PRIORITIES, THE UNIFORM COMMERCIAL CODE AND CONSUMER FINANCING

DAVID H. VERNON*

INTRODUCTION

The special treatment given secured transactions involving consumer goods under Article 9 of the Uniform Commercial Code[1] is, at times, inequitable and, at other times, gives rise to undesirable and unnecessary uncertainties in commercial situations. In part, moreover, the Code's handling of the financing of consumer purchases is not only unrealistic but penalizes the consumer-buyer by holding him to a commercial standard of conduct with which he is unfamiliar.

To highlight the problems in this area, discussion shall be centered around hypothetical consumer-financing transactions. These will be analyzed in terms of Code rules, the Code's solution evaluated, and, in some cases, adjustments in Code language suggested to permit a clearer, more equitable alignment of the rights of the parties.

CONSUMER-BUYERS AND CONSUMER-SELLERS

To understand the Code's operation in the area of consumer financing, the following rules, established by the Code, must be kept in mind and their interaction understood:

1. Goods are consumer goods only "if they are used or bought for use primarily for personal, family or household purposes."[2]
2. Goods are classified as "equipment" if they do not fit into the other three Code categories: consumer goods, farm products or inventory.[3]
3. A purchase money security interest in consumer goods may be perfected without filing and without taking possession.[4]
4. A purchase money security interest in consumer goods which is perfected but unfiled is subject to being defeated by a good faith consumer-buyer of the goods from a consumer-seller.[5]

---

* Associate Professor, University of New Mexico School of Law.

1 The version of the Uniform Commercial Code dealt with is that found in the two-volume UCC edition published by the Edward Thompson Company in 1962. It is part of the Uniform Laws Annotated Series, and includes the 1963 Official Recommendations of the Permanent Editorial Board.

2 UCC § 9-109(1).

3 UCC § 9-109. "Goods are . . . (2) '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. . . ."

4 UCC § 9-302(1). "A financing statement must be filed to perfect all security interests except the following: . . . (d) a purchase money security interest in consumer goods. . . ."

5 UCC § 9-307(2). "In the case of consumer goods . . . , a buyer takes free of a security interest even though perfected if he buys without knowledge of the security

5. A non-purchase money security interest in consumer goods may be perfected only (a) by filing or (b) by the secured party's taking possession of the goods.[6]
6. A security interest in consumer goods which is perfected by filing is not subject to being defeated by a good faith consumer-buyer of the goods from a consumer-seller.[7]
7. Priorities between conflicting security interests in the same collateral are determined by the order of their perfection unless both are perfected by filing in which case the order of filing controls.[8]
8. A buyer in ordinary course from a retail seller takes the goods free of any security interest in them even though the interest is perfected if, but only if, that interest was created by the retailer.[9]
9. A buyer of goods not in ordinary course of business prevails over the holder of an unperfected security interest to the extent that, while the interest remains unperfected, such buyer gives

---

interest, for value and for his own personal, family or household purposes . . . unless prior to the purchase the secured party has filed a financing statement covering such goods." As stated above, the rule is couched in terms of a "consumer-buyer from a consumer-seller." The fact that the buyer must be buying for his own personal, family or household purposes is set forth clearly in the section. That the seller must be a "consumer-seller" is less clear. The section reads, "In the case of consumer goods," a buyer takes free of specified security interests. In the hands of a retailer, goods are not consumer goods, but inventory. UCC § 9-109(4). For a seller to be selling consumer goods, necessarily, the seller must have used them or bought them for personal, family or household purposes. Subsection (1) of 9-307 covers the case of a retail sale. Here knowledge is not a factor.

[6] Under UCC § 9-302, all security interests except those listed are required to be filed in order to be perfected. Non-purchase money interests in consumer goods are not listed among the exceptions. UCC § 9-305 provides that "A security interest in . . . goods . . . may be perfected by the secured party's taking possession of the collateral."

[7] UCC § 9-307(2). See note 5 supra.

[8] This statement of the Code rule is accurate for present purposes of discussion. It is subject to exceptions, however, as provided in UCC §§ 9-312(1), (2), (3) and (4) although none of the exceptions are applicable herein.

That portion of UCC § 9-312(5) which is applicable reads as follows:

> (5) 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:
>
> (a) in the order of filing if both are perfected by filing, regardless of which security interest attached first under Section 9-204(1) and whether it attached before or after filing;
>
> (b) in the order of perfection unless both are perfected by filing, regardless of which security interest attached first under Section 9-204(1) and, in the case of a filed security interest, whether it attached before or after filing . . . .

[9] UCC § 9-307(1). "A buyer in ordinary course of business (subsection (9) of Section 1-201) . . . takes free of a security interest *created by his seller* even though the security interest is perfected and even though the buyer knows of its existence." (Emphasis supplied.)

value and takes possession without knowledge[10] of the existence of the security interest.[11]

10. A buyer of goods not in ordinary course includes any person buying from a seller not in the business of selling goods of the kind involved.[12]

PROBLEM I

Alan Able buys a refrigerator from the Hart Department Store, paying $50 down and signing a note for the balance of $480. At the same time, he signs a security agreement specifying the refrigerator as the collateral and designating Hart as the secured party. No document relating to the transaction is filed. Hart delivers the refrigerator to Alan's home.

About a week after making the purchase, Alan loses his job. Needing money, he tells his neighbor, Bob Bobble, that he is taking a new job in Tucson and that he does not wish to transport the refrigerator. Alan does not mention that he had paid only $50 down, and he offers to sell the refrigerator to Bob for $75 less than he had paid for it, i.e., a total price to Bob of $455. Bob agrees to buy the refrigerator and gives Alan $55 to bind the deal.

(i) *The Consumer-Buyer and Unfiled Security Interests*

To the facts of Problem I, add the following:

a. *Alan then goes to the Chad Loan Company, and using the refrigerator as collateral, borrows $200. Alan signs a security agreement designating Chad Loan Company as the secured party and specifying the refrigerator as the collateral. By 10:00 a.m. the next day, Alan has finished packing and he delivers the refrigerator to Bob's house, receiving from him the balance due on the purchase price. At 11:00 a.m. the same morning, Chad Loan files the security agreement in the office of the Secretary of State.*

---

10 UCC § 1-201(25). "A person 'knows' or has 'knowledge' of a fact when (a) he has actual knowledge of it. . . ."

11 UCC § 9-301(1). Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of . . . (c) in the case of goods . . . a person who is not a secured party and who is a transferee in bulk or *other buyer not in ordinary course of business* to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected . . . . [Emphasis supplied.]

