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FINANCING THE ACQUISITION OF NEW GOODS UNDER THE UNIFORM COMMERCIAL CODE

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I. INTRODUCTION

With a characteristically slow and deliberate pace American law has observed, and then occasionally absorbed, our national concern for moving massive quantities of goods from the production line to the ultimate user. Radio, television, magazines, the press, even the daily mails, flood our lives with solicitations for particular products. To these must be added the messages, often inspirational in tone, from both major political camps about the apparently desperate need to raise our gross national product another notch.

Strangers to our society quickly note that the much romanced buyer needs little or no cash to purchase these goods. Sellers often hawk their wares on the basis of the amount of the down payment, or the small monthly payment, rather than upon the ultimate total cost to the consumer. Department stores, discount firms, mail-order houses, and banks proclaim their willingness to give customers a line of credit to make the purchases of their choice. The growing number of finance companies related to business equipment suppliers attests to the fact that the need for cash does not wax when the purchaser is a commercial as distinct from an individual consumer.

Whether we study the acquisition of new goods from the viewpoint of the practicing lawyer, the banker, the businessman, the economist, or the legal scholar, it soon becomes evident that we deal here with something unique and quite distinct from other forms of extending credit secured by personal property. Whether we examine the legal scheme for such transactions under the Uniform Commercial Code or under the prior law of a given state, as lawyers we can quickly perceive that a special and advantageous position is given to the financer of newly acquired property.

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Non-Code law creates this privileged category more obscurely in the special treatment afforded those familiar tools of secured commercial financing, the conditional sale and the trust receipt. In fact, the struggle to establish these devices in the face of a frequently hostile and often rigorous body of chattel mortgage law has been aptly described as an attempt to tailor the legal mechanisms to the functional needs of business, and as an experiment by business prior to any legal recognition of these needs.[1] The increased frequency of the credit sale brought with it an increased demand for legal tools simple enough to be effectively executed by sales and clerical personnel unskilled in the intricacies of the law of personal property security. Since public recording requirements were the most severe legal demands, the purchase money financer called for their abolition or at least for an easier kind of filing than that permitted for chattel mortgages. Where that demand was rejected by judicial refusal to recognize the conditional sale or the trust receipt, one of two consequences usually followed. On the one hand, legislation might be enacted validating the old device and permitting the arrangement to be effective with a less rigorous or no public recordation.[2] On the other hand, the ingenuity of the bar might devise a new technique which would permit more flexibility and less formal methods of operation.[3] In Pennsylvania the lat-

[1] Isaacs, The Economic Advantages and Disadvantages of the Various Methods of Selling Goods on Credit, 8 Cornell L.Q. 199 (1923).

[2] In Maryland in the absence of statute conditional sale is ineffective against bona fide purchasers from vendee. Praeger v. Emerson-Brantingham Implement Co., 122 Md. 303, 89 Atl. 501 (1914). Maryland provided for conditional sales recording in 1916. Laws of 1916, ch. 355. The history of present Article 21, § 66 of the Maryland Code is traced in Tattlebaum v. Pantex Mfg. Corp., 204 Md. 360, 104 A.2d 813 (1954). In Michigan conditional sales for resale must be recorded. Mich. Comp. Laws §§ 442.101, 556.140-566.146 (1948).

[3] Some transactions employed both a chattel mortgage and a conditional sale. This was disturbing to those attempting to retain the distinction. "If the instruments are separate it would seem that the first to take effect should control; if an attempt is made to arrange the two transactions in the same instrument, or in separate instruments taking effect at the same time, it will be a difficult question of fact to find the controlling dominant intent". Bogert, Commentaries on Conditional Sales, 2A Uniform Laws Ann. 12. It was also suggested that the answer should turn on the issue of whether the vendor had parted with "title". Magill, The Legal Advantages and Disadvantages of the Various Methods of Selling Goods on Credit, 8 Cornell L.Q. 210, 221 (1923). Still another suggestion was made that the answer be based on a construction of the document against the draftsman, the vendor. Note, 20 Colum. L. Rev. 493 (1920). Compare In re German Publication Society, 289 Fed. 509 (S.D.N.Y. 1922) (distinction between pledge and chattel mortgage floats nebulously in that fog—the intent of the parties). In formulating the Uniform Conditional Sales Act and the Uniform Trust Receipts Act, the suggestion that the devices be merged was rejected. Burdick, Codifying the Law of Conditional Sales, 18 Colum. L. Rev. 103, 107 (1918); Commissioners' Prefatory Note, Uniform Trust Receipts Act, 9C Uniform Laws Ann. 223-24. The same kind of ingenuity has more recently developed the leasing device. Grant, Illusion in Lease Financing, 37 Harv. Bus. Rev., March-April 1959, p. 121. UCC § 1-201(37) includes leases intended as security within Article 9's requirements. See Kripke, Conceptual Obsolescence in Law and Accounting-Finance Relations Between Retailer and Assignee of Retail Receivables, 1 B.C. Ind. & Com. L. Rev. 55 (1959).

ter technique was developed, and the result was called the "bailment lease".[4] In England the new arrangement was labeled a "hire-purchase" contract.[5] Although the opinions were usually written in rather abstract terms, judicial recognition of these new devices followed upon the realization that the legitimate business needs required a relatively simple and elastic means for securing the debt arising from the acquisition of new goods. Of course, other motivations can be traced in all these developments. In some respects the various purchase money techniques offered an opportunity to avoid the usury laws by bringing the deal within the "time sale" rule, and frequently remedial advantages accrued to the secured party who could employ the conditional sales type machinery.[6] Nonetheless, these matters should not obscure the basic fact that a principal reason for the search for a security vehicle distinctly limited to purchase money, rested upon the need for a legally acceptable and practically workable means of protecting the secured party against the debtor and against the risk of losing the collateral to third parties. The volume of purchase money financing simply demanded legal recognition.

Despite the fact that much ink has been put to paper extolling the Commercial Code's adoption of a single unitary concept, the "security interest", in place of the hodgepodge of devices under the prior law, the Code itself candidly isolates the purchase money transaction.[7] Furthermore, the Code creates several advantages for that

[4] Montgomery, The Pennsylvania Bailment Lease, 79 U. Pa. L. Rev. 920 (1931). The device could not be used for previously owned collateral and for financing collateral which the bailee planned to sell. Note, 56 Dick. L. Rev. 337 (1952).

[5] The seller in fact sells to the financing agency, which in turn pays the seller and then lets the car to the user on "hire-purchase" terms. When there is a genuine transfer from the seller to the financing agency, the contract need not be recorded under the Bills of Sales Acts, 1878 and 1882. McEntire v. Crossley Brothers Ltd., [1895] A.C. 457; Helby v. Matthews, [1895] A.C. 471. Waldock, The Law of Mortgages 97 (1950). For the controls placed on such contracts in the interests of debtor protection, see Wild, The Law of Hire-Purchase (1960).

[6] The argument that there is a sufficient distinction between bona fide price for a sale on credit and a loan has lost ground in light of the extensive regulatory statutes governing finance charges. Warren, Regulation of Finance Charges in Retail Instalment Sales, 68 Yale L.J. 839 (1959), and the growing minority view that sales on credit are within the usury laws. Symposium, 55 Nw. U.L. Rev. 301, 308 (1960); Note, 71 Harv. L. Rev. 1143 (1958); Note, 57 Mich. L. Rev. 298 (1958). The common law doctrine of election of remedies requiring the financing conditional seller to choose either a suit for a deficiency or the recapture of the goods was in some ways harsh, since in cases of recapture of the goods the buyer would forfeit his payments; but it was modified first by contract and later by statutes. See Warren, Statutory Damages and the Conditional Sale, 20 Ohio St. L.J. 289 (1959).

[7] UCC § 9-107. (Unless otherwise indicated, all Code citations are to the Uniform Commercial Code, 1958 Official Text with Comments (1958). Citations to Article 9, as enacted in a given state, refer to the reports in 1 & 2 Condit. Sale-Chat. Mort. Rep. (1961) under each Code state.) The Comment to UCC § 9-101 elaborately discusses the abolition of the distinctions based on form and the substitution of distinctions based on the type of property involved. Unfortunately, no mention is made of the retention of the purchase money distinction.

device, principally by eliminating the need for filing in certain cases (Section 9-302), by allowing a delay in filing in other cases (Section 9-301), and by creating a special rule of priority over other security interests (Section 9-312 (3) and (4)).

It is the purpose of this paper to analyze the provisions of the Code pertaining to purchase money financing not only to determine where the Code solves old difficulties, but also to isolate and examine those cases where the Code may create distinctly new problems.

II. Collateral Held by the Debtor for Use: Equipment, Consumer Goods

A. *Creating the Security Interest*

1. *The Security Agreement.* Where the collateral must remain in the possession of the debtor, the Code's purchase money security interest is the simplest and most effective means of obtaining such protection as a secured position provides against the risks associated with lending. At the outset the seller, or the financer who takes an assignment from the seller, is relatively sure that the buyer has not previously encumbered the goods. This is true under both Code and non-Code law. If the financing is accomplished in the form of a conditional sale, the goods coming into the buyer's control are, unlike previously owned property, probably not burdened with another secured debt. Where a financing agency takes a transfer of the buyer's contract from the seller, there is assurance that all of the seller's interest, as well as that created by the buyer, is transferred.

Where a seller furnishes the credit, his route to a secured position is simple and unencumbered under the Code; more importantly this route is strikingly parallel to that provided by present law. The same statement is true where a financing agency enters the transaction by taking an assignment from the seller. Under the Code the seller must first be certain that the buyer-debtor has signed the "security agreement", describing the collateral.[8] The description need not be "specific if it reasonably identifies what is described".[9] No other formalities are required by the Code itself. Thus, the typical non-Code conditional sales form would satisfy all Code formal requirements.

It is possible to speak in a generalized way about the typical non-Code conditional sales form, but one must be alert to the fact that the law of a particular jurisdiction might call for specific disclosures of certain information about the transaction and the buyer's rights and might also demand or prohibit certain contract provisions, *e.g.*, clauses for confession of judgment.[10] Although usually directed to-

[8] UCC § 9-204.

[9] UCC § 9-110.

[10] It may be an unfortunate accident of history that the state which was first to

ward consumer protection, these statutes may also apply whether one deals with an individual debtor or with a business debtor.[11]

With that limitation in mind, the typical conditional sales form normally includes a statement of the purchase price, the amount of the down payment, the unpaid balance, the finance charges, the amount, number, and due date of any payments, and an indication of any delinquency charges. The description of any machine reveals the manufacturer, the model and serial numbers, as well as the type or kind of machine involved.

Further, the form frequently includes covenants whereby the buyer undertakes to keep the property free of liens and encumbrances,[12] to insure, and to refrain from secreting, removing, misusing or disposing of the collateral. Aiming at the possibility of default, there might also be provisions for acceleration of the obligation in the event of a breach of the duty to make any payment or of the obligations imposed by the agreement.[13] For the same reasons, there might be contractual undertakings governing the procedure for realization upon default.

Although the default provisions can be safely omitted under the Code, it may be desirable to retain provisions defining the obligation of the parties imposed by the statute.[14] All other provisions can, and more significantly, should be retained. The permission that the Code grants for less specific and detailed arrangements should not be read as a guarantee that the secured party does not increase his risks by using such short forms.

First of all, the use of as detailed a description as possible, including the use for which the debtor purchases the property, is helpful in establishing that the particular collateral is "equipment" or "consumer goods". Such a classification of the collateral will be crucial in determining the issues relating to filing, priority, sub-purchasers, and default. Section 9-109 groups all goods as "consumer goods", "equip-

enact the Code is quite liberal in regard to judgment notes. Pa. Stat. Ann. tit. 12, § 739 (1953). Much of the earlier Code case law has been concerned with reopening such judgments.

11 Hogan, A Survey of State Retail Instalment Sales Legislation, 44 Cornell L.Q. 38, 72 (1958). The Code explicitly makes these regulatory statutes control the provisions of Article 9. UCC §§ 9-201, 9-203.

12 See text following notes 61 and 121 infra for a discussion indicating the special practical significance of this clause in disputes involving two conflicting purchase money security interests.

13 UCC § 1-208 places a duty of good faith, i.e., honesty in fact (§ 1-201(19)) on the person accelerating "at will" or "when he deems himself insecure". It does not seem likely that the added requirement that a merchant must observe "reasonable commercial standards of fair dealing in the trade" to be in good faith under Article 2 will affect the duty imposed in Article 1. See UCC § 2-103.

