.L. Rev. § 57A-9-324(d) (Supp. 2000).
315. S.D.C.L. Rev. § 57A-9-324(g) (Supp. 2000).
316. S.D.C.L. Former § 57A-9-312(2).
317. U.C.C. Model § 9-324A.

days thereafter.[318] This provision presents no change in South Dakota, which had a non uniform amendment under former Article 9 changing the former uniform ten-day period to twenty days.[319] The purchase-money secured party who complies with this provision also has priority in the identifiable proceeds of the collateral.[320] Moreover, a perfected purchase-money security interest in software is granted the same priority status "as the purchase-money security interest in the goods in which the software was acquired for use."[321]

When the collateral is inventory, the purchase-money secured party must perfect the security interest before the debtor receives possession of the inventory, and send the required timely authenticated notice to a holder of an earlier-filed conflicting security interest.[322] The purchase-money secured party may send the notice to the address provided by the prior secured party on the security agreement, and it will be deemed to have been received.[323]

Revised Article 9 adds a special exception that grants priority to a purchase-money secured party with an interest in livestock that are farm products.[324] The purchase-money secured party will have priority over a prior perfected secured party with an interest in after-acquired livestock provided that: (1) the purchase-money security interest is perfected when the debtor receives possession of the livestock; and (2) the holder of the purchase-money security interest sends the prescribed authenticated notice within six months before the debtor receives possession of the livestock.[325] The perfected secured party who complies with this rule, in most instances, also has priority in the identifiable proceeds and the identifiable products of the livestock in their unmanufactured states.[326]

Former Article 9 did not provide a rule to govern priorities when two or more parties had purchase-money security interests in the same collateral. This priority conflict could arise if the bank lends money for the down payment on a tractor and takes a purchase-money security interest in the tractor, and the retail seller then accepts the down payment and sells the tractor on credit, also taking a purchase-money security interest in the tractor. It could also occur when two lenders provide money to buy the

318. U.C.C. Rev. § 9-324(a) cmt 3 clarifies the circumstances under which the debtor "takes possession" of the collateral.

319. S.D.C.L. Former § 57A-9-312(4).

320. S.D.C.L. Rev. § 57A-9-324(a) (Supp. 2000). The purchase-money secured party could still lose a priority contest in cash proceeds if the proceeds were deposited into a bank account, and the bank perfected an interest in the deposit account by control. S.D.C.L. § 57A-9-327(1) (Supp. 2000).

321. S.D.C.L. Rev. § 57A-9-324(f) & U.C.C. Rev. § 9-324 cmt 12.

322. S.D.C.L. Rev. § 57A-9-324(b)(2) (Supp. 2000).

323. U.C.C. Rev. § 9-324 cmt. 6 & S.D.C.L. Rev. § 57A-9-102(a)(74).

324. S.D.C.L. Rev. § 57A-9-324(d) (Supp. 2000).

325. *Id.* The notification must state that the sender has a purchase-money security interest in the debtor's livestock or expects to acquire such an interest, and it must describe the livestock. S.D.C.L. Rev. § 57A-9-324(d)(4) (Supp. 2000).

326. S.D.C.L. Rev. § 57A-9-324(d) (Supp. 2000).

same goods and both take a purchase-money security interest in those goods. The rules under Revised Article 9 provide that when the conflicting purchase-money security interests arise between the seller of the collateral and a party, such as the bank or finance company that provided value to enable the debtor "to acquire rights in or use of the collateral," the seller of the collateral will have priority.[327] Thus, the vender has priority over the lender. In all other cases of conflicting perfected purchase-money security interests, the first to file or perfect by other means has priority.[328] If both are unperfected, the first to attach has priority.[329]

3. *PERFECTED PURCHASE MONEY SECURED PARTY V. BUYER, LESSEE, OR LIEN CREDITOR*

A purchase-money secured party will also have priority over an intervening buyer, lien creditor or lessee provided he or she files a financing statement within the 20 day grace period after the debtor receives delivery of the collateral.[330] Under former Article 9, the purchase-money secured party had the advantage of a twenty-day grace period in South Dakota, but only as against a lien creditor or a transferee in bulk.[331] Previously there was no grace period for the purchase-money secured party to file against other buyers.[332]

C. CONFLICTING SECURITY INTERESTS IN DEPOSIT ACCOUNTS

Deposit accounts, such as savings or passbook accounts maintained with a bank,[333] are perfected by control.[334] When the bank in which the account is maintained has a security interest in the account, it will have control, which will generally give it priority over other secured creditors.[335] The only significant exception to this rule is if another secured party becomes the bank's customer on the account, thus perfecting its interest in the account by control.[336] Usually the priority contest is between the secured party perfected by control of the account and a secured party having a perfected interest in identifiable proceeds deposited in the

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327. S.D.C.L. Rev. § 57A-9-324(g) (Supp. 2000).

328. S.D.C.L. Rev. § 57A-9-324(g) (Supp. 2000) applying the pure race statute of S.D.C.L. Rev. § 57A-9-322(a) (Supp. 2000).

329. *Id.*

330. S.D.C.L. Rev. § 57A-9-317(e) (Supp. 2000) which provides that:

> [e]xcept as otherwise provided in Sections 9-320 and 9-321, if a person files a financing statement with respect to a purchase-money security interest before or within 20 days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of a buyer, lessee, or lien creditor which arise between the time the security interest attaches and the time of filing.

Id.

331. S.D.C.L. Former § 57A-9-301(2) (Repealed July 1, 2001).

332. *Id.*

333. S.D.C.L. Rev. § 57A-9-102(a)(29) (Supp. 2000).

334. S.D.C.L. Rev. § 57A-9-104 (Supp. 2000).

335. S.D.C.L. Rev. § 57A-9-327(1) & (3) (Supp. 2000).

336. S.D.C.L. Rev. § 57A-9-327(3) & (4); S.D.C.L. Rev. § 57A-9-104(3) (Supp. 2000).

account. In that case, the party with control of the account will generally defeat the secured party with the interest in the proceeds.[337]

D. CONFLICTING SECURITY INTERESTS IN LETTER-OF-CREDIT RIGHTS

A party with a security interest in letter-of-credit rights who perfects by control has priority over secured parties who perfect by any other means.[338] Control is the only direct method of perfecting a security interest in letter-of-credit rights.[339] A letter of credit, however, may serve as a supporting obligation.[340] A secured party is automatically perfected in a letter-of-credit right that serves as a supporting obligation,[341] but the party that is automatically perfected will lose to the party perfected by control.[342] When two or more secured parties perfect by control, they rank in priority according to the time they obtain control.[343]

E. PARTY WITH A SECURITY INTEREST IN AN ACCESSION V. PARTY WITH A SECURITY INTEREST IN OTHER GOODS

An accession is a good that is "physically united with other goods in such a manner that the identity of the original goods is not lost."[344] An example of an accession would be a new engine that is installed in a tractor. The priority conflict arises when one party holds a security interest in the tractor and another party holds a security interest in the tractor engine, and the debtor defaults to one or both parties.[345] Revised Article 9 has changed and simplified the priority rules applicable to accessions.[346] The new rules provide that when the goods are perfected by a notation of the lien on a certificate of title, the party with the perfected security interest in the whole, such as the car, has priority over the party with the perfected security interest in the accession, such as new tires mounted on the car.[347] This rule applies irrespective of which secured party first filed or perfected.[348] In all other priority conflicts involving accessions, the priority rules for two parties with conflicting security interests in the same collateral are applicable.[349] In other words, the first to file or perfect by

337. S.D.C.L. Rev. § 57A-9-327(1) & (3) (Supp. 2000).
338. S.D.C.L. Rev. § 57A-9-107 (Supp. 2000) & S.D.C.L. Rev. § 57A-9-329 (Supp. 2000).
339. S.D.C.L. Rev. § 57A-9-314(b) (Supp. 2000).
340. S.D.C.L. Rev. § 57A-9-102(a)(77) (Supp. 2000). "'Supporting obligation' means a letter-of-credit right or secondary obligation that supports the payment or performance of an account, chattel paper, a document, a general intangible, an instrument, or investment property." *Id.*
341. *See* U.C.C. § 9-329 cmt 2. "Perfection of a security interest in collateral also perfects a security interest in a supporting obligation for the collateral." S.D.C.L. Rev. § 57A-9-308(d) (Supp. 2000).
342. S.D.C.L. Rev. § 57A-9-329(1) (Supp. 2000).
343. S.D.C.L. Rev. § 57A-9-329(2) (Supp. 2000).
344. S.D.C.L. Rev. § 57A-9-102(a)(1) (Supp. 2000).
345. *See* U.C.C Rev. 9-335 cmt. 3, example 1.
346. S.D.C.L. Rev. § 57A-9-335(d) (Supp. 2000).
347. *Id.*
348. *Id.*
349. S.D.C.L. Rev. § 57A-9-335(c) (Supp. 2000).

other means will have priority,[350] unless the later perfected party has a purchase-money security interest that fulfills the requirements giving it priority over an earlier secured party.[351]

F. BUYERS V. SECURED PARTIES

A security interest continues in collateral even after the secured party has sold, leased, licensed, exchanged, or otherwise disposed of the collateral, unless there is an applicable exception in Article 9 or the secured party authorizes the disposition free and clear of the security interest.[352] Consequently, buyers who purchase personal property that is subject to a security interest may have the property repossessed from them or they may be sued in conversion. Revised Article 9 has made only limited changes to the various exceptions to this rule.

