O' Give Me A Home: Determining the Location of the Debtor's Chief Executive Office Under Section 9-103 of the UCC

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I. Introduction

A great deal of the litigation under Article 9 of the Uniform Commercial Code (UCC) concerns choice of law issues, and in particular, the location of the debtor's "chief executive office" under section 9-103.[1] In the context of multistate transactions, section 9-103 lays out the rules for perfection of security interests and also explains the effects of perfection and nonperfection.[2] For accounts, general intangibles, and mobile goods given as collateral in multistate transactions, section 9-103(3)(b) dictates that the law of the debtor's jurisdiction governs perfection and its effect.[3] Section 9-103(d) explains that the debtor is deemed located at his place of business if he has one, at his chief executive office if he has multiple places of

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1. *See* WILLIAM D. HAWKLAND ET AL., UNIFORM COMMERCIAL CODE SERIES § 9-103:9 (1997).
2. *See* U.C.C. § 2-314 cmt. 6 (1996).
3. *Id.* § 9-103(3)(b).

business, or otherwise at his residence.[4] In the latter case, the UCC does not define what a chief executive office is, nor does it explain how to determine where such an office is located for a given business. Consequently, various courts have struggled with this lack of guidance from the UCC, formulating different tests for applying the chief executive office rule.[5]

This Note has two central purposes concerning these problems with section 9-103. First, it attempts to provide an in-depth analysis of the tests courts have developed—not just a description, but an exploration of their true meaning and impact as applied. Second, this Note seeks to present why one test should be favored over the others. In Part I, the problem at issue is presented. Part II explains section 9-103 in greater detail. Part III analyzes the various tests the courts have applied to determine the location of a debtor's chief executive office, and Part IV presents arguments for which test should be uniformly applied. Lastly, Part V is a summary of the main points addressed.

II. Applying Section 9-103(3)

Although this Note focuses mainly on section 9-103(3), it is helpful to know the structure of section 9-103 as a whole in order to understand the relevance and impact of the issues presented. In general, section 9-103 explains the rules for perfecting security interests in collateral involved in multistate transactions. It does this by categorizing collateral into five categories and applying different

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4. *Id.* § 9-103(3)(d).

5. *See, e.g.,* Mellon Bank, N.A. v. Metro Communications, Inc., 945 F.2d 635, 642 (3d Cir. 1991) (rejecting the rigid two-part test discussed below in Part III.B. when determining the debtor's chief executive office); Jarboe v. United Bank of Denver (*In re* Golf Course Builders Leasing, Inc.), 768 F.2d 1167, 1170 (10th Cir. 1985) (relying on the volume of business test); Aoki v. Shepherd Mach. Co. (*In re* J.A. Thompson & Son, Inc.), 665 F.2d 941, 950 (9th Cir. 1982) (stating that business volume is relevant in cases when one cannot easily identify the chief executive office); Chase Manhattan Bank v. Nemko, Inc. (*In re Nemko*), 209 B.R. 590, 601-02 (Bankr. E.D.N.Y 1997) (discussing the test laid out in *Mellon Bank*); Tatelbaum v. Commerce Inv. Co., 262 A.2d 494, 498 (Md. 1970) (instructing creditors to find the debtor's office with the greatest volume of business).

rules to each category.[6] Section 9-103(1) deals with instruments, documents, and ordinary goods; section 9-103(2) deals with goods subject to certificates of title; section 9-103(3) covers accounts, general intangibles, and mobile goods; section 9-103(4) deals with chattel paper; and section 9-103(5) covers minerals.[7] With the exception of goods subject to certificates of title, the approach to determining which jurisdiction's laws govern perfection of a security interest is bifurcated. Depending on the section in which the collateral falls, the governing jurisdiction will be determined either by the location of the collateral or by the location of the debtor.[8] As a general rule of thumb, tangible collateral is governed by the jurisdiction in which the collateral is located, and intangible collateral is governed by the jurisdiction in which the debtor is located.[9]

Since section 9-103 is organized around types of collateral, the logical first step in analyzing a multistate transaction for purposes of perfection is to classify the collateral into one of the categories listed in the section. As stated above, section 9-103(3) is concerned with accounts, general intangibles, and mobile goods. Accounts and general intangibles have fairly clear and succinct definitions under section 9-106, so they are easy to classify.[10] Mobile goods are also easy to classify. Section 9-103(3)(a) gives specific examples of mobile goods, and the Official Comment to the section provides guidance, explaining that mobile goods are usually equipment, but can sometimes be inventory.[11] The Comment also points out that the

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6. *See* U.C.C. § 9-103 (1996).

7. *Id.*

8. *See id.*

9. *See* Steven L. Harris & Charles W. Mooney, Jr., *Choosing the Law Governing Perfection: The Data and Politics of Article 9 Filing*, 79 MINN. L. REV. 663, 664 (1995).

