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## Uniform Commercial Code Article 9 Filing Procedures for Railroad, Utility, and Other Corporate Debtors: Some Suggestions

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UNIFORM COMMERCIAL CODE ARTICLE 9 FILING PROCEDURES  
FOR RAILROAD, UTILITY, AND OTHER CORPORATE  
DEBTORS: SOME SUGGESTIONS

Article 9 of the Uniform Commercial Code has raised a number of questions concerning the perfection of security interests in property securing corporate debt under the language of a long-term mortgage. The typical document of this sort is quite broad in its coverage of collateral, and usually includes all real property, tangible personal property including mobile and affixed goods and equipment, and most of the property acquired by the debtor subsequent to execution of the indenture. Article 9 is apparently more concerned with short-term than long-term financing, although the Code language applies literally to all agreements intended to create any sort of a security interest in personalty.<sup>1</sup> Due to the peculiar problems created by an inadvertent lack of treatment of the broad corporate mortgage (hereinafter sometimes referred to as a package mortgage) by the draftsmen of the article, and possibly due to inadequate consideration of pre-Code law respecting specific types of these mortgages, an element of uncertainty has permeated the filing procedures to be followed for perfecting and maintaining security interests under mortgages executed both before and after the adoption of the Code.

After a brief discussion of the provisions of Article 9 peculiarly applicable to the long-term mortgage, a portion of this comment will review the relevant statutes and case authority in force prior to the effective date of the Code in various states and still applicable in others. More specifically, it will examine the special treatment accorded certain types of corporate indentures, particularly those securing the debt of railroads and other public utilities. Second, an attempt will be made to explain the probable solutions to the problems raised by the filing requirements of Article 9 as promulgated in each jurisdiction and as applicable to the various forms of package mortgages. Also, there will be discussion throughout of the almost prohibitive burden placed upon the mortgagor in certain of these agreements, for it is his duty under the typical language therein to comply with the local filing requirements in order to avoid default. This problem presented by Article 9 is also of concern to the trustee, who is equally desirous of avoiding default and its concomitant extensive and costly negotiation and litigation which does not otherwise arise except in bankruptcy.<sup>2</sup> Finally, there will be examined amendments to Article 9 adopted by certain states

<sup>1</sup> UNIFORM COMMERCIAL CODE § 9-102 provides in part: ". . . this Article applies so far as concerns any personal property and fixtures within the jurisdiction of this state (a) to any transaction . . . which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangible chattel paper accounts or contract rights . . ."

<sup>2</sup> See generally Posner, *The Trustee and the Trust Indenture: A Further Study*, 46 YALE L.J. 737, 743 (1937). It must be made clear, however, that the trustee is under no duty to advise himself of the mortgagor's filing practices, and in fact most mortgages have exculpatory clauses freeing the trustee of any such duty.

in an effort to remedy the problems caused for the package mortgage by the Code's filing requirements.

### I. THE GENERAL SCOPE OF ARTICLE 9

In order to understand the filing requirements of Article 9 in the context of the long-term package mortgage, it is necessary to examine briefly the portions of the article which are particularly, and in some cases, uniquely, relevant to such instruments.

Since Article 9 is expressly inapplicable to real estate,<sup>3</sup> it can be seen that all security interests in realty which are included in the collateral will be unaffected by the Code language. The article does provide, however, that it shall apply, with respect to any personalty and fixtures within a given Code jurisdiction, to any transaction intended to create a security interest.<sup>4</sup> The purpose of this broad applicability, while not unlike the variegated complex of pre-Code security law, is to unite under a single system of rules most of the law of secured transactions.<sup>5</sup> This novel treatment has created a situation in which the corporate trustee or the debtor may be somewhat uncertain as to the application of certain Code provisions, since such filing requirements were not customarily applicable to the package mortgage prior to the enactment of the Code.<sup>6</sup>

Although involving a Code topic beyond the scope of this comment, an important example of unique Code treatment of security law is its coverage of fixtures. Previous law in most Code states and the present law in non-Code states has prevented the removal of fixtures by creditors if material damage would result to the freehold.<sup>7</sup> This rule made it unlikely that fixtures would be used frequently as collateral, since their severability was generally precluded unless the debtor went into bankruptcy. While the non-Code law in each state still determines the definition of a fixture, the common-law principle denying removal has been expressly modified and a special filing provision for perfection of interests in fixtures has been adopted in the Code.<sup>8</sup>

<sup>3</sup> UNIFORM COMMERCIAL CODE § 9-102. Fixtures are, however, deemed personalty under the express language of this section.

<sup>4</sup> *Ibid.*

<sup>5</sup> See generally Coogan, *The Lazy Lawyer's Guide to Secured Transactions Under the Code*, 60 MICH. L. REV. 685 (1962); Coogan & Bok, *The Impact of Article 9 of the Uniform Commercial Code on the Corporate Indenture*, 69 YALE L.J. 203 (1959).

<sup>6</sup> See Coogan, *Security Interests in Fixtures Under the Uniform Commercial Code*, 75 HARV. L. REV. 1319 (1962); Coogan, *Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the Floating Lien*, 72 HARV. L. REV. 838 (1959); Coogan & Bok, *supra* note 5, at 210-12, 251-59; Felix, *Financing of Dealer Inventories and Retail Sale of Consumer Goods*, 11 BUS. LAW. 71 (1955); Kripke, *Chattel Paper as a Negotiable Specialty Under the Code*, 59 YALE L.J. 1209 (1950).

