COMMENTS

THE PERFECTION OF PURCHASE MONEY SECURITY INTERESTS IN MOBILE HOME INVENTORY UNDER THE UNIFORM COMMERCIAL CODE

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INTRODUCTION TO THE PROBLEM

The quantity and variety of inventory which today's American businessman must maintain in order to sell his product and effectively meet his competition has compelled the outside financing of inventory. A prime example is the automotive industry where manufacturers are producing half-year as well as year models and are thereby forcing dealers to stock new car inventories far beyond their own financial capabilities.[1] Similarly, within the mobile home industry, which has had an amazing rate of growth since World War II,[2] outside financing is now being sought at the dealer level. In that industry it is the high per unit cost, as well as the variety of models, which has brought about this situation.

The day when the mobile home dealer placed a few units in front of his small office has passed. Today the mobile home dealer either has a large showroom where he displays many of the available models or he owns a trailer park in which he sets several units on cement blocks with utilities already attached. The large volume dealer might even have both a showroom and a park next door so that he might detach an already affixed home and place it in the showroom, or vice versa. To further complicate matters for potential secured parties of mobile homes and subsequent creditors of the dealer, some mobile home dealers, having interstate organizations with showrooms and parks in separate states, may shuffle the homes between the locations.

These situations are not hypothetical or academic; they do exist. In such cases, the drafters of the Uniform Commercial Code[3] did not

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[1] Skilton, Cars for Sale: Some Comments on the Wholesale Financing of Automobiles, 1957 Wis. L. Rev. 352.

[2] In 1963 there were approximately 200,000 mobile homes manufactured in the United States, as compared to approximately 16,000 in 1940. These trailers range up to 59 feet in length and generally are 10 feet wide. The price per unit averages between $3500 to $15,000. It has been estimated that in 1963 over 3,000,000 people in the United States will live in mobile homes, and that 1 out of every 13 new homes will be a trailer. See Changing Times, Aug. 1963, p. 30.

[3] In the discussion of this comment the Uniform Commercial Code will be referred

intend that the secured party or the creditor risk his security on his speculation of how the debtor-dealer will use and place his mobile home inventory. The Code was drafted as a body of law which would grow with and adapt to commercial practices through custom, usage and agreement,[4] and its terms were not designed to cover every possible situation which might arise under it. However, the growth of the mobile home industry and the accompanying frequency of inventory financing necessitate the elimination of conjecture.

The outside financing of mobile home inventory has created a two-sided problem in the interpretation and application of the Code which does not exist in the financing of automobile inventory.[5] Succinctly stated, one side of the problem is: "How must a secured lender or a secured party[6] perfect his purchase money security interest[7] in the collateral[8] which is the subject of the security agreement?"[9] The other side of the problem concerns the creditor or secured party who is attempting to determine the existence of prior security interests in mobile home collateral. This comment will analyze the former problem and suggest a possible solution.[10] This solution will also serve to solve the latter problem.

Classification and Perfection Under the Code

The recognized purpose of the Code is to permit the expansion of commercial practices through uniformity and simplicity of the law governing business transactions.[11] To further this purpose, Article 9 of the Code has substituted the single term "security agreement" for such security devices as chattel mortgages, pledges, factor liens, assignments, conditional sales agreements and trust receipts and agree-

to as the "Code" and the use of sections will be references to the 1958 Official Text as published by the American Law Institute, National Conference of Commissioners on Uniform State Laws.

[4] UCC § 1-102(1)(b).

[5] As will be noted below, it is the classification of the inventory which brings the confusion to the forefront, and since an automobile can be classified only as personalty, the problem is non-existent.

[6] UCC § 9-105(1)(i).

[7] UCC § 9-107.

[8] UCC § 9-105(1)(c).

[9] UCC § 9-105(1)(h).

[10] Although the scope of this comment is limited to the inventory level of mobile home financing, a quite similar problem arises when the secured party on the dealer-consumer level seeks to perfect his security interest in a mobile home. Should the mobile home dealer who has consummated the sale of a mobile home under a purchase money security agreement consider for perfection purposes the mobile home as personalty? Or is it more properly classified as a fixture? Will the experience which a lending institution has gained by securing the purchase of mobile home inventory serve to help the institution answer the "where-to-file" question which arises when it purchases the dealer's chattel paper? Does UCC § 9-405 answer this last question?

