Effect of the Uniform Commercial Code on Virginia Commercial Law: Conditional Sales and Article 9

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Provision is made in UCC section 6-110 for the protection of bona
fide purchasers of the goods who have no notice of the seller's failure
to comply with the bulk sales statute. Such purchasers take free of
any defect in title while purchasers with notice of the transferor's
noncompliance take subject to the defect in title. 8

The final section in the UCC bulk sales article concerns the statute
of limitations on actions by creditors claiming noncompliance with the
article. The comments state that the six months' limitation on actions
and levies is appropriate because of the unusual obligations the statute
imposes on buyers of property in bulk. 4 If the transfer has been con-
cealed, however, actions may be brought or levies made within six
months after discovery of the concealment. 41

At first glance the Virginia Code appears to embody the same six
months statute of limitations. 42 Virginia Code section 55-85 states that
after six months have passed, "no suit or action shall be brought to
have declared void... any sale or purchase" which is claimed to be a
bulk sale. However, Virginia Code section 55-86 provides that if the
sale has been made for value and in good faith, although the provisions
of the act have not been complied with, and no action has been begun
within twelve months of the sale, then no action to declare the transfer
void shall be brought. Thus it appears that the Virginia Code has some-
what conflicting statutes of limitation, and it is submitted that section
55-86 is unnecessary and should be repealed, regardless of the adoption
in Virginia of the UCC.

On balance, Article 6 of the UCC offers Virginia a well-written
bulk sales statute and the advantages of uniformity with other states in
this area of commercial law.

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CONDITIONAL SALES AND ARTICLE 9

The conditional sale is one of several common law and statutory
security devices merged into what is called a security interest under
the secured transactions article of the Uniform Commercial Code. Full

8Under UCC § 6-108 (4) the sanction at auction sales is placed on the auction-
cer, not the buyers.
9UCC § 6-11, Comment, Point 1.
10UCC § 6-11.
11Va. Code Ann. § 55-84 (Repl. Vol. 1959). This section further provides that
both seller and purchaser shall preserve the inventory, list and affidavit required
by § 55-83 for six months. See Barker v. Stant, 3 F.2d 918 (4th Cir. 1925), which
applies the Virginia six months statute of limitations.
protection for the seller and the buyer in the traditional conditional sale is as effectively provided by the UCC as under Virginia law. However, there are some basic differences in the method and philosophy of the UCC and Virginia law. Some differences are minimal, but others are substantial and merit consideration and explanation.

The philosophy of Article 9, and the principal test used in determining whether a particular transaction comes under the article, is that of giving effect to the intentions of the parties as shown by their actions. The important question is: Did the parties intend that the transaction should create a security interest? If they did, mutual consent to the creation of the security interest being established, the sanctions and protections of the UCC become effective. The exact location of the title to goods, heretofore an important consideration in determining the type of secured transaction is no longer of significance. It had been controlling in determining whether the transaction constituted a conditional sale, i.e., retained title, as distinguished from a chattel mortgage, transferred title. The significant feature under the UCC is that the parties intended to create a security interest, agreed to do so, and have complied with the UCC provisions. It is indicative of the change in approach of the UCC that under Virginia law, conditional sales were not always favored by the courts, while the UCC looks upon security interests as both necessary and desirable in a modern business world.

The purpose of the Virginia statute on conditional sales, section 55-88 of the Code of 1950, is to protect the seller of goods allowing him to retain title to the goods until they are paid for. The

\[1\] M.J., Chattel Mortgages and Conditional Sales, § 2.
\[2\] Mullins v. Sutherland, 131 Va. 547, 109 S.E. 420 (1921).
\[3\] Va. Code Ann. § 55-88 (Repl. Vol. 1959) reads as follows:
Every sale or contract for sale of goods and chattels, wherein the title thereto or a lien thereon is reserved until the same be paid for, in whole or in part, or the transfer of title is made to depend on any condition, when possession is delivered to the vendee, shall, in respect to such reservation and condition, be void as to creditors of the vendee, who acquire a lien upon the goods and as to purchasers from the vendee, for value without notice, unless such sale or contract be evidenced by writing, signed by the vendor and the vendee, setting forth the date thereof, the amount due, when and how payable, a brief description of the goods and chattels, and the terms of the reservation or condition; and unless such writing is filed with the clerk by whom deeds are admitted to record, as provided by law, of the county or corporation in which such goods and chattels may be; provided, that if such filing be done within five days from the delivery of the goods and chattels to the vendee, it shall be as valid as to creditors and purchasers as if such filing had been done on the day of such delivery of the goods and chattels.
“goods and chattels” covered are “visible, tangible and movable” personal property.4 Property such as a boiler in a plant,5 machinery, sprinkler system6 or other movable machinery, even though bolted to the floor, and durable goods, are subject to such a retention of title agreement. Choses in action are not goods or chattels under Virginia law.7 The conditional sales device is available irrespective of the use to which the goods and chattels are to be put. The UCC, however, distinguishes the different types of goods and chattels according to their use. These distinctions are important and fundamental. Goods are classified as (1) consumer goods,8 if they are used or bought for use primarily for personal, family or household purposes, and (2) equipment,9 if they are used or bought for use primarily in business (including farming or a profession). These classes of goods are mutually exclusive. In any single transaction, a chattel is either consumer goods or equipment, but it cannot be both. In borderline cases, where a chattel might be considered either consumer goods or equipment, the principal use to which the property is to be put is determinative. These two classifications are especially important in considering the differences between the Virginia law and the UCC, for consumer goods and equipment generally constitute the goods and chattels subject to the Virginia conditional sales statute.

