



## Case Western Reserve Law Review

---

Volume 26 | Issue 3

---

1976

# Secured Transactions--Purchase Money and After-Acquired Property Security Interests--Priority of Security Interests under UCC 9-312

Patrick A. Guida

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

---

### Recommended Citation

Patrick A. Guida, *Secured Transactions--Purchase Money and After-Acquired Property Security Interests--Priority of Security Interests under UCC 9-312*, 26 Case W. Res. L. Rev. 708 (1976)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol26/iss3/8>

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

## Recent Cases

### SECURED TRANSACTIONS—PURCHASE MONEY AND AFTER-ACQUIRED PROPERTY SECURITY INTERESTS— PRIORITY OF SECURITY INTERESTS UNDER UCC 9-312

*International Harvester Credit Corp. v. American National Bank*,  
296 So. 2d 32 (Fla. 1974)

#### I. INTRODUCTION

The innovative provisions of section 9-312 of the Uniform Commercial Code (Code)<sup>1</sup> were drafted to remedy the complexities and pitfalls once confronted in the determination of priorities among conflicting security interests in the same collateral. In response to the pre-Code preference for the priority of conditional sales security interests,<sup>2</sup> subsection 9-312(4)<sup>3</sup> provides a means by which “purchase money security interests in collateral other than inventory”<sup>4</sup> can obtain priority over conflicting and even prior security interests. This special priority for purchase money interests is qualified only to the extent that the purchase money interest must be perfected “at the time the debtor receives possession of the collateral or within ten days thereafter.”<sup>5</sup> This qualification is intended as a safeguard for the benefit of pre-existing secured creditors of the debtor and

---

1. UNIFORM COMMERCIAL CODE § 9-312 [hereinafter cited as UCC]. Unless otherwise specified, the 1972 Official Text of the Code will be employed throughout this analysis. The 1972 version is used rather than the more widely adopted 1962 version because: (1) the 1972 text, being more recent, is probably more representative of the direction in which the states revising their Codes will move; (2) pre-1972 variances from the intended interpretation and application of the Code may well have motivated the draftsmen of the 1972 text to articulate the purposes of the Code better; and (3) the 1972 Code and its accompanying Appendix are helpful in determining the draftsmen's opinions on both the various shortcomings of earlier versions and how the revisions may better implement the desired effect of the Code. It should be noted, however, that under the facts of *International Harvester*, no differences in effect result from the application of the 1972 version or the 1962 version of UCC § 9-312.

2. Pre-Code law generally sought to protect the purchase money security interest against after-acquired property interests and other types of security interests and liens. UCC § 9-312, Comment 3.

3. UCC § 9-312(4) states:

A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral or its proceeds if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within ten days thereafter.

4. *Id.*

5. *Id.*

those contemplating extensions of credit to or purchases from the debtor. In order for any such party to evaluate its risk of loss accurately vis-à-vis the extent of encumbrance upon the debtor's possessions, the system must impose upon the efficacious purchase money interest the obligation of public notice. Should the purchase money security interest fail to meet this lone qualification for perfection of an otherwise bona fide purchase money interest,<sup>6</sup> the special priority is lost.<sup>7</sup> The purchase money interest is thus left to compete for priority with conflicting security interests under the "general or residual rules of priority" of subsection 9-312(5) "which are to apply when none of the 'special rules' is applicable."<sup>8</sup>

On February 13, 1974, the Supreme Court of Florida utilized the provisions of section 9-312 in *International Harvester Credit Corp. v. American National Bank*.<sup>9</sup> The majority opinion is certain to arouse apprehension and anxiety among those affected by the operation of section 9-312, and the facts of that case are a particularly good illustration of the confrontations which arise under that section. On April 8, 1969, Machek Farms executed a retail installment note and security agreement with American National Bank of Jacksonville ("Bank") which encumbered all property thereafter acquired by Machek. The Bank filed its financing statement two days later on April 10, 1969. On April 25, 1969, Florida Truck and Tractor Company sold and delivered two items of farm equipment

6. UCC § 9-107 provides the basis and the criteria for a bona fide purchase money security interest. It states:

A security interest is a "purchase money security interest" to the extent that it is

- (a) taken or retained by the seller of the collateral to secure all or part of its price; or
- (b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

7. UCC § 9-312(5) states:

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

- (a) Conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection.
- (b) So long as conflicting security interests are unperfected, the first to attach has priority.