[11] UCC § 1-102.

ments. When the security agreement is designed to enable the debtor to purchase the collateral, the term "purchase money security agreement" is used. A purchase money security agreement would be the instrument involved when the mobile home dealer seeks outside financing of his inventory. In its simplest form of operation, the secured party, usually a bank, lends money to the dealer to acquire his mobile homes. Upon their purchase, the bank takes, by virtue of the purchase money security agreement, a security interest in them. A provision is usually inserted in the purchase money security agreement extending its coverage to the proceeds received by the debtor upon the sale of the collateral.[12]

Although the Code has adopted the notice filing concept for perfection of security interests, Section 9-302 has provided exceptions to the rule. None of these exceptions, however, would allow the secured party who has a security interest in mobile home inventory to avoid filing for permanent perfection. Section 9-302(1)(a) provides that a security interest in collateral in the possession of the secured party is thereby perfected. However, possession by the secured party in a purchase money arrangement would frustrate the debtor in obtaining the necessary funds with which to repay the loan. The essence of a purchase money arrangement where inventory is the collateral is the ability of the debtor to sell the financed goods. Thus it would certainly not be in the best interests of the secured party to perfect his security interest by possession of the collateral. Therefore, the secured party must file the necessary papers as provided by Section 9-402 in order to perfect his interest.

Before filing is possible, the Code requires the secured party to wend his way through a maze of terminology in search of a proper classification of his collateral and the proper place to file his security agreement or financing statement. At this point it is of importance to define the term "mobile home,"[13] for a definition in itself will serve to illustrate one of the reasons for the existence of the above stated problems.

Probably the classic definitive description of a mobile home appeared in *Aetna Life Ins. Co. v. Aird*[14] in which Judge Hutcheson, in referring to a mobile home, said:

> Streamlined, mounted on two wheels, and capable when connected with beast or vehicle having motive and tractor power, of swift and easy motion, though it was, it was not

[12] UCC § 9-306.

[13] The term "mobile home" has been used by the courts and the legislatures interchangeably with such terms as "automobile trailer," "travel trailer," "home trailer" and just plain "trailer."

[14] 108 F.2d 136 (5th Cir. 1939).

> automotive, and it was not bought to be, nor was it, used, except incidentally, for locomotion. The only use made of its movability was to get it to the place where it was to be used, just as ready cut houses, if small enough, may be and sometimes are moved, and set up complete. Well, indeed completely, equipped as a place in which to live, with beds, bath, toilet, cooking facilities, side walls, a roof and floors, and with cross walls subdividing it into parts, it was bought and equipped to be . . . used as . . . residence and office combined.[15]

As can be seen, the mobile home is unique and, as such, has caused a great amount of conflicting and confusing court decisions and a problem with regard to Code classification.

The Code classifies collateral not only according to the character of the party who uses it at the time the security interest attaches,[16] but also by the actual use to which the debtor puts the collateral. By so doing, the Code distinguishes between the mobile home the dealer uses as his office and the mobile homes he purchases ultimately for sale. In the former instance, the mobile home would be "equipment,"[17] whereas, in the latter instance, the mobile homes would be "inventory." The importance of this determination becomes obvious when the secured party realizes that the Code provides that the rights of persons who purchase secured goods from a debtor,[18] the priority of secured parties as to the same collateral[19] and the rights of the parties upon default[20] depend upon it.

Once the proper determination is made, the secured party need only refer to Section 9-401 to ascertain the proper place to file. As drafted, the Code presented to an adopting state three optional methods for determining the place to file to perfect a security interest.[21] All the state had to do was choose the combination which it desired; the secured party then just chose the provision which fit his situation. Of course, it should be noted that here the risk of failure to file properly could mean the loss of the security interest as against subsequent purchasers and creditors.[22]

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15 Id. at 137.
16 UCC §§ 9-109(1)-(4).
17 UCC § 9-109(2).
18 UCC § 9-307.
19 UCC § 9-312.
20 UCC §§ 9-501-07.
21 See Haydock, Certainty and Convenience—Criteria for the Place of Filing Under the Uniform Commercial Code, 3 B. C. Ind. & Com. L. Rev. 179 (1962). For an analysis of the filing provisions in states recently adopting the Code, see Comment, 5 B. C. Ind. & Com. L. Rev. 360, 380 (1964).
22 UCC § 9-312.