Other terminology under the UCC is of importance. The Virginia Code defines the seller of goods under a conditional sales contract as the conditional vendor and the buyer as the conditional vendee.10 The UCC redefines these parties. The seller is the secured party; the buyer is the debtor.11 The conditional sales contract is now called the security agreement.12 In essence a conditional sale agreement is covered by the special term, “purchase money security interest,” used throughout Article 9.

“A security interest is a purchase money security interest to the extent that it is taken or retained by the seller of the collateral to secure all or part of its price.”13 In short, the seller of goods has a

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5Ibid.
8UCC § 9-109(1).
9UCC § 9-109(2).
11UCC § 9-105(1)(d).
12UCC § 9-105(h).
13UCC § 9-107(a).
purchase money security interest if he retains a security interest in the goods. There are special rules applicable to the "purchase money security interest" which differ in some respects from other interests created under Article 9. It is a favored security interest under the UCC.14

A brief example will summarize the basic differences in terminology which should be borne in mind in considering the effect of the UCC on the traditional conditional sales contract. Under the Virginia law, a retail dealer selling a refrigerator executes a conditional sales contract retaining title in himself as the conditional vendor as against the conditional vendee; under the UCC the seller creates a purchase money security interest in consumer goods (possibly equipment) in which he is the secured party and the buyer becomes the debtor.

Bearing in mind these fundamental distinctions in terminology, the differences between Virginia's law of conditional sales and the UCC in regards to the rights between the parties, rights as against third parties, recordation and filing, and default, can be more easily understood.

RIGHTS BETWEEN THE PARTIES

There is little difference between the Virginia law and the UCC in regulating the rights between the parties. Virginia has no statutory coverage, and the case law indicates "their rights and liabilities depend upon the intention of the parties as expressed in the contract by which they have bound themselves."15 The UCC gives the same authority to the parties, subject only to the limitations of state retail installment acts.16 Virginia statutes are thus applicable here, as before. Failure to comply with the Virginia regulatory statutes has whatever effect may be specified in the particular statute, but no more.17 There is some Virginia case law on the enforceability of the rights between the parties. The rulings of these cases are still applicable under the UCC. It has been held: that the seller can take out insurance and add the premium to the buyer's debt;18 that the risk of loss in case of fire or other destruction is on the buyer;19 and that the court will

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14UCC § 9-312.
17UCC § 9-203(2).
18Fisch v. Steingold, 79 F.2d 448 (4th Cir. 1935).
not enforce an illegal agreement. Virginia law requires conditional sales contracts to be in ten-point type, a requirement that is continued under the UCC.

The UCC specifically states that unless the secured party has possession, the security agreement must be set forth in a writing that describes the collateral and is signed by the debtor; these requirements are in the nature of a statute of frauds and the security interest is not enforceable between the parties unless complied with. The Virginia statute requires the agreement to be in writing and signed by both vendor and vendee. The failure of the vendor to sign resulted in the nonenforcement of a contract in the recent federal case of In re Adkins.

Under the Virginia statute the security interest is effective between the parties when it is written, while the UCC requires the "attachment" to establish a valid security interest. Ordinarily there will be no problem here since under the UCC attachment simply means: (1) There must be an agreement that the security interest attach; (2) the secured party must have given value; and (3) the debtor must have an interest in the collateral.

The UCC provides a new technique whereby the debtor may obtain clarification of his liabilities. The debtor may prepare and sign a statement setting forth his understanding of the aggregate of the amount of the unpaid debt and a list of the collateral securing the debt and ask the secured party to approve or correct the statement. The secured party must comply with the request within two weeks and is liable for any loss the debtor may suffer from noncompliance.

It will be noted that these requirements, with the exception of the need for the vendor's signature are somewhat more exacting than those under prior Virginia law, but the terms and provisions of the purchase money security interest remain within the discretion of the parties, subject only to the present Virginia limitations on retail installment sales of motor vehicles.

