

3-1986

## The Interaction of Articles 6 and 9 of the Uniform Commercial Code: A Study in Conveyancing, Priorities, and Code Interpretation

Steven L. Harris

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Commercial Law Commons](#)

---

### Recommended Citation

Steven L. Harris, The Interaction of Articles 6 and 9 of the Uniform Commercial Code: A Study in Conveyancing, Priorities, and Code Interpretation, 39 *Vanderbilt Law Review* 179 (1986)  
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol39/iss2/1>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# VANDERBILT LAW REVIEW

VOLUME 39

MARCH 1986

NUMBER 2

## The Interaction of Articles 6 and 9 of the Uniform Commercial Code: A Study in Conveyancing, Priorities, and Code Interpretation

*Steven L. Harris\**

I.	INTRODUCTION . . . . .	180
II.	THE POLICIES OF ARTICLES 6 AND 9 . . . . .	183
	A. <i>The Bulk Sales Risk</i> . . . . .	184
	B. <i>The Problems of Nonpossessory Liens</i> . . . . .	190
III.	THE RIGHTS OF A SECURED PARTY WHOSE COLLATERAL IS SOLD IN BULK AGAINST A BUYER IN BULK . . . . .	194
	A. <i>The Rights of a Perfected Secured Party</i> . . . . .	194
	1. Against a Noncomplying Buyer in Bulk . . . . .	194
	2. Against a Complying Buyer in Bulk . . . . .	196
	B. <i>The Rights of an Unperfected Secured Party</i> . . . . .	202
	1. Against a Complying Buyer in Bulk . . . . .	202
	2. Against a Noncomplying Buyer in Bulk . . . . .	203
	(a) <i>The Frydlewicz Opinion</i> . . . . .	204
	(b) <i>A More Appropriate Code Analysis</i> . . . . .	207

---

\*Professor, University of Illinois College of Law. B.A., J.D., The University of Chicago. This Article benefited from the comments and suggestions of Douglas Baird, John Dolan, Julian McDonnell, Barry Zaretsky, and my colleagues Marion Benfield, Donald Dripps, and Michael Hoeflich.

	(c) <i>An Economic Analysis</i> .....	211
IV.	THE RIGHTS OF A SECURED PARTY WHOSE COLLATERAL IS SOLD IN BULK AGAINST TRANSFEREES FROM THE BUYER.....	221
	A. <i>The Rights of a Perfected Secured Party</i> ....	222
	1. Against a Secured Party Whose Debtor Is the Buyer in Bulk .....	222
	(a) <i>Priorities in the Transferred Collateral: The General Rule</i> .....	222
	(b) <i>Priorities in the Transferred Collateral: SP2's Purchase Money Security Interest</i> .....	227
	(c) <i>Priorities in the Buyer's After-Acquired Collateral</i> .....	231
	2. Against a Buyer from the Buyer in Bulk	238
	3. Against a Lien Creditor of the Buyer in Bulk .....	238
	B. <i>The Rights of an Unperfected Secured Party</i>	239
	1. Against a Secured Party Whose Debtor Is the Noncomplying Buyer in Bulk .....	239
	2. Against a Buyer from the Noncomplying Buyer in Bulk .....	244
	3. Against a Lien Creditor of the Noncomplying Buyer in Bulk .....	246
V.	CONCLUSION.....	247

## I. INTRODUCTION

By 1940, the National Conference of Commissioners on Uniform State Laws no longer was content to revise the then existing uniform acts that related to commercial transactions.<sup>1</sup> Rather, the National Conference joined with the American Law Institute in an effort to promulgate proposed new legislation containing principles, policies, and definitions common to a number of separate aspects of mercantile commerce, including the sale and financing of goods and methods of payment.<sup>2</sup> Like all human creations, the re-

1. See Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1, 2 (1967). Among the uniform acts that the National Conference proposed to supplant were the Uniform Sales Act, Uniform Negotiable Instruments Law, Uniform Bills of Lading Act, Uniform Warehouse Receipts Act, Uniform Stock Transfer Act, Uniform Conditional Sales Act, and Uniform Trust Receipts Act. See *id.*

2. See 1 U.L.A. xv-xvii (master ed. 1976).

sulting product—the Uniform Commercial Code<sup>3</sup>—imperfectly achieved the goals of its sponsors. In particular, important questions have arisen about the proper interplay among various articles of the Code,<sup>4</sup> each of which was drafted by different people addressing different, and sometimes competing, concerns.<sup>5</sup> The sponsors answered some of these questions by amending the Code,<sup>6</sup> and a consensus has developed on others.<sup>7</sup> Other questions remain without a generally accepted answer.<sup>8</sup>

This Article discusses and attempts to answer some of the remaining questions—those that arise from the interaction of Article 9 (secured transactions) with Article 6 (bulk transfers). Specifically, this Article analyzes the impact of bulk transfers on secured financing by clarifying the rights of a secured party whose collateral is or has been sold as part of a bulk transfer. That these rights are in doubt is not surprising. The primary purpose of Article 6 is to prevent a merchant from defrauding his unsecured creditors.<sup>9</sup> In contrast, Article 9 sets forth the rights of secured creditors. These rights are shaped, at least in part, by a desire to prevent a type of fraud entirely different from the fraud that Article 6 addresses.

Unfortunately, the case law adds little to a principled reconciliation of the competing policies of the two articles. Instead of ana-

3. Unless otherwise indicated, all references to sections of and comments to the Uniform Commercial Code ("Code" or "U.C.C.") are to the 1978 official text.

4. See, e.g., Dolan, *Good Faith Purchase and Warehouse Receipts: Thoughts on the Interplay of Articles 2, 7, and 9 of the UCC*, 30 HASTINGS L.J. 1 (1978); Leary & Schmitt, *Some Bad News and Some Good News from Articles 3 and 4*, 43 OHIO ST. L.J. 611, 620-24 (1982) (relationship of § 3-418 and § 4-213); Peters & Jackson, *Quest for Uncertainty: A Proposal for Flexible Resolution of Inherent Conflicts Between Article 2 and Article 9 of the Uniform Commercial Code*, 87 YALE L.J. 907 (1978).

5. See generally 1 U.L.A. xviii-xxiii (master ed. 1976) (short drafting history of Code).

6. For example, the 1972 amendments to Article 9 added § 9-114, which explains the filing requirements of § 2-326(3). See Permanent Editorial Board for the Uniform Commercial Code, Review Committee for Article 9 of the Uniform Commercial Code, Final Report 58, 223 (1971).

7. See, e.g., *National Sav. & Trust Co. v. Park Corp.*, 722 F.2d 1303, 1306 (6th Cir. 1983) (relationship of § 3-418 and § 4-213), *cert. denied*, 104 S. Ct. 1916 (1984).

8. See, e.g., J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 25-15 (2d ed. 1980) (authors, like courts, disagree about the relationship of § 2-403 and § 9-307).

9. See *infra* notes 18-47 and accompanying text. Article 6 does not contain an affirmative grant of rights to unsecured creditors. Rather, it renders certain transfers "ineffective" against creditors of the transferor, U.C.C. §§ 6-104, 6-105, including both secured and unsecured creditors. See *id.* § 1-201(12). Any additional rights that a secured creditor acquires as a consequence of an "ineffective" transfer are largely duplicative of his rights as a secured party. See *infra* notes 122-25 and accompanying text; U.C.C. § 9-501(1); *cf.* Baker, *Bulk Transfers Act—Patch, Bury, or Renovate?*, 38 BUS. LAW. 1771, 1786 (1983) (secured parties' rights are not affected by bulk transfers).

lyzing those policies and carefully scrutinizing the text of the Code, courts have determined the rights of the secured party in a bulk transfer by, for example, needlessly changing the meanings of defined terms in Article 6 or Article 9 to reach a desired result.<sup>10</sup> As a consequence, some of the important judicial opinions in the area not only interpret the Code improperly but also reach undesirable and incorrect results. In doing so, they create needless costs. Most secured parties whose collateral is inventory and many secured parties whose collateral is equipment now face significant additional risks; the lawyers who advise them or who represent potential buyers in bulk now face increased uncertainty.

Although this uncertainty has been exacerbated considerably by a recent Fifth Circuit case, *National Bank v. West Texas Wholesale Supply (In re McBee)*,<sup>11</sup> to some extent uncertainty inheres in the Code. The existing literature on the Code is of little aid in understanding the issues and resolving the disputes that may arise when a secured party's collateral is or has been the subject of a bulk transfer. The extensive commentary on Article 9 has all but ignored the interaction of that article with Article 6. Although the Article 6 commentary is considerably less voluminous, Article 6 long has been recognized as needing amendment<sup>12</sup> and increasingly is the object of criticism. During the past few years, an American Bar Association committee and a national organization of commercial lawyers have proffered extensive, specific amendments to Article 6.<sup>13</sup> Others have argued that amendments are inadequate and that Article 6 should be rewritten or perhaps repealed.<sup>14</sup> In response, the National Conference has appointed a

---

10. *E.g.*, *National Bank v. West Texas Wholesale Supply Co. (In re McBee)*, 714 F.2d 1316, 1330 (5th Cir. 1983) (definition of "purchaser" in § 6-110); *National Bank v. Frydlewicz*, 67 Mich. App. 417, 421, 241 N.W.2d 471, 473 (1976) (definition of "transferee in bulk" in § 9-301(1)(c)).

11. 714 F.2d 1316 (5th Cir. 1983).

12. *See, e.g.*, Hawkland, *Remedies of Bulk Transfer Creditors Where There Has Been Compliance with Article 6*, 74 *COM. L.J.* 257 (1969); Levit, *Bulk Transfers—Stepchild of the Uniform Commercial Code?*, 46 *NOTRE DAME LAW.* 694 (1971); Rapson, *Article 6 of the Uniform Commercial Code: Problems and Pitfalls in Conducting Bulk Sales*, 68 *COM. L.J.* 226 (1963). For a compendium of Article 6 ambiguities and problems, see Brines, *Article Six Bulk Transfers: Thirty Years of Confusion*, 86 *W. VA. L. REV.* 29 (1983).

13. Hawkland, *Proposed Revisions to Article 6*, 38 *BUS. LAW.* 1729 (1983) (recommendations of ABA Uniform Commercial Code Committee); Braunstein, *The President's Page*, 84 *COM. L.J.* 48 (1979) (summary of proposals of Commercial Law League of America).

14. *See Baker, supra* note 9 (proposed renovation of Article 6); Rapson, *U.C.C. Article 6: Should It Be Revised or "Deep-Sixed"?*, 38 *BUS. LAW.* 1753, 1769 (1983) ("statutory euthanasia" may be in order); *cf.* Law Revision Commission of British Columbia, LRC 67, Report on Bulk Sales Legislation (1983) (recommending repeal of Sale of Goods in Bulk

drafting committee to revise the article.<sup>15</sup> The proffered amendments address a vast array of bulk transfer problems that have arisen in the reported cases; nevertheless, the effect of a bulk transfer on the rights of an Article 9 secured party has escaped serious discussion. This Article seeks to fill that void.

Part II of this Article explains the policies underlying Article 6 and Article 9. It not only demonstrates that the policies do not conflict but also reveals remarkable similarities between them. Part III develops the rights that a secured party (perfected or unperfected) whose collateral is sold as part of a bulk transfer may exercise against the buyer in bulk. Certain of my conclusions differ dramatically from statements in *McBee*, but they are fully consistent with both the language of the Code and the policies explored in part II. Part IV explores the competing claims of a seller's secured party and of persons whose interests derive from the buyer in bulk, including lien creditors, other secured parties, and sub-buyers. In resolving these priority contests, this Article rejects the reasoning and results of *McBee* and develops an analysis that can be used to resolve similar disputes that may arise in contexts unrelated to bulk sales. Inasmuch as the National Conference currently is reconsidering Article 6, the conclusion suggests a few revisions that would clarify the interaction of that article with Article 9.

## II. THE POLICIES OF ARTICLES 6 AND 9

Understanding the policies that underlie Articles 6 and 9 is necessary to integrate the operation of the two articles. Interestingly, each of the articles seeks to prevent a particular kind of injury to creditors, and each does so by requiring public notice of a conveyance of personal property.<sup>16</sup> These common elements have caused confusion in the official comments to the Code,<sup>17</sup> appar-

---

Act; Act subsequently was repealed).

15. The author is the American Bar Association's Advisor to the National Conference's drafting committee to revise Article 6. This Article expresses the author's personal views, which are not necessarily those of the ABA.

16. The notice requirements of Article 9 apply to security interests in fixtures, which are real estate, as well as in personal property. U.C.C. §§ 9-102(1)(a), 9-313(1)(a). The notice requirements of Article 6 apply to certain transfers of "equipment," *id.* § 6-102(2), which is a category of "goods," *id.* § 9-109(2), which includes "fixtures," *id.* § 9-105(1)(h). This Article does not consider problems that may arise from a transfer of goods that are or become fixtures.

17. Comment 2 to § 6-103 suggests that the reason Article 6 excludes transfers for security is that Article 9 regulates security interests. The comment to § 9-111 is more cogent. Observing that "the bulk transfer type of fraud has not often made its appearance in the security field," the comment to § 9-111 concludes that "[s]ince compliance with the bulk

ently without adversely affecting the case law. This part distinguishes the purposes underlying the notice provisions of Article 6 from those underlying Article 9's public notice system and shows how the consequences that each article imposes for failure to give notice relate to those purposes.

### A. *The Bulk Sales Risk*

Article 6 addresses a fraud that apparently was common around the turn of the century: A merchant would acquire his stock in trade on credit, then sell his entire inventory ("in bulk") and abscond with the proceeds.<sup>18</sup> Even though the buyer acquired the merchant's business assets, he would not ipso facto become obliged to pay the merchant's debts. Only by affirmatively assuming those debts would the buyer become personally liable for them.<sup>19</sup> The merchant's creditors had a right to sue the merchant

---

transfer laws is onerous and expensive, legitimate financing transactions should not be required to comply when there is no reason to believe that other creditors will be prejudiced." To the extent that Article 6 is intended to notify creditors of impending preferential transfers, U.C.C. § 6-107(2)(c) (notice must state "whether the transfer is to pay existing debts"), the exclusion of all transfers for security, even those made to secure existing debts, minimizes the realization of that intent. Early drafts of Article 6 excluded bulk transfers that were for the sole purpose of securing repayment of new value, but included bulk transfers that secured existing debts. *See, e.g., id.* § 6-103(1) (official draft 1952). One commentator on an early draft observed that the policing of preferences "may well be the most important contribution of the [Bulk Sales] Article, and it is a worthwhile contribution." Miller, *The Effect of the Bulk Sales Article on Existing Commercial Practices*, 16 LAW & CONTEMP. PROBS. 267, 283 (1951). In December 1952, the Code's Editorial Board recommended the elimination of all "bulk securities transactions as distinguished from bulk sales transactions," because their inclusion "would interfere with the [intended] operation of Article 9." Recommendations of the Editorial Board for Changes in the Text of the Uniform Commercial Code 4 (1952), reprinted in 15 Uniform Commercial Code Drafts 354 (E. Kelly comp. 1984) [hereinafter cited as U.C.C. Drafts].

18. *See* Billig, *Bulk Sales Laws: A Study in Economic Adjustment*, 77 U. PA. L. REV. 72, 75-78 (1928). Comment 4 to § 6-101 refers to the merchant who sells his inventory, pockets the proceeds, and leaves his creditors unpaid as "the major bulk sales risk, [whose] prevention is the central purpose of the [previously] existing bulk sales laws and of this Article [6]." Another form of commercial fraud that Article 6 addresses is the practice of the merchant who sells his inventory to a friend and pays creditors less than what they are owed, with the hope of "com[ing] back into the business through the back door some time in the future." U.C.C. § 6-101 comment 2. This is a fraudulent conveyance and can be set aside under the law of fraudulent conveyances. *Id.*, comment 3; *see infra* notes 26-31 and accompanying text.

19. *See, e.g.,* Chicago Specialty Shoe Co. *ex rel.* Stein & Rosenthal v. Uhwat, 197 Ill. App. 460 (1916) (even a buyer who fails to comply with the bulk sales act does not become personally liable for the seller's debts); Rothchild Bros. v. Trewella, 36 Wash. 679, 79 P. 480 (1905) (same). The rule remains the same today and usually is invoked in the corporate context: when one company sells all its assets to another company, the purchaser is not liable for the debts and liabilities of the seller. *See, e.g.,* Philadelphia Elec. Co. v. Hercules,

on the debts, but the right to recover was of little practical value. The merchant-debtor often disappeared after the sale; and even if he were found, in personam jurisdiction over him was not readily available.<sup>20</sup> Even creditors who succeeded in obtaining a judgment often were unable to recover their debts because the defrauding seller had spent or hidden the sale proceeds. Nor did the creditors ordinarily have recourse to the merchandise sold. Because one person's creditors cannot appropriate another person's property to satisfy their claims,<sup>21</sup> the transfer of the inventory to an innocent buyer effectively immunized the goods from the reach of the seller's creditors.<sup>22</sup> The creditors of a seller in bulk thus might be left without a means to satisfy their claims.

To a limited extent, the law of fraudulent conveyances ameliorated the plight of the creditors.<sup>23</sup> Ordinarily, creditors have no

Inc., 762 F.2d 303, 308 (3d Cir. 1985); see also 15 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7122, at 188 (rev. perm. ed. 1983) and cases cited therein. This rule is subject to four generally recognized exceptions: when the purchaser expressly or impliedly agrees to assume the seller's debts, when the transaction is fraudulently entered into to escape liability, when the purchasing company is merely a continuation of the seller, and when the transaction amounts to a de facto merger or consolidation. *Philadelphia Elec.*, 762 F.2d at 308-09; see also 15 FLETCHER, *supra* § 7122, at 189 and cases cited therein. Some courts have developed an additional exception in product liability cases. See *infra* note 155 and accompanying text.

20. Under the rule of *Pennoy v. Neff*, 95 U.S. 714, 727 (1878), a state "could render a judgment binding a defendant personally only if he was physically present and served with process while in the forum State." Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 535. Over the years, the Court expanded the concept of the defendant's "presence," so that by 1945,

states could exercise extraterritorial in personam jurisdiction in basically four kinds of cases: claims against corporations "doing business" in the state; claims against nonresident motorists arising from accidents in the state; claims against individuals, partnerships, or unincorporated associations "doing business" in the state arising from that in-state business; and actions for divorce or annulment.

R. CASAD, JURISDICTION IN CIVIL ACTIONS ¶ 4.01, at 4-3 (1983) (footnotes omitted).

21. See, e.g., *Post v. Berwind-White Coal Mining Co.*, 176 Pa. 297, 35 A. 111 (1896) (creditor requires no lien on property if title and possession pass from debtor to buyer prior to levy); *Davis v. Turner*, 45 Va. (4 Gratt.) 422, 426 (1848) (Baldwin, J.) (a person's creditors "can subject to their demands only the right which remains in him, and not that from which he has lawfully parted"). This principle remains true. See, e.g., *Carolina Power & Light Co. v. Uranex*, 451 F. Supp. 1044, 1054 (N.D. Cal. 1977) (applying California law) ("creditor may attach only his debtor's actual interest in property that the debtor holds"). Garrard Glenn stated the obverse: "the creditor is entitled to realize on whatever property the debtor may himself be able to realize on. In other words, whatever the debtor can lawfully alienate, that in turn the creditor can reach." G. GLENN, THE RIGHTS AND REMEDIES OF CREDITORS RESPECTING THEIR DEBTOR'S PROPERTY § 25, at 23 (1915).

22. See Billig, *supra* note 18, at 80 and cases cited therein.

23. "[A]t the beginning of this century, the law of fraudulent conveyances was a mosaic of statutes and decisions, which had developed around the Statute of Elizabeth [Statute of Fraudulent Conveyances, 13 Eliz., ch. 5 (1571)]." 1 G. GLENN, FRAUDULENT CONVEYANCES



right to insist that their debtor maintain his assets in a particular form.<sup>24</sup> Nevertheless, the law long has prohibited the conversion of an entire stock of inventory into easily transportable cash when a debtor makes the exchange for the purpose of preventing his creditors from satisfying their claims. Indeed, the sale of one's entire stock once constituted prima facie evidence of a fraudulent conveyance.<sup>25</sup> In much the same way as it does now, the law of fraudulent conveyances enabled turn-of-the-century creditors in some cases to reach property that their debtor had fraudulently conveyed. A buyer, including a buyer in bulk, who was in league with a defrauding seller or who paid less than a fair price, took the goods subject to the right of the defrauded creditors to apply the goods toward the satisfaction of their claims against the seller-debtor.<sup>26</sup> Not all buyers in bulk fail to act in good faith or give insufficient value. Some buyers pay a fair price and are wholly and justifiably unaware that the seller intends to pocket the proceeds and disappear. Fraudulent conveyance law has provided no remedy against the goods in the hands of those persons who buy in good faith and for adequate value.<sup>27</sup> The creditors' only remedy has been against

AND PREFERENCES § 58, at 80-81 (rev. ed. 1940). Professor Glenn's two-volume treatise, which remains the most extensive discussion of fraudulent conveyance law, discusses the early development of that law at some length. *Id.* §§ 58-61. Modern law has been influenced by the Uniform Fraudulent Conveyance Act (UFCA), which 25 states have adopted since its promulgation in 1918. UNIF. FRAUDULENT CONVEYANCE ACT, 7A U.L.A. 427 (master ed. 1985). In 1984, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment the Uniform Fraudulent Transfer Act (UFTA) to replace the UFCA. *Id.*

24. *E.g.*, *Davis v. Turner*, 45 Va. (4 Gratt.) 422, 426 (1848).

25. *See, e.g.*, *Walbrun v. Babbitt*, 83 U.S. (16 Wall.) 577, 581 (1872); *Pennell v. Robinson*, 164 N.C. 257, 259, 80 S.E. 417, 418-19 (1913); 1 G. GLENN, *supra* note 23, § 309, at 537; *cf.* *Twyne's case*, 3 Coke 80, 81, 76 Eng. Rep. 809, 812 (Star Chamber 1601) (quoting *maxim dolus versatur in generalibus* (fraud deals in generalities), the court finds the general transfer of a debtor's property without exception of necessities to be a badge of fraud); Clark, *The Duties of the Corporate Debtor to Its Creditors*, 90 HARV. L. REV. 505, 512-13 (1977) (exchange of liquid assets for illiquid assets to hinder creditors violates the general ideal of "[n]onhindrance of the enforcement of valid legal obligations against oneself, in connection with transfers of one's property," which fraudulent conveyance law embodies). *But see* *Hart v. Roney*, 93 Md. 432, 433, 49 A. 661, 662 (1901).

26. *See* Statute of Fraudulent Conveyances, 13 Eliz., ch. 5 (1571); U.F.C.A. §§ 9, 10, 7A U.L.A. 577-78, 630 (master ed. 1985); 1 G. GLENN, *supra* note 23, §§ 67, 274. Creditors may enforce their rights through a representative, such as a bankruptcy trustee. *See* 11 U.S.C. § 544(b) (1982); *see also id.* § 548 (bankruptcy trustee may avoid a fraudulent transfer even if it is unavoidable by a particular creditor).

27. The Statute of Fraudulent Conveyances, 13 Eliz., ch. 5 (1571), does not extend to any property that is "upon good Consideration and *bona fide* lawfully conveyed . . . to any Person . . . not having at the Time of such Conveyance . . . any Manner of Notice or Knowledge of such Covin, Fraud, or Collusion." U.F.C.A. § 9, 7A U.L.A. 577 (master ed.

the seller, and that remedy may be, in effect, no remedy at all.

The plight of creditors at the turn of the century differs significantly from the situation that confronts contemporary lenders. Today, a lender is able to investigate a debtor's creditworthiness more easily and comprehensively than it could eight decades ago. Credit reporting companies now provide credit histories at little cost; the use of certified financial statements is widespread; and a single search of the public real estate and personal property records will disclose most encumbrances on the debtor's assets. Aided by the information these sources disclose, a creditor is able to make a better-reasoned decision about whether to extend credit than it could in 1900.

