I. Key Concepts

A. **Perfection**: Determines the relative rights of the secured creditor and third parties asserting claims against the SC’s collateral

B. **Priority**: The rank order in which various claimants asserting a right to collateral may collect against that collateral’s value.

   1. If the collateral has insufficient value to satisfy all claimants, holders of senior liens take before holders of junior liens who take before unsecured creditors.

   2. As a general rule, the first to perfect wins. The rationale for this is that subsequent lenders can find out about prior loans, but prior lenders cannot find out about subsequent loans.

II. Methods of Perfection

A. **Filing**: Subject to certain exceptions, a SC may perfect against any collateral by filing a financing statement that satisfies the requirements of § 9-502.

   ♦ Filing is the only permissible method of perfecting an interest in general intangibles or accounts.

B. **Possession**

   1. § 9-313(a) permits perfection by possession of, *inter alia*, goods, instruments, negotiable documents (*e.g.*, warehouse receipts, bills of lading), or chattel paper.

   2. § 9-312(b)(3) requires possession to perfect an interest in money.

   3. **Possession Through an Agent or Bailee**: A secured party can possess collateral through an agent or a bailee. § 9-312(c).

      ♦ There is disagreement among courts whether the agent/bailee must be under the secured party’s exclusive control or merely have notice of the secured party’s interest
C. **Control**

1. § 9-314(a) *permits* perfection by control of investment property or electronic chattel paper.

2. § 9-312(b)(1)-(2) *requires* control to perfect an interest in deposit accounts or letter-of-credit rights.

D. **Automatic Perfection**

1. **PMSI in Consumer Goods** “automatically” perfects per § 9-309(1).

2. **PMSI**: Secured debt incurred to fund the purchase of collateral. “Purchase money” status may be lost if
   a. the borrower/buyer does not use the exact funds lent to make the purchase, and/or
   b. the lender consolidates purchase money loans with non-purchase money loans.

3. **Consumer Goods**: Goods used or bought for use primarily for personal, household, or family purposes. § 9-102(a)(23).
   ♦ In other words, actual or intended use, not nature, determines whether a good is a “consumer good” for purposes of, *inter alia*, § 9-309(1).

4. **Non-Consumer Goods**: A PMSI in any non-consumer good must be perfected by the same means appropriate for a similar non-PMSI.

III. **Characterizing Collateral** – Key consideration is actual or intended use at the time the security agreement attaches, rather than the intrinsic nature of collateral.

A. **Personal vs. Real Property**

1. A security interest must be filed in the county real estate records if the collateral is
   a. **real property** or

2. **Fixture**: An item of personal property that has become so attached to real property that a right in it arises under real property law. § 9-102(41). Courts consider three factors:
a. firmness with which collateral is affixed to real estate;

b. intent of the parties whether collateral is a permanent part of the realty; and

c. degree to which collateral is essential to the ability of the realty to serve its intended function.

3. Article 9 defers to state real property law to determine

a. any means other than an Article 9 fixture filing for perfecting a security interest in fixtures, § 9-334(b); and

b. the place for filing both Article 9 and non-Article 9 liens against fixtures.

4. Even though Article 9 defers to state real property law to determine the proper place to file a SI in fixtures, Article 9 prescribes the form of filing. § 9-502(b).

5. A fixture filing cannot be made against “ordinary building materials incorporated into an improvement on land.” § 9-334(a).

B. Tangible Personal Property

1. Consumer Goods: As above, goods used or bought for use primarily for personal, household, or family purposes. § 9-102(a)(23).

2. Inventory: Goods held by a person, in the business of selling or leasing such goods, for sale or lease. § 9-102(a)(48).

   a. Inventory is not equipment. § 9-102(a)(33).

   b. I & E both filed in same system under § 9-501; the issue goes more to coverage in FS.

3. Farm Products: Crops, livestock, farming supplies, and unmanufactured products of crops and livestock. § 9-102(a)(34).

   a. Farm products are not equipment or inventory. § 9-102(a)(33) & (48).

   b. Debtor must be “engaged in ... farming operations.” § 9-102(a)(34).