<sup>7</sup> See generally *Teaff v. Hewitt*, 1 Ohio St. 511 (1853); *Cambell v. Roddy*, 44 N.J. Eq. 244 (Ct. Err. & App. 1888); 5 AMERICAN LAW OF PROPERTY §§ 19.1-4 (Casner ed. 1952); BROWN, PERSONAL PROPERTY §§ 137-57 (2d ed. 1955).

<sup>8</sup> UNIFORM COMMERCIAL CODE § 9-102(1). Section 9-313(5) states: ". . . a secured party . . . may, on default . . . remove his collateral from the real estate but he must reimburse any

Also of significance to the Code trustee are the Code provisions<sup>9</sup> which have collectively rejected the outmoded and unwise law of several states which did not recognize after-acquired property clauses in some or all security agreements.<sup>10</sup> However, the brief Code treatment of this matter and the consequent subjection of such collateral to the filing provisions of Article 9 presents burdensome, and in some cases nearly impossible procedures for the corporate debtor the mortgages of which were executed prior to the adoption of the Code.<sup>11</sup>

Article 9 also contains a clear statement of the specific requirements for perfection of security interests in goods and equipment which are normally used beyond a single jurisdiction.<sup>12</sup> The fact that this provision makes express reference to railroad rolling stock—an important item of collateral in many package mortgages of railroad debtors—creates some interpretative difficulties which will be analyzed fully below.<sup>13</sup>

There are other provisions of Article 9 which clarify or work material changes in pre-Code law or which embody entirely new concepts. While of considerable importance to the specialist and to the general practitioner alike, they are not germane to filing problems under the Code.<sup>14</sup>

On the other hand, aside from the above-mentioned types of property, the Code is basically similar to previous statutory treatment of the collateral typically includible in package mortgages. Problems arise, however, due to the lack of specificity characteristic of most of the Code provisions in Article 9.

encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed . . . ." Section 9-402 provides for the filing of financing statements for the perfection of security interests in fixtures. See generally Coogan, *supra* note 6; Coogan & Clovis, *The Uniform Commercial Code and Real Estate Law: Problems for Both the Real Estate Lawyer and the Chattel Security Lawyer*, 38 IND. L.J. 535 (1963).

<sup>9</sup> See UNIFORM COMMERCIAL CODE §§ 9-108, 9-204(3), 9-303.

<sup>10</sup> See text accompanying notes 15-24 *infra*.

<sup>11</sup> For extensive discussion of the evolution and present status of the law of after-acquired property, see Cohen & Gerber, *The After-Acquired Property Clause*, 87 U. PA. L. REV. 635 (1939); Cunningham & Tischler, *Equitable Real Estate Mortgages*, 17 RUTGERS L. REV. 679, 716-24 (1963); Klooster, *Mortgages of After-Acquired Railroad Property*, 27 ILL. L. REV. 781 (1933); Comment, 53 COLUM. L. REV. 392 (1953).

<sup>12</sup> UNIFORM COMMERCIAL CODE § 9-103(2) states: "If the chief place of business of a debtor is in this state, this Article governs the validity and perfection of a security interest . . . with regard to goods of a type which are normally used in more than one jurisdiction (such as automotive equipment, commercial harvesting equipment, rolling stock, airplanes, road building equipment, commercial harvesting equipment, construction machinery and the like). . . . Otherwise, the law (including the conflict of laws rules) of the jurisdiction where such chief place of business is located shall govern."

<sup>13</sup> See text accompanying notes 62-66 *infra*.

<sup>14</sup> See UNIFORM COMMERCIAL CODE § 9-102(2) and the official index following that section which shows the various types of collateral covered by the Code. See also Coogan & Bok, *supra* note 5, at 223-61; Gordon, *Security Interest in Inventory Under Article 9 of the Uniform Commercial Code and the Preference Problem*, 62 COLUM. L. REV. 49 (1962); Hogan, *Collateral Held by Debtor For Use: Equipment, Consumer Goods*, 3 BOSTON COLLEGE INDUSTRIAL & COMMERCIAL L. REV. 118 (1962); Kripke, *supra* note 6.

This dilemma can be better understood by a discussion of both past and present non-Code law which has been applied to various forms of corporate mortgages and which was, for the most part, ignored by the Code draftsmen.

## II. NON-CODE LAW APPLICABLE TO PACKAGE MORTGAGES

State filing requirements for all types of corporate indentures have always varied to a great degree.<sup>15</sup> Most jurisdictions have never granted special consideration in their recording acts, chattel mortgage laws, or elsewhere to the ordinary corporate or package mortgage (hereinafter understood to be a mortgage securing the debt of a non-public service corporation), especially with reference to the coverage therein of after-acquired property.<sup>16</sup> Since the long-term mortgage typically covered most forms of personalty, the language of the local chattel mortgage statutes was specifically applicable unless exemption was provided therein or by another statute. For the typical trustee under the ordinary package mortgage, these laws presented certain worries because of the length of time during which the mortgage was to remain in existence and the extensive coverage of collateral. These two facts posed the danger of inadvertent failure of the mortgagor to file properly under these statutes, which characteristically required—in the county where the debtor resided or where the property was situated—a re-filing or an initial recording.<sup>17</sup> Furthermore, though exempting certain classes of agreements from re-filing, some jurisdictions have required the execution and filing of supplemental indentures in order that effective liens might attach to after-acquired property otherwise covered by the language of the original agreement.<sup>18</sup> Although these rules were exacting, they were not intolerable, since the physical assets of the ordinary corporation are not normally widely spread throughout many counties or jurisdictions. Thus, for the ordinary corporate debtor, the principal problem presented by the Code filing requirements is merely the new phraseology, since the procedure itself is little different from prior law.<sup>19</sup>

Filing procedure under Article 9 and the minimal treatment therein of public utility corporations presents greater problems than those confronting ordinary corporate mortgagees and mortgagors. Further, tentative solutions to these problems require burdensome measures in order to comply. In almost all states, either by statute<sup>20</sup> or by implication derived

<sup>15</sup> See McCLELLAND & FISHER, CORPORATE MORTGAGE BOND ISSUES 315-24, 333-42 (1937).

