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**SYLLABUS:**

1. Opinion No. 3513, Opinions of the Attorney General for 1962, issued December 28, 1962, is overruled and of no further force and effect;

2. The financing statement created under Chapter 1309, Revised Code, is the device to perfect the security interest in personal property and fixtures against third party creditors and when filed the financing statement must comply in form only with the requirements of Section 1309.39, Revised Code, and

3. The security agreement is the device that creates the security interest and encumbers personal property and fixtures and if the agreement is filed to perfect the security interest the agreement must comply in form with Section 1309.39, Revised Code, and Section 317.111, Revised Code.

Columbus, Ohio, May 20, 1963

Hon. Earl W. Allison  
Prosecuting Attorney  
Franklin County  
Columbus 15, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"The Honorable James A. Schaefer, Recorder of Franklin County, Ohio, has officially requested me to ask you to reconsider 1962 Ohio Attorney General Opinion No. 3513, dated December 28, 1962, in which it was stated that the financing statement is the instrument that creates the security interest and encumbers the collateral.

"In his request to me Mr. Schaefer has stated that several lawyers have questioned the correctness of that opinion. Since I do not believe it is the function of this office to rule on the correctness of an attorney general's opinion, I am forwarding his request to you for such consideration as you may see fit to give."

Opinion No. 3513, Opinions of the Attorney General for 1962, was in response to the following inquiry:

"There appears to be some conflict between the provisions of the Ohio Revised Code Section 1309.39 and Ohio Revised Code Section 317.111 relating to placing the words, 'this instrument prepared by,' upon financing statements filed under the Uniform Commercial Code.

"What is your Opinion concerning whether or not the words 'this instrument prepared by' is or is not required to be placed upon financing statements filed under the Uniform Commercial Code in order to make them in conformity with the recording statutes pertaining to county recorders offices?"

The syllabus of this 1962 Opinion ruled as follows:

"A financing statement described in Section 1309.39, Revised Code, is an instrument by which the title to real

estate or personal property is encumbered, and pursuant to the provisions of Section 317.111, Revised Code, a county recorder is under a clear duty to refuse to accept a financing statement for filing unless the provisions of such Section 317.111, Revised Code, have been met."

The conclusion reached in the 1962 Opinion was premised upon the flatly stated assumption that a financing statement "encumbers the title to the real or personal property covered thereby, and thus, the general provisions of Section 317.111, *supra*, are applicable to financing statements." In order to rule on the correctness or incorrectness of the 1962 Opinion it is necessary to determine, not assume, the legal effect and purpose of the financing statement as created under the Ohio Uniform Commercial Code.

The policy and scope of the Uniform Commercial Code as it relates to secured transactions is set forth in Section 1309.02, Revised Code, as follows:

"(A) Except as otherwise provided in section 1309.03 of the Revised Code on multiple state transactions and in section 1309.04 of the Revised Code on excluded transactions, sections 1309.01 to 1309.50, inclusive, of the Revised Code, apply so far as concerns any personal property and fixtures within the jurisdiction of this state:

"(1) to any transaction, regardless of its form, which is intended to create a security interest in personal property or fixtures, including goods, documents, instruments, general intangibles, chattel paper, accounts, or contract rights; and also

"(2) to any sale of accounts, contract rights, or chattel paper.

"(B) Sections 1309.01 to 1309.50, inclusive, apply to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. Sections 1309.01 to 1309.50, inclusive, of the Revised Code do not apply to statutory liens except as provided in section 1309.29 of the Revised Code.

The first step in determining the effect and purpose of the financing statement is to analyze the "security interest" and how it is created. A security interest as defined in Section 1309.01 (KK), Revised Code, is "an interest in personal property or fixtures which

secures payment and performance of an obligation . . . .”

The security interest arises from an agreement between the parties defined in Section 1301.01 (C) as follows:

“‘Agreement’ means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in Sections 1301.11, and 1302.11 of the Revised Code. Whether an agreement has legal consequences is determined by the provisions of Chapters . . . 1309 of the Revised Code, if applicable; otherwise by law of contracts.”

An agreement creating an interest in personal property and fixtures as security for payment and performance is a security agreement and the legal consequences of such an agreement is set forth in Section 1309.01 (A) (8), Revised Code:

“‘Security agreement’ means an agreement which *creates* or provides for a security interest;” (Emphasis added)

The Uniform Commercial Code herein provides that the device for creating the security interest is the security agreement. This conclusion is further supported by Section 1309.15 (A), as follows:

“(A) A security interest cannot attach until there is agreement, as defined in division (C) of Section 1301.01 of the Revised Code, that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpone the time of attaching.”

The above cited provisions unequivocally state that the interest is created by the security agreement and it is, therefore, the security agreement which encumbers the collateral. The obvious exclusion of any mention of a financing statement clearly illustrates this was not the intended purpose or effect of the financing statement.

There are several requirements regarding the security interest which I would like to mention briefly. Section 1309.14, Revised Code, states that a security interest is unenforceable against the debtor or third person unless 1) the collateral is in the possession of the secured party, or 2) the debtor has signed a security agreement which contains a description of the collateral. I allude to this provision only to point out that a security interest may be created

without a written agreement. When the interest is non possessory the agreement must be in writing and describe the collateral security. Of course, it is desirable to set out therein the use of the collateral and the rights, duties and obligations of the parties.