8. II G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 34.1 (1965) [hereinafter cited as GILMORE].

9. 296 So. 2d 32 (Fla. 1974).

to Machek under a retail installment contract.<sup>10</sup> No financing statement on this purchase money contract was ever filed. On August 8, 1969, seven additional items of farm equipment were sold and delivered by Florida Truck to Machek under a second retail installment contract. Three of these items had a retail price in excess of \$2,500. Both of these contracts created a security agreement between Florida Truck and Machek, with the goods sold serving as collateral.<sup>11</sup> The later contract was assigned by Florida Truck to International Harvester Credit Corporation ("International Harvester"). On September 3, 1969, more than ten days after Machek received the equipment, International Harvester filed a financing statement in the office of the clerk of the local circuit court.

Machek defaulted with respect to all of these obligations. He then voluntarily relinquished possession to Florida Truck of all equipment purchased from it under the retail installment contracts. On December 7, 1970, the Bank filed a replevin action seeking possession of the farm equipment.

The Florida court, applying section 9-312 of the Code, held that the party with a security interest in the after-acquired property takes priority under subsection 9-312(5) over the party with a purchase money security interest which was not perfected within ten days after the debtor took possession of the collateral.<sup>12</sup> This much of the court's holding was consistent with the majority of authority.<sup>13</sup> However, the court also held that such priority is limited to debtor's equity in the after-acquired property.<sup>14</sup> The Bank therefore was given priority over International Harvester only to the extent of Machek's equity in the property. The court's allocation of priorities in such a manner seems to be more a product of pre-Code law than of the Code provisions upon which the court justified its interpretation. This can best be illustrated by a careful analysis of pre-Code law, followed by a careful examination of the Florida decision in light of the current Code provisions.

---

10. Each of the two items had a purchase price of less than \$2,500, but together had a combined price of approximately \$4,000. As to whether the security interest in these two items of equipment with an aggregate price in excess of \$2,500 should be deemed perfected without filing, as held by the Florida Supreme Court in *International Harvester*, see 3 FLA. ST. U.L. REV. 150 (1975); notes 101-08 *infra* and accompanying text.

11. For a description of these contracts, see the trial court opinion, *American Nat'l Bank v. International Harvester Credit Corp.*, 269 So. 2d 726, 727-29 (Fla. App. 1972).

12. See note 70 *infra*.

13. 296 So. 2d 32, 35 (Fla. 1974).

14. *Id.* at 35.

## II. PRE-CODE PURCHASE MONEY PRIORITY

Prior to the adoption of the Uniform Commercial Code, the conditional sales agreement<sup>15</sup> enjoyed a recognized preeminence. Merchants and all others interested in perpetuating the growth of the economy had been anxious to find an efficient means by which an item for sale could serve as collateral for its purchase price. The needs of commercial society were filled by the creation of the conditional sales agreement, a device by which a vendor of goods could be assured of repossessory rights in goods sold until the purchaser had paid for them in full. The law soon developed the legal fictions and improvisations necessary to circumvent established impediments and, thus, to implement the conditional sales device.