<sup>16</sup> See, e.g., MINN. STAT. ANN. § 511.01 (1947); MO. ANN. STAT. § 443.460 (Supp. 1962). See also Cunningham & Tischler, *supra* note 11, at 717-18. *But see* statutes cited in note 24 *infra* and accompanying text.

<sup>17</sup> E.g., IOWA CODE ANN. §§ 556.3, 556.12 (1950).

<sup>18</sup> See, e.g., *Zartman v. First Nat'l Bank*, 189 N.Y. 267, 82 N.E. 127 (1907); McCLELLAND & FISHER, *op. cit. supra* note 15, at 336-38.

<sup>19</sup> See text accompanying notes 42-74 *infra* for expanded discussion of this procedure.

<sup>20</sup> E.g., IOWA CODE ANN. § 476.15 (1949); LA. REV. STAT. §§ 45.382, 45.384 (1951).

from common-law court decisions,<sup>21</sup> railroad mortgages with broad after-acquired property clauses have been deemed exempt from chattel mortgage filing procedures. The practice has been to file these instruments as real estate mortgages, which are generally considered to be on public record from the time of filing until maturity date.<sup>22</sup> This policy has frequently been applied to all public service corporations<sup>23</sup> and on rare occasions to all corporations of any sort.<sup>24</sup> In general, however, these exemptions concern only a limited class of debtors.

The rationale upon which these exemptions rest is best explained by reference to a typical railroad's financing practices. As a consequence of extremely high costs of purchasing and maintaining its physical assets, a railroad must operate with a considerable amount of funded debt. To a lesser degree this holds true for other public service companies; their practice in the past has been to finance growth and maintenance through extensive mortgaging. This practice results in the encumbrance of a great portion of the assets of a given corporation, including those to be acquired in the future.<sup>25</sup> Obviously, the duration of the bond issue requires the trustee to demand after-acquired property as security, because the assets existing at the time of execution of the security agreement generally have a limited life span. The assets of almost all public utility corporations, and railroads in particular, are situated throughout many jurisdictions and innumerable counties, each of which has a filing office. Thus, unless exempted, these mortgages must be filed and re-filed under local chattel mortgage law in each of the relevant counties.<sup>26</sup> Since the assets of some railroads are covered by a large number of mortgages and the bond issues which the mortgages secure may not mature for a century,<sup>27</sup> compliance with all re-filing requirements in the various counties would be nearly impossible. Therefore, the practice in states where re-filing, re-recording, or execution of supplemental indentures is required has been to rely on either statutory exemption or questionable case authority, thereby ignoring the aforemen-

<sup>21</sup> *E.g.*, *Galveston R.R. v. Cowdrey*, 78 U.S. (11 Wall.) 459, 481-82 (1870); *Pennock v. Coe*, 64 U.S. (23 How.) 117 (1859); *In re New York S. & W.R.R. Co.*, 109 F.2d 988 (3d Cir. 1940); *Compton v. Jesup*, 68 Fed. 263, 286-87 (6th Cir. 1895); *Boston Safe Deposit & Trust Co. v. Bankers' & Merchants' Tel. Co.*, 36 Fed. 288, 298 (S.D.N.Y. 1888); *Buck v. Seymour*, 46 Conn. 156, 169-73 (1878). See also authorities cited in *Cunningham & Tischler, supra* note 11, at 714-18.

<sup>22</sup> See *Coogan & Clovis, supra* note 8, at 551-56; *Cunningham & Tischler, supra* note 11, at 715-23.

<sup>23</sup> *E.g.*, *Pintsch Compressing Co. v. Buffalo Gas Co.*, 280 Fed. 830, 835-36 (2d Cir. 1922); *In re Frederica Water, Light & Power Co.*, 10 Del. Ch. 362, 93 Atl. 376 (Ch. 1915); *MINN. STAT. ANN.* §§ 222.18, 300.10-11 (1952).

<sup>24</sup> *E.g.*, *DEL. CODE ANN.* tit. 25, § 2317 (1953); *HAWAII REV. LAWS* §§ 196-2, 343-52 (1955).

<sup>25</sup> See *Coogan & Clovis, supra* note 8, at 538-39; *Cunningham & Tischler, supra* note 11, at 717; *Klooster, supra* note 11.

<sup>26</sup> State chattel mortgage statutes which require only an initial filing do not pose this potential burden.