As against third party creditors, the secured party must protect his interest by *perfecting* the security interest in the collateral. Section 1309.22 (A), Revised Code, provides as follows:

“A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken, as provided in sections 1309.21, 1309.23, 1309.24, and 1309.25, of the Revised Code. If such steps are taken before the security interest attaches it is perfected at the time when it attaches.”

Section 1309.21 provides in part:

“(A) A financing statement must be filed to *perfect* all security interests except the following . . . .”

(Emphasis added)

Section 1309.21, *supra*, further sets forth various types of security interests which do not require filings to perfect the interest. Section 1309.23, Revised Code, provides a security interest in chattel paper and negotiable instruments may be perfected by filing. Sections 1309.23, *supra*, and 1309.24, Revised Code, set forth the circumstances under which security interests may be perfected by possession, and Section 1309.25, Revised Code, provides various rules relating to the security interests.

The fact that a financing statement does not create the security interest is illustrated by considering the possessory security interest. When the collateral is to remain in the possession of the secured party, I have pointed out there must always be some form of agreement, either oral or written, between the parties to create the security interest. The security interest, however, is created without a financing statement and as mentioned above the security interest may be perfected without a financing statement. The fact that the financing statement does not create the security interest is most clearly illustrated by noting that under Sections 1309.21, *supra*, and 1309.09, Revised Code, when the financing statement is filed it has no effect until the security interest “attaches.” The security interest attaches when there is an agreement, value given and the

debtor has rights in the collateral. Section 1309.15, *supra*. The effect of the financing statement then is simply to *perfect* the security interest of the secured party in those instances when a filing is required under Chapter 1309, *supra*.

Section 1309.39, *supra*, sets forth the legal requirements for a financing statement. This section further provides in part:

“A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by both parties.”

The purpose of a financing statement is pointed out in the committee comments following Section 1309.39:

“This Section adopts the system of ‘notice filing’ which has proved successful under the Uniform Trust Receipts Act. What is required to be filed is not, as under chattel mortgage and conditional sales acts, the security agreement itself, but only a simple notice which may be filed before the security interest attaches or thereafter. The notice itself indicates merely that the secured party who has filed may have a security interest in the collateral described. Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs. \* \* \* Notice filing has proved to be of great use in financing transactions involving inventory, accounts and chattel paper, since it obviates the necessity of refileing on each of a series of transactions in a continuing arrangement where the collateral changes from day to day. Where other types of collateral are involved, the alternative procedure of filing a signed copy of the security agreement may prove to be the simplest solution.

It is apparent that the 1962 Opinion is erroneous in two respects. First, Chapter 1309, *supra*, relates to security interests in personal property, not real estate, except as it applies to security interests in crops, minerals or timber to be extracted and cut from the land, and security interests in goods which are or are to become fixtures. In these limited cases the instrument must describe the related real estate since real estate interests may be affected. Second, the financing statement serves only to *perfect* a security interest and in no way creates the interest or encumbers the collateral.

Section 317.111, *supra*, provides as follows:

“No interest by which the title to real estate or per-

sonal property, or any interest therein or lien thereon, is conveyed, created, encumbered, assigned or otherwise disposed of, shall be received for record or filing by the county recorder unless the name of the person who, and governmental agency, if any, which prepared such instrument appears at the conclusion of such instrument and such name is either printed, typewritten, stamped, or signed in a legible manner. \* \* \*

In answer to the inquiry directed to the Attorney General in the 1962 Opinion, it is my opinion that because a financing statement is not an instrument which creates a security interest or encumbers title it does not fall within the operation of Section 317.111, *supra*. When a financing statement is filed to perfect the security interest it must comply in form only with the requirements of Section 1309.39, *supra*. I therefore overrule Opinion No. 3513, Opinions of the Attorney General for 1962, issued December 28, 1962, in its entirety and hold it of no force and effect.

Under the Uniform Commercial Code it is the security agreement that is the device for creating the security interest and encumbering the collateral. Therefore the security agreement is an instrument as defined in Section 317.111, *supra*. If the agreement is filed to perfect the security interest against third parties under Section 1309.39, it must comply with the requirements of Section 317.111, *supra*. In the case of *Brown & Sons v. Honabarger, et al.*, 171 Ohio St., 247, the Supreme Court held that the county recorder was under a duty to refuse to accept an instrument which did not comply with Section 317.111, *supra*.

Therefore it is my opinion and you are advised:

1. Opinion No. 3513, Opinions of the Attorney General for 1962, issued December 28, 1962, is overruled and of no further force and effect;

2. The financing statement created under Chapter 1309, Revised Code, is the device to perfect the security interest in personal property and fixtures against third party creditors and when filed the financing statement must comply in form only with the requirements of Section 1309.39, Revised Code, and

3. The security agreement is the device that creates the security interest and encumbers personal property and fixtures and

if the agreement is filed to perfect the security interest the agreement must comply in form with Section 3109.39, Revised Code, and Section 317.111, Revised Code.

Respectfully,  
WILLIAM B. SAXBE  
Attorney General