14 Dealing with realization upon default, UCC § 9-501 permits the parties to establish standards (which are not "manifestly unreasonable") even as to those duties and rights which cannot be waived or varied.

ment", "farm products", or "inventory". Goods are said to be "equipment", "if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a non-profit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods . . . ." Once it is established that the goods are bought for use in a business, the definition is principally a negative one, and as a consequence it is necessary to examine whether the collateral can be classified as "inventory".

Inventory includes goods held for sale, lease, or for use under service contracts,[15] raw materials, work in process, or materials used or consumed in a business.[16] For example, a typewriter used in the office of a stationery store would be equipment, while the typewriters held for sale or rental would be inventory. On the other hand, both the paper held for sale and the paper used in the office would fall into the inventory category, since both are either held for sale or consumed in the business.

"Consumer goods" are more easily identified, since the characterization is wholly drawn from the fact that they are used or bought primarily for personal, family or household purposes.[17] Some potentially troublesome cases can be isolated. Is a doctor's car to be classed as equipment or as consumer goods? Similarly, the truck of a small part-time farmer or the private car of a salesman create problems of classification. Where such doubt arises it does not create an insoluble counselling problem because the secured party can, for example, file where filing might be excused under Section 9-302 or file on both bases where there is doubt as to the proper place to file under Section 9-401.

Secondly, the form of the arrangement should also clearly indicate that the transaction is "a purchase money security interest". The traditional conditional sales forms used in the traditional way will usually satisfy this need. On the other hand, where the financer engaged in financing acquisitions of new goods by means of a chattel mortgage taken directly from the buyer, the law did not clearly isolate his status.[18] Here the Code offers a new opportunity to the secured

[15] Goods furnished by the debtor under service contracts as well as goods held to be furnished under such contracts are included. UCC § 9-109(4).

[16] UCC § 9-109(4).

[17] UCC § 9-109(1).

[18] In some cases special treatment has been afforded to purchase money chattel mortgages as to the:

Formal requisites of execution: In re Chubby's Parkchester, Inc., 94 F. Supp. 701 (S.D.N.Y. 1951) (two-third stockholder consent required by N.Y. Stock Corp. Law § 16 not applicable to purchase money chattel mortgages);

Applicability of bulk transfer laws: Citizens' Nat'l Trust & Sav. Bank v. Gardner, 161 F.2d 530 (9th Cir. 1947); In re Rosom Utilities, Inc., 105 F.2d 132 (2d Cir. 1939); In re Mercury Engineering, 68 F. Supp. 376 (S.D. Cal. 1946);

party to qualify as a purchase money financer even though he does not deal with the seller in any way. Consequently, where such a lender employed a chattel mortgage form under non-Code law, he should include a provision clearly indicating that the value is given to "enable the debtor to acquire rights in or the use of collateral" and further, he should be certain that the "value is in fact so used".[19] In such a case the secured party who is intent upon obtaining the advantages associated with purchase money financing must police the activity of the debtor at least to the extent necessary to make certain that the advance is paid to the supplier of the goods. A check made payable to the seller, a letter of credit, or even a covenant in the security agreement may be aids to assure that the advance is so used. Where the seller himself finances the transaction, or where the financing agency becomes the secured party by assignment from the seller, it will be apparent from the sales contract that the debt relates to the acquisition of the goods.

2. *Rights in the Collateral.* After the execution of the appropriate security agreement, the buyer-debtor must still have "rights in the collateral" before the in rem property interest securing the debt can attach.

Problems can arise here when the financer is dealing as the seller's assignee in a fictitious sales transaction, a phenomenon not wholly unknown in the law of secured transactions.[20] Neither the Code nor the non-Code law can solve this problem to the satisfaction of the secured party. Creating a property interest where no property exists or where there is no underlying transaction is awkward conceptually. Where the seller himself does the financing, the risk of the fictitious contract can be avoided by appropriate internal controls over his employees. Similarly, the financing firm which takes assignments of such contracts must police the seller-assignor or take steps to collect directly from the debtor-buyer. In both cases the secured party can avoid the risk by using business sense rather than legal devices. The "rights in the collateral" problem can also arise in other factual pat-

Recording: In re Lewis, 230 Iowa 694, 298 N.W. 842, 137 A.L.R. 562 (1941). Compare Yetley v. Irons, 238 Iowa 23, 25 N.W.2d 677, 168 A.L.R. 1159 (1947), and Miller v. Sulmeyer, 263 F.2d 513 (9th Cir. 1959);

Fraud as to creditors based on dominion by debtor: Cox v. Birmingham Dry Goods Co., 125 Ala. 320, 28 So. 456 (1899); Dodds v. Pratt, 64 Miss. 123, 8 So. 167 (1886); Hall v. Keating Implement & Machine Co., 33 Tex. Civ. App. 526, 77 S.W. 1054 (1903); Conaway's Adm'r v. Stealey, 44 W. Va. 163, 28 S.E. 793 (1897); see Annot., 73 A.L.R. 236; and

Priority: United States v. Chickering, 27 F. Supp. 377 (D.N.H. 1939); Hammel v. First Nat'l Bank, 129 Mich. 176, 88 N.W. 397 (1901).

19 UCC § 9-107.

20 Apparently as an inventory financing device, demonstrator cars were frequently "sold" to salesmen under conditional sales contracts which were then transferred to a financing agency, e.g., Tripp v. Nat'l Shawmut Bank, 263 Mass. 505, 161 N.E. 904 (1928); Clark v. Corser, 154 Minn. 508, 191 N.W. 917 (1923).

terns where the law is willing to find that one with no rights himself is able to create rights in another. A financer taking by assignment cannot assume that the seller of the goods has an undisputed claim to the goods. First, an earlier transaction supporting the seller's claim to the goods may be voidable by reason of fraud, duress, illegality, and the like. Here the secured party who takes an assignment from the seller may find protection in asserting that he, as well as the buyer in the financed transaction, qualifies as a bona fide purchaser. The Sales provisions of the Code enlarge and clarify the rights of such a purchaser. Section 2-403 (1) makes effective a transfer to a bona fide purchaser for value by a person with a voidable title. In addition, problem areas under the non-Code law are isolated and made subject to the rule. Consequently, the bona fide purchaser prevails where the earlier transaction is defective because of a fraudulent misrepresentation as to identity, or as a cash sale, or because of a dishonored check, or due to any fraud punishable as larceny under the criminal law. All of these questions have been troublesome under non-Code law, but the Code resolves these issues in favor of the bona fide purchaser for value class, which includes the secured party. The Code extends a new protection to a special kind of bona fide purchaser in Section 2-403(2) when a "buyer in ordinary course of business"[21] prevails over the claim of one who entrusts goods to a dealer in goods of that kind. Secured parties are not included in the special group, but the argument is open that the buyer in a purchase money transaction does qualify, and the secured party derives his interest from the buyer who does fall into the safeguarded category.[22]

In addition to the issues arising when an underlying previous transaction is upset, the definition of a purchase money security interest itself raises questions of "rights in the collateral". Section 9-107 requires either a financing seller, or a third party who "by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used". Obviously, the requirements here are not exactly the same as the "rights in the collateral" test in the creation of the security interest,[23] since the debtor may acquire either the *use of or rights* in the collateral.

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[21] UCC § 1-201(9) carefully defines the buyer in the ordinary course, and the definition is significant in Articles 2, 7, and 9. See UCC §§ 2-403(2), 7-205 and 9-307(1).

[22] Care must be taken in using this argument, since it ignores the inventory financer's claims to proceeds in contests between an inventory financer and a purchaser of instalment paper arising from the sale of the inventory. Kripke, Inventory Financing of Hard Goods, 1956 Ill. L.F. 580, 596. Compare UCC §§ 9-306 and 9-308 with Collins, The Retail Paper Purchaser and The Proceeds Lien, 1 B.C. Ind. & Com. L. Rev. 97 (1959).

[23] The security interest cannot attach until the debtor has rights in the collateral. UCC § 9-204. Consequently, perfection cannot occur until that time. UCC § 9-303.

The difference in the language in Sections 9-204 and 9-107(b) at first blush suggests that some transactions can be classified as purchase money where the non-selling secured party supplies value to enable the debtor to obtain merely the *use* of the collateral without any *rights* in the property, while no security interest could attach to the property because the debtor had use of, but no rights in, the property. However attracted the Hohfeldian-oriented may be to this approach, it should be rejected in the interests of common sense; and the addition of the word "use" in Section 9-107 should properly be considered as an explicit recognition of one kind of "right".

Reading the Code as a whole in search of the meaning of the word "rights" in Section 9-107(b) leads to the conclusion that the term "rights" is not limited to full-fledged, outright ownership. In Section 1-201(37) the term "security interest" is defined to include reservations of title by a lessor where a lease is intended as security. Furthermore, Section 9-112 provides for situations where the collateral is not owned by the debtor. Finally, in Section 2-403(1) the later mortgagee from a buyer who fraudulently induced the original sale may prevail over the defrauded seller's claim to the goods. Thus, the defrauding buyer's power to convey to the mortgagee must qualify as a "right" to the collateral under Section 9-204. Security interests consequently attach in several cases where the debtor does not have complete ownership.

3. *Value.* After there is agreement and the debtor has rights in the collateral, one still does not acquire or perfect a security interest even where filing is accomplished unless "value is given".[24] In examining this issue in connection with purchase money transactions, one must again distinguish those cases where the seller finances the purchaser (with or without a subsequent assignment) from those cases where the sale is financed by a stranger to the transaction. In the latter category the Code is quite clear that a special kind of "value" is required in purchase money transactions. The secured party must, by making advances or incurring an obligation, give "value". This provision is designed to require "present consideration" as a test.[25] Even a security interest in newly acquired property in favor of a non-seller will not be a purchase money security interest if taken to secure an old debt. Something "new" must be added, and in addition, that new value must be expended in acquiring rights in the collateral. Although the Comment to Section 9-107 makes explicit the notion that time is introduced to the extent that fresh value is needed, the section and the comment are equally unclear on the timing of the

[24] UCC §§ 9-204 and 9-303. Furthermore, UCC § 1-201(37) defines a security interest as "an interest in personal property or fixtures which secures an *obligation*". (Emphasis supplied.)

[25] Comment 2 to UCC § 9-107 and Comment 2 to UCC § 9-108.

acquisition of the goods. When a non-seller finances the sale at the outset, one can infer from the language of the section that the buyer must acquire the goods after the value is given. The section speaks in terms of giving value "to enable the debtor to acquire" the collateral. There is a hint of prospective acquisition, although it would be far better to read the section as permitting the introduction of the financing agency even after the debtor acquires rights in a sales law sense. Some promptness should be demanded, but the purchase money category will only be effective if the definition is interpreted in light of the requirements of the transaction.

When the seller of the collateral is the original secured party, and he takes or retains the security interest to secure all or part of its price, the seller qualifies for the purchase money advantages. If the interest secures more than the price of the goods, is it a purchase money security? Nothing in the Code suggests that such a security interest is not a purchase money interest to the extent of the amount due as the price. In fact, the introduction to Section 9-107 states that the secured transaction qualifies "to the extent that it is . . . to secure all or part of its price".

If such a security interest is created by the agreement of the seller and buyer, and then the seller assigns his interest to a financer, the security interest in the goods apparently still qualifies as a purchase money interest.[26] Unlike prior law, the categorization occurs whether the original seller-buyer arrangement is in the form of a chattel mortgage or a conditional sale.[27] But are there any outside time limits on the seller's taking a purchase money security interest?

We have seen that a question of proper timing may arise under the definition where the original secured party is not the seller of the collateral. The definition section would appear to permit the seller to "take" his security interest either before, at, or after the time of the sale. Thus, a seller could obtain a purchase money security interest to secure the past due price of the collateral. Putting the matter in another way, Section 9-107 literally permits a purchase money interest in favor of a seller to secure the buyer's antecedent debt for the price. At least two objections can be made to this interpretation. First, Comment No. 2 to Section 9-108 states that although the Code does not define the term "new value", the concept is illustrated in the definition of purchase money security interest in Section 9-107, and in other situations it is left to the courts to distinguish between "new" and "old" value, between "present consideration" and "antecedent debt". This comment reveals an intent to require fresh consideration in all purchase money transactions.

[26] Comment 1 to UCC § 9-107.

[27] See note 18 supra and Comment to UCC § 9-107.

More significant from a practical viewpoint is the fact that any secured seller in a case involving an obviously antecedent debt for the price would not qualify for two of the major protections offered to purchase money security. Under Section 9-301(2) the secured party must *file* within ten days after collateral comes into possession of the debtor, and under Section 9-312(4) a security interest in equipment must be *perfected* when the debtor gets possession or within ten days thereafter in order to qualify for the special purchase money protection. On the other hand, no similar time limit is placed upon the advantage accruing to certain purchase money transactions in permitting perfection without filing.