12 UCC § 1-201(9) defines a buyer in ordinary course of business as one who buys goods in the ordinary course "from a person in the business of selling goods of that kind." Thus, anyone buying goods from one not in the business of selling goods of the kind in question should be classified as a buyer not in ordinary course.

Applying the Code rules to I(a), both Hart and Chad Loan hold perfected security interests in the refrigerator. Chad Loan's interest has been perfected by filing.[13] Since Hart holds a purchase money security interest in consumer goods, its interest was perfected without filing.[14] As between the two, Hart, having perfected first, has a priority over Chad Loan.[15]

Bob, however, takes the refrigerator free of both interests. The refrigerator belongs in the category of consumer goods, Alan having purchased it for "household purposes."[16] And since Bob bought it from Alan for his personal or family use, section 9-307(2) operates to cut out Hart's security interest. As applied to consumer goods, the section reads:

> In the case of consumer goods . . ., a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes . . . unless prior to the purchase the secured party has filed a financing statement covering such goods.

At the time Bob bought the refrigerator from Alan, Hart's interest, though perfected, was unfiled. And Chad Loan's non-purchase money interest being unfiled at the time was not perfected until after the sale to Bob.[17] The section, therefore, operates to give Bob ownership of the refrigerator free of any existing security interests.

b. *Assume that Alan, rather than selling the refrigerator to Bob, his neighbor, sells it to Dandy Appliance Company, a dealer in second-hand appliances, and that he completes the delivery to Dandy and is paid at 10:00 a.m., one hour before Chad Loan filed with the Secretary of State. Assume further that at 10:30 that morning, Bob purchases the refrigerator from Dandy Appliance.*

On these adjusted facts, Dandy Appliance would take the refrigerator subject to Hart's perfected but unfiled security interest.[18] Since Chad Loan's interest was unperfected at the time of the sale to Dandy

---

[13] UCC § 9-302.

[14] Rule 3—UCC § 9-302(1)(d). See supra note 4 and accompanying text.

[15] Rule 7—UCC § 9-312(5)(b). See supra note 8 and accompanying text.

[16] Rule 1—UCC § 9-109(1). See supra note 2 and accompanying text.

[17] UCC § 9-302.

[18] UCC § 9-307 provides for buyers of goods taking free of security interests when such interests are perfected. Since Dandy Appliance is neither a buyer in ordinary course of business nor one buying for his own personal, family or household purposes, it does not come within the group afforded protection by 9-307. Thus Dandy takes subject to the perfected interest of Hart.

Appliance, the appliance company, as a buyer not in ordinary course,[19] would take free of Chad Loan's security interest.[20] Hart, having perfected its interest first, again would have a priority over Chad Loan.[21]

But what of Bob? He was a buyer in ordinary course from a retailer.[22] In the normal retail sale, the Code's treatment is to permit the buyer in ordinary course to take free of any security interest in the retailer's inventory. Thus, section 9-307(1) provides: "A buyer in ordinary course of business . . . takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence." The buyer in ordinary course, however, takes free of a perfected security interest in inventory *only* if his seller is the one who created the security interest. Here, Alan created it, not Dandy Appliance. Bob, therefore, although a buyer in ordinary course, is not protected by 9-307(1). Nor does section 9-307(2) offer any shelter since it only protects a consumer-buyer when he purchases goods which are consumer goods in the hands of his vendor.[23] In the appliance store's hands, obviously, the refrigerator is inventory.[24]

Alan could have transferred the refrigerator to Bob free of any security interest if he had sold it to him directly. Due to the intervention of a non-consumer buyer in the chain, however, Bob takes the refrigerator subject to Hart's interest, although free of Chad Loan's.

This difference in treatment cannot be justified. Under the entrusting provision of Article 2 [section 2-403(2)], "any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." Applying this provision, the Code favors the innocent buyer from a retailer over an owner of property who makes it possible for the buyer to see the goods displayed and, thus, to purchase them. By entrusting the goods to the merchant's possession, the owner must make a judgment as to the merchant's honesty. The section, in essence, makes him pay for his error in judgment. Where the owner makes no such error, *i.e.*, where the goods are stolen from the owner and then placed in the hands of a merchant, the "entrusting" provision favors the owner over the buyer in ordinary course.[25]

---

19 Rule 10—UCC § 1-201(9). See supra note 12 and accompanying text.

20 Rule 9—UCC § 9-301(1)(c). See supra note 11 and accompanying text.

21 Supra note 15.

22 UCC § 1-201(9).

23 See supra note 5.

24 UCC § 9-109(4).

25 The applicable portions of UCC § 2-403 read as follows:

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention

Applying the policy established in the entrusting provision to section 9-307(1), and to the case at hand, what result would be forthcoming? Both Hart and Chad Loan, by advancing funds to Alan, made a calculated decision to trust Alan. They trusted him to repay what he borrowed. By allowing him possession of the refrigerator, they trusted him not to dispose of it in derogation of his duties to them. In essence, Hart and Chad Loan made the same error in judgment as that made by the owner of goods when he entrusts them to a merchant who in bad faith sells the goods in ordinary course. In both cases, the parties act for their own benefit, *i.e.*, Chad Loan and Hart act in the expectation of being paid, and the owner acts for his own purposes, either to have the goods repaired or stored, or to have them sold.

In assessing fault, it must be remembered that the lenders made it possible for Alan to dispose of the refrigerator. By leaving him in possession as they did, they made it possible for Alan to defraud Bob, and they did this in expectation of payment. If the entrusting provision of Article 2 is justifiable and proper, and I believe it is, the different results reached under section 9-307(1), as stated above, are unjustifiable and improper. I would urge that a buyer in ordinary course from a retail merchant should take free of any security interest in the goods he buys regardless of *who* creates the security interest. I would suggest to the Permanent Editorial Board, therefore, that the language of section 9-307(1) be adjusted as follows to reflect this policy:

> (1) A buyer in ordinary course of business (subsection (9) of section 1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest [created by his seller] *in the goods he buys* even though the security interest is perfected and even though the buyer knows of its existence. [Deletions are bracketed. New language is italicized.]