<sup>27</sup> The assets of the New York Central Railroad Co. and those of the Southern Pacific Railway Co., for example, are encumbered respectively by twenty-three and fourteen mortgages. See generally *MOODY'S TRANSPORTATION* (1962).

tioned requirements. This procedure has been similarly followed in the case of mortgages covering after-acquired property.<sup>28</sup> Although this failure to re-file may appear somewhat reckless, corporate trustees have apparently accepted it as compliance with the requirements of the mortgage.<sup>29</sup>

Under the most reasonable interpretation of the Code, however, there appears to be a revision of these liberal pre-Code policies due to inadequate reference to corporate indentures in the Article 9 filing provisions.<sup>30</sup> With respect to railroads having outstanding mortgages executed prior to the adoption of the Code and, in fact, with respect to all corporations similarly situated, it would seem evident that in a Code state no property obtained subsequent to execution of the instrument constitutes secured collateral unless further steps are taken.<sup>31</sup> Thus the large railroad debtor with property in any Code state now has the option of complying with Article 9 filing requirements or possibly subjecting himself to default or costly negotiation under the terms of the mortgage. The latter alternative is, of course, undesirable for all parties to the agreement.

### III. AN INTERPRETATION OF THE FILING REQUIREMENTS FOR PACKAGE MORTGAGES

For the most part, the filing requirements of Article 9 are easily understood; for the corporate debtor in particular, a minimum of explanation is necessary for a grasp of the details. Thus, this section has the more important purpose of pointing out the instances in which non-apparent difficulty will be encountered and consequently where amendment of Article 9 is badly needed.

#### A. Exemptions From Code Filing

Article 9 provides for certain exemptions from its filing requirements, and some states, wisely recognizing the need for complementary exclusion, have adapted their respective versions of the Code accordingly. Section 9-302(1) of the Code requires that a financing statement be filed in order to perfect all security interests in personal property other than a few which concern assets of an intangible nature.<sup>32</sup> Section 9-302(3) further states:

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

<sup>28</sup> See cases cited in note 21 *supra* and accompanying text.

<sup>29</sup> Interview with George T. Lowy of the New York Bar, in New York City, July 29, 1963.

<sup>30</sup> Section 9-302(1) of the Code provides in part: “A financing statement must be filed to perfect all security interests except the following: [none of the exceptions are significant in this context].”

<sup>31</sup> *But cf.* Coogan & Clovis, *supra* note 8, at 550.

<sup>32</sup> See generally Coogan, *Public Notice Under the Uniform Commercial Code and Other Recent Chattel Security Laws, Including Notice Filing*, 47 IOWA L. REV. 289 (1962); Coogan & Bok, *supra* note 5, at 213-20; Kupfer, *Filing Provisions Under Article 9 of the Code*, 6 PERSONAL FINANCE L.Q. REPORT 35 (1952); Silin, *Filing Requirements Under the Uniform Commercial Code*, 3 BOSTON B.J. (1959).

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

Since this exemption is applicable to, among other statutory provisions, section 20(c) of the Interstate Commerce Act, which concerns security interests in locomotives and rolling stock,<sup>83</sup> there will be expanded analysis below of the ICC filing procedure. The filing procedure under section 20(c) is literally merely permissive, but it in effect has been made mandatory by the draftsmen of the Code.<sup>84</sup>

Section 9-302(3) further allows exemption of security interests subject to any statute

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

It is this Code provision which allows a state to circumvent the great difficulties of filing which now burden such parties as the railroad debtor. Although less than one-third of the states which have adopted the Code exempt any type of mortgage, considerable pressure is being applied by interested parties for the enactment of exclusionary legislation by all state legislatures.<sup>85</sup>

<sup>83</sup> 66 Stat. 724 (1952), 49 U.S.C. § 20c (1958). This section provides in part: “Any mortgage, lease, equipment trust agreement, conditional sale agreement or other instrument evidencing the mortgage, lease, conditional sale or bailment of railroad cars, locomotives or other rolling stock, used or intended for use in connection with interstate commerce . . . may be filed with the Commission . . . .” See generally Atkins & Billyou, *Current Developments in Railroad Equipment Financing*, 12 BUS. LAW. 207 (1957); Note, 71 HARV. L. REV. 1516 (1958).

<sup>84</sup> UNIFORM COMMERCIAL CODE § 9-302, comment 8, provides: “subsection (4) makes clear that when such a system [national filing] exists perfection of a relevant security interest can be had only through compliance with that system (i.e., . . . permissible alternative).”

<sup>85</sup> Interview with George T. Lowy of the New York Bar, in New York City, July 29, 1963; Letter from Frank H. Heiss of the New York Bar to Frank R. Kennedy, Nov. 20, 1963, on file in the offices of the *Michigan Law Review*. A proposed amendment to the Code which has been prepared by the Association of American Railroads states:

“Add to section 9-302 of the Code a new paragraph numbered (5) to read as follows:

“Except as provided in this subsection, the filing provisions of this Article do not apply to a security interest in property of any description or any interest therein created by a mortgage made by a corporation which is a railroad or a public utility . . . but the mortgage shall be recorded and filed in accordance with the following requirements:

“(a) the mortgage shall be recorded in (the appropriate office of each county in this state) in which any real estate described in the mortgage is situated; and

“(b) the mortgage shall be filed in the office of the (Secretary of State or appropriate state official) if the mortgage includes any rolling stock, movable equipment or machinery or any other personal property. . . .

“To the extent that any mortgage heretofore executed has been filed or recorded as provided herein, it need not be re-filed or re-recorded thereunder, and nothing hereunder shall be deemed to impair the lien or effect of any mortgage heretofore executed which has been recorded or filed in accordance with the laws of this state applicable thereto prior to the effective date of this act.”