B. *Perfecting the Security Interest*

Generally the Code permits the secured party to obtain the benefits of a "perfected security interest" by taking possession of the collateral or by filing.[28] In most cases the secured party should not plan to take an unperfected interest because it provides a secured position of very low quality.[29] In purchase money transactions involving certain consumer goods and farm equipment, the security interest is perfected as soon as it attaches without any additional action by the lender.[30] In this way the Code, as a Uniform Act, adjusts to the law of commercially important jurisdictions which traditionally have not required filing of conditional sales contracts.[31]

The exemption from the requirement of filing, even where the debtor receives possession of the collateral, reflects a determination that in these two areas public notoriety is not as useful as the private credit information shared by business creditors both secured and unsecured.[32] In this light the 2,500 dollar limitation on farm equipment

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28 UCC §§ 9-302 and 9-305. In transactions involving "proceeds": (§ 9-306) or negotiable documents (§ 9-304), there is a limited automatic perfection without filing. See text accompanying note 126 infra.

29 UCC § 9-301, and see text following note 72 infra.

30 UCC § 9-302(1)(c) and (d) and Comment 4. Oklahoma failed to enact the exceptions for purchase money interests and, consequently, all such transactions will be perfected by filing. Massachusetts, New Hampshire, Rhode Island and Ohio limit automatic perfection in farm equipment transactions to cases where the purchase price is $500 rather than $2,500.

31 Comment 4 to UCC § 9-302. Both Illinois and Massachusetts generally permitted conditional sales contracts to be perfected without filing under pre-Code law. Sherer-Gillet Co. v. Long, 318 Ill. 432, 149 N.E. 225 (1925) (based on Uniform Sales Act §§ 20 and 23). Hoe v. Rex Mfg. Co., 205 Mass. 214, 91 N.E. 154 (1910); Nichols v. Ashton, 155 Mass. 205, 29 N.E. 519 (1892); Barrett v. Pritchard, 19 Mass. (2 Pick.) 512 (1824).

32 The Code anticipates that one class of third parties should look to the filing records for an indication of an outstanding security interest. Under UCC § 9-307(2) a subsequent buyer for personal, family or household purposes, or for his own farming operations will prevail over the perfected purchase money security interest unless the secured party has filed. In Rhode Island UCC § 9-307(2) is modified to protect only

financings exempted by Section 9-302(1)(c), and the implied requirement that all interests in motor vehicles and fixtures must be perfected by filing[33] can be rationalized. When the farmer buys expensive equipment or when any motor vehicle is financed, the public notoriety becomes more significant.

The commercial desirability of making the public aware of the outstanding property claims to a motor vehicle can be based upon the highly mobile quality of the collateral as well as upon the ready marketability of used cars.[34] In the hands of a dishonest debtor the motor vehicle has long been a source of frustration to secured lenders.[35] Certificate of title laws have been enacted in a number of jurisdictions to provide a special kind of publicity to the interests of third parties.[36]

The certificate of title statutes, varying considerably in their requirements, have been assimilated by Section 9-302(3). Subsection (b) of that section is offered by the sponsors in alternate forms. Alternative A is provided for those states where the certificate of title law demands that any security interest *must* be noted on the certificate.[37] On the other hand, Alternative B is designed for those jurisdictions where the security interest *may* be noted on the certificate.[38] Even where the latter alternative provision is adopted, Section 9-302(4) makes the notation on the title certificate essential to obtaining a perfected security interest.[39]

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those subpurchasers who buy goods with an original price over $300. In Oklahoma the subsection is entirely omitted; see note 30 supra.

33 In Massachusetts a variation of the Code provision permits perfection of purchase money security interests in motor vehicles without any filing. Mass. Gen. Laws Ann. ch. 106, § 9-302 (1958). UCC § 9-302(3) and (4) preserves and enhances any requirement of notation on a certificate under motor vehicle certificate of title laws. There must be a filing with realty records under UCC § 9-401 in order to perfect an interest in fixtures. See UCC § 9-313 for the special priority rules where fixtures are involved.

34 Leary, Horse and Buggy Lien Law and Migratory Automobiles, 96 U. Pa. L. Rev. 455 (1948); Comment, 47 Calif. L. Rev. 543, 545 (1959).

35 Kripke, The Modernization of Chattel Security Under the Uniform Commercial Code, 16 Law & Contemp. Prob. 183, 187 (1951); Commissioners' Prefatory Note, Uniform Motor Vehicle Certificate of Title and Anti-Theft Act, 9 Uniform Laws Ann. 235.

36 Forty jurisdictions now have some kind of certificate of title legislation. Comment, 70 Yale L.J. 995, 996 (1961). The only states there listed as not having such statutes are: Alabama, Georgia, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, New Hampshire, New York, Rhode Island, and Vermont.

37 Arkansas, Connecticut, Illinois, Kentucky, Massachusetts, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Rhode Island, and Wyoming have all adopted Alternative A in UCC § 9-302. Ohio's numbering unfortunately does not follow the Code, and the provision appears as Section 1309.21(C) of the Ohio Revised Code.

38 Pennsylvania and Oregon followed Alternative B.

39 Comment, 70 Yale L.J. 995, 999 (1961). Kentucky law has been unduly complicated, since the requirement that the secured party must deliver the registration receipt of the owner for recordation of a "lien" in Ky. Rev. Stat. § 186.195 (Supp. 1961)

A similar exemption from Code filing stems from Section 9-302 (3)(a), dealing with specialized centralized recording systems. These exist at the federal level for security interests in specialized equipment collateral, such as ships, aircraft, and certain motor vehicles held by interstate carriers. In some of these federally regulated cases these transactions are excluded from the Code;[40] in others only the Code filing provisions are excluded;[41] and in a third class the federal law itself absorbs the Code terminology and filing system giving the Code system a national effect.[42] As a practical matter, other interests in consumer goods and equipment will be perfected by filing.[43]

Apart from the delayed filing sanctioned by Sections 9-301(2) and 9-312(4), there is little in the filing provisions of Article 9 which has special impact upon purchase money transactions. In the farm equipment and consumer goods transactions, filing under Section 9-401 (1)(a) will be at the local level, *i.e.*, in the counties, cities, or towns. In the business transactions involving equipment financing, filing will be either entirely at the central office or at both a central and local office.[44] It is not recommended that the secured party claim an interest in the proceeds in the financing statement, since in most cases resale of collateral held primarily for use is not contemplated or authorized.[45]

has been construed as being outside of UCC § 9-302. Consequently, both filing and the notation are necessary for perfection. Lincoln Bank & Trust Co. v. Queenan, 344 S.W.2d 383 (Ky. 1961).

40 UCC § 9-104 makes the Code inapplicable to "a security interest subject to any statute of the United States such as the Ship Mortgage Act, 1920, to the extent that such statutes govern the rights of parties to and third parties affected by transactions in particular types of property."

41 UCC § 9-302(3)(a). The Code could continue to fill the gaps left in assaying the rights of third parties under such statutes as 24 Stat. 386 (1887), as amended, 49 U.S.C. § 20 (1958) (railroad rolling stock) and 72 Stat. 772 (1958), 49 U.S.C. § 1403 (1958) (aircraft), providing for federal filing of security interests. Even the Ship Mortgage Act, 41 Stat. 1000 (1920), as amended, 46 U.S.C. §§ 911-84 (1958), may have such gaps. Equipment trusts covering railway rolling stock are excluded from the Code. UCC § 9-104(e).

42 72 Stat. 812 (1958), 49 U.S.C. § 313 (1958). Perfection of security interests in any of the covered motor trucks or buses owned by carriers certificated by the Interstate Commerce Commission may be by use of the certificate of title or by the recording system of the debtor's home state. See UCC § 9-103 (chief place of business). Perfection here is good only against general creditors and subsequent third parties. Comment, 67 Yale L.J. 1024 (1958).

43 Filing is still the most appropriate means of perfection, although it is literally possible that interests in such goods may be perfected by the use of documents under UCC § 9-304 or by the provisions as to proceeds in UCC § 9-306, or under a seller's security interest arising under Article 2 and perfected by operation of UCC § 9-113. Hogan, The Marriage of Sale to Chattel Security in the Uniform Commercial Code: Massachusetts Variety, 38 B.U.L. Rev. 571, 575-89 (1958).

44 See Coogan, Public Notice Under the Uniform Commercial Code and Other Recent Chattel Security Laws, Including "Notice Filing", 47 Iowa L. Rev. 289 (1962).

45 In fact if proceeds are claimed, the secured party might find the statement used as evidence of a liberty of sale by the debtor.

C. *Third Party Risks*

1. *Other Secured Parties.* Much of the discussion of Article 9 focuses upon the Code rules giving vitality to after-acquired property agreements through notice filing,[46] the "first-to-file" rule of priority,[47] and the abolition of the legal basis for *Benedict v. Ratner*.[48] These provisions have their principal impact upon inventory and accounts receivable transactions.[49] Traditionally, purchase money equipment financing has had few of the problems associated with inventory financing. The purchaser of equipment buys for use and not for resale. The collateral is clearly identified and ascertained and not a shifting stock of goods. The debt is specific, since no future advances are involved. New instruments can be practicably executed if new property is acquired.

The after-acquired property approach of the Code thus mainly concerns the sales financer of equipment or consumer goods defensively, rather than offensively. In other words, the Code will not add much to his arsenal of techniques for obtaining security; rather, it poses the threat that the financed collateral will be subjected to a claim of another financer under an after-acquired property agreement with the debtor.[50]

The Code itself rather carefully provides the purchase money consumer goods or equipment financer with protection against the possible dangers of a monopolistic "floating lien" and against the loss of the collateral to the holder of a subsequent security agreement made under a prior filing.[51] Section 9-312(4) gives priority over any conflicting security interest in the same collateral if the purchase money security interest is perfected at the time the debtor received possession of the collateral or within ten days thereafter.[52] Three elements are crucial to this special priority: (1) the conflicting claim must be in the same collateral; (2) the purchase money interest must be *perfected* within the allotted period; and (3) the period of grace ends ten days after the debtor-buyer receives "possession" of the goods.

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[46] UCC §§ 9-108, 9-204 and 9-402.

[47] UCC § 9-312(5).

[48] 268 U.S. 353 (1925); UCC § 9-205.

[49] See Coogan, Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien," 72 Harv. L. Rev. 838, 850-55 (1958).

[50] Of course the Code does relieve the purchase money financer of technical distinctions between chattel mortgages and conditional sales which formerly often led to the loss of the entire security. Gilmore and Axelrod, Chattel Security: I, 57 Yale L.J. 517, 541-43 (1948).

[51] In addition, if the purchase money financer uses the pledge technique, he will perfect by taking possession (UCC § 9-304) and will prevail under the first-to-perfect rule notwithstanding an earlier filing.

[52] The ten day grace period is also present in determining the rights of lien creditors. UCC § 9-301(2). Compare text accompanying note 72 infra.

In the excepted farm equipment and consumer transactions, perfection will occur without filing as soon as the security interest has attached, *i.e.*, when there is an agreement, value has been given, and the debtor has rights in the collateral.[53] In most other Code-covered equipment transactions, perfection will not occur until the appropriate filing has been accomplished.[54] Also important here is the fact that perfection cannot occur until the interest has attached.[55]

Ideally, the purchase money financer should be certain that the transaction is timed as follows:

(1) Filing of a notice or preferably the contract (Section 9-401);
(2) Security Agreement; and
(3) Sale and delivery of the goods.

If the transaction is thus arranged, the security interest will both attach and be perfected no later than the time the buyer takes delivery of the goods. Where the financer deals directly with the buyer, value may be given by the secured party's appropriately conditioned promise to make the advance in step number two so that perfection could occur even before the advance was made.[56] Furthermore, by filing initially the financer wins not only the purchase money protection, but also the advantage of early filing under the first-to-file rule.[57]

Obviously, there are many transactions which simply cannot be so timed. The sales financing questions may arise after the sale and delivery, or the security agreement may be in the sales contract itself. In 1958 changes were made in this subsection and in Section 9-301(2) in recognition of the fact that filing frequently occurs only after delivery in non-inventory financing.[58] In this event the financer can still obtain priority if he delays filing, or any one of the other requirements for perfection, until some time within ten days after the debtor gets possession of the goods. This priority is effective even though the purchase money financer knows of the prior filing.[59] In the non-seller related deal, care must still be taken to assure that the "value" is not so antecedent that it disqualifies the lender from being a purchase money security holder.