In addition, changes in the law now afford creditors greater opportunities to collect their debts. Dramatic developments in the constitutional theory of jurisdiction<sup>28</sup> coupled with the universal promulgation of state long-arm statutes and rules<sup>29</sup> have greatly improved the possibility of obtaining personal jurisdiction over the debtor who flees to another state. Moreover, creditors of a merchant no longer face the choice of extending unsecured credit or no credit at all. Retaining an interest in inventory to secure its

---

1985), permits aggrieved creditors to avoid a fraudulent conveyance "as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase." *Accord id.* § 10, 7A U.L.A. 630. McCoid, *Constructively Fraudulent Conveyances: Transfers for Inadequate Consideration*, 62 *TEX. L. REV.* 639 (1983), examines the development of the branch of fraudulent conveyance law that deals with transfers for inadequate consideration. "Fair consideration" itself includes a good faith requirement. U.F.C.A. § 3, 7A U.L.A. 448-49 (master ed. 1985). Regarding that requirement, see generally Note, *Good Faith and Fraudulent Conveyances*, 97 *HARV. L. REV.* 495 (1983). The new Uniform Fraudulent Transfer Act carries forward the protection of transferees "who took in good faith and for a reasonably equivalent value." U.F.T.A. § 8(a), 7A U.L.A. 576 (master ed. 1985); see also 11 U.S.C. § 548(c) (1982) (good faith transferee for value has a lien on or may retain any interest transferred to the extent of value given).

28. In 1945 the Supreme Court ruled that due process no longer required a defendant's presence within the territorial jurisdiction of a court as a prerequisite to rendition of an in personam judgment against him. Instead, "due process requires only that . . . a defendant . . . have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

29. Although "[s]everal years passed after *International Shoe* before state legislatures began expanding the range of their courts' territorial jurisdiction[.]" every state has since "acquired, either by statute or court rule, provisions for invoking jurisdiction over nonresident individuals and corporations in most kinds of cases in which it would be constitutionally permissible." R. CASAD, *supra* note 20, ¶ 4.01, at 4-3 to -4. These statutes and rules are collected in *id.*, at A-32 to -102.

price has become relatively simple and inexpensive under Article 9.<sup>30</sup>

The present business and legal context may enable creditors to protect themselves adequately, so that a special statute addressed to bulk sales is not an efficient method of deterring fraud.<sup>31</sup> But creditors of the 1900's lacked the advantages afforded to contemporary creditors. Without the benefit of credit reporting services, long-arm statutes, and inventory liens, trade creditors were perceived to be particularly vulnerable to the risk of fraudulently intended bulk sales.

Pressed by the National Association of Credit Men,<sup>32</sup> state legislatures attempted to minimize the bulk sales risk through the enactment of antifraud legislation.<sup>33</sup> The bulk sales acts took a variety of forms, but they all imposed upon the buyer in bulk the duty to protect the seller's unsecured creditors.<sup>34</sup> Typically, the buyer fulfilled his duty by notifying the creditors of the impending transfer.<sup>35</sup> In some states, the buyer was obliged in addition to disburse the sale proceeds to the seller's creditors.<sup>36</sup> The buyer's failure to comply with the statute subjected the transferred property to the

30. See U.C.C. § 9-203(1). "The conditional sale remained, through most of the nineteenth century, a matter for occasional judicial or scholarly speculation, of no commercial importance whatever." 1 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 3.2 at 67 (1965). Although purchase money security interests since have become commonplace, starting with the financing of industrial equipment and consumer goods in the late nineteenth century, *see id.* at 67-68, for reasons yet to be fully explained they are still widely unused by those who are the primary intended beneficiaries of bulk sales legislation: trade creditors, *see Schwartz, Security Interests and Bankruptcy Priorities: A Review of Current Theories*, 10 J. LEGAL STUD. 1, 4 n.10 (1981).

31. See, e.g., A. SCHWARTZ & R. SCOTT, *COMMERCIAL TRANSACTIONS* 506 (1982) (absent more data, the burdensome transaction costs imposed by Article 6 are difficult to justify); Rapson, *supra* note 14, *passim*. The ABA subcommittee that considered Article 6 revisions rejected the view that Article 6 should be repealed as well as the view that the article should be strengthened and expanded. See Hawkland, *supra* note 13, at 1730-31. The National Conference's drafting committee, *see supra* text accompanying note 15, is likely to arrive at a similar middle ground and leave unchanged the basic scope and operation of Article 6. Accordingly, this Article assumes that some version of a bulk transfer law will remain in effect and does not address the utility of bulk transfer legislation.

32. The Association "consisted of the credit department representatives of business houses scattered all over the United States." Billig, *supra* note 18, at 81.

33. See *id.* at 81-88 (chronicling the campaign for bulk sales legislation at the turn of the century).

34. See, e.g., *id.* at 72-74.

35. See, e.g., *id.*

36. This type of statute became known as the "Pennsylvania form." *Id.* at 73-74; *cf.* U.C.C. § 6-106 (optional section obligating transferee to apply consideration to pay transferor's debts).

claims of the seller's creditors<sup>37</sup> and, in some states, imposed personal liability on the buyer.<sup>38</sup>

Like the bulk sales statutes that it supersedes, Article 6 rests upon two premises: special legislation is desirable to minimize the risk that a merchant might use a bulk sale to perpetrate a fraud on his creditors, and the most effective deterrent to fraud is the imposition of the monitoring duty on the buyer in bulk.<sup>39</sup> Like its predecessors, Article 6 requires the buyer to notify the seller's creditors that a bulk sale will occur.<sup>40</sup> His failure to notify renders the transfer "ineffective against any creditor of the transferor,"<sup>41</sup> thereby enabling the seller's creditors to reach the property through judicial process.<sup>42</sup> In addition, optional section 6-106 makes the buyer responsible for the proper application of the sale proceeds to the seller's creditors and has been a basis for imposing personal liability on the buyer who fails to comply.<sup>43</sup> Worthy of particular note is the fact that Article 6, like its nonuniform predecessors, creates rights against the goods and the buyer even when the buyer acts in good faith and pays adequate value. The article thereby extends the rights of aggrieved creditors beyond those afforded by the law of fraudulent conveyances. Like fraudulent conveyance law, Article 6 runs directly counter to a basic legal principle: *B's* property is not liable for *A's* debts.<sup>44</sup> Even more striking, however, is that Article 6 imposes liability on the noncomplying good faith buyer in bulk, in the absence of any fraud whatsoever. That is, Article 6 imposes a penalty: regardless of the bona fides of the parties, a buyer in bulk may pay full value for goods and lose them or their value to the seller's creditors merely because he neglects to comply

---

37. See, e.g., 1 G. GLENN, *supra* note 23, § 314.

38. See, e.g., L. VOLD, *HANDBOOK OF THE LAW OF SALES* § 81, at 416-17 (2d ed. 1959).

39. See U.C.C. § 6-101 comments.

40. *Id.* §§ 6-105, 6-107.

41. *Id.* § 6-105.

42. See, e.g., *American Express Co. v. Bomar Shoe Co.*, 125 Ga. App. 408, 409-10, 187 S.E.2d 922, 924 (1972) (aggrieved creditor has any remedy he might have had against the transferor or the goods); *Fico, Inc. v. Ghinger*, 287 Md. 150, 157, 411 A.2d 430, 435 (1980) (in dictum, aggrieved creditor may levy, attach, or garnish the goods); U.C.C. § 6-104 comment 2; U.C.C. § 6-111 comment 2; Annot., 18 A.L.R.4th 1090 (1982).

43. See *Darby v. Ewing's Home Furnishings*, 278 F. Supp. 917 (W.D. Okla. 1967). Some authorities disagree with this reading of § 6-106. See, e.g., 6 W. HAWKLAND, *UNIFORM COMMERCIAL CODE SERIES* § 6-106:02 (1984); see also *Petereit v. Mid-West Marko, Inc.*, 564 S.W.2d 442, 444 (Tex. Ct. App. 1978) (in dictum, no personal liability). Some courts have imposed personal liability on the transferee without relying on the local enactment of § 6-106. See *infra* note 162.

44. See *supra* note 21.

with the notice provisions of Article 6.<sup>45</sup>

The possibility of having to pay for goods and not enjoying their use, or of paying twice for the goods, is supposed to induce the buyer in bulk to perform his statutory duty of notifying creditors and, in some states, applying the proceeds of the sale to their claims.<sup>46</sup> Performance of those duties, in turn, is supposed to help prevent the seller-debtor from utilizing a bulk sale to defraud his creditors.<sup>47</sup>

### B. *The Problems of Nonpossessory Liens*

Like Article 6, Article 9 presumes that public notice can prevent fraud. The fraud that Article 9 addresses arises from nonpossessory interests in personal property. For centuries the law of personal property has considered the separation of title from possession as a "fruitful . . . source of deception."<sup>48</sup> Who is deceived by a secret security interest in, say, the debtor's inventory of shoes? First, absent public notice, persons who extend credit to the debtor may be misled into thinking that the debtor owns the shoes free and clear. Acting on that misapprehension, a creditor may extend credit secured by the shoes, only to learn later that another creditor has prior, superior rights. Or a creditor may extend unsecured credit, believing that even if the particular shoes may not

---

45. The enactment of the first bulk sales act, LA. LAWS 1896, No. 94, resulted from "dissatisfaction with what was considered a defect in the law of fraudulent conveyances, *i.e.*, the situation where the purchaser of a stock of goods could not be proved to have had any fraudulent intent even though there was clearly fraud on the part of the seller." Miller, *supra* note 17, at 268. Although the good faith buyer may pay twice for the same goods, the seller must indemnify him for any loss suffered as a consequence of his failure to comply with Article 6. See *Johnson v. Mid States Screw & Bolt Co.*, 733 F.2d 1535 (11th Cir. 1984). In explaining why the buyer should have a right to indemnity and should not bear the ultimate loss, the court states, "The Bulk Sales Act is not punitive in nature." *Id.* at 1537. The Article 6 "penalty" that the text refers to is the imposition of liability on the buyer in the first instance. *Id.*

46. No one denies that Article 6 may be a trap for the unwary, but honest, bulk buyer. See, *e.g.*, U.C.C. § 6-101 comment 5 (acknowledging the danger). Anecdotes abound about attorneys who learned of Article 6 only after the bulk buyers they represented had lost goods to creditors of the bulk seller.

47. Creditors may set aside a complying bulk sale if it is voidable under fraudulent conveyance law, for example, if the seller conducted the sale for the purpose of defrauding his creditors and the buyer knew of the fraud. See *Boss v. Bassett Furniture Indus.*, 288 S.E.2d 559 (Ga. 1982); U.C.C. § 1-103; *id.* § 6-101 comment 3; *cf.* Miller, *supra* note 17, at 277 (discussing 1950 proposed final draft of Code). Nevertheless, I have heard attorneys express concern that Article 6 actually facilitates fraud. They argue that dishonest parties who comply with Article 6 can use the fact of their compliance as evidence of their good faith and thereby avoid liability under fraudulent conveyance law.

48. *Sturtevant v. Ballard*, 9 Johns. 337, 343 (N.Y. Sup. Ct. 1812).

be available for eventual satisfaction of the debt, the proceeds that the debtor receives upon their sale will be.<sup>49</sup>

A second group that may be disadvantaged by a nonpossessory security interest in the inventory consists of creditors who seek to satisfy their claims by judicial process on the shoes, only to find that the shoes are encumbered. These creditors may not have extended credit in reliance on the debtor's possession of the shoes; nevertheless, the law has made secret security interests ineffective against them.<sup>50</sup> The most commonly proffered reason is that a secret grant of a security interest may be a ruse by which a debtor arranges with an ally to shield his assets from his creditors.<sup>51</sup> The debtor treats the shoes as his own and enjoys all their benefits, including the right to sell them for profit, yet none of his creditors can reach them, save the secured party. The secured party, however, is content to leave his security in a precarious position—in the control of the debtor, who may diminish its value or dispose of it altogether and dissipate the proceeds. In short, the parties' actions contradict their words. The parties say the shoes stand as collateral, but the assertion is particularly dubious when the transaction is secret and is revealed only when a competing creditor as-

---

49. See, e.g., *Zartman v. First Nat'l Bank*, 189 N.Y. 267, 271, 82 N.E. 127, 128 (1907) (general creditors are presumed to have dealt with debtor in reliance on his absolute ownership of the stock on hand). A straightforward premise underlies the common law notion that retention of possession is deceptive or fraudulent: possession of goods implies unencumbered ownership. In a legal system in which a contrary premise prevails and in which no inferences regarding the state of the title arise from possession of goods, retention of possession would not be fraudulent. That creditors actually rely on the debtor's possession of personal property in deciding whether to extend credit long has been considered dubious. See, e.g., *Davis v. Turner*, 45 Va. (4 Gratt.) 422, 441 (1848) (Baldwin, J.) ("there is something rather loose and indefinite in the idea of a delusive credit gained by the possession of personal property"); M. BIGELOW, *THE LAW OF FRAUDULENT CONVEYANCES* 374 (1911) (general credit is not based upon the debtor's ownership of any particular piece of property); Coogan, *Article 9—An Agenda for the Next Decade*, 87 YALE L.J. 1012, 1033-36 (1978); Phillips, *Flawed Perfection: From Possession to Filing Under Article 9*, 59 B.U.L. REV. 1, 34-43 (1979).

50. See, e.g., *Martin v. Mathiot*, 14 Serg. & Rawle 214, 215 (Pa. 1826) (creditor of conditional vendee); U.C.C. § 9-301(1)(b).

51. See, e.g., *Clow v. Woods*, 5 Serg. & Rawle 275, 280, 282 (Pa. 1819) (Gibson, J.); 1 G. GLENN, *supra* note 23, at 606; cf. *Davis v. Turner*, 45 Va. (4 Gratt.) 422, 426-27 (1848) (Baldwin, J.) ("The fraud is therefore to be found in the falsehood of the transaction; in the pretence of a sale when there is none; in the reservation of an interest for the grantor under the cover of a transmission of his right to the grantee.") (sale-leaseback of chattels); *Benedict v. Ratner*, 268 U.S. 353, 361-63 (1925) (reservation of dominion inconsistent with effective disposition of title renders transfer of accounts void). According to Professor Glenn, "There is another element as well, because, seeing no change in his debtor's position, the creditor may forbear to press his claim." 1 G. GLENN, *supra* note 23, at 606.

serts a claim to the goods.<sup>52</sup>

Thus common law judges, to alleviate their suspicions about secret conveyances and to protect reliance creditors, developed the doctrine that retention of possession by a seller or chattel mortgagor (now, Article 9 debtor) is fraudulent against his creditors, who therefore may avoid the grant of a nonpossessory interest in the goods.<sup>53</sup> Public notice arguably would ameliorate both aspects of the nonpossessory lien problem. It would solve the problem of ostensible ownership because the debtor's creditors easily could discover encumbrances on goods in the debtor's possession, and it would reduce the problem of asserting a sham security interest to insulate assets from judicial liens. Article 9 builds upon this notion by establishing the means through which a secured party can publicize his nonpossessory security interest.<sup>54</sup> It also encourages publicity by imposing a penalty on a secured party who fails to publicize his interest: the security interest, which is enforceable against the debtor, is ineffective against certain third parties, including creditors who subsequently acquire rights in the goods and whose rights otherwise would be subordinate to the security interest.<sup>55</sup> Like the Article 6 buyer in bulk, the Article 9 secured party suffers this penalty even when the debtor intended no fraud, the failure to perfect the security interest was the consequence of a good faith mistake, and no one was misled by the failure to file.<sup>56</sup>

52. "The inference is . . . strong . . . that the transaction was merely colorable; and that the parties intended to hold the sale in reserve, to be used against creditors at a convenient season." *Clow v. Woods*, 5 Serg. & Rawle at 281 (Gibson, J.) (applying seller-in-possession rules to chattel mortgagor in possession).

53. See, e.g., *Sturtevant v. Ballard*, 9 Johns. 337 (N.Y. Sup. Ct. 1812) (sale); *Clow v. Woods*, 5 Serg. & Rawle 275 (Pa. 1819) (Gibson, J.) (chattel mortgage).

54. See generally U.C.C. §§ 9-302, 9-304, 9-305 (methods of giving public notice).

55. Ordinarily, a transferee obtains no better title than his transferor had. See *id.* § 2-403(1) (first sentence); *id.* § 9-306(2) (security interest continues notwithstanding disposition). These rules exemplify the general principle expressed by the maxim *nemo dat quod non habet* (one cannot give what one does not have). Professor Gilmore has sketched the history of the principle. 1 G. GILMORE, *supra* note 30, at 229 n.1. For a thoughtful discussion of the interaction of this "security of property" or "derivation" principle, and its opposite, the "good-faith-purchase" principle, see Dolan, *The U.C.C. Framework: Conveyancing Principles and Property Interests*, 59 B.U.L. Rev. 811 (1979). Failure to give prompt public notice may result in subordination of the security interest to a subsequent, competing claim. See, e.g., U.C.C. § 9-301(1) (lien creditor, buyer, and transferee); *id.* § 9-312(5) (secured party); *id.* § 9-313(4)(b) (owner or encumbrancer of real estate); 11 U.S.C. §§ 544(a)(1), 547 (1982 & Supp. II 1984) (bankruptcy trustee). But a security interest no longer is invalid or fraudulent by reason of liberty in the debtor to use or dispose of the collateral or its proceeds. U.C.C. § 9-205 (repealing, *inter alia*, *Benedict v. Ratner*, 268 U.S. 353 (1925)).

56. See, e.g., *In re Smith*, 326 F. Supp. 1311 (D. Minn. 1971) (finance company's perfected security interest takes priority over bank's prior, unperfected security interest of

In many significant respects, then, Article 9 is similar to Article 6. Each article addresses a fraud on creditors that may arise from a conveyance of personal property; each article puts the burden of preventing the transferor's fraud on the transferee; and each article assumes that providing notice of the transfer to the parties likely to be affected will have a salutary effect. In the case of Article 6, those parties are the existing creditors of the transferor, who are entitled to direct notice. Article 9 protects as well potential creditors of the transferor by establishing a system of constructive notice. Each article imposes adverse consequences on the noncomplying transferee even when he purchases in good faith and for value and even when no fraud is committed. Each imposes a similar penalty by enabling creditors of the transferor to acquire rights superior to those of the transferee, contrary to basic legal principles. Article 6 permits creditors of *A* to reach *B*'s property, and Article 9 permits a transferee of the collateral to acquire better title than his transferor, the debtor, had.<sup>57</sup>

Although conceptually they are quite similar, the notice requirements of Article 6 and 9 address different frauds. Article 6 reduces the bulk sales risk that the debtor will dispose of his assets and abscond with the proceeds. Article 9 solves the problems associated with nonpossessory, consensual liens by preventing a debtor from misleading his creditors about the state of his assets and by discouraging a debtor from using a sham secured transaction to insulate his assets from his creditors.<sup>58</sup> From time to time situations arise that require notice under both articles. The following discussion examines these situations and suggests the legal consequences

---

which finance company had actual knowledge). Compare U.C.C. § 9-301(1)(b) (1962 official text) with *id.* § 9-301(1)(b) (1972 official text) (latter version deletes requirement that creditor acquire lien "without knowledge of the [unperfected] security interest" in order to take priority).

57. In one sense, the latter consequence is a variation of the former; for example, a lien creditor of the debtor can reach a secured party's property (his unperfected security interest) to satisfy the debtor's obligation.

58. Nonpossessory interests in personal property are now common, so that the historical notion that an unpublicized security interest is presumptively deceptive or fraudulent lacks whatever force it once may have had. See *supra* note 49. But cf. Phillips, *The Commercial Culpability Scale*, 92 YALE L.J. 228, 248-51 (1982) (the first-to-file-or-perfect priority rule reflects the historical view that the failure to file a financing statement constitutes conduct intended to cause others to rely to their detriment). Regardless of the effect it may have on reducing fraud, the public notice requirement enables subsequent potential claimants to rely on the absence of public notice of a security interest as an indication that particular personal property is not so encumbered. In that way, the requirement reduces the cost of acquiring information. See Baird & Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175, 179-90 (1983).



that should follow when both notices are properly given, when neither is given, and when only one is given.

### III. THE RIGHTS OF A SECURED PARTY WHOSE COLLATERAL IS SOLD IN BULK AGAINST A BUYER IN BULK

This part considers the relative rights of a secured party whose collateral is sold in bulk and a buyer of the collateral. It shows that whether the buyer in bulk takes the goods free of the security interest or subject to it may depend on whether the secured party is perfected and whether the buyer in bulk complies with Article 6. I will assume throughout that a secured party has a valid security interest in the existing and after-acquired inventory<sup>59</sup> of a retailer,<sup>60</sup> that the retailer sold the entire inventory to a buyer<sup>61</sup> who purchased in good faith and for adequate consideration,<sup>62</sup> and that the retailer disposed of the proceeds.<sup>63</sup>

#### A. *The Rights of a Perfected Secured Party*

##### 1. Against a Noncomplying Buyer in Bulk

Assume first that the secured party has perfected its security interest properly by filing a financing statement in the appropriate office<sup>64</sup> and that the buyer has failed to comply with any of his

59. "A 'bulk transfer' is any transfer in bulk and not in the ordinary course of the transferor's business of a major part of the . . . inventory . . . of an enterprise subject to this Article [6]." U.C.C. § 6-102(1). In addition, "[a] transfer of a substantial part of the equipment . . . is a bulk transfer if it is made in connection with a bulk transfer of inventory, but not otherwise." *Id.* § 6-102(2). Because the transfer of inventory gives rise to most bulk transfer problems, I have devoted the text of this Article to issues that arise from inventory transfers. Discussion of problems peculiar to the transfer of equipment is in the footnotes.

60. "The enterprises subject to this Article [6] are all those whose principal business is the sale of merchandise from stock, including those who manufacture what they sell." *Id.* § 6-102(3). Although retailers are not the only transferors in bulk who are subject to Article 6, they are typical of that class and are used by way of example. *But see infra* notes 155-56 and accompanying text.

61. Although a transfer of a "major part" of the inventory implicates Article 6, in order to simplify the analysis I have assumed that all the inventory was transferred. A "major part" is more than half. *See, e.g.,* *Wikelund Wholesale Co. v. Tile World Factory Tile Warehouse*, 57 Ill. App. 3d 269, 271-72, 372 N.E.2d 1022, 1023 (1978).

62. Fraudulent conveyance law immunizes transferees who act in good faith and give adequate consideration. *See supra* note 27. Accordingly, the effects of Article 6 are seen more clearly when the article is applied to transferees of that kind.

63. A security interest continues in any identifiable proceeds of a sale of collateral. U.C.C. § 9-306(2). The secured party's recovery of the proceeds would reduce the debt secured by the original collateral but not affect the analysis otherwise.

64. To determine the appropriate office(s) in which to file, see *id.* § 9-103 (designating the state whose law governs perfection) and *id.* § 9-401(1) (setting forth the appropriate

duties under Article 6. Not surprisingly, both Article 9 and Article 6 support the view that the perfected secured party prevails over the noncomplying buyer.

Article 9 suggests that the buyer takes the goods subject to the security interest. The security agreement (which grants the security interest) is "effective according to its terms . . . against purchasers of the collateral."<sup>65</sup> Indeed, except when Article 9 "otherwise provides, a security interest continues in collateral notwithstanding [an unauthorized] sale."<sup>66</sup> The principal exception that enables a buyer of inventory to take free of a perfected security interest is section 9-307(1), which protects buyers in ordinary course of business.<sup>67</sup> The Code specifically excludes from that favored category our buyer, who bought in bulk.<sup>68</sup> Accordingly, the perfected security interest is enforceable against him.<sup>69</sup> This result comports with the policy of Article 9. By filing, the secured party has prevented any problem of the debtor's ostensible ownership.

place to file within a state). Section 9-402 sets forth the formal requisites of the financing statement.

65. *Id.* § 9-201. A buyer is a "purchaser." *See id.* § 1-201(33), (32).

66. *Id.* § 9-306(2). This rule is a particular application of the first sentence of § 2-403(1).

67. Notwithstanding § 2-402(3), which provides that nothing in Article 2 shall be deemed to impair the rights of creditors of the seller under Article 9, some courts have relied on § 2-403(2) (a merchant to whom goods have been entrusted has the power to transfer the entruster's rights to a buyer in ordinary course) as an alternative to § 9-307(1) when enabling a buyer in ordinary course of business to take free of a perfected security interest. *See, e.g., Makransky v. Long Island Reo Truck Co.*, 58 Misc. 2d 338, 295 N.Y.S.2d 240 (Sup. Ct. 1968). *Contra* National Shawmut Bank v. Jones, 108 N.H. 386, 389, 236 A.2d 484, 486 (1967). If the security interest is perfected through a warehouse receipt, *see* U.C.C. § 9-304(2), (3), the inventory is fungible, and the warehouse is also in the business of buying and selling goods of that kind, then the security interest can be lost to a buyer in ordinary course from the warehouse. *Id.* § 7-205; *cf. id.* §§ 7-502, 7-503 (a perfected security interest in goods may be lost to a holder to whom a negotiable document of title covering the goods has been duly negotiated). Although certain buyers of other types of collateral may take free from perfected security interests, *see, e.g., id.* § 9-307(2) (consumer goods); *id.* § 9-308 (chattel paper and instruments); *id.* § 9-309 (negotiable instruments, negotiable documents, and securities), buyers of equipment do not. Regarding authorized sales, *see infra* notes 88-95 and accompanying text.

