

Article 9 of the Indiana Uniform Commercial Code in Transition

EDWARD A. KEIRN*

I. INTRODUCTION

From July 1, 1964, through December 31, 1985, Indiana's law of secured transactions regarding personal property and fixtures was essentially that contained in Article 9 of the 1962 Official Text of the Uniform Commercial Code (Old Indiana UCC).¹ Effective January 1, 1986, however, Indiana adopted substantially all of Article 9 of the 1972 Official Text of the Uniform Commercial Code (New Indiana UCC),² and in doing so conformed its law of secured transactions to that of the vast majority of other jurisdictions.³ As the result of the important changes made under the New Indiana UCC regarding transactional scope, the manner by which security interests are perfected, and the resolution of priority disputes among multiple claimants to the same collateral,⁴ a logical first question is: what impact will the New Indiana UCC have on transactions entered into before its effective date? The correct answer to this question, it seems, may be: (a) very little, if any; (b) a great deal; or (c) it's anybody's guess, depending upon the particular factual circumstances and legal issues involved.

As a starting point in the analysis, it is necessary to locate a series of facially innocuous "transition rules" adopted along with the New

*Associate, Barnes & Thornburg, Indianapolis. B.S., Marion College, 1973; M.P.A., Ball State University, 1979; J.D., Indiana University School of Law—Indianapolis, 1983. The author gratefully acknowledges the research assistance of Ken L. Armstrong—IL, University of Chicago.

¹The Old Indiana UCC was codified at IND. CODE §§ 26-1-9-101 to -507 (1982 & Supp. 1984).

²The New Indiana UCC is codified at IND. CODE §§ 26-1-9-101 to -507 (1982 & Supp. 1986).

³See Johnson, *Changes in the Uniform Commercial Code, 1985 Survey of Recent Developments in Indiana Law*, 19 IND. L. REV. 99 (1986) [hereinafter *1985 Survey*].

⁴See generally *1985 Survey*, *supra* note 3, at 99-114; Bepko, *Perfection & Priorities Under Revised UCC in Indiana*, UNIFORM COMMERCIAL CODE XI-1 (ICLEF 1985); Eslick & Tyler, *A Practical Approach to the 1972 UCC Official Text of Article 9, Perfection, Remedies, Post-Insolvency Filings*, UNIFORM COMMERCIAL CODE VIII-1 (ICLEF 1985); Falvey, *Fixtures Under the 1972 Version of the Uniform Commercial Code*, UNIFORM COMMERCIAL CODE XIV-1 (ICLEF 1985); Meyer, *Indiana's Adoption of 1972 Amendments to Article 9*, UNIFORM COMMERCIAL CODE X-1 (ICLEF 1985); Thorne & Hostetler, *A Practical Approach to the 1972 UCC Official Text of Article 9, Competing Liens and Interests, Multistate Transactions and Transition*, UNIFORM COMMERCIAL CODE IX-1 (ICLEF 1985).

Indiana UCC (New Transition Rules). Unlike the transition rules adopted in connection with the Old Indiana UCC,⁵ the New Transition Rules are not codified in the Indiana Code. Rather, they must literally be "discovered" from the compiler's notations to title 26 of *Burns Indiana Statutes Annotated* or *West's Indiana Annotated Code* or expressly "looked up" in the Indiana Acts.⁶ The New Transition Rules are comprised of six sections (some with multiple parts) numbered sections 42 through 47, inclusive.

The next step, of course, after locating the New Transition Rules is to read them. During this initial reading, the language of the New Transition Rules may appear to be quite easy to understand. There is almost no legalese, and the rules themselves are not exceptionally long. After all, one may ask: why shouldn't the New Transition Rules be relatively easy to interpret and understand since they are nearly identical to the model transition rules prepared by the Reporters of the 1972 Official Text of the UCC,⁷ and adopted in whole or in part by most of the other jurisdictions enacting the 1972 Official Text? Certainly, it is easy to overlook the fact that, unlike the 1972 Official Text itself, the model transition rules (from which the New Transition Rules were taken) have not been approved or endorsed by the National Conference of Commissioners on Uniform State Laws, any of its boards or committees, or the American Law Institute.⁸

Having now put the reader on notice that there may be more to the New Transition Rules than a casual reading may reveal, let us now turn to the substance and application of the rules themselves.

II. THE NEW TRANSITION RULES

A. Section 42

Section 42 contains both a validity provision and a perfection continuation provision. The validity provision states that a transaction validly entered into before January 1, 1986, under the Old Indiana UCC (and which would be subject to the New Indiana UCC if it had been entered into after December 31, 1985) and the rights, duties, and interests flowing from such a transaction remain valid after December 31, 1985, and "may be terminated, completed, consummated, or enforced as required or permitted by [the New Indiana UCC]."⁹ The validity mentioned in

⁵See IND. CODE §§ 26-1-10-101 to -106 (1982).

⁶1985 Ind. Acts 828-30, Pub. L. No. 93-1984, §§ 42 to 47, *reprinted in* IND. CODE ANN. in note to § 26-1-1-105 (West Supp. 1986).

⁷Compare *id.* with U.C.C. §§ 11-101 to -108 (1972).

⁸See U.C.C., Article 11, 3A U.L.A. 431 (1981).

⁹1985 Ind. Acts 828-30, Pub. L. No. 93-1985, § 42, *reprinted in* IND. CODE ANN. in note to § 26-1-1-105 (West Supp. 1986).

this provision obviously has reference to the general validity of security agreements as between the parties (and certain third persons) described in section 9-201 of the Old Indiana UCC.¹⁰

Neither the Old Indiana UCC nor the New Indiana UCC directly addresses completion or consummation of transactions. Both do, however, contain specific provisions on enforcement and termination. With respect to enforcement, section 42 provides that the New Indiana UCC's enforcement provisions may be used in connection with transactions entered into under the Old Indiana UCC. Accordingly, the secured party in such a transaction may take advantage of the generally less burdensome provisions of the New Indiana UCC in giving notice of a proposed public or private sale or in proposing to retain the collateral in satisfaction of the underlying obligation.¹¹ This result is clear and relatively straightforward.

Now, let us turn to the more problematical termination analysis of section 42. This section, on its face, states that transactions entered into under the Old Code "may be terminated . . . as required or permitted by [the New Indiana UCC]."¹² What does this language mean? The logical initial response is that a secured party in a transaction entered into under the Old Indiana UCC may take advantage of section 9-404 of the New Indiana UCC, pertaining to the duties of the secured party in terminating financing statements when the financing relationship between the secured party and the debtor comes to an end.¹³

¹⁰IND. CODE § 26-1-9-201 (1982) provides in pertinent part: "Except as otherwise provided by this Act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors. . . ."

¹¹*Compare* IND. CODE §§ 26-1-9-504(3) and 26-1-9-505(2) (1982) (requiring notices to be given to debtor and persons who have filed a financing statement with respect to the collateral and to persons known by the secured party to possess a security interest in the collateral, if collateral is other than consumer goods) *with* IND. CODE §§ 26-1-9-504(3) and 26-1-9-505(2) (1986) (requiring notices to be given to debtor and to other secured parties from whom secured party has received a written notice of claim of an interest in the collateral, if the collateral is other than consumer goods). Note also that the time period for the debtor or other persons to object to the secured party's proposal to accept the collateral as discharge of the obligation has been reduced from 30 days to 21 days under the New Indiana UCC. *Compare* IND. CODE § 26-1-9-505(2) (1982) *with* IND. CODE § 26-1-9-505(2) (Supp. 1986).

¹²1985 Ind. Acts 828-30, Pub. L. No. 93-1985, § 42, *reprinted in* IND. CODE ANN. in note to § 26-1-1-105 (West Supp. 1986).