The time at which the debtor receives possession starts the run-

[53] UCC §§ 9-204 and 9-302.

[54] In addition to perfection through motor vehicle certificates of title, it is also possible that perfection can be accomplished by other means; see note 43 supra.

[55] UCC § 9-303(1).

[56] UCC § 1-201(44).

[57] UCC § 9-312(5). The 1958 Amendments make this result clear. Uniform Commercial Code, 1958 Supplement to the Official Text, 17.

[58] See Coogan, Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien," 72 Harv. L. Rev. 838, 861-63 (1958).

[59] Comment 3 to UCC § 9-312.

ning of the ten day grace period for perfection. Problems will undoubtedly arise as to when the debtor "receives possession" of the collateral. The Code does not offer a specific definition of the term, but there are indications that actual delivery to the buyer or to a third party is crucial.[60] It is important to realize that this priority rule turns on the more easily ascertained time of receipt of possession and not upon the time the debtor obtains "rights" in the collateral.

As a result of this special priority, there is usually no real need to search filing records if you are a purchase money financer of consumer goods or equipment. With one exception, whether the lender is a seller or a third party, he will be able to prevail against any other secured creditors claiming the collateral so long as he perfects within the permitted time.

The exception to this notion comes from the possibility that, under the Code, a purchase money position will be claimed by two parties. The supplier may retain a purchase money interest for seventy-five per cent of the price, and another financer (even an after-acquired property holder) may supply the down payment. Both could qualify technically for the purchase money position, and both or neither could qualify for the special priority under Section 9-312(4). If the value of the collateral is not sufficient to satisfy both claims on default, who prevails? Who will be given priority? Since there is no solution to the problem in the special priority rule, one would be forced to look to Section 9-312(5), the first-to-file, first-to-perfect, or first-to-attach rules. Where neither purchase money claimant has qualified for the Section 9-312(4) priority because of a failure to perfect on time, the language of Section 9-312(5) now clearly indicates that these general priority provisions prevail.[61]

Where both qualify for the priority by perfecting within the permitted time, the language is not so clear. Section 9-312(5) commences:

> In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4) of this section), priority between conflicting security interests in the same collateral shall be determined as follows . . . .

The quoted parenthetical language in the preamble of Section 9-312(5) may be interpreted as excluding the case where two purchase money security interests both qualify for the priority under

60 UCC § 1-201(14) defines "delivery" only partially in that it omits goods. UCC § 2-103(1)(c) defines "receipt" at least for sales law purposes.

61 See note 57 supra.

Section 9-312(4). This could result in the court's looking outside the Code to case law for the resolution of any such conflict.[62] The financer who retained title to the property would have an excellent position under most of the earlier conditional sales cases.[63] On the other hand, the court might feel compelled to develop new case rules in light of the Code provisions. In this way a court could revive the earlier Code idea of a pro rata sharing between two conflicting purchase money security interests.[64] However, it was apparently the intention of the draftsmen to make subsection (5) a catchall provision; and the provision and the general priority rules probably control even here, since these do provide a workable set of rules.

The following courses of conduct seem possible solutions to the difficulties presented by the situation of two or more conflicting purchase money security interests in equipment, where filing is a prerequisite to perfection.

I. S sells the goods to B and remains in possession of the goods under circumstances whereby a security interest in the goods arises under Article 2. No writing or filing is thus required to perfect the interest.[65] S then files a notice or the signed agreement itself prior to delivering the goods to B.

If TP (another purchase money security holder) has filed, S can check the record and then refuse to deliver the goods. If S does not check the record or decides to deliver the goods, he may still claim that his Article 2 security interest comes ahead of the third party's claim because perfection of A's interest occurred at the time of the sale and remains continuously perfected through the filing.[66] S can claim perfection from the earliest possible moment, *i.e.*, the time when the debtor first obtained rights in the collateral. S can thus claim priority under the first-to-perfect rule.[67] One risk still remains where S does not check the record on filing. The third party may have so arranged his transaction that his security interest was also perfected upon the debtor's acquiring rights in the collateral. Here it seems

[62] UCC § 1-103 provides that unless "displaced by the particular provisions of this Act" all supplemental bodies of law continue to apply. At least one court has shown a remarkable willingness to flee the Code for the safety of the prior law. See In re Kravitz, 278 F.2d 820 (3rd Cir. 1960).

[63] Even when liens on after-acquired property are permitted, the theory seems to be that the lien falls on the debtor's interest as acquired. Thus the conditional seller prevails. Hunter v. Scruggs Drug Store, Inc., 113 F.2d 971 (4th Cir. 1940). Compare Central Chandelier Co. v. Irving Trust Co., 259 N.Y. 343, 182 N.E. 10 (1932) (unfiled conditional sales contract).

[64] See text accompanying note 72 infra.

[65] UCC § 9-113. See Hogan, The Marriage of Sales to Chattel Security in the Uniform Commercial Code: Massachusetts Variety, 38 B.U.L. Rev. 571, 585 (1958); Comment, 68 Yale L.J. 751 (1959).

[66] UCC §§ 9-303 and 9-312(6).

[67] UCC § 9-312(5)(b).

that a court would be forced to leave the Code. If precedent is to be the guide, the fact that the buyer acquired the property burdened with the seller's claim would make for a priority in the seller under the traditional title analysis.[68] Section 9-202, making title irrelevant in interpreting the Code provisions, would not bar this approach here, since the Code can be said to have no provision. All in all, the wise seller will check the record.

Analyzing the Code further on these same facts, with only the addition of a later filing by TP within the ten day period of Section 9-312(4), we can isolate another troublesome question. Both security interests will qualify for Section 9-312(4) priority. If the risk is significant, both parties should check the record after the expiration of the ten day grace period, and if another purchase money security interest is present, both loans should be called. Where this kind of checking is impractical or calling the loan is inappropriate, the seller can assert that the previously described Article 2 security interest makes his claim the first-to-be-perfected or that S is entitled to precedence under the first-to-file rule in any event.

II. S sells and delivers the goods, filing thereafter, but before the end of the ten day period. If no other purchase money interest is then filed, S will probably be able to take advantage of the first-to-file rule of Section 9-312(5) even where TP files within the ten day grace period. S's risk here is only the very unlikely possibility that another purchase money lender has perfected prior to the filing by taking possession of the collateral after the delivery to B. On the other hand, if TP's claim will be given priority under the first-to-file rule, S's only argument will then be that Section 9-312(5) does not apply; and since S sold on a title retained basis, he should be given priority.

III. If S does not remain in possession before filing and does not file within the ten day period, Section 9-312(4) clearly seems to indicate that TP wins if TP perfects within the ten day period.

IV. If S sells, does not remain in possession before filing, and both S and TP fail to file within ten days, then neither qualifies for the Section 9-312(4) priority, and the first-to-file would take precedence. In the unlikely event that neither ever files, the first to take possession would be the first to perfect, and he would thus prevail. Otherwise, the matter will be resolved on the question of whose interest first attached. This issue can again involve the previously discussed question of simultaneous attaching and the traditions protecting a conditional seller.

The third party financer contemplating an advance to enable the debtor to obtain the collateral can contribute to the avoidance of these kinds of conflicts by becoming aware of the identity of the seller

[68] See cases cited note 63 supra.

and checking on his extension of credit. Even this will not entirely eliminate the chance of these disputes, since the entire series of facts can involve two or more purchase money financers who are not sellers.[69] If practicable, a TP financer could also withhold making the actual advance until after the ten day period expired. In that event a security interest could attach and be perfected before the ten day period, but TP would be able to rescind any contract with a covenant against other encumbrances if another purchase money interest was filed. The security interest would attach and be perfected earlier because value can be given by the contingent promise to make the advance.

More difficult questions arise where the conflicting purchase money security interests can be perfected without filing as is the case in certain transactions involving consumer goods or farm equipment having a price not in excess of 2,500 dollars.[70] Again, if only one of the interests qualifies for the special priority under Section 9-312(4), that interest will prevail. Where both interests so qualify, we are again confronted with the applicability of Section 9-312(5).[71] It is clear that this general priority rule applies where neither interest qualifies for this special rule. Assuming that general rule controls in either case, since neither interest is perfected by filing, the first-to-perfect rule will control. This results in the seller-financer getting a more advantageous position because of the fact that his Article 2 interest may be perfected first and because of the tradition protecting the conditional seller under the theory of title. Actually, there is no way for the competing financer to avoid this problem other than by consulting with the seller prior to making the advance. All in all, it is to be regretted that the Code draftsmen have eliminated Section 9-312(5) of the prior draft of the Code. That section provided: "When there are conflicting purchase money security interests, the interest of a seller or of a secured party whose advance was used at his direction to pay a seller takes priority if he has perfected his interest at the time the debtor receives the collateral or within ten days thereafter. In any other case of conflicting purchase money security interests they rank equally".[72]

2. *Lien Creditors, Bulk Transferees and Buyers Not in Ordinary Course of Business.* A ten day grace period similar to that provided in priority rules for collateral other than inventory is given to *all* purchase money financers in Section 9-301(2). Again, the ten day period commences when the collateral "comes into possession of the debtor". Although somewhat different language is used in Section

69 UCC § 9-107(b).

70 UCC § 9-302.

71 See text accompanying note 58 supra.

72 UCC § 9-312(5), Uniform Commercial Code, Text and Comments Edition (Official Draft 1952).

9-312(4), where the ten day period is measured when the debtor "receives possession", the two sections apparently permit the same grace period.

A test different from the perfection concept of the priority rule is employed for asserting the protection under Section 9-301(2); filing within the ten day grace period is necessary. Since a perfected security interest prevails over lien creditors in any case (not involving fraud or a fraudulent conveyance), the grace period here is only necessary for those cases where perfection occurs solely by filing. On the other hand, Section 9-312(4) deals with disputes between secured creditors which could involve disputes between interests not perfected by filing like the farm equipment and consumer goods transactions exempted under Section 9-302. As was the case under Section 5 of the Uniform Conditional Sales Act, the lien creditor or transferee in bulk loses to the purchase money party in any event where the transfer or lien attaches prior to a timely filing. Of course, neither a prior filing nor filing within the ten day period can cut off the rights of a lien creditor or transferee which arose before the security interest attached, *i.e.*, before the secured party had any interest in the collateral. When the filing is not timely, *i.e.*, delayed beyond the ten day period, the purchase money security interest is nonetheless perfected and will be entitled to precedence over a subsequent lien creditor.[73] Although the Code contains no provisions specifically giving any perfected security interest rights superior to a subsequent lien creditor, the same effect is reached by Section 9-201. That section makes any security agreement effective according to its terms between the parties, against purchasers of the collateral, and against creditors except where the Code otherwise provides. In Section 9-301(1), the Code has "otherwise provided", and the unperfected security interest is made subordinate to the rights of several classes of third parties, including a lien creditor.

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[73] UCC § 9-301(1) thus rejects the notion that a chattel mortgage unfiled beyond a reasonable time is not valid against creditors who extended credit prior to the filing, even though such creditors obtain no lien until after filing. Karst v. Gane, 136 N.Y. 316, 32 N.E. 1073 (1893). The New York chattel mortgage statute has recently been amended to allow a ten day delay, but it is not certain that the rule of Karst v. Gane would not still apply where filing is delayed more than ten days. N.Y. Lien Law § 230. Compare N.Y. Pers. Prop. Law § 65 as to conditional sales. The bankruptcy impact of the Code rule is ably discussed in Kennedy, The Trustee in Bankruptcy Under the Uniform Commercial Code: Some Problems Suggested by Articles 2 and 9, 14 Rutgers L. Rev. 518, 527-29 (1960). Perfection by filing within the ten day period even where bankruptcy has intervened will be effective against the trustee under Bankruptcy Act § 60(a)(7). On the other hand, a delay of eleven days will be perilous in such a case. A delay in filing with an intervening bankruptcy could bring Sections 70(c) and (e) of the Bankruptcy Act into play; but timely filing would still result in the secured party's obtaining a perfected interest under the grace period provided by state law. The "strong-arm" clause of section 70(c) lost much of its muscle in Lewis v. Manufacturers National Bank, 364 U.S. 603 (1960).

Except for the purchase money rule of subsection (2), in the event of non-perfection all security holders risk losing the collateral to:

(1) Secured creditors under Section 9-312.

(2) Lien creditors without knowledge of the security interest and who obtain liens before perfection of the security interest.

(3) Transferees in bulk to the extent that they give value and receive delivery without knowledge of the security interest and before it is perfected.