It is also possible that the secured party cannot, without more, take the step from the determination under Section 9-109 to the filing of his security interest. In some instances, a classification must also be made as to whether the collateral is a fixture, personal property or real property. If the collateral is personal property, Section 9-401 clearly indicates the proper place to file. If the collateral is classified as a fixture, the Code still applies, but the place of filing becomes complex. Lastly, if the collateral is real property, then the Code is inapplicable. The non-Code law of the state in which the collateral is located, or is to be located, controls the making of this classification.[23]

THE NON-CODE LAW CONFUSION

Collateral, in the form of inventory, usually can be readily classified once the non-Code law of the state is examined. Generally, it is an easy step for the secured party to take from the signing of the security agreement to the proper filing under Sections 9-401 and 9-402. However, if the classification of the collateral becomes problematic, a simple step is turned into a hazardous risk. The classification of mobile home inventory presents just such a hazard to the secured party.

There appears to be no reported case under the Code, for purposes of either Section 9-401 or 9-313, which holds that mobile homes are properly classified as fixtures,[24] realty[25] or personalty when they are the subject of a purchase money security agreement. The language of the Code itself is of no assistance. In the absence of precedent, the secured party must search the judicial history of the state to discover the views of the courts with respect to mobile homes. Almost without exception, this search proves inconclusive and it usually results in great conflict. The secured party is faced with this confusion whether he examines the law of a single state, the law of the country as a whole or even the federal case law. For every case that exists which classifies a mobile home as personal property, there appears a case holding that the mobile home is either real property or a fixture.[26]

As an illustration, the judicial law of the Commonwealth of Penn-

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[23] UCC § 9-313(1).

[24] Can a mobile home be classified as a fixture and still be within the "inventory" classification? UCC § 9-105(1)(f) includes fixture as being a "good" and goods can be inventoried under UCC § 9-109. There are very few commercial enterprises which do in fact inventory fixtures.

[25] Of course, if a mobile home was properly classified as real property, it would not be a "good" or "inventory" within the meaning of the Code. See UCC § 9-104(j).

There is a need for this fixture vs. realty dichotomy because the filing for perfection of a security interest in one may not perfect the same interest if it later resolves itself into the other classification. See Coogan, Security Interests in Fixtures under the Uniform Commercial Code, 75 Harv. L. Rev. 1319, 1341, n.34 (1962).

[26] See Hodes and Roberson, The Law of Mobile Homes (1957).

sylvania, the first state to adopt the Code,[27] contains case law in support of the proposition that a mobile home is personal property and also in support of the proposition that a mobile home has characteristics resembling real property (as opposed to personal property). In *Streyle v. Board of Property Assessment*,[28] the court held that a mobile home was personalty within the meaning of the applicable tax statute.[29] Yet, this same court at an earlier date, when interpreting a building code, stated that a mobile home was a dwelling house and noted:

> To say that these were not dwelling houses is an attempt to fictionalize a reality. They were used and intended to be used as homes, and were as much dwellings as any similarly sized structures could be. . . . They differed from the ordinary house only in respect *to the ease* with which they could be moved. (Italics in original.)[30]

Be a mobile home real property or a fixture, this court was sure that it was not personal property.

The New York courts were quite strong in their views that a mobile home, as the subject of a zoning ordinance,[31] a building code[32] or an election statute,[33] had the characteristics of real property or a fixture. This strength and unanimity was lost when the issue involved a mobile home and its application to a real estate tax assessment. In this situation, the court was equally adamant that the subject was personal property.[34] This disharmony brought the New York Legislature to the aid of the court in the field of taxation by passing a law expressly stating that a mobile home was, for purposes of the real estate tax, real property.[35]

Arizona, a Code state, reveals a similar picture of confusion. A

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[27] Pa. Stat. Ann. tit. 12A, §§ 1-101 et seq. (Supp. 1953).