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20 Levy v. Davis, 115 Va. 814, 80 S.E. 791 (1914).
22 UCC § 9-208(1).
23 UCC § 9-203. Comment, Point 5 indicates that unless the secured party is in possession of the collateral, his interest is not enforceable even against the debtor and cannot be made so on any theory of equitable mortgage or the like.
26 UCC § 9-204.
27 Ibid.
28 UCC § 9-208.
RIGHTS OF THIRD PARTIES AND PRIORITIES

Secured Creditor v. Bona Fide Purchaser from the Debtor

In Virginia, the conditional vendor must record his conditional sales contract if he desires complete protection, for, a bona fide purchaser of second-hand goods from the vendee will prevail over a conditional vendor who has not recorded the contract. This requirement is in effect regardless of the nature of the goods. The Virginia statute provides a five-day grace period, which affords protection to the seller who records his contract within five days from delivery of the goods to the vendee.

Under the UCC whether or not recording is necessary depends on the nature of the goods, i.e., whether they are equipment or consumer goods. If the goods are equipment, a financing statement must be filed to perfect the security interest. However, if the goods are consumer goods the purchase money security interest is said to be perfected at the time it attaches; the three requirements for attachment previously discussed being all that is required. The concept of "perfection" or "to perfect" is used to describe a security interest which cannot be defeated in insolvency proceedings. Thus, the seller has a security interest superior to those of a trustee in bankruptcy or another later secured creditor, as regards consumer goods, as defined in the UCC. However, if the secured party desires protection against another bona fide purchaser of consumer goods from the first buyer, that is one who buys for value and for his own personal, farming or household use, he must file a financing statement. If he fails to do so the bona fide purchaser takes free of the security interest. But having filed a financing statement, even though this is not required by the UCC, the secured party will be protected as fully as the seller is protected under the Virginia conditional sales statute.

The problem of a purchase by the bona fide purchaser from the debtor, discussed above, will most often arise when the debtor tries to sell his chattel secondhand. Ordinarily, the seller can trust the buyer, but if he has suspicions he may protect himself by filing the

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30Ibid.
32UCC § 9-302(1).
33UCC § 9-302(1) (d).
34UCC § 9-302.
35UCC § 9-307(2).
36Ibid.
financing statement. When the chattel is equipment, as where a doctor buys a refrigerator for his office, the secured party must file a financing statement to perfect his interest, but having done so he will be fully protected, since a person buying a refrigerator from the doctor is not by definition, buying "in the ordinary course of business."\(^{37}\)

While the UCC follows the well known *Boice v. Finance & Guaranty Corp.* rule,\(^{38}\) this rule has no application where a person other than a dealer sells goods, subject to a security interest, to a bona fide purchaser. The conditional vendor in Virginia who records a conditional sale prevails over a purchaser from the conditional vendee. In *Rudolph v. Farmer's Supply Co.,*\(^{39}\) the Virginia Court of Appeals upheld the rights of a conditional vendor who sold a car to a conditional vendee, who sold it to a second-hand dealer who in turn sold it to a bona fide purchaser. The court distinguished the *Boice* line of cases in which a bona fide purchaser of a new car from an auto dealer prevailed over the financing agency, which was financing the dealer and which had a validly recorded conditional sale. The court said:

"There is nothing in [the statute] to indicate that the General Assembly, when it gave the lien which that section affords, intended to place upon the vendor the duty of following the subsequent course of the chattel sold by him, and, failing in this duty, incur the penalty of losing his lien in the event that in the ultimate such chattel without his knowledge became a part of a shifting stock, and was sold to an innocent purchaser. It would be unreasonable to place such an interpretation on the statute."\(^{40}\)

**Secured Party v. Other Secured Parties**

Under the present Virginia statutes, a conditional sales contract is "void as to creditors of the vendee, who acquire a lien upon the goods and as to purchasers from the vendee, for value without notice," unless the contract is recorded.\(^{41}\)

Under this statute as interpreted by the Supreme Court of Appeals, a secured party is a purchaser for value and thus must be without notice of the rights of a conditional vendor.\(^{42}\) Thus, if a conditional vendee executes a chattel mortgage on the secured goods, in return

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\(^{37}\) UCC § 9-307(1).

\(^{38}\) 127 Va. 363, 102 S.E. 591, 10 A.L.R. 654 (1920).

\(^{39}\) 131 Va. 305, 108 S.E. 628 (1921).


\(^{41}\) Klingstein v. Vaughan, 149 Va. 147, 140 S.E. 275 (1927); Arbuckle Bros. v. Gates, 95 Va. 802, 90 S.E. 499 (1898).
for a loan of money, the chattel mortgagee is treated as a purchaser and must have no knowledge of the conditional vendor's rights. If he has no knowledge and records his chattel mortgage before the conditional vendor, and after the five day grace period has elapsed, he will prevail.

The UCC places the secured party in an independent status. He is neither a lien creditor nor a purchaser. Although there is no definite statement in the UCC, the secured party would seem to be required to be without notice. The UCC provides that a purchase money security interest in goods has priority over a conflicting security interest in the same goods, if the purchase money security interest is perfected at the time the debtor receives possession or within ten days thereafter. Thus, the secured party prevails over the lender of money, formerly called a chattel mortgagee, if he perfects his security interest when the debtor receives possession of the collateral or within ten days thereafter.