(4) Buyers not in the ordinary course of business to the extent that they give value and receive delivery without knowledge of the security interest and before it is perfected.

Secured creditors are explicitly precluded from claiming rights under groups (3) and (4).[74]

Clearly, the special ten day rule for purchase money transactions in subsection (2) of Section 9-301 excepts from the classes who take priority over an unperfected security interest only groups (2) and (3). Thus, it appears that a seller retaining a purchase money interest and relying on the ten day grace period in Section 9-301(2), still has the risk that he will lose the collateral to an intervening "buyer not in ordinary course". For example, a seller of a bulldozer who obtains a signed security agreement from the buyer-contractor and who delivers the collateral to a contractor will apparently lose to a subpurchaser who without knowledge gives value and takes delivery from the contractor prior to a delayed filing within the ten day period. The risk is not lessened by reason of the knowledge requirement, since the secured party would have to show that such a purchaser had actual knowledge, and not merely reason to know, of the security interest. Nor does the "value" requirement help the secured party substantially, since value is broadly defined in Section 1-201(44).

If the secured party wishes to avoid this risk, he must file before delivery to the buyer. The risk can be minimized by filing as promptly as possible after delivery. This risk, added to the priority problem arising from the possibility of two purchase money security interests, should lead the purchase money security lender to file as soon as possible and preferably before delivery of the collateral.

3. *Subsequent Buyers of Consumer Goods or Equipment.* The preceding section was concerned in part with the effectiveness of an unperfected security interest against two kinds of purchasers, the buyer *not* in ordinary course of business and the transferee in bulk. Now

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[74] UCC § 9-301(1)(c).

we turn to the rights of a buyer in ordinary course of business against a perfected security interest. Section 9-307(1) protects such a buyer where the security interest is perfected, even though the buyer knows of its existence. The definition of this kind of buyer in Section 1-201 (9) limits the protected group to those buying in ordinary course from a person "in the business of selling goods of that kind". The usual case will involve not equipment or consumer goods, but inventory. Comment No. 2 to Section 9-307 indicates that the only case where subsection (1) can apply is where the collateral is inventory. In some situations, however, it is conceivable that the debtor in possession of equipment subject to a perfected security interest may regularly sell the collateral.[75] Hence, an otherwise qualified buyer from such a seller can be classified literally as a buyer in ordinary course. Some buyers who do not qualify for protection as buyers in ordinary course may nonetheless prevail under Section 9-307(2). Since holders of purchase money security interests in certain consumer goods and farm equipment are not required to file to perfect their security interests, a subsequent purchaser from the possessor of such collateral has no means of learning of the prior security interest. To offer some measure of protection to such purchasers, the Code provides that unless the secured party files, the innocent purchaser for value who buys such collateral for his personal, family, or household purposes, or for his own farming operations, prevails (no grace period). In counselling the secured party in this context, one must assess the risk of losing to such a purchaser against the economics and efficiency inherent in perfection without filing. It should also be noted that under subsection (2) the second purchaser must be without knowledge of the security interest. Further, since the subsection is limited to consumer goods and farm equipment, it has no application to situations where the debtor originally holds the collateral for sale. That matter is governed entirely by subsection (1), despite the fact that the two subsections are not explicitly made exclusive alternatives.

Where the collateral is such that filing must be made in order to perfect the security interest, then of course a failure to file will mean that the secured party loses in any contest with the kind of buyer covered by Section 9-307(2) or by Section 9-301. Thus, any purchase money security interest in fixtures must be filed in order to protect the secured party, since subsection (2) explicitly excepts fixtures from its operation.[76] Similarly, although motor vehicles are not mentioned in Section 9-307(2), in any purchase money transaction involving a motor vehicle required to be licensed, which qualifies as consumer goods or farm equipment, filing is required for perfection.[77] Here,

[75] Comment 3 to UCC § 9-109 states that such collateral remains equipment.

[76] Comment 2 to UCC § 9-307 makes it clear that the parenthetical exception of fixtures refers to both the farm equipment and consumer goods transactions.

[77] UCC § 9-302(1)(c) and (d).

failure to file will result in non-perfection, and the consequent risk of loss of the collateral to the subpurchasers covered by Sections 9-301 and 9-307(2). One major exception to the need for a Code financing statement is important in this connection. Sections 9-302(3) and (4) provide that the filing provisions of the Code do not apply to a security interest subject to a federal registration or filing statute, or to a statute of the Code state which provides for central filing or for certificates of title. Perfection in such instances can only be accomplished through complying with the special federal or state statute.[78] What effect does this exception to Code filing have upon the requirement in Section 9-307(2) that even where there is a perfected security interest the secured party must have "filed a financing statement covering such goods" or he risks the loss of his security to the protected purchasers? If the secured party fails to file a Code financing statement but does perfect under the special federal or state statute under Section 9-302(4), does the secured party run the risk of losing to the purchasers protected by Section 9-307(2)? Although Comment No. 3 to Section 9-307 indicates a negative answer, the language of the statute is not completely clear. Section 9-307(2) suggests that a *financing statement* must be filed to avoid the risk, but Section 9-302(3) indicates that the filing provisions of Article 9, in which Section 9-307(2) may be grouped, do not apply to transactions subject to the special statutes. It is upon the latter point that the comment relies, and this seems sound. Otherwise, a secured party could be misled into failing to file a Code statement by Section 9-302. Furthermore, in this group of cases the purchasing class safeguarded by Section 9-307(2) does have a source for checking the seller's title to the goods. This is all that Section 9-307(2) really offers such purchasers.

III. Financing the Purchase of Inventory

A. *Introduction*

Under the non-Code law the financer of newly acquired inventory has potentially available to him the entire list of security devices. To effectuate his desire to become a secured creditor, he may choose in many jurisdictions to use the pledge (usually in the form of a documentary arrangement), the chattel mortgage (floor-plan statutes), the conditional sale, the trust receipt, or the factor's lien. In many situations the appropriate arrangement may involve a combination of two or more of these techniques. The Code's greatest contribution here is that selecting the wrong device will no longer result in an automatic loss of the security. Further, the advantages associated with purchase

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[78] UCC § 9-302(4). See text following note 36 supra.

money financing may flow to the secured party irrespective of the technical form of device.[79]

As noted earlier, Section 9-107 permits either the seller or a third party to qualify for the purchase money advantages. Further, the Code extends the concept of notice filing, *i.e.*, the filing of a single simple statement, to all the various security transactions. More will be said shortly about this aspect of the problem. Inventory financing may involve collateral which is specific and identifiable, *e.g.*, cars held for sale, refrigerators, and other appliances; or it may involve collateral which is simply incapable of such identification. In the latter category must be grouped small parts, work in process, and most raw materials. Each of these classes will be considered separately, since each involves distinctly different problems.

B. *Specific and Easily Identified Inventory Collateral*

1. *Creating the Security Interest.* In non-Code law, where the secured creditor supplies funds for the acquisition of readily identified inventory, he will usually investigate the relative merits of using the conditional sales or trust receipt pattern. Under the prior Uniform Acts governing each of these devices, a purchase money transaction is essential.[80] In some cases a chattel mortgage could be employed but as noted earlier, the chattel mortgage was rarely differentiated as a distinctly purchase money device.[81]

Where the secured party is presently financing readily identifiable collateral under a chattel mortgage, conditional sale, or a trust receipt plan, the Code will permit him to continue substantially the same business pattern.[82] In addition, the Code will eliminate several legal obstacles to the successful use of the pattern.

No longer will the conditional sale be subject to a declaration of invalidity because the buyer owned the goods at the outset.[83] In fact, even the special benefits of purchase money financing will extend to such a financer under the definition of Section 9-107. For the same

[79] These primary advantages are catalogued in UCC §§ 9-301, 9-302, and 9-312.

[80] See Kripke, Inventory Financing of Hard Goods, 1956 Ill. L.F. 580, 587, where it is pointed out that Connecticut, Florida, Illinois, Indiana, Maine, Nevada, Oregon, and Wisconsin do not limit the trust receipt to purchase money transactions and that California and Tennessee permit the device to be used in non-purchase money transactions involving specific collateral. N.Y. Lien Law § 230-c provides a means of employing a chattel mortgage with central notice filing as a supplement to the trust receipts act.

[81] See note 18 supra.

[82] Two cautions are in order. The Code newly requires notices to other secured parties under UCC § 9-312(3). UCC § 9-301(2) protects the unfiled interest against lien creditors for only ten days, while Section 8 of the Uniform Trust Receipts Act provides for twenty-one days. UCC § 9-304 provides a twenty-one day period for negotiable documents and instruments.

[83] For example, Hughbanks, Inc. v. Gourley, 12 Wash.2d 44, 120 P.2d 523 (1941), Annot., 138 A.L.R. 664 and cases cited in Annot., 175 A.L.R. 1366, 1378. See Bogert, Commentaries on Conditional Sales, 2A Uniform Laws Ann. 12.

reason, a non-selling chattel mortgagee may claim purchase money status.

In the trust receipt transaction governed by the common law or The Uniform Trust Receipts Act (UTRA), a tripartite arrangement is required. The seller and the buyer of goods must be joined by a third party financer.[84] Where the common law alone governs the transaction, it is also necessary to assure that the flow of title is from the seller to the financer and does not first pass to the buyer.[85] In fact, there is some case authority for the proposition that the trust receipt can never be classified as an independent device.[86] Finally, not only does UTRA require that the trust receipt may only be utilized in purchase money transactions, but it further limits the use of the device to inventory type transactions.[87] In the present law a failure to meet any one of these requirements results in the risk of losing all the collateral to any third party. The Code removes all of these pitfalls for the unwary secured creditor.

Under the Code, the fact that the transaction is non-purchase money or is not an inventory financing device will not necessarily lead to the loss of the security. Whether the trust receipt, conditional sale, or chattel mortgage form is used, the security interest will be effective notwithstanding the fact that the agreement covers only previously owned assets. On the other hand, if the security interest does qualify as a purchase money interest, then the Code gives special qualities to that security interest in connection with filing and priorities.[88]

Nonetheless, even under the Code the careless secured creditor may still find that he risks losing all of the inventory collateral because he has delayed filing in the erroneous belief that he holds a purchase money security interest, or because he does not qualify for the purchase money priority rule in Section 9-312(3). As in the case of equipment or consumer goods financing, the secured party who is not a seller should be certain[89] that the form of the agreement reveals that the value is given to "enable the debtor to acquire rights in or the use of collateral"[90] and he should be certain that the value is in fact so used.[91]

[84] Uniform Trust Receipts Act § 1. See B-W Acceptance Corp. v. Colley, 256 F.2d 937 (10th Cir. 1958). In some states this rule is modified; see note 80 supra.

[85] Commissioners' Prefatory Note, Uniform Trust Receipts Act, 9C Uniform Laws Ann. 222.

[86] G.M.A.C. v. Whiteley, 217 Iowa 998, 252 N.W. 779 (1934) (classified as conditional sale); Industrial Finance Corp. v. Cappelman, 284 Fed. 8 (4th Cir. 1922) (classified as "in the nature of a chattel mortgage" under South Carolina law). See also Colo. Rev. Stat. Ann. § 20-2-11 (1953) (trust receipt equated with chattel mortgage).

[87] Uniform Trust Receipts Act § 2(3).

[88] UCC §§ 9-301 and 9-312(3). UCC § 9-302 does not excuse filing in inventory financing solely because purchase money is involved.

[89] UCC § 9-107.

[90] See text following note 18 supra.

[91] This may involve some "policing" by the secured party despite the abolition by UCC § 9-205 of the fraud-in-law rule based on dominion.

Both in the case of selling and non-selling financers, the section is somewhat obscure as to the relative timing of the acquisition of the goods and the giving of value. As noted earlier, subsection (1) literally seems to permit a seller to qualify as a purchase money holder even though he takes a security interest long after delivery of the goods.[92] This is clearly contrary to the concept that purchase money security interests are to be preferred because they facilitate the flow of goods or because they bring in a special kind of new asset. On the other hand, subsection (2) dealing with non-sellers can be literally read as being excessively restrictive. Does the phraseology "to acquire" demand that the financing arrangement must occur before the debtor gets any rights in the collateral? It should not be so read because the section could then exclude from the protected group a bank which comes into the transaction after the buyer and seller proceeded so far in their arrangements that the goods are "identified". Clearly, in substance, the bank in this case is financing the acquisition of the goods even though the buyer has some rights in the collateral. A substantially similar problem is now present in trust receipt law. Under UTRA Section 2 (1)(a), the entruster must, prior to the transaction, have or "acquire promptly" a security interest in the goods. This provision was designed to assure that the trust receipt was used only in the "purchase money situation". Perhaps the courts will look to the few cases under that section in connection with the meaning of "promptly", and this would permit security interests to qualify as purchase money even though at the time the arrangement is made the buyer holds some rights to the goods.[93] One caution must be raised in using trust receipt precedent, since the Code clearly does not and UTRA does require a tripartite transaction. What should be required is a substantially simultaneous acquisition of rights to the goods by the buyer, a creation of the security interest to secure the advance by the secured party, and payment by the buyer of the price to the seller.