See also Billyou, *A Proposal for a Federal Railroad Mortgage Recording Statute*, 26 ICC PRACTITIONERS J. 424 (1959).

At this time, seven states have implemented section 9-302(3)(b) by exempting, either through language in their own Code versions or elsewhere in their statutes, some or all classes of package mortgages from Article 9 filing requirements.<sup>36</sup> A number of others have neither repealed nor affirmed in express terms their pre-Code exclusionary provisions,<sup>37</sup> and the filing procedure required in such jurisdictions remains unclear.<sup>38</sup>

New York and Ohio appear to have adopted the most reasonable provisions. New York is the only state to exempt all corporate indentures,<sup>39</sup> while Ohio has excluded, in unequivocal language and with clear cross reference to the Code, all public utility mortgages.<sup>40</sup> A Code amendment combining the breadth of the New York statute and the lucidity of the Ohio statute should be adopted by the Permanent Editorial Board of the Uniform Commercial Code to obviate both the obvious difficulties and the uncertainties in the present version.<sup>41</sup>

### B. Filing Procedures

The following explanation will serve in part to illustrate the difficulties inherent in the filing of certain types of corporate mortgages and in part to illustrate the necessary steps for perfection of security interests in collateral under any of these mortgages. It must be noted that special reference is made in this discussion to indentures which were executed prior to the promulgation of the Code in a given jurisdiction. Because of the large number of such indentures, special problems arise with respect to perfection of interests in after-acquired collateral thereunder.

<sup>36</sup> CONN. GEN. STAT. ANN. § 42a-9-302 (1960); ILL. REV. STAT. ch. 95, § 51 (Supp. 1962); KY. REV. STAT. § 355.9-302(3)(b) (1962); N.Y. LIEN LAW § 231 (Supp. 1963); OHIO REV. CODE ANN. § 1309.21(6)(2) (Page 1962); R.I. GEN. LAWS ANN. § 34-25-7 (Supp. 1962). Missouri has also adopted an exemption provision recently. Mr. Frank Heiss of the New York Bar, one of the active parties in favor of amendment, in a long and detailed letter to the Permanent Editorial Board expressed concern that even these various exemption provisions are insufficient to protect liens under package mortgages in the case of certain types of collateral. His concern is arguably well grounded, especially with respect to the poor drafting of some of these provisions.

<sup>37</sup> GA. CODE ANN. § 94-301 (1958); OKLA. REV. CODE ANN. tit. 66, §§ 14, 15 (1960); MONT. REV. CODES ANN. §§ 72-211, 72-214 (1962); PA. STAT. ANN. tit. 67, § 523 (1930).

<sup>38</sup> Letter from Frank H. Heiss of the New York Bar to Frank R. Kennedy, Nov. 20, 1963, on file in the offices of the *Michigan Law Review*.

<sup>39</sup> N.Y. LIEN LAW § 231 states: "Mortgages creating a lien upon real and personal property, executed by a corporation . . . and recorded as a mortgage of real property in each county where such real property is located . . . need not be filed or re-filed as a chattel mortgage."

<sup>40</sup> OHIO REV. CODE ANN. § 1309.21(c)(2) (Page 1962) states: "The filing provisions of sections 1309.01 to 1309.50 [Article 9], inclusive, of the Revised Code do not apply to a security interest in property subject to a statute . . . of this state (including section 1701.66 of the Revised Code) which provides for central filing. . . ."

OHIO REV. CODE ANN. § 1701.66 (Page Supp. 1962) states: "A mortgage of property of any description, or any interest therein, made (1) by a corporation which is a railroad or a public utility . . . shall be recorded in the office of the county recorder . . . but a mortgage . . . which includes rolling stock . . . may be filed in the office of the Secretary of State. . . ."

<sup>41</sup> Cf. the amendment proposed by the Association of American Railroads, *supra* note 35.

Part 4 of Article 9 states, in skeleton form, the requirements for filing financing statements for all property, including fixtures and ordinary personalty. The versions of the Code adopted by the various states<sup>42</sup> differ with respect to the perfection of security interests in ordinary personalty. About half of these, however, provide a system of central filing for statements covering such property; the remainder provide for local filing.<sup>43</sup> All versions of the Code state that a financing statement is sufficient if it is signed by the debtor and the secured party, gives the address of each party, and contains a statement indicating the types or describing the items of collateral.<sup>44</sup> Section 9-402(3) provides a format which is deemed adequate to comply with these requirements.<sup>45</sup> In any case, the principal concern of the corporate trustee will be whether there has been a sufficient description of all ordinary collateral covered by the mortgage. A financing statement for an involved package mortgage should be adequate if it contains a clause reading essentially as follows:

“This financing statement covers all personal property, now owned or hereafter acquired, of every kind and nature, including, without limitation, desks, office furniture and equipment, electronics parts and equipment, machinery, tools, supplies, implements and all movable property such as automotive and construction equipment and rolling stock [add, especially in the case of railroads and other specialty businesses, other general types of personalty owned by the debtor].”

Common sense dictates that a financing statement should contain more than appears necessary under the Code. While no more than this is necessary initially for perfection of interests in ordinary tangible personalty, it must be noted that for continued perfection of the security interest the Code requires that a continuation statement be filed at either a stated maturity date of five years or less, or within six months before or sixty days after the expiration of a five-year period.<sup>46</sup> Of incidental importance are the requirements of Part 4 of Article 9 dealing with termination or assignment of security interests or release of collateral described in a financing statement.<sup>47</sup>

The procedure for perfecting interests in fixtures differs somewhat from that required for all other personalty.<sup>48</sup> The Code provides: “[W]hen the collateral is goods which at the time the security interest attaches are or are

<sup>42</sup> See UNIFORM COMMERCIAL CODE, UNIFORM LAWS ANNOTATED 489-99 (1962) for standard version and all alternatives.