10. Section 9-106 reads as follows:

> "Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance. "General intangibles" means any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, investment property, rights to proceeds of written letters of credit, and money.

U.C.C. § 9-106 (1996).

11. *Id.* § 9-103 cmt. 5(b).

section pertains to goods "normally used in more than one jurisdiction."[12] This suggests that the good just has to normally be used in more than one jurisdiction, but not actually used in more than one.[13]

The next step in a section 9-103 analysis is to determine which jurisdiction's laws apply. Section 9-103(3) employs a situs of the debtor rule; thus, the jurisdiction of the debtor's location controls perfection and the effects of perfection or non-perfection.[14] Having a debtor situs rule makes sense considering that accounts, general intangibles, and mobile goods do not necessarily have permanent locations, which is a prerequisite for the alternate collateral situs rule.[15] Theoretically, determining the debtor's location should not be terribly difficult, considering that the UCC deems the debtor located at his place of business, if he has one, and if he does not then he is deemed located at his residence.[16] In cases in which there is only one place of business or a residence, determining the debtor's location is not difficult. A problem arises, however, when a debtor has more than one place of business. In that instance, the UCC instructs courts to look for the debtor's chief executive office. However, the drafters of section 9-103(3) never define exactly what constitutes such an office, so courts must rely on the Official Comment for direction. The Official Comment aids courts with the following language:

> "Chief executive office" does not mean the place of incorporation; it means the place from which in fact the debtor manages the main part of this [sic] business operations. This is the place where persons dealing with the debtor would normally look for credit information, and is the appropriate place for filing. The term "chief executive office" is not defined in this Section or elsewhere in this Act.[17]

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12. *Id.*

13. *See id.*; *see also* PNC Bank v. Varsity Sodding Serv., Inc. (*In re* Varsity Sodding Serv., Inc.), 191 B.R. 306, 308-09 (Bankr. M.D. Pa. 1996) (analyzing section 9-103(c) of the Pennsylvania Uniform Commercial Code); Gary D. Samson, *Choice of Law and Multi-State Transactions*, 665 PLI/Comm. 141, 146 (1993) (discussing section 9-103(3)).

14. U.C.C. § 9-103(3)(d).

15. *See* HAWKLAND, *supra* note 1, at 9-211 to 9-212.

16. U.C.C. § 9-103(3)(b).

17. *Id.* § 9-103 cmt 5(c).

It is because of this vague language that courts fashion different tests resulting in non-uniformity, the very evil sought to be prevented by the drafters of the UCC.[18]

Since determining a debtor's chief executive office is only necessary when dealing with accounts, general intangibles, or mobile goods given as collateral by a debtor with more than one place of business, this may seem to be an obscure point in the UCC.[19] However, the broad definition of mobile goods brings this provision into play in numerous multistate transactions. Furthermore, some courts look to section 9-103(3) in order to define chief executive office for other provisions in the UCC.[20] More importantly, the leading revisions to section 9-103 call for creditors to file in the jurisdiction of the debtor's "major executive office" to perfect all non-possessory security interests in collateral other than certificate of title goods.[21] With greater reliance being placed on the debtor's chief executive office, it is essential that it be clearly defined. Given these considerations, section 9-103(3)(d) is in definite need of clarification and scholarly debate.

III. Tests That Courts Have Applied

There are basically three tests that various courts adopted in order to apply the UCC's chief executive office rule. The first test applied by some courts was a volume of business test.[22] The volume

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18. *See generally id.* § 1-102(2)(c) (noting that one policy of the U.C.C. is "to make uniform the law among the various jurisdictions").

19. *See* Allen W. Vestal, *Choice of Law and the Fiduciary Duties of Partners Under the Revised Uniform Partnership Act*, 79 IOWA L. REV. 219, 232 (1994) (discussing how section 9-103(3) only deals with perfection and the related issues of priority, and does not encompass issues of attachment between the debtor and creditor); Steven O. Weise, *U.C.C. Article 9 — Personal Property Secured Transactions*, 47 BUS. LAW. 1593, 1619 n.166 (1992) (discussing the same).

20. *See, e.g.*, Tatelbaum v. Commerce Inv. Co., 262 A.2d 494, 498 (Md. 1970) (instructing creditors to find the debtor's office with the greatest volume of business).

21. *See* Alvin C. Harrell, *1994 Meetings Refine Proposed Article 9 Revisions*, 48 CONSUMER FIN. L. Q. REP. 326, 335 (1994) (discussing proposed section 9-103(a)(3) of the Uniform Commercial Code).

22. *See Tatelbaum*, 262 A.2d at 498.

of business test was rejected, however, by the Ninth and Tenth Circuit Courts of Appeal in favor of a two-part inquiry,[23] and the two-part inquiry was in turn rejected by the Third Circuit Court of Appeals, which found it too formalistic and replaced it with a simpler one-part inquiry.[24] These tests are elaborated on in the ensuing subsections.