This purchase money interest truly reigned supreme in pre-Code law.<sup>16</sup> As early as 1631, the English courts determined in *Nash v. Preston*<sup>17</sup> that the purchase money security interest was worthy of paramount priority status.<sup>18</sup> This priority was originally used only to protect the purchase money lienor against such competing interests as judgment creditors and claimants of dower, curtesy, and community property.<sup>19</sup> Ultimately, however, the interest became so favored by the courts that it was given the power to dislodge virtually all antecedent claims, including the suspect after-acquired property interest.<sup>20</sup>

Although the scope of the purchase money priority expanded, the rationale behind it has remained the same. The development and expansion of the purchase money priority was both necessary and justified. After all, it was only through the magnanimity of the purchase money lender that the buyer secured the possession and use of the equipment prior to receipt of payment by the seller. The purchase money creditor assumed sizable risks, in that it not only extended credit to the buyer, but also provided the buyer with the collateral for the debt. If the maximum encouragement were to be given sellers to undertake these risky but commercially beneficial transactions, it was quite natural that the priority would evolve and

---

15. The pre-Code equivalent of the purchase money security interest was the conditional sales agreement. For a more comprehensive discussion of the various equivalent forms of pre-Code security devices see Coogan, *Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien,"* 72 HARV. L. REV. 838, 840-44 (1959).

16. See GILMORE §§ 28.1, 29.1.

17. 79 Eng. Rep. 767 (K.B. 1631).

18. *Id.* at 767-68.

19. See GILMORE § 28.1.

20. *Id.*

expand to protect sellers against antecedent interests other than those of spouses or unsecured creditors.

The primary impediment to the unqualified priority of the purchase money interest was a prior security interest or lien. Some such prior interests were capable of attaching not only to all of the debtor's present goods, but also to any goods which would thereafter come into possession. This was the essence of the after-acquired property security interest.<sup>21</sup> Pre-Code courts and the commercial community had no desire to vitiate the after-acquired interest, for it, too, was a useful and necessary device.<sup>22</sup> Often, new small business operators or farmers who had suffered a bad harvest would not have sufficient assets to serve as collateral in financing a new business or a new growing season. The after-acquired property interest provided such a debtor with an opportunity to get a new and promising business or growing season on its feet. Like the purchase money interest, it made certain business activities possible to persons who would otherwise have been foreclosed from them.

The commercial necessity of the purchase money interest, however, proved stronger and more compelling. The commercial community defended the purchase money interest against any encroachment by the after-acquired property interest's "floating lien."<sup>23</sup> As a result, the priority of the purchase money interest became virtually absolute.

The conflict between the purchase money interest and the after-acquired interest was prominently exposed in *United States v. New Orleans R.R.*<sup>24</sup> In this 1870 case, a railroad had executed mortgages between 1858 and 1860, the provisions of which asserted attachment of all present and after-acquired company property as security for the bondholder-mortgagees' interests. Upon foreclo-

---

21. The Supreme Court extended recognition to the after-acquired property security interest in *Pennock v. Coe*, 64 U.S. (23 How.) 117 (1860).

22. See GILMORE § 28.2. The 19th-century courts developed what have been conceptualized as "equitable limitations" to the purchase money priority doctrine. These equitable limitations arose out of the fears that purchase money interests would otherwise have unfettered capacity to devour all of the original security assets of the general mortgagee bondholders.

23. The original device improvised to thwart such encroachment and protect the purchase money interest was the doctrine of transitory or instantaneous seisin, whereby title vested in the buyer and then left him again for the purchase money mortgagee (seller) so quickly that no other existing security interest had time to attach. See GILMORE § 28.1.

24. 79 U.S. (12 Wall.) 362 (1870). For a more comprehensive discussion of the origins and institution of purchase money priority in the United States, see GILMORE § 28.

sure proceedings initiated by the bondholder-mortgagees, it was revealed that two locomotives and ten cars (rolling stock) in the possession of the railroad were also subject to unrecorded security interests, in the form of purchase money bonds, acquired by the United States government in 1866.<sup>25</sup> The United States sought priority over the general mortgagees' interests with respect to this rolling stock.