(ii) *The Consumer-Buyer and Filed Security Interests: Circuity*

c. *Assume that Chad Loan Company advanced the funds to Alan and filed the security agreement with the Secretary of State before Alan discussed the sale of the refrigerator with Bob. Assume further that Alan then sold the refrigerator to Bob, his neighbor, Bob intending to use the refrigerator in his home.*

---

of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

Here again, because it perfected first, Hart is prior to Chad Loan.[26] But Hart's interest can be defeated by the operation of section 9-307 (2) which permits a person in Bob's position to prevail over a perfected but unfiled security interest. However, while thus taking free of Hart's claim, Bob does take subject to Chad Loan's interest because Chad Loan filed prior to the sale to him. Under 9-307(2) Bob prevails only over perfected security interests which are *unfiled*. Thus, on these facts, we end up with a circuity of interests:

1. Hart is superior to Chad Loan but inferior to Bobble.
2. Chad Loan is superior to Bobble but inferior to Hart.
3. Bobble is superior to Hart but inferior to Chad Loan.

The circuity of interests created by the Code, if and when the cases arise in fact, somehow must be broken. How best to adjust the competing interests is not easy of solution. Weighing the comparative innocence of the competing parties, however, and taking into account the Code's general approach tending to discourage non-purchase money secured financing of consumers, it is urged that Bob, the consumer-buyer, should prevail.[27]

1. *Non-Purchase Money Consumer Financing*

As suggested, the Code draftsmen seem to have gone out of their way to discourage secured transactions involving consumer goods except where purchase money is being supplied. A purchase money security interest in consumer goods may be perfected without filing. Filing or possession, of course, is necessary if the nature of the interest is non-purchase money. This alone would not indicate an attempt to discourage non-purchase money advances on the security of household goods. But since the secured vendor is able to perfect his interest without making it a matter of public record, a prospective lender after the fact has no effective means of ascertaining the existence of a prior security interest. Section 9-208, which establishes a method for obtaining information concerning a prior security interest in proposed collateral, does not work effectively when consumer goods are involved. Under the section, the person of whom inquiry is made has two weeks in which to give the requested information. A prospective borrower wishing to use his household furnishings as collateral normally is not in a position to wait fourteen days before obtaining the money he desires. In the very competitive small loan area, the lender would seem to be put to a choice of advancing the funds without checking on prior interests, or having the borrower go elsewhere.

---

[26] Supra note 15.

[27] With such a solution, i.e., the consumer-buyer taking free of all security interests, we need not proceed to the point of allocating priorities between Chad Loan and Hart.

When the purchase money secured party forecloses, the Code requires that he give notice of his action to all secured parties of record and to those of whom he has knowledge *unless* the collateral is consumer goods.[28] If consumer goods are involved, the foreclosing purchase money creditor need not give notice to other secured parties even when he is aware of their existence.[29] And, of course, if the holder of the purchase money interest sells the goods on foreclosure, the buyer takes free of any junior interest.[30] Finally, the Code wisely prohibits after-acquired property clauses where consumer goods are involved unless the consumer acquires the property within ten days of the secured party's giving of value.[31] Thus, unless purchase money is supplied, the after-acquired property clause is inoperative.

If I am right and if these sections of the Code exhibit a distaste for non-purchase money financing with consumer goods as collateral, a court might be urged to break the circle by finding against the non-purchase money secured party—in the instant case, against Chad Loan Company.

2. *Competing Equities*

Beyond the general Code policy, an examination of the comparative equities of the competing parties again calls for a holding in favor of the consumer-buyer. While it is true that Chad Loan has no effective means of preventing its borrower, Alan, from disposing of the refrigerator, as a lender Chad Loan is in the business of assuming such a risk. The consumer-buyer, on the other hand, acts without any understanding that a risk is involved. The only risk he consciously undertakes involves the functioning of the refrigerator as such. Chad Loan can and should be careful about lending its money. Some form of credit investigation prior to lending can be made in a relatively short period of time—a much shorter time than it would take to discover if an unfiled purchase money interest exists. The lender is paid to assume the risk of a borrower's honesty. Chad Loan can be said to have assumed the risk of Alan's defalcation. Bob did what he did in complete ignorance that such a risk was involved.

The fact that Chad Loan filed the security agreement should not operate in its favor as against Bob. (The same would be true if Hart filed.) Consequently section 9-307(2) operates unfairly against a consumer-buyer. It is unrealistic to believe that such a buyer will check the record, and such a burden should not be placed on him. The section as now written permits a secured party who has filed to shift the risk of loss from himself to a person who had nothing to do with the

[28] UCC § 9-504(3).
[29] Ibid.
[30] UCC § 9-504(4).
[31] UCC § 9-204(4)(b).

lender's decision to commit his funds. "On the one hand we have a person [the lender] taking a calculated risk and being paid for it; on the other hand we have one who does not understand that any risk is involved. Why should the latter bear the loss?"[32]

Insofar as section 9-307(2) permits the holder of a filed security interest to prevail over a noncommercial buyer, it operates unfairly by imposing commercial standards of conduct on a person who is unaware of the standards. Since this is true, and since the existence of the circuity gives the court a relatively free hand in solving the problem, I would urge that the consumer-buyer be permitted to prevail over Chad Loan as well as over Hart.

It is submitted that the provision should be amended to prevent the circuity from arising and to place the risk of dishonest dealing with the collateral on the group being paid to assume the risk—on the lenders. I therefore urge that consideration be given to amending 9-307(2) to read as follows:

> (2) In the case of consumer goods and in the case of farm equipment having an original purchase price not in excess of $2500.00 (other than fixtures, see Section 9-313), a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes or his own farming operations [unless prior to the purchase the secured party has filed a financing statement covering such goods]. [Deletions are bracketed.]

(iii) *When Are Consumer Goods Not Consumer Goods?*

d. *Assume that Alan, when he purchased the refrigerator from Hart, did so with the present intention of defrauding Hart, Chad Loan and Bob, and that he never intended to use the refrigerator, nor did he use it, for personal, family or household purposes. Assume further the facts set forth under (a), i.e., that the sale to Bob was consummated prior to Chad Loan's filing in the office of the Secretary of State.*

Under the Code definition, goods are consumer goods only "if they are *used* or *bought for use* primarily for personal, family or household purposes."[33] (Emphasis supplied.) Here, Alan purchased the refrigerator for use primarily—or entirely—in defrauding other persons and this is the only use to which it was put. The refrigerator, thus, cannot

---

[32] Vernon, Recorded Chattel Security Interests in the Conflict of Laws, 47 Iowa L. Rev. 346, 364 (1962).