The security interest in consumer goods, having been perfected at the time of its attachment, is valid as against other secured parties, even though no financing statement has been filed. The filing of a financing statement to protect the secured party is only necessary to protect him against a bona fide purchaser (buyer) from the debtor. If however, the goods are classified as equipment, the financing statement is necessary for protection against other secured parties, such as a chattel mortgagee.

A brief example will suffice to sum up the rights of the purchase money secured party (seller of goods) as against another secured party (lender of money who takes a chattel mortgage or other security instrument). Assume that on January 1, the debtor, a doctor, purchases a refrigerator (equipment) for his office. The debtor uses the refrigerator to obtain a loan on January 9, and the secured money lender records his financing statement. If the seller records his financing statement on the same day, even though after the money lender,

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43UCC § 9-105(1)(i).
44UCC § 9-312(4)(g)(a). See Comment, example 2, which indicates that the lender is not barred if he knows of the other interest at the time he perfects his own. It follows that it is not proper for him to have knowledge of the seller's interest before he advances money. See also Spivack, Secured Transactions 110 (Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association 1962).
45UCC § 9-312(4).
46UCC § 9-312(5)(a).
47UCC § 9-302(1)(d).
48UCC § 9-302(1).
he will prevail. If however, the ten day period elapses, the lender, having perfected his security interest before the seller of the goods, will prevail.

**Secured Party v. Lien Creditors**

Because under the UCC the security interest in consumer goods is perfected when it attaches, the secured party is fully protected as against a lien creditor.\(^4\) When the goods are classified as equipment, however, the secured party must file a financing statement in order to perfect his security interest against lien creditors.\(^5\) Until the conditional sales contract has been recorded the Virginia statute provides that it is not valid as against lien creditors, regardless of the nature of the goods.\(^6\) However, in Virginia the seller has a five day grace period in which to record his contract.\(^7\) Under the UCC there is a ten day grace period.\(^8\)

Under the UCC a lien creditor means "a creditor who has acquired a lien on the property involved by attachment, levy or the like, and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment."\(^9\) This is a restrictive definition and only those parties who fall within its terms are entitled to the status of a lien creditor. This definition is similar to that previously used in Virginia with one significant exception. Whereas the assignee for the benefit of creditors has been treated as a purchaser for value in Virginia,\(^10\) he is defined as a lien creditor under the UCC\(^11\) This change of status, however, has little substantive effect because of another important change made by the UCC. Under the Virginia statute, the lien creditor may know of the conditional vendor's unrecorded contract, and still be protected if his lien attaches before the conditional vendor records his document.\(^12\) The UCC expressly provides that the lien creditor will take priority only if he does not have notice of the earlier security interest

\(^4\)UCC § 9-302(1)(d).
\(^5\)UCC § 9-302(1).
\(^7\)Ibid.
\(^8\)UCC 9-301(2).
\(^9\)UCC 9-301(3).
\(^10\)Corbett v. Riddle, 209 Fed. 811 (4th Cir. 1913).
\(^11\)UCC § 9-301(3).
\(^12\)Va. Code Ann. § 55-88 (Repl. Vol. 1959). See Guerrant v. Anderson, 25 Va. (4 Rand.) 208 (1886). There have been no recent cases on this, but a careful reading of the statute indicates that this is true.
in the goods.58 This change in the knowledge provision thus negates the effect of the change in status of the assignee for creditors.

Virginia cases indicate that the notice required to bar a purchaser from asserting his rights in goods, places a strong burden of proof on the party seeking to assert rights against the purchaser from the vendee.69 If the seller who has failed to record his retention of the title is to prevail over the sub-purchaser the "proof must be such as to affect the conscience of the purchaser and must be so strong and clear as to fix upon him the imputation of mala fides"60 It would seem that the lien creditor, who under the UCC must be without actual notice of an unrecorded security interest in equipment, will benefit from this stringent burden of proof developed under earlier Virginia law.

These problems will not be too troublesome in normal retail-consumer-sale-financing, because most of the goods purchased fall into the classification of consumer goods. Where there is doubt as to whether particular items are consumer goods or equipment, the secured party should file a financing statement as a precautionary measure rather than suffer from a misinterpretation of the nature of the collateral in later litigation. By so doing he will have assurance that his rights cannot be subordinated to those of other secured parties or lien creditors.