68. "Buying" . . . does not include a transfer in bulk." U.C.C. § 1-201(9); *see also infra* note 116.

69. "[S]ince the transferee takes subject to the security interest, the secured party may repossess the collateral from him or in an appropriate case maintain an action for conversion." U.C.C. § 9-306 comment 3. For discussions of the secured party's rights against a transferee of the collateral, *see* Nickles, *Enforcing Article 9 Security Interests Against Subordinate Buyers of Collateral*, 50 GEO. WASH. L. REV. 511 (1982); Wechsler, *Rights and Remedies of the Secured Party After an Unauthorized Transfer of Collateral: A Proposal for Balancing Competing Claims in Repossession, Resale, Proceeds, and Conversion Cases*, 32 BUFF. L. REV. 373 (1983); *infra* notes 174-251 and accompanying text.

The buyer easily could have discovered the security interest by checking the public records. He then could have either refused to consummate the transaction or discharged the security interest by applying the sale proceeds to the secured party's claim.

Article 6 gives the same sensible result. Failure to comply with Article 6, for example, by not notifying the seller's creditors that the sale will occur, renders the sale "ineffective against any creditor" of the seller,<sup>70</sup> including secured creditors.<sup>71</sup> Because the sale is ineffective against the secured party, the secured party may enforce its perfected security interest against the buyer. This result is to be expected. Article 6 imposes a penalty upon buyers in bulk who fail to discharge their duty to advise creditors of a potential fraud. That penalty deprives a noncomplying buyer of rights he ordinarily would acquire. One would be surprised if Article 6 enabled a noncomplying buyer to take free of the security interest and acquire better rights than his transferor had.

## 2. Against a Complying Buyer in Bulk

Are the perfected secured party's rights adversely affected when the buyer in bulk complies with Article 6? Presumably the secured party received notice of the impending bulk sale.<sup>72</sup> If it fails to act before the buyer pays for the inventory and takes possession, has the secured party lost its collateral to the buyer? A recent case from the Fifth Circuit Court of Appeals, *In re McBee*,<sup>73</sup> suggests repeatedly in dictum an affirmative answer: "Secured creditors of the transferor cannot assert any claims against the transferee or his property after a complying bulk transfer; the transferee will not 'pay twice' for property thus freed from prior security interests."<sup>74</sup> The following analysis suggests that the

---

70. U.C.C. §§ 6-104(1), 6-105. Pre-Code bulk sales laws did not use the term "ineffective." Rather, they used a variety of fraudulent conveyance terms:

void, fraudulent and void, presumed to be fraudulent and void, conclusively presumed to be fraudulent and void, conclusively presumed to be fraudulent, presumed to be fraudulent, voidable, prima facie be presumed to be fraudulent and void, presumed to be fraudulent and therefore void, and shall be held to be prima facie void.

Miller, *supra* note 17, at 274-75 (footnotes omitted).

71. See, e.g., *Automatic Truck & Trailer Wash Centers, Inc. v. Eastamp, Inc.*, 320 So. 2d 7, 10 (Fla. Dist. Ct. App. 1975); U.C.C. § 1-201(12) (definition of "creditor").

72. Even if the buyer complies with Article 6, the secured party may not receive notice. The seller may have omitted the secured party from the list of creditors, or the secured party may not have received the notice that the buyer sent. See *infra* text following note 91.

73. *National Bank v. West Texas Wholesale Supply Co.* (*In re McBee*), 714 F.2d 1316 (5th Cir. 1983).

74. *Id.* at 1326; see also *id.* at 1319 (security interest was retained "by virtue of the

court's view is incorrect. Under both Article 9 and Article 6, a perfected security interest survives a complying bulk sale.

The applicable Article 9 rule is clear: a security interest generally continues in the collateral notwithstanding that the collateral is sold.<sup>75</sup> Unfortunately, the *McBee* court ignores the statute and asserts the opposite: "In the absence of a bulk sales law, creditors generally would lose all security interest in collateral on transfer to a new owner . . . ."<sup>76</sup> The court supports its position by citing to Professors White and Summers, who state that "[i]n the absence of a bulk sales law a transferor's creditors are generally not entitled to levy or the like on assets the transferor has sold to a new owner."<sup>77</sup> The court, however, neglects to consider this statement in the context in which it appears. Throughout their discussion of bulk sales, White and Summers focus on the rights of unsecured trade creditors.<sup>78</sup> The statement on which the court relies is no more than a restatement of the basic rule that *B*'s property is not liable for *A*'s debts.<sup>79</sup> A different principle governs transfers of goods subject to security interests: a purchaser acquires no greater rights than his transferor had.<sup>80</sup> White and Summers recognize the crucial distinction between secured and unsecured creditors. In the introduction to their discussion, the authors make clear that a transferor's creditors "might protect themselves by taking security interests in the merchandise they supply, for such security would be good even against a transferee of the business who bought in good faith and for fair value."<sup>81</sup> They go on to suggest that widespread use of security interests would obviate the need for a bulk sales law.<sup>82</sup>

In short, the Fifth Circuit panel misapprehends the general

non-complying bulk transfer"), 1327-28 (had transferee complied with Article 6, secured parties would have retained no interest).

75. U.C.C. § 9-306(2). The rule is subject to exceptions, none of which applies to the case under consideration. See *infra* notes 83-95 and accompanying text.

76. *In re McBee*, 714 F.2d at 1316.

77. J. WHITE & R. SUMMERS, *supra* note 8, at 768.

78. *Id.* ch. 19 *passim*.

79. See *supra* note 21.

80. See *supra* note 55.

81. J. WHITE & R. SUMMERS, *supra* note 8, at 757. Insofar as it contemplates unperfected secured parties, this statement may be too broad. See *infra* notes 103-73 and accompanying text.

82. J. WHITE & R. SUMMERS, *supra* note 8, at 757. Professor Hawkland believes that a perfected secured party "may actually be in a stronger position after the bulk transfer than he was previously," inasmuch as "the secured party acquires an interest in the proceeds generated by the transfer in addition to retaining an interest in the transferred goods themselves." 6 W. HAWKLAND, *supra* note 43, § 6-104:11, Art. 6 at 81-82.

rule that the sale of collateral does not terminate a perfected security interest. Although there are two exceptions to this rule, neither necessarily applies to a bulk sale. The first exception enables a buyer of inventory in ordinary course to take free of a security interest created by his seller.<sup>83</sup> By definition, a buyer in bulk does not buy in ordinary course<sup>84</sup> and so is not entitled to take free of a perfected security interest. Nor does a buyer in bulk deserve the special treatment the Code affords to the buyer in ordinary course. Allowing a buyer to cut off a perfected security interest in the inventory of his seller frees the buyer from the cost and delay attendant to an investigation into the state of the seller's title to the goods. Imposing on the buyer the risk that the seller is financing his inventory seems far less appropriate in an ordinary course transaction than in a bulk sale. Even without a title investigation, a bulk sale typically requires considerably more time and expense to negotiate, document, and consummate. Moreover, the buyer in ordinary course has every reason to believe that a secured party would authorize the sale to him. The creditor who is secured by goods that the debtor is in the business of selling has the expectation, or at least the hope, that the debtor will sell the goods in ordinary course because those sales enable the debtor to continue in business and repay his debt. One would look askance at a secured party that objected to ordinary course sales or that effectively prevented them by refusing to release its security interest. Accordingly, the Code generally precludes a secured party from these actions.<sup>85</sup> One cannot safely presume that a secured party would relinquish its security interest to facilitate a bulk sale, in which all the collateral may be removed from the debtor's possession at once and the debtor left holding relatively small proceeds with which to pay the secured debt.<sup>86</sup> Consequently, Article 9 does

---

83. U.C.C. § 9-307(1). Presale notice to the secured party is irrelevant to the operation of this section.

84. *Id.* § 1-201(9) (definition of "buyer in ordinary course of business"); *id.* § 6-102(1) (definition of "bulk transfer"); *see also infra* note 116.

85. A buyer of farm products in ordinary course of business is excepted from the general rule and does not take free of a security interest created by his seller. U.C.C. § 9-307(1). *But see* Food Security Act of 1985, Pub. L. No. 99-198, § 1324, 99 Stat. 1535-40 (to be codified at 7 U.S.C. § 1631) (effective Dec. 23, 1985) (governing the rights of buyers of farm products in ordinary course and superseding state law to the contrary). A buyer who actually knows that the secured party has prohibited the sale to him or that the sale otherwise would violate the security interest cannot be a buyer in ordinary course of business, *id.* § 1-201(9), and takes subject to the security interest, *id.* § 9-306(2).

86. *See* Nickles, *Rethinking Some U.C.C. Article 9 Problems*, 34 ARK. L. REV. 1, 119 n.689 (1980). *See generally, e.g.,* United States v. Handy & Harman, 750 F.2d 777, 781 (9th

not deprive a secured creditor of his perfected security interest when the collateral is sold in bulk.<sup>87</sup>

A second exception to the general rule that a security interest in inventory continues notwithstanding sale of the collateral occurs when the secured party, "in the security agreement or otherwise," authorizes the disposition.<sup>88</sup> Courts have interpreted "otherwise" to include cases in which the secured party impliedly authorizes a sale or in some manner waives its security interest.<sup>89</sup> The unstated premise for the *McBee* court's view that a complying buyer in bulk takes free of a perfected security interest may be the court's belief that, by failing to assert its security interest in the face of a bulk sale notice, the secured party "otherwise" authorizes the sale. Even if the premise is correct,<sup>90</sup> it does not support the court's blanket rule.

Waiver and implied authorization depend on the secured

---

Cir. 1984); *Martin Marietta Corp. v. New Jersey Nat'l Bank*, 505 F. Supp. 946, 952 (D.N.J. 1981); *First Sec. Bank v. Absco Warehouse, Inc.*, 104 Idaho 853, 856, 664 P.2d 281, 284 (Ct. App. 1983) (security agreements permitted only sales in ordinary course of business).

87. For suggestions that the rule in § 9-307(1) may be economically efficient, see A. SCHWARTZ & R. SCOTT, *supra* note 31, at 601-02 (secured parties appear capable of bearing risk of unauthorized sales by debtors at lower cost than most buyers); Baird & Jackson, *supra* note 58, at 210 (§ 9-307(1) may replicate agreement that secured party and buyer in ordinary course would reach in face-to-face bargaining).

88. U.C.C. § 9-306(2). To the extent that one considers the rule of § 9-307(1) to be premised upon the secured party's implied authorization of ordinary course sales, that rule may be considered a particular application of the rule in § 9-306(2) regarding authorized dispositions. Pre-Code law used the theory of implied authorization to protect ordinary course buyers. See Nickles, *supra* note 86, at 119-125.

89. See, e.g., *State Bank, Palmer v. Scoular-Bishop Grain Co.*, 217 Neb. 379, 349 N.W.2d 912 (1984) ("or otherwise" includes implied consent, waiver, or ratification by course of dealing); see also *Muir v. Jefferson Credit Corp.*, 108 N.J. Super. 586, 262 A.2d 33 (1970) (secured party estopped from asserting perfected security interest). Most of the cases finding an implied authorization of the sale or a waiver of the security interest concern buyers of farm products in ordinary course. Those buyers would take free of the security interest had they bought inventory rather than farm products. U.C.C. § 9-307(1). The cases on authorized sales are far from uniform in their reasoning and results. For a discussion of cases and policies in the agricultural setting, see B. CLARK, *THE LAW OF SECURED TRANSACTIONS* ¶ 8.4[3] (1980 & Cum. Supp. No. 1 1985).

90. Whether a disposition has been "authorized" within the meaning of § 9-306(2) is a question of fact. See, e.g., *Five Points Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 677, 350 N.W.2d 549 (1984). Some cases hold that a secured party who knows of an impending sale, but does not object, does not necessarily authorize it. See, e.g., *Central Cal. Equip. Co. v. Dolk Tractor Co.*, 78 Cal. App. 3d 855, 144 Cal. Rptr. 367 (Cal. Ct. App. 1978) (mere acquiescence is not authorization when security agreement prohibits disposition without secured party's written consent); *Matto's, Inc. v. Olde Colonie Place (In re Matto's, Inc.)*, 8 Bankr. 485 (Bankr. E.D. Mich. 1981) (secured party consented to sale but did not authorize transfer free of security interest). But see, e.g., *In re Vieths, Inc.*, 9 U.C.C. Rep. Serv. (Callaghan) 943 (Ref. E.D. Wis. 1971).

party's acquiescence in the bulk transfer, which in turn depends on the secured party's knowledge of the transfer.<sup>91</sup> Even the buyer's complete compliance with Article 6 does not insure that the secured party will learn of the sale before it occurs. For example, the buyer may never send notice to the secured party because the seller may omit the secured party from the list of creditors that he prepares. Unless the buyer is "shown to have had knowledge,"<sup>92</sup> which means "actual knowledge,"<sup>93</sup> the omission does not render the transfer ineffective. Notice need be sent only to creditors on the list and "to all other persons who are known [again, by actual knowledge] to the transferee to hold or assert claims against the transferor."<sup>94</sup> Moreover, the buyer meets his statutory obligations by mailing the notice, even if for some reason the secured party never receives it.<sup>95</sup> Thus, to the extent that the *McBee* court's notion that a complying bulk transfer ipso facto terminates a perfected security interest is based on a theory of implied authorization or waiver, the notion is without foundation.

Not only does the Fifth Circuit panel misapprehend the nature of the security interest, it also misunderstands the purpose of Article 6. The court errs in its belief that Article 6 must be read to "protect the transferee and his subsequent creditors by bringing to light and terminating all prior security claims to the transferred property."<sup>96</sup> Like its predecessors, Article 6 was enacted to protect the seller's creditors from fraud, not a buyer in bulk from otherwise valid claims to the goods.<sup>97</sup> The buyer's protection arises from

---

91. See, e.g., *First Sec. Bank v. Absco Warehouse, Inc.*, 104 Idaho 853, 856, 664 P.2d 281, 284 (Ct. App. 1983); *Citizens Sav. Bank v. Sac City State Bank*, 315 N.W.2d 20, 26 (Iowa 1982) (no implied authorization by secured party that lacked prior knowledge of bulk sale of collateral); *State Bank, Palmer v. Scoular-Bishop Grain Co.*, 217 Neb. 379, 387, 349 N.W.2d 912, 917 (1984).

92. U.C.C. § 6-104(3).

93. *Id.* § 1-201(25).

94. *Id.* § 6-107(3).

95. Section 6-107(3) requires that the notice be "delivered personally or sent." Compare *id.* § 1-201(38) (definition of "send") with *id.* § 1-201(26) (when person "receives" a notice).

96. *In re McBee*, 714 F.2d 1316, 1327. A badly drawn default clause may prevent a secured party from foreclosing on collateral and terminating its security interest upon receiving notice of an impending bulk transfer. Even so, the secured party may notify the buyer that the security interest exists. Notification presumably would negate any authorization that might be inferred from the secured party's silence.

97. Bulk sales laws do afford some benefits to buyers, however. A bulk buyer who complies with the statute no longer is the transferee of a presumptively fraudulent transfer. Cf. *Walbrun v. Babbitt*, 83 U.S. (16 Wall.) 577, 581 (1872) (bulk sale was prima facie evidence of fraud). Rather, the creditors who think a complying bulk sale is fraudulent must

Article 9.<sup>98</sup> Perfected secured parties already have publicized their interest by filing; notice of an impending bulk sale is not necessary to bring their claims to light. Finally, Article 6 does not purport to enable a complying buyer to acquire better title than the seller had. Rather, it imposes a penalty for noncompliance with its requirements: the transfer is “ineffective,” so that the buyer takes the goods subject to potential claims that a sale to him ordinarily would cut off. By complying with Article 6, a buyer does no more than avoid the penalty. He acquires those rights, but only those rights, that a purchaser of goods subject to a security interest ordinarily acquires: “all title which his transferor had or had power to transfer.”<sup>99</sup> Occasionally, a good faith purchaser of goods may obtain better title than his transferor had, but these occasions are few, and the relevant statutory provisions address that issue clearly.<sup>100</sup> Nothing in Article 6 grants the seller the power to convey greater title than he has, and nothing in Article 6 awards the buyer better title than that of the seller. Although compliance with its notice requirements may “*permit*[ ] the creditors to protect their security interests before the transfer,”<sup>101</sup> Article 6 does not prescribe the consequences of the creditors’ failure to do so. Any consequences of the secured party’s failure to assert its security interest against a complying buyer would be found in Article 9,<sup>102</sup> and Article 9 does not justify the *McBee* court’s blanket rule. As with the noncomplying buyer, each article compels a result that is consistent not only with its purposes but also with the result compelled by the other article.

---

prove the fraud. Although they may be assisted in this task by receiving advance notice of the sale, *see* U.C.C. § 6-101 comment 3, the fact of the buyer’s compliance may inure to his benefit, *see supra* note 47.

98. Regarding protection of the buyer’s creditors, *see infra* notes 174-226, 229-31 and accompanying text.

99. U.C.C. § 2-403(1) (first sentence); *see also id.* § 9-201 (security agreement is effective according to its terms against purchasers); *id.* § 9-306(2) (security interest continues notwithstanding sale of collateral).

100. *E.g., id.* § 2-403(1) (second and third sentences) (person with voidable title can give good title); *id.* § 2-403(2) (merchant to whom goods are entrusted can transfer entruster’s rights); *id.* § 9-307(1) (buyer of inventory in ordinary course takes free of certain security interests).

101. *In re McBee*, 714 F.2d 1316, 1327 (emphasis changed).

102. General principles of law and equity supplement Article 9’s provisions. *See* U.C.C. § 1-103.



## B. *The Rights of an Unperfected Secured Party*

### 1. Against a Complying Buyer in Bulk

The preceding part shows that the rights of a perfected secured party against a buyer in bulk, whether complying or non-complying, are governed by the general principle that a transferee of goods acquires no greater rights than his transferor had. The Code contains exceptions to this rule, some of which are found in Article 9. Among those exceptions is section 9-301(1)(c), which provides in relevant part as follows:

(1) . . . 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.<sup>103</sup>

This section enables a buyer in bulk, in particular cases, to take goods free of valid security interests and thereby acquire greater rights than the seller had. It protects those buyers who concluded from the seller's possession of the goods and the absence of a filed financing statement that the seller owned the goods free and clear and who are likely to have acted in reliance on that conclusion to their detriment. A buyer who actually knows of the security interest will not rely to his detriment and so will not take free of the security interest. Similarly, one who has not given value is not likely to be injured if the goods he receives are encumbered.<sup>104</sup> Moreover, a buyer who fails to take delivery of goods in which he has an interest has himself created problems analogous to those caused by nonpossessory liens.<sup>105</sup> Section 9-301(1)(c) pro-

103. U.C.C. § 9-301(1)(c).

104. Ordinarily, the donee can return the goods to the encumbrancer; however, if return of the goods is not possible, or if their value has depreciated, the donee may be personally liable for conversion. The value requirement has been in all UCC drafts of § 9-301(1)(c) since it was added for clarification in 1956. 1956 Recommendations of the Editorial Board for the Uniform Commercial Code 273-74, *reprinted in* 18 U.C.C. *Drafts, supra* note 17, at 297-98. The value requirement was contained in early drafts, *see, e.g.*, U.C.C. § 8-302(1)(a) (Sept. 1949 rev.), *reprinted in* 8 U.C.C. *Drafts, supra* note 17, at 322, but concern with the delivery requirement, *see infra* note 106, apparently resulted in the inadvertent omission of the value requirement in a few drafts, *see* U.C.C. § 9-301(1)(c) & comment 2(c) (proposed final draft, spring 1950), *reprinted in* 11 U.C.C. *Drafts, supra* note 17, at 247, 249.

105. *See generally supra* notes 48-58 and accompanying text. Pre-Code law sought to reduce the frequency of these problems by treating as fraudulent the failure of the buyer to take possession of goods that he contracted to buy. *See generally* 1 G. GLENN, *supra* note 23, ch. XIX. The Code follows suit. It permits a creditor of the seller to treat a sale or identification of goods to a contract for sale as void if as against the creditor a retention of posses-

vides, in essence, that the first party who solves those problems by giving public notice of his interest will take priority.<sup>106</sup> Thus if the secured party perfects first, then it will prevail. By taking delivery first, the buyer will cut off the secured party's rights, even if the buyer did not rely on the absence of a filing by the secured party and even if the secured party's failure to perfect its interest was neither fraudulent nor negligent.<sup>107</sup>

Article 6 does not affect this result. When the buyer in bulk complies with the notice provisions, the statutory penalty of making the transfer ineffective does not arise. The buyer acquires those rights awarded him by other Code provisions; in this case, he acquires superior rights to the inventory by virtue of section 9-301(1)(c).<sup>108</sup>

## 2. Against a Noncomplying Buyer in Bulk

At first reading, section 9-301(1)(c) appears to enable a buyer in bulk to take free of an unperfected security interest whether or not the buyer complies with the notice requirements of Article 6. After all, section 9-301(1)(c) refers to a "transferee in bulk" without any qualifications. A number of commentaries on the Code

---

sion by the seller is fraudulent under any rule of law of the state where the goods are situated. U.C.C. § 2-402(2). The Code deems certain commercially reasonable retentions of possession not fraudulent, notwithstanding non-Code law to the contrary. *Id.*

106. An early Code draft gave priority to a buyer to the extent he either received delivery of the collateral or paid all or part of the purchase price before he received knowledge of the unperfected security interest. U.C.C. § 8-301(1)(c) (Oct. 1949 rev.), *reprinted in* 8 U.C.C. *Drafts*, *supra* note 17, at 500. The reporters noted that the section conflicted with the then existing § 2-405 (since rewritten and renumbered as § 2-402). Old § 2-405 protected a buyer who bought goods that a seller previously had sold to another buyer who left the seller in possession, only if the second buyer took delivery of the goods. The reporters believed that the Article 2 policy was desirable and that "there would seem to be no reason to prefer a buyer who fails to protect himself by taking delivery over a secured lender who fails to protect himself by filing." Unif. Commercial Code 93 (Oct. 1949 rev.) (note to § 8-301), *reprinted in* 8 U.C.C. *Drafts*, *supra* note 17, at 501. The published draft immediately following resolved the perceived conflict by granting priority to a buyer "to the extent he receives delivery of the collateral before he receives knowledge of the security interest and before it is perfected." U.C.C. § 9-301(1)(c) (Mar. 1, 1950 text only printing), *reprinted in* 9 U.C.C. *Drafts*, *supra* note 17, at 154; *see also* Unif. Commercial Code 757 (spring 1950 proposed final draft) (explaining purpose of change), *reprinted in* 11 U.C.C. *Drafts*, *supra* note 17, at 249.

107. To this extent, the rule may be said to impose a penalty on the secured party.

108. Section 9-301(1)(c) does not by its terms enable a buyer to "take[ ] free" of a security interest, but rather only "subordinate[s]" the security interest. *Compare* U.C.C. § 9-307(1) *with id.* § 9-301(1)(c). In the context of § 9-301(1)(c), subordination should be read as termination. *See* Carlson, *Death and Subordination Under Article 9 of the Uniform Commercial Code: Senior Buyers and Senior Lien Creditors*, 5 CARDOZO L. REV. 547, 547-63 (1984).

contain general statements that are consistent with that result;<sup>109</sup> however, the one case that confronts the issue, *National Bank of Royal Oak v. Frydlewicz*,<sup>110</sup> resolves the priorities issue the other way. *Frydlewicz* is characterized by weak analysis and confusing discussion. Nevertheless, I prefer its rule, under which an unperfected security interest survives a noncomplying bulk sale. Subpart (a) analyzes *Frydlewicz* and disposes of the tortured reading of the Code and the erroneous premises on which the opinion is based. The analysis provides useful background to subpart (b), in which I offer what I believe to be a proper reading of the Code and sound arguments that support the *Frydlewicz* result. In subpart (c), I suggest that the *Frydlewicz* result not only is consistent with the Code's design but also may have the desirable effect of minimizing costs.