[33] Supra note 16.

be classified as consumer goods. Under Code usage, it properly belongs in the equipment category, it being the catch-all for goods which fit in no other group.[34]

If the refrigerator is classified as equipment rather than consumer goods, Hart's unfiled purchase money security interest would be unperfected.[35] To perfect a purchase money interest in equipment, the secured party either must take possession of the equipment or file.[36] Hart has done neither. Chad Loan, having filed, has a perfected interest in the refrigerator and would have a priority in the collateral over any claim of Hart.

If the refrigerator were consumer goods in Alan's hands, 9-307(2) would operate in Bob's favor as against Chad Loan, since its interest was filed after Bob bought the refrigerator. However, that section is not operative because equipment is involved. If Chad Loan's interest is to be defeated by the sale to Bob, it must be by virtue of some other Code section. In treating unperfected security interests, the Code provides in section 9-301(1) that

> . . . [A]n unperfected security interest is subordinate to the rights of
>
> . . . .
>
> (c) in the case of goods . . . a person who is not a secured party and who is a . . . buyer not in ordinary course of business to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected; . . .

Bob is a buyer not in ordinary course since he bought the equipment from Alan, a person not in the business of selling goods of the kind in question.[37] Bob, therefore, would take the refrigerator free of Chad Loan's security interest.

It is interesting to note that on the facts of (b), where Alan sold the refrigerator to Dandy Appliance, which in turn sold to Bob, the result would be changed if, due to Alan's fraudulent intention, the refrigerator is classified as equipment rather than as consumer goods. In such a case, both Hart and Chad Loan would have unperfected security interests at the time of Alan's sale to Dandy Appliance. Since Dandy Appliance comes within the provisions of section 9-301(1)(c) as a buyer not in ordinary course, having purchased from Alan, a nonmerchant, the appliance company would take free of any security in-

[34] Rule 2—UCC § 9-109(2). See supra note 3 and accompanying text.

[35] UCC § 9-302, which provides exceptions to the filing rule, contains none for the perfection of a security interest in equipment except for the secured party's taking possession.

[36] Ibid.

[37] Supra note 19.

terest. And Bob, of course, would acquire from it whatever interest the appliance company had.[38] So we have a situation in which a consumer-buyer takes a greater interest in goods if they can be classified as equipment rather than as consumer goods.

The definition of consumer goods, further, fails to be very helpful in a situation where the buyer is free to put the goods to use either for his business or household purposes.[39] Thus, assume a case where a doctor has his offices located in a wing of his house. If the doctor buys four chairs from a furniture company, two for his livingroom and two for his waiting room, the former will be classified as consumer goods while the latter are called equipment. The vendor will not know the difference. And a week after delivery, the doctor may decide to shift the waiting room chairs to the livingroom and the livingroom chairs to the waiting room. Here, under the statutory definition, the two living-room chairs (now located in the waiting room) would be classified as consumer goods since they were "bought for use primarily for personal, family or household purposes." And the two chairs originally in the waiting room (now in the livingroom) might also be classified as consumer goods since they are being "used" primarily for household purposes. The buyer can change the character of the goods by changing their use, and, thus, change unperfected interests to perfected. There seems to be no reason for continuing this state of affairs. The consumer goods concept can be revised to provide more certainty than it currently does. In section 9-109 the following would accomplish this:

> Goods are (1) "consumer goods" if *they are of a type which are normally used for household purposes or* they are used or bought for use primarily for personal, family or household purposes; . . . [New language is italicized.]

Under the suggested definition, a refrigerator of a size normally used for household purposes would be classified as consumer goods whether the purchaser bought the refrigerator for use in the house, his office, a factory or for the purpose of defrauding the seller or others. Chairs of a type normally used for household purposes would be classified as consumer goods whether or not they are bought for use or are used in the livingroom or in the doctor's waiting room. Chairs of a type normally used commercially would be classified as equipment unless they are used or bought for use for family or personal purposes. By use of the amended section, I believe that several problems currently raised by the definition of consumer goods would be solved.[40]

---

[38] UCC § 2-403(1).

[39] The Official Comment to § 9-109 recognizes this problem. See also, Hogan, Financing the Acquisition of New Goods Under the Uniform Commercial Code, 3 B.C. Ind. & Com. L. Rev. 115 (1962).

[40] I realize that even with the language change, § 9-109(1) remains somewhat un-

CONSUMER-BUYERS' RIGHTS AND THE ASSIGNEES OF CHATTEL PAPER

PROBLEM II

Dan Davids buys a refrigerator from the Hart Department Store, paying $100 down and signing a negotiable note for the balance of $380. At the same time, Dan signs a security agreement specifying the refrigerator as the collateral and designating Hart as the secured party. The refrigerator is delivered to Dan's home and is used there.

On the day following the sale, Hart transfers the note and security agreement to the Easy Finance Company, the company buying the paper for its face value less the usual discount. Throughout the month, Dan had complained to Hart and had demanded that the store take back the refrigerator and return his $100. About a month after the sale when the first payment on the note is due, Dan refuses to pay, alleging that the refrigerator is faulty.

Assume that under Article 2 of the Code, Hart's warranty obligation in fact has been breached and that the department store is obliged to refund Dan's money and take back the refrigerator.[41] *What are Easy Finance's rights against Dan?*

Traditionally, Easy Finance, as the holder in due course of the note, would take the chattel paper free of any warranty defense Dan might raise.[42] This traditional approach is codified in section 9-206. Subject to any statute or decision in the individual Code state establishing a different rule for consumer goods, this section gives Easy Finance the right to collect the full purchase price from Dan despite his defense of breach of warranty. The section reads as follows:

(1) *Subject to any statute or decision which establishes*

certain. With the change, however, it covers everything now embraced by the section and other items normally used in a home. The refrigerator purchased by a lawyer for office use should be treated no differently from the same refrigerator when purchased for home use. The vendors of such property, if they wish to take advantage of the perfected but unfiled provision of the Code, should be able to do so without being put to the task of ascertaining the use to which the product is to be put.

[41] See UCC §§ 2-601, 2-602.