1. EXCEPTION FOR BUYERS V. UNPERFECTED SECURED PARTIES

All buyers of tangible and quasi-tangible collateral who give value and receive delivery without knowledge that it is encumbered by a security interest or agricultural lien take free of an unperfected security interest or an unperfected agricultural lien.[353] Revised Article 9 does not follow former Article 9 which restricted this provision to transferees in bulk, buyers not in ordinary course of business, or buyers in ordinary course of business of farm products.[354]

2. EXCEPTION FOR BUYERS IN ORDINARY COURSE (EXCEPT FARM PRODUCTS) V. PERFECTED SECURED PARTIES

There has been no explicit change in the provision that buyers in ordinary course of business of goods, other than buyers of "farm products from a person engaged in farming operations," continue to take free of perfected security interests created by their sellers even though the buyer knows of the security interest.[355] A new subsequent provision, however, does change the law in certain limited situations.[356] A buyer in ordinary course of business does not gain priority over a prior perfected secured party if the secured party is in possession of the collateral.[357] Thus, the new law limits the exception.

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350. S.D.C.L. Rev. § 57A-9-322(a)(1) (Supp. 2000).
351. S.D.C.L. Rev. § 57A-9-324 (Supp. 2000).
352. S.D.C.L. Rev. § 57A-9-315(a) (Supp. 2000).
353. S.D.C.L. Rev. § 57A-9-317(b) (Supp. 2000). This provision covers "tangible chattel paper, documents, goods, instruments, or a security certificate." *Id.*
354. S.D.C.L. Former § 57A-9-301(1)(c) (Repealed July 1, 2001).
355. S.D.C.L. Rev. § 57A-9-320 (Supp. 2000) & S.D.C.L. Former § 57A-9-307(a) (1997) (Repealed July 1, 2001).
356. *See* S.D.C.L. Rev. § 57A-9-320(e) (Supp. 2000).
357. *Id.*

3. *FEDERAL FOOD SECURITY ACT: BUYERS IN ORDINARY COURSE OF FARM PRODUCTS V. PERFECTED SECURED PARTIES WITH A SECURITY INTEREST*

Buyers of farm products, although not protected by the Article 9 exception for buyers in ordinary course, are protected under the federal Food Security Act (FSA), which preempts Article 9 in this area.[358] There has been no change in this provision of the law. The general rule of the FSA is that barring an exception in the Act, "a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations shall take free of a security interest created by the seller, even though the security interest is perfected and the buyer knows of the existence of such interest."[359]

Exceptions to this general rule allow the secured creditor to take action to protect its perfected security interest from innocent buyers by giving them notice of the perfected security interest.[360] If the state has set up a centralized filing system, as has South Dakota, the secured party must file an "effective financing statement" (EFS) with the Office of the Secretary of State.[361] Buyers and selling agents must also register with the Secretary of State.[362] The Secretary of State then distributes a master list of secured creditors and the farm products subject to the security interests to the registered buyers and selling agents.[363] The Secretary of State must also provide non-registered buyers and selling agents with confirmations of effective financing statements on file.[364] If the buyer then proposes to buy farm products subject to a security interest, the buyer must first contact the secured party to receive instructions on how to obtain a waiver of the security interest.[365] The secured party often provides the waiver if the buyer makes the check out directly to the secured party or jointly to the seller and the secured party. Alternately, in states that do not have a centralized filing system, the secured party or the seller can give notice of the security interest to the buyer within one year before the sale of the farm products.[366] The notice must include the payment obligations which the buyer must fulfill for a release of the security interest.[367] If the buyer does not comply with the payment instructions, the buyer takes the farm

358. Food Security Act of 1985, §1631(e)(2).
359. *Id.* §1631(d).
360. *Id.* §1631(e).
361. *Id.* §1631(e)(2).
362. *Id.* §1631(e)(2)(A) & (g)(2)(C).
363. *Id.* §1631(c)(2).
364. *Id.* §1631(c)(2)(F).
365. *Id.* §1631(e)(3).
366. *Id.* §1631(e)(1)(A).
367. *Id.* The notice must contain (1) the name and address of the secured party; (2) the name and address of the debtor; (3) the debtor's social security number or IRS taxpayer identification number; and (4) "a description of the farm products subject to the security interest. . .including the amount of such products where applicable, crop year, country or parish, and a reasonable description of the property." *Id.*

products subject to the security interest. Conversely, if the debtor sells to a party who has not received written notice of the security interest, the buyer takes free of the security interest.[368]

4. *SOUTH DAKOTA'S NON-UNIFORM PROVISIONS PROTECTING INNOCENT PURCHASERS OF FARM PRODUCTS*

South Dakota has two non-uniform provisions further protecting the innocent purchasers of farm products.[369] A secured party can not commence an action against innocent third-party purchasers of farm products, livestock auction agencies, public grain warehouses, public terminal grain warehouses, or grain dealers unless the suit is brought within twenty-four months of the date of the sale of the farm products, and the secured creditor has first offered to file a complaint against the debtor.[370] Moreover, in South Dakota, a person who sells livestock through a livestock auction agency or who "sells grain through a public grain warehouse, or through a public terminal grain warehouse, or a grain dealer" with intent to defraud and without notifying the buyers of a security interest in the farm products "is guilty of farm products fraud" and a Class 1 misdemeanor.[371]

5. *EXCEPTION FOR BUYERS OF CONSUMER GOODS FOR CONSUMER USE V. PERFECTED SECURED PARTIES*

Buyers, who buy goods for consumer use from someone who is selling consumer goods continue to take free of the security interest if they give value and do not have knowledge of the security interest, provided that the secured party has not filed a financing statement.[372] Revised Article 9 has limited this provision, however, in that it is now inapplicable if the secured party has possession of the goods in question.[373]

6. *EXCEPTION FOR BUYERS OF INSTRUMENTS V. SECURED PARTY*

A purchaser of an instrument who gives value and takes possession of an instrument "in good faith and without knowledge that the purchase violates the rights of the secured party," has priority over any prior security interest that was not perfected by possession.[374] Therefore, a secured party can be assured of having priority over the purchaser of an instrument by perfecting by possession and maintaining possession of the instrument.

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368. Food Security Act of 1985, §1631(e)(1)(B) & §1631(g).

369. S.D.C.L. Rev. § 57A-9-609.1 & § 57A-9-609.2 (Supp. 2000). These provisions are not new to Revised Article 9. They are former provisions 57A-9-503.1 & 57A-9-503.2 (Repealed July 1, 2001).

370. S.D.C.L. Rev. § 57A-9-609.1 (Supp. 2000).

371. S.D.C.L. Rev. § 57A-9-609.2 (Supp. 2000).

372. S.D.C.L. Rev. § 57A-9-320(b) (Supp. 2000).

373. S.D.C.L. Rev. § 57A-9-320(e) (Supp. 2000).

374. S.D.C.L. Rev. § 57A-9-330(d) (Supp. 2000).

Alternately, a secured party who does not maintain possession, perhaps because the holder of the instrument must present it for payment,[375] could inscribe a legend on the face of the instrument before surrendering it, stating something to the effect of "this instrument is subject to a security interest held by South Dakota World Bank."

G. LICENSEES AND LESSEES IN ORDINARY COURSE V. SECURED PARTIES

Licensees[376] of general intangibles and lessees of goods in ordinary course of business, generally take free of a perfected security interest created by the licensor or lessor, even if the licensee or lessee knows of the existence of the security interest.[377] For example, software,[378] is generally licensed to the user, or licensee. If the licensor of the software has granted a security interest in the software and has also granted a nonexclusive license for its use, the licensee in ordinary course of business[379] holds its rights free of the security interest, even if the security interest is perfected and the licensee is aware of its existence.[380]

H. SECURITY INTEREST IN FIXTURES V. THE ENCUMBRANCER OR OWNER OF THE REAL ESTATE

Revised Article 9 has made only minimal changes to the priority provisions governing fixtures.[381] The general rule remains that the real estate encumbrancer or owner has priority unless there is an applicable exception.[382] Changes to the exceptions are few. The exception for purchase-money security interests now allows the purchase-money secured party a grace period of twenty days after the goods become fixtures to file

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375. S.D.C.L. Rev. § 57A-9-312(g) (Supp. 2000) which provides that:

> [a] perfected security interest in a certificated security or instrument remains perfected for 20 days without filing if the secured party delivers the security certificate or instrument to the debtor for the purpose of: (1) ultimate sale or exchange; or (2) presentation, collection, enforcement, renewal, or registration of transfer.

Id.

376. *Id.*

377. S.D.C.L. Rev. § 57A-9-321(b) & (c) (Supp. 2000).

378. "'Software' means a computer program and any supporting information provided in connection with a transaction relating to the program. The term does not include a computer program that is included in the definition of goods." S.D.C.L. Rev. § 57A-9-102(a)(75) (Supp. 2000).

379. S.D.C.L. Rev. § 57A-9-321(a) (Supp. 2000) provides that:

> 'licensee in ordinary course of business' means a person that becomes a licensee of a general intangible in good faith, without knowledge that the license violates the rights of another person in the general intangible, and in the ordinary course from a person in the business of licensing general intangibles of that kind. A person becomes a licensee in the ordinary course if the license to the person comports with the usual or customary practices in the kind of business in which the licensor is engaged or with the licensor's own usual or customary practices.

Id.

380. S.D.C.L. Rev. § 57A-9-321(b) (Supp. 2000).

381. *See* S.D.C.L. Rev. § 57A-9-334 (Supp. 2000).

382. S.D.C.L. Rev. § 57A-9-334(c) (Supp. 2000).

a fixture filing in order to gain priority in the applicable circumstances.[383] Revised Article 9 also expands the exception that grants priority to readily removable fixtures to "equipment that is not primarily used or leased for use in the operation of the real property," in addition to the previous categories of office or factory machines and "replacements of domestic appliances that are consumer goods."[384] The general provision on fixtures also incorporates two additional transactions, manufactured homes as fixtures[385] and crops.[386]

1. *SECURED PARTIES WITH AN INTEREST IN A MANUFACTURED HOME V. THE OWNER OR ENCUMBRANCER OF REAL ESTATE*

Revised Article 9 has added a new provision granting priority to certain secured parties with perfected interests in manufactured homes that are fixtures when there is a priority conflict with the owner or encumbrancer of the real property.[387] The new section only applies if a security interest is created in a manufactured home as that term is specifically defined in Revised Article 9.[388] Moreover, the exception applies solely in a "manufactured-home transaction,"[389] when the security interest is perfected under a certificate of title statute.[390]

2. *PERFECTED SECURITY INTEREST IN GROWING CROPS V. MORTGAGEE OR OWNER OF THE PROPERTY*

Revised Article 9 contains a new provision governing priority conflicts between perfected security interests in growing crops and the conflicting interests of the mortgagee or owner of the land on which the crops are

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383. S.D.C.L. Rev. § 57A-9-334(d) (Supp. 2000). Former S.D.C.L. Rev. § 57A-9-313(4)(a) (Repealed, July 1, 2001) provided that the secured party had to make a fixture filing before the goods became fixtures or within ten days thereafter.