### (a) *The Frydlewicz Opinion*

In *Frydlewicz*, the Michigan Court of Appeals affirmed a money judgment in favor of an unperfected secured party against a buyer in bulk that failed to request a list of the seller's creditors. After stating that "[n]ormally, as a transferee in bulk, [the buyer] would be entitled to priority over plaintiff's unperfected security interest,"<sup>111</sup> and citing section 9-301(1)(c), the court made the following pronouncement, for which it offered no authority: "However, [the buyer] failed to satisfy the requirements necessary under the bulk transfer provisions of UCC, art 6, to assert a claim of priority as a transferee in bulk."<sup>112</sup> Apparently, the court thought that although the buyer "was, as the trial court held, a transferee in bulk,"<sup>113</sup> it nevertheless was not a "transferee in bulk" for purposes of section 9-301(1)(c), and consequently took the inventory subject to the security interest. Asserting that "[b]ut for the bulk sales law plaintiff [an unperfected secured party] might be without remedy,"<sup>114</sup> the court grounded its ruling on its belief that the interaction of Articles 9 and 6 "require[s] that plaintiff be protected

---

109. The commentators generally do not distinguish between complying and noncomplying transferees for purposes of § 9-301(1)(c). See, e.g., 6 W. HAWKLAND, *supra* note 43 § 6-106:05, Art. 6 at 104; *id.* § 6-104:05, Art. 6 at 6-7 (Supp. 1985); J. WHITE & R. SUMMERS, *supra* note 8, at 1071.

110. 67 Mich. App. 417, 241 N.W.2d 471 (1976).

111. *Id.* at 421, 241 N.W.2d at 473.

112. *Id.*

113. *Id.* at 422, 241 N.W.2d at 473.

114. *Id.* at 423, 241 N.W.2d at 474.

against loss of collateral by the coverage of the bulk transfer notice provisions."<sup>115</sup>

Although the court reaches the proper result, the *Frydlewicz* opinion is unpersuasive both in its statutory construction and in its underlying premises. The court's interpretation of section 9-301(1)(c) is particularly troublesome. Its notion that a noncomplying transferee in bulk is a "transferee" of a bulk transfer for purposes of Article 6, but is not a section 9-301(1)(c) "transferee in bulk," is unsupported by the statutory language. Indeed, even if the court's reading were correct, section 9-301(1)(c) would protect a noncomplying buyer in bulk as an "other buyer not in ordinary course of business."<sup>116</sup>

One might attempt to support the court's construction of section 9-301(1)(c) by arguing that the section was designed to protect only those buyers that justifiably rely on the seller's possession of the inventory and their own lack of notice of the secured party's interest as evidence of the seller's clear title. Having neglected to provide the unperfected secured party the opportunity to bring its interest to the buyer's attention, the noncomplying buyer in bulk cannot be said to be without notice of the security interest and thus ought not be treated as a reliance party. This attempt fails for at least two reasons. First, section 9-301(1) does not randomly impose knowledge or notice requirements on competing claimants. Rather it distinguishes between, on the one hand, lien creditors, for whom knowledge is irrelevant, and, on the other hand, transferees (of accounts and general intangibles) and buyers (of other collateral), for whom knowledge affects priority.<sup>117</sup> The Code defines the term "knowledge," which it distinguishes from "notice."<sup>118</sup> Judicial expansion of the term "knowledge" beyond its defined meaning would be inappropriate, especially if the term were construed to include a kind of inquiry notice that is entirely foreign to the

---

115. *Id.* at 424, 241 N.W.2d at 474.

116. U.C.C. § 9-301(1)(c). One might argue that a buyer in bulk is never an "other buyer" under § 9-301(1)(c), inasmuch as § 1-201(9) provides that "buying" does not include a transfer in bulk. A better reading is that the explanation of "buying" in § 1-201(9) applies only to the definition of "buyer in ordinary course of business," of which the explanation is a part. In any case, a person prepared to argue that a noncomplying transferee in bulk is not a "transferee in bulk" for § 9-301(1)(c) purposes, should be prepared to acknowledge that a noncomplying transfer in bulk is not a "transfer in bulk" for § 1-201(9) purposes, and thus is not excluded from the definition of "buying."

117. Compare U.C.C. § 9-301(1)(b) (lien creditors) with *id.* § 9-301(1)(c) (buyers) and *id.* § 9-301(1)(d) (transferees).

118. "Notice" includes, but it is not limited to, "knowledge." *Id.* § 1-201(25).

Code.<sup>119</sup> There is a second reason for not imposing additional prerequisites for priority under section 9-301(1)(c). When a duty to discover existing security interests and to warn the secured party of a competing claim to the collateral is a condition precedent to obtaining priority, Article 9 explicitly so states.<sup>120</sup> Article 9 imposes no such duty on the buyer in bulk. The only possible source of this duty for a buyer in bulk is Article 6.

The *Frydlewicz* court bases its ruling in favor of the unperfected secured party not only on a misguided interpretation of section 9-301(1)(c), but also on the premise that "[b]ut for the bulk sales law plaintiff [an unperfected secured party] might be without remedy."<sup>121</sup> This premise is erroneous. Even if the *Frydlewicz* rule is rejected and an unperfected security interest is ineffective against a noncomplying buyer in bulk, the secured party will not be without a remedy. Rather, the secured party will have the same remedies that the applicable state law affords other pre-transfer creditors<sup>122</sup> with no property interest in the transferred goods. Specifically, the secured party will have a right to reach the goods through levy or other judicial process, or the court may appoint a receiver to take control of the goods for the benefit of all the creditors.<sup>123</sup> If the buyer in bulk transfers the goods to a good faith purchaser, the once secured party may have the right to recover money damages from the noncomplying buyer.<sup>124</sup> In other

---

119. That is, notice that a buyer would have received had he complied with Article 6, had the seller included the secured party on the list of creditors, had the notice reached the secured party before the buyer took delivery and gave value, and had the secured party acted prior to that time.

120. Section 9-312(3) requires, as a condition of obtaining priority, that a purchase money secured party give written notification to the holder of a conflicting security interest in inventory. Section 9-114 contains a similar rule for consigned goods.

121. 67 Mich. App. at 423, 241 N.W.2d at 474.

122. See U.C.C. § 6-109 (explaining which creditors are protected by Article 6).

123. See *id.* § 6-104 comment 2; *id.* § 6-111 comment 2. For discussions of creditors' rights following a noncomplying bulk transfer, see, e.g., 6 W. HAWKLAND, *supra* note 43, §§ 6-104:09, :11; J. WHITE & R. SUMMERS, *supra* note 8, §§ 19-5, 19-7. In *Frydlewicz* the secured party and other creditors also may have been able to avoid the transfer as a fraudulent conveyance. See 67 Mich. App. at 423, 424, 241 N.W.2d at 474 (transfer made at less than wholesale cost; seller declared bankruptcy within the year); MICH. COMP. LAWS § 566.14 (1970) (U.F.C.A. § 4 (1919)); Bankruptcy Act of 1898 § 67d, 11 U.S.C. § 107d (1976) (repealed).

124. See U.C.C. § 6-110 (rights of transferees of bulk buyer); *id.* § 6-106 (optional section imposing duty on buyer to apply consideration to payment of seller's debts); *supra* note 43; *infra* note 162. For a comparison of the post-transfer rights of an unperfected secured party whose security interest survives the bulk transfer with those of an unsecured creditor (including an unperfected secured party whose security interest does not survive the bulk transfer), see *infra* notes 160-66 and accompanying text.

words, even if it were to lose its Article 9 remedies, an unperfected secured party whose security interest is cut off by a noncomplying buyer in bulk would retain the remedies of an aggrieved creditor under Article 6.<sup>125</sup> Indeed, to hold otherwise would place a creditor that takes security in a worse position than one that does not. That penalty is wholly inconsistent with the concept of security.

In resolving the competing claims, then, the issue is not whether to allow or deny all remedy to the unperfected secured party whose collateral is sold to a noncomplying buyer in bulk. Regardless of which result obtains, the unperfected secured party will have some remedy in addition to an action against the seller. The real issue is whether the unperfected secured party may enforce its security interest or whether it must look only to its Article 6 remedies. *Frydlewicz* holds that the security interest is not lost, and the following discussion explains my agreement with that result.

(b) *A More Appropriate Code Analysis*

Notwithstanding its shortcomings, *Frydlewicz* reaches a result that is consistent with both the language of the Code and the policies of Articles 6 and 9. Although the *Frydlewicz* court fails to realize it, section 9-301(1)(c) does lead the careful reader to the desired result without the need for redefining terms. The section provides that an unperfected security interest is subordinate to *the rights* of a transferee in bulk, not simply that the transferee always takes priority. To determine the extent of those rights, one must refer to Articles 2 and 6.

Normally, a buyer of goods acquires the rights of his transferor;<sup>126</sup> however, Article 6 penalizes the noncomplying buyer by making the transfer "ineffective" against creditors of the seller.<sup>127</sup> Comment 2 to section 6-104 explains that when a transfer is inef-

---

125. Cf. B. CLARK, *supra* note 89, at ¶ 6.7[1] n.106, ¶ 10.5[1] n.104 (a perfected secured party's Article 6 rights are completely independent of its Article 9 rights). A formerly secured party's Article 6 remedies may be lost with the passage of time, see U.C.C. § 6-111 (six-month statute of limitations), or because the bulk buyer's transferees assert superior claims to the goods. See *infra* notes 174-251 and accompanying text. Assertion of Article 6 rights by other aggrieved, unsecured creditors of the bulk seller may diminish or eliminate the formerly secured party's recovery. Inasmuch as one or more of these events might occur, the secured party "might" be without a remedy, as *Frydlewicz* suggests, if it loses its security interest upon a noncomplying bulk transfer. But even if the security interest were to survive the sale, the secured party "might" be without remedy. For example, a competing claimant might take the goods free of the security interest, see *infra* notes 233-51 and accompanying text, and the statute of limitations might run.

126. U.C.C. § 2-403(1) (first sentence).

127. *Id.* §§ 6-104(1), 6-105.

fective, creditors may "disregard the transfer and levy on the goods as still belonging to the transferor, or a receiver representing them can take them by whatever procedure the local law provides."<sup>128</sup> Following the comment, the cases suggest that unsecured creditors may use a variety of judicial remedies to reach the goods in the hands of the noncomplying buyer.<sup>129</sup> The comment's reference to levy and receivership suggests that it was written with unsecured creditors in mind, even though the transfer is ineffective against secured creditors as well.<sup>130</sup> A fair reading of the word "ineffective" as it applies to secured creditors should yield an analogous result: the secured creditor may disregard the transfer and treat the goods as still belonging to the transferor. That is, upon default the secured party may "foreclose or otherwise enforce the security interest by any available judicial procedure."<sup>131</sup>

By focusing on the rights of the noncomplying buyer in bulk, the foregoing gives coherent meaning to the precise language of both Article 6 and Article 9. It is not the only possible reading, and courts should not use it unless it leads to a sensible result. In my view, it does.

The priority provisions of section 9-301(1)(c) directly address the problem of ostensible ownership by enabling a person who is likely to be misled to his detriment by a secret security interest (e.g., a buyer in bulk) to take free of a security interest that is not publicized appropriately, provided that the person who may be

---

128. *Id.* § 6-104 comment 2. Comment 2 to § 6-111 suggests that an aggrieved creditor may use "not only levies of execution proper but also attachment, garnishment, trustee process, receivership, or whatever proceeding, under the state's practice, is used to apply a debtor's property to payment of his debts."

129. *See* *Vincent Brass & Aluminum Co. v. Johnson*, 149 Ga. App. 537, 254 S.E.2d 752, *rev'd on other grounds*, 244 Ga. 412, 260 S.E.2d 325 (1979) (garnishment); *Belber v. H.S.F., Inc.*, 26 Pa. D. & C.2d 796 (1961) (receiver); *see also, e.g., Anderson & Clayton Co. v. Earnest*, 610 S.W.2d 846 (Tex. Ct. App. 1980) (denying personal judgment against transferee; suggesting that creditors may levy execution, obtain injunctions, request receiver, or have transfer set aside).

130. *See supra* note 71.

131. U.C.C. § 9-501(1). Because transfers made in settlement or realization of security interests are not subject to Article 6, *id.* § 6-103(3), enforcement of a security interest ordinarily will not present Article 6 problems. *See, e.g., United States v. Gore*, 437 F. Supp. 344 (E.D. Pa. 1977); *Midland Bean Co. v. Farmers State Bank*, 37 Colo. App. 452, 552 P.2d 317 (1976). *But see, e.g., Starman v. John E. Wolfe, Inc.*, 490 S.W.2d 377, 382-83 (Mo. Ct. App. 1973) (the § 6-103(3) exemption applies only when the secured party has the right to foreclose at the time of the bulk transfer, the transfer is made to the secured party and not to a third party for the benefit of the secured party, and the consideration received for the transfer is used to extinguish the secured debt before being applied to unsecured debts).

misled does not create an ostensible ownership problem himself.<sup>132</sup> In the case under discussion, the noncomplying buyer in bulk has solved the ostensible ownership problem by taking delivery of the goods, and he ordinarily would prevail against the unperfected secured party. But the buyer has run afoul of another set of notice requirements, those of Article 6. By failing to notify the seller's creditors of the impending bulk sale, the buyer prevents the seller's creditor's from protecting themselves before the transfer and thus subjects himself to the penalty imposed by that article: creditors of the seller may use what have become the buyer's goods to satisfy their claims against the seller.

One might respond to this analysis by noting that although secured parties are entitled to notice of a bulk transfer, Article 6 was enacted to protect unsecured creditors.<sup>133</sup> Without an interest in the debtor's goods, those creditors face the bulk sales risk described in part II above. By taking collateral, a secured party reduces the bulk sales risk considerably, provided it publicizes its interest. Article 9, and not Article 6, alerts the secured party to the need to perfect its security interest, penalizes the secured party that fails to perfect, and protects the secured party that complies. Having excluded itself voluntarily from the class of unsecured creditors, a secured party arguably ought not benefit from legislation designed to protect that class. Moreover, by construing section 9-301(1)(c) to award priority to all buyers in bulk, including non-complying buyers, one affords unsecured creditors a much greater opportunity to satisfy their claims from the transferred goods, because those goods will not be encumbered.<sup>134</sup> Arguably this result

---

132. See *supra* note 106.

133. Weintraub & Levin, *Bulk Transfers—A Functional Approach to Article 6 of the Code*, 1C P. COOGAN, W. HOGAN, D. VAGTS & J. McDONNELL, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 22.01 (1985); cf. Billig & Smith, *Bulk Sales Laws: A Study in Code Interpretation*, 38 W. VA. L.Q. 309, 310 (1932) (referring to pre-Code bulk sales laws).

134. If a noncomplying buyer in bulk takes free of an unperfected security interest, the secured party will become unsecured. Any interest it subsequently acquires in the transferred goods, for example, by obtaining a judicial lien, will take priority over the interests acquired by the other unsecured creditors only if it is the first interest to arise. If, however, the unperfected security interest survives the sale, the secured party can take priority over the unsecured creditors with greater ease—by perfecting its security interest before unsecured creditors become lien creditors. U.C.C. § 9-301(1)(b). In either case, by taking collective action, a group of unsecured creditors may limit the secured party to its pro rata share of the value of the transferred goods. See, e.g., *Murdock v. Plymouth Enter.*, (*In re Curtina Int'l, Inc.*), 23 Bankr. 969 (Bankr. S.D.N.Y. 1982) (bulk seller's trustee in bankruptcy may assert Article 6 rights for the benefit of the estate); 11 U.S.C. §§ 303, 544(b), 547(b), 550 (1982).



is consistent with Article 6's efforts to protect unsecured creditors.

The foregoing response is inconclusive. First, nothing in Article 6 restricts its application to the rights of unsecured creditors; on the contrary, sections 6-109 and 1-201(12), as well as the drafting history of Article 6, suggest that Article 6 protects secured creditors.<sup>135</sup> Second, to the extent that a secured party is partially unsecured—that is, to the extent that the value of the collateral is less than the debt it secures—the secured party faces the same bulk sales risk and thus deserves the same Article 6 protection as a creditor who is completely unsecured. To deny a partially unsecured creditor the protection of Article 6 would create an unjustifiable distinction among similarly situated creditors. On the other hand, to require that notice be given to undersecured creditors but not to fully secured creditors would create difficult questions of valuation and needlessly would undermine the creditors' efforts to reduce the risk of the debtor's nonpayment. Finally, although historically the perceived plight of unsecured creditors prompted the enactment of bulk transfer laws, those laws, and their contemporary successor, were intended neither as general relief provisions

---

135. In its early drafts, the bulk transfer provisions of the Code specifically protected a wide array of creditors, including secured creditors, notwithstanding that the Code's general definition of "creditor," which derived from early drafts of Article 2, included only unsecured creditors. Compare U.C.C. § 1-201(11) (May 1949 draft) (definition of "creditor"), reprinted in 7 U.C.C. Drafts, *supra* note 17, at 19, with *id.* § 7-711(1), reprinted in 8 U.C.C. Drafts 688 (which creditors are protected by bulk transfer provisions). The October 1949 revisions removed the expansive definition of creditors in the bulk sales article, apparently leaving the narrow Article 1 definition to control. See U.C.C. § 9-109(1) (Oct. 1949 rev.), reprinted in 8 U.C.C. Drafts, *supra* note 17, at 557. But see Miller, *supra* note 17, at 280 ("Despite the absence of such language in this [1950 proposed final] draft, nothing appears to limit the breadth of the definition in any way.").

In 1955 the Code's Editorial Board recommended that the Article 1 definition of "creditor" in § 1-201(12) be widened "to include all classes of creditor," including secured creditors. American Law Institute & National Conference of Commissioners on Uniform State Laws, Supplement No. 1 to the Official Draft of Text and Comments of the Uniform Commercial Code 4 (1955), reprinted in 17 U.C.C. Drafts, *supra* note 17, at 322. Subsequent Code drafts all reflected a more inclusive definition. See 18-23 U.C.C. Drafts, *supra* note 17, *passim*. The Editorial Board's recommendation may have been made in response to the actions of the Association of the Bar of the City of New York, which cited § 1-201(12) as an example of a term that was given an "artificial meaning." Association of the Bar of the City of New York, Committee on Uniform State Laws, *Report on the Proposed Uniform Commercial Code*, at 9 (1953), reprinted in 15 U.C.C. Drafts, *supra* note 17, at 307, 317; 8 Rec. A.B. City N.Y. 56-57 (1953) (reporting Association approval of Committee Report); see also Weintraub & Levin, *supra* note 133 (mindful that a secured creditor may have an unsecured deficiency, the Code includes secured creditors within § 1-201(12) definition of "creditor" and affords them benefits of bulk transfer statute). The Code's protection of secured parties in Article 6 does not make a change from prevailing pre-Code bulk sales acts. See Annot., 85 A.L.R.2d 1211, 1238-39 (1962); Annot., 84 A.L.R. 1406, 1416, 1418 (1933).

for unsecured creditors nor as regulation of the relative rights of secured and unsecured creditors. Their intention is considerably more modest: to protect aggrieved creditors against a particular kind of debtor misconduct, the use of a bulk transfer as a means of avoiding payment. Article 6 attempts to achieve this protection by granting to the transferor's creditors rights against transferred goods and, in some cases, against the transferee himself. The rights of unsecured and secured creditors *inter se* are set forth clearly in Article 9. Nothing in Article 6 justifies adjusting them.<sup>136</sup>

(c) *An Economic Analysis*

The preceding subpart suggests a reading of section 9-301(1)(c) that protects the unperfected secured party's Article 9 rights at the expense of a noncomplying buyer in bulk and in a manner consistent with the language of the Code and the policies of both Article 6 and Article 9. The Code's resolution of these competing claims, however, is not free from ambiguity. Section 9-301(1)(c) is susceptible to more than one reading. As a consequence, external norms may be particularly appropriate guides to allocating the underlying loss when the buyer in bulk has failed to comply with Article 6 and the secured party has failed to cure an ostensible ownership problem.<sup>137</sup>

One common approach to problems of risk allocation is to impose the risk of loss on the party who can prevent or insure against the loss at less cost. This allocation usually has two effects. First, it minimizes the resources spent on loss avoidance, thereby freeing those resources for alternative uses. Second, because some losses are likely to exceed one party's cost of avoidance but be less than the other party's cost, allocating the loss to the efficient cost avoider is likely to reduce the total number of losses.<sup>138</sup>

---

136. The courts have construed optional U.C.C. § 6-106(1) as preserving the secured party's priority in the proceeds of a bulk transfer and obligating the buyer to distribute accordingly the consideration he pays for the goods. *Huguelet v. M & M Assocs.*, 375 So. 2d 1150 (Fla. Dist. Ct. App. 1979); *Bomanzi of Lexington, Inc. v. Tafel*, 415 S.W.2d 627 (Ky. Ct. App. 1967) (dictum); *William Isehn & Co. v. Delta Auction & Real Estate Co.*, 433 So. 2d 911 (Miss. 1983) (dictum); *cf. In re Clement Bulk Sale*, 98 Dauph. 55, 71 Pa. D. & C.2d 717 (1976) (pretransfer judicial lien creditor entitled to priority).

137. The Code contains its own norms. See U.C.C. § 1-102(2) (Code's underlying purposes and policies). When the Code resolves competing claims unambiguously, as it does, for example, in the cases discussed *supra* notes 18-58 and accompanying text, I do not discuss external norms, such as efficiency, in detail. I do, however, occasionally suggest that efficiency is not inconsistent with the results of my analysis. See, e.g., *supra* note 87; *infra* text accompanying notes 179-82.

138. For general discussions of an efficiency analysis of legal rules, see, e.g.,

To choose a rule that requires a case-by-case determination of the efficient cost avoider is both costly and inconsistent with the Code's approach to loss allocation.<sup>139</sup> Accordingly, a general rule for these cases may be preferable.<sup>140</sup> That rule would impose the risk of loss on the class of parties—unperfected secured parties or buyers—that is likely to be able to bear the loss at less cost. Unfortunately, as between secured parties and buyers in bulk, one cannot identify *a priori* the class of efficient cost avoiders.

The secured party and the buyer in bulk each can prevent the loss by complying with the notice requirements of Article 9 and Article 6 respectively. For the secured party, the costs would be those of perfecting the security interest and keeping it perfected, probably by filing.<sup>141</sup> These costs would include not only the costs of preparing and filing a financing statement, including the filing fees, which are usually low,<sup>142</sup> but also the potentially greater costs

N. MERCURO & T. RYAN, *LAW, ECONOMICS AND PUBLIC POLICY* (1984); R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977); *Symposium on Efficiency as a Legal Concern*, 8 *HOFSTRA L. REV.* 485 (1980). A. SCHWARTZ & R. SCOTT, *supra* note 31, applies efficiency analysis to a variety of Code rules. When each party has neglected to undertake antifraud measures (Article 9 filing and Article 6 notice), theories of corrective justice are unlikely to assist in allocating the risk of loss.

139. Costs would include not only litigation expenses (*e.g.*, attorneys' fees, delay, court costs) but also the costs of uncertainty. Professor David Morris Phillips suggests that when a loss occurs and no party is culpable, the Code tends to impose the loss according to a "strict liability" principle. "Such an approach implements a legislative calculation that, in general, parties within a certain class can more easily avoid loss than can members of the class to which their adversaries belong . . . . The doctrine is a probability calculus, not an inquiry directed to the actual circumstances of the parties." Phillips, *supra* note 58, at 232.

140. See A. SCHWARTZ & R. SCOTT, *supra* note 31, at 461. Professor Phillips points out that courts may not be properly equipped to identify in each case the party that could have avoided the loss at least cost. Phillips, *supra* note 58, at 277. He also notes several difficulties inherent in allocating loss according to the class to which the party belongs: the efficiency calculation underlying the rule may be based on an incomplete set of factors; it may become dated over time; and the rule is less flexible than judgments made on the basis of a party's intention, knowledge, or negligence. *Id.* at 232 n.11.

141. A security interest in goods can be perfected by the secured party's taking possession of the collateral. U.C.C. § 9-305. Because inventory and equipment typically are of greater value when left in the debtor's hands, filing is preferable. A secured party will be deemed to have possession of goods that are under the control of a field warehouse established at his behest. See *id.* (second sentence). Under a properly administered field warehouse, the debtor will be able to consummate sales of inventory in ordinary course but not out of the ordinary course, such as in bulk. Perfection through field warehousing is very likely to be more costly than perfection through filing. The debtor's need to use equipment prevents field warehousing from being an effective substitute for the secured party's taking possession of equipment. See *id.* § 9-205 (second sentence and comment 6). For a discussion of the history and uses of field warehousing, see generally Skilton, *Field Warehousing as a Financing Service* (pts. 1 & 2), 1961 *Wis. L. Rev.* 221, 403.

142. In very few states, filing fees are supplemented by taxes on secured debt. See,

of ascertaining the debtor's correct name and location,<sup>143</sup> determining where to file,<sup>144</sup> making multiple filings,<sup>145</sup> and monitoring the debtor to discover changes in the debtor's name and in the location of collateral.<sup>146</sup> That even sophisticated secured parties periodically are unperfected suggests that the costs of perfection are not so trivial as they might appear at first blush.