A. Volume of Business Test

The court in *Tatelbaum v. Commerce Investment Co.*,[25] in a rather cryptic opinion, interpreted section 9-103 as instructing creditors to find the debtor's office with the greatest volume of business.[26] The opinion was reached under an older version of section 9-103 in which the pertinent language was not "chief executive office" but was instead "chief place of business."[27] At issue in the case was the meaning of chief place of business for purposes of filing under section 9-401. The court reasoned that the phrase was borrowed from section 9-103, so understanding the phrase's meaning in that section would also clear up the confusion in section 9-401.[28] Looking to the Official Comment[29] and Maryland law prior to enactment of the UCC, the court concluded that "chief place of business" could not mean the corporation's office as reported for taxing purposes; rather, the court concluded that it must mean the location where "the corporate debtor conducts its greatest volume of business activity."[30] Unfortunately, the court was not clear on how it arrived at this conclusion, nor was it clear when it concluded that the debtor's location with the greatest volume of business is the same location where creditors would naturally look for credit information

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23. *See* Jarboe v. United Bank of Denver (*In re* Golf Course Builders Leasing, Inc.), 768 F.2d 1167, 1170 (10th Cir. 1985); Aoki v. Shepherd Mach. Co. (*In re* J.A. Thompson & Son, Inc.), 665 F.2d 941, 950 (9th Cir. 1982).

24. *See* Mellon Bank, N.A. v. Metro Communications, Inc., 945 F.2d 635, 642 (3d Cir. 1991).

25. 262 A.2d 494 (Md. 1970).

26. *Id.* at 498.

27. *See id.* at 497.

28. *See id.*

29. This is now Official Comment 5 to section 9-103.

30. *Tatelbaum*, 262 A.2d at 498.

about the business.[31] *Tatelbaum* remained the authoritative case in this area until the Ninth Circuit took up the issue.

B. *The* J.A. Thompson *Test*

Aoki v. Shepherd Machinery Company (In re J.A. Thompson & Son, Inc.)[32] was another case construing the pre-1972 revision of section 9-103. The requisite phrase was still "chief place of business;" however, the revised section had been promulgated, so the Ninth Circuit had the benefit of examining revised section 9-103 for guidance.[33] Like the courts before it, the *J.A. Thompson* court first looked to the Official Comment for section 9-103. Unlike the *Tatelbaum* court, however, the Ninth Circuit explicitly rejected the volume of business test and instead concluded that based on the language of the Official Comment, the drafters intended a two-part inquiry to determine the location of the debtor's chief place of business.[34] The inquiry, the court explained, should first focus on the "place from which . . . the debtor manages the main part of his business operations," and second on the reasonable expectations of creditors.[35] Acknowledging that there was some ambiguity in these general phrases, the court sought to clarify how each prong is applied.[36]

With the first prong of the inquiry, the court noted there could be alternate understandings.[37] References to "place of management" could be read to refer to either the location of central administrative activity in a multistate business, or it could be read to refer to where the largest plant or project is managed on a daily basis. To solve this quandary within the Official Comment, the court turned to revised

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31. *See Id.*
32. 665 F.2d 941, 949 (9th Cir. 1982).
33. *See id.* at 950.
34. *See id.* at 949-50; *see also* Jarboe v. United Bank of Denver (*In re* Golf Course Builders Leasing, Inc.), 768 F.2d 1167, 1070-71 (10th Cir. 1985) (explaining the *J.A. Thompson* court's analysis).
35. *Aoki* (*In re J.A. Thompson*), 665 F.2d at 949 (quoting U.C.C. § 9-103 cmt. 5(c)).
36. *See id.* at 949-50.
37. *See id.*

section 9-103.[38] The court acknowledged that the revision was not adopted at the time in California and therefore was not binding; nevertheless the justices argued that the latter version was to be given "substantial weight."[39] Since the drafters of the revision changed the phrase from chief place of business to chief executive office, it was clear to the justices that "place of management" in the first prong of the test referred to something akin to executive headquarters, not the business location with the largest volume of business.[40]

Obviously, it is not always readily apparent which location in a multistate business serves as the executive headquarters.[41] When such a situation arises, the court pointed out several factors that should be considered, such as "[L]ocation of the Board of Directors' meetings, management offices, payroll and other business records."[42] Although the court rejected the volume of business factor as dispositive of the debtor's chief place of business, it did say that volume of business should be considered among the other factors.[43] Thus, the court's explanation of the first prong was that in order to determine the place from which the main part of a business is managed, courts should look to the location of the debtor's executive headquarters. If such a location is not readily apparent, courts should look to the factors listed above to sort through the possible locations and determine the appropriate one.