<sup>43</sup> Alaska, Connecticut, Illinois, Indiana, Montana, New Jersey, New Mexico, Rhode Island and Tennessee have central filing provisions. Arkansas, Georgia, Kentucky, Maryland, Michigan, New Hampshire, Ohio, Oregon, Pennsylvania, West Virginia and Wyoming have provided for local filing. See UNIFORM COMMERCIAL CODE § 9-401, comment 1, for a discussion of the competing policies in favor of each system.

<sup>44</sup> See UNIFORM COMMERCIAL CODE § 9-402(1).

<sup>45</sup> Massachusetts and Illinois have issued their own UCC forms and instruction booklets. See also 43 Mass. L.Q., Oct. 1958, p. 3.

<sup>46</sup> UNIFORM COMMERCIAL CODE § 9-403(3).

<sup>47</sup> See UNIFORM COMMERCIAL CODE §§ 9-404 to -406.

<sup>48</sup> See Coogan, *supra* note 11; Coogan & Clovis, *supra* note 8, at 549-73.

to become fixtures . . ." the proper place to file is in the office where a mortgage on the real estate concerned would be filed or recorded.<sup>49</sup> The form of the financing statement for perfection of interests in fixtures is described in sections 9-402(1) and (3). A description of the various goods owned by the debtor which constitute fixtures will be similar in most respects to the description of ordinary tangible personalty which was discussed above,<sup>50</sup> but it must be noted that mention of the location of the real estate to which these fixtures are attached must be included in the financing statement.<sup>51</sup> Heretofore, in drafting package mortgages, the method of describing real estate has varied in degree of specificity with the type of mortgage involved. Railroad indentures and those of other public utility corporations have characteristically described realty covered thereunder in a very general fashion,<sup>52</sup> while in ordinary package mortgages it is not unusual to find full metes and bounds descriptions.<sup>53</sup> It seems clear that, whatever the preferred practice has been in the past, it will continue due to the patently liberal language of section 9-110.<sup>54</sup> Indeed, the official Code comment to this section explains that its purpose was to relax the requirements, sometimes enunciated in older chattel mortgage cases, of exact and detailed description.

A financing statement in the following general form would be adequate to perfect interests in fixtures:

"This financing statement covers all personalty which constitutes or may in the future constitute fixtures and which is now owned or hereafter may be acquired, and which includes, without limitation, heating and cooling equipment, machinery, plant equipment, and electronic devices [railroad mortgage statements will also include switches, ties, rails, signal devices, etc., and all statements should include property peculiar to the business] located on or about the property set forth in Schedule A hereto."

Attached to the financing statement would be a "Schedule A," consisting of a photocopy of the real estate granting clause of the mortgage in question. Finally, a continuation statement must be filed every five years or oftener in order to maintain the efficacy of the lien previously established.<sup>55</sup>

An after-acquired property clause in a mortgage executed subsequent to the Code's enactment presents no problems, because the Code does not

<sup>49</sup> UNIFORM COMMERCIAL CODE § 9-401(1). In Oklahoma, only central filing with the county clerk of Oklahoma County is required.

<sup>50</sup> See text accompanying notes 45, 46 *supra*.

<sup>51</sup> UNIFORM COMMERCIAL CODE § 9-402(1).

<sup>52</sup> Interview with George T. Lowy of the New York Bar, in New York City, July 29, 1963.

<sup>53</sup> Letter from William Knox of the New York Bar to Frank R. Kennedy, Nov. 25, 1963, on file with the *Michigan Law Review*, which also pointed out that local law often determines the requisite specificity.

<sup>54</sup> "For the purposes of this Article any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described"

<sup>55</sup> UNIFORM COMMERCIAL CODE § 9-403(3).

require additional filing once a security interest is perfected.<sup>56</sup> Since section 9-204(3) provides that a security agreement may encumber collateral whenever acquired, any property subsequently obtained will automatically be covered by the terms of the agreement if the proper steps are taken initially for recording the instrument. Any original financing statement, therefore, must contain a description of the type of property expected to be obtained in the future.<sup>57</sup> If any of this property is likely to be in the category of fixtures, provision must be made for this possibility in the financing statement covering such property. Although it may be generally accepted that no additional filing is necessary for perfection of interests in after-acquired property, it must be noted that if fixtures are attached to real property not initially possessed by the debtor after execution of the mortgage, a new financing statement will have to be filed.<sup>58</sup>

For the most part, the aforementioned filing procedure applies in similar fashion to mortgages securing the debt of railroads and other public utilities. It must be recalled, however, that the exclusionary provisions which have been adopted in certain states apply most frequently to indentures of this sort.<sup>59</sup> Also, the filing practices of these types of debtors, especially railroads, will be considerably more extensive, since they often own property in countless municipalities. This creates a burden even regarding a mortgage executed after the adoption of the Code, and for this reason the logic of an exemption provision in each state's version of the Code can be understood. This reasoning will become increasingly clear after the discussion below of filing practices for debtors under mortgages executed prior to the Code's enactment.