[28] 173 Pa. Super. 324, 98 A.2d 410 (1953). See also Kinkella v. Board of Property Assessment, 173 Pa. Super. 329, 98 A.2d 413 (1953).

[29] General County Assessment Law of May 22, 1933, P.L. 853, 72 P.S. § 5020 (Pa.).

[30] Lower Merion Twp. v. Gallup, 158 Pa. Super. 572, 575, 46 A.2d 35, 36 (1946); see also Commonwealth v. Flannery, 1 D. & C.2d 680 (Pa. 1954).

[31] Corning v. Town of Ontario, 204 Misc. 38, 121 N.Y.S.2d 288 (1953).

[32] People v. Murray, 32 Misc. 2d 757, 224 N.Y.S.2d 864 (1962).

[33] In Schreiner v. Allen, 13 App. Div. 2d 871, 216 N.Y.S.2d 57 (1961), the court held that inhabitants of rented mobile homes located in a trailer park, regardless of the extent of trailer annexation to the park, were not entitled to vote in a school district election since they were not persons "leasing real property."

[34] Stewart v. Carrington, 203 Misc. 543, 119 N.Y.S.2d 778 (1953). It should be noted that in its decision the court, like many other courts across the country when faced with a mobile home situation, considered the extent to which the trailer was annexed to the ground.

[35] This statute was held to be constitutional in Beagell v. Douglas, 2 Misc. 2d 361, 157 N.Y.S.2d 461 (1955); see also New York Mobile Homes Ass'n v. Steckel, 9 N.Y.2d 533, 175 N.E.2d 151 (1961).

mobile home on cement blocks without utility connections was held not to be a fixture,[36] but a mobile home was also held to be a dwelling for purposes of a burglary conviction.[37] It can be concluded that the courts felt that, depending on the situation, a mobile home could be considered as either real estate or personalty. Two other Code states, Michigan and Massachusetts, present a comparable situation.[38]

Texas, a non-Code state, has in its judicial history two cases which, although distinguished by one court,[39] seem quite diametrically opposed. The court in *Clark v. Vitz*[40] ruled that a mobile home properly comes within the statutory homestead exemption. The same court, speaking in the case of *Gann v. Montgomery*,[41] was convinced that a mobile home does not come within the homestead exemption.

States such as California, Colorado, Illinois, Indiana, Minnesota and Ohio have reported cases in which mobile homes were classified as personal property,[42] whereas Iowa, Mississippi, Georgia and Vermont have held otherwise.[43] Federal statutes have not been interpreted so as to give a harmonious classification of the mobile home.[44]

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[36] Gomez v. Dykes, 89 Ariz. 171, 359 P.2d 760 (1961).

[37] State v. Parsons, 70 Ariz. 399, 222 P.2d 637 (1950).

[38] In Michigan a mobile home was held to be properly a subject of a conditional sales agreement, Wade v. Chariot Trailer Co., 331 Mich. 576, 50 N.W.2d 162 (1951), and also held to have the characteristics of personal property, as indicated by the case of Cook v. Bandeen, 356 Mich. 328, 96 N.W.2d 743 (1959). Yet, within Mich. Comp. Laws § 211.2a (Supp. 1961) and Bane v. Township of Pontiac, 343 Mich. 481, 72 N.W.2d 134 (1955), a mobile home can be considered real property for tax purposes.

In Massachusetts a mobile home is not a house within the meaning of zoning laws (Town of Marblehead v. Gilbert, 334 Mass. 602, 137 N.E.2d 921 (1956)), but still might be taxed as real property (compare Town of Franklin v. Metcalfe, 307 Mass. 386, 30 N.E.2d 262 (1940) to Wright v. City of Peabody, 331 Mass. 161, 118 N.E.2d 68 (1954)).

[39] Gann v. Montgomery, 210 S.W.2d 255 (Tex. Civ. App. 1948).

[40] 190 S.W.2d 736 (Tex. Civ. App. 1945).

[41] Supra note 39.