The foreclosure court held that the United States had a "superior equity" in the rolling stock via its purchase money lien.<sup>26</sup> The decree ordering that this rolling stock be turned over to the United States was affirmed by the Supreme Court.<sup>27</sup> In response to the mortgagees' contention that their mortgages, being antecedent to the purchase money bonds, deserved priority, the Supreme Court speaking through Mr. Justice Bradley, held:

A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires.<sup>28</sup>

The Supreme Court thus established two principles. First, the after-acquired property security interest (or general mortgage) would attach to those items of collateral subject to the purchase money agreement. This point, however, was limited by the second principle, that this interest could only attach to that portion of the property to which the purchase money interest holder had relinquished his rights.<sup>29</sup> In other words, the after-acquired interest attached only to the value of the collateral in excess of the amount still owing to the purchase money interest holder.

The many conflicts between competing creditors of insolvent railroads following *United States v. New Orleans R.R.* prompted the courts to confine the priority of the after-acquired property lien or mortgage interest further to the permanent structure or fixtures involved. The purchase money security interest thus retained pri-

---

25. 79 U.S. (12 Wall.) at 363. Ironically, it was the United States Government, as one of the after-acquired property interest holding mortgagees, which initiated the mortgage foreclosure and thus caused the discovery of its purchase money interests.

26. *Id.*

27. *Id.* at 365.

28. *Id.*

29. *Id.*

ority in all rolling stock or non-fixture category of assets.<sup>30</sup> The distinction between nonfixture assets, or rolling stock, and fixtures, or permanent structure, provided a convenient rationale for separating the railroad collateral into two separate categories. However, as the after-acquired property security interest gained recognition in other areas of industrial financing, the fixture-nonfixture dichotomy became increasingly confusing and, thus, less useful. The difficulty of splitting the collateral into categories and equitably balancing priorities between the various competing after-acquired and purchase money interest reflected far more sophistry than sophistication.

The fixture-nonfixture dichotomy and its inherent limitations were brought before the Supreme Court in *Holt v. Henley*.<sup>31</sup> Speaking for the Court, Justice Holmes rejected the priority of the after-acquired property interest in the "permanent structure," as almost all new equipment purchases in the vast majority of industries become attached or "bolted" to the permanent structure in some manner and would thus be subject to such an interest.<sup>32</sup> Holmes and the Court were unwilling "to give a mystic importance to attachment by bolts and screws" and thereby dislodge a purchase money interest.<sup>33</sup> Consistent with Justice Bradley's decision in *New Orleans R.R.*,<sup>34</sup> Holmes stated that mortgagees with an after-acquired property interest can take only such interest in property as the mortgagor has.<sup>35</sup> Further, he held, as did Justice Bradley in *New Orleans R.R.*,<sup>36</sup> that the conditional seller's failure to file or record the conditional sales agreement was not relevant, as the filing statute was only intended to protect subsequent purchasers and creditors.<sup>37</sup>

The Supreme Court's view of the operation of the after-acquired property interest in *Holt* proved quite influential. In resolving con-

---

30. See *McGourkey v. Toledo & O. Cent. Ry.*, 146 U.S. 536 (1892); *Forster v. Pittsburg Bessemer Steel Co.*, 122 U.S. 267 (1887); *Myer v. Car Co.*, 102 U.S. 1 (1880); *Fosdick v. Schall*, 99 U.S. 235 (6th Cir. 1878); *Harris v. Youngstown Bridge Co.*, 90 F. 322 (6th Cir. 1898); *Venner v. Farmers' Loan & Trust Co.*, 90 F. 348 (6th Cir. 1898).

31. 232 U.S. 637 (1914).

32. *Id.* at 640-41.

33. *Id.* at 641.

34. See note 27 *supra* and accompanying text.

35. 232 U.S. at 641.

36. Consistent with the common law doctrine that the registry laws were intended only for the protection of subsequent, not prior, creditors. Justice Bradley had held that a failure to record or file the conditional sales agreement did not preclude its priority when in conflict with a prior after-acquired interest. 79 U.S. (12 Wall.) at 365.