[42] E.g., United States v. Hansett, 120 F.2d 121, 122 (2d Cir. 1941); United States v. Bryant, 58 F. Supp. 663, 666 (S.D. Fla. 1945), aff'd, 157 F.2d 767 (5th Cir. 1946); Royal Tire Service, Inc. v. Shades Valley Boys' Club, 232 Ala. 357, 168 So. 139, 140 (1936); Coral Gables, Inc. v. Heim, 120 Conn. 419, 181 Atl. 613 (1935); Fabrizio v. Anderson, 62 A.2d 314, 315 (D.C. Mun. Ct. App. 1948); Rubio Sav. Bank v. Acme Farm Prods. Co., 240 Iowa 547, 37 N.W.2d 16, 19 (1949) ("Knowledge that an instrument was given for the sale of goods warranted or guaranteed by the seller does not deprive an indorsee of his status as a holder in due course, if the warranty or guaranty is breached, where the holder had no knowledge of the breach prior to taking the instrument."); Cooke v. Real Estate Trust Co., 180 Md. 130, 22 A.2d 554, 558 (1941); Alropa Corp. v. King's Estate, 279 Mich. 418, 272 N.W. 728, 729 (1937); New Jersey Mortgage & Investment Corp. v. Calvetti, 68 N.J. Super. 18, 171 A.2d 321, 326 (1961). Accord UCC § 3-304(4)(b).

> *a different rule for buyers or lessees of consumer goods,* an agreement by the buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the Article on Commercial Paper (Article 3). *A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement.* [Emphasis supplied.]
>
> (2) When a seller retains a purchase money security interest in goods the Article on Sales (Article 2) governs the sale and any disclaimer, limitation or modification of the seller's warranties.

If Hart had retained the chattel paper[43] arising from the sale, subsection (2) of 9-206 would operate to relieve Dan of his obligation on the note. Since Hart assigned the chattel paper to Easy Finance, however, and since the agreement is silent concerning defenses against an assignee, Dan, in most Code states, would have no defense in a suit by Easy for the full purchase price.

As section 9-206(1) is written, Dan's only defense against Easy Finance would be that the Code state involved has a "statute or decision" taking consumer transactions out of the operation of the section. As far as I can ascertain, no Code state has a decision which operates generally to give consumer-buyers their warranty defenses against assignees of chattel paper. Furthermore, only two of the eighteen Code states have statutes aimed broadly at protecting consumer-buyers against the claims of such assignees.[44]

There is a line of cases holding the assignee of chattel paper to the seller's warranty when the relationship between the assignee and the vendor is such as to constitute the assignee an integral part of the sale transaction itself.[45] On the facts stated here, however, this is

[43] UCC § 9-105(1)(b) defines chattel paper as meaning "a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods. . . ."

[44] Mass. Ann. Laws ch. 255, § 12C (Supp. 1962); N.Y. Pers. Prop. Law §§ 302(9) (motor vehicles), 403(1) & (3) (1959).

[45] E.g., Schuck v. Murdock Acceptance Corp., 220 Ark 56, 247 S.W.2d 1, 5 (1952); Bastian-Blessing Co. v. Stroope, 203 Ark. 116, 155 S.W.2d 892, 893 (1941); Commercial Credit Co. v. Childs, 199 Ark. 1073, 137 S.W.2d 260, 262 (1940). ("We think appellant was so closely connected with the entire transaction or with the deal that it can not be heard to say that it, in good faith, was an innocent purchaser of the instrument for value before maturity. It financed the deal, prepared the instrument, and on the day it was executed took an assignment of it from the . . . [vendor]. Even before it was executed it prepared the written assignment thereon to itself. Rather than being a purchaser of the instrument after its execution it was to all intents and purposes a party to

not available to Dan. Easy played no such role, nor is there any indication that Easy Finance is anything but a holder in due course.[46] Section 9-206(1) talks in terms of a "decision which establishes a different rule for buyers or lessees of consumer goods." The case law, however, is not couched in terms of special rules for buyers of consumer goods. Where defenses have been available against the assignee, the courts have not established special or different consumer-buyer rules.[47] It seems, therefore, that the "decision" exception in 9-206(1) is meaningless unless the courts develop an entirely new approach in the area.

Massachusetts and New York appear to be the only current Code states with legislation aimed at preserving consumer-buyers' defenses against the assignee of chattel paper arising from the sale.[48] Three

the agreement and the instrument from the beginning."); Commercial Credit Corp. v. Orange Mach. Wks., 34 Cal. 2d 766, 214 P.2d 819 (1950); Mutual Fin. Co. v. Martin, 63 So. 2d 649 (Fla. 1953); Citizens Loan Corp. v. Robbins, 40 So. 2d 503 (La. App. 1949); Davis v. Commercial Credit Corp., 87 Ohio App. 311, 94 N.E.2d 710 (1950) (a conspiracy to defraud was found to exist between the vendor and the assignee).

A New York court, in holding an assignee subject to a buyer's defenses, said:

> Looking, without the distortion of ancient notions, at the picture thus presented, we find the actual control and management of the credit and finance of sellers doing a conditional sale business in the hands of these finance corporations.
>
> It is obvious that here we have a factual joint enterprise in which, so far as conditional sales are concerned, the management rests in the far larger part in the hands of the finance companies. The finance company and the merchant-seller are as a fact engaged in one business, like Longfellow's description of man and woman, useless one without the other. To pretend that they are separate and distinct enterprises is to draw the veil of fiction over the face of fact.
>
> Seeing thus in true focus, should we permit the finance company to isolate itself behind the fictional fence of the law merchant? Should we give ear to its protestations that it has followed the Biblical injunction and has let not its right hand (the finance company) know what its left hand (the sales department) is doing, and, therefore, should be unbound by the representations to the buyer by the sales division of the joint business, representations, and promises at variance with the terms of the printed form, a printed form impossible of reading in the present instance save with a magnifying glass, and comprehensible only by a commercial lawyer? Should we thus throw the burden of caution on the untrained run-of-the-mill buyer, who by every means known to sales artistry has been induced to believe that he is dealing with an honorable house? Should not the risk of the fraud and misrepresentation of the salesman be the risk of the business, rather than the risk of the unwary buyer? The finance company, being a de facto part of a great conditional sale commercial machine, should be no more allowed to escape from the effects of the misrepresentation of a salesman than is the merchant himself. This rule imposes no great hardship on the finance company. Zeal is shown in investigating the credit of the buyer; let zeal likewise be expended in investigating the good faith of the salesman. If any hardship is imposed by this rule, it is only the hardship that has always followed the refusal of the law to permit the divorce of honor from enterprise.

Buffalo Industrial Bank v. De Marzio, 162 Misc. 742, 296 N.Y.S. 783, 785 (1937). But cf. United States v. Nousam Realty Corp., 125 F.2d 456 (2d Cir. 1942).

[46] See UCC § 3-302.

[47] See cases cited notes 42 and 45 supra. See also, King, The Unprotected Consumer-Maker under the Uniform Commercial Code, 65 Dick. L. Rev. 207 (1961).