[42] Clifford v. Epsten, 106 Cal. App. 2d 22r, 234 P.2d 687 (1951) (not realty or fixture with regard to the sale of a trailer park); Pagel v. Gisi, 132 Colo. 181, 286 P.2d 636 (1955) (the proper subject of a restrictive covenant); Village of La Grange v. Leitch, 377 Ill. 99, 35 N.E.2d 346 (1941) (not within the scope of a zoning ordinance); Liberty Coach Co. v. Butts, 126 Ind. App. 515, 132 N.E.2d 149 (1956) (the proper subject of a chattel mortgage); Simmons v. State, 234 Ind. 489, 129 N.E.2d 121 (1955) (not a dwelling within the meaning of an arson statute); Gendreau v. State Farm Ins. Co., 206 Minn. 237, 288 N.W. 225 (1939) (a vehicle under the terms of a fire insurance policy); Swigart v. Richards, 87 Ohio L. Abs. 37, 178 N.E.2d 109 (Ct. Com. Pl. 1961) (the proper subject of a restrictive covenant) and Brodnick v. Munger, 64 Ohio L. Abs. 306, 111 N.E.2d 695 (Ct. App. 1952) (within the scope of a building code).

[43] Jones v. Beiber, 251 Iowa 969, 103 N.W.2d 364 (1960) (was a building within covenant in a warranty deed); Schaeffer v. Gatling, 243 Miss. 155, 137 So. 2d 819 (1962) (was a residential purpose within the meaning of same in a deed); Kimsey v. City of Rome, 84 Ga. App. 671, 67 S.E.2d 206 (1951) (within the scope of a zoning ordinance); In re Willey, 120 Vt. 359, 140 A.2d 11 (1958) (within the scope of a zoning ordinance).

[44] In Biasotti v. Clarke, 51 F. Supp. 608 (D. R.I. 1943), the court was able to classify a mobile home, using the past usage of the trailer, as a vehicle within the

The confusion as noted above, however, can be shown in reality to be no confusion at all. The facts of each of the above cases and the law applied thereto have a reasonable and predictable relationship. A mobile home, when the subject of a building code, is not necessarily the same as a mobile home as the subject of a taxing statute. However, when a secured party examines the non-Code law to determine the proper classification of the inventoried mobile home, he must examine *all* the non-Code law and not just that which concerns a specific taxing statute.

The Alternatives Available

In an attempt to solve this problem, the secured party could file once in the office of the Secretary of State, a second time in the appropriate Registry of Deeds and a third time in the appropriate Land Records. This would end all the risk-of-security problems, but might create an unwanted financial burden.

If the secured party is "penny wise and pound foolish" and refuses to record in all three places, and litigation with regard to his priority in the collateral later arises, what arguments can be proferred by this party in support of his priority? Section 9-401(2) provides that a filing which is made in good faith in an improper place or not in all the required places is still effective to the extent that it actually conforms to proper procedure and is also effective against any subsequent secured party who had knowledge of the contents of the financing statement.[45] This section is of no assistance when the filing is completely improper. It has also been argued that the *possible use* of collateral determines the proper filing under Section 9-401. In one case the secured party claimed that the collateral (a tractor with shovel attachments and actually used in excavation work) could possibly be classified as "equipment used in farming operations"[46] and, thus, filing in the office of the Secretary of State was proper. The Referee in Bankruptcy wisely ruled that the test of Section 9-401 was the *actual use* of the collateral at the time the security interest attached and not the possible use.[47] The classification problem with re-

federal narcotics statute, but, the District Court, in the case of United States v. One 1953 Model Glider Trailer, 120 F. Supp. 504 (E.D. N.C. 1954), held that a mobile home was not "property" within the revenue laws.

[45] A possible pitfall may arise under this section if the subsequent creditor is a trustee in bankruptcy. See In the Matter of Luckenbill, 156 F. Supp. 129 (E.D. Pa. 1957); and In the Matter of Babcock Box Co., 200 F. Supp. 80 (D. Mass. 1961).

[46] Pa. Stat. Ann. tit. 12A, § 9-401(1)(a) (Supp. 1953). This statute provided that when collateral is equipment used in farming operations, a filing must be in the office of the Secretary of State and if all of the debtor's places of business are in a single county, then a filing must also be in the office of the prothonotory of that county.