Apart from the timing question, the purchase money financer of readily identified inventory should be certain that the description of the collateral is so specific that no doubt will arise as to the collateral covered. This is essential to an intelligent use of the Code's special priority for purchase money inventory financing. Of course, Section 9-110 only requires that the description reasonably identify the collateral; but this rule relates to the validity of the security interest and will not aid the secured party to determine which ten of fifty different

[92] UCC § 9-107; see text following note 27 supra.

[93] B-W Acceptance Corp. v. Benjamin T. Crump Co., 199 Va. 312, 99 S.E.2d 606 (1957); In re San Clemente Elec. Supply Co., 101 F. Supp. 252 (S.D. Calif. 1951); In re Chappell, 77 F. Supp. 573, 576 (D. Ore. 1948). Compare Assoc. Discount Corp. v. Slayton, 85 So.2d 199 (Miss. 1956) (one day delay after purchase by dealer, issue not discussed).

refrigerators come within his agreement. This is another reason for continuing the pattern of financing now in existence. Although the Code rules relax many of the rigid requirements of the prior law, voluntarily complying with many of those requirements where it is feasible and practicable will often aid the secured party. Consequently, where under non-Code law a power of attorney was furnished by a dealer to the financer for the execution of individual notes and trust receipts, that practice can well be continued under the Code even though a single agreement can be legally substituted. If the old format is used, it will be clear that, by this advance, this secured party enabled this debtor to acquire this particular collateral. At least if the trust receipt pattern is abandoned under the Code, some documentary substitute must be devised for such an identification of lender, purchase price, and collateral.

The same point should be considered in connection with the fact that Section 9-205 abolishes the so-called prohibition on free-handed mortgages. The Code does not require as a matter of law that the secured party must police the collateral and its proceeds. The fact remains that if the secured party does not exercise some control, he runs the business risk that the debtor will dissipate the collateral. Thus, some form of policing provision may still be desirable in the agreement.

2. *Perfecting the Security Interest.* Suggesting a specific description of the collateral in the security agreement does not necessarily lead to the same demand in the financing statement in inventory financing. The Code explicitly permits the secured party to file a simple notice of financing "indicating the types, or describing the items of collateral".[94] The secured party may comply with the Code by indicating much less than would be required of him under most non-Code chattel mortgage or conditional sales law. Again, however, if specific collateral is being acquired (and this is true even though a number of acquisitions are involved), the description in the financing statement should not be broadly written. General statements such as "inventory wherever located" should not be used unless it is certain that the secured party is financing the acquisition of *all* the debtor's inventory. If the dealer has stock other than the collateral financed, the secured party's subsequent disputes will be more easily resolved if the financing statement is explicitly limited to the particular stock acquired. Thus, if a dealer in appliances purchases several brands of refrigerators, a financing statement should at least indicate the brand of inventory being financed.[95]

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[94] UCC § 9-402.

[95] Another incentive to particularized descriptions of the collateral is that in the absence of the most specific description, the secured party may be called upon to amend the statement under UCC § 9-402(4).

As a starting point, one may anticipate that usually the purchase money security interest in readily identifiable collateral will be perfected by filing. Perfection by taking possession of the collateral[96] or through perfection of an interest in documents[97] is available, but filing is the most effective means of perfecting an interest in such goods.[98] The details of filing practices differ little from those covering any business financing.[99] As elsewhere, the Code adopts the notice filing concept of UTRA.[100] Consequently, since the trust receipt was the device best adapted to this kind of collateral, there will be little change in the filing practices developed under that statute. Unlike equipment transactions, the secured party should here be certain that an interest in proceeds is claimed in the financing statement, since a resale of inventory to a buyer in the ordinary course of business will mean the loss of the interest in the specific goods.[101]

3. *Third Party Risks.*

(a) *Other Secured Parties (Other Than Those Claiming Through Documents).*

Although a secured party has a security interest which has attached to readily identifiable collateral and has been perfected by filing, there is still the possibility that he may lose this collateral to a third party financer. In the absence of a special rule, the Code generally provides for priority among competing secured parties on the basis of first-to-file, first-to-perfect, or first-to-attach.[102] A special conditional exception is provided for purchase money security interests in Section 9-312(3). The quality of the purchase money security interest obtained will thus depend upon whether the secured party has taken the steps called for in Section 9-312(3). Upon the fulfillment of these steps the secured party gets the major benefit of qualifying as a purchase money financer of inventory, *i.e.*, priority over a conflicting security interest in the same collateral. Such a financer can also defeat a claim made under an after-acquired property clause in an earlier filed non-purchase money security agreement. We can now examine each of the required steps.

96 UCC § 9-305.

97 UCC § 9-304.

98 See text accompanying note 127 infra.

99 See Coogan, Public Notice Under the Uniform Commercial Code and Other Recent Chattel Security Laws, Including "Notice Filing", 47 Iowa L. Rev. 289 (1962).

100 Uniform Trust Receipts Act § 13. Both provide for central office filing, but UCC § 9-401(c) (option) may call for two filings in business financings.

101 UCC §§ 9-306 and 9-307. For a good discussion of the improvements made in current law by the Code, see Kripke, Inventory Financing of Hard Goods, 1956 Ill. L.F. 580, 591-99. A buyer of "farm products" is not protected apparently because so many buyers are bulk purchasers who themselves finance the farmer. Coates, Chattel Secured Farm Credit 39 (1954). The special priority in UCC § 9-312(3) apparently will not apply to proceeds since that is not the "same collateral".

102 UCC § 9-312(5).

First, the transaction between the purchase money financer and the debtor must result in a perfected security interest "at the time the debtor receives possession of the collateral".[103] Perfection in this context initially requires that the security interest has "attached".[104] In addition, since a business debtor is involved, a proper filing must be made in most cases.[105] To benefit from this rule, the purchase money secured party should file before the debtor receives possession of the collateral. The grace period provided by the purchase money priority rule for non-inventory financing[106] is not allowed in the priority rule for inventory financing.

Unlike consumer goods or equipment financing, these inventory transactions usually involve at the outset persons who are familiar with the demands of the law of chattel security, so that the need for a grace period is not so great. More importantly, the grace period is only excluded in cases involving conflicting claims to the same inventory collateral.[107] Thus, we are not here concerned with whether a lien creditor should prevail over the secured party, but whether the purchase money secured party should prevail over another secured party who has done all that is required to obtain and to perfect an effective prior interest. It probably would tip the scales too heavily in favor of the purchase money interest to grant a grace period here too. This becomes more apparent when one confronts the fact that the special notice to other secured parties is required precisely because another inventory financer may make future advances under the assumption that he has obtained a first priority.[108] The risk of such advances by a competing inventory financer is as great during the ten day grace period as it is thereafter.

Thus, the secured party ideally should proceed as follows:

(1) File;

(2) Notify those parties who appear from the public filings at the time he files to have previously filed and those whose security interest is known;

(3) Execute the security agreement with a contingent promise to pay value; and

(4) Assure that the debtor acquires rights in and possession of collateral.

Minimally, the secured party should at least be certain that the filing

[103] UCC § 9-312(3)(a).

[104] UCC §§ 9-303 and 9-204.

[105] Perfection of an interest in goods covered by negotiable documents occurs upon perfection of an interest in the document. See text accompanying notes 126, 127 infra.

[106] UCC § 9-312(4).

[107] In contests with subsequent lien creditors and trustees in bankruptcy, the delayed filing within the ten day period is still effective. UCC § 9-301(2). See note 73 supra.

[108] Comment 3 to UCC § 9-312.

occurs before the debtor acquires possession of the collateral. The notice required here adds a new kind of requirement in testing chattel security priority.

Section 1-201 clarifies the meaning of the demand that the conflicting security interest holder must have "received notification of the purchase money interest." Subsection (26) of Section 1-201 provides that a person "receives" a notice or notification "when

(a) it comes to his attention; or

(b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications." It is clear that the purchase money holder must do more than dispatch such a notice to the other secured party before the debtor obtains possession of the goods. In addition, the purchase money claimant must be sure that the notice has at least reached the place of business of the other secured party prior to the time the debtor receives the collateral. Under Section 1-201(27) more is required where the conflicting nonpurchase money security interest is held by an "organization". In such cases the purchase money holder must be sure that delivery to the debtor is delayed until the notice is brought to the attention of the individual conducting the rival transaction, or until the notice would have been brought to that person's attention if the organization had exercised due diligence. Since a substantial majority of financings will be effected by such "organizations", the purchase money financer will be required to time his transaction so that the notice is sent far enough in advance of delivery of the collateral to the debtor to assure that the responsible person in the competing organization will receive the notice.

This aspect of timing the notice is less severe on the secured party than first appears, since the purchase money financer may satisfy the requirement for a series of transactions by a single notice. Section 9-312(3)(c) inferentially indicates this conclusion when it provides that the notice sent to the other secured party must describe such inventory by "item or *type*". Thus, a notice indicating that purchase money financing of "appliances" is contemplated should be sufficient to protect the purchase money financer in a series of such transactions with the same debtor. Nothing in Article 9 expresses a limit for the duration of the effect of this notice. Caution would indicate that a secured party should renew the notice at least as often as he renews his filing under Section 9-403.[109]

[109] In fact, the relatively long period provided by UCC § 9-403 may be too long for this purpose. The suggestion has been made that experience may demonstrate the need for a statutory standard for the duration of the notice called for in UCC § 9-312 (3). See Coogan, Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien," 72 Harv. L. Rev. 838, 862 n.89 (1959).

Under the 1958 amendments to Section 9-312(3), the purchase money financer is required to notify other secured parties who have filed prior to his filing, and thus he need not be concerned with subsequent filings.[110] On the other hand, the section provides no such cut-off point for notifying a secured party who "is known to the holder of the purchase money security interest". Clearly, "known" means actual knowledge.[111] It is conceivable that at some point after the filing, the purchase money financer will receive actual knowledge of another secured party. What should he do? His action should be governed by the physical location of the goods. If the debtor has received possession, then the notice would seem to be unnecessary. If the debtor has not received possession of the collateral, the purchase money secured party should give notice to the conflicting claimant immediately.

The failure to notify a known unfiled security interest claimant will not deprive the purchase money security interest of priority over that claimant. The consequence is merely the loss of the special purchase money priority. Under the 1958 amendments it is now clear that the general rules of priority in Section 9-312(5) apply to any case where the purchase money holder fails to meet the test for the special priority. Consequently, under the first-to-file rule the purchase money financer could take priority over the unnotified but known rival claimant who had not filed. It is clear that knowledge is irrelevant under the general first-to-file priority rule of Section 9-312(5). A similar result would obtain under the first-to-attach or first-to-perfect rules.

The real peril to the purchase money financer who fails to notify the holder of a known but unfiled interest lies in the fact that Section 9-312(3) would literally deprive the purchase money financer of any special priority even against rivals notified of the interest. The purchase money financer obtains the benefit of the special priority rule "if . . . (b) any secured party . . . has received notification. . . ."[112] Thus, if two competing filings are on record when the purchase money financer files, he should notify both parties. Otherwise, he risks losing his special priority against even the party notified. Although no useful purpose would be served by such a result, the history of chattel security obviously teaches the counsellor planning the transaction to be prepared for such interpretations.[113]

Furthermore, in the context of failing to notify the unfiled but known rival claim, we have seen that the purchase money holder may

[110] Uniform Commercial Code, 1958 Supplement to the 1957 Official Text, p. 17.

[111] UCC § 1-201(25).

[112] UCC § 9-312(3).