[48] Mass. Ann. Laws ch. 255, § 12C (Supp. 1962), reads as follows:

others among the states which have adopted the Code, Michigan, Pennsylvania and Oregon, have legislated in the area.[49] All three of these statutes, however, are limited and apply only to the sale of motor vehicles. Michigan and Oregon, while prohibiting contractual language waiving defenses against assignees, preserve the right of the assignee as a holder in due course.[50] Thus, if the prohibited language appears, the buyer's remedy, apparently, is to sue the vendor for whatever damages the buyer suffers as a result of having to pay the full purchase price to the assignee who is a holder in due course.[51]

> Promissory Notes Executed in Sales of Consumer Goods Shall Not Be Negotiable Instruments; Exception.
>
> If any contract for sale of consumer goods on credit entered into in the commonwealth between a retail seller and a retail buyer requires or involves the execution of a promissory note, such note shall have printed on the face thereof the words "consumer note," and such a note with the words "consumer note" printed thereon shall not be a negotiable instrument within the meaning of the Uniform Commercial Code—Commercial Paper. For the purposes of this section "consumer goods" means tangible personal property used or bought for use primarily for personal, family or household purposes.
>
> Whoever obtains a note in violation of this section shall be punished by a fine of not less than one hundred nor more than five hundred dollars.
>
> If a note is obtained in violation of this section, no finance, delinquency, collection, repossession or refinancing charges may be recovered in any action or proceeding based on such contract for sale.
>
> The provisions of this section shall not apply to any notes executed in connection with any financing which is insured under Federal Housing Administration regulations.

See comment, 75 Harv. L. Rev. 437 (1961). N.Y. Pers. Prop. Law §§ 302(9), 403(1) & (3) (1959).

[49] Mich. Stat. Ann. § 23.628(14)(f) (1957); Pa. Stat. Ann. tit. 69, § 615F & G (Supp. 1962); Ore. Rev. Stat. § 83.650 (1961).

[50] Mich. Stat. Ann. § 23.628(14)(f) (1957):

> No installment sale contract shall contain any provision relieving the holder, or other assignee, from liability for any legal remedies which the buyer may have had against the seller under the contract or under any separate instrument executed in connection therewith: Provided, That this subsection shall in no way impair or affect the rights and powers of a holder in due course of a negotiable instrument.

Ore. Rev. Stat. § 83.650 (1961):

> Effect of negotiation of notes on buyer's rights against seller. (1) No retail instalment contract shall require or entail the execution, by the buyer, of any note or series of notes, which when separately negotiated will cut off as against third parties any right of action or defense which the buyer may have against the seller. (2) The rights of a holder in due course of any negotiable instrument executed contrary to subsection (1) of this section are not impaired by reason of the violation of subsection (1) of this section, but the buyer may bring an action against the seller for the recovery of any loss or expense, including attorneys' fees in defending an action on the instrument by the holder, incurred by reason of the violation of subsection (1) of this section. The buyer's action may be joined with any other right of action he has against the seller arising out of the instalment sale.

[51] See subsection (2) of § 83.650 of Ore. Rev. Stat. (1961). The Michigan provision is less clear about the buyer's right to recover against the seller for damages caused

The Pennsylvania provision is stronger and, as regards installment sales of motor vehicles, seems adequate. Not only does it contain a prohibition against affirmative provisions waiving the buyer's defenses against assignees, but, following the Massachusetts-New York pattern, the section provides:[52]

> No installment sale contract shall require or entail the execution of any note or series of notes by the buyer, which when separately negotiated, will cut off as to third parties any right of action or defense which the buyer may have against the original seller.

A ban on waiver clauses in time-sale contracts, without a companion prohibition like that found in Pennsylvania, might prove ineffective under the Code.[53] The problem is that under section 9-206(1), the absence of any provision constitutes a waiver of defenses against assignees. While it is doubtful that silence will constitute a waiver in the face of regulatory legislation which bans affirmative waiver provisions,[54] the matter is still not clear.

It is clear, however, that in most Code states 9-206(1) operates to treat all buyers alike, consumer-buyers, in reality, getting no special treatment.[55] In attempting to satisfy various commercial interests, the Code draftsmen seem to have shunted aside the interest of the consumer-buyer. The consumer who buys an item on time and is given a warranty obviously is unaware of the fact that he will be obligated to pay the purchase price even if the item purchased never works. There is no justification for a system which requires Dan to pay Easy Finance month after month for a refrigerator which is defective and which did not satisfy the warranty given by the seller. Easy should be restricted to its recourse against Hart.

Section 9-206(1) should be amended to provide a meaningful consumer-buyer exception which would operate in all Code states, not only in those few with special legislation. I suggest that the section should read as follows:

> (1) [Subject to any statute or decision which establishes a different rule] *Except* for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert

by the seller's failure to comply with the statutory provisions concerning assignments. See Mich. Stat. Ann. §§ 23.628(31), 23.628(37)(b) (1957).

52 Pa. Stat. Ann. tit. 69, § 615G (Supp. 1962).

53 The Michigan statute operates merely to ban affirmative waiver provisions. Mich Stat. Ann. § 23.628(14)(f).

54 UCC § 9-203(2) provides that regulatory statutes such as Installment Sales Acts will prevail over the Code when they conflict with it.

55 The section does leave each jurisdiction free to make special provision for the protection of consumer-buyers. The problem, of course, is that so few jurisdictions have done so.

> against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the article on commercial paper (Article 3). A buyer, *other than a buyer of consumer goods,* who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement. *A buyer or lessee of consumer goods shall have the right to assert against an assignee any claim or defense which he may have against the seller or lessor, and any agreement to the contrary shall be void.* [Deletions are bracketed. New language is italicized.]

In opposition to the proposed change in section 9-206, it might be argued that such a provision would make it impossible, or at the very least difficult, for retailers to dispose of chattel paper arising out of the sale of consumer goods. In answer, it can be pointed out that such paper is sold in states now having such a rule.