In determining where creditors would normally search for credit information, the second prong of the test, the court rejected the determination of a lower court that only creditors of the location with the largest volume of business should be considered.[44] Again, the *J.A.Thompson* court looked to the Official Comment, which said to

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38. *See id.* at 950.

39. *Id.* (citing May Dep't Stores Co. v. Smith, 572 F.2d 1275, 1278 (8th Cir. 1978)).

40. *Aoki* (*In re J.A. Thompson*), 665 F.2d at 950.

41. The Official Comment to section 9-103 anticipates that it will be a rare occasion for the possible number of chief executive offices in a given multistate business to number more than two. U.C.C. § 9-103 cmt. 5 (1996). *Cf.* Mellon Bank, N.A. v. Metro Communications, Inc., 945 F.2d 635, 643-44 (3d Cir. 1991) (analyzing a situation with two possible chief executive offices).

42. *Aoki* (*In re J.A. Thompson*), 665 F.2d at 950.

43. *See id.*

44. *See id.*

consider "persons dealing with the debtor."[45] From this language, the court determined that the lower court was too narrow in its interpretation and that future courts should consider "the reasonable expectations of a representative number of creditors."[46] Furthermore, the court noted this second prong is not dispositive and does not eclipse the importance of the first prong by creating a principle of estoppel; that is, a creditor does not automatically establish a debtor's chief place of business merely by showing reliance on the debtor's representations as to the location of its chief executive office.[47] The two-part inquiry intended by the court is much broader than estoppel and requires courts to consider both prongs of the inquiry and the relevant factors within each.

Following the Ninth Circuit's lead, the Tenth Circuit in *In re Golf Course Builders Leasing, Inc.*[48] also looked to a business's administrative activities and creditor expectations in determining the debtor's chief place of business.[49] Similar to the Ninth Circuit, the Tenth Circuit based its support of the two-part inquiry on a consideration of the Official Comment and revisions to section 9-103.[50]

In *Golf Course Builders*, the bankruptcy court relied, as did the bankruptcy court in *J.A. Thompson*, on the volume of business test articulated in *Tatelbaum*.[51] The Ninth Circuit agreed with the Tenth Circuit and argued that while volume of business was no doubt a factor to be considered, it was not the only factor.[52] To determine a business's executive headquarters, the Ninth Circuit added the following factors to those put forth in *J.A. Thompson*: the office from which invoices were paid; where monthly, quarterly, and annual reports were prepared; where liability and worker's compensation insurance was acquired; and where equipment was leased or purchased.[53] Since the Ninth and Tenth Circuits formulated the two-

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45. U.C.C. § 9-103 cmt. 5(c) (1996).
46. *Aoki* (*In re J.A. Thompson*), 665 F.2d at 950.
47. *See id.*
48. Jarboe v. United Bank of Denver (*In re* Golf Course Builders Leasing, Inc.), 768 F.2d 1167, 1171 (10th Cir. 1985).
49. *See id.* at 1171.
50. *See id.* at 1170.
51. *See id.* at 1169-70.
52. *See id.* at 1170.
53. *See Jarboe* (*In re Golf Course Builders*), 768 F.2d at 1171.

part inquiry, numerous courts have expanded the factors considered and have utilized the *J.A. Thompson* test to locate both chief places of business and chief executive offices, depending on which is required.[54]

C. *The* Mellon Bank *Test*

The Third Circuit Court of Appeals, in *Mellon Bank, N.A. v. Metro Communications, Inc.*,[55] supposedly rejected the approach of the Ninth and Tenth Circuits for being too formalistic in construing the Official Comment.[56] The bankruptcy court in *Mellon Bank* utilized the *J.A. Thompson* test,[57] but the Third Circuit overruled the lower court, arguing that the drafters intended a test that simply asked "'where does the debtor manage the main part of its business' because that is where creditors are likely to search for information."[58]

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54. *See, e.g.*, Schaheen v. Allstate Fin. Corp., Nos. 91-1556, 91-1574, 1992 WL 111163, at *3 (4th Cir. 1992) (listing the location from which a business's financial operations and de facto management are conducted); Yoppolo v. Ohio Citizens Bank (*In re* A.J. Gibbons Roofing and Sheet Metal, Inc.), 139 B.R. 654, 656-657 (Bankr. N.D. Ohio 1991) (stating that volume of business is not the only factor, and considering the location of president, meetings, creditors, where invoices are received, incorporation, and checking accounts); Advance Fin. Corp. v. Isla Rica Sales, Inc., 747 F.2d 21, 28 (1st Cir. 1984) (supporting the headquarters approach); *In re* Astrocade, Inc., 31 B.R. 245, 250-251 (Bankr. S.D. Ohio 1983) (citing the following factors: location of outside auditing, accounting, principle office listings in Dunn and Bradstreet, bookkeeping, location of company presidents, payroll, financing, banking, telephone calls regarding the business, administrative functions, location of management team, inventory production, planning, significant records, tax statements, location from which goods are shipped, returns and equipment repairs, and meeting sites); Lands v. Ericson (*In re* Ericson), 6 B.R. 1002, 1008-1009 (Bankr. D. Minn. 1980) (stating factors to consider, but not deciding the chief executive office issue).