37. 232 U.S. at 640.



flicts between purchase money interests and other interests that were "first in time," the pre-Code courts most often resorted to the "title doctrine."<sup>38</sup> Under this theory the title to the goods transferred from the seller-creditor to the buyer-debtor was seen to remain in the seller-creditor until the purchase price was fully paid. As a result, if a seller of equipment retained title until the purchase price was fully remunerated, his rights to priority in the collateral-equipment reigned supreme over any claim arising under an after-acquired property clause of an antecedent agreement since in the eyes of the court, no property had been acquired. This result prevailed even though the purchase money agreement had never been recorded.<sup>39</sup>

The purchase-money priority was retained in such statutory reforms as the Uniform Conditional Sales Act.<sup>40</sup> Although the condi-

---

38. *Manhattan Trust Co. v. Sioux City Cable Ry.*, 76 F. 658 (C.C.N.D. Iowa 1896); *Babbitt & Cowden Live Stock Co. v. Hooker*, 28 Ariz. 263, 236 P. 722 (1925); *Goodrich Silvertown Stores v. A. & A. Credit Sys., Inc.*, 200 Minn. 265, 274 N.W. 172 (1937); *Simmons v. Lee James Fin. Co.*, 56 Wash. 2d 234, 351 P.2d 507 (1960). In some states, the holder of an after-acquired property interest was limited to an equitable interest in the debtor's after-acquired property. Provision was made that such an equitable interest could be defeated by a seller's legal lien interest. See *Metropolitan Trust Co. v. Railroad Equip. Co.*, 108 F. 913 (6th Cir. 1901); *Southern Surety Co. v. Peoples State Bank*, 332 Ill. 362, 162 N.E. 659 (1928); *Trenton Lumber Co. v. Boling*, 230 Miss. 233, 92 So. 2d 440 (1957).

39. See *Holt v. Henley*, 232 U.S. 637 (1914); *Myer v. Car Co.*, 102 U.S. 1 (1880); *Fosdick v. Schall*, 99 U.S. 235 (1879); *United States v. New Orleans R.R.*, 79 U.S. (12 Wall.) 362 (1871); *United States Fidelity & Guar. Co. v. G. W. Parsons Co.*, 235 F. 114 (8th Cir. 1916); *Manhattan Trust Co. v. Sioux City Cable Ry.*, 76 F. 658 (C.C. N.D. Iowa 1896). It is interesting to note at this point that the consequences of nonfiling were substantially different in cases where the security agreement was deemed to be a chattel mortgage rather than a conditional sales agreement. An unfiled chattel mortgage was deemed void against creditors generally in most states. A conditional sale, often used as a substitute for the chattel mortgage, was in some states valid against all creditors without filing; in other states, if the sale was not filed, void only against lien creditors. UCC § 9-101, Comment.

40. The UNIFORM CONDITIONAL SALES ACT §§ 4 & 5 provide:

§4. Conditional sales valid except as otherwise provided.—Every provision in a conditional sale reserving property in the seller after possession of the goods is delivered to the buyer, shall be valid as to all persons, except as hereinafter otherwise provided.

§5. Conditional sales void as to certain persons.—Every provision in a conditional sale reserving property in the seller, shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or a copy thereof shall be filed as hereinafter provided, unless such contract or copy is so filed within ten days after the making of the conditional sale.

Section 4 has been explicitly rejected by UCC § 9-202. Section 5 and other similar pre-Code provisions were consistently interpreted not to operate in favor of the antecedent after-acquired interest. See 2A G. BOGERT, UNIFORM LAWS, ANNOTATED, COMMENTARIES ON CONDITIONAL SALES ch. 5 (1922); cases accompanying note 39 *supra*.

tional sales contract was required to be filed,<sup>41</sup> the protection afforded by these filings did not extend to one whose security interest antedated the conditional sales contract.<sup>42</sup> Where the after-acquired security interest was antecedent to an unfiled conditional sales contract, the after-acquired interest was thought to be undamaged by the seller's breach of the recording statutes and so was not deemed to carry the equitable right to priority over the conditional seller.<sup>43</sup>