Perhaps the experience in New Mexico is relevant to this point. In 1943, the New Mexico Supreme Court, in a case involving the conditional sale of refrigeration equipment to a restaurant, held that the assignee of the chattel paper arising from the sale was subject to all of the buyer's warranty defenses.[56] Although the suit was on the note and not an attempt to foreclose under the terms of the conditional sales contract, the court held that the assignee, by virtue of the assignment of the conditional sales contract along with the note, was subject to all defenses arising out of the conditional sales contract. This holding came after the court characterized the assignee of the note as a holder in due course. The New Mexico decision was not limited to the assignment of chattel paper arising from the sale of consumer goods, although it encompassed such assignments. (In Code terms, the case involved equipment.)[57]

The only real difference between pre- and post-1943 financing in New Mexico was that the financing institutions of the state required the retailer to establish a larger reserve to take care of possible warranty defenses. And further, the consumer-buyer, and other buyers, were given a potent weapon in enforcing vendors' warranties. If the retailer refused to give satisfaction, the buyer's next move was to complain to

[56] State Nat'l Bank v. Cantrell, 47 N.M. 389, 143 P.2d 592 (1943). See, e.g., First & Lumbermen's Nat'l Bank v. Buchholz, 220 Minn. 97, 18 N.W.2d 771, 774 (1945). The Nebraska court reached the same result where the note and conditional sale contract were printed on the same sheet of paper. Von Nordheim v. Cornelius, 129 Neb. 719, 262 N.W. 832 (1935).

[57] UCC § 9-109(2).

the financing party, or assignee. The financing party was in a position to put more pressure on the seller than was the buyer himself, and in many cases did so.

New Mexico's experience would seem to indicate that the holder in due course concept has no necessary place in the protection of purchasers of chattel paper. In our economy, with so few retailers holding their own paper, the Code provision defeats the buyer's warranty rights. He can go against his vendor, of course, but in the meantime, under the present Code provision, he is required to pay the full purchase price to a stranger to the transaction. The average consumer-buyer would be shocked if he realized what he was getting himself into. The consumer-buyer should not be put in this position. At least for consumer goods, there should be a uniform rule which grants the consumer-buyer the same defenses against the assignee of the chattel paper as he now enjoys against the original seller. Thus, the amendment proposed would operate to protect the consumer-buyer without unduly hampering the transfer of chattel paper arising from retail sales.

PROBLEM III

George Gens, a resident of a state still operating under the Uniform Conditional Sales Act,[58] *purchases a piano there under a conditional sale contract which the vendor, Popular Piano, files as required by the U.C.S.A. George pays $100 down and signs a note for the balance of $1,050. The piano is delivered to George's home where he and his family use it for three weeks. George then moves to a Code state and has the piano transported there along with his other household goods.*

CONSUMER GOODS AND SECURITY INTERESTS PERFECTED OUT-OF-STATE

Security interests in goods which are perfected out-of-state are dealt with in Section 9-103(3) of the Code as follows:

> If personal property . . . is already subject to a security interest when it is brought into this state, the validity of the security interest in this state is to be determined by the law (including the conflict of laws rules) of the jurisdiction where the property was when the security interest attached. . . . If the security interest was already perfected under the law of the jurisdiction where the property was when the security interest

[58] A few states are still operating under the Uniform Conditional Sales Act. E.g., Ariz. Rev. Stat. Ann. §§ 44-301 to -330 (1956); Del. Code Ann. tit. 6, §§ 901-29 (1953); Ind. Ann. Stat. §§ 58-801 to -829 (1961); S.D. Code §§ 54.0201 to .0229 (1939); W. Va. Code Ann. §§ 4007-38 (1961); Wis. Stat. Ann. §§ 122.01 to .31 (1957 and Supp. 1962). Alaska, New Hampshire, New Jersey and Pennsylvania operated under the U.C.S.A. before their adoption of the Code. New York also has the U.C.S.A. N.Y. Pers. Prop. Law §§ 60-81. It will be repealed in New York on the effective date of the Code, September 27, 1964.

attached and before being brought into this state, a security interest continues perfected in this state for four months and also thereafter if within the four month period it is perfected in this state.

Assume that within a few weeks of his arrival in the Code state George borrows $300 from the Easy Finance Company using the piano as collateral. Assume further that Easy Finance, following Code procedure, files the security agreement. And finally, assume that six months later Popular Piano, the out-of-state vendor, locates the piano and, not having been paid, attempts to foreclose on it.

If Popular Piano had located the piano in the Code state within the four month statutory period, section 9-103(3) clearly operates to give the out-of-state vendor a priority over Easy Finance. The result after the passage of the four-month period is less clear. A New York court in *Churchill Motors, Inc. v. A. C. Lohman, Inc.*,[59] analyzing the four month Code period, said:

> Under the provisions of the Uniform Commercial Code, the conditional vendor's interest continued to be a perfected interest for four months. At the end of that period, it ceased to be a perfected interest and became an unperfected one but there is no provision which forfeits the four month period of protection because of the failure to file prior to its expiration. The four month period under the Uniform Commercial Code is thus different from the ten day grace period allowed under the New York conditional sales law for the original filing of a conditional sale contract. . . . Under the New York statute, if the contract is filed within ten days, the interest of the vendor is deemed perfected from the beginning but if he fails to file within ten days, then the security interest of the vendor remains unperfected from the time of the original sale. . . . In contrast with this, the four month period provided in Section 9-103(3) of the Uniform Commercial Code is not a grace period for filing; it is an absolute period of protection of the vendor's security interest designed to give him adequate time to make an investigation and to locate the property. If the vendor fails to file within the four month period, the protection of his security interest ceases upon the expiration of that period and his unperfected security interest is thereafter subject to being defeated in the same way in which any unperfected

[59] 16 App. Div. 2d 560, 229 N.Y.S.2d 570, 577 (1962). For a general discussion of the conflicts provision of Article 9, see Ruud, Part I—Secured Transactions: Article IX, 16 Ark. L. Rev. 108, 117-23 (1962).

> security interest may be defeated under the Code. A subsequent purchaser for value without notice of the unperfected security interest would take a title superior to it. . . . But a prior purchaser who had purchased during the four month period of statutory protection is not retroactively given a superior title. He is not in the same position as a subsequent purchaser who acquired his interest after the expiration of the four month period.

The *Churchill* analysis is open to some doubt. As applied to the problem case, with an intervening secured party such as Easy Finance, the failure to take action within the statutory period seems to operate, contrary to *Churchill*, to defeat the out-of-state interest. This is suggested in Official Comment 7 to 9-103 which states:

> The four month period is long enough for a secured party to discover in most cases that the collateral has been removed and to file in this state; thereafter, if he has not done so, his interest, although originally perfected in the state where it attached, is subject to defeat here by those persons who take priority over an unperfected security interest (see Section 9-301.) *Under Section 9-312 (5) the holder of a perfected conflicting security interest is such a person even though during the four month period the conflicting interest was junior.* [Emphasis supplied.]