Nevertheless, these costs would seem to be less than the costs of complying with Article 6. The costs of Article 6 compliance are numerous. They include the costs of determining that the sale is subject to Article 6, preparing the notice, distributing the notice to creditors, preparing the schedule of property transferred, and making available to the seller's creditors the schedule and a sworn list of the creditors.<sup>147</sup> Disclosure of the fact that the transaction will occur and the particular details surrounding it may give rise to less obvious costs. For example, the buyer may lose a competitive advantage if his competitors discover that he is entering into a particular business or learn the cost of his inventory. Once they become aware of the impending change of ownership, the seller's trade creditors may be reluctant to continue to supply the business, thereby jeopardizing its continued operation. Some states impose upon the buyer the duty to apply the consideration he owes for the goods to the payment of the seller's debts.<sup>148</sup> Because some of these debts may be unliquidated, disputed, or entitled to prior-

---

*e.g.*, MD. ANN. CODE art. 81, § 277(a), (s) (1980 & Supp. 1984) (tax on "instrument of writing" at the rate of \$1.65 for each \$500 of the principal amount of debt secured under certain UCC financing statements). Payment of the taxes may be a prerequisite to perfection. *See American City Bank v. Western Auto Supply Co.*, 631 S.W.2d 410 (Tenn. Ct. App. 1981) (security interest perfected only to extent of tax paid). *But see Associates Commercial Corp. v. Sel-O-Rak Corp.*, 746 F.2d 1441 (11th Cir. 1984) (construing Florida law) (conditioning perfection on payment of tax does violence to both the language and purpose of Article 9).

143. *See, e.g., In re Raymond F. Sargent, Inc.*, 8 U.C.C. Rep. Serv. (Callaghan) 583 (Ref. D. Me. 1970) (financing statement showing "Raymond F. Sargent Co., Inc.," as debtor held ineffective); *In re Kalinoski*, 13 U.C.C. Rep. Serv. (Callaghan) 387 (Ref. W.D. Wis. 1973) (debtor located in the small part of Cuba City that is in LaFayette County; postal directory, official state highway map, and State Blue Book place Cuba City entirely in Grant County; filing in Grant County held ineffective).

144. *See supra* note 64.

145. *See, e.g., MASS. ANN. LAWS* ch. 106, § 9-401(1) (Michie/Law. Co-op. 1984) (third alternative subsection (1) to § 9-401).

146. *See* U.C.C. § 9-402(7) (changes in debtor's name); *id.* § 9-103 (multiple state transactions).

147. *See id.* §§ 6-104, 6-105, 6-107. Either the buyer may preserve the list and schedule for six months and permit the seller's creditors to inspect and copy them at all reasonable hours, or he may file the documents in a designated public office. *Id.* § 6-104(1)(c).

148. *See id.* § 6-106. Fewer than half the states have adopted this optional section. *See* 2A U.L.A. 314 (master ed. 1977); *id.* at 147-48 (Supp. 1985).

ity in payment, this task may be formidable.<sup>149</sup>

Both the secured party and the buyer in bulk may be able to prevent the loss by taking steps other than filing or giving a proper Article 6 notice. The secured party can monitor the debtor to discover an impending bulk sale. Once it discovers that the debtor is contemplating a bulk sale, the secured party can prevent the buyer from taking delivery or inform the buyer of the security interest, thereby preventing the buyer from qualifying for the protection of section 9-301(1)(c).<sup>150</sup> Similarly, the buyer could undertake to discover whether the goods are encumbered with a security interest. Presumably, most buyers make some investigation, perhaps by conducting a search of the UCC filings or by asking the debtor for financial information, so that they can discover perfected security interests. Discovery of unperfected security interests may require a more thorough, and therefore more costly, investigation. The risk of a noncomplying bulk sale notwithstanding, the administration of an inventory loan requires the secured party to monitor the debtor's business.<sup>151</sup> Thus the monitoring costs incurred in preventing a bulk sales loss may be less for the secured party than for the buyer, who often has no prior relationship with the debtor-seller and no prior experience buying in bulk.

Insuring against the loss is an alternative to preventing it by giving public notice or monitoring. Although neither the secured party nor the buyer in bulk is likely to have market insurance available, both parties can self-insure. For example, each can obtain a surety.<sup>152</sup> Alternatively or additionally, the secured party can

---

149. Sections 6-104(2) and 6-106(2) refer specifically to disputed claims. Comment 1 to § 6-109 states that "[t]he claims referred to of course include unliquidated claims"; accord Rapson, *supra* note 12, at 227 ("creditors" in Article 6 "probably includes" holders of unliquidated claims). *Contra* Aluminum Shapes, Inc. v. K-A Liquidating Co., 290 F. Supp. 356, 358 (W.D. Pa. 1968) (§ 6-109(1) "refers to persons holding liquidated claims rather than assertions of potential liability for breach of contract") (alternate holding). To the effect that the pro rata distribution required by § 6-106(3) is subject to priorities, see cases cited *supra* note 136.

150. Professors Baird and Jackson have criticized the Code's distinction among buyers on the basis of their knowledge. Baird & Jackson, *Information, Uncertainty, and the Transfer of Property*, 13 J. LEGAL STUD. 299, 312-18 (1984). Others have suggested that knowledge should play a greater role in Article 9's priority scheme. See, e.g., Felsenfeld, *Knowledge as a Factor in Determining Priorities Under the Uniform Commercial Code*, 42 N.Y.U. L. REV. 246 (1967); Nickles, *supra* note 86, at 72-103.

151. By selling inventory in ordinary course of business and dissipating the proceeds, the debtor can render the secured party unsecured.

152. For suggestions regarding the bulk buyer's use of a bond issued by a compensated surety, see Miller, *How to Conduct a Bulk Sale*, PRAC. LAW., Jan. 1955, at 78, 82. An uncompensated surety may be available. Indeed, an agreement by the selling corporation's parent

self-insure by raising interest charges, and the buyer can self-insure by decreasing the purchase price or increasing the price he charges to his customers. The secured party is likely to be in a better position to spread the risk. The secured party typically has many debtors, whereas the buyer in bulk is likely to have only one bulk seller. Because the loss often deprives him of the inventory transferred, the buyer in bulk may have greater difficulty passing the loss to his customers. On the other hand, the buyer in bulk is able in effect to reduce the purchase price by placing it in escrow or otherwise out of the seller's reach, to be available for the satisfaction of the seller's creditors until the statute of limitations runs. The apparent popularity of this technique suggests it is less costly than compliance with the notice requirements of Article 6.<sup>153</sup>

The cost of negotiating an arrangement whereby a portion of the purchase price is withheld to protect the noncomplying buyer in bulk against claims arising from Article 6 may be less than one first might imagine. The general rule that shields the buyer of business assets from liability for obligations incurred by the seller does not always afford complete immunity to the buyer.<sup>154</sup> For example, when the buyer continues to manufacture and distribute the seller's product line, some courts may impose strict tort liability upon the buyer for defects in products manufactured and distributed by the seller.<sup>155</sup> If he acquires the seller's real estate along

---

to indemnify the bulk buyer has been characterized as "the result of a standard business practice to provide financial savings and business security." *Mercantile Fin. Corp. v. P. & F. Indus.*, 63 A.D.2d 1014, 1014, 406 N.Y.S.2d 357, 358 (N.Y. App. Div. 1978); cf. U.C.C. § 7-710 (May 1949 draft), reprinted in 8 U.C.C. Drafts, *supra* note 17, at 687-88 (acceptance of the seller's bond with a corporate surety fulfills the bulk buyer's obligation to apply the sale proceeds to the seller's creditors). Section 7-710 was deleted in the October 1949 revision.

153. The use of an escrow as an alternative to compliance with Article 6 is discussed in, e.g., M. LANE, *PURCHASE AND SALE OF SMALL BUSINESS* 16 (1985); 6 W. HAWKLAND, *supra* note 43, Art. 6 at 72; cf. U.C.C. § 7-710 (May 1949 draft), reprinted in 8 U.C.C. Drafts, *supra* note 17, at 687 (deposit of sale proceeds with a responsible agency under an escrow agreement fulfills the bulk buyer's obligation to apply the sale proceeds to the seller's creditors). A number of attorneys whose practices involve bulk sales have commented to me that, in lieu of compliance with Article 6, the parties agree that some or all of the sale proceeds will be held by the seller or in escrow. Writing 30 years ago, Professor Miller suggested that establishing an escrow probably would be less costly than obtaining a bond. Miller, *supra* note 152, at 82.

154. See *supra* note 19.

155. See, e.g., *Ray v. Alad Corp.*, 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984); see also Phillips, *Product Line Continuity and Successor Corporation Liability*, 58 N.Y.U. L. Rev. 906 (1983) (discussing cases and offering a theory of liability), criticized in Schulman, *Commentary: Successor Corporation Liability and the Inadequacy of the Product Line Continuity Approach*, 31 WAYNE L. REV. 135 (1984). But see, e.g., *Bernard v. Kee Mfg. Co.*, 409 So. 2d

with the inventory, the buyer in bulk may be held liable for the costs of cleaning up environmental hazards created by the seller.<sup>156</sup> In some states, the buyer in bulk may become liable for taxes owed by the seller.<sup>157</sup> Because of the absence of market insurance, the parties not uncommonly set aside a portion of the purchase price from which the buyer can indemnify himself if he incurs liability.<sup>158</sup> These types of potential liability do not accompany every bulk sale, but when they do, they are likely to impose upon the seller considerably greater risks than does noncompliance with Article 6. Consequently, the marginal cost of expanding the withholding arrangement to take account of potential losses from failure to comply with Article 6 would seem to be small. Even when Article 6 risks predominate, the short, six-month limitations period for asserting Article 6 claims<sup>159</sup> reduces the costs of withholding a portion of the purchase price.

Based on the foregoing, it is difficult to determine which class of parties is able to avoid the loss at less cost. The costs of properly perfecting a security interest appear to be less than those of complying with Article 6; secured parties are likely to have lower monitoring costs than buyers in bulk; and they probably are able to spread the risk more efficiently. If most buyers in bulk would

---

1047 (Fla. 1982) (refusing to impose liability on the transferee); *Jones v. Johnson Mach. & Press Co.*, 211 Neb. 724, 320 N.W.2d 481 (1982) (same).

156. *See, e.g.*, *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); 42 U.S.C. § 9607(a) (1982).

157. *See, e.g.*, MICH. COMP. LAWS ANN. § 205.59(2) (West Supp. 1985); N.Y. TAX LAW § 1141 (McKinney Supp. 1986).

158. *See* Heitland, *Survival of Products Liability Claims in Assets Acquisitions*, 34 BUS. LAW. 489, 498 (1979) (suggesting that a buyer may wish to use an escrow of some or all of the purchase price to secure the seller's obligation to indemnify him).

159. U.C.C. § 6-111. Noncomplying buyers who set aside a portion of the purchase price in lieu of complying with Article 6 run the risk of extending the limitations period. Concealment of the transfer tolls the limitations period until the transfer is discovered. *Id.* Courts disagree about whether the failure to comply with Article 6 ipso facto constitutes a concealment. *See, e.g.*, *Lang v. Graham (In re Borba)*, 736 F.2d 1317 (9th Cir. 1984) (construing California law) (tolling provision of § 6-111 refers to affirmative concealment, not to mere failure to give notice); *Columbian Rope Co. v. Rinek Cordage Co.*, 314 Pa. Super. 585, 461 A.2d 312 (1983) (when circumstances do not reveal to creditors that transfer has occurred, complete failure to give notice is concealment); *SVM Inv. v. Mexican Exporters, Inc.*, 685 S.W.2d 424, 430 (Tex. Ct. App. 1985) (concealment requires affirmative efforts at concealing the transfer and complete and total failure to comply with Article 6 notice provisions). If the bulk seller files a bankruptcy petition during the six-month period, the statute of limitations is tolled. At any time during the two years following the filing of the petition, the seller's bankruptcy trustee may commence a proceeding to assert Article 6 rights. *See* *Murdock v. Plymouth Enters., (In re Curtina Int'l, Inc.)*, 23 Bankr. 969, 975 (Bankr. S.D.N.Y. 1982); 11 U.S.C. §§ 108, 544(b), 550 (1982).

withhold some or all of the purchase price regardless of the potential bulk sale risk, it would appear that, as a class, buyers in bulk are able to avoid the loss at less cost than secured parties. Otherwise, I am uncertain whether the costs of withholding are less than the costs that secured parties must incur to avoid the loss.

In determining the efficient cost avoider, one also must consider the possibility that for both parties, the cost of prevention may exceed the anticipated loss. In that case, to minimize losses, the loss should fall on the class of parties whose loss is likely to be lower. That class would seem to be the secured parties. The anticipated loss that a secured party would suffer if a noncomplying buyer in bulk took free of its unperfected security interest would be (a) the anticipated value of the loss of the security interest, reduced by (b) the anticipated value of other debt collection remedies. The former, (a), is a result of the net value of the goods (net proceeds following a foreclosure sale) and of any recovery against the buyer personally,<sup>160</sup> discounted by the likelihood of a noncomplying bulk transfer's occurring. The latter, (b), is the net recovery from other sources—from the debtor personally, from the goods transferred,<sup>161</sup> and from the buyer in bulk<sup>162</sup>—discounted by the

---

160. A secured party, whether perfected or unperfected, upon the debtor's default acquires the right to retake the goods from any person who holds them subject to a security interest, *see* U.C.C. §§ 9-306 comment 3, 9-503; Nickles, *supra* note 69, at 512-17 and cases cited therein, and recover the secured debt from the proceeds of a foreclosure sale, *see* U.C.C. § 9-504; Nickles, *supra* note 69, at 517-20. The secured party also may enforce the security interest through the judicial process. U.C.C. § 9-501(1). A bulk buyer who receives goods subject to a security interest and disposes of them may be personally liable to the secured party for their value on the theory of conversion. *See id.* § 9-306 comment 3; Nickles, *supra* note 69, at 520-39; *see also* Charles S. Martin Distrib. Co. v. Indon Indus., 134 Ga. App. 179, 181, 213 S.E.2d 900, 902-03, *aff'd*, 234 Ga. 845, 218 S.E.2d 562 (1975) (security interest was perfected).

161. If the security interest does not survive a bulk sale, the secured party would become unsecured and, like other unsecured creditors of the seller, would have to resort to judicial process to recover the goods from the bulk buyer. For discussions of the remedies of creditors aggrieved by a noncomplying bulk sale, *see, e.g.*, 6 W. HAWKLAND, *supra* note 43, §§ 6-104:09-11; J. WHITE & R. SUMMERS, *supra* note 8, §§ 19-5, 19-7.

162. At least one court has construed optional § 6-106 to impose upon a bulk buyer personal liability for the debts of the seller, up to the amount of new consideration payable to the buyer. *See* Darby v. Ewing's Home Furnishings, 278 F. Supp. 917 (W.D. Okla. 1967). Other courts have imposed personal liability on the noncomplying bulk buyer when the goods were unavailable to satisfy the claims of the seller's creditors. *See, e.g.*, Moskowitz v. Michaels Artists & Eng'g Supplies, Inc., 29 Colo. App. 44, 477 P.2d 465 (1970) (relying on Darby, although § 6-106 not locally enacted); Cornehius v. J & R Motor Supply Corp., 468 S.W.2d 781 (Ky. 1971) (relying on pre-Code law notwithstanding local enactment of § 6-106). Others have relied upon the failure to enact § 6-106 in a particular jurisdiction as one ground among others for refusing to impose personal liability on the noncomplying bulk buyer. *See* Bill Voorhees Co. v. R & S Camper Sales, 605 F.2d 888 (5th Cir. 1979) (applying



likelihood of recovery. If the loss were placed on the noncomplying buyer in bulk (that is, if he took the goods subject to an unperfected security interest), his anticipated loss would be greater than the secured party's because of both factors. The value of factor (a) would appear to be greater for buyers in bulk than for secured parties for two reasons. First, the value of the goods to the buyer is wholesale or retail value,<sup>163</sup> whereas the value to the secured party is a lower liquidation value, reduced by the costs of locating, retaking, and selling the goods.<sup>164</sup> Second, the likelihood that the goods are subject to an unperfected security interest is greater than the likelihood that they will be sold in a noncomplying bulk transfer. The value of (b) for buyers in bulk is likely to be lower than for secured parties. Although both have a right to recover from the seller,<sup>165</sup> the secured party has additional potential sources of recovery that reduce its anticipated loss. That is, the secured party that loses its security interest would have Article 6 rights against the goods and perhaps against the noncomplying buyer in bulk.<sup>166</sup>

In short, it appears that the class of secured parties will place a lower value on the loss than will the class of buyers in bulk. Accordingly, if costs of prevention exceed the loss for both classes, the loss should be placed on the secured parties, which value it less.

The inquiry, however, does not end here. Imposing the risk of loss on one party rather than the other may affect levels of compliance with Article 6 and Article 9 notice requirements. The buyer in bulk is likely to be sensitive to the allocation of the risk of loss because, when compared to the other risks of noncompliance, the risk of losing the goods to an unperfected secured party would be large. Aggrieved unsecured creditors must seek their remedy against him within six months after he takes possession of the goods; unperfected secured parties are likely to have a longer limi-

---

Alabama law). For a discussion of non-Code theories of personal liability, see *id.* at 890.

163. For equipment, the value will be use value.

164. The secured party may recover these costs from the proceeds of the sale of the collateral, see U.C.C. § 9-504(1)(a), or from the debtor personally. In the event that the secured party has a right to recover from the bulk buyer on the theory of conversion, see *supra* note 160, the value of factor (a) to the secured party would be the market value of the goods. See Nickles, *supra* note 69, at 536-39. In any case, the value of factor (a) to the secured party will not exceed the secured debt.

165. The debtor is liable to the secured party on the secured debt and to the bulk buyer for breach of the warranty of title in § 2-312(1)(b).

166. See *supra* notes 121-25, 161-62 and accompanying text.

tations period.<sup>167</sup> Whereas an unsecured creditor may be reluctant to invoke the judicial process, with its attendant costs and delay, the unperfected secured party may exercise self-help against the noncomplying buyer.<sup>168</sup> The debt owed to any particular unsecured creditor is likely to be smaller than a debt secured by inventory; accordingly, the aggrieved secured creditor is likely to obtain a

---

167. In determining the appropriate limitations period, one must distinguish between the rights Article 9 awards to a secured party and the rights Article 6 awards to aggrieved creditors of the bulk seller. The six-month statute of limitations in § 6-111 does not bar all remedies against the goods. Rather, it provides specifically that “[n]o action *under this Article* [6] shall be brought nor levy made more than six months after the date on which the transferee took possession of the goods.” U.C.C. § 6-111 (emphasis added). The *perfected* secured party’s cause of action against the buyer for conversion of the collateral, see Nickles, *supra* note 69; Wechsler, *supra* note 69, is independent from its Article 6 rights. Thus, regardless of whether the bulk buyer complies with Article 6, the perfected secured party is not bound by § 6-111 and instead may avail itself of the longer limitations period for conversion. See *Carpenter, Bennett & Morrissey v. Jones*, 197 N.J. Super. 475, 481, 485 A.2d 316, 319 (1984) (“If a claim is asserted based upon rights available irrespective of Article 6, the limitation section will not apply”; case did not involve a secured party). The *McBee* court’s assertion to the contrary, 714 F.2d at 1328, is erroneous. The Georgia Supreme Court makes a similar mistake. Although it recognizes the distinction between rights arising from noncompliance with Article 6 and rights that are independent from Article 6, it erroneously places a perfected secured party’s conversion action against a noncomplying bulk buyer in the former category. *Indon Indus., v. Charles S. Martin Distrib. Co.*, 234 Ga. 845, 218 S.E.2d 562 (1975).

The *McBee* court suggests further that the four-month period for refiling upon a name change of the debtor, U.C.C. § 9-402(7) (second sentence), is inapplicable to bulk transfer cases because “it would in effect reduce the specific provision in Article 6 from six to four months.” 714 F.2d at 1329 n.19. That suggestion also is incorrect. The four-month period in § 9-402(7), second sentence, is not a statute of limitations, nor does the expiration of the period affect the secured party’s rights in transferred goods. Rather, the sentence refers to the effectiveness of a financing statement, filed under the debtor’s original name, with respect to property acquired by the debtor after the debtor’s name changes. Even had *McBee* concerned a change of the debtor’s name instead of a transfer of collateral from the debtor to a third party, the effect of the second sentence in § 9-402(7) would do no more than to render unperfected a security interest in those goods acquired by the debtor more than four months after the name change. Although the secured party would lose priority in those after-acquired goods to a subsequent, perfected security interest, the secured party would not be barred from enforcing its security interest after the four-month period expired.

The text argues, and *Frydlewicz* holds, that unlike a perfected security interest, which survives regardless of whether the bulk buyer complies with Article 6, an unperfected security interest may survive in some cases solely because of the bulk buyer’s noncompliance. In those cases, one can argue that the secured party has rights in the transferred goods only because Article 6 makes the transfer “ineffective,” see U.C.C. §§ 6-104(1), 6-105, and that, accordingly, the six-month statute of limitations in § 6-111 should apply. On the other hand, one may argue that, absent an exception, a security agreement is effective against purchasers of the collateral, see *id.* § 9-201, and that therefore the unperfected secured party whose collateral is sold in a noncomplying bulk sale should have the same limitations period as any other secured party that enforces a security interest. To the extent one wishes to increase the costs to a noncomplying buyer, one would prefer the latter reading.

168. See *supra* note 160.

larger recovery. Thus, the loss incurred by denying a secured party its Article 6 protections may be greater than that incurred by omitting another creditor. Moreover, to the extent that secured debt constitutes a large portion of all the seller's debt, the relative importance of giving any notice at all increases. Finally, in many cases the buyer in bulk is likely to respond to the risk of losing the goods to an unperfected secured party by complying with Article 6, rather than withholding a portion of the purchase price. Withholding works well in part because the statute of limitations for asserting claims arising under Article 6 is a brief six months. As indicated, an aggrieved secured party whose security interest survives a bulk transfer may not be subject to the six-month limitations statute. The longer that the purchase price is withheld, the more costly the arrangement becomes. The costlier it becomes, the less likely it will be used.<sup>169</sup>

One cannot anticipate a similar responsiveness by secured parties to the allocation of loss. The anticipated loss to a noncomplying buyer in bulk is small relative to other losses attributable to being unperfected. A bulk sale jeopardizes only that portion of the inventory that is sold, and it is not a common occurrence. Bankruptcy filings are more frequent and cause an unperfected secured party to lose the entire collateral.<sup>170</sup> The relatively small increase in risk attributable to a noncomplying bulk transfer is likely to be insufficient to motivate an unperfected secured party to effectuate a proper filing. Inasmuch as many security interests are unperfected because of defective filings,<sup>171</sup> the secured party that does respond to the allocation of risk of a noncomplying bulk sale might respond through means other than a proper filing. For example, it might monitor the debtor more closely, discover the impending sale, and seize the collateral or inform the buyer of the security interest before the buyer receives delivery of the goods.

Buyers in bulk seem to be more likely to respond to differences in risk allocation than are secured parties.<sup>172</sup> A rule that pre-

---

169. Should withholding become more costly, bulk buyers may choose methods of loss prevention or insurance other than compliance with Article 6 (for example, reducing the purchase price or monitoring the debtor more intensively).

170. See 11 U.S.C. § 544(a)(1) (1982); U.C.C. § 9-301(1)(b); *id.* § 9-301(3).

171. See Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725, 734 n.26, 764 n.117 (1984). The text accompanying notes 142-45 *supra* suggests the major causes of filing errors.

172. The responsiveness of bulk buyers to risk allocation depends on their appreciation of the risks. An unknown but perhaps significant portion of bulk buyers is unaware of Article 6 and will not respond to increased risk. See *supra* note 46. Nevertheless, if the risks

serves an unperfected security interest in goods that are the subject of a noncomplying bulk sale probably would increase compliance with Article 6 without reducing Article 9 filings noticeably. Assuming that both Article 9 filing and compliance with Article 6 notice requirements are efficient,<sup>173</sup> that rule would be desirable. If, however, the class of secured parties is able to avoid the loss at less cost than the class of buyers in bulk, then one cannot determine which rule (preserving or destroying unperfected security interests in goods that are the subject of a noncomplying bulk sale) is more efficient. Being more certain of the differential compliance effect than of the relative costs of compliance, I would integrate Article 9 with Article 6 as suggested above: under section 9-301(1)(c) an unperfected security interest is subordinate to the rights of a noncomplying transferee in bulk; under sections 6-104, 6-105 and, where enacted, 6-106, failure to comply with Article 6 renders the transfer ineffective against creditors of the transferor; thus the rights that the noncomplying buyer acquires are no greater than those of his transferor—that is, they are subject to the unperfected security interest.