¹³IND. CODE § 26-1-9-404(1) (Supp. 1986) provides:

(1) If a financing statement covering consumer goods is filed on or after January 1, 1986, then within one (1) month or within ten (10) days following written demand by the debtor after there is no outstanding secured obligation and no commitment to make advances, incur obligations, or otherwise give value, the secured party must file, with each filing officer with whom the financing statement was filed, a termination statement, which shall be identified by file number. In other cases, whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations, or otherwise give value, the secured

However, upon comparing section 9-404 of the New Indiana UCC with section 9-404 of the Old Indiana UCC, the correctness of this initial response becomes suspect. Unlike the situation with respect to enforcement, the New Indiana UCC imposes an additional burden on the secured party. From the perspective of the secured party, the only real difference between the two versions of section 9-404 is that the New Indiana UCC requires the secured party actually to file appropriate termination statements with respect to financing statements covering consumer goods "within one (1) month or within ten (10) days following written demand by the debtor after there is no outstanding secured obligation and no commitment to make advances, incur obligations, or otherwise give value"¹⁴ By contrast, section 9-404 of the Old Indiana UCC made no distinction between financing statements covering consumer goods and other financing statements; in both cases, the secured party merely was required to send the appropriate termination statement *to the debtor* "within ten (10) days after proper [written] demand therefor"¹⁵ Simply stated, it appears to make little sense to enact a transition rule that authorizes (but apparently does not require)¹⁶ the secured party to utilize the New Indiana UCC's more stringent termination procedures.¹⁷

Well then, if the reference to termination in section 42 was not intended primarily to require (or perhaps, even to authorize) compliance with section 9-404 of the New Indiana UCC as to transactions entered

party must on written demand by the debtor send the debtor, for each filing officer with whom the financing statement was filed, a termination statement to the effect that he no longer claims a security interest under the financing statement, which shall be identified by file number. A termination statement signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record, complying with IC 26-1-9-405(2), including payment of the required fee. If the affected secured party fails to file such a termination statement as required by this subsection, or to send such a termination statement within ten (10) days after proper demand therefor, he shall be liable to the debtor for one hundred dollars (\$100), and in addition for any loss caused to the debtor by such failure.

¹⁴See *supra* note 13.

¹⁵See IND. CODE § 26-1-9-404(1) (1982).

¹⁶Section 42 provides only that the "transaction . . . may be terminated . . . as required or permitted by [the New Indiana UCC]." The "may," of course, suggests that the secured party has the option of complying with either the Old Indiana UCC or the New Indiana UCC.

¹⁷Notwithstanding section 42, however, section 9-404(1) of the New Indiana UCC expressly applies to "a financing statement covering consumer goods . . . filed on or after January 1, 1986, . . ." See IND. CODE § 26-1-9-202(1) (Supp. 1986). Hence, presumably even in the case of a transaction entered into prior to January 1, 1986, if a financing statement covering consumer goods was filed in connection with the transaction and the filing took place after December 31, 1985, the secured party must file a termination statement within the time constraints described in section 9-404(1) of the New Indiana UCC.

into under the Old Indiana UCC, what other function, if any, does the language "may be terminated . . . as required or permitted by the [New Indiana UCC]" perform? If nothing else, this language should be construed to authorize the use of the New Indiana UCC termination statement forms in connection with Old Indiana UCC transactions. In other words, the secured party should be permitted to use a new UCC-3 termination statement to terminate an old UCC-1 financing statement and to use a new UCC-4 land records termination statement to terminate an old UCC-1a fixtures financing statement.¹⁸ On the other hand, such language should *not* be construed to *require* the use of New Indiana UCC termination statement forms in connection with Old Indiana UCC transactions. The operative language is "may be terminated," *not* "shall be terminated." Consequently, the secured party should be entitled to utilize the termination copy of the originally filed old UCC-1 financing statement as well as the old UCC-3 (in the case of a UCC-1) and the old UCC-3a (in the case of a UCC-1a) in terminating financing statements filed pursuant to the Old Indiana UCC.¹⁹

The perfection continuation provision of section 42 applies to the same transactions as the validity provision. It states that a security interest validly entered into *and* perfected under the Old Indiana UCC remains perfected under the New Indiana UCC until it lapses (as provided in sections 44 and 45) and "may be continued as permitted by [the New Indiana UCC]," unless section 44 provides for a different rule.²⁰ The section 44 exception refers to the situation in which the New Indiana UCC requires a filing in an office where the Old Indiana UCC did not.²¹ In that instance, section 44(3) instructs the secured party to file a "special financing statement" conforming to section 45(4) (rather than a continuation statement) in the new filing office.²²

¹⁸Even absent section 42, there really should not be any question that either the new forms or the old forms may be used to terminate financing statements filed under the Old Indiana UCC. Pursuant to section 9-404 of both the Old Indiana UCC and the New Indiana UCC, to be effective, a termination statement need only be in writing, be signed by the secured party of record (or the secured party's assignee of record), state that the secured party no longer claims a security interest under the financing statement, and identify the financing statement by file number. See IND. CODE § 26-1-9-404(1) (1982) and IND. CODE § 26-1-9-404(1) (Supp. 1986). The only question should be whether the termination statement is on a "non-standard" form so as to be subject to an additional filing fee. According to the Interim Rules issued by the Indiana Secretary of State on December 20, 1985, old forms formerly approved by the Secretary of State are acceptable and will not be considered to be "irregular filings." See Secretary of State, *Interim Rules for the Administration of the Uniform Commercial Code*, at 6 (Dec. 20, 1985) [hereinafter *UCC Interim Rules*].

¹⁹See *supra* note 18.

²⁰1985 Ind. Acts 828-30, Pub. L. No. 93-1985, § 42, reprinted in IND. CODE ANN. in note to 26-1-1-105 (West Supp. 1986).

²¹See Reporters' Discussion of 1972 changes to U.C.C. § 11-103 (1972).

²²According to section 45(4), this "special financing statement" "may be signed by

The various perfection lapse rules will be addressed below when sections 44 and 45 are examined; however, the real "meat" of this provision appears to be its authorization to employ the New Indiana UCC perfection continuation rules in connection with transactions entered into and perfected under the Old Indiana UCC. The changes, real or cosmetic, effectuated under the New Indiana UCC with regard to perfection continuation include: (1) a different (and generally later) time to file a continuation statement when, for whatever reason, the financing statement indicates a scheduled maturity date of the obligation secured of five years or less;²³ (2) the automatic continuation of financing statements that otherwise would expire during the pendency of the debtor's bankruptcy proceeding;²⁴ (3) a requirement that a continuation statement signed by a person other than the secured party of record be accompanied by an appropriate statement of assignment signed by the secured party of record and the applicable filing fee for the statement of assignment;²⁵ (4) a "special rule" providing for indefinite duration (without need of a continuation statement) where a debtor is identified as a "transmitting utility;"²⁶ (5) a "special rule" providing for indefinite

either the debtor or the secured party . . . [and] must identify the security agreement, statement, or notice (however denominated in any statute or other law repealed or modified by this act), state the office where and the date when the last filing, refiling or recording, if any, was made with respect thereto, and the filing number, if any, or book and page, if any, of recording, and further state that the security agreement, statement or notice, however denominated, in another filing office under [the New Indiana UCC] or under any statute or other law repealed or modified by [the New Indiana UCC] is still effective." Also, according to section 45(4), this "special financing statement" must comply with IND. CODE § 26-9-403(3) (Supp. 1986) pertaining to the requirements for a continuation statement, except to the extent inconsistent with the requirements described in section 45(4).

²³Compare IND. CODE § 26-1-9-403(2), (3) (Supp. 1986) with IND. CODE § 26-1-9-403(2), (3) (1982). Section 44(1), which deals more directly with this change, is discussed *infra* at notes 41-46 and accompanying text.

²⁴IND. CODE § 26-1-9-403(2) (Supp. 1986) provides that "[i]f a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against the debtor, the security interest remains perfected until termination of the insolvency proceedings and thereafter for a period of sixty (60) days or until expiration of the five (5) year period, whichever occurs later." However, the courts in applying section 9-403 of the Old Indiana UCC have reached essentially this same result. See *In re Chasely's Foods, Inc.*, 726 F.2d 303 (7th Cir. 1983) (applying Indiana law).

²⁵This provision merely makes explicit what was formerly implicit under the Old Indiana UCC. Compare IND. CODE § 26-1-9-403(3) (Supp. 1986) with IND. CODE § 26-1-9-403(3) (1982).