Finally, special consideration must be given the perfection of interests in goods which are normally used in more than one jurisdiction. Included in this category would be such items as automotive equipment, trucks, road building machinery, and railroad rolling stock. It is obvious that this type of coverage is most significant to the railroad debtor, but it is also important for all corporate trustees, since most businesses have equipment of this nature.

Section 9-103(2) explicitly provides that if the chief place of business of the debtor is in a state adopting the Code, then filing therein is sufficient for "validity and perfection of a security interest" in such mobile property. The section continues: "Otherwise the law (including the conflict of laws rules) of the jurisdiction where such chief place of business is located shall govern."<sup>60</sup> While it is subject to doubt that such filing in the debtor's

<sup>56</sup> UNIFORM COMMERCIAL CODE § 9-303(1) states: "A security interest is perfected when it has attached and when all of the applicable steps for perfection have been taken . . . . If such steps are taken before the security interest attaches, it is perfected at the time when it attaches."

<sup>57</sup> It must be noted that Code § 9-108 limits after-acquired collateral to that used in the ordinary course of business.

<sup>58</sup> See Coogan & Clovis, *supra* note 8, at 567-73.

<sup>59</sup> See statutes cited note 36 *supra* and accompanying text.

<sup>60</sup> See also comment 3 to this section.

home county or state will assure an effective lien on mobile property at the time of its attachment by a third party in a non-Code jurisdiction, it is clear that this prior lien will be honored in all Code states.<sup>61</sup>

The perfection of interests in railroad rolling stock presents a very special situation. While rolling stock is specifically mentioned in section 9-103(2) as an example of mobile personalty covered by the Code, section 9-302(3)(a) exempts rolling stock from the Article 9 filing requirements by its exclusion of all security interests in property subject to a federal recording statute.<sup>62</sup> Since most railroad mortgages include rolling stock in their coverage,<sup>63</sup> there must be a filing with the Interstate Commerce Commission under section 20(c) of the Interstate Commerce Act.<sup>64</sup> The Commission has indicated that it will accept corporate mortgages filed under section 20(c) for this purpose, although this procedure has not heretofore existed.<sup>65</sup> The transmittal letter relating to such filing need only state that the mortgage constitutes a lien on any rolling stock owned at present by the debtor or thereafter to be acquired, subject, however, to equipment obligations.<sup>66</sup>

Thus far it has been apparent that none of the steps to be taken by corporate debtors is excessively onerous, although railroad and other utility trustees have some cause for concern over the extent of filing necessary for establishment of effective liens. The following discussion, however, should illustrate the pressing need for relief from the circumstances in which parties to pre-Code mortgages find themselves.

With respect to these mortgages and other security agreements in effect prior to the Code, section 10-102(2) provides:

"Transactions validly entered into before the effective date . . . and the rights, duties and interests flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this Act as though such repeal or amendment never occurred."<sup>67</sup>

A number of variations of this section have been enacted in a few states, and these provide filing requirements that must be carefully followed by

<sup>61</sup> See UNIFORM COMMERCIAL CODE § 9-103(2).

<sup>62</sup> See comment 3 to this section; text accompanying and preceding notes 33, 34 *supra*.

<sup>63</sup> Most financing of new equipment or new rolling stock, however, is done by conditional sale and equipment trust, with the vendor, assignor, or trustee retaining title and thus priority over any mortgagee. See also § 9-312, expressly providing for the priority of such interests, which are therein called "purchase money security interests."

<sup>64</sup> See note 33 *supra*.

<sup>65</sup> Interview with George T. Lowy of the New York Bar, in New York City, July 29, 1963; Letter from Frank H. Heiss of the New York Bar to Frank R. Kennedy, Nov. 20, 1963, on file in the offices of the *Michigan Law Review*.

<sup>66</sup> See 49 C.F.R. §§ 57.1 to .5 (1963), for details of the filing procedure. The mortgages accepted recently by the ICC have not strictly complied with these regulations, which in fact cannot be followed with respect to after-acquired property.

<sup>67</sup> See generally Coogan & Bok, *The Impact of Article 9 of the Uniform Commercial Code on the Corporate Indenture*, 69 YALE L.J. 203, 210-12 (1959); Coogan & Clovis, *The Uniform Commercial Code and Real Estate Law: Problems for Both the Real Estate Lawyer and the Chattel Security Lawyer*, 38 IND. L.J. 535, 550-51 (1963).

trustees under pre-Code mortgages, or there will be a lapse of all collateral covered by such agreements.<sup>68</sup> In some cases, considerable preparation will be needed for total compliance with these provisions. These statutes aside, most interests in property perfected prior to the various enacting dates will remain effective, either because no additional filing is required or because the sometimes burdensome procedure relating to after-acquired property will continue the effectiveness of liens on pre-Code collateral.

The statutes and common law which exempted railroad and other public utility mortgages should be sufficient to maintain liens on property owned by the debtor at the time of execution of the mortgage and property acquired between the time of the original filing and the adoption of the Code. There are, however, a few problems relating to other after-acquired property which require discussion.