Secured Party v. Possessory Lienor

Under the UCC a person who, in the ordinary course of his business repairs goods which are subject to a security interest or attaches his own materials to such goods and under state statutory or common law is entitled to a possessory lien, is given priority over the security interest, unless the lien is statutory and expressly provides otherwise.61

Virginia gives statutory recognition to three possessory liens: the inkeepers lien,62 the lien of keepers of livery stables and garages,63 and the lien of mechanics.64 The statutory lien for just and reasonable charges for the services of a mechanic gives a priority over the rights of a conditional vendor to the extent of $50.00,65 but the other two liens do not expressly give any priority over the conditional vendor.66

58UCC § 9-301(1)(b).
59Arbuckle Bros. v. Gates, 95 Va. 802, 39 S.E. 496 (1898).
60Id. at 813.
61UCC § 9-310.
65Ibid.
66See supra notes 62 and 63.
Since none of the statutes expressly provides otherwise, it appears that the $50.00 clause in the mechanics' lien statute is rendered nugatory under the UCC and in all three instances the possessory lien takes priority over the perfected security interest.

Secured Creditor v. Owner and Purchaser of Real Property as Regards Fixtures

In Virginia, as has been noted, goods which are attached to realty, yet are removable, are subject to the provisions of the conditional sales statutes. Under the UCC, a purchase money security interest in goods is fully protected if it attaches and is perfected before the goods become fixtures. Such a security interest as that which a merchant holds in a washing machine or in a furnace in a consumer's home, which has been perfected without filing, presents some possible problems. This provision which allows the secured party to prevail over the buyer of the home, may appear harsh, for the buyer would have no way of knowing the goods were subject to a "perfected security interest." Further, the provision of the UCC which gives the bona fide purchaser of goods priority over the secured party who has not protected his interest in consumer goods by the filing of a financing statement, does not apply if the consumer goods are fixtures. However, the UCC further provides that whether goods become fixtures is a question of state law, not covered by the UCC. A liberal approach as to whether the goods become fixtures has been followed in Virginia indicating that the washing machine and furnace are not fixtures, but remain consumer goods or equipment. Hence, a security interest perfected without filing in these consumer goods is defeated by the bona fide purchaser of such consumer goods from the debtor. There have been several Virginia cases holding that such items as a boiler in a plant, a sprinkler system and other machinery bolted down in the plant or even imbedded in concrete, are not necessarily fixtures. Whether an item of collateral is said to be a fixture depends on the intent of the parties. The United State Supreme Court in considering the status of a sprinkling system installed in a factory, interpreted Virginia law on the fixture provision as follows:

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6 See supra, notes 5 and 6.
7 UCC § 9-313(2).
8 UCC § 9-307(2).
9 UCC § 9-307(2); UCC § 9-313(1).
12 Ibid.
"The system was attached to the freehold, but it could be removed without any serious harm for which complaint could be made..., other than the loss of the equipment itself. Removal would not affect the integrity of the structure on which the mortgagees advanced. To hold that the mere fact of annexing the system to the freehold overrode the agreement that it should remain personalty and still belong to [the vendor] would be to give a mystic importance to attachment by bolts and screws... The case is not like those in which the addition was in its nature an essential, indispensable part of the completed structure contemplated by the mortgage. The system although useful and valuable can be removed and the work still go on." 74

If the secured seller has filed a financing statement to protect the security interest in the consumer goods placed in the home, he will of course prevail over the rights of the buyer of the home. This is proper and in accord with the previous discussion of the rights of the seller as against those of a bona fide purchaser of goods.

If the secured party does have priority, on default by the debtor he is entitled to remove his collateral from the real estate. However, he must reimburse any encumbrancer or owner of the real estate, who is not his debtor, and who has not otherwise agreed, for the cost of repair of any physical injury. The secured party is not liable for any subsequent diminution in the value of the real estate which might be caused by the removal of the goods. The parties entitled to reimbursement may require the secured party to give adequate security for performance before allowing the removal of the goods. 75

THE FILING OF A PURCHASE MONEY SECURITY INTEREST UNDER THE UCC AS COMPARED WITH THE RECORDATION OF A CONDITIONAL SALE UNDER VIRGINIA LAW

The "filing of a financing statement" is not necessary to perfect a security interest that has attached to consumer goods, but it is necessary to perfect an interest in equipment. The ordinary retail seller will not ordinarily be concerned with filing. His security interest is good at the time it attaches as against the debtor and all other parties except a direct sub-purchaser of the consumer goods from his debtor. However, if the retail seller does want protection against the possibility of a resale by his debtor, he must file a financing statement, which under

74 Id. at 640-41.
75 UCC § 9-313(5).
the UCC involves some minor differences from prior Virginia recordation requirements.