384. S.D.C.L. Rev. § 57A-9-334(e)(2) (Supp. 2000).

385. *See* S.D.C.L. Rev. § 57A-9-334(e)(4) (Supp. 2000).

386. S.D.C.L. Rev. § 57A-9-334(i) & (j) (Supp. 2000).

387. S.D.C.L. Rev. § 57A-9-334(e)(4) (Supp. 2000).

388. S.D.C.L. Rev. § 57A-9-102(a)(53) (Supp. 2000).

> 'Manufactured home' means a structure, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or 40 body feet or more in length, or, when erected on site, is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems contained therein. The term includes any structure that meets all of the requirements of this paragraph except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the United States Secretary of Housing and Urban Development and complies with the standards established under Title 42 of the United States Code.

Id.

389. S.D.C.L. Rev. § 57A-9-102(a)(54) (Supp. 2000).

> 'Manufactured-home transaction' means a secured transaction: (A) that creates a purchase-money security interest in a manufactured home, other than a manufactured home held as inventory; or (B) in which a manufactured home, other than a manufactured home held as inventory, is the primary collateral.

Id.

390. S.D.C.L. Rev. § 57A-9-334(e) (Supp. 2000).

growing.[391] Many mortgages contain a standard "rents and issues" clause, which gives the mortgagee of the land rights to the rents and profits produced on or by the mortgaged land as security for the mortgage debt.[392] This clause has been held sufficient under real estate law to grant the mortgagee an interest in crops growing on the mortgaged real estate.[393] Similarly, real estate leases may contain a clause that creates an interest in crops grown on the property.[394] Revised Article 9 clarifies that in a priority dispute between an Article 9 secured party with a perfected security interest in the crops against the mortgagee or owner of the real estate, the perfected secured party has priority provided that "the debtor has an interest of record in or is in possession of the real property."[395] South Dakota's Revised Article 9 provides that in a priority conflict over growing crops that are subject to a perfected security interest and to the interest of the mortgagee or owner of the real estate, the perfected security interest in the growing crops has priority "over any inconsistent statute."[396]

XII. DEFAULT AND ENFORCEMENT

The extensive changes and clarifications to the default and enforcement provisions of Revised Article 9 answer many of the questions that resulted in litigation under the former law.[397] Other standards such as what constitutes a "commercially reasonable" disposition of collateral remain virtually unchanged, so the extensive case law in those areas is still good law. The new law gives secured parties "safe harbors" by providing notice forms and notice time-frames.[398] Revised Article 9 does not define default. The determination of when the debtor is in default continues to be left to the security agreement between the parties. The time of default for an agricultural lien is determined by the statute that created the lien.[399]

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391. S.D.C.L. Rev. § 57A-9-334(i) & (j) (Supp. 2000).

392. Linda J. Rusch, *Farm Financing Under Revised Article 9,* 73 AM. BANKR. L.J. 211, 213 (1999).

393. *Id.* at 221-22.

394. *Id.* at 222 *citing* Keith Meyer, *A Potpourri of Agricultural U.C.C. Issues: Attachment, Real-Estate-Growing Crops and Federalization,* 12 HAMLINE L. REV. 741, 753-763 (1989).

395. S.D.C.L. Rev. § 57A-9-334(i) (Supp. 2000).

396. S.D.C.L. Rev. § 57A-9-334(i) (Supp. 2000). U.C.C. Rev. § 9-334 cmt. 12 provides

> [g]rowing crops are "goods" in which a security interest may be created and perfected under this Article. In some jurisdictions, a mortgage of real property may cover crops, as well. In the event that crops are encumbered by both a mortgage and an Article 9 security interest, subsection (i) provides that the security interest has priority.

Id. States whose real-property law provides otherwise should either amend that law directly or override it by enacting subsection (j).

397. For a comprehensive treatment of the default and enforcement provisions of Revised Article 9 *see* TIMOTHY R. ZINNECKER, THE DEFAULT PROVISIONS OF REVISED ARTICLE 9 UNIFORM COMMERCIAL CODE, 90-91 (ABA ed. 1999); Timothy R. Zinnecker, *The Default Provisions of Revised Article 9 of the Uniform Commercial Code: Part I,* 54 BUS. LAW. 1113 (1999) and Timothy R. Zinnecker, *The Default Provisions of Revised Article 9 of the Uniform Commercial Code: Part II,* 54 BUS. LAW. 1737 (1999) [hereinafter Zinnecker, *The Default Provisions of Revised Article 9*].

398. S.D.C.L. Rev. § 57A-9-614(3) & 612(5). (Supp. 2000).

399. S.D.C.L. Rev. § 57A-9-606 (Supp. 2000) which states "[f]or purposes of this part, a default occurs in connection with an agricultural lien at the time the secured party becomes

Consequently, it is necessary for the creditor holding the lien to consult the enabling statute to determine when it can be enforced.[400] The rules as to how the secured party can enforce an agricultural lien upon default are governed by the default provisions of Revised Article 9.[401]

A. SECURED PARTY'S RIGHT TO POSSESSION OF THE COLLATERAL AFTER DEFAULT

When the debtor is in default, the creditor has a right to take possession of the collateral.[402] Creditors repossessing in South Dakota, however, should be aware that Indian reservations are sovereign territory and may have their own rules for repossession.[403] Under Revised Article 9, the secured party, including the agricultural lien holder, may foreclose, reduce the claim to judgment, or otherwise enforce the claim.[404] The only change in this area is that if the secured party chooses to reduce the claim to a judgment lien and have the sheriff levy on the collateral, the lien relates back to either the date of perfection of the security interest or the date of filing of the financing statement that covers the collateral.[405] Previously the lien related back only to the date of perfection of the security interest, which is often after the date of filing if the secured party files before giving value.[406] If the agricultural lien holder reduces its claim to judgment, the levy on the farm products relates back to "any date specified in a statute under which the agricultural lien was created."[407] The option chosen by the secured party must be taken and carried out in good faith.[408] Revised Article 9 includes an expanded definition of "good faith" that includes both a subjective and objective standard.[409] "Good faith," under Revised Article 9, means "honesty is fact and the observance of reasonable commercial standards of fair dealing."[410] Former Article 9 relied on a purely subjective standard of good faith.[411]

A secured party gets possession of collateral through judicial action by bringing an action for claim and delivery, also called an action in

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entitled to enforce the lien in accordance with the statute under which it was created." *Id.*

400. *See* U.C.C. Rev. 9-606 cmt. 2.

401. The revised default provisions use the terms "secured party," "collateral" and "debtor," all terms which are applicable to agricultural liens as well as to security interests. *See* Donald W. Baker, *Some Thoughts on Agicultural Liens Under the new U.C.C. Article 9*, 51 ALA. L. REV. 1417, 1426 (2000).

402. S.D.C.L. Rev. § 57A-9-609 (Supp. 2000).

403. *See generally* The Cheyenne River Sioux Tribe and the South Dakota Secretary of State's U.C.C. compact <www.state.sd.us/sos/>

404. S.D.C.L. Rev. § 57A-9-601(a)(1) (Supp. 2000).

405. S.D.C.L. Rev. § 57A-9-601(e)(1) & (2) (Supp. 2000).

406. S.D.C.L. Former § 57A- 9-501(5) (Repealed July 1, 2001).

407. S.D.C.L. Rev. § 57A-9-601(e)(3) (Supp. 2000).

408. *See* U.C.C. Rev. § 9-601 cmt. 5 which provides that the secured party who acts in good faith may exercise remedies simultaneously.

409. S.D.C.L. Rev. § 57A-9-102(a)(43) (Supp. 2000).

410. *Id.*

411. S.D.C.L. § 57A-1-201(19) (1997) defining "good faith" as "honesty in fact in the conduct or transaction concerned." *Id.*

replevin.[412] A secured party exercises self-help by seizing the collateral or rendering equipment unusable.[413] Self-help can only be used if it can be accomplished without a breach of the peace.[414] The only change in this provision is that the secured party's option to render equipment unusable on the debtor's premises is now also explicitly subject to the "without a breach of the peace" standard.[415] The Code specifies that the debtor and secured party may not agree to waive the secured party's duty to repossess without breach of the peace.[416] Revised Article 9 does not define breach of the peace, so prior cases should still be good law.[417] A comment to the new law provides limited clarification of the without a breach of the peace standard, in that it states that the provision "does not authorize a secured party who repossesses without judicial process to utilize the assistance of a law-enforcement officer."[418]

B. DISPOSITION OF COLLATERAL AFTER DEFAULT

Revised Article 9 provides that after default a secured party may dispose of the collateral by sale, lease, license, or other disposition.[419] The Code specifies that the secured party may dispose of the collateral "in its present condition or following any commercially reasonable preparation or processing."[420] The secured party should not take this language literally. An official comment to Revised Article 9 clarifies that it may be commercially unreasonable for the secured party to dispose of the collateral, without preparing or processing it for disposal, before first doing a cost-benefit analysis. [421] All aspects of the disposal of the collateral must be "commercially reasonable."[422] The statute provides that the fact that a higher price could have been obtained is not alone a sufficient reason to prevent the secured party from establishing that the actions taken were

412. *See* WHITE & SUMMERS, UNIFORM COMMERCIAL CODE, SECURED TRANSACTIONS, *supra* note 7, § 25-8.