[113] See Panel Discussion on Bankruptcy Problems, 9 Bus. Law., No. 2, Jan. 1954, p. 96.

nonetheless prevail over the unfiled claim. Consequently, unless the failure to notify the known rival deprives the purchase money party of his special priority as against all other secured parties, including those actually notified, the requirement of notice to known and unfiled claims will be meaningless. The problem here really stems from the attempt to marry a statutory rule making the purchase money holder's knowledge of the competing claim relevant[114] with a rule making such knowledge irrelevant.[115]

This problem highlights another difficulty with the tests expressed in Section 9-312(3)(b). Who is a "secured party whose security interest is known to the holder of the purchase money interest or who . . . had filed"? Literally applying the Code definitional scheme, a secured party is one "in whose favor there is a security interest".[116] One must look further to the definition of "security interest" in Section 1-201(37), which basically defines the term as "an interest in personal property or fixtures which secures payment or performance of an obligation." It would thus appear that notice must be sent only to those third parties who have acquired an attached security interest under Section 9-204 and to whom the debtor owes an "obligation" within Section 1-201(37). Under this kind of approach, the question of who is entitled to notice would be most difficult to unravel.[117] For the lawyer planning the transaction the answer is simple—notice should be sent to everyone who has filed prior to the filing by the purchase money holder, and to every rival claimant known prior to the delivery of the goods to the debtor.

Litigation as to the meaning of "secured party" in Section 9-312 (3) should only occur when this fundamental notion is violated. Nonetheless, since many rival inventory lenders will properly file before any value is extended,[118] the question will eventually arise.. In such circumstances there will be a gap between the filing and the time that the competing lender actually acquires a security interest, *i.e.*, the time when an agreement is made, value is given, and the debtor has rights in some collateral.[119] Clearly, notice should be sent by a purchase money financer to such a "gap claimant" because otherwise the latter lender may unwittingly make his advance or give value relying on the collateral acquired under the purchase money

114 UCC § 9-312(3)(b).

115 UCC § 9-312(5).

116 UCC § 9-105(1)(i).

117 Since the notice would be sent only to those who had "attached" interests, the purchase money financer would be investigating when the debtor obtained "rights" in the collateral under Article 2, Sales, which tries to minimize the importance of title. See Comment to UCC § 2-401.

118 This is likely, since the rival claimant will seek the benefits of the first-to-file rule and will be making future advances. See UCC § 9-204(5).

119 UCC § 9-204.

deal. Avoiding this kind of reliance is the basic purpose of the notice requirement.[120] As a result, a literal reading of the statute should not be the focus for determining who is entitled to notice.

(*b*) *Two Conflicting Purchase Money Security Interests in the Same Inventory Collateral.*

In the discussion of the purchase money priority in equipment and consumer goods financing, the problem of two conflicting purchase money security interests in the same collateral was isolated and discussed.[121] The same question can arise in the inventory framework.

In its simplest form the problem arises from the following facts:

Debtor Inc. buys one hundred new refrigerators on a conditional sales contract basis. Sugar Sales Co. agrees to sell and finance the sale but requires a twenty per cent cash down payment. Debtor borrows the amount of the down payment from Local Bank and signs a security agreement covering the same collateral. The problem becomes acute where both secured parties seek to realize on their security and the collateral has so far depreciated that both lenders cannot be satisfied. Is it possible that both could qualify for the purchase money interest special priority under Section 9-312(3)? It is possible but less likely than in consumer goods or equipment financing. In the simple transaction one of the secured parties would probably file first, and the other financer would then be required to notify the holder of the earlier filed interest. To the extent that such a notice was specific in describing the collateral, the dual claims would be immediately apparent to the recipient of the notice. Action could then be taken by the seller to delay delivery to the buyer or by the bank to delay the advance of funds. If neither course is possible, the loan could be called before the collateral depreciated to the danger point.[122] A second reason for the conclusion that the dispute is less likely in inventory financings is that in order to qualify for the special priority, both purchase money parties must perfect their interest before the debtor receives possession of the collateral. Perfection will usually be by filing, and as a consequence of the lack of a grace period in Section 9-312(3), there is more likelihood that one of the secured parties will find a filing in favor of the other party when the record is searched.

The problem can become more complex. Suppose that Local Bank has a prior filing covering the inventory and an after-acquired property clause in a prior agreement. If Local Bank makes an advance

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[120] Comment 3 to UCC § 9-312.

[121] See text following note 60 and extending to note 72 supra.

[122] This recommendation assumes the presence of an appropriately drafted acceleration provision based upon breach of a covenant against liens and encumbrances. See also UCC § 1-208.

under that prior agreement, and that advance is in fact used to meet the down payment on the sale by Sugar Sales Co. to Debtor Inc., will Local Bank qualify as a purchase money financer? The definition of purchase money security interest in Section 9-107(b) seems to require of the non-selling lender a consciousness of the fact that the advance is being made "to enable the debtor to acquire . . . the collateral."[123] Thus, although Local Bank could show that it met all the conditions of Section 9-312(3), it might not qualify for the purchase money priority unless the advance was made specifically for the purpose of enabling Debtor to acquire the collateral. If this test could be met, then Local Bank would be able to qualify for the priority if no secured party had made a prior filing and Local Bank had no knowledge of any other secured parties. Sugar Sales Co. would be required to notify Local Bank, however, if Sugar perfected by filing. As noted earlier, this fact should aid in uncovering the dual purchase money financers and offer Sugar Sales Co. a motive for making its notice to Local Bank as specific as possible under the circumstances.

(c) Other Secured Parties Claiming Through Documents. The Code does not restrict the use of documents as collateral to the inventory situation. Nonetheless, purchase money financing through documents is discussed at this point, since the trust receipt pattern of financing identifiable goods is the richest source of documentary transactions.

A purchase money security interest in goods may be created under the Code through the use of documents of title.[124] If non-negotiable documents are involved, a security interest in the goods can be perfected by:

(1) Filing as to the goods;
(2) The issuance of a non-negotiable document in the name of the secured party; or
(3) The bailee's receipt of notification of the secured party's interest.[125]

In the case of negotiable documents the perfection of a security interest in the document also perfects an interest in the goods in

[123] If this analysis is followed, the possibility that two purchase money claims will arise is diminished somewhat.

[124] In fact, a purchase money security interest can be asserted in any kind of collateral, since the definition in UCC § 9-107 does not limit purchase money interests to goods. Here, as noted subsequently, the perfection of an interest in the negotiable documents perfects an interest in goods also. UCC § 9-304(2).

[125] The latter two methods of perfection can be viewed as a special means of perfecting through taking possession of the collateral.

possession of the issuer of the document.[126] Filing as to the documents or taking possession of the documents are two of the means available for perfecting an interest in negotiable documents.[127] In the same manner that UTRA facilitated short term transactions,[128] Section 9-304(4) provides an "automatic" perfection for twenty-one days when the security interest arises for new value under a written agreement.[129]

Where the purchase money security interest is thus perfected through the use of negotiable documents alone, the ten day purchase money grace period for filing in Section 9-301 is practically extended to twenty-one days. No lien creditor, bulk transferee, or buyer not in ordinary course could realize on the goods or the document until after the twenty-one day automatic perfection period. In one sense this provision may supply another special rule for purchase money interests, since "new value" must be given to qualify for the "automatic perfection", and purchase money is clearly "new value".[130] On the other hand, the twenty-one day automatic perfection period for negotiable documents is not explicitly limited to the purchase money transaction.

With this foundation, we shall now address the question of the relation of the documentary transaction to the special priority rule for purchase money financing of inventory.[131]

One can argue that in the documentary setting the purchase money priority rule is inapplicable, since that priority rule deals with "a conflicing security interest in the *same collateral*".[132] Since a conflicting security interest perfected in a negotiable document perfects an interest in the goods in the possession of the issuer, it seems clear that the conflict concerns the same collateral, *i.e.*, the goods.

Furthermore, a purchase money security interest perfected through the negotiable document takes priority over all other security interests perfected while the goods are in the possession of the issuer. In such disputes the documentary claimant will prevail apart from Section 9-312(3).[133]

Despite the strong position thus obtained by the purchase money

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126 UCC § 9-304(2).

127 UCC §§ 9-304(1) and 9-305.

128 Uniform Trust Receipts Act §§ 8 and 2(1)(b) (limitation of thirty days; compare the twenty-one day maximum in Bankruptcy Act § 60(a)(7)).

129 Neither the Uniform Trust Receipts Act in Section 2(1)(b) nor the Code in Section 9-304 expressly limits the automatic perfection of documents to purchase money situations. Other cases where the secured party supplies "new value" also qualify. Note that Uniform Trust Receipts Act § 2(1)(b) requires that the document be "exhibited" to the entruster while UCC § 9-304(2) is silent in that regard. See note 73 supra.

130 Comment to UCC § 9-108.

131 UCC § 9-312(3).

132 Ibid. (Emphasis supplied.)

133 UCC § 9-304(2). This rule is specifically made controlling by UCC § 9-312(1).

financer through negotiable documents, some questions may arise which can be resolved only through Section 9-312(3). The cautious documentary financer will thus send the notices called for by that section.

If the documentary claimant is in conflict with one who asserts a security interest perfected before the goods are in possession of the issuer, then the special purchase money claim will be relevant.[134] For example, a rival, claiming through a prior filing made in connection with a security agreement covering after-acquired property, may assert that his interest was perfected before the goods were delivered to the issuer of the document.[135] Thus, the rival claimant could assert that his security interest has priority under the first-to-file or the first-to-perfect general rules. If the documentary financer has complied with the notification requirements of Section 9-312(3), he should prevail. Where the documentary financer "automatically" perfects his security interest or perfects by taking possession of the document, he will satisfy the notice requirement of Section 9-312 (3) by notifying all other known secured parties. If the security interest in negotiable documents is filed, notices should be dispatched to all other parties with a filed claim covering this type of collateral.

(d) *Lien Creditors, Bulk Transferees, and Buyers Not in Ordinary Course of Business.*

Since the special priority rule provides no ten day grace period for the inventory purchase money financer,[136] the financer of new acquisitions of inventory should not as a matter of practice rely on the ten day grace period granted by Section 9-301(2) to all purchase money security interests. If the financer takes advantage of this grace period and delays making a required filing, he risks the automatic loss of the special priority over other secured creditors offered by Section 9-312(3), since the security interest will not necessarily be perfected when the debtor "receives possession of the collateral".[137]

A further reason for being certain that any required filing is made prior to the debtor's obtaining possession of inventory collateral

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134 Since the priority rule of UCC § 9-304(2) is explicitly limited to cases where the conflicting security interest arises while the goods are in the possession of the issuer of the negotiable document, the problem raised in the text will be governed by UCC § 9-312.

135 Under Article 2 a buyer may obtain sufficient "rights" in the collateral to permit the after-acquired property interest to attach prior to the seller's delivery of the goods to the carrier issuing the document; thus the documentary priority of UCC § 9-304(2) would not apply. Where the documentary financer can succeed to the seller's rights under UCC § 2-506 or UCC § 2-707, the documentary financer may be able to claim prior perfection. See Hogan, The Marriage of Sales to Chattel Security in the Uniform Commercial Code: Massachusetts Variety, 38 B.U.L. Rev. 571, 587-88 (1958).

136 UCC § 9-312(3).

137 Ibid.

stems from the fact that the ten day grace period in Section 9-301(2) only protects a purchase money financer of inventory against the lien creditors and transferees in bulk described in Section 9-301(1). As noted in the discussion of equipment,[138] the Code is subject to the interpretation that the unfiled and unperfected purchase money interest will not be protected during the ten day period against other "buyers *not* in the ordinary course of business" to the extent that such a buyer gives value and receives delivery without knowledge of the security interest.[139] If this analysis is followed, how much does the inventory financer who fails to make a required filing increase his risk during the ten day grace period? The filed or unfiled perfected security interest in inventory is not effective against buyers in ordinary course of business under Section 9-307.[140] Transferees in bulk cannot assert rights because of the grace period. Other secured creditors will be required to demonstrate priority under Section 9-312. What kind of transferees are left?

The inquiry actually reduces itself to a determination of the possibility that there are transferees not in the ordinary course of business who are not transferees in bulk.

Questions have arisen under non-Code law concerning whether one dealer, in purchasing from another dealer goods subject to a filed trust receipt or conditional sales contract, qualifies as a "buyer in ordinary course of business". At times the dealer-buyer has been denied that status.[141] If the same result is reached under the Code definition of "buyer in ordinary course", then we have another kind of buyer *not* in ordinary course who may prevail over the purchase money security interest during the ten day grace period. Consequently, the ten day grace period for filing may not offer as complete a protection to the inventory financer as first appears. Again, the secured party should, if possible, file before the debtor obtains possession of the collateral to avoid this risk and to preserve the special priority provided in Section 9-312(3).