#### IV. THE RIGHTS OF A SECURED PARTY WHOSE COLLATERAL IS SOLD IN BULK AGAINST TRANSFEREES FROM THE BUYER

The preceding part discusses the rights of a secured party whose collateral has been sold in bulk to recover from the buyer of the collateral. This part considers how the transfer of the goods or of an interest in them to a third party affects the secured party's rights. Following the format of part III, this part first analyzes the rights of a perfected secured party and then evaluates the rights of one that is unperfected.

---

associated with noncompliance become greater, one can expect some increased awareness of Article 6. The present, widespread noncompliance with Article 6 results not only from ignorance of the statute's requirements, but also from calculated judgments made by informed bulk buyers. These buyers can be expected to respond to risk allocation.

173. I am assuming only that, given the legal recognition of secured credit, filing is efficient. I make no assumptions concerning the efficiency of secured credit itself. For discussions of the latter issue, see Jackson & Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143 (1979); Levmore, *Monitors and Freeriders in Commercial and Corporation Settings*, 92 YALE L.J. 49 (1982); Schwartz, *supra* note 30 (finding efficiency explanations of secured credit wanting); Schwartz, *The Continuing Puzzle of Secured Debt*, 37 VAND. L. REV. 1051 (1984) (same); White, *Efficiency Justifications for Personal Property Security*, 37 VAND. L. REV. 473 (1984). For expressions of doubt about the economic efficiency of Article 6, see A. SCHWARTZ & R. SCOTT, *supra* note 31, at 506; Rapson, *supra* note 14, *passim*.

A. *The Rights of a Perfected Secured Party*

1. Against a Secured Party Whose Debtor Is the Buyer in Bulk

As part III. A. explains, a perfected security interest in inventory survives a bulk sale, whether complying or noncomplying. The buyer in bulk may use the inventory to secure a debt to a different secured party. Which of the two security interests has priority? A proper reading of Article 9 awards priority to the seller's secured party (*SP1*), and Article 6 does not change this result.

(a) *Priorities in the Transferred Collateral: The General Rule*

Assume that after the buyer acquires the inventory, his secured party (*SP2*) extends a working capital loan and takes a security interest in the buyer's existing and after-acquired inventory and equipment, including the goods transferred in bulk. Under the general rule in section 9-312(5), *SP1* will have priority, inasmuch as it was the first to file its financing statement or perfect its security interest.

One can imagine a scenario in which *SP2* is the first to file or perfect. For example, the buyer in bulk may be an established merchant who, long prior to the bulk sale, granted a security interest in his existing and after-acquired inventory to *SP2*. If *SP2* were to file before *SP1*, then section 9-312(5) would appear to award priority to *SP2*. In my view, the application of section 9-312(5) to that priority dispute would be inappropriate.

The first-to-file-or-perfect rule of section 9-312(5) is a variation of the "first in time, first in right" rule that pervades property law. The latter rule is a specific application of the basic principle of conveyancing: one cannot convey better title than he has.<sup>174</sup> Once the debtor encumbers his interest in the goods with a security interest, any person whose interest derives from the debtor will take subject to the encumbrance. Thus, under a strict first-in-time rule, the first party to take a security interest in collateral would have priority over later secured parties. Section 9-312(5) modifies the rule to cure the ostensible ownership problem that was discussed in part II. For the first security interest to be effective against a subsequent secured party, the first creditor must publicize his interest, usually by filing. Among the penalties for failure to publicize is the loss of priority to subsequent creditors who may be disadvantaged by the absence of publicity.

---

174. See *supra* note 55.

Comment 1 to section 1-102 explains that "the proper construction of the [Code] requires that its interpretation and application be limited to its reason." In the case under consideration—the buyer in bulk acquires goods subject to *SP1*'s perfected security interest, *SP2*'s security interest attaches automatically to the after-acquired inventory, and *SP2* has filed before *SP1*—the reason for section 9-312(5) is inapplicable. Prior to the contract of sale between the buyer and the seller, the buyer had no rights in the inventory. Accordingly, *SP2* had no interest in the goods<sup>175</sup> and could not possibly have been disadvantaged by a secret security interest in favor of *SP1*. *SP1* publicized its interest by filing before *SP2*'s interest attached, and *SP2* could have discovered the encumbrance by checking the files.<sup>176</sup> Having failed to discover *SP1*'s security interest, *SP2* should take subject to it. Conversely, having appropriately cured the ostensible ownership problem before *SP2* could have relied to its detriment on the seller's apparently unencumbered ownership, *SP1* should not suffer a penalty when its debtor, without authorization, later sells the collateral in bulk. If one does not impose the penalty of section 9-312(5), one must apply the ordinary rule of section 2-403(1), under which the purchaser (*SP2*) acquires no greater rights than his transferor (the buyer) had or had power to convey; that is, *SP2* takes his security interest subject to those encumbrances that are effective against the buyer, including *SP1*'s security interest.<sup>177</sup>

Comment 5 to section 9-312 suggests a second justification for the first-to-file rule: "the necessity of protecting the filing system—that is, of allowing the secured party who has first filed to make subsequent advances without each time having, as a condi-

---

175. See U.C.C. § 9-203(1)(c).

176. Ordinary course sales cut off most security interests. See *id.* § 9-307(1). When *SP2*'s debtor acquires collateral that once may have been farm products, *SP2* has some reason to suspect that the goods may be encumbered by a security interest, inasmuch as § 9-307(1) does not cut off security interests in farm products even when the goods are sold to a buyer in ordinary course. There may be no similar warning that a bulk sale has occurred, because the relative size of the transfer, not its absolute size, and the nature of the transferor's enterprise are determinative. See *id.* § 6-102(1) (bulk transfer is transfer of "a major part" of the inventory of "an enterprise subject to this Article [6]"). Thus, as a practical matter, *SP2* may prefer to run the relatively small risk that its debtor is acquiring encumbered inventory as the transferee of a bulk transfer rather than to investigate the source of the debtor's title and the circumstances of the transfer. The fact that newly acquired equipment has been previously owned puts *SP2* on notice that the equipment may be subject to encumbrances. That risk may justify an investigation, which probably will be less costly than in the case of inventory.

177. See also *id.* § 9-201 ("a security agreement is effective . . . against purchasers of the collateral and against creditors").

tion of protection, to check for filings later than his." In the usual case, concerning only one debtor, the consequences of removing the search burden from the first to file and placing it on the second to file are not clearly undesirable. A potential creditor can check the filings, discover the first secured party's filing, and conduct himself accordingly. Ordinarily he will take second priority, but he can acquire first priority by taking a purchase money security interest and notifying the first secured party of that fact.<sup>178</sup>

When two debtors are involved, as may be the case following a bulk sale, the consequences of applying section 9-312(5) are clearly undesirable. When *SP1* takes a security interest in the seller's inventory, it will not discover *SP2*'s security interest because it has no reason to investigate the title of goods owned by persons other than its debtor. If section 9-312(5) were applied to the case under consideration, then *SP1* may be completely unable to protect itself;<sup>179</sup> whereas if *SP1* were afforded priority, then *SP2* would be able to discover that the inventory was encumbered and would refuse to make an advance against it. The Code generally affords the inventory lender considerable protection against third party claims to the collateral and so minimizes the need for an inventory lender

---

178. See *id.* § 9-312(3). For equipment and other noninventory collateral, giving notice is not a prerequisite for acquiring a purchase-money priority. See *id.* § 9-312(4).

179. Once the goods are identified to the contract, the buyer acquires rights in them and *SP2*'s security interest attaches. See *id.* § 2-501 (buyer's special property arises on identification); *id.* § 9-203(1)(c); 1 G. GILMORE, *supra* note 30, at 353; Baird & Jackson, *supra* note 58, at 203. If the seller remains in possession, *SP1* might be able to avoid the buyer's interest as a fraudulent conveyance under non-Code law and thus under § 2-402(2). The section's safe harbor for commercially reasonable retention of possession by a merchant-seller may not be available to the buyer, because retention arguably is not "in the current course of trade." U.C.C. § 2-402(2). Even if *SP1* can avoid the buyer's rights, *SP2* may qualify as a good faith purchaser for value from a person with voidable title and may take good title, free from *SP1*'s right to avoid the transfer to the buyer. See, e.g., *Shell Oil Co. v. Mills Oil Co.*, 717 F.2d 208 (5th Cir. 1983); *Lavonia Mfg. v. Emery Corp. (In re Emery Corp.)*, 52 Bankr. 944 (E.D. Pa. 1985); *Petroleum Specialties, Inc. v. McLouth Steel Corp. (In re McLouth Steel Corp.)*, 22 Bankr. 722 (Bankr. E.D. Mich. 1982); U.C.C. § 2-403(1) (second sentence); *id.* § 1-201(33). But see McDonnell, *The Floating Lienor as Good Faith Purchaser*, 50 S. CAL. L. REV. 429 (1977) (recommending that a secured party not be afforded good-faith-purchase treatment unless it relies to its detriment on particular after-acquired property); Rapson, A "Home Run" Application of Established Principles of Statutory Construction: U.C.C. Analogies, 5 CARDOZO L. REV. 441, 445-47 (1984) (same); see also *Collingwood Grain, Inc. v. Coast Trading Co. (In re Coast Trading Co.)*, 744 F.2d 686, 690-91 (9th Cir. 1984) (good-faith-purchase rights under § 2-403(1) do not arise until delivery to the buyer or the buyer's designee); Baird & Jackson, *supra* note 58, at 202-05 (buyer must have possession in order to convey good-faith-purchase rights); Dolan, *The Uniform Commercial Code and the Concept of Possession in the Marketing and Financing of Goods*, 56 TEX. L. REV. 1147, 1172-73 (1978) (suggesting that possession is a necessary element of voidable title).

to investigate the source of his collateral.<sup>180</sup> Nevertheless, an inventory lender may become aware that his debtor has acquired inventory through a transfer in bulk. Placing the risk of loss on *SP2*, who can prevent the loss by refusing to lend, rather than on *SP1*, who may be unable to prevent it,<sup>181</sup> seems reasonable. Thus, in the context of a bulk sale when each perfected secured party has a different debtor, I would read Article 9 to grant priority to *SP1* regardless of when each secured party filed.<sup>182</sup>

One can, however, read section 6-110 as reordering the priorities when a noncomplying buyer in bulk is *SP2*'s debtor. Section 6-110 provides as follows:

When the title of a transferee to property is subject to a defect by reason of his non-compliance with the requirements of this Article, then:

(1) a purchaser of any such property from such transferee who pays no value or who takes with notice of such non-compliance takes subject to such defect, but

(2) a purchaser for value in good faith and without such notice takes free of such defect.<sup>183</sup>

In *McBee* the inventory lender of the buyer in bulk (our *SP2*) argued that as a secured party it was a "purchaser," that it gave value and took its security interest in good faith and without notice of the buyer's failure to comply with Article 6, and that therefore it took its security interest free from the claims of the seller's

---

180. See U.C.C. § 9-307(1); *supra* note 176.

181. Even if *SP1* discovers that a debtor plans a bulk transfer, it may be too late for him to prevent *SP2*'s rights from arising. See *supra* note 179.

182. To the best of my knowledge, only two authors previously have recognized that § 9-312 may not apply to security interests created by different debtors and have attempted to explain why. Perhaps not coincidentally, the authors were colleagues at the University of Kansas Law School. Noting that all the examples in the comments to § 9-312 concern security interests created by a single debtor, Professor Charles H. Oldfather advances the proposition that the section contemplates only cases of that kind. Oldfather, *Floor Plan Financing Under Article 9 of the Uniform Commercial Code*, 14 U. KAN. L. REV. 571, 582-84 (1966). Although, as the text indicates, I agree with his conclusion, I do not endorse all the particulars of Professor Oldfather's analysis. For example, he argues by analogy to a case in which *SP2*'s debtor is a purchaser from a thief. There would be no priority contest at all in that case, however, because *SP2*'s debtor would have no rights in the collateral, and so *SP2*'s security interest would not attach. See U.C.C. § 9-203(1)(c). I am dubious also about Professor Oldfather's conclusions regarding cases in which *SP2* is a purchase money secured party. See *infra* notes 197-205 and accompanying text. Professor Barkley Clark's discussion of the "Double Debtor Dilemma" is more consistent with this Article's analysis. See B. CLARK, *supra* note 89, at ¶ 3.8[4] (1980); see also Skilton, *Security Interests in After-Acquired Property Under the Uniform Commercial Code*, 1974 WIS. L. REV. 925, 948 (citing Oldfather, *supra*, on the inapplicability of § 9-312 in a two-debtor case and concluding that *SP1* has priority because of §§ 9-306(2) and 2-403).

183. U.C.C. § 6-110.



perfected secured creditors (our *SP1*).<sup>184</sup> Finding *SP2*'s argument "not persuasive," the Fifth Circuit panel reaches the correct result.<sup>185</sup> Unfortunately, it constructs its own unpersuasive argument, which it bases on a tortured reading of section 6-110. The court acknowledges that under the Code the term "purchaser" may include a secured party.<sup>186</sup> It goes on, in the absence of authority, to "find it clear that the term as used in Section 6-110 was not intended to include secured creditors."<sup>187</sup> It proffers two reasons for its conclusion. One reason is the court's doubt about "whether a subsequent creditor could assert a claim that it took its interest 'without notice,'" inasmuch as *SP1* had filed a financing statement.<sup>188</sup> The court thus would charge the subsequent creditor (*SP2*) with "notice" of a perfected security interest, notwithstanding the Code's definition of "notice," which clearly does not include constructive notice from the filing system.<sup>189</sup> In other words, to support its refusal to follow the Code's definition of "purchaser," the court ignores as well the Code's definition of "notice" and substitutes for it the court's own definition. Even if one follows the *McBee* court's erroneous assumption that a subsequent secured party (e.g., *SP2*) has "notice" of a prior perfected security interest, that party would not ipso facto have notice of the particular fact that would disqualify it from receiving good-faith-purchase treatment under section 6-110(2): the buyer in bulk's "non-compliance with the requirements of this Article [6]."<sup>190</sup> The court's second argument for creating a special, Article 6 definition of "purchaser" is also weak. The court argues that, inasmuch as Article 6 contemplates that perfected security interests survive a noncomplying bulk sale, to allow a subsequent security interest to cut off those presale security interests would be "at odds with the specific purpose behind Article 6."<sup>191</sup>

The *McBee* court has difficulty because it neither reads section 6-110 carefully nor understands its purpose. The section does not provide that a good faith purchaser for value without notice

---

184. 714 F.2d at 1330.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. See U.C.C. § 1-201(25); cf. *id.* § 9-309 (Article 9 filing does not constitute notice to a holder in due course, a holder to whom a negotiable document of title has been duly negotiated, or a bona fide purchaser of a security).

190. *Id.* § 6-110(2).

191. 714 F.2d at 1330.

takes free of prior perfected security interests. It provides instead that a purchaser of that kind "takes free of such defect," a defect in the buyer's title "by reason of his non-compliance with the requirements of this Article [6]."<sup>192</sup> As discussed above, the *McBee* court is wrong in its belief that a buyer in bulk takes free of an existing, perfected security interest if the buyer complies with Article 6. In fact, Article 9 explicitly provides to the contrary, and Article 6 does not purport to enlarge the buyer's rights. A perfected security interest survives a bulk sale regardless of whether the buyer complies with Article 6.<sup>193</sup> The security interest therefore is not a title "defect by reason of [the buyer's] non-compliance with the requirements" of Article 6.<sup>194</sup> Accordingly, section 6-110 does not purport to affect the security interest. With section 6-110 inapplicable, the general priority rules apply, and *SP1* takes priority over *SP2* regardless of which party filed first.<sup>195</sup> The court is correct that the Code imposes upon *SP2* the risk of failing to discover *SP1*'s security interest.<sup>196</sup> But just as Article 9 (and not Article 6) provides for *SP1*'s perfected security interest to survive the bulk sale, so Article 9 and not Article 6 protects *SP1*'s priority over *SP2*.

The court's treatment of *SP1*'s filing as notice to *SP2* suggests that the court realizes that section 6-110 addresses a problem of ostensible ownership and that *SP1* has cured that problem by filing. Unfortunately, the court focuses on the wrong ostensible ownership problem. The priority rules of Article 9 address unpublicized security interests. Section 6-110 addresses the secret claims that Article 6 creates: the right of the seller's creditors to reach the goods in the hands of the buyer. If *SP2* justifiably relies to its detriment on the buyer's possession of the goods, then it will take free of those secret claims, not of all claims of the seller's creditors.

(b) *Priorities in the Transferred Collateral: SP2's Purchase Money Security Interest*

For a number of purposes, Article 9 affords special treatment to creditors whose loans enable their debtors to acquire rights in the collateral—purchase money secured parties.<sup>197</sup> Specifically, sec-

---

192. U.C.C. § 6-110.

193. See *supra* notes 64-102 and accompanying text.

194. U.C.C. § 6-110.

195. See *supra* notes 174-82 and accompanying text.

196. 714 F.2d at 1330.

197. See U.C.C. § 9-107(b).

tion 9-312(3) provides an exception to the first-to-file-or-perfect priority rule of section 9-312(5) and awards priority to the later, purchase money secured party, provided it properly and timely notifies the existing secured party of its interest. A commonly advanced reason for awarding priority to a purchase money secured party is to aid a debtor whose existing and after-acquired assets are encumbered in obtaining credit from another lender.<sup>198</sup> Absent the purchase-money priority, the new lender could not obtain priority in the newly acquired goods without the existing secured party's consent, and so it may be unwilling to lend. If the existing secured party is unwilling to consent or to advance additional credit, then the debtor may be unable to obtain credit from any source. The special priority thus "give[s] the debtor somewhat greater bargaining power and at least theoretically enlarge[s] his ability to get credit."<sup>199</sup> The purchase-money priority arguably is not inimical to the interests of the existing lender. Without the enabling loan, the debtor, and hence the secured party, would have no interest in the additional inventory.

For goods other than inventory, a purchase money secured party obtains priority if it perfects its purchase money security interest no later than ten days after the debtor receives possession of the collateral.<sup>200</sup> Inventory presents special ostensible ownership problems, for which the Code prescribes special prerequisites to obtaining purchase-money priority. Chief among these prerequisites is giving advance written notice to the holder of a conflicting security interest in the same type of inventory.<sup>201</sup> As comment 3 to section 9-312 explains, unlike lenders whose collateral is, say, equipment, a secured party with an interest in after-acquired inventory often agrees to make periodic advances to the debtor against newly acquired inventory. If the first secured party knows that another secured party may have purchase-money priority, it is not likely to be defrauded by the debtor into making an advance against encumbered property.

Suppose that *SP2* agrees to finance the acquisition of inventory in a bulk sale. Upon discovering *SP1*'s interest, *SP2* complies

---

198. *E.g.*, J. WHITE & R. SUMMERS, *supra* note 8, at 1043.

199. *Id.*

200. U.C.C. § 9-312(4). Some states have extended this period to 20 days. *E.g.*, ILL. REV. STAT. ch. 26, § 9-312(4) (1985); TEX. BUS. & COMM. CODE ANN. § 9.312(d) (Vernon Supp. 1986).

201. *See* U.C.C. § 9-312(3). The other major requirement is that the purchase money security interest be perfected at the time the debtor receives possession of the inventory. *Id.*

with all the requirements of section 9-312(3). Will *SP2* obtain priority? Although the language of the section suggests an affirmative answer, the better answer is "no." The purchase-money priority was designed for cases concerning a single debtor who grants a security interest in after-acquired property to one creditor and who subsequently grants a purchase money security interest to a second creditor in property covered by the first creditor's after-acquired property clause.<sup>202</sup> Our priority contest, like the non-purchase-money contest discussed above, is atypical in that *SP1* and *SP2* do not share a common debtor. As with the first-in-time rule of section 9-312(5), the rationale for the purchase-money rule in section 9-312(3) is inapplicable to a case in which each secured party has a different debtor. The reason for the purchase-money priority is to aid a debtor in obtaining credit, without adversely affecting the in-

---

202. Professors Jackson and Kronman note that there is a "logical link between security interests in after-acquired property and purchase money security interests," as well as a "strong and clear historical link between them." Jackson & Kronman, *supra* note 173, at 1165 n.70. They even state that "[i]f the law did not allow security interests in after-acquired property, no special priority rule for purchase money security interests would be necessary." *Id.* (relying on 2 G. GILMORE, *supra* note 30, § 28.1, at 746, and Note, *The Priority Conflict Between a Purchase Money Security Interest and a Prior Security Interest in Future Accounts Receivable*, 22 VAND. L. REV. 1157, 1159 (1969)).

Interestingly, the theory of purchase-money priority, as it originally developed, was consistent with first-in-time and security of property principles. The first creditor acquired no greater rights to after-acquired property than did its debtor. The purchase-money priority originally extended only to conditional vendors, who retained an interest (title) in the goods to secure the purchase price. Accordingly, the debtor acquired an encumbered interest, to which the creditor's interest in after-acquired property thereafter attached. *See, e.g.*, *United States v. New Orleans R.R.*, 79 U.S. (12 Wall.) 362, 365 (1870). The UCC has undercut the foundations of this theory. It has expanded the concept of purchase money security interest to include those "taken" to secure an enabling loan from one other than the seller. *Compare* U.C.C. § 9-107(b) with *e.g.*, *Hughbanks, Inc. v. Gourley*, 12 Wash. 2d 44, 120 P.2d 523 (1941). For many cases the UCC provides that the security interest in after-acquired property and the purchase money security interest attach and become perfected simultaneously, when the debtor acquires rights in the collateral. *See* U.C.C. § 9-203(1) (when security interest attaches); *id.* § 9-303 (when security interest perfected). It makes timely public notice a prerequisite for purchase-money priority. *Compare id.* § 9-312(3) and *id.* § 9-312(4) with *New Orleans R.R.*, 79 U.S. (12 Wall.) at 365. Nevertheless, the original concept of title retention has not disappeared altogether. *See, e.g.*, *International Harvester Credit Corp. v. American Nat'l Bank*, 296 So. 2d 32 (Fla. 1974) (security interest in after-acquired property attaches only to the debtor's equity), *overruled*, 1978 Fla. Laws 222; *cf.* S. REP. NO. 1708, 89th Cong., 2d Sess. 4, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 3722, 3725 (explaining priority of purchase money mortgages over previously filed federal tax lien on the ground that the taxpayer acquires a right to lien property only to the extent the property's value exceeds the purchase-money debt).

In the case under consideration, *SP1*'s perfected security interest arises first—before the buyer in bulk, and hence his purchase money secured party (*SP2*), acquires any interest in the goods. To award *SP2* priority would have the curious effect of reversing the first-in-time rule from which the present purchase-money priority derives.

terests of the original secured party. In a two-debtor case, *SP2* does not need a special priority rule as an incentive to finance the inventory purchase. If the buyer were to purchase unencumbered merchandise, instead of goods subject to a security interest, *SP2* would be able easily to acquire a first-priority security interest. In that case, *SP2* should be willing to extend credit to the buyer for the acquisition of inventory, even without a purchase-money priority over *SP1*.<sup>203</sup> When there are two debtors, *SP2*'s need for the special priority arises not because the Code's ordinary priority rules favor the first to file, but because *SP2*'s debtor chooses to acquire encumbered goods. Moreover, in a two-debtor case, one cannot justify giving *SP2* priority on the ground that but for *SP2*'s enabling loan, *SP1* would not acquire any rights in the collateral. On the contrary, the award of priority to *SP2* would come at the expense of *SP1* and often would have the effect of depriving *SP1* of its collateral altogether.<sup>204</sup> The buyer took subject to *SP1*'s security interest; *SP2*'s rights derive from the buyer; *SP2* can discover *SP1*'s perfected interest. In the absence of a good reason to prefer *SP2* at *SP1*'s expense, section 9-312(3) should not be read to apply to cases, like those that may arise in a bulk sale, that concern two debtors. Instead, the basic conveyancing principle—the transferee acquires no greater title than his transferor has—should apply.<sup>205</sup>

---

203. Professors Jackson and Kronman observe that an after-acquired property clause saves transaction costs, but creates a situational monopoly that increases the cost to the debtor of subsequent credit from other creditors. In their view, the purchase-money priority is efficient because it preserves those transaction costs savings while blunting the monopoly, without the need to incur the cost of negotiating a contract that would compensate the original secured party for the effects of the monopoly. In two-debtor cases, *SP1* has no monopoly power over *SP2*'s debtor. Accordingly, the first-in-time rule, which ordinarily is more efficient, should apply. Cf. Jackson & Kronman, *supra* note 173, at 1161-64 (arguing that first-in-time rule is efficient in the single-debtor context).