4. Equipment: Goods other than inventory, farm products, or consumer goods. § 9-102(a)(33).
C. **Intangible Personal Property**

1. **Account:** A right to payment of a monetary obligation, whether or not earned by performance, for, *inter alia*, the sale, lease, or license of property or the rendition of services, excluding, *inter alia*, rights to payment evidenced by chattel paper or an instrument, commercial tort claims, deposit accounts, investment property, and letters of credit and letter-of-credit rights. § 9-102(a)(2).
   ♦ May only be perfected by filing. See § 9-313(a).

2. **Chattel Paper:** A document evidencing both (i) a monetary obligation and (ii) a security interest in or lease of specific goods. § 9-102(a)(11).
   a. May be perfected either by filing or possession, § 9-313(a).
   b. **However,** a subsequent purchaser/creditor who
      i. gives **new value**
      ii. in the **ordinary course** of its business, and
      iii. acts **without knowledge** of an earlier-filed security interest in the chattel paper

   has priority over the earlier-filed security interest. § 9-330(b).
   c. **Electronic Chattel Paper** is simply chattel paper evidenced by one or more electronic record(s). § 9-102(a)(31).

3. **Commercial Tort Claim:** A tort claim in favor of
   a. a corporation or other business organization or
   b. an individual, **provided** that the claim arose in the course of her business or profession and does not include damages arising out of personal injury or death. § 9-102(a)(13).

4. **Deposit Account:** A demand, time, or other account in a depository institution, excluding investment property and accounts evidenced by an instrument. § 9-102(a)(29).

5. **Instrument:** A device that
   a. evidences a right to payment of money;
   b. is not itself a security agreement or lease; and
c. is “of the type which is in the ordinary course of business transferred by delivery with any necessary indorsement or assignment.” § 9-102(a)(47).

♦ An interest in an instrument may be perfected by possession or filing. § 9-313(a).


♦ Securities are governed by Article 8, so we won’t spend much time on these.

7. **Money**: A domestic, foreign, or intergovernmental medium of exchange. § 1-201(a)(24).

8. **General Intangible**: Any intangible personal property, including legal claims (excluding commercial tort claims), other than accounts, chattel paper, deposit accounts, documents of title, electronic chattel paper, instruments, investment property, letter-of-credit rights, letters of credit, or money, § 9-102(a)(42), including

   a. **Payment Intangible**: A general intangible under which the account debtor’s primary obligation is to pay money, § 9-102(a)(61); and

   b. **Software**, excluding software that is embedded in goods, § 9-102(a)(75).

IV. **Proper State for Initial Perfection**

A. **Perfection by Filing**: The basic rule under Revised 9 is that an SI properly perfected by filing should be filed in the state where the debtor is located.

1. An **individual debtor** is located in the state of her “principal residence.” § 9-307(b)(1).

2. A **registered organization** is located in the state in which it was organized. § 9-307(e).

3. A **non-registered organization** (e.g., a partnership)

   a. with only one place of business is located at its place of business, § 9-307(b)(2);
b. with more than one lace of business is located at the place of its “chief executive office,” § 9-307(b)(3).

4. Special Cases

a. **Fixture Filings** are made in the appropriate records of the county where the real property is located. §§ 9-301(3)(A) & 9-501(a)(1).

b. **Filings Against Timber or Minerals** are made in the appropriate records of the state where the real property from which the timber or minerals are to be taken is located. § 9-301(3)(B) & (4).

B. **Perfection by Possession:** An SI properly perfected by possession is perfected under the law of the state where the collateral is located. § 9-301(2).

C. **Perfection by Control:** An SI properly perfected by control is perfected as provided for in §§ 9-304 to 9-306.

V. Financing Statements

A. **Required Elements** – § 9-502(a) requires only that a financing statement contain

1. **Debtor’s Name**, see § 9-503(a);

   a. **Basic Concepts**

   i. **Substantial Compliance:** A “substantially complying” filed FS is effective “even though it contains minor errors that are not seriously misleading.” § 9-506(a).

   ii. **“Safe Harbor”:** A FS is sufficient against a registered entity (corporation, registered LP, LLP, etc.) only if it provides the entity’s registered name. As to individuals and non-registered partnerships, must provide the debtor’s “individual or organizational name.” § 9-503.

   iii. If there’s some variance between the name that’s filed and the name you searched under (and vice versa), is the error seriously misleading enough to constitute non-compliance?

   b. **Individual Debtor** – Must include the debtor’s full, legal name, and should also include any “common” name(s) by which he or she is known.

   c. **Corporate or Limited Partnership Debtor** – Must include the debtor’s legal name as recorded on its certificate of incorporation, etc.; may also include trade name(s).
d. **General Partnership Debtor** - Must include the name by which the debtor is “commonly known” in the community in which it does business; may also include the names of one or more general partner(s).

e. **Trade Names**: Trade names are too uncertain and too likely not to be known to the secured party or person searching the record, to form a basis for a filing system. Therefore, a SC must file under the corporation’s or other registered entity’s legal name. § 9-503.