413. S.D.C.L. Rev. § 57A-9-609(a) (Supp. 2000).

414. S.D.C.L. Rev. § 57A-9-609(a) & (b) (Supp. 2000).

415. *Id.*

416. S.D.C.L. Rev. § 57A-9-602(6) (Supp. 2000).

417. *See* WHITE & SUMMERS, UNIFORM COMMERCIAL CODE: SECURED TRANSACTIONS, *supra* note 7, § 25-7. *See* ZINNECKER, THE DEFAULT PROVISIONS OF REVISED ARTICLE 9, *supra* note 397, at 37-40 for guidelines on what actions do and do not generally constitute breach of the peace.

418. *See* U.C.C. Rev. § 9-609 cmt. 3.

419. S.D.C.L. Rev. § 57A-9-610(a) (Supp. 2000). Disposal by "license" was incorporated into Revised Article 9. *Id.*

420. *Id.*

421. U.C.C. Rev. § 9-610 cmt. 4 states that:

> [a] secured party may not dispose of collateral "in its then condition" when, taking into account the costs and probably benefits of preparation or processing and the fact that the secured party would be advancing the costs at its risk, it would be commercially unreasonable to dispose of the collateral in that condition.

Id.

422. S.D.C.L. Rev. § 57A-9-610(b) (Supp. 2000). The standard of "commercial reasonableness" can not be waived. S.D.C.L. Rev. § 57A-9-602(7) (Supp. 2000).

commercially reasonable.[423] An official comment, however, states that "a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable."[424] These statements may place a secured party in a difficult position.

Revised Article 9 makes a valuable contribution to the secured party's peace of mind by providing the secured party with the option of obtaining advance approval as to the commercial reasonableness of the proposed method of enforcement.[425] The secured party may obtain advance approval by means of a court order or negotiation with a creditors' committee or representatives of the creditors.[426] Lack of approval, however, does not mean that the disposition was not commercially reasonable.[427] Alternately, the parties may establish the standards of a commercially reasonable disposition of the collateral in the security agreement,[428] provided that the standards they set are not "manifestly unreasonable."[429]

1. THE SECURED PARTY'S RIGHT TO PURCHASE COLLATERAL

As under the former law, the secured party is allowed to purchase the collateral at a public disposition.[430] "Public disposition" is not defined in either former or Revised Article 9. An official comment provides the following guidance:

> 'a public disposition' is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding. 'Meaningful opportunity' is meant to imply that some form of advertisement or public notice must precede the sale or other disposition and that the public must have access to the sale disposition.[431]

A public sale is usually a public auction.

The secured party can only purchase at a private disposition when the "collateral is of a kind that is customarily sold on a recognized market or is the subject of widely distributed price quotations."[432] The comments clarify that a "recognized market" is a limited concept, which "applies only to markets in which there are standardized price quotations for property that is essentially fungible, such as stock exchanges."[433] Moreover,

> [a] market in which prices are individually negotiated or the items are not fungible is not a recognized market, even if the items are the subject of widely disseminated price guides or are disposed of

423. S.D.C.L. Rev. § 57A-9-627(a) (Supp. 2000).
424. U.C.C. Rev. § 9-627 cmt. 2.
425. S.D.C.L. Rev. § 57A-9-627(c) (Supp. 2000).
426. *Id.*
427. S.D.C.L. Rev. § 57A-9-627(d) (Supp. 2000).
428. S.D.C.L. Rev. § 57A-9-603(a) (Supp. 2000).
429. U.C.C. Rev. § 9-603 cmt. 2.
430. S.D.C.L. Rev. § 57A-9-610(c) (Supp. 2000).
431. U.C.C. Rev. § 9-610 cmt. 7.
432. S.D.C.L. Rev. § 57A-9-610(c)(2) (Supp. 2000).
433. U.C.C. Rev. § 9-627 cmt. 4.

through dealer auctions.[434]

Therefore, relying on this comment, a car dealer who disposed of a repossessed car at a dealers' auction would not be permitted to purchase it.

2. *COLLATERAL COVERED BY IMPLIED WARRANTIES*

Collateral disposed of under Revised Article 9 is covered by the implied warranties of good title, quiet enjoyment, possession and other similar warranties that normally accompany a voluntary disposition of property subject to a contract.[435] Formerly, a comment to the warranty of title provision in Article 2 seemed to imply that there was no warranty of good title for goods sold at a foreclosure sale.[436] This comment has been revised to specify that there is a warranty of good title in compliance with Revised Article 9.[437] The secured party may disclaim these warranties in a record stating "[t]here is no warranty relating to title, possession, quiet enjoyment, or the like in this disposition."[438] Other similar wording will also disclaim the warranties,[439] however, the practitioner is well advised to avoid any question or ambiguity by using the exact wording set forth in the Code.

3. *NOTICE OF DISPOSITION OF COLLATERAL*

Revised Article 9 specifies that in most instances the secured party must send timely notice of the disposition of the collateral to the debtor and all secondary obligors.[440] Although it is not immediately obvious from the wording, this results in a change in the notice requirements of Article 9.

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434. U.C.C. Rev. § 9-610 cmt. 9.

435. S.D.C.L. Rev. § 57A-9-610(d) (Supp. 2000).

436. U.C.C. Former § 2-312 cmt. 5 (Revised July 1, 2001).

437. U.C.C. Rev. § 2-312 cmt. 5 now reads:

> [f]oreclosure sales under Article 9 are another matter. Section 9-610 provides that a disposition of collateral under that section includes warranties such as those imposed by this section on a voluntary disposition of property of the kind involved. Consequently, unless properly excluded under subsection (2) or under the special provisions for exclusion in Section 9-610, a disposition under Section 9-610 of collateral consisting of goods includes the warranties imposed by subsection (1) and, if applicable, subsection (3).

Id.

438. S.D.C.L. Rev. § 57A-9-610(e) (Supp. 2000).

439. S.D.C.L. Rev. § 57A-9-610(f) & (e)(1) (Supp. 2000). The disclaimer may use similar words or make a disclaimer that is effective under the relevant article of the UCC. *Id.*

440. S.D.C.L. Rev. § 57A-9-611(1) (Supp. 2000). Under former Article 9, in most instances the secured party was obligated to give notice of the disposition of collateral to the debtor. S.D.C.L. Former § 57A-9-105(d) (Repealed July 1, 2001). "Debtor" meant any person obligated on the loan, which would include sureties and the person with an interest in the collateral. S.D.C.L. Former § 57A-9-504(3) (Repealed July 1, 2001). Under former Article 9, the term "debtor" was defined as:

> the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term debtor means the owner of the collateral in any provision of the Article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires.

Id.

Under Revised Article 9, the debtor is the party with the interest in the collateral.[441] The term no longer includes the person obligated to pay the debt, who is now known as the obligor.[442] Therefore, under Revised Article 9 the secured party no longer is obligated to notify the primary obligor of the disposition of the collateral.[443] Some commentators suggest that the secured party may voluntarily choose to give notice to the primary obligor, either out of courtesy or because of the possibility that the obligor will attempt to satisfy the debt before the sale.[444] When the collateral is consumer goods, the secured party is only obligated to notify the debtor and secondary obligors.[445] When the collateral is perishable, "threatens to decline speedily in value or is of a type customarily sold on a recognized market," the secured party need not send notice to any party.[446] The debtor and secondary obligors, such as guarantors, can only waive the right to notification in an authenticated agreement entered into after default.[447]

The secured party must also notify other interested parties of the disposition of most types of collateral. Under Revised Article 9 the foreclosing party, for the first time, is required to check the UCC filings and send notification to any secured party or lien holder who has an interest in the collateral.[448] The secured party complies with this requirement by making a timely request to the appropriate filing office for financing statements filed under the debtor's name, and then sending notice to all parties claiming an interest in the collateral in question.[449] If the secured party does not receive a response from the filing office by the notification date, the secured party is still deemed to have complied with the notice requirement.[450] The secured party has no obligation to send notice to unknown debtors or secondary obligors or to any secured parties or lien holders of an unknown debtor.[451] Under former Article 9, the secured party was only obligated to notify any other "secured party" who had sent the foreclosing party written notice of a claim to the collateral.[452] Revised Article 9 continues that requirement but expands it to "any other person" who has sent the foreclosing party timely notification.[453]

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441. S.D.C.L. Rev. § 57A-9-102(a)(28) (Supp. 2000).
442. S.D.C.L. Rev. § 57A-9-102(a)(59) (Supp. 2000).
443. U.C.C. Rev. § 9-611 cmt. 3 provides an example:

> Behnfeldt borrows on an unsecured basis, and Bruno grants a security interest in her car to secure the debt. Behnfeldt is a primary obligor, not a secondary obligor. As such, she is not entitled to notification of disposition under this section.

Id.

444. *See* LAWRENCE, HENNING, AND FREYERMUTH, UNDERSTANDING SECURED TRANSACTIONS, *supra* note 7, at 466.
445. S.D.C.L. Rev. § 57A-9-611(b) (Supp. 2000).
446. S.D.C.L. Rev. § 57A-9-611(b) & (d) (Supp. 2000).
447. S.D.C.L. Rev. § 57A-9-624(a) (Supp. 2000).
448. S.D.C.L. Rev. § 57A-9-611(c)(3)(B) (Supp. 2000).
449. S.D.C.L. Rev. § 57A-9-611(e)(1) (Supp. 2000).
450. S.D.C.L. Rev. § 57A-9-611(e)(2)(A) (Supp. 2000).
451. S.D.C.L. Rev. § 57A-9-605 (Supp. 2000).
452. S.D.C.L. Former § 57A-9-540(3) (Repealed July 1, 2001).
453. S.D.C.L. Rev. § 57A-9-611(c) (Supp. 2000).