55. 945 F.2d 635 (3d Cir. 1991).

56. *Id.* at 642.

57. Mellon Bank, N.A. v. Metro Communications, Inc. (*In re* Metro Communications, Inc.), 95 B.R. 921, 927-930 (Bankr. W.D. Pa. 1989), *overruled in part*, Mellon Bank, N.A. v. Metro Communications Inc., 945 F.2d 635 (3d Cir. 1991) (considering the following factors: existence of office autonomy, location of officers and directors, office from which the annual report was generated, location of financial records, office from which business was negotiated and contracts were executed, location that generated the greatest revenues, area in which the majority of the debtor's creditors were located, and location from which primary accounting and legal services were rendered).

58. *Mellon Bank*, 945 F.2d at 642. The *Mellon Bank* court, like the other courts, draws the drafters' intent from the Official Comment to section 9-103.

According to the *Mellon Bank* court, the nature of this simple inquiry was violated when it was divided into a rigid two-part inquiry as required by the *J.A. Thompson* test.[59] The court further rejected the *J.A. Thompson* test by concluding there was no need to take factors thought relevant in some cases and apply them to all cases; rather, courts should examine all the facts of each dispute individually on a case-by-case basis.[60]

The distinctions the *Mellon Bank* court drew between the test it was fashioning and the two-part inquiry developed by the *J.A. Thompson* and *Golf Course Builders* courts cannot truly turn on the latter being too rigid. There are essentially two interpretations of what the court was doing in *Mellon Bank*, and neither interpretation supports the court's rigid explanation. The first interpretation is made by the court in *In re Nemko*,[61] which suggests the *Mellon Bank* court itself undertakes the very analysis it purports to reject.[62] As already stated, the Third Circuit's critique of the other two circuits is that those circuits divide the Official Comment into a rigid two-part inquiry and then require usage of unnecessary factors from previous unrelated cases.[63] The *Nemko* court interpreted *Mellon Bank* as simply reconfiguring the two-part inquiry, not rejecting it, and also maintaining the use of various factors.[64] According to the court, *Mellon Bank* first required courts to identify the main part of the debtor's business, which was accomplished through seeking out the debtor's location with the greatest volume of business.[65] With the main part of the business identified, the court then said *Mellon Bank* required courts to look to where the main part of the business was managed, using factors other courts had laid out, because that was

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59. *Id.*

60. *See id.*

61. Chase Manhattan Bank v. Nemko, Inc. (*In re Nemko*), 209 B.R. 590, 601-12 (Bankr. E.D.N.Y. 1997).

62. *Id.* at 601-12. This troubling aspect of the *Mellon Bank* opinion has led some courts and scholars to read the Third Circuit as agreeing with the Ninth and Tenth Circuits, despite clear language in the Third Circuit opinion to the contrary. *See* HAWKLAND., *supra* note 1, at art. 9-218; Vestal, *supra* note 19, at 232-36.

63. *See Mellon Bank*, 945 F.2d at 642.

64. *See Chase Manhattan Bank* (*In re Nemko*), 209 B.R. at 590.

65. *See id.* at 602.

where creditors would look for credit information.[66] The court's use of this second prong, however, must be a misinterpretation of *Mellon Bank*. In *Mellon Bank*, the court explicitly rejected the idea of creditors seeking out a business's place of management by stating that "to require the creditors of a corporation to speculate as to who is calling the final shots is impractical and irrelevant."[67] Contrary to the *Nemko* court's conclusion, *Mellon Bank* essentially ignored the Official Comment's reference to "place of management" and instead focused solely on the "main part of the business," which it defined as being synonymous with the location engaged in the greatest volume of business.

Furthermore, in applying the two prongs of the inquiry it found in *Mellon Bank*, the *In re Nemko* court allowed for the consideration of various factors.[68] *Mellon Bank*, however, strongly alluded that any factors aside from those indicating the location with the greatest volume of business were secondary[69] when it stated that accounting and financial services, both of which were key to finding the chief executive office in the *J.A. Thompson* line of cases, were secondary to the main part of the debtor's business.[70] While this does not

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66. *See id.* at 603.

67. *Mellon Bank*, 945 F.2d at 643.

68. *See Chase Manhattan Bank* (*In re Nemko*), 209 B.R. at 602-08 (allowing consideration of the following factors: location of a debtor's chief executive officer under section 9-103(3)(d); location of a debtor's largest business volume; and where a debtor manages the "main part" of its business that the creditors will look to for credit information).