204. Because the price paid for inventory purchased in bulk cannot be expected to approach the sum of the prices for which the inventory could be sold in ordinary course, see Nickles, *supra* note 86, at 119 n.689, *SP1*'s right to the proceeds of a bulk sale is an inadequate substitute for continuation of the security interest.

205. Accordingly, the dicta that § 9-312(3) might apply to priority disputes between our *SP1* and *SP2* are incorrect. *In re McBee*, 714 F.2d at 1331 n.21, 1327 n.16. *McBee* is not alone in its assumption that the purchase-money priority rules would apply to security interests created by two different debtors and enable *SP2* to prevail over *SP1* when *SP2*'s debtor acquired the goods subject to *SP1*'s security interest. See *Universal C.I.T. Credit Corp. v. Middlesboro Motor Sales, Inc.*, 424 S.W.2d 409, 413 (Ky. 1968) (dictum) ("It could be that [§ 9-306(2)] is broad enough to protect [*SP2*], which with no knowledge of violation of [*SP1*'s security] agreement, loans money in this type situation in reliance on the apparent authority of the retailer [*SP1*'s debtor] to make the sales."); 2 G. GILMORE, *supra* note 30, at 913-14; cf. *National Bank of Commerce v. First Nat'l Bank & Trust Co.*, 446 P.2d 277, 282

(c) *Priorities in the Buyer's After-Acquired Collateral*

The preceding subparts resolve the competing claims of the seller's secured party (*SP1*) and the buyer's secured party (*SP2*) to goods that are the subject of a bulk transfer. They conclude that when its security interest is perfected, *SP1* will have priority, even if *SP2* files first or has a purchase money security interest. This subpart considers the competing claims of the two secured parties to goods that the buyer in bulk acquires after the bulk sale. In sharp contrast to the result that obtains for the transferred goods, *SP2*'s claim to the buyer's after-acquired property nearly always will prevail. Indeed, in most cases *SP1* will have no claim at all to those goods.

Although its security agreement is likely to cover after-acquired inventory,<sup>206</sup> *SP1*'s security interest will not attach to any particular item of inventory and will not become enforceable against that item unless *SP1*'s debtor, the seller in bulk, has rights in the collateral.<sup>207</sup> This fundamental Article 9 rule is a particularized restatement of the basic principle of conveyancing: one cannot transfer an interest in property in which one has no interest.<sup>208</sup> Even though the buyer in bulk may continue to do business under the trade name of the seller, at the same location, and using the same assets, the two parties usually are distinct legal persons. The

---

(Okla. 1968) (*SP1* awarded priority under § 9-312(4) and as first to file). Two commentators have expressed sympathy for *SP2* when *SP2*'s debtor is a retail buyer who does not qualify as a buyer in ordinary course. See Oldfather, *supra* note 182, at 584 ("at best by inclusion as a buyer in ordinary course or at worst under the general principles of estoppel pervading the floor plan area, [*SP2*] may find its due measure of protection"); Skilton, *Buyer in Ordinary Course of Business Under Article 9 of the Uniform Commercial Code (and Related Matters)*, 1974 Wis. L. Rev. 1, 87 (priority depends on assessing the risks *SP1* should be said to assume in becoming an inventory financier). This Article suggests that estoppel against *SP1* should not be presumed, see *supra* text accompanying notes 91-95, and that placing the risk of loss on *SP2* is likely to be economically efficient. See *supra* notes 179-82 and accompanying text; *supra* note 203.

206. Even if a security agreement covering inventory lacks an after-acquired property clause, a court may construe the agreement to cover both existing and after-acquired inventory. *E.g.*, *In re Fibre Glass Boat Corp.*, 324 F. Supp. 1054, 1056 (S.D. Fla. 1971); *Borg-Warner Acceptance Corp. v. Wolfe City Nat'l Bank*, 544 S.W.2d 947, 950-51 (Tex. Ct. App. 1976). *But see, e.g.*, *In re Taylored Prods., Inc.*, 5 U.C.C. Rep. Serv. (Callaghan) 286, 289-91 (Ref. W.D. Mich. 1968).

207. U.C.C. § 9-203(1)(c). *Houchen v. First Nat'l Bank (In re Taylorville Eisner Agency, Inc.)*, 445 F. Supp. 665 (S.D. Ill 1977), holds that, under the last sentence of § 9-402(7), a secured party with an after-acquired property clause obtains a security interest in property that its debtor's transferee acquires after the transfer from persons other than the debtor. The case is wrong and has been criticized. See, *e.g.*, Burke, *The Duty to Refile Under Section 9-402(7) of the Revised Article 9*, 35 Bus. Law. 1083, 1100-02 (1980).

208. See *supra* note 55.

seller thus has no rights in inventory that the buyer in bulk acquires from third parties. Accordingly, there is no priority contest for that inventory. *SP2*'s security interest is the only enforceable security interest in the goods.

The recent Fifth Circuit opinion in *McBee* directly considers the priority of competing secured parties in inventory that a non-complying buyer in bulk acquired after the bulk sale. Remarkably, the court gives the seller's secured party priority in the post-bulk-sale inventory, but only to the extent of the value of the inventory transferred in the bulk sale.<sup>209</sup> That the result in *McBee* may be incorrect<sup>210</sup> is not nearly so disturbing as the serious error in the court's analysis. Consider the implications of the following passage:

In the immediate case, all of the secured parties had a security interest in the after-acquired property. By virtue of [the buyer's] failure to comply with Article 6, this security interest in the ever-changing inventory-collateral remained effective. [*SP2*'s] contention that [the seller's] creditors' interest, if any, was limited to the actual inventory transferred and which remained with the gun shop at the time of [the buyer's] bankruptcy is therefore without merit.<sup>211</sup>

For no apparent commercial purpose, the court permits the seller to alienate the buyer's property without the buyer's consent. The court's fundamental misunderstanding of the operation of an after-acquired property clause thus leads the court to violate a basic principle of personal property law that the Code embodies.

Notwithstanding the general rule, the Code does provide two rather limited ways in which *SP1* can obtain a security interest in inventory that the buyer in bulk acquires from parties other than *SP1*'s debtor. Interestingly, the successful use of either route is unrelated to *SP1*'s claim to after-acquired property, which the *McBee* court finds so essential.<sup>212</sup>

First, suppose that the buyer sells some of the transferred inventory for cash and uses the cash to purchase new inventory from a third party. In that case, the cash and new inventory are the proceeds of *SP1*'s original collateral, and *SP1*'s security interest

---

209. 714 F.2d at 1332.

210. For a discussion of the narrow circumstances under which the *McBee* result would be correct, see *infra* text accompanying notes 219-25.

211. 714 F.2d at 1331.

212. Although the Fifth Circuit does not describe the scope of the various security agreements, it does cite cases to the effect that unless the security agreement contraindicates, a security interest in "inventory" includes both existing and after-acquired inventory. *Id.* at 1330-31, 1325 n.10. The bankruptcy court does likewise. *In re McBee*, 20 Bankr. 361 (Bankr. W.D. Tex. 1982), *rev'd* 714 F.2d 1316 (5th Cir. 1983).

continues in them, to the extent that they are identifiable.<sup>213</sup> *SP2*'s security interest likewise will continue.<sup>214</sup> Under the normal rule that priority in proceeds dates from priority in the original collateral, *SP1* will have priority in the new inventory.<sup>215</sup> One difficulty inherent in acquiring a security interest in the new inventory as proceeds is the need for *SP1* to identify particular inventory as having been purchased with the proceeds of inventory transferred in bulk.<sup>216</sup> The buyer in bulk may prevent *SP1* from tracing its original collateral (the goods transferred in bulk) to new inventory if the buyer commingles the original collateral with inventory acquired from other sources.

---

213. *Moister v. National Bank (In re Guaranteed Muffler Supply Co.)*, 1 Bankr. 324, 328-29 (Bankr. N.D. Ga. 1979) ("proceeds" includes proceeds from sale of collateral by bulk transferee); see *Peoples State Bank v. San Juan Packers, Inc. (In re San Juan Packers, Inc.)*, 696 F.2d 707, 709-10 (9th Cir. 1983) ("proceeds" includes proceeds from sale by debtor's transferee, who is a "debtor" under § 9-105(1)(d)); *Baker Prod. Credit Ass'n v. Long Creek Meat Co.*, 266 Or. 643, 650, 513 P.2d 1129, 1132-33 (1973) ("proceeds" includes whatever is received upon the sale of collateral by debtor's transferee); U.C.C. § 9-306(1) ("[p]roceeds" includes whatever is received upon the sale . . . of collateral"); *id.* § 9-306(2) ("security interest continues . . . in any indentifiable proceeds including collections received by the debtor"). *Contra Get It Kwik of Am., Inc. v. First Ala. Bank*, 361 So. 2d 568, 572 (Ala. Civ. App. 1978) ("proceeds" does not include proceeds from sale of collateral by bulk buyer); see *Beneficial Fin. Co. v. Colonial Trading Co.*, 81 York Leg. Rec. 87, 88, 43 Pa. D. & C.2d 131, 132 (1967) (secured party has no right of action in assumpsit against purchaser of collateral, "either for original debt or for the proceeds of resale"). By enabling a debtor to grant a security interest in proceeds received by a third party who buys the collateral from the debtor and then sells it, § 9-306(2) creates an exception to the *nemo dat* rule described *supra* note 55.

214. See U.C.C. § 9-306(2). In addition to being *SP2*'s proceeds, the new inventory will be *SP2*'s original collateral under the after-acquired property clause of its security agreement. See *id.* § 9-204(1). The Fifth Circuit to the contrary notwithstanding, the new inventory will not be *SP1*'s original collateral. Compare *In re McBee*, 714 F.2d at 1331 n.21 with U.C.C. § 9-203(1)(c). But see *infra* text accompanying notes 219-25.

215. See generally U.C.C. §§ 9-306(2), 9-306(3), 9-312(5), 9-312(6). Although none of these sections deals directly with the issue at hand, they all support the "normal rule" of the text. The problem becomes more complicated if *SP1*'s security interest becomes unperfected but *SP2*'s does not. This may occur, for example, if inventory is sold on open account and *SP1* has not filed in the jurisdiction in which the debtor is located. Compare *id.* § 9-103(1)(b) (place of filing for ordinary goods) with *id.* § 9-103(3)(b) (place of filing for accounts). Even if *SP2* likewise becomes unperfected, *SP2*'s security interest will attach to new inventory acquired with the proceeds of the account and will be perfected upon attachment. See *id.* §§ 9-203(1), 9-303. For discussions of the problems created by lapsed perfection, see Pearson, *Absolute Versus Conditional Protection for Secured Parties: Problems of Lapsed Perfection Under Article 9 of the Uniform Commercial Code*, 17 Hous. L. Rev. 1 (1979); Zaretsky, *Lapse of Perfection in Secured Transactions: A Search for a Consistent Approach*, 22 B.C.L. Rev. 247 (1981).

216. See, e.g., *Howarth v. Universal C.I.T. Credit Corp.*, 203 F. Supp. 279, 282 (W.D. Pa. 1962) (burden on secured party to trace cash proceeds received from disposition of collateral into debtor's bank account).



Ironically, the same commingling that may deny *SP1* the benefit of the proceeds rule may provide another means by which *SP1* may obtain a security interest in goods that the buyer in bulk acquires after the bulk sale. Section 9-315(1) provides that, if a security interest in goods is perfected before "the goods are so . . . commingled that their identity is lost in the . . . mass," then the security interest continues in the mass.<sup>217</sup> This statutory analogue to the equitable doctrine of confusion of goods arguably awards to *SP1* a security interest in the entire inventory of the buyer in bulk, including goods acquired after the transfer in bulk, if commingling has prevented *SP1* from identifying its collateral.<sup>218</sup>

To see how commingling affects *SP1*'s rights, assume that the transferred inventory is subject to *SP1*'s perfected security interest, that the buyer commingles the inventory with existing or after-acquired inventory, and that *SP2* has not yet taken a security interest. Because *SP1* has a perfected security interest in the transferred inventory, section 9-315 awards *SP1* a security interest in the inventory that the buyer commingles with the transferred inventory. *SP1* may enforce this security interest only to the extent

---

217. U.C.C. § 9-315(1)(a).

218. The comments to § 9-315 suggest that the section is limited to cases in which a secured party's collateral contributes to a product in which there are conflicting claims. The comments cite as examples cases in which different ingredients (such as flour and eggs) are commingled into a product (such as cake) and in which components are assembled into a machine. Professor Gilmore's discussion likewise ignores the possible application of § 9-315 to the commingling of different inventory from various sources by, for example, storing identical inventory from different sources in a single warehouse without keeping a record of which inventory came from what source. See 2 G. GILMORE, *supra* note 30, at § 31.4. The very few cases that have considered the issue have applied the section to commingled, fungible goods. See *Peoples State Bank v. San Juan Packers, Inc.* (*In re San Juan Packers, Inc.*), 696 F.2d 707 (9th Cir. 1983) (unprocessed vegetables of food processor); *First Sec. Bank v. Zions First Nat'l Bank*, 537 P.2d 1024 (Utah 1975) (work in process, raw materials, and stock in trade of electronics manufacturer).

Section 9-315 appears to codify the equitable rule that when the property of two persons is wrongfully mingled, equity will grant to each a proportionate share of the whole. See *RESTATEMENT OF RESTITUTION* §§ 214, 211 (1937). Although the rule is applied most often to commingling of funds, it has been applied also to commingling of goods. See *id.* In their brief commentary on *McBee*, Professors Leary and Frisch write, "A distinction can and should be made between a secured party's property interest in the [inventory] itself, which is transferred, and the interest, historically an equitable interest, in having the security interest attach to purchases made by one other than the debtor." Leary & Frisch, *Uniform Commercial Code Annual Survey: General Provisions, Sales, Bulk Transfers, and Documents of Title*, 39 BUS. LAW. 1851, 1903 (1984). Apparently, the equitable interest to which they refer is the equitable lien that arises on commingling, which at least one of the authors believes is codified in § 9-315. See Frisch, *UCC Section 9-315: A Historical and Modern Perspective*, 70 MINN. L. REV. 1, 24 (1985). Professor Frisch's article traces the development of the doctrine of confusion as well as the drafting history of § 9-315.

of the value of the goods transferred.<sup>219</sup> *SP2*'s security interest, once it attaches, is subordinate to *SP1*'s to the extent of the value of the goods transferred; that is, *SP2* is entitled to the balance of the value of the inventory up to the amount of its advances. If the buyer in bulk acquires and commingles additional inventory between the time *SP2*'s interest attaches and the filing of the buyer's bankruptcy petition, *SP2* would be entitled to the value of that inventory as well. As long as the buyer in bulk acquires, but does not sell, inventory then *SP1* would have priority in an amount equal to the value of the collateral transferred, and *SP2* would be entitled to the remainder.

A simple example will make this clear. Assume that *B* owns no inventory and has no secured lender. As the result of a bulk sale, *B* acquires inventory worth \$10,000 subject to *SP1*'s perfected security interest. As *B* acquires new inventory and commingles it with the transferred inventory, *SP1*'s security interest attaches to the mass. Suppose that as of the date *SP2* takes its security interest from *B*, *B* has \$12,000 in inventory—\$10,000 of which was received in the bulk sale and \$2000 of which was acquired thereafter. Notwithstanding the language of section 9-315(1), *SP1* should be able to enforce its security interest only in \$10,000 of the collateral.<sup>220</sup> *SP2* is entitled to the remaining \$2000. As *B* acquires more collateral and commingles it, *SP2*'s share increases, so that if *B* increases his commingled inventory by \$3000, *SP1*'s share remains \$10,000, and *SP2*'s becomes \$5000.

Section 9-315(2) is designed to resolve priority disputes in commingled goods; unfortunately, it does not work in the case under discussion.<sup>221</sup> To avoid dealing with subsection (2) alto-

---

219. Nothing in § 9-315 limits the secured party's interest in the mass that includes his collateral to the value of the collateral commingled. There seems to be no reason to enable an undersecured secured party to improve his position as a consequence of the debtor's wrongdoing, and that result would be contrary to analogous equitable principles. See RESTATEMENT OF RESTITUTION § 214 & comment a (1937); cf. *id.* § 209 (rule regarding commingling of money). Professor Frisch has reached the same conclusion. See Frisch, *supra* note 218, at 41-45.

220. See *supra* note 219.

221. Section 9-315(2) provides: "When under subsection (1) more than one security interest attaches to the product or mass, they rank equally according to the ratio that the cost of the goods to which each interest originally attached bears to the cost of the total product or mass." Presumably, "the cost of the goods to which [*SP1*'s] security interest originally attached" is the cost of the goods before any commingling, or \$10,000. Inasmuch as *SP2* took a security interest in all the inventory, "the cost of the goods to which [*SP2*'s] interest originally attached" would seem to be "the cost of the total . . . mass," or \$12,000. If so, *SP2*'s security interest cannot "rank equally" with *SP1*'s, because the sum of the "ratio[s] that the cost of the goods to which each interest originally attached bears to the cost

gether, one can argue that *SP2*'s security interest did not attach to the mass by virtue of commingling "under subsection (1)," but rather by virtue of its security agreement under sections 9-201 and 9-203(1). Under this approach, section 9-315(2) by its terms does not apply, and one must look elsewhere, to equitable principles, to resolve the priority dispute.<sup>222</sup> When the buyer does not sell any of the commingled inventory, those principles award priority to *SP1* in an amount equal to the value of the collateral transferred. The *McBee* court awards priority to *SP1* in that amount, but it does so on grounds that I have suggested are erroneous. Whether the facts of *McBee* would support the court's result on appropriate grounds is dubious. The court's opinion, like that of the bankruptcy judge who heard the case, makes no reference to any commingling having occurred, let alone a commingling that prevented identification of the transferred inventory.<sup>223</sup> Considering the nature of the assets transferred—the inventory of a gun shop—the absence of any reference appears not to have resulted from oversight. Moreover, even if the requisite commingling occurred in *McBee*, the following paragraph demonstrates that the court's result would not obtain when some of the commingled collateral is sold and replaced with newly acquired inventory.

Section 9-315(2) does not purport to give guidance for cases in which portions of the commingled mass are sold. Presumably, the pre-Code result will obtain, and the competing secured parties will share in the remaining collateral as they did in the whole mass before sale.<sup>224</sup> To continue with the previous example, assume that

---

of the total . . . mass," 10/12 plus 12/12, is greater than one. To reach the correct result under the subsection, one must assume that *SP2*'s security interest "originally attached" only to the \$2000 of value that *SP1* could not reach. Any other manipulation of the formula would give *SP2* a windfall. For example, *SP1* and *SP2* may "rank equally" in the ratio that each party's interest bears to the total amount of claims. Thus, if *SP1* has an interest to secure \$10,000 of debt, and *SP2*'s interest secures \$12,000, then *SP1* would receive 45.45% (10/22), and *SP2* would receive 54.54% (12/22). Or one may argue that *SP1* has no interest in \$2000 of the inventory, which goes to *SP2*. As to the remaining \$10,000, the parties "rank equally." *SP1* would receive \$5000, and *SP2* would receive \$7000. For discussions of some difficulties in the application of § 9-315, see 2 G. GILMORE, *supra* note 30, at § 31.4; D. BAIRD & T. JACKSON, *SECURITY INTERESTS IN PERSONAL PROPERTY* 465-74 (1984); Frisch, *supra* note 218, at 53-57.

222. See U.C.C. § 1-103 (unless displaced by particular Code provisions, principles of equity supplement the Code). Professor Frisch has reached a similar conclusion. See Frisch, *supra* note 218, at 48-52.

223. See *National Bank v. West Texas Wholesale Supply Co. (In re McBee)*, 714 F.2d 1316 (5th Cir. 1983), *rev'g In re McBee*, 20 Bankr. 361 (Bankr. W.D. Tex. 1982).

224. See RESTATEMENT OF RESTITUTION § 214 comment a (1937); *cf. id.* § 213(1) & comment c (rules regarding commingling of money).

*B* owns \$15,000 of commingled inventory, of which *SP1*'s share is \$10,000 and *SP2*'s is \$5000. If *B* sells \$6000 of the inventory, then *SP1* and *SP2* will share in the remaining \$9000 as they did in the \$15,000; that is, *SP1* will receive two-thirds (\$6000) and *SP2* will receive one-third (\$3000). As *B* acquires new inventory and commingles it, *SP2*'s share will increase. Suppose that \$11,000 of new collateral is added to the \$9000 remaining. Because *SP1*'s interest attaches to the goods when they are already encumbered by *SP2*'s security interest, the extent of *SP2*'s share of the mass should be increased by the \$11,000 of newly added value.<sup>225</sup> Thus *SP2* will be entitled to 70% (14/20), and *SP1* to 30% (6/20). When *B* subsequently sells \$10,000 of the commingled collateral, *SP2*'s share of the \$10,000 balance will be \$7000 and *SP1*'s share \$3000.

The example shows that, absent unusual circumstances, *SP1*'s share of the collateral can be expected to shrink over time. Thus, even assuming that the buyer in *McBee* continuously commingled new inventory with the goods he received in the bulk transfer, the holding of *McBee*—that *SP1* automatically has priority over *SP2* in an amount equal to the value of the transferred goods—most likely would not comport with section 9-315 and related equitable principles.<sup>226</sup>

---

225. *SP2*'s interest attaches as soon as the debtor has rights in the collateral. U.C.C. § 9-203(1). *SP1* will acquire no interest in the new inventory until later, when the debtor commingles it. *Id.* § 9-315(1). The lowest intermediate balance rule provides a useful analogy. It applies when one person wrongfully commingles his fungible goods with those of another person, diminishes the amount of the mass below the amount of the other person's goods, and subsequently adds his goods to the mass. Under that rule, the other person ordinarily is entitled to no more than the amount on hand before the additional goods were commingled. RESTATEMENT OF RESTITUTION § 214 comment a (1937); *cf. id.* § 212 & comment a (applying the lowest intermediate balance rule to commingled money). Courts have applied the lowest intermediate balance rule to Code cases in which a secured party's proceeds are commingled in a bank account. *E.g.*, *Universal C.I.T. Credit Corp. v. Farmers Bank*, 358 F. Supp. 317 (E.D. Mo. 1973).

226. In *McBee* only a few months passed between the transfer in bulk (May 5, 1980) and *SP2*'s filing of a financing statement (July 16, 1980), and between *SP2*'s filing and the buyer-debtor's filing of a bankruptcy petition (Oct. 22, 1980). 714 F.2d at 1318-19. Thus *SP1* may have been entitled to a very large share of the inventory under the analysis offered in the text. Professor Westbrook suggests that *McBee* "might have turned on the application of the last sentence of section 9-402(7)," which relates to continued perfection of a security interest in goods transferred by the debtor. Westbrook, *Glitch: Section 9-402(7) and the U.C.C. Revision Process*, 52 GEO. WASH. L. REV. 408, 412 n.17 (1984). To this extent, his position is consistent with an argument advanced in the text: *SP1*'s perfected security interest continues as a perfected interest notwithstanding the bulk transfer. See *supra* notes 64-102 and accompanying text. When he applies § 9-402(7) to the facts of *McBee*, Westbrook uses the second sentence of the section, dealing with the effect on perfection of changes in the debtor's name, even though the Fifth Circuit panel treats the case as a transfer of collateral and not a change of name. Compare Westbrook, *supra*, at 412 n.17 with *In re McBee*,

## 2. Against a Buyer from the Buyer in Bulk

When the transferee from a buyer in bulk is himself a buyer (*B2*), the Code's resolution of the competing claims of *B2* and *SP1* is clearer and less complex than its determination of the relative rights of *SP1* and *SP2*. Under both Article 9 and Article 6, when the buyer in bulk acquires goods subject to the perfected security interest of *SP1* and then resells the goods, *B2* takes subject to the perfected security interest.

Article 9 provides that, in the absence of a statutory exception, a security interest continues in the collateral notwithstanding an unauthorized sale.<sup>227</sup> The exception found in section 9-307(1) enables buyers in ordinary course to take free of most security interests in inventory; however, it applies only to security interests created by the buyer's seller. *SP1*'s security interest was created not by *B2*'s seller (the buyer in bulk), but by the seller in bulk. Accordingly, *B2* acquires no greater rights than his seller had; he takes the goods subject to *SP1*'s perfected security interest.