²⁶IND. CODE § 26-1-403(5) (Supp. 1986) provides that "[i]f a debtor is a transmitting utility (IC 26-2-9-401(5)) and a filed financing statement so states, it is effective until a termination statement is filed." Prior to the effective date of the New Indiana UCC, however, "transmitting utilities" (as defined in section 9-105(1)(n) of the New Indiana UCC) were not subject to the perfection provisions of the Indiana UCC. See IND. CODE §§ 8-1-2-1 and 8-1-5-1 (1982).

duration (without need of a continuation statement) of a real estate mortgage that is effective as a fixture filing;²⁷ and (6) a declaration that the lapse of a financing statement resulting from the failure to file a timely continuation statement will be "retroactive."²⁸

Notwithstanding its other possible functions, however, the language in this provision stating that the perfection of a transaction entered into and perfected under the Old Indiana UCC "may be continued as permitted by [the New Indiana UCC]"²⁹ should also be construed to authorize the secured party to use the New Indiana UCC continuation statement forms in connection with transactions entered into and perfected under the Old Indiana UCC.³⁰ In other words, the secured party in such

²⁷IND. CODE § 26-1-9-403(5) (Supp. 1986) provides that "[a] real estate mortgage which is effective as a fixture filing under IC 26-1-9-402(6) remains effective as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real estate." The possibility of using a real estate mortgage as a fixture filing under the New Transition Rules is the subject of section 44(4), discussed *infra* at notes 71-72 and accompanying text.

²⁸IND. CODE § 26-1-9-403(2) (Supp. 1986) provides that "[i]f the security interest becomes unperfected upon lapse, it is deemed to have been unperfected against a person who became a purchaser or lien creditor before lapse."

Under the Old Indiana UCC, it was possible to argue with conviction that a secured party whose perfection in the collateral lapsed by reason of his failure to file a timely continuation statement enjoyed perfection as against any purchaser or creditor whose interest in the collateral arose prior to the lapse. *See generally* B. CLARK, *THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* 2.14 (1980). However, under section 9-403(2) of the New Indiana UCC, a judgment lienor, an outright purchaser, or even a competing secured party whose interest in the collateral arose prior to the lapse in perfection will have a superior interest in the collateral. *Id.*

Although certainly not free from doubt, it would appear that section 46, not section 42, will determine whether the new rule stated under section 9-403(2) of the New Indiana UCC should be applied to a secured transaction entered into and perfected under the Old Indiana UCC. Section 46 generally provides that the New Indiana UCC applies to questions of priority unless the positions of the parties were "fixed" before January 1, 1986. 1985 Ind. Acts 828-30, Pub. L. No. 93-1985, § 46, *reprinted in* IND. CODE ANN. in note to § 26-1-1-105 (West Supp. 1986). Hence, if the lapse in perfection occurs on or after January 1, 1986, section 46 apparently would require that the harsh retroactive lapse rule dictated by section 9-403(2) of the New Indiana UCC be applied.

²⁹1985 Ind. Acts 828-30, Pub. L. No. 93-1985, § 42, *reprinted in* IND. CODE ANN. in note to § 26-1-1-105 (West Supp. 1986).

³⁰Even absent section 42, there should not be any question that either the new forms or the old forms may be used to continue financing statements filed under the Old Indiana UCC. Pursuant to section 9-403 of both the Old Indiana UCC and the New Indiana UCC, to be effective, a continuation statement need only be in writing, be signed by the secured party of record (or the secured party's assignee of record), identify the original financing statement by file number, and provide that the original financing statement is still effective. *See* IND. CODE § 26-1-9-403(3) (1982); IND. CODE § 26-1-9-403(3) (Supp. 1986). The only question should be whether the continuation statement is on a "non-standard" form so as to be subject to an additional filing fee. According to the Interim Rules promulgated by the Indiana Secretary of State on December 20, 1985, old forms

a transaction should be entitled to use a new UCC-3 continuation statement to continue an old UCC-1 financing statement (filed in the same filing office) and a new UCC-4 land records continuation statement to continue an old UCC-1a fixtures financing statement. On the other hand, because the operative language is "may be continued," not "shall be continued," the secured party should also be permitted to use an old UCC-3 continuation statement to continue an old UCC-1 financing statement (filed in the same filing office) and an old UCC-3a fixtures continuation statement to continue an old UCC-1a fixtures financing statement.³¹

B. Section 43

Section 43 provides that an unperfected, but validly created security interest under the Old Indiana UCC will be deemed to be properly perfected under the New Indiana UCC effective January 1, 1986, if the New Indiana UCC either permits perfection without filing or authorizes filing in the office where a prior ineffective filing was made.³² In other words, this section can have the effect of "curing," as of January 1, 1986, a multitude of perfection sins committed by the secured party prior to that date.

Consider, for example, the secured party who relied upon the automatic perfection of his purchase money security interest in consumer goods under the Old Indiana UCC, only later to learn that the consumer goods that he sold to the debtor had become fixtures. Under the Old Indiana UCC, a secured party's entitlement to automatic perfection for purchase money security interests in consumer goods was lost if the goods became fixtures.³³ Under the New Indiana UCC, however, it is clear that automatic perfection does operate under these facts, at least as against non-real estate parties.³⁴ Hence, pursuant to section 43, a secured party who erroneously relied on automatic perfection under the Old Indiana UCC will enjoy the benefits of automatic perfection under the New Indiana UCC (with respect to non-real estate parties) as of

formerly approved by the Secretary of State are acceptable and will not be considered to be "irregular filings." See *UCC Interim Rules*, *supra* note 18, at 6.

³¹See *supra* note 30. However, the (final) *Rules for the Administration of the Uniform Commercial Code* (effective September 1, 1986) issued by the Indiana Secretary of State [hereinafter, the *UCC Final Rules*] suggest that in the case of a fixture filing made prior to January 1, 1986, it may be necessary to use a new UCC-4 land records continuation statement so as to continue the fixture filing in the real estate (mortgage) records. See *infra* note 61.

³²1985 Ind. Acts 828-30, Pub. L. No. 93-1985 § 43, *reprinted in* IND. CODE ANN. in note to § 26-1-1-105 (West Supp. 1986).

³³IND. CODE § 26-1-9-302(1)(d) (1982).

³⁴IND. CODE § 26-1-9-302(1)(d) (Supp. 1986).

January 1, 1986,³⁵ without having lifted a hand and, perhaps, in complete oblivion of the original perfection blunder.

A similar result should be achieved by section 43 in connection with the perfection of proceeds.³⁶ Under the Old Indiana UCC, if a secured party was granted a security interest in proceeds but failed to check the "proceeds box" on the UCC-1, he had no perfected interest in proceeds after ten days from the receipt of the proceeds by the debtor.³⁷ The New Indiana UCC, however, changes this result in two important circumstances.

Under the New Indiana UCC, the secured party will enjoy an automatic and continuously perfected security interest in proceeds, even though the financing statement filed in connection with the original collateral is "silent" as to proceeds,³⁸ if: (1) the proceeds are identifiable cash proceeds;³⁹ or (2) the financing statement is filed in the same filing office(s) where an original security interest in the type of property constituting the proceeds should be filed (and the proceeds are not acquired with cash proceeds).⁴⁰ By operation of section 43 in these two circumstances, an unperfected security interest in proceeds under the Old Indiana UCC will automatically be transformed into a properly perfected security interest in proceeds as of January 1, 1986.

C. Section 44

Section 44(1) contains the general rule that a financing statement or a continuation statement filed prior to January 1, 1986 (and which has not lapsed prior to that date) remains effective for the period provided under the Old Indiana UCC, but not less than five years.⁴¹ Under the

³⁵See Reporters' Discussion on 1972 changes to U.C.C. § 11-104 (1972).

³⁶*Cf. In re S & Z Int'l Management, Inc.*, 10 Bankr. 580 (Bankr. S.D. Fla. 1981) (omission of UCC § 11-104 by Florida legislature showed intent not to automatically perfect previously unperfected pre-amendment security interest in proceeds).

³⁷IND. CODE § 26-1-9-306(3)(a) (1982).

³⁸Pursuant to section 9-203(3) of the New Indiana UCC, the secured party is granted automatically a security interest in proceeds, unless the security agreement provides to the contrary. IND. CODE § 26-1-9-203(3) (Supp. 1986). Under the Old Indiana UCC, however, a reference to proceeds in the security agreement arguably was necessary for the secured party to have any claim to proceeds. *Cf. In re S & Z Int'l Management, Inc.*, 10 Bankr. at 584 (referring to an inconsistency between section 9-203(1)(b) and section 9-306(2) of the 1962 Official Text).

³⁹IND. CODE § 26-1-9-306(3)(b) (Supp. 1986).

⁴⁰IND. CODE § 26-1-9-306(3)(a) (Supp. 1986). If the proceeds are acquired with cash proceeds, the description of the collateral in the financing must indicate the types of property constituting the proceeds. *Id.*

⁴¹Notwithstanding this seemingly clear rule contained in section 44(1), the recently effective *UCC Final Rules*, *supra* note 31, issued by the Indiana Secretary of State provide in pertinent part: "All fixtures filings made in the fixture index prior to January 1, 1986

Old Indiana UCC, a financing statement that stated a maturity date of the obligation secured of five years or less was effective until the maturity date disclosed plus sixty days.⁴² All other financing statements were effective for five years from the date of filing.⁴³ Section 44(1) adopts the rule under the New Indiana UCC (which places a uniform five year duration on continuation and financing statements)⁴⁴ and applies it to filings made before January 1, 1986.