Under former Article 9 there was often litigation over whether the notice sent by the secured party was adequate and commercially reasonable.[454] Revised Article 9 has now eliminated the need for concern in this area. The secured party is provided with a safe harbor from litigation if he or she uses the notice forms set forth in Revised Article 9 for consumer transactions[455] and non-consumer transactions.[456] The secured party must send a reasonable authenticated notification.[457] Timeliness of the notification is one aspect of its reasonableness.[458] Revised Article 9 also accords the secured party a safe harbor in non-consumer transactions for the timeliness of notification by providing that:

> a notification of disposition sent after default and ten days or more before the earliest time of disposition set forth in the notification is sent within a reasonable time before the disposition.[459]

A practitioner who sends out the prescribed form notice within the specified time can now be more assured of avoiding litigation as to the reasonableness of the notice.

4. *APPLICATION OF THE PROCEEDS OF THE DISPOSITION OF COLLATERAL*

There are few changes in Revised Article 9's rules regarding how the proceeds of a post-default disposition of collateral shall be divided. As under former Article 9, the proceeds are first applied to the secured party's reasonable expenses in repossessing, storing, preparing the collateral for sale, and selling the collateral, as well as to attorney's fees if they were provided for in the security agreement and are not prohibited by law.[460] Second, the proceeds are applied to satisfy the debts secured by the collateral to the party that foreclosed on the property.[461] Third, the proceeds are distributed to junior creditors, lien holders, or consignors, who have made authenticated demands before the distribution of the proceeds was completed.[462] Under former Article 9, only junior security interests, not lien holders or consignors, had the right to demand a share in the proceeds of the foreclosure disposition.[463] Fourth, unless the proceeds are non-cash proceeds or the underlying transaction was an outright sale of accounts, chattel paper, promissory notes, or payment intangibles, any

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454. *See* Barkley Clark, *Revised Article 9 of the UCC: Scope, Perfection, Priorities, and Default*, 4 N.C. BANKING INST. 129, 174 (2000) (stating that due to the extensive litigation concerning the adequacy of notice under Former Article 9, "creditors strongly applaud the safe harbor into which they may now sail)."

455. S.D.C.L. Rev. § 57A-9-614(3) (Supp. 2000).

456. S.D.C.L. Rev. § 57A-9-612(5) (Supp. 2000).

457. S.D.C.L. Rev. § 57A-9-611(b) (Supp. 2000).

458. S.D.C.L. Rev. § 57A-9-612(a) (Supp. 2000) & U.C.C. Rev. § 9-612 cmt. 2.

459. S.D.C.L. Rev. § 57A-9-612 (Supp. 2000).

460. S.D.C.L. Rev. § 57A-9-615(a)(1) (Supp. 2000).

461. S.D.C.L. Rev. § 57A-9-615(a)(2) (Supp. 2000).

462. S.D.C.L. Rev. § 57A-9-615(a)(3) (Supp. 2000).

463. S.D.C.L. Former § 57A-9-504(1)(c) (Repealed July 1, 2001).

remaining proceeds are turned over to the debtor.[464] A senior secured party or one ranking equally with the foreclosing party has no right to the proceeds of a foreclosure sale.[465] The security interest continues, however, in the collateral sold.[466] Therefore, a party intending to buy at a foreclosure sale would be wise to check the UCC filings to determine if there are any senior secured parties whose interests will continue in the collateral and to adjust the price accordingly.

Revised Article 9 adds an important pro-debtor provision that applies: (1) when the collateral is transferred to the secured party, someone related to the secured party,[467] or a secondary obligor at a foreclosure disposition; and (2) the amount of proceeds is "significantly below" what a disposition to an unrelated party would have brought.[468] In such a case, the post-disposition surplus or deficiency is based on the sum that would have been realized if the collateral had been transferred to someone other that the interested party.[469]

5. *SECURED PARTY'S EXPLANATION OF CALCULATION OF SURPLUS OR DEFICIENCY*

Following the disposition of collateral in a consumer-goods transaction,[470] the secured party must send the debtor an explanation of any surplus or deficiency.[471] The explanation must set forth the amount of the surplus or deficiency and the basis used by the secured party to

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464. S.D.C.L. Rev. § 57A-9-615(c)(d)(e) (Supp. 2000).

465. S.D.C.L. Rev. § 57A-9-615(g) (Supp. 2000).

466. *See* ZINNECKER, THE DEFAULT PROVISIONS OF REVISED ARTICLE 9 UNIFORM COMMERCIAL CODE, *supra* note 397, at 90-91. Zinnecker explains that:

> [t]here is a reason that the payment scheme makes a priority-based distinction: the interest of a junior creditor is terminated when the collateral is disposed, but the interest of a non-junior creditor survives the disposition.

Id. at 91.

467. S.D.C.L. Rev. § 9-102(a)(62) (Supp. 2000) provides:

> 'Person related to,' with respect to an individual, means: (A) the spouse of the individual; (B) a brother, brother-in-law, sister, or sister-in-law of the individual; (C) an ancestor or lineal descendant of the individual or the individual's spouse; or (D) any other relative, by blood or marriage, of the individual or the individual's spouse who shares the same home with the individual.

Id. S.D.C.L. Rev. § 9-102(a)(63) (Supp. 2000) provides:

> With respect to an organization 'person related to' means: (A) a person directly or indirectly controlling, controlled by, or under common control with the organization; (B) an officer or director of, or a person performing similar functions with respect to, the organization; (C) an officer or director of, or a person performing similar functions with respect to, a person described in subparagraph (A); (D) the spouse of an individual described in subparagraph (A), (B), or (C); or (E) an individual who is related by blood or marriage to an individual described in subparagraph (A), (B), (C), or (D) and shares the same home with the individual.

Id.

468. S.D.C.L. Rev. § 57A-9-615(f) (Supp. 2000).

469. *Id.*

470. A "consumer-goods transaction" is "a consumer transaction in which: (A) an individual incurs an obligation primarily for personal, family, or household purposes; and (B) a security interest in consumer goods secures the obligation." S.D.C.L. Rev. § 9-102(a)(24) (Supp. 2000).

471. S.D.C.L. Rev. § 57A-9-616 (Supp. 2000).

calculate it.[472] A secured party who does not claim a deficiency or have a surplus to distribute has no obligation under this provision and can not, therefore, be liable for damages for non-compliance.[473]

C. STRICT FORECLOSURE

Strict foreclosure means that the secured party accepts the collateral in total or partial satisfaction of the debt.[474] The debtor must give express or implied permission for the secured party to exercise strict foreclosure and other interested parties must not object to it.[475] The secured party's effective acceptance of the collateral fully discharges the debtor's obligation in the case of full strict foreclosure.[476] In the case of partial strict foreclosure, the underlying obligation is discharged to the extent that the debtor consented.[477] Unless the parties agree otherwise, the debtor is then liable for any deficiency.[478] Furthermore, both full and partial strict foreclosure transfer all the debtor's rights in the collateral to the secured party, discharge the debtor's security interest or agricultural lien, discharge all subordinate security interests and other subordinate liens on the collateral, and terminate all other subordinate interests.[479]

Strict foreclosure can be beneficial in that it avoids the need for the secured party to conduct a commercially reasonable foreclosure sale with all the pitfalls that such a sale often entails. If the secured party is willing to accept the property in full satisfaction of the debt, the debtor can avoid a deficiency judgment.[480] Moreover, it may also save the debtor the costs of repossession, which are added to the amount of the debt owed.[481] Except in the case of consumer goods, Revised Article 9 eliminates the requirement that the secured party have possession of the collateral to institute strict foreclosure.[482] Thus, intangible collateral, such as accounts and general intangibles, can now be subject to strict foreclosure.[483]

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472. S.D.C.L. Rev. § 57A-9-616(b) & (c) (Supp. 2000). *See* U.C.C. Rev. § 9-616 cmt. 2.

473. *See* S.D.C.L. Rev. § 57A-9-625 (b) & (c) (Supp. 2000). In South Dakota, a secured party who does not comply with the duty to provide an explanation is liable for any loss caused but not for the additional $500 in statutory damages. *Id.* South Dakota did not adopt uniform provision Rev. § 9-625(f) on statutory damages.

474. S.D.C.L. Rev. § 57A-9-620(a) (Supp. 2000). Revised Article 9 has changed the wording. A secured party no longer "retains" the collateral, it "accepts" the collateral. *See* U.C.C. Rev. § 9-620 cmt. The secured party acquires only the debtor's interest in the collateral when it strictly forecloses. S.D.C.L. Rev. § 57A-9-622(a)(2) (Supp. 2000).

475. S.D.C.L. Rev. § 57A-9-620(a) (Supp. 2000).

476. S.D.C.L. Rev. § 57A-9-622(a)(1) (Supp. 2000).

477. *Id.*

478. S.D.C.L. Rev. § 57A-9-622(a)(1) (Supp .2000) & U.C.C. Rev. § 9-622 cmt.2.

479. S.D.C.L. Rev. § 57A-9-622(a)(1) (Supp. 2000).

480. S.D.C.L. Rev. § 57A-9-622(a) (Supp. 2000).

481. *See* S.D.C.L. Rev. § 57A-9-615(a)(1) (Supp. 2000).

482. *See* U.C.C. Rev. § 9-620 cmt. 7. The secured party may not institute strict foreclosure if the debtor is in possession of consumer goods. S.D.C.L. Rev. § 57A-9-620(e) (Supp. 2000).

483. *See* U.C.C. Rev. § 9-620 cmt. 7.