Article 6 does not affect this result, even when a noncomplying bulk sale has occurred. As discussed in connection with the rights of *SP2*, section 6-110 enables certain good faith purchasers from the noncomplying buyer in bulk to take better title than the buyer had.<sup>228</sup> But section 6-110 does not purport to give unencumbered, good title in all cases. It cuts off only those rights that arise as a consequence of noncompliance with Article 6. *SP1*'s perfected security interest is effective against the buyer in bulk regardless of whether the latter complies with Article 6. Section 6-110, then, does not affect *SP1*'s Article 9 rights.

## 3. Against a Lien Creditor of the Buyer in Bulk

A creditor of the buyer in bulk may obtain a lien on the inventory through the judicial process. Creditors who acquire liens in

---

714 F.2d at 1322, 1323. This confusion may arise from a belief that the parties to the bulk transfer in *McBee* set out to defraud the buyer's secured party and "structure[d] the scam as a transfer." Westbrook, *supra*, at 410 n.12. Had *McBee* involved a change of the debtor's name rather than a transfer of the goods to a third party, the seller's secured parties would have had perfected security interests in inventory that the debtor acquired during the four months following the change and, if the financing statement did become seriously misleading, also in inventory that was acquired thereafter. U.C.C. § 9-402(7) (second sentence). In that event, the ordinary priority rules, which are designed for cases concerning a single debtor, would apply.

227. U.C.C. § 9-306(2); *accord id.* § 2-403(1) (first sentence). Sales by a party other than the original debtor are unlikely to be authorized.

228. *See supra* text following note 182.

this way do not give value to the debtor in exchange for their liens, in reliance upon the debtor's possession of the inventory. That any particular items of inventory are in the debtor's possession when the lien attaches is a fortuity. One would be surprised, therefore, were the law to afford lien creditors any greater rights than it affords to good faith buyers, who are more likely to rely on the debtor's possession of particular goods when they give value to the debtor in exchange for those goods.

In this regard, neither Article 9 nor Article 6 contains any surprises. Section 9-201 provides that the security agreement, and hence the grant of the security interest, is effective against creditors, and section 9-306(2) suggests that the security interest survives the judicial lien.<sup>229</sup> The negative implication of section 9-301(1)(b), which awards lien creditors priority over unperfected security interests, is that a perfected secured party takes priority over a person who becomes a lien creditor after the security interest is perfected. Inasmuch as the lien creditor does not acquire his lien through a voluntary transaction, he is not a "purchaser" who is entitled to the protection of section 6-110.<sup>230</sup> But even if he were, section 6-110 would afford him no protection against claims to the goods arising from Article 9, such as *SPI's* perfected security interest.<sup>231</sup>

### B. *The Rights of an Unperfected Secured Party*

#### 1. Against a Secured Party Whose Debtor Is the Noncomplying Buyer in Bulk<sup>232</sup>

Part III. B. discusses whether a noncomplying buyer in bulk acquires goods free of an unperfected security interest held by the seller's secured party (*SPI*). It concludes that the better rule is that the security interest survives.<sup>233</sup> If the buyer then grants a se-

229. The suffering of a lien is arguably an "other disposition" of the collateral. U.C.C. § 9-306(2).

230. *Id.* § 1-201(33), (32). *But see infra* note 251.

231. *See supra* text following note 182.

232. A complying bulk buyer ordinarily takes free of an unperfected security interest. *See supra* notes 104-08 and accompanying text. The rare case in which a bulk buyer complies with Article 6 but nevertheless takes the goods subject to an unperfected security interest, *see* U.C.C. § 9-301(1)(c), will be governed by the Article 9 analysis suggested in this subpart.

233. Even if the noncomplying buyer were eligible to take free of *SPI's* unperfected security interest, the interest would survive to the extent that the buyer does not "give[] value and receive[] delivery of the collateral without knowledge of the security interest and before it is perfected." U.C.C. § 9-301(1)(c). The Article 9 analysis suggested in this subpart

curity interest to his creditor (*SP2*), a priority dispute may arise. This dispute is similar to the priority disputes, discussed above in part IV. A.1., that may arise when *SP1* is perfected. The analysis of those disputes showed that, because *SP1*'s perfected security interest survives a bulk sale regardless of whether the buyer complies with Article 6, one must look only to Article 9 to resolve the competing claims. I argued that Article 9 should be read to award priority to *SP1*, even if *SP2* is the first to file or has a purchase money security interest. When *SP1*'s security interest is unperfected, Article 6 arguably comes into play and yields the opposite rule: *SP2*'s rights are superior, even if *SP1* perfects after the transfer and is the first—or the only—party to file.

Section 6-110 is the cause of this anomalous outcome, in which a perfected *SP1* is subordinate to an unperfected *SP2*. That section, which is set forth above,<sup>234</sup> specifically addresses the subsequent transfer of property that was the subject of a bulk sale. It enables "a purchaser for value in good faith and without . . . notice" of the buyer's noncompliance with Article 6 to take free of a "defect [in the buyer's title] by reason of [the buyer's] non-compliance." But for the buyer's failure to comply with the requirements of Article 6, *SP1*'s unperfected security interest would not survive the bulk sale. The security interest appears to be a "defect by reason of [the buyer's] non-compliance," and *SP2*, as a good faith purchaser for value and without notice, "takes free" of it.<sup>235</sup> Section 6-110 does not require that a purchaser cure the ostensible ownership problem as a condition to qualifying for good-faith-purchase protection. It appears, then, that *SP2*'s security interest prevails over *SP1*'s even if *SP1* later perfects by filing and *SP2* does not.

The award of priority to an unperfected security interest over a perfected security interest is not the only anomaly that section 6-110 appears to create. The section treats *SP2* more favorably than Article 9 treats a similarly situated secured party whose debtor does not buy in bulk but nevertheless takes goods subject to an unperfected security interest. Assume, for example, that a buyer takes delivery of equipment that he knows is encumbered by *SP1*'s unperfected security interest. Under section 9-301(1)(c), *SP1*'s se-

---

applies to these cases. The buyer in bulk virtually always gives value before taking delivery. See *id.* § 1-201(44)(d) ("a person gives 'value' for rights if he acquires them . . . in return for any consideration sufficient to support a simple contract").

234. See *supra* text following note 182.

235. U.C.C. § 6-110.

curity interest survives. If the buyer grants a security interest to *SP2*, a priority dispute may arise. I considered priority disputes involving two debtors and a perfected *SP1* above.<sup>236</sup> In that context I argued that to resolve those disputes properly, one cannot rely on section 9-312, which apparently contemplates priority disputes concerning a single debtor. The ordinary rules work well, however, when an unperfected secured party (*SP1*) is one of the claimants. If both *SP1* and *SP2* are unperfected, the rule of section 9-312(5)(b) would award priority to *SP1*, whose security interest was the first to attach. This result comports with the security of property rule that applies generally to transfers of personal property.<sup>237</sup> No reason exists for varying the rule to enable *SP2* to acquire better rights than its transferor, the buyer, had. *SP1*'s failure to file may have misled *SP2* into thinking that the goods were unencumbered, but *SP2* itself has created a misleading situation.<sup>238</sup> If *SP2* cures the ostensible ownership problem by filing before *SP1*, then section 9-312(5)(a) will penalize *SP1* and award *SP2* priority as the holder of the first security interest to be filed or perfected.<sup>239</sup> If *SP1* files first, then it will take priority.<sup>240</sup> The purpose of section 9-312(5) is to award priority to the first secured party to give public notice of his interest. The section thus works well, even in a two-debtor case.

It seems, then, that Article 6 enables an unperfected *SP2* to

---

236. See *supra* notes 174-226 and accompanying text.

237. See *supra* note 55.

238. Although *SP2*'s unperfected security interest will be secret, *SP1*, having extended credit to the seller in bulk (*SP1*'s debtor) prior to the transfer, is not likely to be among those who are misled. If *SP1* were to make a future advance while unaware of the transfer, it would have had no reason to search for a financing statement in the buyer's name. *SP2*'s failure to file thus would be irrelevant. If, however, *SP1* knew of the transfer, *SP1* would be foolish to make a future advance. See U.C.C. § 9-307(3) (buyer not in ordinary course "takes free of a security interest to the extent that it secures future advances made after the secured party acquires knowledge of the purchase"). Thus *SP1* joins lien creditors and perfected secured parties who take their interests with knowledge of a prior, unperfected security interest as nonreliance creditors who benefit from Article 9's filing requirements. See *id.* §§ 9-301(1)(b), 9-312(5).

239. Even if *SP2* takes its security interest after learning of *SP1*'s, *SP2* still will prevail if *SP2* is the first to file. See, e.g., *In re Smith*, 326 F. Supp. 1311 (D. Minn. 1971). However, as I suggest below, *SP2* may take subject to *SP1*'s Article 6 rights if *SP2* had notice of the noncomplying bulk transfer at the time its security interest attached. See *infra* text following note 241.

240. See U.C.C. § 9-312(5)(a). *SP1*'s filing should be effective to perfect its security interest even though its debtor no longer has rights in the collateral. The security interest has attached, *id.* § 9-203(1), and *SP1* has given the requisite public notice, *id.* § 9-302(1). See *id.* § 9-303; cf. *id.* § 9-402(7) (last sentence) (filed financing statement remains effective notwithstanding transfer of the collateral).



take priority over a perfected *SP1* when *SP2*'s debtor is a noncomplying buyer in bulk, but that Article 9 compels the opposite result when *SP2*'s debtor is a non-ordinary-course buyer with knowledge of *SP1*'s security interest. I can find no justification for arranging the relative priorities of *SP1* and *SP2* according to the characteristics of *SP2*'s debtor. The relative burdens on *SP1* and *SP2* to discover competing encumbrances on the goods are the same, regardless of why the buyer (*SP2*'s debtor) took subject to *SP1*'s unperfected security interest. Accordingly, Article 9 draws no distinctions among the buyers who fail to qualify for the protection of section 9-301(1)(c) or among their secured parties. As an Article 9 matter, the analysis I developed for a non-ordinary-course buyer with knowledge applies equally to a noncomplying buyer in bulk. The general rule in section 9-312(5) promotes the policies of Article 9 and should govern.

Although Article 6 appears to compel a contrary result, I would not construe it in that manner. Affording good-faith-purchase protection to an unperfected *SP2* conflicts with the major goal of Article 6—to afford unsecured creditors of the seller an opportunity to recover their debts. Just as *SP1*'s unperfected security interest can be considered a defect by reason of the buyer's non-compliance with Article 6, so can a lien that an aggrieved creditor of the seller acquires after the bulk sale. If section 6-110 allows *SP2* thereafter to take free of this lien, then the value of the opportunity that Article 6 affords to unsecured creditors of the seller will be reduced considerably.<sup>241</sup> One ought not construe section 6-110 to create an unnecessary disincentive to aggrieved creditors who otherwise might exercise their Article 6 rights. Yet the reading that I reject creates this disincentive by increasing the likelihood that any expenditure incurred in locating the transferred goods and obtaining a lien on them will be for naught.

Accordingly, I would construe section 6-110 in a manner that both gives effect to the policies of Article 9 and is consistent with those of Article 6. Specifically, I would limit the operation of section 6-110 by creating a definition for "defect [in the buyer's title] by reason of his non-compliance with the requirements of this Article [6]"<sup>242</sup> that permits the application of Article 9 to competing

---

241. Not only secured parties can cut off liens under the reading of § 6-110 that I reject. Buyers from the bulk buyer also are § 6-110 "purchasers" and would be eligible to take free of liens. See *infra* notes 246-50 and accompanying text. Lien creditors of the bulk buyer may present similar problems. See *infra* note 251 and accompanying text.

242. U.C.C. § 6-110. This approach avoids any need to manipulate terms that are al-

security interests while protecting aggrieved creditors of the seller.

I strongly suspect that the drafters of Article 6 did not consider the effect of a bulk transfer on an unperfected security interest, let alone intend to resolve the relative claims of the seller's unperfected secured party and the buyer's secured party. Surely the major title "defect" that the drafters addressed in section 6-110 is the right of the seller's aggrieved creditors to assert claims against the transferred goods. Unlike most title defects, that "defect" is not a property interest in, or claim to, specific goods. Rather, the defect is only the risk that the aggrieved creditors will acquire a property interest in the future. That risk is the penalty that Article 6 imposes for noncompliance. In the first instance, the penalty is effective only against the noncomplying buyer in bulk. The creditors' rights are secret, difficult for third parties to discover, and most unusual.<sup>243</sup> Rather than impose upon innocent third parties the risk of failing to discover those rights, section 6-110 solves this ostensible ownership problem by encouraging the aggrieved creditors to locate the goods and assert their claims quickly, lest they lose the goods to good faith purchasers for value and without notice of the creditors' rights. Only those transferees from the buyer who are or should be aware that they may be assisting him in removing the goods from the reach of the aggrieved creditors take subject to the creditors' right to reach the goods.<sup>244</sup>

In my view, the Code works best when the only "defect" that section 6-110 addresses is the right of the seller's creditors to acquire property interests in goods that he has sold in bulk. Under that reading, section 6-110 relieves qualified purchasers only from the need to discover those extraordinary rights. It thereby cures the ostensible ownership problem that is peculiar to Article 6 but relegates the resolution of all other ostensible ownership problems and competing claims to whatever other law is designed to address those concerns. In the case under consideration, in which two se-

---

ready defined, e.g., "purchaser" and "notice." See *id.* § 1-201(33); *id.* § 1-201(25).

243. The law of fraudulent conveyances creates similar rights. Cf. 1 G. GLENN, *supra* note 23, § 314 (remedies under pre-Code bulk sales acts included remedies available to creditors aggrieved by a fraudulent conveyance).

244. Purchasers from the buyer who give no value also take subject to the rights of the seller's aggrieved creditors, apparently on the theory that the assertion of those rights will cause them little, if any, injury. The Article 6 treatment of purchasers from the bulk buyer is generally consistent with the treatment of purchasers under the UNIF. FRAUDULENT CONVEYANCE ACT § 9(1), 7A U.L.A. 577 (master ed. 1985), the proposed UNIF. FRAUDULENT TRANSFER ACT § 8(b)(2), 7A U.L.A. 662 (master ed. 1985), and the Bankruptcy Code, 11 U.S.C. § 550(b) (1982).

curity interests compete, that law is Article 9. Section 9-312(5) gives priority to the first secured party to file or perfect. Under my reading of section 6-110, Article 6 does not conflict with that result. That section 6-110 ought not to be used to resolve conflicts among secured parties does not mean, however, that the section never affects the rights of *SP1* and *SP2*. Suppose, for example, that *SP1*'s unperfected security interest survives a noncomplying bulk sale and that *SP2* takes and perfects its security interest with notice of the buyer in bulk's (its debtor's) noncompliance. Under my reading of section 6-110, Article 9 governs the priority of conflicting security interests, and it awards priority to *SP2*. Nevertheless, *SP2*'s security interest will be subject to the defect in the buyer's title that is peculiar to Article 6. That is, the seller's aggrieved creditors, including *SP1*, may use the judicial process to acquire rights in the transferred goods, and any judicial lien they obtain will take priority over *SP2*'s security interest.

## 2. Against a Buyer from the Noncomplying Buyer in Bulk

Part IV. A.2. demonstrates that when a buyer in bulk acquires the goods subject to a perfected security interest, the security interest (of *SP1*) continues when the goods are sold to a sub-buyer (*B2*), even if *B2* is a buyer in ordinary course. If *SP1*'s security interest is unperfected, however, the result may differ, and *B2* may prevail. Unfortunately, a literal reading of Article 9 and Article 6 does not always give what I believe to be the correct result.

Section 9-301(1)(c) subordinates an unperfected security interest to the rights of

a person who is . . . a transferee in bulk or other buyer not in ordinary course of business or is a buyer of farm products 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.<sup>245</sup>

One safely may assume that *B2* gives value and takes delivery without knowledge of *SP1*'s security interest. Nevertheless, read literally, section 9-301(1)(c) affords no protection to *B2* if he is a buyer of goods other than farm products in ordinary course of business. Nor can *B2* benefit from the protection that section 9-307(1) affords to buyers in ordinary course, because *SP1*'s security interest was not created by his seller (the buyer in bulk). *B2* thus falls between the cracks. Ironically, *B2* would be better off if he had bought other than in ordinary course of business. In that case, he

---

245. U.C.C. § 9-301(1)(c).

clearly would obtain the protection of section 9-301(1)(c).<sup>246</sup>

Prior to the 1972 revisions of Article 9, buyers of farm products in ordinary course of business similarly were left unprotected. While explicitly excluded from the protection that section 9-307(1) affords to buyers of inventory in ordinary course, ordinary course buyers of farm products were not mentioned in the 1962 version of section 9-301(1)(c). Professors White and Summers believe that these buyers "were implicitly protected in that the section granted superiority over unperfected secured creditors to less meritorious claimants (buyers not in ordinary course). The 1972 amendment corrects what we suspect was an unintended omission."<sup>247</sup> The omission from section 9-301(1)(c) of the inventory buyers in ordinary course who do not prevail under section 9-307(1) likewise seems unintended. When faced with this problem, a court should resolve the *casus omissus* in *B2*'s favor.<sup>248</sup>

Previously I suggested that, in certain cases, Article 9 priority rules are inappropriate when each competing claimant derives his interest from a different person.<sup>249</sup> Application of section 9-301(1)(c) to the competing claims of *SP1* (whose interest derives from the seller in bulk) and *B2* (whose interest derives from the buyer) is not one of those cases. The reason for enabling a person who buys directly from the debtor to take free of an unperfected security interest is that the secured party has created a potentially misleading state of affairs. The ostensible ownership problem is as great, if not greater, when *B2* buys from a person who is not a party to the secured transaction. Accordingly, *B2* should be entitled to the protection of section 9-301(1)(c).

In most cases, Article 6 will give the same result, even under a literal reading of section 6-110. As a good faith purchaser for value and without notice of the buyer in bulk's noncompliance with Article 6, *B2* will take free of *SP1*'s unperfected security interest under both articles. Suppose, however, that *B2* has notice of the noncompliance, yet lacks actual knowledge of the unperfected security in-

---

246. This assumes that § 9-301(1)(c) applies to sales made by persons other than *SP1*'s original debtor. See *infra* text following note 248.

247. J. WHITE & R. SUMMERS, *supra* note 8, at 1033; accord B. CLARK, *supra* note 89, at 3-14. Another apparently unintended omission is the buyer in ordinary course of farm products in § 9-307(3).

248. Professor Carlson reaches the same conclusion, but is slightly more optimistic about the capacity of the judiciary to resolve the problem properly. See Carlson, *supra* note 108, at 557 n.34 ("one can safely assume" that courts would extend section 9-301(1)(c) to cover *B2*).

249. See *supra* notes 172-224 and accompanying text.

terest. In that case, *B2* will take subject to that "defect" under section 6-110 yet take free of it under section 9-301(1)(c). As was shown to be the case when *SP1* competes with *SP2*, Articles 6 and 9 may be read to give different results. I would resolve the sub-buyer cases by reading section 6-110 as I did in the *SP2* cases; that is, I would read "defect" to refer only to the potential claims of the seller in bulk's creditors and not to existing property interests.<sup>250</sup> The reading gives effect to both Article 9 and Article 6. It enables *B2* to take free of *SP1*'s unpublicized security interest, but subjects him to rights of which he was, or should have been aware: the right of his seller's aggrieved creditors, including *SP1*, to reach the transferred goods through the judicial process.

### 3. Against a Lien Creditor of the Noncomplying Buyer in Bulk

Section 9-301 speaks to the rights of lien creditors as well as of certain buyers. Its subsection (1)(b) subordinates an unperfected security interest to the rights of "a person who becomes a lien creditor before the security interest is perfected." In our case, a lien creditor of the seller in bulk would prevail over *SP1*'s unperfected security interest. There seems to be no reason why a lien creditor of the buyer in bulk likewise should not prevail. In both cases, the party whose interest is not properly disclosed loses to the party whose interest is publicized by actual or constructive possession. Article 6 arguably contains nothing to the contrary, inasmuch as section 6-110 affects only the rights of "purchasers," and a lien creditor is not a "purchaser."<sup>251</sup>

---

250. See *supra* text following note 241. A case in which *B2* has actual knowledge of *SP1*'s unperfected security interest but lacks notice of his seller's noncompliance with Article 6 is hard to imagine. If it were to arise, I would resolve it by giving effect to Article 9.

251. See *Mazer v. Williams Bros. Co.*, 461 Pa. 587, 337 A.2d 559 (1975); U.C.C. § 1-201(33), (32). Under fraudulent conveyance law and pre-Code bulk sales acts, a lien creditor of the transferee takes priority over aggrieved creditors of the transferor whose liens attached subsequently. See, e.g., *City of New York v. Johnson*, 137 F.2d 163 (2d Cir. 1943) (awarding priority to transferee's bankruptcy trustee under both the Uniform Fraudulent Conveyance Act and New York Bulk Sales Act); 1 G. GLENN, *supra* note 23, § 238. Both Code cases that have considered the issue directly rule in favor of the bulk transferee's lien creditor (the trustee in bankruptcy), albeit without confronting the language of § 6-110. *In re Dee's, Inc.*, 311 F.2d 619, 622 n.5 (3d Cir. 1962) (citing § 6-110, U.F.C.A. § 9, and Stat. 13 Eliz.); *In re Gruber Indus.*, 345 F. Supp. 1076, 1077-78 (E.D.N.Y. 1972) (discussing *Johnson* and citing *In re Dee's* and a pre-Code bankruptcy case). Those cases are consistent in result with the principle developed *supra* text accompanying and following notes 233-48: competition between property interests in goods that are the subject of a bulk transfer should be resolved by non-Article 6 law. The commentaries recognize the need to deal with § 6-110 but disagree about how to do so. Compare R. DUESENBERG & L. KING, SALES & BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE [3A Bender's Uniform Commercial Code Service]

## V. CONCLUSION

Articles 6 and 9 of the Uniform Commercial Code are designed to prevent different frauds. Each article does so by requiring the transferees of interests in personal property to publicize the transfers and by penalizing persons who fail to comply. In most cases in which the two articles come into play, a close reading of the Code yields a sound result. Occasionally, the Code's answer is uncertain or the outcome it appears to yield is inconsistent with well-established Code principles. In those cases, I have suggested that courts resolve disputes in a manner that promotes the underlying policies of each article at the least cost.

Most of the difficult issues arise when the seller in bulk's secured party fails to perfect its security interest. Three small adjustments in the Code would clarify matters immeasurably. First, the Code should state unambiguously whether an unperfected security interest survives a noncomplying bulk sale. Because the National Conference of Commissioners on Uniform State Laws currently is reconsidering Article 6, that article is the more appropriate short-term location for the rule. Second, Article 6 should specify that its protection of good faith purchasers addresses only the right of aggrieved creditors to reach goods transferred in a noncomplying bulk sale and does not affect property rights that are regulated elsewhere. Finally, in view of the case law and the variety of approaches to the problem already suggested, Article 6 should deal directly with the rights of a lien creditor of the bulk buyer.<sup>252</sup>

A number of issues that arise in connection with bulk sales may arise in a variety of other contexts. Particularly important are cases in which different debtors create competing security interests in the same collateral.<sup>253</sup> The reasoning of this Article can provide

---

§ 15.08, at 15-60 to -61 (1984) (approving result in *In re Dee's* on the ground that the express protection § 6-110 affords to subsequent good faith purchasers should not be held to exclude protection for subsequent lien creditors) and Weintraub & Levin, *Bulk Sales Law and Adequate Protection of Creditors*, 65 HARV. L. REV. 418, 432 (1952) (changes in pre-Code law are undesirable and probably unintended notwithstanding § 6-110) with 6 W. HAWKLAND, *supra* note 43, § 6-110:01, Art. 6 at 133 (*Gruber Indus.* was incorrectly decided; Code definition of "purchaser" as used in § 6-110 supersedes pre-Code cases, with which *In re Dee's* is erroneously grouped) and J. WHITE & R. SUMMERS, *supra* note 8, at 776 (although a lien creditor may be a "purchaser" for purposes of § 6-110, a "judge-made priority rule generally favoring the transferor's creditors would be more consistent with Article Six").

252. See *supra* note 251.

253. See *supra* notes 174-226, 233-44 and accompanying text. A special amendment to clarify that § 9-312 does not apply to cases in which each secured party has a different

guidance in those contexts, when the Code's underlying principles clearly dictate a sound result but its precise language does not.

---

debtor might be helpful, but I see no pressing need for it. Cf. Oldfather, *supra* note 182, at 584 ("My *suggestion* is that some statutory clarification would seem to be called for."); B. CLARK, *supra* note 89, at 3-54 ("the language is ambiguous enough to suggest the need for amendment").