69. *See Mellon Bank*, 945 F.2d at 643. *Mellon Bank* concludes that the use of factors contributes to rigidity because courts are forced to use unnecessary factors from unrelated cases, but in none of the cases heretofore cited in support of *J.A. Thompson* have any courts felt constrained or bound by factors used in preceding cases. Each case used some factors from previous cases, ignored others, and even added new factors. *J.A. Thompson* listed four or five factors to consider, but by the time of *In re Astrocade*, the list had grown to nineteen relevant factors. *See* Aoki v. Shepherd Mach. Co. (*In re* J.A. Thompson & Son, Inc.), 665 F.2d 941, 950 (9th Cir. 1982); *In re* Astrocade, Inc., 31 B.R. 245, 250-51 (Bankr. S.D. Ohio 1983). In truth, factors were never rigidly applied, for courts were always as free and flexible as the *Mellon Bank* court to consider a wide range of evidence.

70. *See Mellon Bank*, 945 F.2d at 643; *see also Chase Manhattan Bank* (*In re Nemko*), 209 B.R. at 607 (acknowledging the importance of financial affairs as a factor); Lynn M. LoPucki, *Why the Debtor's State of Incorporation Should be the Proper Place for Article 9 Filing: A Systems Analysis*, 79 MINN. L. REV. 577, 594 (1995) (discussing the importance of financial services to determining chief executive office).

necessarily lead to the conclusion that all other factors are secondary, financial and accounting services are considered to be such important factors by other courts and commentators that it is hard to see how any other factors similar to them could ever be primary unless they related directly to volume of business.

The *In re Nemko* court does read *Mellon Bank* correctly to say creditor expectations are not an independent inquiry.[71] However, the court, despite clear language in *Mellon Bank* to the contrary, links creditor expectations to the place of management, not the main place of business.[72] In short, because of clear language from the Third Circuit to the contrary, *In re Nemko* cannot be a wholly valid interpretation of *Mellon Bank*.

The second interpretation of *Mellon Bank* is probably a more accurate interpretation of what the court concluded. This interpretation sees the *Mellon Bank* and *J.A. Thompson* courts coming at section 9-103 from entirely different directions. With careful reading, one sees that there is a wide philosophical difference underpinning the *Mellon Bank* and *J.A. Thompson* approaches to section 9-103. Remember, as an initial step in forming its two-part inquiry, the *J.A. Thompson* court had to first determine the correct interpretation of "the place from which . . . the debtor manages the main part of his business operations."[73] The court set out two possible meanings for this expression: the debtor's location with the greatest volume of business, or the location of central administrative activities in the executive headquarters of the business.[74] The philosophical difference between the *Mellon Bank* test and the *J.A. Thompson* test is that the latter looks for the executive headquarters, while the former looks for the office with the greatest volume of business.[75] With the initial premise of their inquiries being so different, the courts necessarily developed distinct analytical approaches to the chief executive office rule.

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71. *See Chase Manhattan Bank* (*In re Nemko*), 209 B.R. at 602.

72. *See id.* at 603; *see also Mellon Bank*, 945 F.2d at 643 (linking creditor expectations to the main place of business).

73. Aoki v. Shepherd Mach. Co. (*In re* J.A. Thompson & Son, Inc.), 665 F.2d 941, 949 (9th Cir. 1982).

74. *See id.* at 949-50.

75. *See id.*; *Mellon Bank*, 945 F.2d at 643.

As already alluded to, the Third Circuit was not explicit in its return to the volume of business test; it did so, however, by emphasizing the "main part" of a debtor's business.[76] To find a business's chief executive office, the Third Circuit required courts to look at a given business and determine the largest portion of that business, what that business spent the bulk of its time doing, and the main business of the company.[77] On the facts in *Mellon Bank* itself the court examined Metro Communication's business and determined, "The 'main part' of Metro's activities was the acquisition of syndication rights and the sale of advertising."[78] It reached that conclusion because that was the bulk of Metro's business at the time. Applying the *J.A. Thompson* test to the same situation, the court, if it was necessary, would have looked to a variety of factors to determine the main part of the business and would not have focused solely on the location with the greatest volume of business.

As pointed out in the *J.A. Thompson* line of cases, using volume of business as a factor is not prohibited, but the *J.A. Thompson* test meant to make it one of many factors to consider when identification of the chief executive office was otherwise too difficult.[79] *Mellon Bank* effectively made it a single dispositive test without independent consideration of other factors. More importantly, the test made the determination without consideration of where creditors would normally look for credit information.[80] The structure of the inquiry was for the court to simply ask "where does the debtor manage the main part of its business because that is where creditors are likely to search for information."[81] In other words, to find the chief executive office, courts should look for the office with the greatest volume of business regardless of other factors, because that location would automatically be deemed where creditors are expected to look for information.