1. NOTICE OF STRICT FORECLOSURE

A secured party that wishes to accept the collateral in full satisfaction of the secured obligation must send notice of the intended strict foreclosure to the debtor and to other persons who have a claim or interest in the collateral.[484] Those persons include: (1) secured parties or lien holders who have filed a financing statement or perfected according to another statute, regulation, or treaty;[485] (2) any person who sent the secured party notice before the debtor consented;[486] and (3) in the case of partial strict foreclosure, secondary obligors, such as sureties.[487] As secondary obligors will also be liable for any deficiency judgment, they should also have the right to object to the secured party's proposal to accept the collateral at less than the full amount of the obligation owed. Creditors should be aware that Revised Article 9 does not contain the limitation included in former Article 9, which provided that the secured party was required to send notice of strict foreclosure of consumer goods collateral only to the debtor.[488]

2. DEBTOR'S CONSENT TO STRICT FORECLOSURE

The debtor may expressly or impliedly agree to full strict foreclosure.[489] The debtor expressly agrees by authenticating a record after default.[490] The debtor impliedly agrees by failing to timely object to the secured party's post-default proposal of strict foreclosure.[491] The secured party must *receive* the debtor's objection within twenty days after the secured party *sent* the proposal.[492] Thus, in fact, the debtor has less than twenty days to effectively object. Other parties subject to the notification requirements also have twenty days or less to provide the secured party with a notification of rejection of the proposed strict foreclosure.[493]

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484. S.D.C.L. Rev. § 57A-9-621(Supp. 2000).

485. S.D.C.L. Rev. § 57A-9-621(a)(2) & (3) (Supp. 2000). U.C.C. Rev. § 9-621 cmt. 2 provides, in relevant part:

> Subsection (a) specifies three classes of competing claimants to whom the secured party must send notification of its proposal: (i) those who notify the secured party that they claim an interest in the collateral, (ii) holders of certain security interests and liens who have filed against the debtor, and (iii) holders of certain security interests who have perfected by compliance with a statute (including a certificate-of-title statute), regulation, or treaty described in Section 9-311(a).

Id.

486. S.D.C.L. Rev. § 57A-9-621(a)(1) (Supp. 2000).

487. S.D.C.L. Rev. § 57A-9-621(b) (Supp. 2000).

488. S.D.C.L. Former § 57A-9-505 (Repealed July 1, 2001).

489. S.D.C.L. Rev. § 57A-9-620(c)(2) (Supp. 2000).

490. *Id.*

491. S.D.C.L. Rev. § 57A-9-620(c)(2)(A)(B)&(C) (Supp. 2000).

492. S.D.C.L. Rev. § 57A-9-620(c)(2)(C) (Supp. 2000).

493. S.D.C.L. Rev. § 57A-9-620(d) (Supp. 2000) which reads:

> [Effectiveness of notification.] To be effective under subsection (a)(2), a notification of objection must be received by the secured party: (1) in the case of a person to which the proposal was sent pursuant to Section 9-621, within 20 days after notification was sent to that person; and (2) in other cases: (A) within 20 days after the last notification was sent

3. LIMITATIONS ON STRICT FORECLOSURE OF CONSUMER GOODS

Revised Article 9 includes certain special rules governing the strict foreclosure of consumer goods. The secured party is not permitted to institute strict foreclosure when the collateral is consumer goods that are in the possession of the debtor at the time that the debtor consents.[494] The purpose of this restriction is presumably to protect consumer debtors from their own failure to respond to a notification of strict foreclosure.[495] The unfortunate result of this provision is that it forces the secured party to repossess the consumer goods, adding additional costs to the amount owed. In such a case, the secured party may decide that strict foreclosure is no longer a viable option, and will sell the collateral at a foreclosure sale, which will most likely result in a deficiency.[496] Also, without the express post-default waiver of the debtor,[497] the secured party can not exercise strict foreclosure of consumer goods in the secured party's possession if the debtor has already paid 60% of the cash price secured by a purchase-money security interest or 60% of the principal amount of the obligation secured with a non-purchase-money security interest.[498]

4. NO CONSTRUCTIVE STRICT FORECLOSURE

The secured party must also agree to strict foreclosure.[499] The debtor can not force the secured party to accept the collateral. The secured party effectively agrees to accept the collateral by sending the debtor a proposal or by consenting to strict foreclosure in an authenticated record.[500] Consequently, a secured party can not be charged with constructive strict foreclosure by a delay in collecting or disposing of the collateral, which was a source of contention under the former Article 9.[501] This provision preempts the South Dakota Supreme Court holding in *Wang v. Wang,* that a secured party who delays a sale can be held to have made a *de facto* election of strict foreclosure.[502]

5. PARTIAL STRICT FORECLOSURE

Revised Article 9 specifies that the secured party may accept the collateral in partial satisfaction of the debt and still sue for a deficiency

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pursuant to Section 9-621; or (B) if a notification was not sent, before the debtor consents to the acceptance under subsection (c).

Id.

494. S.D.C.L. Rev. § 57A-9-620(a)(3) (Supp. 2000).

495. *See* Zinnecker, *The Default Provisions of Revised Article 9 of the Uniform Commercial Code: Part II, supra* note 397, at 1769 (1999).

496. *Id.*

497. S.D.C.L. Rev. § 57A-9-624(b) (Supp. 2000).

498. S.D.C.L. Rev. § 57A-9-620(e) (Supp. 2000).

499. S.D.C.L. Rev. § 57A-9-620(b) (Supp. 2000).

500. *Id.*

501. *Id. See* U.C.C. Rev. § 9-620 cmt. 5.

502. Wang v. Wang, 440 N.W.2d 740, 745 (1989).

judgment provided that certain requirements are met.[503] The debtor must expressly consent to partial strict foreclosure in a record authenticated only after the default.[504] It is not sufficient that the debtor simply fails to respond within the twenty days permitted for notice of full foreclosure. Additionally, even with the debtor's consent, partial strict foreclosure is not permitted in a consumer transaction.[505]

The debtor and the secured party may establish the dollar amount of credit the debtor will receive for the partial strict foreclosure, provided that they exercise good faith.[506] The secured party is also obligated to exercise good faith in proposing partial foreclosure or its acceptance of the collateral will not be effective.[507] A comment to Revised Article 9 explains that it would be bad faith for a secured party to propose to accept $1000 of marketable securities in full strict foreclosure for a debt of $100, with the hope that the debtor would inadvertently fail to object.[508] The comment adds, however, that normally strict foreclosures should not be "second-guessed" on the basis of the value of the collateral involved.[509]

D. RIGHT TO REDEMPTION OF COLLATERAL

Following the seizure of collateral, the debtor, secondary obligor, or other secured party or lien holder may redeem the collateral under determined circumstances.[510] The right to redemption is cut off when the secured party already has sold, leased, licensed, or otherwise disposed of the collateral or entered into a contract for disposal of the collateral,[511] exercised the option of strict foreclosure,[512] or collected collateral from the account debtor or any other obligated person.[513] When the secured party has chosen to dispose of the collateral in parcels, rather than all at once, a party may redeem the remaining collateral.[514] The debtor or a secondary

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503. S.D.C.L. Rev. § 57A-9-620.

504. S.D.C.L. Rev. § 57A-9-620(c)(1) (Supp. 2000).

505. S.D.C.L. Rev. § 57A-9-620(g) (Supp. 2000). Zinnecker appropriately criticizes this provision, explaining:

> The reason for prohibiting partial strict foreclosures in consumer transactions may have been in response to a concern that a consumer might not understand the creditor's proposal and accept it without realizing all the ramifications. Rather than address the concern through a blanket prohibition, the statute could have mandated the insertion of conspicuous language in the creditor's notice aimed at fully apprising the consumer of its rights and potential liability. In this manner revised section 9-620 could have addressed the need to improve consumer awareness while concurrently preserving a remedy that both parties might find mutually beneficial.

The Default Provisions of Revised Article 9, supra note 397, at 1768.

506. *See* U.C.C. Rev. § 9-621 cmt. 2.

507. The good faith obligation is imposed by Section S.D.C.L. § 57A-1-203. *See* U.C.C. Rev. § 9-620 cmt. 11.

508. *See* U.C.C. Rev. § 9-620 cmt. 11.

509. *Id.*

510. S.D.C.L. Rev. § 57A-9-623(a) (Supp. 2000).

511. *See* S.D.C.L. Rev. § 57A-9-623(c)(2) (Supp. 2000).

512. *See* S.D.C.L. Rev. § 57A-9-623(c)(3) (Supp. 2000).

513. S.D.C.L. Rev. § 57A-9-623(c)(1) (Supp. 2000).

514. *See* U.C.C. Rev. § 9-623 cmt. 3.

obligor may enter into a post-default agreement to waive the right of redemption, except in a consumer-goods transaction.[515]

The right to redemption is expanded under Revised Article 9 to allow lien holders and secondary obligors to exercise redemption rights.[516] A debtor in default can seldom exercise the option to redeem, because of the total amount that must be tendered. The redeeming party must tender the full amount secured by the collateral, all reasonable expenses, and also the secured party's attorney's fees if they were provided for in the security agreement and are not prohibited by other law.[517] In a consumer-goods transaction, the secured party must include a telephone number in the notice of disposition that the debtor or other interested party can call to determine the amount that must be paid to redeem the collateral.[518]

E. CREDITOR MISBEHAVIOR

When a secured party inadvertently or intentionally fails to comply with Revised Article 9's provisions, there are remedies available to the debtor. The debtor may get an injunction to restrain the secured party from collecting or disposing of the collateral.[519] Alternately, the debtor may be awarded compensatory damages for the amount of the loss caused by the secured party's failure to comply with Revised Article 9.[520] The compensatory damages also may reimburse the debtor for the inability to obtain financing or for the increased costs of other financing.[521] Uniform Revised Article 9 provides for additional statutory damages of $500 for certain types of creditor misbehavior.[522] South Dakota, however, did not adopt the statutory damages provisions.

In an action for a surplus or deficiency, when the secured party's compliance with Revised Article 9 is in question, courts have applied different tests to determine whether and to what extent the debtor may have been damaged.[523] Revised Article 9 has adopted the "rebuttable presumption rule" for non-consumer transactions.[524] South Dakota's non-

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515. S.D.C.L. Rev. § 57A-9-624(c) (Supp. 2000).

516. *See* U.C.C. Rev. § 9-623 cmt.2.

517. S.D.C.L. Rev. § 57A-9-623(b) (Supp. 2000) & S.D.C.L. Rev. § 57A-9-615(a)(1) (Supp. 2000). *See* LAWRENCE, HENNING, AND FREYERMUTH, UNDERSTANDING SECURED TRANSACTIONS, *supra* note 7, at 488.