This automatic extension of certain financing statements mandated by section 44(1) may, of course, work to the detriment of a secured party who is not aware of the extension. For example, a secured party might erroneously file a continuation statement shortly before the pre-extension maturity of a financing statement stating an (obligation) maturity date of three years and, therefore, neglect to file a continuation statement within six months prior to the newly-extended maturity date of the financing statement (which under section 44(1) is five years from the date of filing).⁴⁵ In that case, the secured party would be holding an unperfected security interest after five years from the date of filing of the financing statement.⁴⁶

Section 44(2) provides that if a financing statement or continuation statement filed before January 1, 1986, purports to cover collateral acquired by the debtor after December 31, 1985, perfection as to such after-acquired collateral will be effective only if the filing or filings are in the office or offices that would be appropriate to perfect the security interests in the new collateral under the New Indiana UCC.⁴⁷ The rea-

will be effective until they expire under the prior law or until December 31, 1988, *whichever comes first. . .*" *Id.* at 13 (emphasis in original). Simply stated, even though section 44(1) unambiguously provides that the effectiveness of a pre-1986 continuation statement or financing statement will last for a full five years, the fixtures financing statement itself will be purged from the "public record" after December 31, 1988, whether or not the five years have elapsed. If the secured party wants to prevent this pre-maturity removal of his fixtures financing statement after December 31, 1988, in this situation, it appears he must file an appropriate continuation statement in the real estate (mortgage) records during the six-month period preceding December 31, 1988. *Id.* at 13, 27-28.

As legally unjustified as the above administrative rule appears to be, secured parties and attorneys representing secured parties can at least take some solace in the fact that the Secretary of State apparently has abandoned an even more unjustified interim administrative rule providing that all "[f]ilings made under the 1962 Act up until December 31, 1985, will remain effective until they expire under the old law or until December 31, 1988, whichever comes first." *See UCC Interim Rules, supra* note 18, at 4.

⁴²IND. CODE § 26-1-9-403(2) (1982).

⁴³*Id.*

⁴⁴*See* IND. CODE § 26-1-9-403(2), (3) (Supp. 1986).

⁴⁵*Id.* § 26-1-9-403(3).

⁴⁶*See, e.g., In re Callahan Motors, Inc.*, 538 F.2d 76 (3d Cir.), *cert. denied sub nom. Sterns v. Princeton Bank & Trust Co.*, 429 U.S. 987 (1976).

⁴⁷1985 Ind. Acts 828-30, Pub. L. No. 93-1985, § 44(2), *reprinted in* IND. CODE ANN. in note to § 26-1-1-105 (West Supp. 1986).

sonable inferences from section 44(2) are that: (1) all existing financing statements and continuation statements on the effective date of the New Indiana UCC will remain effective for the remainder of the five years described in section 44(1) as to existing collateral, even though the appropriate place for filing may have changed;⁴⁸ and (2) the existing filings will also apply to collateral acquired after the effective date of the New Indiana UCC, unless the appropriate filing place is different under the New Indiana UCC.⁴⁹ Perhaps the proper application of section 44(2) can be best illustrated by the following hypothetical:

Facts: On January 1, 1984, Debtor, a domestic farming corporation, grants to Creditor *A* a non-purchase money security interest in "all its equipment, whether now owned or hereafter acquired." Creditor *A* properly perfects its security interest in such collateral on January 2, 1984, pursuant to the Old Indiana UCC, by filing an appropriate financing statement with the Indiana Secretary of State.⁵⁰ On January 1, 1985, Debtor grants to Creditor *B* a non-purchase money security interest in the same collateral. On January 2, 1985, Creditor *B* properly perfects his security interest in such collateral by filing an appropriate financing statement with the Indiana Secretary of State. However, because of an ambiguity in the Old Indiana UCC's perfection requirements, Creditor *B* also files with the Recorder's Office in the county where Debtor resides and has its principal place of business.⁵¹ On January 1, 1986, Debtor acquires \$1 million in new farm equipment. Assuming that neither creditor takes any additional steps to perfect, which creditor has priority with respect to the after-acquired collateral?

Pursuant to the Old Indiana UCC's priority and perfection provisions, Creditor *A* would, of course, enjoy priority over Creditor *B* both as to the existing collateral and as to the newly-acquired collateral, because Creditor *A* filed first.⁵² By contrast, under the New Indiana UCC, Creditor *B* would enjoy priority over Creditor *A* both as to the existing collateral and as to the newly-acquired collateral (unless Creditor *B* had actual knowledge of the contents of Creditor *A*'s financing statement), because only Creditor *B* would be deemed to be properly

⁴⁸See Reporter's Discussion on 1972 Changes to U.C.C. § 11-105 (1972).

⁴⁹See *id.*

⁵⁰See *Second National Bank of Danville v. Massey-Ferguson Credit Corp.*, 470 N.E.2d 916 (Ind. Ct. App. 1985) (interpreting section 9-401 of the Old Indiana UCC).

⁵¹See Compiler's Note to IND. CODE § 26-1-9-401 (Burns 1974) (suggesting that the Indiana Legislature unintentionally repealed certain language in section 9-401 that, in this case, would require filing both locally and centrally).

⁵²See IND. CODE § 26-1-9-312(5)(a) (1982).

perfected.⁵³ The New Indiana UCC clearly provides that in order for a secured party to be perfected as to farm equipment owned by a domestic (farming) corporation, it is necessary to file centrally with the Secretary of State and locally with the Recorder's Office in the county where the debtor has its residence.⁵⁴ Only Creditor *B* has satisfied this dual filing requirement.

By operation of section 44(2), however, a compromise is struck. Creditor *A* will enjoy priority over Creditor *B* as to the collateral in existence on December 31, 1985.⁵⁵ On the other hand, Creditor *B* will enjoy priority over Creditor *A* as to the collateral acquired on January 1, 1986.⁵⁶ If Creditor *A* had wanted to maintain his relative priority with respect to the collateral acquired after December 31, 1985, he should have anticipated the change in filing offices under the New Code and filed a "special financing statement" with the Recorder's Office in the county where Debtor had its residence on or before December 31, 1985.⁵⁷

Section 44(3) contains the general rule that a financing statement or continuation statement that is filed prior to January 1, 1986, "may be continued . . . as permitted by [the New Indiana UCC];"⁵⁸ however, an express exception is made to this general rule in a case where the place for filing has changed under the New Indiana UCC. According to this exception, "[i]f [the New Indiana UCC] requires a filing in an office where there was no previous financing statement, a new financing statement conforming to Section 45 [of the New Transition Rules] shall be filed in that office."⁵⁹ In other words, a "special financing statement" (rather than a continuation statement) must be filed in the new filing office to continue perfection.

Section 44(3), like the perfection continuation provision in section 42, appears to lend support to the general proposition that a secured party may use New Indiana UCC continuation forms to continue the perfection of transactions entered into and perfected under the Old Indiana UCC. Nonetheless, a possible legal argument exists under this section that neither a new UCC-4 land records continuation statement nor an old UCC-3a fixtures continuation statement may be used to continue an old UCC-1a fixtures financing statement. This argument is based on the premise that the New Indiana UCC requires a financing statement covering a security interest in fixtures to be filed in the real estate records,

⁵³See IND. CODE §§ 26-1-312(5)(a), 26-1-9-401(1)(a), (2) (Supp. 1986).

⁵⁴See *id.* § 26-1-9-312(5)(a).

⁵⁵See *supra* note 48 and accompanying text.

⁵⁶See *supra* note 49 and accompanying text.

⁵⁷See, e.g., *In re Painter*, 39 Bankr. 544, 548 (Bankr. D.S.D. 1984).

⁵⁸1985 Ind. Acts 828-30, Pub. L. No. 93-1985, § 44(3), *reprinted in* IND. CODE ANN. in note to § 26-1-1-105 (West Supp. 1986).