Neither the *Churchill* analysis nor the Official Comment would seem to be applicable to the problem case, however. Under section 9-109, the piano clearly can be classified as consumer goods. Since Popular Piano holds a purchase money security interest in the piano, it would seem that its interest is perfected without filing.[60] For out-of-state purchase money interests in consumer goods, it would appear that the four month statutory period during which the out-of-state interest must be perfected locally has no application. For such interest, since filing is unnecessary for perfection, no action is necessary.

If the above analysis is accurate, Popular Piano, after the expiration of the four month period, will be deemed to have a perfected though unfiled security interest in the piano. What is the nature of its interest during the four month period? Since it filed its interest in the state of the original sale, will a Code state treat it as having a filed and perfected interest during the four months, or will it be treated for what it in fact is in the Code state, as an unfiled but perfected interest? Section 9-103(3) is not clear on this point, merely saying that the interest "continues perfected" in the Code state. Determining whether or not the

[60] Rule 3—UCC § 9-302(1)(d). See supra note 4 and accompanying text.

interest is to be treated as being filed is conclusive on the rights of a consumer-buyer of the piano from George during the four month statutory period. Section 9-307(2), as it is currently written, will protect the consumer-buyer only if Popular Piano's interest is deemed perfected but unfiled during the four month period.

Little justification can be found for treating Popular Piano's interest as a filed interest during the first four months. Such treatment operates to give the out-of-state lender an interest in the piano superior to that acquired by the consumer-buyer. Under it, although the interest in fact is unfiled, the out-of-state party is given more favorable treatment than local purchase money lenders with unfiled interests. Conceding that the conditional vendor has no effective means at his disposal to prevent his debtor from moving the piano to the Code state, still, by virtue of the fact that he is in the business of selling on credit, he is in the business of assuming such a risk. A consumer-buyer does not understand that a credit risk is involved when he buys the piano. The only risk he might comprehend is that the piano may be defective.

A conditional vendor, as any other lender, should be careful about lending his money. Before committing his funds, he can and should make a credit investigation. If no such investigation is made, to give the conditional vendor, or other lender, an interest superior to that of the consumer-buyer is indefensible. The risk that the noncommercial buyer assumes, if any, is assumed in ignorance. The lender, on the other hand, assumes his risk knowingly.

If the conditional vendor undertakes a credit investigation revealing a bad or borderline credit history, and he still lends the money, the vendor himself should bear the loss. He should not be permitted to pass it off onto the consumer-buyer. A "safe" borrower rarely involves the vendor-lender in a situation where, without notice, property is removed to another jurisdiction. And, indeed, if the borrower is "safe," the lender can recover from him directly without resort to the security. Whatever fate may befall the lender, nothing justifies his shifting the risk of loss to a stranger to the transaction—the consumer-buyer.

By its silence, the conflicts section of the Code causes unnecessary confusion and uncertainty. The comparative rights of out-of-state lenders and local consumer-buyers are left for judicial decision. Nothing justifies such legislative abdication. The conflicts section of Article 9 should provide a solution—one which recognizes the equities favoring the consumer-buyer.

If the out-of-state interest in consumer goods is deemed perfected though unfiled for an indefinite period, Popular Piano, despite the official Code comment, will continue to retain a priority over Easy Finance beyond the four month period. And if George sells the piano to a consumer-buyer after Easy Finance has perfected its interest, another cir-

cuity of interest situation arises. The consumer-buyer takes free of the unfiled out-of-state interest but subject to Easy Finance's filed interest.[61] Easy Finance, while retaining its interest as against the consumer-buyer, is junior to the out-of-state secured party.[62] An amendment to section 9-307(2) as previously suggested[63] will break the circle in favor of the consumer-buyer, *i.e.*, such buyer will take free of all security interests whether filed or not.

I question the validity of the Code's operation as between the out-of-state purchase money secured party and Easy Finance. It seems that the four month period should be treated as a time within which *action* must be taken. The statute should not operate, as it apparently does, to permit an out-of-state purchase money secured party dealing in consumer goods to remain wholly inactive locally and still retain a perfected interest. As regards security interests in goods which may be perfected without filing and without possession, I would suggest that section 9-103(3) be amended to require the out-of-state party to *act* within the four months, either by filing or by taking possession, or to lose his status as the holder of a perfected security interest. The longer the goods and the person are present locally, local parties tend to deal with them with more confidence. Some cut-off point should operate in favor of local lenders like Easy Finance. The four month period would seem to be sufficiently long. I, therefore, suggest an amendment to 9-103(3) to accomplish this.

Combining the two suggested changes the section would read as follows:

> (3) If personal property other than that governed by subsections (1) and (2) is already subject to a security interest when it is brought into this state, the validity of the security interest in this state is to be determined by the law (including the conflict of laws rules) of the jurisdiction where the property was when the security interest attached. However, if the party to the transaction understood at the time that the security interest attached that the property would be kept in this state and it was brought into this state within thirty days after the security interest attached for purposes other than transportation through this state, then the validity of the security interest in this state is to be determined by the law of this state. If the security interest was already perfected under the law of the jurisdiction where the property was when the security interest attached and before being brought into this state, the security interest continues perfected in this state for

[61] UCC § 9-307(2).
[62] UCC § 9-312(5)(b).
[63] See text following note 32 supra.

four months and also thereafter if within the four month period it is perfected in this state. *If the security interest is not perfected by some affirmative action in this state within the four month period, it shall be considered to have been unperfected from the time it was brought into this state.* The security interest may also be perfected in this state after the expiration of the four month period; in such case perfection dates from the time of perfection in this state. If the security interest was not perfected under the law of the jurisdiction where the property was when the security interest attached and before being brought into this state, it may be perfected in this state; in such case perfection dates from the time of perfection in this state. *If the out-of-state interest is one which could have been perfected in this state without taking possession of the goods and without filing, the out-of-state security interest shall be deemed to be perfected but unfiled during the four month period.* [New language is italicized.]

CONCLUSION

The thrust of the position taken in this short comment is that the Code's treatment of the consumer-buyer leaves much to be desired. This criticism should not be taken as attempted condemnation of the Code as a whole. My own state, New Mexico, has gained much by the adoption of the Code. The amendments suggested here are intended for the consideration of the Permanent Editorial Board. It is my hope that the Board will consider the recommended changes and will take upon itself the task of representing the one almost totally unorganized group in our economy—the consumer.