518. S.D.C.L. Rev. § 57A-9-614(1)(C) (Supp. 2000). The safe harbor form provided in Revised Article 9 includes a paragraph that reads:

> [y]ou can get the property back at any time before we sell it by paying us the full amount you owe (not just the past due payments), including our expenses. To learn the exact amount you must pay, call us at [*telephone number*].

S.D.C.L. Rev. § 57A-9-614(3) (Supp. 2000).

519. S.D.C.L. Rev. § 57A-9-625(a) (Supp. 2000).

520. S.D.C.L. Rev. § 57A-9-625(b) (Supp. 2000).

521. *Id.*

522. U.C.C. Rev. § 9-625(e) and (f).

523. These tests include the absolute bar rule, rebuttable presumption rule, and, occasionally, a "netting" approach. *See* LAWRENCE, HENNING, AND FREYERMUTH, UNDERSTANDING SECURED TRANSACTIONS, *supra* note 7, at 500-04.

524. U.C.C. Rev. § 9-626.

uniform provision adopts the rebuttable presumption rule for all transactions, including consumer transactions.[525] The rebuttable presumption rule provides that if the debtor or a secondary obligor raises the issue of the secured party's compliance with relevant provisions, the secured party has the burden of proof that its actions did conform to the Code.[526] If the secured party does not satisfy the burden, the Code provides the method for calculating the deficiency.[527] According to the Code:

> [u]nder the rebuttable presumption rule, the debtor or obligor is to be credited with the greater of the actual proceeds of the disposition or the proceeds that would have been realized had the secured party complied with the relevant provisions. If a deficiency remains, then the secured party is entitled to recover it.[528]

XIII. TRANSITION TO REVISED ARTICLE 9

The transition to Revised Article 9 may require some action on the part of the secured parties to maintain a perfected security interest.[529] Secured parties must make changes to certain security agreements or means of perfecting within the first year of the effectiveness of the new law.[530] The effective date of Revised Article 9 was July 1, 2001 for all states that had adopted the new law by that date.[531] Other changes may be made when the filing statement naturally lapses, provided that it lapses by June 30, 2006.[532] In other cases, the secured party will not be required to take any action, because the steps taken under the prior law satisfy Revised Article 9.[533] Moreover, certain security interests that were not perfected under the prior law may become perfected on July 1, 2001 without any action.[534]

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525. S.D.C.L. Rev. § 57A-9-626(a) (Supp. 2000) eliminating the wording "other than a consumer transaction" and sub (b). The South Dakota Supreme Court had previously adopted the rebuttable presumption rule. Wang v. Wang, 440 N.W.2d 740, 743 (1989).

526. S.D.C.L. Rev. § 57A-9-626(a)(1) & (2) (Supp. 2000).

527. S.D.C.L. Rev. § 57A-9-926(a)(3)-(5) (Supp. 2000); S.D.C.L. Rev. § 57A-9-615(f) (Supp. 2000).

528. U.C.C. Rev. § 9-626 cmt. 3 & S.D.C.L. § 57A-9-626(a)(3) (Supp. 2000).

529. For an analysis of the transition provisions *see* Steven O. Weise, *Preparing for the Revised UCC Article 9: The Transition Rules* in SELECTED COMMERCIAL STATUTES, 1364 (2000); Steven O. Weise, *Transitioning to Revised 9, 59, and Revised UCC Article 9: Staying Perfected Through the Transition* 69 in THE NEW ARTICLE 9 UNIFORM COMMERIAL CODE (Cooper 2nd ed. ABA, 2000); Marcus Salitore, *Maintaining Perfection: Pracitioners Must Act Soon to Preserve Interests Under the U.C.C. Revised Article 9,* 31 TEX. TECH. L. REV. 1043 (2000).

530. S.D.C.L. Rev. § 57A-9-703(b)(2) & (3); S.D.C.L. Rev. § 57A-9-705(a) (Supp. 2000).

531. S.D.C.L. Rev. § 57A-9-701(Supp. 2000).

532. S.D.C.L. Rev. § 57A-9-705(c) (Supp. 2000).

533. S.D.C.L. Rev. § 57A-9-703(a); S.D.C.L. Rev. § 57A-9-704 (A) (Supp. 2000).

534. S.D.C.L. Rev. § 57A-9-704(3)(A).

A. PRE-EFFECTIVE DATE TRANSACTIONS OR LIENS NOT FORMERLY WITHIN THE SCOPE OF ARTICLE 9

Unless there is an applicable exception, Revised Article 9 applies to any lien or transaction that now falls within its scope.[535] The new law applies even if the lien or transaction was created or entered into before Revised Article 9 took effect.[536] Thus, formerly valid transactions such as agricultural liens and sales of payment intangibles remain valid under Revised Article 9 after July 1, 2001.[537] Revised Article 9 provides that the newly incorporated transactions can be "terminated, completed, consumated, and enforced" under the provisions of Revised Article 9 or pursuant to the law under which these transactions were created.[538] For example, assume that a creditor took a security interest in a commercial tort claim prior to the effective date of Revised Article 9. This transaction was then covered by contract law rather than Article 9, because all tort claims were excluded from the scope of former Article 9.[539] Subsequent to July 1, 2001, if the debtor defaults, the secured party may proceed to collect the amount owing from the debtor under Revised Article 9 or the law under which the security interest was created.[540] Likewise, agricultural liens that were created before July 1, 2001 when Revised Article 9 took effect, retain their validity after that date.[541] After July 1, 2001, either the provisions of Revised Article 9 or those of the enabling statute that established the lien may be applied to enforce the lien.[542] If, however, an action, case, or proceeding involving one of the newly included transactions was commenced before July 1, 2001, it is governed by the law that created the transaction.[543]

B. SECURED TRANSACTIONS ENTERED INTO UNDER FORMER ARTICLE 9

The provisions of Revised Article 9 will govern all security interests entered into under former Article 9.[544] It is the responsibility of the

535. S.D.C.L. Rev. § 57A-9-702(a) (Supp. 2000).
536. S.D.C.L. Rev. § 57A-9-702(a) (Supp. 2000).
537. S.D.C.L. Rev. § 57A-9-702(b)(1) (Supp. 2000).
538. *Id.*
539. S.D.C.L. Former § 57A-9-104(k) (Repealed July 1, 2001) which provided, "[t]his article does not apply to a transfer in whole or in part of any claim arising out of tort." *Id.*
540. S.D.C.L. Rev. § 57A-9-702(b)(2) (Supp. 2000)
541. S.D.C.L. Rev. § 57A-9-702(b)(1) (Supp. 2000) which provides that [e]xcept as otherwise provided in subsection (c) and Sections 9-703 through 9-709:

> (1) transactions and liens that were not governed by [former Article 9], were validly entered into or created before this [Act] takes effect, and would be subject to this [Act] if they had been entered into or created after this [Act] takes effect, and the rights, duties, and interests flowing from those transactions and liens remain valid after this [Act] takes effect . . .

Id.
542. S.D.C.L. Rev. § 57A-9-702(b)(2) (Supp. 2000).
543. S.D.C.L. Rev. § 57A-9-702(c) (Supp. 2000).
544. S.D.C.L. Rev. § 57A-9-702(a) (Supp. 2000) & U.C.C. 9-702 cmt. 1.

secured party to determine whether the steps taken under the former Article 9 for the enforcement (attachment) and perfection of the security interest also suffice under Revised Article 9. If they do not, the secured party must take action to remain perfected.[545]

1. SECURITY INTERESTS PERFECTED BEFORE THE EFFECTIVE DATE

The secured party need not take further action if a security interest was properly perfected under former Article 9 and is also properly perfected under the rules of Revised Article 9.[546] Consequently, if the security agreement would be effective under both former Article 9 and the revision, and the secured party's method of perfection for the collateral is effective under both the former and revised law the secured party maintains perfection after the transition.[547]

If a security interest was enforceable under former Article 9, but would not be enforceable under Revised Article 9 the security interest remains enforceable for one year until July 1, 2002.[548] This situation arises when the requirements for the security agreement between the parties have been subject to revisions under Revised Article 9. If the parties' security agreement does not satisfy Revised Article 9, the secured party has one year to get a new authenticated agreement from the debtor or the security interest will no longer be enforceable.[549] For example, the former law allowed a creditor to take a security interest in "all investment property" irrespective of the type of underlying secured transaction.[550] This description was adequate under former Article 9 to create an enforceable security interest. Under Revised Article 9, however, in a consumer transaction, investment property can no longer be described by type; the description must be more specific.[551] To maintain an enforceable security interest, the secured party, within one year of the effective date, must obtain a newly authenticated security agreement from the debtor containing a more specific description of the collateral. If the secured party does not do so, the security interest becomes unenforceable within one year.[552]

A pre-effective-date security interest that was properly perfected remains perfected for one year when it does not satisfy the requirements of

545. S.D.C.L. Rev. §§ 57A-9-703 to 705 (Supp. 2000).
546. S.D.C.L. Rev. § 57A-9-703(a) (Supp. 2000).
547. *Id.*
548. S.D.C.L. Rev. § 57A-9-703(b) (Supp. 2000).
549. S.D.C.L. Rev. § 57A-9-703(b)(2) (Supp. 2000).
550. S.D.C.L. Former § 57A-9-115(3) (Repealed July 1, 2001).
551. S.D.C.L. Rev. § 57A-9-108(e) (Supp. 2000).
552. U.C.C. Rev. § 9-703 cmt. 2, example 1. Official Comment 2 to U.C.C. Rev. § 9-703 provides other examples such as perfection by possession through notification of a bailee who does not issue a document under former Section 9-305. Under Revised Article 9, the bailee must acknowledge in an authenticated record that it holds for the secured party. S.D.C.L. Rev. § 57A-9-313(c). Note, however, that a change in the definition of the collateral does not require a new security agreement. *See* U.C.C. Rev. § 9-703 cmt. 3.