In summary, the *Mellon Bank* court purports to reject the *J.A. Thompson* test because it is too rigid, but this cannot possibly be the

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76. *See Mellon Bank*, 945 F.2d at 643.
77. *See id.* at 643-44.
78. *Id.* at 643.
79. *See Aoki* (*In re J.A. Thompson*), 665 F.2d at 950.
80. *See Mellon Bank*, 945 F.2d at 643.
81. *Id.* at 642.

real distinction on which the Third Circuit relied. Under the *In re Nemko* interpretation of *Mellon Bank*, the *Mellon Bank* court simply applied a modified two-part inquiry similar to that of the *J.A. Thompson* test. The *In re Nemko* court's interpretation, however, is contradicted by explicit language in the *Mellon Bank* opinion. Under the interpretation favored by this author, the real distinction underlying the *Mellon Bank* court's analysis is its exclusive reliance on the volume of business test, which was specifically rejected by *J.A. Thompson* and its progeny. Under *Mellon Bank*, according to this latter interpretation, once the location with the greatest volume of business is determined, the court knows where creditors will normally look for credit information and can ignore any other factors not pertaining to the volume of business inquiry. In terms of the two-part inquiry, this author sees the *Mellon Bank* court removing from independent consideration the second prong of the analysis along with independent consideration of other factors aside from volume of business. For the *Mellon Bank* court, once the location with the greatest volume of business is found, for all practical purposes the location of the debtor's chief executive office is likewise found.

IV. Which Test Should Prevail

Three tests for the chief executive office rule in section 9-103 emerge from the cases. Although not explicitly stated in the opinion, the *Mellon Bank* test is really a reincarnation of the volume of business test that was first argued for in *Tatelbaum*.[82] Thus, the real issue boils down to whether, in an effort to have uniformity in determining the location of a debtor's chief executive office, courts should use the two-part inquiry and look for a business's executive headquarters, as *J.A. Thompson* argues, or use the *Mellon Bank* test and seek out the debtor's location with the greatest volume of business. There are three reasons the courts should follow the *J.A. Thompson* analysis.

First, and probably most persuasive, is the argument that the location of a business's executive headquarters is a more stable factor

82. *See supra* Part III.A.

for courts to look to than volume of business.[83] Business volume in many industries has the potential to be cyclical, depending on the season, economy, consumer preferences, and other factors. In the retail business, what is in high demand by frenzied shoppers at Christmas could easily give way to more reasoned purchases in the summer. Or in another instance, a company with a location selling big ticket items may not be able to keep those items in stock during a booming economy, but during an economic down-turn that same company may not be able to sell one of those items. If the volume of business approach is followed, with each change in the cycle, season, or economy, the appropriate place to file a financing statement under section 9-103(3)(d) would change.

The constant flux creates potential strain on the debtor-creditor relationship. A creditor in an ongoing relationship with a debtor would have to continually monitor the debtor, not only to ensure the value of its collateral, which one would normally expect, but also to track which of the debtor's business locations is currently engaged in the greatest volume of business in order to ensure that its financial statement continues to be properly filed. The strain is not as likely if creditors can rely on a debtor's executive headquarters for filing.

It is improbable that the location of a business's executive headquarters is in any way cyclical. Businesses do not normally move their administrative headquarters after Christmas, nor do they normally move their headquarters when consumers decide they prefer the company's product at location X as opposed to location Y. And short of a severe down-turn in the economy, companies do not normally move their headquarters when consumers decide to save rather than spend in difficult economic times. In short, the debtor-creditor relationship is better served when the creditor is able to rely on a stable factor, such as the debtor's headquarters, rather than on a volatile one like volume of business, which forces the creditor to expend greater resources to constantly monitor the debtor for reasons other than ensuring the value of its collateral. It is unlikely the

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83. *See* Aoki (*In re J.A. Thompson*), 665 F.2d at 950 (stating that the volume of business is relevant in cases in which one cannot easily identify the chief executive office); Jarboe v. United Bank of Denver (*In re* Golf Course Builders Leasing, Inc.), 768 F.2d 1167, 1170 (10th Cir. 1985) (accepting the analysis of the *J.A. Thompson* court).

drafters of the UCC intended to create a filing system in which creditors have little assurance that they initially filed in the proper place, or that their financial statement remained properly filed. Yet this is the result the *Mellon Bank* court created by solely relying on volume of business to determine a debtor's chief executive office.