⁵⁹*Id.*

which arguably is a different “office” than the “office” where the original fixtures filing was made. In other words, it might be asserted that a “special” UCC-2 land records *financing statement* containing a legal description of the real estate should be filed in the real estate records to continue an old UCC-1a filed in the old fixtures index.⁶⁰

It is submitted that such an argument is totally without merit for the simple reason that both the real estate records and the old fixtures index are, in fact, located in the same “office”—the County Recorder’s Office. If the drafters of this section had meant to say “index” or “file” (rather than “office”), they would have said so.⁶¹

A much more troublesome interpretive problem arises under this section with respect to the continuation of perfection in watercraft. Under the Old Indiana UCC, a security interest in watercraft was generally perfected by the filing of an appropriate financing statement.⁶² However, pursuant to the New Indiana UCC, a security interest in watercraft (other than watercraft that is inventory held for sale by a person in the business of selling goods of that kind) generally must be perfected by notation of the secured party’s lien on the certificate of title issued by the Department of Natural Resources.⁶³ The obvious question, of course,

⁶⁰See section 45(4) quoted in pertinent part *supra* at note 22 for the required contents of the “special financing statement” mandated by section 44(3).

⁶¹Notwithstanding the obvious lack of merit to this argument, the recently effective *UCC Final Rules* promulgated by the Indiana Secretary of State provide that: “[i]n no event shall a fixture filing made prior to January 1, 1986, be effective after December 31, 1988 unless re-filed or continued in the real estate (mortgage) records.” See *UCC Final Rules*, *supra* note 31, at 13 (emphasis in original). The emphasized language, of course, suggests that a “special financing statement” may be necessary to effectuate a transfer from fixtures index to the mortgage records index. Based upon a telephone conference with Beth Adams, the Director of the Uniform Commercial Code Division of the Indiana Secretary of State’s Office, it appears that the appropriate continuation statement form to effectuate this transfer from the fixtures index to the mortgage records index is a new UCC-4 land records continuation statement. Telephone interview of September 17, 1986.

⁶²See IND. CODE § 26-1-9-302(1) (1982). Automatic perfection was available as well in the case of a purchase money security interest in watercraft, if the debtor’s use of the collateral was primarily for a personal, family, or household purpose, see *id.* §§ 26-1-9-109(1), 26-1-9-302(1)(d), but this was somewhat risky, because a buyer without actual knowledge of the security interest who gave value to the debtor was entitled to take the watercraft free of such security interest. See *id.* § 26-1-9-307(2). Finally, it was possible (although certainly not practical) for the secured party to perfect a security interest in watercraft by taking actual physical possession of the collateral. See *id.* § 26-1-9-302(1)(a).

⁶³See IND. CODE § 26-1-9-302(3)(b) (Supp. 1986); see also *United Leaseshares Inc. v. Citizens Bank & Trust*, 470 N.E.2d 1383 (Ind. Ct. App. 1984) (indicating that in the case of vehicles subject to titling, the lien notation must be by an official or employee of the Bureau of Motor Vehicles). One reading of section 9-302 of the New Indiana UCC, however, suggests that it may be possible to make use of automatic perfection in

is: what impact, if any, will this change in perfection procedure have on transactions entered into and perfected by the filing of a financing statement pursuant to the Old Indiana UCC?⁶⁴

First, pursuant to section 42, the secured party's lien on the watercraft remains perfected until it lapses under either section 44 or section 45. With respect to sections 44 and 45, only section 44(1) contains a lapse rule applicable to the type of transaction under discussion. It provides that a financing statement or a continuation statement filed before January 1, 1986, which has not lapsed before that date, remains effective for five years from the date of filing.⁶⁵

If perfection will lapse five years after filing, what, if anything, can be done to continue perfection after that date? According to section 42, the security interest "may be continued as permitted by [the New Indiana UCC] except as stated in Section 44"⁶⁶ Unfortunately, the New Indiana UCC does not permit the continuation of a perfected security

the case of a purchase money security interest in a watercraft if the collateral is acquired primarily for a personal, family, or household purpose. *Compare id.* § 26-1-9-302(1)(d), (3)(b) (perfection of motor vehicles) *with id.* § 26-1-9-302(1)(d), (3)(b) (perfection of watercraft). Nevertheless, IND. CODE § 14-1-4-21 (Supp. 1986) appears to preclude automatic perfection by stating that "[a] security agreement covering a security interest in a watercraft that is not inventory held for sale can be perfected only by indication of the security interest on the certificate of title . . . by the [Department of Natural Resources]." For the same reason, it appears that the secured party may not perfect a security interest in non-inventory watercraft by taking actual physical possession of the collateral.

It should be noted that the meaning of IND. CODE § 14-1-4-21 (Supp. 1986) is somewhat "muddled" by another section of chapter 4 of title 14, which states that the chapter on "watercraft certificates of title" does not apply to "[w]atercraft other than motorboats unless the owner voluntarily wishes to become subject to this chapter." IND. CODE § 14-1-4-2(4) (Supp. 1986). In short, it is unclear how a secured party may safely perfect a security interest in a watercraft other than a motorboat if the owner does not elect to become subject to this chapter (by obtaining a certificate of title for the watercraft). Because the owner presumably could acquire a certificate of title on the boat at any subsequent time and thereby elect to be subject to the chapter, a person pondering whether to grant credit based upon a security interest in a watercraft other than a motorboat should insist that the debtor obtain a certificate of title and have the security interest duly noted thereon.

⁶⁴For the purposes of the analysis contained in the text, it will be assumed that the watercraft at issue is a motorboat and that the security interest created did not qualify for automatic perfection pursuant to the Old Indiana UCC. *See supra* notes 62 & 63. However, even assuming that the security interest did qualify for automatic perfection under the Old Indiana UCC, it appears that section 45(1) of the New Transition Rules would operate to terminate the automatic perfection as of December 31, 1988, unless prior to that date, the secured party had his lien noted on the certificate of title by the Department of Natural Resources. *See infra* notes 76-79 and accompanying text for further discussion of section 45(1).

⁶⁵1985 Ind. Acts 828-30, Pub. L. No. 93-1985, § 44(1), *reprinted in* IND. CODE ANN. in note to § 26-1-1-105 (West Supp. 1986).

⁶⁶*Id.* § 42.

interest in (non-inventory) watercraft to be accomplished by filing a continuation statement. As previously noted, the secured party must have his lien noted on the watercraft's certificate of title by the Department of Natural Resources for perfection to be continued under the New Indiana UCC.

Section 42, of course, contains a cross-reference to section 44. Well then, does section 44 add anything to the perfection continuation analysis? Section 44(3), the only subsection of section 44 to which the "except as stated in Section 44 . . ." language of section 42 could refer, provides that a financing statement or continuation statement filed under the Old Indiana UCC "may be continued by a continuation statement as permitted by [the New Indiana UCC] except that if [the New Indiana UCC] requires a filing in an office where there was no previous financing statement, a new financing statement conforming to Section 45 . . . shall be filed in that office."⁶⁷

Again, the New Indiana UCC does not permit the continuation of a perfected security interest in (non-inventory) watercraft to be accomplished by the filing of a continuation statement. Moreover, the exception contained in section 44(3) also does not appear to apply. Arguably, the notation of the secured party's lien on the certificate of title is not a "filing" within the meaning of section 44(3).⁶⁸ And, in any event, the filing of a section 45 financing statement (i.e., a "special financing statement") with the Department of Natural Resources would in all likelihood be an exercise in futility. That agency simply is not equipped to receive or maintain an index for UCC financing statements or continuation statements.

The bottom-line appears to be that sometime prior to the perfection lapse under section 44(1), the secured party must present a properly completed application for certificate of title, together with the prescribed fee, to the Department of Natural Resources and have the lien noted on the face of the title.⁶⁹ Unfortunately, the title application forms

⁶⁷*Id.* § 44(3).

⁶⁸*Id.*

⁶⁹*See* IND. CODE § 14-1-4-21(b) (Supp. 1986). Arguably, the debtor-owner is under a statutory duty to obtain a certificate of title as of January 1, 1986, if the watercraft is subject to a security interest on that date. *See* IND. CODE § 14-1-4-4 (Supp. 1986) ("[A] watercraft acquired by the owner before January 1, 1986, is not required to have a certificate of title until it is mortgaged, sold, or transferred, or a lien is placed on the watercraft."). However, there appears to be no corresponding statutory duty for the debtor-owner to have the secured party's lien noted on the certificate of title once it is obtained. Assuming the statutory duty exists, the debtor-owner would be guilty of a Class C misdemeanor if he should fail to obtain a certificate of title. *See* IND. CODE § 14-1-4-22(a) (Supp. 1986). Moreover, if the debtor-owner should obtain the requisite certificate of title but fail to have the second party's lien noted thereon, he presumably would be subject to the penalties of perjury. *See UCC Final Rules, supra* note 31, at 33.

presently being used contemplate that the debtor, not the secured party, must execute the application for certificate of title.⁷⁰ Hence, if the debtor should refuse to execute the title application form, the secured party may well be "stuck" with an unperfected security interest and be at the mercy of other potential claimants to the watercraft, including judgment lien creditors and the debtor's trustee in bankruptcy.