C. *Inventory Collateral Which Is Not Readily Identifiable*

1. *Creating and Perfecting the Security Interest.* The Code's formulation of an integrated body of chattel security law will probably have its greatest impact in the financing of what is here called inventory collateral which is not readily identifiable. Where the goods are in process, or are of relatively small value on a unit basis, or are

138 See text following note 74 supra.

139 UCC § 9-301(1)(c).

140 See text accompanying notes 101 and 75 supra.

141 Most cases have not disqualified a subpurchaser because he happened to be a dealer. See Colonial Finance Co. v. DeBenigno, 125 Conn. 626, 7 A.2d 841 (1939) (trust receipts); Stemmons, Inc. v. Universal C.I.T. Credit Corp., 301 P.2d 212 (Okla. 1956) (floor plan statute).

otherwise not susceptible to specific description, the individualizing of the financing of each unit is impossible or at least impracticable. Rigid rules of description, individualized recording requirements, and stringent policing requirements in traditional mortgage law have been abandoned in the Code[142] and in the more modern non-Code inventory security laws.[143] Furthermore, the Code rejects the limitations placed on the kind of debtors, or the kind of lenders who may take advantage of the flexibility of the newer security techniques. Providing notice filing, authorizing central filing, validating after-acquired property clauses, abolishing dominion rules, authorizing future advances —all will help both the secured party and the debtor to use effectively this class of inventory as collateral.[144] In these cases a more general description of the collateral is necessary and is permissible under the Code so long as the description serves reasonably to identify the collateral.[145] Similarly, the financing statement will necessarily be more indefinite in describing the goods financed. Conflicts over the collateral will nonetheless frequently involve the question whether the particular property was subject to the security interest or was covered by a filing. It is thus axiomatic that, as a matter of practice, only one inventory financer should be engaged in financing this kind of inventory collateral for a particular debtor. When the purchase money financer dealing with such collateral finds that another financer has made a prior filing, the purchase money holder should realize that the nature of the collateral itself rather than any set of legal rules will create serious problems. Such a unique question arises in connection with ascertaining the priority of a purchase money financer over other secured parties.

2. *Contests With Other Secured Parties.* When the financer attempts to qualify for the purchase money special priority in Section 9-312(3), he will meet the same problems discussed earlier.[146] The primary difficulty will arise in connection with the fact that the special priority only operates when the conflicting security claim relates to the "same collateral". Frequently, the purchase money financer will enable the debtor to acquire goods which are mingled with, attached to, or processed into other goods. In this kind of transaction the rival claimant can successfully assert that the purchase money priority no longer controls, since the purchase money security interest

142 Henson, Chattel Mortgages in Illinois v. Secured Transactions Under the Uniform Commercial Code, 9 De Paul L. Rev. 125, 135 (1960).

143 Sutherland and Braucher, Trust Receipts in Texas, 14 Sw. L.J. 328, 339 (1960); Silverman, Factoring: Its Legal Aspects and Economic Justification, 13 Law & Contemp. Prob. 593 (1948); Skilton, Factor's Liens on Merchandise, 1955 Wis. L. Rev. 356.

144 Coogan, Operating Under Article 9 of the Uniform Commercial Code Without Help or Hindrance of the "Floating Lien", 15 Bus. Law. 373, 387 (1960).

145 UCC § 9-110.

146 See text following note 101 supra.

is not in the same collateral. Further, it seems clear that the purchase money priority will not control to the extent that Sections 9-314 (Accessions) and 9-315 (Priority When Goods Are Commingled or Processed) provide different rules for testing priority.[147]

No special treatment is extended to the purchase money financer by reason of these provisions for accession and commingling or processing. If the purchase money financer perfects by filing, he can be certain that Section 9-315 governs his rights merely by claiming in the filed statement a right to any products into which the goods have been manufactured, processed, or assembled. In such a case the purchase money financer will assure himself at least a pro rata equality with other security interests in the product or mass.[148] In fact, the purchase money financer of a manufacturer's inventory collateral which is not easily identifiable would be well advised always to claim products in his financing statement, since by this means he will assure himself of at least a pro rata equality in the finished goods even where the collateral financed might be held to be identifiable.[149]

How is the pro rata ratio for determining the relative shares of the conflicting interests defined under the Code? The basic terms of the ratio are defined in terms of costs of the goods.[150] Each secured party shares in the amount realized on the sale of the product based upon the ratio of the cost of the goods to which his interest originally attached to the cost of the total product. For the purchase money financer the cost of the goods to which his interest has attached will usually be the price of the goods financed.[151] The other factor in the ratio is more complicated. If a rival non-purchase money financer has a security interest in all inventory of the debtor, the rival security interest will also originally attach to the goods subject to the purchase money claim. For example: Local Bank has outstanding a non-purchase money security agreement covering after-acquired property and has advanced 20,000 dollars. Local Bank's security interest will "originally attach" to the same collateral financed by the rival purchase money financer and which we shall assume costs 1,000 dollars. If the balance of the costs of the completed item is 8,000 dollars and

147 UCC § 9-312(1).

148 UCC § 9-402(3) provides for a financing statement claiming an interest in "products" without defining the term.

149 Under UCC § 9-315(1)(b) the commingling rule applies even where there has been no "true commingling" in any case where the goods have been "manufactured, processed or assembled." If the purchase money financer does not claim "products" in this kind of case, priority will turn on the provisions of UCC § 9-314 where the "winner takes all" without any pro rata sharing.

150 UCC § 9-315(2).

151 "Costs" are not clearly defined, and an argument that the term includes more than acquisition price, contrary to the conclusion in the text, may be made from the fact that elsewhere the Code uses terms clearly indicating "price". UCC §§ 9-107, 9-302(1)(c), 9-307(2), and 9-505.

there is no other claim, the purchase money financer will apparently receive one tenth of the realization value of the assets and the Local Bank will receive nine tenths of that amount.[152] It is noteworthy that the amount of the debt is not relevant in this formula except that it puts a maximum limitation on any ultimate recovery. Similarly, there is no consideration given to which of the conflicting claims was first-to-file, first-to-perfect, or first-to-attach.

If the provisions of Section 9-315 are not made applicable by an appropriate claim of an interest in products in the financing statement, and the financed goods are not installed or affixed to other goods without loss of identity, then the Code's accession rule operates. Here, the Code does attempt to do more than provide for a ratable distribution of claims. If the purchase money financer is to obtain maximum protection by this route, he must be certain that his security interest is *perfected* prior to the time the goods are installed or affixed. If perfection occurs before this time, the financer of the goods installed will prevail over secured creditors who claim under a prior agreement or filing as to the product, as well as those who claim under a subsequent agreement or filing. Compliance with the suggestions of filing at the earliest practicable time or at least before the debtor obtains possession of inventory collateral will meet the test.

IV. Conclusion

Two major questions emerge from the foregoing analysis of the Code provisions treating the purchase money security interest. First, what is the basis for the privileged treatment afforded to this kind of security under the Code? Second, do the problems raised indicate that the enactment of the Code will impede the financing of the acquisition of new goods?

The first and more difficult question explores the basis for the special treatment afforded to purchase money transactions. As noted previously, history is on the side of the Code.[153] Legitimating the judgment of history is another matter.

At the outset the suggestion was made that the privileged position of the financer of incoming goods was in major part due to our

[152] The purchase money financing interests "attached" to $1,000 worth of collateral, and the bank's interest "attached" to $9,000 worth of collateral; consequently, the ratio is 1:10 and 9:10.

[153] See notes 18 and 31 supra. In reorganizations under former Section 77B of the Bankruptcy Act, a divided court held that a conditional seller could recapture the goods, since the subject matter of the sale was not "property" of the debtor to be included in the reorganization plan. In re Lake's Laundry, Inc., 79 F.2d 326 (2d Cir. 1935). Compare In re White Plains Ice Service, Inc., 109 F.2d 913 (2d Cir. 1940). The present broad definition of "transfer" in Bankruptcy Act § 1(30) casts further doubt on this decision.

national concern for moving goods from the maker to the user.[154] Elsewhere in the law we have been developing a concept of negotiability of goods on the same sort of premise.[155] It is not surprising then that we have also extended somewhat unusual protections to the secured sales financer in contests with the purchaser's creditors.[156]

When we turn to the narrower issue of avoiding harm to other creditors of the buyer, it appears that the purchase money financer supplies a special kind of "new value", since the debt for the price is obviously not antecedent to the bargain for the secured position.[157] Other lenders may supply fresh consideration in the form of cash, but the pre-Code devices which were not limited to purchase money transactions did not necessarily reveal the "new value" on their face. On the other hand, the conditional sale and the trust receipt were limited to the acquisition of goods, and thus it was made clear that antecedent creditors could not have been deceived by the ostensible ownership of the collateral by the debtor at the time credit was extended. Consequently, delayed recording here could only mislead the "gap creditors", and this is a small price to pay for facilitating the flow of the goods.[158]

Further, the security agreement in pre-Code devices also clearly revealed that a particular debt was related to some particular property. Thus, the conditional sales and trust receipt categories minimized the possibility of the parties later fictitiously and fraudulently swelling the amount of the debt or the amount of the collateral covered by the agreement. A judicial desire to avoid creditor deception and the sham security transaction has long bottomed our chattel security law, and the purchase money deal minimizes both of these "evils".[159]

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154 See text p. 115 supra.

155 Vold, The Law of Sales, Preface (2d ed. 1959); Gilmore, Commercial Doctrine of Good Faith Purchase, 63 Yale L.J. 1057 (1954).

156 UCC § 9-307 protects buyers who qualify against perfected security interests without regard to the purchase money notion.

157 Purchase money is not always a requisite to the preferred status. UCC § 9-304(4) automatically perfects any security interests in negotiable documents to the extent that the interest arises for "new value". See UCC § 9-108. Bankruptcy Act § 60a(7) also permits a limited delayed recording where a transfer is for "new value" without reference to purchase money.

158 This is contrary to much chattel mortgage law; see Karst v. Gane discussed at note 73 supra. When protection is extended to the purchase money financer without any public recordation for the duration of the loan as under UCC § 9-302(1)(c) and (d), the justification can be that other creditors will not rely on any public record or can find out about the security interest by other means. See text following note 31 supra.

159 Honnold, Cases and Materials, Sales and Sales Financing 384 (1953). In a short but perceptive note following the case of Clow v. Woods, 5 S. & R. 275, 9 Am. Dec. 346 (Pa. 1819), the editor suggests that these two arguments are often mingled in decisions upsetting chattel mortgages. One might add that under UCC § 2-305 the price secured by the purchase money interest may be enforceable although not settled.

In this light it is clear that to the same extent that the so-called "floating lien" problems can be avoided by the continued use of the patterns of financing developed under the pre-Code law,[160] most of the issues raised here can be avoided by the continuance of the earlier business practices of the sales financing industry. These non-Code methods of operation should only be modified where the Code adopts new requirements, such as the notice called for by Section 9-312(3). If the purchase money financers set out to modify entirely their present techniques in light of the most liberal Code rules, then the questions raised here will reach the litigation stage. Experience alone will demonstrate whether additional amendments of the Code provisions will be required.[161] To these remarks one must add the comment that in some instances the casual reader of the purchase money provisions of Article 9 may be lulled into inaction where action is required for the fullest measure of protection.[162] On the whole, the careful student of the Code should conclude that the benefits of a single integrated body of modern chattel security law outweigh the few detriments.[163]

In some instances the seller will be able to fix the price so that a purchase money security interest may not be for a fixed amount.

160 Coogan, Operating Under Article 9 of the Uniform Commercial Code Without Help or Hindrance of the "Floating Lien", 15 Bus. Law. 373 (1960).

161 Possible revisions suggested here include: Elaboration of the definition of a purchase money security interest in UCC § 9-107 to clarify the timing of the acquisition of the goods and the giving of value; revision of the special purchase money priority rules in UCC § 9-312(3) and (4) to provide for pro rata sharing by two competing non-seller purchase money security interests and to make it clear whether the failure of the purchase money inventory financer to notify one rival will result in loss of the special priority of UCC § 9-312(3) as against notified competing secured parties; and the clarification of UCC § 9-301(2) to make it clear that no buyer not in ordinary course of business can prevail over the purchase money financer during the ten day grace period.

162 A purchase money security interest in certain consumer goods and farm equipment transactions is perfected without filing under UCC § 9-302, but is not fully effective against subpurchasers unless filed. UCC § 9-307(2). Further, a purchase money security interest in inventory collateral does not obtain the priority advantages of UCC § 9-312-(3) unless the security interest is perfected when the debtor receives the collateral, even though UCC § 9-301(2) permits a ten day grace period.

163 The experience in Massachusetts since 1958 and in Pennsylvania since 1954 has been favorable to the Code and particularly to Article 9. Malcolm and Funk, Pennsylvania and Massachusetts Experience Under the Uniform Commercial Code, 16 Bus. Law. 525 (1961).