[47] Matter of Leiby, 58 Lanc. L.R. 39 (Pa. 1962).

gard to an inventoried mobile home is not solved by the application of this "actual use" test, for the actual use is inventory. In the absence of the applicability of Section 9-401(2), our confused secured party must rely on the whims of the court or the jury which will hear the case, if and when it reaches the litigation stage.[48]

A Further Problem and a Solution

In his attempt to solve the classification problem, the secured party will come upon a secondary problem when he seeks a proper definition of "fixture" to apply to his mobile home situation. Several excellent and scholarly articles have been written on this subject,[49] with suggestions for its solution appearing therein.[50] The most practical of these suggestions is to amend the Code by: (1) inserting a section to provide that incorporation into a structure is the only manner in which goods may become reality; (2) inserting a section to provide that goods only become fixtures when they are affixed to real estate in a substantial manner and (3) inserting a section to provide that goods do not become real estate merely because their subsequent removal causes economic loss to the freehold.[51] These amendments would, to a good degree, reduce the problem as presented in this comment. Once a fixture determination has been made, either as encompassing the mobile home or not, there remains only the personal property or real property alternatives.[52]

By further amending the Code, specifically Section 9-105(1)(f), so as to expressly bring a mobile home, as such, within the meaning of "goods" and at the same time to exclude, for purposes of the Article, the possibility that a mobile home can be classified as real property under any of the provisions of Section 9-109, only the personal property classification will remain.

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[48] Could it be argued that since the security interest attaches prior to the time when the mobile homes are affixed to the real estate, if that be their destination, they are as of that time clearly inventory and thus this problem of perfection is eliminated? What if the mobile homes are affixed to the real estate by the manufacturer on a "sale or return" or on a "sale on approval" basis?

[49] See Coogan, supra note 25; The Uniform Commercial Code, 37 Calif. St. B.J. 119 (1962); and Braucher, The Uniform Commercial Code—A Third Look? 14 W. Res. L. Rev. 7 (1962).

[50] Almost without exception these authors merely have suggested amendments to the Code so as to insert a provision containing a definition of the term "fixture"; however, Mr. Coogan came forth with a sensible combination of ideas to serve to clarify this fixture problem.

[51] These three steps were first suggested by Mr. Coogan in his article cited in notes 25 and 49, supra. Mr. Coogan also suggested that the fixture determination should be made by a court, and not a jury, when it becomes an issue of litigation.

[52] It should be noted that these amendments would only lessen the risk of error in the determination of the fixture classification, and not eliminate it.

THE AMENDING PROCEDURE

The classification and filing problems discussed in this comment, along with the suggested solution, serve to further indicate that the Uniform Commercial Code is not, and was not, intended to be perfect. The drafters and the sponsors of the Code were aware that by achieving simplicity in a once complex commercial field, they would also create certain problem areas—hopefully small in scope and number. The mobile home inventory classification is just such an area. In proceeding to solve this problem, the present Code states should not hastily seek to alter their present law. If this were done, the Code might well lose its uniformity (as when some states enacted amendments and provisions which others cast aside) and its expert interrelation of provisions and sections. By far, the better procedure would be to submit this problem, along with the desired amendments, to the newly created Permanent Editorial Board.[53] This Board was established in 1961 to consider proposed amendments and, subject to the approval of the sponsors, to approve and promulgate amendments when the necessity arises.[54] Until such time as this procedure is completed, the secured party who seeks to perfect his security interest in mobile home inventory has no intelligent choice but to file his financing statement, or security agreement, in all possible places.

[53] The first meeting of the Permanent Editorial Board was held in May 1962.

[54] Amendments will be promulgated only when:

(a) It has been shown by experience under the Code that a particular provision is unworkable or for any other reason obviously requires amendment; or

(b) Court decisions have rendered the correct interpretation of a provision of the Code doubtful and an amendment can clear up the doubt; or

(c) New commercial practices shall have rendered any provisions desirable.

1961 Handbook of the National Conference of Commissioners on Uniform State Laws, pp. 165-66.