If the mortgage in question was filed in accord with local chattel mortgage law, if these laws necessitated only initial filing of the document and of any supplemental indenture covering after-acquired property (if required to be executed), and if this filing sufficed for effectuation of the lien until the instrument matured, no further action is required under the Code.<sup>69</sup> Two situations arise, however, which involve indentures subject to chattel mortgage statutes demanding re-filing or some similar action. First, if any property has been acquired between the time of the filing of the last supplemental indenture (where execution of such documents is necessary) and the time of the adoption of the Code, a financing statement must be filed, the contents of which would be similar to those described above. Specific reference should be made to all types of property acquired in this interim, and more than one statement may have to be filed.<sup>70</sup>

In those states with pre-Code law subjecting mortgages and supplemental indentures to requirements of periodic re-filing, it would be wise to file a

<sup>68</sup> CONN. GEN. STAT. ANN. § 42a-10-102 (1960) and N.H. REV. STAT. ANN. § 382-A:9-401 provide similarly for what appears to be permissive filing under the requirements of §§ 9-401 and 9-402 for continuance of the perfected status of a security interest. Filing in accord with these respective provisions would seem provident if financing statements are not being filed to perfect interests in after-acquired property. Otherwise, the statement covering after-acquired property could also make reference to all other interests previously perfected. N.J. STAT. ANN. § 12A:10-101 (1962) requires that there be filing under Code requirements of chattel mortgages entered into prior to the adoption of the Code, if the statute applicable to the mortgage required re-filing, execution, or re-recording. This provision exempts all public service corporations from the required procedure. While the language of this section differs little from the implied requirements of all other Code versions, New Jersey is the only state explicitly to clarify this implication. N.Y. UNIFORM COMMERCIAL CODE § 10-102(2) (1962) (effective Sept. 27, 1964) requires that a continuation statement be filed with respect to all agreements which were exempt from more than initial filing. This statement must be filed within twelve months prior to lapse. See Goodwin, *Major Revisions in Article 9 of Uniform Commercial Code—Secured Transactions*, 31 PA. B.A.Q. 261, 264-66 (1960), for a discussion of the law of Pennsylvania in this area.

<sup>69</sup> UNIFORM COMMERCIAL CODE § 10-102(2) would certainly appear to dictate this result. See Coogan, *The Impact of Article 9 of the Uniform Commercial Code on the Corporate Indenture*, 69 YALE L.J. 203, 211 (1950). But see statutes cited in note 50 *supra*.

<sup>70</sup> See Coogan & Clovis, *supra* note 67, at 551.

special financing statement covering all property mentioned in the previous document. This is the safest practice to follow, since the consequences of failure to do so are uncertain.<sup>71</sup> In this case, additional filing need be considered only for a mortgage without an after-acquired property clause; if such a clause exists, the filing of the financing statement discussed in the next paragraph will be sufficient.

Filing will definitely be necessary in order to perfect interests in property acquired subsequent to Code adoption in those states which have not implemented the alternative exemption language of section 9-302(3)(b).<sup>72</sup> While arguably this type of acquisition is merely the continuance of a transaction begun prior to the Code's adoption, which would remain valid under the terms of section 10-102(2) without further action, such an assumption unnecessarily endangers the security interests of the corporate trustee. The uncertainty in this area, particularly with respect to railroad mortgages, should lead the trustee to inquire as to the safest approach to the filing problem. A financing statement covering fixtures and one covering ordinary personalty will have to be filed in all appropriate filing offices for each outstanding mortgage of the corporation. The language of these statements will be substantially the same as that set forth earlier in this comment for statements covering new mortgages.<sup>73</sup> Any ordinary corporation or public utility which may not have been exempted from pre-Code chattel mortgage statutes should also include in this statement specific reference to all property covered by the original document and all property thereafter acquired.

Filing a transmittal letter and a copy of the mortgage with the Interstate Commerce Commission will be sufficient to perfect all interests in after-acquired rolling stock.<sup>74</sup> It must also be noted that any interests in after-acquired property perfected by local filing can be maintained only by the filing of continuation statements.

#### IV. CONCLUSION AND SUGGESTIONS

While the language of Article 9 concerning filing procedure may be easily understood by the corporate trustee and debtor, the wisdom of this language can certainly be questioned. The ordinary corporate debtor under a post-Code mortgage will not be unduly burdened by this procedure, and the typical public utility debtor under a similar document will be faced with only an unpleasant task. The railroad or other utility, however, which has twenty or thirty outstanding bond issues, each of which is secured by

<sup>71</sup> See discussion of the New Jersey statute in note 68 *supra*. Almost uniformly, it must be noted, trustees have not exhibited concern over the possibility that no security actually exists in pre-Code after-acquired property. However, pursuit of a safer course would seem to be dictated by the interpretation of the Code in this comment.

<sup>72</sup> See statutes cited in note 36 *supra*.

<sup>73</sup> See text accompanying notes 44-46 *supra*.

<sup>74</sup> See generally Coogan, *supra* note 32.

substantially all of its assets, which are spread throughout a thousand counties, is faced with an intolerable administrative burden. Furthermore, the chance for error in attempting to comply with the Article 9 rules—and the possibility of default or costly negotiation—is significant. These results were obviously unintended by the draftsmen of the Code, and there appears to be no reason why Article 9 should not be amended to exclude all railroad and utility mortgages, if not corporate indentures altogether, from all but an initial filing. If such a filing occurred prior to the adoption of the Code, no further action should be necessary other than the administrative adjustment in the filing offices. Multiple filing appears to be superfluous, since the original recording of the typical corporate indenture or the Code filing of a single financing statement supplies all the information a potential creditor might desire, and, in fact, such creditors are not a numerous lot. Certainly a Code amendment along the lines suggested would reflect the progressive spirit of the filing provisions of the Code; it would also end the considerable concern that exists today among many corporate trustees and debtors.

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