Section 44(4) allows a real estate mortgage recorded prior to January 1, 1986, to serve as a fixtures filing of goods described in such mortgage, if the mortgage satisfies the provision pertaining to such matters under the New Indiana UCC.⁷¹ For some unknown reason, however, this provision did not become operative until July 1, 1986,⁷² six months after the effective date of the new Indiana UCC. This delay in the effective date, of course, renders the protection afforded by section 44(4) potentially meaningless. Simply stated, a fixtures secured party relying on this provision (without a back-up regular fixture financing statement) may well find that another creditor has obtained priority during the six-month "gap period."

D. Section 45

Section 45 attempts to address questions of when re-perfection should be undertaken in various circumstances and what kind of document should be used for the re-perfection. Section 45(1) provides that a security interest perfected or having priority as of December 31, 1985, without any filing or recording, must be re-perfected under the New Indiana UCC if the New Indiana UCC requires the filing of a financing statement for perfection or priority.⁷³ In this situation, however, the secured party

⁷⁰This result appears to be supported by statutory requirements. See IND. CODE §§ 14-1-4-8(b), -9 (Supp. 1986).

⁷¹Section 9-402(6) of the New Indiana UCC states as follows:

(6) A mortgage is effective as a financing statement filed as a fixture filing from the date of its recording if:

(a) The goods are described in the mortgage by item or type; and
(b) The goods are or are to become fixtures related to the real estate described in the mortgage; and
(c) The mortgage complies with the requirements for a financing statement in this section other than a recital that it is to be filed in the real estate records; and
(d) The mortgage is duly recorded.

No fee with reference to the financing statement is required other than the regular recording and satisfaction fees with respect to the mortgage. IND. CODE § 26-1-9-402(6) (Supp. 1986).

⁷²U.C.C. § 11-105(4) (1972) provides that "the mortgage shall be deemed effective as a fixture filing as to such goods under subsection (6) of Section 9-402 of the [new U.C.C.] on the effective date of [new U.C.C.]."

⁷³1985 Ind. Acts 828-30, Pub. L. No. 93-1985, § 45(1), *reprinted in* IND. CODE ANN. in note to § 26-1-1-105 (West Supp. 1986).

is granted until December 31, 1988, to file the required financing statement or to perfect the security by another method (typically, by taking possession of the collateral).⁷⁴ In the meantime, the secured party's perfection and/or priority under the Old Indiana UCC is continued. If re-perfection is to be accomplished by filing a financing statement, section 45(4) indicates that the filing should not be made until within six months before the security interest would otherwise lapse (i.e., six months before December 31, 1988).⁷⁵ Such financing statement may be signed by either the debtor or the secured party and must identify the security agreement and, presumably, must also state that the security agreement is still effective.⁷⁶

The primary secured transactions to which section 45(1) is directed are those involving purchase money security interests in farm equipment having a purchase price of \$500.00 or less.⁷⁷ Under the Old Indiana UCC, security interests in such collateral were perfected automatically without filing.⁷⁸ The New Code, however, eliminates this particular automatic perfection provision and requires the filing of an appropriate financing statement for perfection.⁷⁹ Section 45(1) allows the secured party in this case to rely on automatic perfection for three full years, during which time the secured party must take appropriate action to perfect under the New Indiana UCC.⁸⁰

Section 45(2) provides that a security interest perfected prior to January 1, 1986, under a law, other than the Old Indiana UCC, that required no filing, refiling, or recording to continue its perfection will continue perfected until and lapse on December 31, 1988, unless: (1) a "special financing statement" complying with section 45(4) is filed within six months before December 31, 1988; (2) the security interest is perfected otherwise than by filing; or (3) the New Indiana UCC expressly defers to the other law.⁸¹ The only secured transactions that appear to be covered by section 45(2) are those transactions subject to Indiana's public utility mortgage statute.⁸² Prior to the effective date of the New Indiana

⁷⁴*Id.*

⁷⁵*Id.* § 45(4).

⁷⁶See section 45(4) quoted in pertinent part in note 22, *supra*, for the required contents of the special financing statement mandated by section 45(1).

⁷⁷See Reporters' Discussion on 1972 changes to U.C.C. § 11-106(1) (1972). Section 45(1) may also cover purchase money security interests in watercraft if such collateral was acquired primarily for a personal, family, or household purpose. See *supra* notes 62-64 and accompanying text.

⁷⁸IND. CODE § 26-1-9-302(1)(c) (1982).

⁷⁹See Reasons for 1972 Change accompanying U.C.C. § 9-302 (1972); see also IND. CODE § 26-1-9-302 (Supp. 1986).

⁸⁰1985 Ind. Acts 828-30, Pub. L. No. 93-1985, § 45(1), *reprinted in* IND. CODE ANN. in note to § 26-1-1-105 (West Supp. 1986).

⁸¹*Id.* § 45(2).

⁸²See generally Reporters' Discussion on 1972 changes to U.C.C. § 11-106(2) (1972).

UCC, Indiana Code section 8-1-5-1 generally provided that in order to have a valid and continuously perfected lien on the real and personal property, including the after-acquired property, of a public utility, the mortgagee had only to record a mortgage describing the property in the real estate records in the county or counties where the property covered by the mortgage was located.⁸³ Effective January 1, 1986, Indiana Code section 8-1-5-1 was amended to provide that, in addition to recording the mortgage in the appropriate county, it is necessary to comply with the filing requirements of the New Indiana UCC in order to perfect a security interest in the collateral of a public utility that is covered by the New Indiana UCC.⁸⁴ Accordingly, pursuant to section 45(2), the public utility mortgagee will enjoy continued perfection for all UCC-covered collateral, including after-acquired collateral,⁸⁵ through December 31, 1988. After December 31, 1988, perfection will lapse as to the UCC-covered collateral unless, prior to that date, appropriate and timely perfection of such collateral is accomplished pursuant to section 45 and the New Indiana UCC. With respect to UCC-covered collateral that properly may be perfected under the New Indiana UCC by filing a financing statement, the public utility mortgagee should file within six months prior to December 31, 1988, a "special financing statement" complying with section 45(4) in the appropriate filing office or offices.⁸⁶ However, if filing a financing statement is not a proper method of perfection under the New Indiana UCC, the mortgagee must comply with the appropriate perfection procedure mandated by the New Indiana UCC sometime prior to December 31, 1988, but not necessarily within the six-month period preceding December 31, 1988. For example, in the case of money or instruments, the mortgagee or his agent must take

⁸³IND. CODE § 8-1-5-1 (1982).

⁸⁴IND. CODE § 8-1-5-1(b) (Supp. 1986).

⁸⁵Section 44(2) states the rule that "[w]ith respect to any collateral acquired by the debtor after December 31, 1985, any effective financing statement or continuation statement described in this section applies only if the filing or filings are in the office or offices that would be appropriate to perfect the security interests in the new collateral." 1985 Ind. Acts 828-30, Pub. L. No. 93-1985, § 44(2), reprinted in IND. CODE ANN. in note to § 26-1-1-105 (West Supp. 1986) (emphasis supplied). Although the filing required under the New Indiana UCC with respect to public utility mortgages may be in a different filing office (generally, in the Secretary of State's office), the only effective financing statements and continuation statements described in section 44 are those which were filed pursuant to the Old Indiana UCC; consequently, public utility mortgages recorded under IND. CODE § 8-1-5-1 should not be governed by section 44(2) as to after-acquired property.