Revised Article 9, with one possible exception.[553] During that year, the secured party must make the changes necessary to properly perfect the security interest under Revised Article 9.[554] Consequently, if the secured party perfected its security interest in instruments only by notifying the bailee who held the instruments of its security interest as was required for perfection under former Article 9, there would be a problem under the revision.[555] Under Revised Article 9 the secured party, within one year, must perfect the security interest in the instruments by filing or by having the bailee authenticate the required record, or the secured party will be unperfected at the end of that period.[556] If the secured party satisfies Revised Article 9's requirements for attachment and perfection during the one year period the security interest is perfected thereafter.[557]

The exception to the provision that grants the secured party one year to correct any deficiencies in perfection applies when the financing statement, which had been correctly filed, is filed in the wrong place under the revision.[558] The secured party gets only until the end of the financing statement's normal five year period of effectiveness.[559] The financing statement may thus cease to be effective in less than a year or in more than one year.

2. *SECURITY INTERESTS UNPERFECTED BEFORE THE EFFECTIVE DATE*

A security interest that was enforceable but unperfected under the former Article 9 may miraculously be perfected on July 1, 2001.[560] This may occur, because the financing statement lacked information under former Article 9 that is no longer required under Revised Article 9. A financing statement that was not adequate and thus did not perfect a security interest under former Article 9 may be adequate under Revised Article 9. For example, a financing statement filed before July 1, 2001 covering an interest in growing crops did not include a description of the real estate on which the crops were growing. A description of the land was required under former Article 9 but is not required under Revised Article 9.[561] Therefore, on the effective date of the revision, July 1, 2001, the

553. S.D.C.L. Rev. § 57A-9-705(a) (Supp. 2000).

554. S.D.C.L. Rev. § 57A-9-702(b)(3) (Supp. 2000).

555. S.D.C.L. Former § 57A-9-305 (1997).

556. S.D.C.L. Rev. § 57A-9-313(c)(1) (Supp. 2000); *See* U.C.C. Rev. 9-703 cmt. 2, example 2.

557. *See* U.C.C. Rev. § 9-703 cmt. 2.

558. S.D.C.L. Rev. § 57A-9-703(b) (Supp. 2000) specifies that it is subject to S.D.C.L. Rev. § 57A-9-705(c).

559. S.D.C.L. Rev. § 57A-9-705(c); S.D.C.L. Rev. § 57A-9-515(a) (2000). *See* S.D.C.L. Rev. § 57A-9-515(b) (f) & (g) for types of financing statements that are effective for longer than five years.

560. S.D.C.L. Rev. § 57A-9-704(3)(A) (Supp. 2000).

561. Former S.D.C.L. § 57A-9-402(1) (Repealed July 1, 2001). Comment 4 to 9-502 explains that the requirement that the real property be described for financing statements covering crops was deleted because it seemed "unwise." S.D.C.L. Rev. § 57A-9-108(a) (Supp. 2000) provides that the description of the collateral must reasonable identify what is described. The test of the sufficiency of the description of the collateral is that the description "make possible the

security interest is perfected.[562] When the necessary requirements to perfect the security interest had been ineffective or otherwise had not been met under the former Article 9, the security interest will be perfected under Revised Article 9 whenever the perfection requirements are satisfied.[563] When the security interest was enforceable under former Article 9, but would not be enforceable under Revised Article 9, the security interest remains enforceable for one year.[564] The security interest remains enforcable after that year if the secured party takes the steps necessary under the new law.[565]

3. *PRE-EFFECTIVE-DATE ACTION*

When the secured party has taken a pre-effective date perfection step, other than filing, but the security interest does not attach until after July 1, 2001, the security interest remains perfected from the time of attachment until one year after the effective date.[566] The security interest will become unperfected one year after the effective date, however, unless the secured party satisfies the Revised Article 9 requirements for attachment and perfection.[567]

A pre-effective date financing statement, which was not sufficient to perfect the security interest under former Article 9, may be sufficient to perfect a security interest under Revised Article 9.[568] This may occur, for example, when the pre-effective date financing statement described the collateral as "all the debtor's assets," a dragnet clause that was not a sufficient description in many jurisdictions under prior Article 9, but which is statutorily sufficient under the revision.[569] The priority date in such instances is July 1, 2001.[570]

When the secured party filed the financing statement in the correct state and office under former Article 9, but it is no longer the correct place to file under Revised Article 9, the filing remains effective until the earlier of the date on which it would normally lapse or June 30, 2006.[571] This situation could occur when the debtor is incorporated in Delaware, has its chief executive office in South Dakota, and maintains the collateral in South Dakota. Under former Article 9 the secured party would have filed

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identification of the collateral described.

562. S.D.C.L. Rev. § 57A-9-704(3)(A) (Supp. 2000).

563. S.D.C.L. Rev. § 57A-9-704(3)(B) (Supp. 2000).

564. S.D.C.L. Rev. § 57A-9-704(1) (Supp. 2000).

565. S.D.C.L. Rev. § 57A-9-704(2) (Supp. 2000). A security interest may be unperfected, because the secured party has failed to take one of the necessary steps for attachment (enforceable) or the action required for perfection. There can be no perfection without attachment. S.D.C.L. Rev. § 57A-9-308(a) (Supp. 2000).

566. S.D.C.L. Rev. § 57A-9-705(a) (Supp. 2000).

567. U.C.C. Rev. § 9-705 cmt.2.

568. S.D.C.L. Rev. § 57A-9-504(2) (Supp. 2000).

569. S.D.C.L. Rev. § 57A-9-705(c) (Supp. 2000).

570. S.D.C.L. Rev. § 57A-9-705(b) (Supp. 2000).

571. S.D.C.L. Rev. § 57A-9-705(c) (Supp. 2000).

the financing statement at the office of the Secretary of State in South Dakota. Under the revised law, the secured party would file in Delaware where the registered organization is organized.[572]

If the pre-effective-date initial financing statement was filed in the correct state and office to perfect the security interest under Revised Article 9, the secured party can file a timely continuation statement in that office after July 1, 2001 to continue perfection.[573] In such a case, if the description of the collateral has been reclassified, the continuation statement must amend the description of the collateral to continue perfection as to that collateral.[574] For example, if the secured party took an interest in the debtor's lottery winnings and correctly described them as "general intangibles" in the pre-revision financing statement, the post-revision continuation statement must amend the description of collateral to "accounts," due to the reclassification of the collateral under Revised Article 9.[575]

If the pre-effective date financing statement was filed in the appropriate office, but that office is no longer correct under the revision, the secured party must file an initial financing statement in the location required by Revised Article 9 before the lapse of the initial financing statement or former continuation statement to continue perfection.[576] The new initial financing statement may be filed at anytime before the lapse of the prior filing; the timing is not limited to the six month period immediately before the lapse of the financing statement as it is for the filing of a continuation statement.[577] The debtor need not authorize the filing of the new initial financing statement.[578]

The new initial financing statement must satisfy several requirements to continue the effectiveness of a filing under Former Article 9.[579] It must be filed in the correct location under Revised Article 9,[580] and it must satisfy the Revised Article 9 requirements for a financing statement.[581] Under this provision, if the description of the collateral under Revised Article 9 is of a different type than under former Article 9, the secured party must indicate the type denominated by Revised Article 9 in the new initial financing statement. The new initial financing statement must also

572. S.D.C.L. Rev. § 57A-9-307(e) (Supp. 2000).
573. S.D.C.L. Rev. § 57A-9-705(d) (Supp. 2000).
574. S.D.C.L. Rev. § 57A-9-705(f) (Supp. 2000) & U.C.C. 9-507 cmt. 6.
575. *See* S.D.C.L. Rev. § 57A-9-102(a)(2) (Supp. 2000).
567. S.D.C.L. Rev. § 57A-9-706(a) (Supp. 2000).
577. *See* U.C.C. Rev. § 9-707 cmt. 1.
578. S.D.C.L. Rev. § 57A-9-708 (Supp. 2000) provides that:

> [a] person may file an initial financing statement or a continuation statement under this part if: (1) the secured party of record authorizes the filing; and (2) the filing is necessary under this part: (A) to continue the effectiveness of a financing statement filed before this [Act] takes effect; or (B) to perfect or continue the perfection of a security interest.

Id.
579. S.D.C.L. Rev. § 57A-9-706(c) (Supp. 2000).
580. S.D.C.L. Rev. § 57A-9-706(1) (Supp. 2000).
581. S.D.C.L. Rev. § 57A-9-706(c)(1) (Supp. 2000).

indicate that the former financing statement continues to be effective,[582] and it must identify that financing statement by providing certain information, so that a party searching the filings could local the other financing statement.[583]

C. PRIORITIES

Revised Article 9 will ordinarily determine priorities between conflicting security interests unless the relative priorities were established under Former Article 9.[584] If a security interest was not correctly perfected by filing under former Article 9 due to a defect in the financing statement that is no longer a defect under Revised Article 9, the date of priority of the newly perfected interest in the collateral is July 1, 2001.[585]

XIV. CONCLUSION

The transition to Revised Article 9 may seem daunting to those of us who have become comfortable practicing under Article 9. The revision, however, will take much of the uncertainty and risk from the practice of secured transactions. This should cut down transaction costs and the cost of credit. Within a short time, most of us will find that the benefits of Revised Article 9 outweigh the costs of making the transition.

582. S.D.C.L. Rev. § 57A-9-706(c)(3) (Supp. 2000)

583. S.D.C.L. Rev. § 57A-9-706(2) requires that the initial financing statement:

> must identify the pre-effective-date financing statement by indicating the office in which the financing statement was filed and providing the dates of filing and file numbers, if any, of the financing statement and of the most recent continuation statement filed with respect to the financing statement; and (3) indicate that the pre-effective-date financing statement remains effective.

Id.

584. S.D.C.L. Rev. § 57A-9-709(a) (Supp. 2000).

585. S.D.C.L. Rev. § 57A-9-709(b) (Supp. 2000).