In summary, the after-acquired interest holder was subordinate to the conditional seller's interest and his rights respecting the conditional sale collateral might reach only to the extent of the conditional buyer's equity.<sup>44</sup> The interpretation thus applied was that the after-acquired interest (mortgage) "could not have covered more than the mortgagor's equity and the title of the conditional vendor or entruster was prior in time and prior in right."<sup>45</sup> The Supreme Court of Mississippi in *Trenton Lumber Co. v. J. B. Boling*<sup>46</sup> typified the pre-Code judicial attitude toward the purchase money priority:

If the Legislature had intended that a deed of trust or chattel mortgage on after-acquired property . . . should have priority over the vendor's lien for the unpaid purchase price of such property, the Legislature would have so provided. . . .<sup>47</sup>

As if taking a cue from the *Trenton* court, the draftsmen of the

41. 2 G. BOGERT, UNIFORM LAWS, ANNOTATED, COMMENTARIES ON CONDITIONAL SALES § 5, at 6-7 (1922).

42. Under such pre-Code interpretations, the only instance in which a non-purchase money creditor could prevail over the purchase money interest was where such creditor could demonstrate that his advance to the common debtor was made subsequent to the seller's unrecorded purchase money agreement and in reliance upon the debtor's appearance of unencumbered ownership. See *Spencer v. Staines*, 292 Mich. 672, 291 N.W. 50 (1940); *Mississippi Valley Trust Co. v. Cosmopolitan Club*, 111 N.J. Eq. 277, 162 A. 396 (1932).

43. See *Simmons v. Lee James Fin. Co.*, 56 Wash. 2d 234, 351 P.2d 507 (1960), for a contemporary example of this pre-Code rule's application.

44. Upon resale or foreclosure sale by the conditional seller,

[i]t is of course equitable that the buyer should receive any balance that may exist after satisfaction of the seller's claims and the expenses which have been caused by the retaking and foreclosure. Such balance represents the equity of the conditional buyer, the parts of the price he has paid less depreciation.

2A G. BOGERT, UNIFORM LAWS, ANNOTATED, COMMENTARIES ON CONDITIONAL SALES § 121, at 164 (1922).

45. Coogan, *Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien,"* 72 HARV. L. REV. 838, 856 (1959).

46. 230 Miss. 233, 92 So. 2d 440 (1957).

47. *Id.* at 244, 92 So. 2d at 444.

Uniform Commercial Code did provide that, in the event that such purchase money interest did not comply with the filing or perfection requirement of section 9-312, priority would be awarded to an antecedent after-acquired property security interest over the purchase money interest.<sup>48</sup>

### III. THE ADOPTION OF THE UNIFORM COMMERCIAL CODE

In framing Article 9 of the Code, the draftsmen were well aware of the compelling bias favoring the purchase money interest in pre-Code law. It is stated in Comment 3 to section 9-312 that:

prior law, under one or another theory, usually contrived to protect purchase money interests over after-acquired property interests (to the extent to which the after-acquired property interest was recognized at all) . . . the result was arrived at on the theory that since 'title' to the equipment was never in the vendee or lessee there was nothing for the lien of the mortgage to attach to. While this article broadly validates the after-acquired property interest, it also recognizes as sound the preference which prior law gave to the purchase money interest. That policy is carried out in subsections (3) and (4).<sup>49</sup>

It is thus apparent that the predisposition favoring the purchase money interest remained a most formidable consideration. Additional practical considerations, however, dictated that an interest endowed with such recognized and enforceable supremacy must take certain precautions to protect the relatively vulnerable non-purchase money interests. The lone precaution was to provide competing and potentially competing creditors with notice of the purchase money interest.