Second, the *J.A. Thompson* inquiry is far more flexible than the one proposed in *Mellon Bank* because it allows courts to consider where creditors would normally look for credit information, and numerous other factors disallowed by the *Mellon Bank* test.[84] This is, of course, an ironic argument considering the great effort the *Mellon Bank* court put forth in proclaiming that its inquiry provided more flexibility by eliminating the rigid two-part inquiry featured in the *J.A. Thompson* test.[85] But, as already shown in Part III of this Note, the *Mellon Bank* court simply replaced a broad two-part inquiry with a much narrower one-part inquiry.[86] The test changed under *Mellon Bank* from considering the location from which the debtor's business is managed and the location to which creditors normally look for credit information under *J.A. Thompson*, to finding the location where the main part of the debtor's business is managed.[87] The *Mellon Bank* court assumed creditors will always look to where the main volume of business is in order to determine where to look for credit information, so the court removed creditor expectations from independent consideration in the test.[88] Not only did *Mellon Bank* remove the second prong of the *J.A. Thompson* test, the court went even further in promoting its more rigid test by eliminating, for all practical purposes, consideration of the broad range of factors allowed in *J.A. Thompson*.[89] The *J.A. Thompson* court reasoned that the drafter's intention, as set out in the Official Comment to section 9-103, was for the inquiries into creditor expectations and place of management to be independent, and accordingly the court provided factors for courts to

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84. *See Aoki* (*In re J.A. Thompson*), 665 F.2d at 949-50; *Mellon Bank*, 945 F.2d at 642.

85. *See Mellon Bank*, 945 F.2d at 642.

86. *See id.*

87. *See Aoki* (*In re J.A. Thompson*), 665 F.2d at 950; *Mellon Bank*, 945 F.2d at 642.

88. *See Mellon Bank*, 945 F.2d at 643.

89. *See id.*

consider in evaluating each.[90] In short, *Mellon Bank* is far more rigid because it severely narrows the range of information courts can evaluate in determining a business's chief executive office.

Third, the revision of section 9-103(3)(d) indicates a preference for the *J.A. Thompson* approach. Prior to the revision, the section required determination of the debtor's chief place of business.[91] *J.A. Thompson* persuasively argued that the change to chief executive office resulted from a desire to move courts away from looking at volume of business and to look instead at the business's executive headquarters.[92] The court cited the following:

> The Committee recommends that the place of business used where there is more than one be redesignated "chief executive office" instead of "chief place of business." This will emphasize that what is intended is the executive office rather than either a statutory office or the site of the largest plant.[93]

Although this type of language is not controlling, both *J.A. Thompson* and *Golf Course Builders* stated it should be given weight in construing section 9-103.[94]

V. Conclusion

Section 9-103(3) governs multistate transactions involving accounts, general intangibles, and mobile goods given as collateral by

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90. *See Aoki* (*In re J.A. Thompson*), 665 F.2d at 949-50. The drafters indicate in Official Comment 5 to section 9-103 that determining a business's chief executive office will normally be a simple process, in which there is almost never more than two potential locations. In cases when there are two possibilities that the test in section 9-103(3)(d) cannot resolve, the drafters state that it should be no great hardship for creditors to file in both locations to protect themselves. U.C.C. § 9-103 cmt. 5 (1996). At least one commentator takes issue with the drafters, arguing that when the cost of filing, time spent filing, and expenses incurred maintaining filings are aggregated, the cost is quite significant to the company. His solution, however, is not to work within the confines of the present section 9-103(3) as this Note attempts; rather, he argues for abandonment of the debtor situs rule and adoption of a rule whereby the debtor's state of incorporation controls perfection. *See* LoPucki, *supra* note 70, at 597-99.

91. *See Aoki* (*In re J.A. Thompson*), 665 F.2d at 949.

92. *See id.* at 950.

93. *Id.* (citing U.C.C. § 9-103(3) (Preliminary Draft No. 2 at 38, 1971)).

94. *See Aoki* (*In re J.A. Thompson*), 665 F.2d at 950; Jarboe v. United Bank of Denver (*In re* Golf Course Builders Leasing, Inc.), 768 F.2d 1167, 1170 (10th Cir. 1985).

a debtor with multiple places of business. It employs a situs of the debtor rule, in which the jurisdiction of the debtor's chief executive office determines the procedure for and effects of perfection. However, the section's explanation of the chief executive office rule is unclear. As a result, courts have developed differing tests for application of the section. Early on, courts applied a volume of business test. This test was abandoned by the Ninth and Tenth Circuits in favor of the *J.A. Thompson* test, which required courts to examine the location of the debtor's executive headquarters and the location to which creditors would normally look for credit information. The Third Circuit developed its own test that purported to provide more flexibility in locating the chief executive office, but in reality was a more rigid single inquiry that required sole reliance on volume of business to determine a debtor's chief executive office. This Note provided an in-depth analysis of these tests and argued that the *J.A. Thompson* test is the superior approach for applying section 9-103(3). The arguments prove that the *J.A. Thompson* test provides more stability to the debtor-creditor relationship, is more flexible, and arguably reflects the intent of the drafters of the section.