Contents of the Statement Filed

Several Virginia cases have involved the contents of the memorandum or contract admitted to record. These cases indicate that the Virginia conditional sales statute was designed to protect the vendor, and if he seeks its protection and constructive notice of his retention of title, the provisions must be strictly complied with. The UCC does not require any acknowledgment of signatures, an earlier formality no longer required by the Virginia statute. The following are necessary requirements of the contract in Virginia: The contract must be evidenced by a writing signed by the vendor and vendee, contain the date of the contract, the amount due, when and how payable, a brief description of the goods and chattels, and the terms of the reservation or condition. The UCC, like Virginia law, allows what is in substance a memorandum, the financing statement, to be filed. The formal requisites of a financing statement must be complied with if the statement, when filed, is to serve as valid constructive notice of the perfected security interest. The entire security agreement may be filed but a statement is sufficient as a financing statement if it is (1) signed by the debtor and the secured party, (2) gives an address of the secured party from which information concerning the security interest may be obtained, (3) gives a mailing address of the debtor and (4) contains a statement indicating the type of collateral or describing the terms of the arrangement for collateral.

The Virginia statutory requirements have been more exacting. Virginia case law indicates that the contract must be so complete that a person can obtain from it information on all the rights which the

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parties intended to create. Consequently, where the due date is not certain because of a discretion left in the vendor to set the date, the contract is not effectively recorded. Where, however, the due dates were listed as thirty, sixty and ninety days from the date referred to in the contract, this was held sufficient. The amount due has been held to be certain despite an insurance provision which added the premium costs to the conditional vendee's debt. The statute requires signature of both seller and buyer, and so if the seller fails to sign the contract, a recordation is defective and does not protect the vendor's interest. The courts have been very strict in applying the statutory provisions relating to signatures, amount due, due date and method of payment. The courts have been somewhat more lenient in dealing with the requirement as to a "brief description," but still unwilling to allow any general description to suffice. The general rule has been that a brief description of the goods is sufficient to serve as constructive notice to third parties if the description in the contract is such as will enable the party examining the instrument to identify the property. The UCC provides that "any description of personal property... is sufficient whether or not it is specific if it reasonably identifies what is described." Since the basic requirement for the description in Virginia and under the UCC is about the same, the many Virginia cases which have decided what constitutes a sufficient description will continue to be applicable.

The tenor of the many Virginia cases dealing with the recordation problems indicate that although there are fewer formal requirements under the UCC, those that are an integral part of the financing statement will have to be strictly complied with.

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84Tokheim Oil Tank and Pump Co. v. Fentress, 33 F.2d 730 (4th Cir. 1929).
86Fisch v. Steingold, 79 F.2d 448 (4th Cir. 1935).
88Tokheim Oil Tank & Pump Co. v. Fentress, 33 Fed.2d 730 (4th Cir. 1929).
90UCC § 9-110.
PLACE OF FILING

Under the UCC a financing statement to cover consumer goods, is filed in the county or city of the debtor's residence, or if the debtor is not a resident of the state, then in the locality where the goods are kept. This represents a departure from Virginia law which requires recordation in the county or corporation where the chattel itself is kept. Tokheim Oil Tank & Pump Co. v. Fentress, a federal bankruptcy case, held that a contract recorded in the city, while the goods were stored in the county, was not validly recorded.

Where the collateral is goods, which are to become fixtures, regardless of how classified the place of filing is where mortgages on real property are recorded, which in Virginia is the county or city where the real estate is located. The UCC provides the three alternatives of central filing, local filing, and both central and local filing where the collateral is equipment, with some combinations available depending on the nature of the collateral.

A good faith filing, although not done correctly, under the UCC is good in so far as it is effective as to all collateral covered by the financing statement. This is so at least as against any person who actually knows the contents of the improperly filed statement. In essence, this provision rejects the idea that an improperly filed statement is not notice even to a person who knows of it.

PLACE OF FILING WHEN CHATTEL IS MOVED FROM ONE LOCALITY TO ANOTHER

The Virginia statute provides that when the goods and chattels covered by the recorded contract are removed to another county, the original recordation becomes invalid or expires after one year, unless within the year the contract is duly recorded in the county or corpora-

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91 The text assumes that Virginia will adopt either alternative two or three of UCC § 9-401(1)(a), and continue the Virginia system of local filing. Alternative one of this subsection provides for central filing. Some amendment of the UCC seems to be necessary here in order to provide for local filing in a county or city, in recognition of the peculiar Virginia situation in which the cities are independent of the counties, a political arrangement, with which the draftsmen of the UCC apparently were not familiar.
93 38 F.2d 730 (4th Cir. 1929).
94 UCC § 9-401(1).
95 Ibid.
96 UCC § 9-401(2).
tion to which the goods are removed. There is a saving provision which affords protection to infants and insane persons until one year after the particular disability is removed.

The UCC provides an alternative provision under which a filing made in the proper county continues effective for four months after a change in the location which controlled the original filing. Adoption of this alternative proposition would cut down the present one year grace period provided in Virginia. The other alternative offered by the UCC provides for continued effectiveness of the original filing even after removal within the state.

Under the UCC when goods come into the state which have been subjected to a valid security interest duly recorded in the former state, the validity of this prior perfected security interest depends on the law of the state in which it was originally perfected. This perfected security interest continues for four months after removal, but it must be perfected again in the state where the goods become newly located. Such perfection results in a continuing perfection. If the four month requirement is not complied with, the security interest may be perfected any time before a third party's rights are affected.