The draftsmen concluded that in many transactions, including the purchase money agreement, a financing statement must be filed.<sup>50</sup> By providing for and maintaining a policy of strict enforcement of filing obligations, it was hoped that there would ensue an implicit trust in the credibility and efficacy of the system.<sup>51</sup> A trustworthy system of public notice in the arena of nonpossessory secu-

---

48. UCC §§ 9-312(4) & (5).

49. UCC § 9-312, Comment 3.

50. See UCC §§ 9-302, 9-312(4).

51. Since it is a routine procedure for anyone lending against equipment already in the possession of a debtor to ascertain whether the equipment is not already encumbered, the necessity of constructing the system so as to insure the maximum accuracy of the records should be readily apparent. Faith in the filing system promotes commerce and the increased trade, at least theoretically, works to the benefit of all.

rity interests would provide a crucial element of confidence in a transaction for potential lenders, purchasers of the subject property, general creditors of the apparent owner, and government tax-collecting agencies. Delinquency in filing a purchase money interest would seriously prejudice the ability of each of these to evaluate their status, whether they be antecedent or subsequent to the purchase money interest. Consequently, the draftsmen have determined that the purchase money interest in noninventory collateral must be perfected by public notice in order to maintain its priority.<sup>52</sup>

The Code allows the purchase money interest ten days after the debtor takes possession of the collateral to subordinate the rights of a competing interest (which may have already relied on the debtor's appearance of ownership) by filing.<sup>53</sup> Although such a limited grace period may seem to be an arbitrary judgment, it actually represents a compromise between the rights of potential creditors on the one hand, and the recognition of the impracticality and inconvenience of an even more limited filing requirement on the other. To require perfection at the time the debtor-purchaser receives possession would force the purchase money creditor in a sales transaction to deny his customer possessory rights until the necessary retail installment contract were completed and the necessary financing statement filed.

Since a significant percentage of conditional sales agreements are conducted by nonprofessionals in isolated transactions, a requirement of filing at the time the debtor receives possession would be most burdensome and perilous for those unpracticed in the expeditious operation of perfection procedures. In jurisdictions where section 9-401 requires that the filing be made with the Secretary of State rather than the county recorder, the dangers would be especially great, as such a requirement would entail a visit to the state capital or other presumably distant location. Since the buyer would probably want immediate possession of the goods in most transactions, to require the seller to file his statement before giving possession would make numerous sales at least more complex, if not, in many cases, impossible.<sup>54</sup> The ten-day filing period, although requiring prompt action on the part of the seller, nonetheless obviates the problems that a filing prior to delivery date would pose.

Of course, allowing the debtor-purchaser to display the characteristics of ownership for any period of time provides him with the opportunity to effectuate a sale or further encumbrance of the

---

52. UCC § 9-302.

53. UCC § 9-312(4).

54. Coogan, *supra* note 45, at 863-64; *see* GILMORE § 29.5.

collateral. Aware of this risk, most creditors would be most hesitant to provide a loan on the security of property in a debtor's possession until assured of obtaining a first priority security interest. Consequently, a party seeking such a loan may experience lengthy delays while a creditor insures himself of the adequacy of his security. Under the Code, the property owner in need of a loan or the proceeds from a sale of the property need wait no longer than ten days for a creditor or purchaser to satisfy himself of the owner's rights in the property.

Perceived in light of the purchase money creditor's desire to consummate the transaction, the owner's need to use or sell the collateral, and other creditors' or purchasers' needs to know the nature and extent of outstanding interests in the collateral, the ten-day rule is a sensible compromise. While not interfering with the initial sale, it nonetheless provides relatively quick notice of the existence or nonexistence of a purchase money interest to subsequent purchasers or creditors.

The sanction imposed by subsection 9-312(5)<sup>55</sup> on a purchase money seller of equipment who fails to file within the ten-day period is loss of the purchase money priority. In any contest between a purchase money interest creditor who fails to file within the ten-day period and a subsequent nonpurchase money creditor, the first party to file would have priority.<sup>56</sup> Since it is the purchase money creditor's failure to give notice of his interest that creates the appearance of complete ownership in the debtor, few would argue that the purchase money creditor's loss of special priority in this instance was unjustified. But such failure to give notice is of significance only to subsequent creditors or purchasers. Those whose interest antedates the transaction are not prejudiced by such failure. The critical issue still remains: whether the Code drafters intended that this sanction be imposed where the competing interest is an after-acquired property interest antecedent to the attachment<sup>57</sup> of the purchase money interest.