2. **Secured Creditor’s (or SC’s authorized representative’s) Name**; and

3. **Statement Indicating the Collateral Covered by the FS, see § 9-504**;

   a. A description of collateral is adequate under Revised 9 if it

      i. satisfies the requirements of § 9-108 governing security agreements; or

      ii. indicates that the collateral is “all assets” or “all personal property”

   b. Recall that § 9-108 forbids “super-generic” collateral descriptions in SAs, so § 9-504(2) permits a FS to be less descriptive than a SA.

4. **Description of the Real Property to Which the Collateral is Related** only if the collateral is timber, minerals, or fixtures, see § 9-502(b).

B. **Filing Office Rules**

1. **Grounds for Rejection** – While not required for enforcement, a filing office may reject a financing statement for not containing the following:

   a. **Debtor’s Mailing Address**, § 9-516(b)(5)(A);

   b. **Secured Party’s Mailing Address**, § 9-516(b)(4);

   c. **Debtor’s Individual or Entity Status**, § 9-516(b)(5)(B); and

   d. If the debtor is an entity, § 9-516(b)(5)(C) requires

      i. Debtor’s **organizational type** (e.g., corporation, LLC, etc.);

      ii. Debtor’s **jurisdiction of organization**; and

      iii. Debtor’s organizational **identification number**.
Note that the filing office is not permitted to inquire about or consider the accuracy of the information.

2. Consequences

a. **Rightful Rejection:** A SC whose FS is rightfully rejected will know of its rejection promptly and may remedy whatever error or omission led to the rejection.

b. **Wrongful Rejection:** A wrongfully rejected FS is still effective against lien creditors, but not against subsequent purchasers or SCs. § 9-516.

c. **Wrongful Acceptance:** A wrongfully accepted FS is effective as of the filing date. § 9-520(c) & cmt. 3.

VI. Maintaining Perfection

A. Lapse, Termination, Release, and Continuation

1. **Lapse:** A security interest perfected by filing remains perfected (and retains its priority over other later-perfected SIs) only for five years from the date of filing, unless it is continued. § 9-515(a).

   ♦ One year after a FS lapses, it may be removed from the filing system and destroyed. § 9-522(a).

2. **Continuation:** A filed SI may be continued beyond its initial five-year span if the creditor files a continuation statement during the last 6 months of the five-year period. § 9-515(c).

   ♦ Continuation may not be accomplished by filing a new FS or by filing before or after the 6-month continuation window. § 9-510(c).

3. **Termination:** Once the debt giving rise to the SI is fully satisfied, the creditor must timely file a termination statement to signify that the collateral is no longer encumbered. § 9-513(c)(1).

   ♦ The SC must timely notice termination or satisfaction or face legal sanctions.

   ♦ TS must identify the FS by filing number, § 9-512, and must indicate that the FS it terminates is no longer effective, § 9-102(79).

   ♦ Upon filing TS, the FS lapses. § 9-513(d).
4. **Release**: Voluntary relinquishment by creditor of some or all of its perfected security interest.
   - Release obligation arises only by way of contract b/w debtor and creditor – no legal obligation to file release
   - Release may be accomplished by filing an amendment to the existing FS. § 9-512(a).
   - The release must identify the FS by filing number. § 9-512.

B. **Debtor’s Name Change**

1. **Existing Collateral**: A change in the debtor’s name does not affect the perfection of a SI in collateral possessed by the debtor prior to or at the time of the name change. § 9-507(c).