Virginia Code section 55-99 provides that goods subject to an "encumbrance" which are "removed to the state" are not valid unless recorded. There is no grace period provided. However, the Virginia court has indicated that a conditional sale is not an "encumbrance" within the provisions of section 55-99. However, if an automobile is involved, there are special provisions under the Motor Vehicle Code which treat a conditional sale as an encumbrance. It should be noted, however, that the issue has never been raised as to whether a security interest in a refrigerator or other item not covered by the Motor Vehicle Code would be considered as an encumbrance by the court today. The cases have always involved automobiles. The adoption of the UCC, of course, resolves that question.

There are some Virginia decisions as to what constitutes removal to the state.

98 UCC § 9-401, Alternate subsection (d).
99 UCC § 9-401(3).
100 UCC § 9-401; UCC § 9-103.
"It is, therefore, settled that before recordation is required under Code, § 55-99, the property brought into Virginia must come to rest and be located here to the extent of acquiring a new situs. The acquisition of a new situs signifies something more than the temporary or transient presence of the property in this state. It implies some degree of permanency, and unless this requirement is established, it can not be said that the property has been 'removed into' and 'located in,' Virginia as contemplated by the statute."\(^{104}\)

Filing is completed under the UCC upon presentation of a financing statement and tender of the filing fee or acceptance of the statement by the clerk.\(^{105}\) Notice is given when a financing statement is filed, not indexed, so the secured party does not bear the risk that the clerk will not properly file the financing statement. This leaves unchanged Virginia law under which constructive notice is effective from the time the conditional sales contract is filed for docketing with the clerk.\(^{106}\)

The duration of the validly perfected security interest is subject to a time limitation not present in Virginia law. The UCC provides that a financing statement is effective until its stated maturity date, but not to exceed five years, plus a sixty day grace period.\(^{107}\) However, continuation statements may be filed which will continue the security interest for another five-year period.\(^{108}\)

**Default**

When the debtor defaults in his payments under the purchase money security interest, the seller of the goods is entitled to reduce his claim to judgment or otherwise enforce his security interest by any available judicial procedure.\(^{109}\) Unless otherwise agreed, he may take possession of the collateral without judicial process, if this can be done

\(^{104}\) Va. at 72.

\(^{105}\) UCC § 9-403(1).


\(^{107}\) UCC § 9-406.

\(^{108}\) The UCC provides a permissive device for noting of record any release of collateral. This is merely permissive and is not a requirement. It is considered to be a device which will reflect the true state of the record. This provision represents somewhat of a departure from Virginia law. The Virginia code specifically provides that every "vendor in a contract for the sale of personal property...shall, upon payment to him of the amount of the purchase price in full, as set forth in the contract, cause the same to be marked satisfied upon the margin of the vendee index and on the line or lines where the name of each vendee appears." See: UCC § 9-406; Va. Code Ann. § 55-98 (Repl. Vol. 1959).

\(^{109}\) UCC § 9-501(1).
without breach of the peace, or he may proceed by legal action.\textsuperscript{110} If the agreement so provides, he may require the debtor to assemble the collateral in a place selected by the secured party, but convenient to both of the parties.\textsuperscript{111} If the secured party does not choose to remove "equipment," he may render the equipment unusable or dispose of it on the debtor's premises, without removal.\textsuperscript{112} However, any such action must be done in a commercially reasonably manner. The secured party may sell, lease, or otherwise dispose of any or all of the goods or collateral in their present condition, or following any commercially reasonable preparation or processing.\textsuperscript{113} He may sell the goods at a public or private sale as long as the sale is made in a commercially reasonable manner. There is no prohibition against the secured parties' buying the goods at a public sale if the collateral is of a type customarily sold in a recognized market or is subject to widely known price quotations.\textsuperscript{114} Reasonable notification as to the time and place of a sale is to be sent to the debtor and, except in the case of consumer goods, to any person who has a security interest in the goods.\textsuperscript{115} A purchaser at the sale takes free of all other rights and interests even though the secured party fails to comply fully with the requirements of a public sale, if he is without knowledge and does not act in collusion with another party or in a private sale if he acts in good faith.\textsuperscript{116} The seller is entitled to a deficiency judgment if the proceeds of the sale do not compensate him.