⁸⁶If the debtor is a "transmitting utility" as defined in IND. CODE § 26-1-9-105(1)(n) (Supp. 1986), the appropriate filing office is with the Office of the Indiana Secretary of State. See IND. CODE § 26-1-9-402(5) (Supp. 1986); see also Official Comments to U.C.C. §§ 9-105(1)(n), -401(5), -403(6) (1972). Multiple filings may be necessary, however, in the case of a "public utility" as defined in IND. CODE § 8-1-2-1 (Supp. 1986) which is not a "transmitting utility." See generally IND. CODE § 26-1-9-401(1) (Supp. 1986).

actual physical possession of the collateral,⁸⁷ and in the case of goods subject to a certificate of title law, the mortgagee must succeed in having his lien noted on the title by the appropriate government agency.⁸⁸

Section 45(3) purports to govern the continuation of perfection of security interests perfected under a law repealed by the New Indiana UCC that requires further filing, refileing, or recording to continue perfection. This provision appears to be superfluous because the New Indiana UCC contains no such repealer.⁸⁹

E. Section 46

Section 46 addresses questions of priority. The "general rule" is that the New Indiana UCC applies to questions of priority unless the rights of the parties were fixed under the Old Indiana UCC. The section contains two separate sentences. The first sentence provides that "[e]xcept as otherwise provided in Sections 42, 43, 44, and 45 [the Old Indiana UCC] applies to questions of priority if the positions of the parties were fixed before January 1, 1986."⁹⁰ The second sentence of section 46 states that "[i]n all other cases, questions of priority will be determined by [the New Indiana UCC]."⁹¹ Unfortunately, these two seemingly very simple sentences virtually defy a meaningful and consistent interpretation.

Perhaps the most perplexing interpretive problem regarding section 46 is determining the meaning of the "[e]xcept as otherwise provided" language in the first sentence. The "plain meaning" of this sentence would appear to be that the Old Indiana UCC governs priority disputes between competing claimants whose positions in the collateral are fixed before January 1, 1986, unless, under the other transition rules (sections 42, 43, 44, and 45), a different result is dictated. The question then becomes: what must these other transition rules provide in order for the Old Indiana UCC not to govern the priority dispute?

For example, must the other transition rules expressly state that the Old Indiana UCC will not govern, or that the New Indiana UCC will govern, a particular priority dispute? If that is the case, there simply are no other transition rules that would satisfy this standard. Consequently, the "[e]xcept as otherwise provided" language would be rendered totally meaningless.

⁸⁷See IND. CODE § 26-1-9-305 (Supp. 1986).

⁸⁸See Reporters' Discussion on 1972 changes to U.C.C. § 11-106(2) (1972).

⁸⁹This subsection in the model transition rules was intended to cover "the case (if any) where a prior transmitting utility provision outside the Code had a filing of limited duration." See Reporters' Discussion on U.C.C. § 11-106(3) (1972). Indiana had no such transmitting utility provision outside the Old Indiana UCC.

⁹⁰1985 Ind. Acts 828-30, Pub. L. No. 93-1985, § 46, reprinted in IND. CODE ANN. in note to § 26-1-1-105 (West Supp. 1986).

⁹¹*Id.*

What about a somewhat lower standard? What if the requisite standard is that the other transition rules must express a particular priority rule (as distinguished from a particular perfection continuation rule), which, under the circumstances, is contrary to the general rule that the Old Indiana UCC governs priority disputes between parties whose positions are fixed prior to January 1, 1986? Under this standard, only section 45(1) expressly refers to priority (as distinct from perfection continuation), and it refers to the continuation of the priority which existed on December 31, 1985. Thus once again, the "[e]xcept as otherwise provided" language would appear to have no meaning.

Dropping then to the seemingly lowest possible standard: what if the requisite standard is merely that the other transition rules must refer to the continuation of perfection under the New Indiana UCC? In other words, the first sentence of section 46 should be interpreted to mean that if a particular transition rule operates to continue the perfection of a security interest under the New Indiana UCC, the rule that the Old Indiana UCC governs priority disputes between parties whose positions are fixed prior to January 1, 1986, does not apply. Or, stated another way, continuation of perfection by operation of the New Transition Rules means that the position of the party holding such a security interest will be deemed to be fixed on or after January 1, 1986. Under this interpretation, the New Indiana UCC would govern the priority dispute if perfection is continued under the New Transition Rules (pursuant to the second sentence of section 46). Although this interpretation would give real meaning to the "[e]xcept as otherwise provided" language, it also would produce the "world's worst" transition policy. Consider the following hypothetical:

Facts: In late 1984, Debtor executes a document designated as a construction mortgage in favor of Creditor *A* in connection with the construction of a large office building on Blackacre. Creditor *A* properly records his mortgage on Blackacre prior to commencing any work. On January 1, 1985, before the construction of the office building is completed, Creditor *B* agrees to supply on credit to Debtor certain goods which are to become fixtures on Blackacre. Creditor *B* wisely asks Debtor to execute a security agreement covering the goods and immediately perfects the security interest so created by filing both a UCC-1 and a UCC-1a before the goods are delivered to Debtor. Subsequently, on January 1, 1986, the New Indiana UCC becomes effective. Pursuant to sections 42 and 44(1) of the New Transition Rules, the perfection of Creditor *B*'s security interest in the goods is continued beyond the January 1, 1986, effective date of the New Indiana UCC. Which of Creditor *A* or Creditor *B* has priority with respect to the goods sold to Debtor by Creditor *B*?

Pursuant to section 9-313(2) of the Old Indiana UCC, Creditor *B* clearly was entitled to priority over Creditor *A* as to the fixtures,⁹² and Creditor *B* may well have relied on this priority when he extended credit to Debtor. Under section 9-313(6) of the New Indiana UCC, however, Creditor *A* would be entitled to priority over Creditor *B*, because of the New Indiana UCC's preference of construction mortgagees over parties holding purchase money security interests in fixtures.⁹³

If the first sentence of section 46 were to be interpreted in the manner suggested above, the New Indiana UCC would control the priority dispute (under the second sentence), and Creditor *B* would "lose out" to Creditor *A*, even though Creditor *B* relied to his detriment on the priority rules under the Old Indiana UCC, and even though the attachment and perfection of the respective interests of the parties in the goods were accomplished before the New Indiana UCC was enacted. Can this be the intended result under section 46? Certainly not!⁹⁴

It appears then, that the *only* interpretation of the first sentence of section 46 that gives some meaning to the "[e]xcept as otherwise provided" language but that does not destroy the reliance interests of parties who perfected under the Old Indiana UCC is to read the "except as otherwise provided" language as modifying the clause "if the positions of the parties were fixed before January 1, 1986." In other words, the first sentence of section 46 should be construed to mean: if the positions of the parties are fixed before January 1, 1986, notwithstanding any continuation of perfection or priority under sections 42, 43, 44, and 45, the Old Indiana UCC governs any questions of priority. Although admittedly, this is a very strained interpretation of the existing language, it at least will not work an injustice on innocent parties. Whether or not this interpretation is the "correct" one is, of course, anybody's guess.

Another significant ambiguity in section 46 is what is meant by the parties having their positions "fixed." Fortunately, several court decisions from other jurisdictions have addressed this issue under a similar or identical transition rule. Although, to date, the courts have refrained from providing a general formulation, there are several factual contexts

⁹²See IND. CODE § 26-1-9-313(2), (4) (1982).

⁹³See IND. CODE § 26-1-9-313(4)(a), (6) (Supp. 1986).

⁹⁴In addition to being grossly inequitable, IND. CODE § 26-1-1-103 (Supp. 1986), this result appears to be subject to constitutional challenge as violating the due process requirements of the fifth amendment. *Cf.* United States v. Security Indus. Bank, 459 U.S. 70 (1982) (discussing the constitutionality of the retroactive application of section 522(f) of the Bankruptcy Code, but relying on non-constitutional grounds for the decision). Moreover, this result runs counter to section 42 which purports to preserve the sanctity and validity of security agreements as against third parties. See IND. CODE § 26-1-9-201 (1982).

in which the meaning of this language has been addressed. For example, the positions of the parties have been deemed to be fixed prior to the effective date of the New UCC if the security interests of each of the claimants were both acquired and perfected before that date.⁹⁵ It has also been held that if one of the claimants to the collateral is the debtor's trustee in bankruptcy, and the petition is filed after the effective date of the New UCC, the priority dispute will be resolved under the New UCC.⁹⁶ Conversely, it has been held that if the bankruptcy petition is filed by or against the debtor before the effective date of the New UCC, the positions of a (perfected or unperfected) secured party claimant to the collateral and the debtor's trustee in bankruptcy should be deemed to be fixed as of the bankruptcy petition date and, hence, prior to the effective date of the New UCC.⁹⁷ Finally, in the case of competing secured parties to after-acquired inventory, it has been held that the position of the parties as to each item of inventory is fixed only when the debtor received possession, because prior to such time the relative priorities as to the item cannot be determined.⁹⁸

Beyond these situations, however, the determination of what it means for the positions of the parties to be fixed becomes increasingly "fuzzy." This is especially true when there are three, rather than two, claimants involved in the priority dispute. Consider the hypothetical priority dispute between the construction mortgagee and purchase money fixtures secured party described above, with the following additional facts:

Additional Facts: On January 2, 1986, Creditor *C* extends credit to Debtor for services rendered and takes back a valid security interest in "all fixtures of Debtor located on Blackacre." On the same day, Creditor *C* perfects his security interest in the fixtures by filing a UCC-2 land records financing statement with the Recorder's Office in the county where Blackacre is located. Now, which of Creditor *A*, Creditor *B*, and Creditor *C* takes priority as to the goods sold to Debtor by Creditor *B*?