2. **“After-Acquired” Collateral**: When a change in the debtor’s name renders a filed FS “seriously misleading,” the filing is not effective to perfect a SI in collateral acquired by the debtor more than four (4) months after the change. SC must file a new FS prior to the 4 mo. deadline in order to perfect as to collateral acquired more than 4 mos. after the change. *Id.*

3. A searcher should always consider the possibility that the debtor’s name changed before the debtor approached the searcher for a loan. *Id.*

4. Provisions in SAs requiring debtor to notify SC of any name change are not much help to the SC and no help at all to searchers. *Id.*

C. **Change in Appearance, Use, or (Intrastate) Location of Collateral**: A change in circumstances other than the debtor’s name, *even if the changes make the initial filing seriously misleading*, will not affect the effectiveness of the initial filing. § 9-507(b).

D. **Proceeds**

1. Recall that a perfected SI continues in identifiable proceeds. §§ 9-102(64) & 9-315(a)(2).

2. As a general rule, a SI in proceeds is perfected if the SI in the original collateral was perfected at the time the proceeds arose. § 9-315(c).

3. A perfected SI in proceeds becomes unperfected **twenty (20) days after the debtor receives those proceeds unless**:
   a. The proceeds are identifiable *cash proceeds*, § 9-315(d)(2);
b. If the proceeds are *other than cash proceeds*,
   i. a filed FS (i.e., no perfection by possession) covers the original collateral;
   ii. the proceeds are collateral in which a SI is properly perfected by filing in the same office as the original FS; and
   iii. the non-cash proceeds were not acquired with cash proceeds, § 9-315(d)(1); or

c. If the proceeds are *non-cash proceeds* but were *acquired with cash proceeds*,
   i. a filed FS (i.e., no perfection by possession) covers the original collateral, and
   ii. the proceeds are collateral which falls within the description of collateral in the original FS, § 9-315(d)(3) & cmt. 5.

4. **Barter/Exchange** (exchange of collateral for noncash proceeds)
   a. “Type 0” (swap for another item fitting the description of collateral in the original FS) – SC retains a perfected SI
   b. “Type 1” (swap for collateral not fitting the original description but which is perfected by filing in the same office as the original FS) – SC retains a perfected SI
   c. “Type 2” (swap for collateral which is perfected by filing in a different office than the original FS) – SC must refile within 20 days in the new office

5. **Purchases** (exchange of collateral for cash proceeds, which is then used to purchase noncash proceeds)
   a. “Type 0” (swap for another item fitting the description of collateral in the original FS) – SC retains a perfected SI
   b. “Type 1” (swap for collateral not fitting the original description but which is perfected by filing in the same office as the original FS) – SC must file on new collateral within 20 days to maintain continuous perfection
c. “Type 2” (swap for collateral which is perfected by filing in a different office than the original FS) – SC must file on new collateral within 20 days to maintain continuous perfection

♦ For both Type 1 and Type 2, if SC files after more than 20 days, SC has a perfected interest in the new collateral, but only as of the date of the new filing – no “relation back”

6. The SC does not need the debtor’s authorization to file the new FS to perfect proceeds of collateral. § 9-509(b)(2).

E. Effect of Interstate Relocation of the Debtor

1. Individual Debtor: When an individual debtor changes her principal residence, an SI properly perfected in State A will remain perfected for four months following the relocation, § 9-316(a)(2), by the expiration of which the SC must file or otherwise perfect in State B or its SI will become unperfected both prospectively, as against all new claimants, and retrospectively as against a purchaser or SC who gave value after the debtor relocated to State B. § 9-316(b).

2. Registered Organization: When a registered organization “relocates” by reorganizing in State B, an SI properly perfected in State A will remain perfected for one year following the relocation, § 9-316(a)(3), by the expiration of which the SC must file or otherwise perfect in State B or its SI will become unperfected both prospectively, as against all new claimants, and retrospectively as against a purchaser or SC who gave value after the debtor relocated to State B. § 9-316(b).

3. Non-Registered Organization: When a partnership or other non-registered organization “relocates” by moving its chief executive office from State A to State B, an SI properly perfected in State A will remain perfected for four months following the relocation, § 9-316(a)(2) & cmt. 2 (Ex. 1), by the expiration of which the SC must file or otherwise perfect in State B or its SI will become unperfected both prospectively, as against all new claimants, and retrospectively as against a purchaser or SC who gave value after the debtor relocated to State B. § 9-316(b).

4. A timely filed FS in State B will keep the SI continuously perfected dating back to the original effective date of the filing in State A. § 9-316(b) & cmt. 2 (Ex. 3).