Except for the aforementioned requirement of notification to the debtor, there is no statutory period during which the collateral must be held before disposition. It would seem that reasonable notification would entail such notice as would allow the person to receive it, and have sufficient time to take appropriate steps to protect his interest by taking part in the sale. There is, however, a special requirement where consumer goods are concerned. The UCC does expressly provide that if the debtor has paid 60 per cent of the purchase price, in the case of a purchase money security interest in consumer goods, the seller who has taken possession of the goods must resell, and if he fails to do so within 90 days after he has taken possession, he will be liable for conversion.\textsuperscript{117} However, the consumer debtor could sign a

\textsuperscript{110}UCC § 9-503.
\textsuperscript{111}Ibid.
\textsuperscript{112}UCC § 9-507.
\textsuperscript{113}UCC § 9-504.
\textsuperscript{114}Ibid.
\textsuperscript{115}Ibid.
\textsuperscript{116}UCC § 9-504(4)(a)(b).
\textsuperscript{117}UCC § 9-505(1).
written renunciation of his right to require sale. It should also be evident that it would not be proper to delay the sale for an excessive period of time so as to place unreasonable storage charges on the debtor.

Another remedy open to the secured party is that he may propose to retain the collateral in satisfaction of the debtor's obligation.\textsuperscript{118} This may be done, unless the debtor, who must be notified, objects in writing within thirty days. If the debtor objects, the secured party must sell and look to the debtor for a deficiency judgment or turn over any excess to the debtor.

The debtor may choose to pay off his obligation and redeem the collateral at any time before the seller has disposed of the collateral or entered into a contract for its disposition. In redeeming the goods he must, of course, offer to pay the additional expenses which have been incurred by the secured party. If the secured party has made a partial sale of the collateral, the debtor by satisfying the remaining obligation may redeem what is left.\textsuperscript{119}

If a public or private sale of the goods does in fact take place, the proceeds are applied in this order:\textsuperscript{120} (1) reasonable expenses of retaking holding and preparing the goods for sale and the reasonable attorneys' fees and legal expenses incurred by the secured party; (2) complete satisfaction of the debtor's indebtedness and satisfaction of the indebtedness of anyone subordinate to the secured interest. If there is a surplus, the secured party must account to the debtor for that amount and the debtor is liable for any deficiency that remains.\textsuperscript{121}

Under Virginia law the seller of goods has these remedies. (1) Under the provisions of a special statute, he can petition a trial justice and get complete relief. Although the statute was passed to cover problems arising under the conditional sales statute, it is not the only remedy available to the seller. (2) He can seek peaceable possession of the property and keep the property as his own or sell at private or

\textsuperscript{118}\textsuperscript{UCC} § 9-505(2).
\textsuperscript{119}\textsuperscript{UCC} § 9-506.
\textsuperscript{120}\textsuperscript{UCC} § 9-504(1).
\textsuperscript{121}The UCC provides a remedy against a secured party who misuses the mechanism of Article 9 and does not proceed in good faith. He must proceed to dispose of goods in a reasonable manner. The fact that at another time he might have gotten a better price for the collateral sold does not indicate lack of good faith. If he fails to give proper notice of sale, he is liable to parties harmed by his noncompliance, and if the collateral is consumer goods, the debtor has a right to recover not less than the credit service charge or time price differential plus 10\% of the cash price or principal amount of the debt. UCC § 507(1).
public sale. (3) He may institute an action at law for the unpaid pur-
chase price. (4) He may bring an action of detinue

Under the provisions of section 55-93 of the Virginia Code, re-
possession and sale by the seller without legal process constitutes
Cancellation and full satisfaction of the amount of the security
covered by the contract. This is the law despite any contrary pro-
visions written into the contract. It was recently held in Virginia that
the fact that an auctioneer at a public sale was not licensed did not
change the essential character of the sale, which was in fact a public
sale.

For several years, Virginia has had a statute which gave a de-
faulting vendee a choice when confronted with an action of detinue.
He could choose to pay the judgment or return the property, in
which case, the act of returning the property cancelled the debt.
However, in recent years, the legislature passed another statute giv-
ing a detinue action. There appears to be some conflict between
the statutes and possibly the option on the part of the vendee no
longer exists. However, if the seller does proceed under section
55-94 and does recover the goods, he is not entitled to a deficiency
judgment. It is felt that the vendor cannot recover both the prop-
erty and a deficiency judgment. The problems created by these two
statutes have not yet been resolved.

If a conditional vendor does seize collateral and sells it at a public
sale, he is entitled to the expenses involved in the sale, in addition
to the satisfaction of the obligation, but he is not permitted to make
a profit on the sale.

The Virginia cases and statutes do not indicate that any real prob-
lems will be created by the UCC. The Virginia conditional sales
statute and its remedies, though criticized, have proved workable
and useful. The UCC seems to follow the better aspects of Virginia
conditional sales law and supplements it with some modern business
experiences and techniques, namely the perfection of a security in-
terest in consumer goods without record.

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Co., 168 Va. 72, 190 S.E. 257 (1937).
168 Va. 72, 190 S.E. 257 (1937); Ashworth v. Fleenor, 178 Va. 104, 16 S.E.2d 309
(1941).
27See Snead, Retail Installment Sales v. Virginia Remedies on Default, 16 Wash.
28Lynchburg Motor Co. v. Thomasson, 141 Va. 153, 126 S.E. 64 (1924).