As between Creditor *A* and Creditor *B*, the positions of the parties should be deemed to be fixed before January 1, 1986, because the interests of each in the fixtures attached and were perfected (or recorded) before January 1, 1986.⁹⁹ This explanation should mean that the Old

⁹⁵See, e.g., *In re Perrotto Refrigeration, Inc.*, 38 Bankr. 284 (Bankr. E.D. Pa. 1984); *Citizens Sav. Bank v. Sac City State Bank*, 315 N.W.2d 20 (Iowa 1982).

⁹⁶See, e.g., *In re Del Norte Depot, Inc.*, 716 F.2d 557 (9th Cir. 1983).

⁹⁷See, e.g., *In re Sterling Navigation Co., Ltd.*, 31 Bankr. 619 (S.D.N.Y. 1983).

⁹⁸See *David Bros. v. United Bank of Littleton*, 41 U.C.C. Rep. Serv. 261 (Colo. App. 1985).

⁹⁹See *supra* note 95 and accompanying text.

Indiana UCC controls the priority dispute, and Creditor *B* would have priority over Creditor *A*.

Then, Creditor *C* enters the priority dispute. His interest attached and was perfected after December 31, 1985; thus his interest should be deemed to be fixed after the effective date of the New Indiana UCC.¹⁰⁰ According to the second sentence of section 46, any priority dispute with him should be determined under the New Indiana UCC. Nonetheless, whichever version of the Indiana UCC is applied, Creditor *C*'s interest would be junior to that of both Creditor *A* and Creditor *B*.¹⁰¹

The significant question is, of course, whether the mere entry of Creditor *C* into the priority dispute means that the New Indiana UCC's priority rules should be applied for *all* of the parties. Certainly, the relative positions among the three claimants did not become fixed until Creditor *C*'s security interest was perfected. However, should the mere happenstance that a clearly junior secured creditor obtains a security interest and perfects after the New Indiana UCC's effective date be sufficient legal justification for causing Creditor *B* to "lose out" to Creditor *A*? Such would appear to be the fortuitous result of a literal interpretation of section 46.¹⁰²

Unfortunately, it appears that the Reporters who drafted what is now section 46 of the New Indiana UCC did not anticipate the three-party priority dispute just described.¹⁰³ If and when such a dispute does occur, how it will be resolved is really anybody's guess. The courts should, however, be guided by public policy considerations, and not merely by a literal application of section 46 to the facts of the case. Any interpretation of section 46 that would cause a creditor to lose priority through events totally beyond his control should not and cannot be countenanced.

F. Section 47

Section 47 merely recites that the New Indiana UCC takes effect on January 1, 1986. This is the only one of the New Transition Rules that contains no "big surprises" and no ambiguities.

¹⁰⁰*Cf. In re Perrotto Refrigeration, Inc.*, 38 Bankr. at 286-87 (indicating that perfection is the key to determining when the positions of the parties are fixed under Pennsylvania's version of section 46).

¹⁰¹As to Creditor *A*, see IND. CODE § 26-1-9-313(3) (1982); IND. CODE § 26-1-9-313(6) (Supp. 1986). As to Creditor *B*, see IND. CODE § 26-1-9-312(4) (1982); IND. CODE § 26-1-9-312(4) (Supp. 1986).

¹⁰²See *supra* note 94.

¹⁰³See Reporters' Discussion on 1972 changes to U.C.C. § 11-107 (1972).

G. The "Missing" Transition Rule

Although section 47 is the last of the New Transition Rules, no discussion of the New Transition Rules would be complete without at least a reference to the transition rule that was *not* enacted in Indiana. Section 11-108 of the model transition rule provides that "[u]nless a change in law has clearly been made, the provisions of [new U.C.C.] shall be deemed declaratory of the meaning of the [old U.C.C.]." ¹⁰⁴ In other words, provisions of the New UCC may be used to interpret the Old UCC, unless a clear change in law was made by the New UCC.

What is the significance of Indiana's omission of section 11-108 from its New Transition Rules? In the first place, the omission of this section means that a creditor may not simply point to this section when he wants a court to find that a particular provision of the New Indiana UCC is declarative of the law under the Old Indiana UCC. Without the benefit of this section, it may be a little more difficult, for example, to convince a court that a "lessor" who files a "protective financing statement" under the Old Indiana UCC should not have the filing used as a factor in determining whether or not the "lease" was intended as security. ¹⁰⁵

More serious, however, is the possibility that a court will consider the omission of section 11-108 as an indication by the Indiana General Assembly that any changes made in the language of the Indiana UCC by the New Indiana UCC should be construed as a change in law from the Old Indiana UCC. ¹⁰⁶ Or, stated another way, the provisions of the New Indiana UCC that are in any respect different from the provisions of the Old Indiana UCC will *not* be deemed declaratory of the meaning of the Old Indiana UCC as a matter of law. Such a result could prove devastating to those creditors, lessors, and consignors of all kinds and descriptions who entered into transactions prior to January 1, 1986.

III. SUMMARY AND CONCLUSIONS

If nothing else, the preceding discussion and analysis illustrates that the New Transition Rules offer a plethora of potential "traps" and "windfalls" to secured creditors. Fortunately for some and unfortunately for others, these "traps" and "windfalls" are buried in uncodified law. ¹⁰⁷

¹⁰⁴U.C.C. § 11-108 (1972).

¹⁰⁵See IND. CODE § 26-1-9-412 (Supp. 1986).

¹⁰⁶*Cf. In re S & Z Int'l Management, Inc.*, 10 Bankr. 580 (Bankr. S.D. Fla. 1981) (omission of U.C.C. § 11-104 by Florida legislature showed intent not to automatically perfect previously unperfected pre-amendment security interests); *In re Conger Printing Co., Inc.*, 18 U.C.C. Rep. Serv. 224 (D. Ore. 1975) (omission of U.C.C. § 11-108 by Oregon legislature used as a basis for determining that revised U.C.C. § 9-402(7) was not declaratory of prior law).

¹⁰⁷Obscurity, of course, may be the most redeeming quality of the New Transition

Because the New Transition Rules are based in major part on the so-called model transition rules¹⁰⁸ (which, in turn, have formed the basis for the UCC transition rules adopted in other jurisdictions enacting the 1972 Official Text), the interpretive and other problems addressed in the Article will not necessarily be unique to Indiana. For some reason, however, it appears that the other 1972 Official Text jurisdictions have not experienced any significant amount of litigation as a result of their adoption of the model transition rules (in whole or in part). At least, there are relatively few *reported* decisions dealing with these rules.

Perhaps, Indiana will be so fortunate as to share a similar experience under the New Transition Rules. Then again, Indiana may end up a "litigation hotbed" for resolving perfection, priority, and other disputes when at least one of the parties entered into a transaction or took steps to perfect a security interest pursuant to and in accordance with either the Old Indiana UCC or a law (other than the Old Indiana UCC) modified, amended, or repealed by the New Indiana UCC.

Of course, the only practical and certain solution to the many potential problems created by the New Transition Rules is a legislative one. Simply stated, it is time to ask the Indiana General Assembly to enact a *new* set of transition rules to the New Indiana UCC (perhaps, retroactively). And, unquestionably such a new set of rules should be made a part of the Indiana Code, for all of the world to see and appreciate.

Rules, and for that reason, the author had to engage in a great deal of "soul searching" before submitting this article for publication.

¹⁰⁸The only major departures from the model transition rules include: (1) a very curious delayed effective date applicable to section 44(4) (pertaining to the use of recorded mortgages as fixtures filings), *see supra* notes 71-72 and accompanying text; and (2) the omission of section 11-108 of the model transition rules (designed to create a presumption that the provisions of the New UCC will be deemed declaratory of the meaning of the Old UCC). *See supra* notes 104-06 and accompanying text.