---

55. See note 7 *supra* and accompanying text.

56. See R. HENSON, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 89 (1973).

57. UCC § 9-203 states:

(1) Subject to the provisions of Section 4-208 on the security interest of a collecting bank and Section 9-113 on a security interest arising under the Article on Sales, a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless

(a) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned; and

An analysis of subsection 9-312(5)<sup>58</sup> and the accompanying Official Comment clearly shows that the purchase money creditor's failure to file a financing statement within the allotted period results in the loss of *all* special priority traditionally afforded the purchase money interest, regardless of whether the competing interest antedates or postdates the attachment of the purchase money interests. "What had been intended was that a purchase money-interest which did not meet the perfection requirements of (3) and (4) lost its special purchase-money priority (e.g., over after-acquired property interests) and thereafter took rank as if it had been an ordinary non-purchase-money interest."<sup>59</sup> Hence, as a result of this loss of special priority, the purchase money interest must compete with other creditors under the terms of section 9-312(5).

As previously noted, the recording statutes were not originally intended to protect holders of antecedent after-acquired interests who had never relied on the debtor's trappings of ownership.<sup>60</sup> Nor is there any reason to believe that the Code draftsmen had any desire to grant any special favor to antecedent after-acquired property interests.<sup>61</sup> Under section 9-312(5) the priority given an antecedent perfected after-acquired property interest over a purchase money creditor who has not perfected within the ten-day period results in nothing less than a windfall for the after-acquired interest creditor. This windfall, however, is not necessarily the product of the draftsmen's solicitude for after-acquired property interests. Rather, the more reasonable view is that it is a mere by-product of the draftsmen's stalwart intent to promote the integrity of the filing system by conditioning even the previously favored purchase money priority on prompt and proper filing.

#### IV. THE INTERNATIONAL HARVESTER OPINION

*International Harvester Credit Corp. v. American National Bank*<sup>62</sup> involves a near-classic example of conflict between a pur-

---

(b) value has been given; and

(c) the debtor has rights in the collateral.

(2) A security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Attachment occurs as soon as all of the events specified in subsection (1) have taken place unless explicit agreement postpones the time of attaching.

58. UCC § 9-312(5) states that its general rules apply to "all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4) of this section) . . . ."

59. GILMORE § 34.1.

60. See notes 42, 43 *supra* and accompanying text.

61. See note 47 *supra* and accompanying text.

62. 296 So. 2d 32 (Fla. 1974).

chase money security interest and an after-acquired property security interest. The conflict arose because the purchase money interest failed to file a financing statement within the ten-day period required by section 9-312(4).<sup>63</sup> Had International Harvester Credit Corp., the holder of the purchase money interest, made a timely filing as required by the Code, there could have been no effective challenge to its priority<sup>64</sup> and American National's after-acquired interest would have operated only on the debtor's equity<sup>65</sup> in the newly acquired collateral.<sup>66</sup> It is in light of this result that one may best comprehend the Florida court's lack of deference to those provisions of the Code drafted to promote the integrity of the filing system by sanctioning those who ignore it and to the Code's underlying objective of enforcing a credible uniform system of commercial law among the states.

It has already been shown that the Code was intended to invoke the penalty of loss of all priority where the purchase money interest is delinquent in filing. This sanction must operate irrespective of the fact that the competing after-acquired interest was secured prior to the purchase money interest.<sup>67</sup> The express language of the Code and its underlying policy notwithstanding, the Florida court held that the priority of the Bank's after-acquired property interest over the holder of an unperfected purchase money interest is confined to the debtor's equity in the property. This decision appears to be not only identical to the interest's priority status where filing has been made in a timely manner, but also much more consistent with pre-Code law than with contemporary interpretations of subsection 9-312(5).

The Florida improvisation or "compromise solution" in granting priority to the extent of the debtor's equity appears to be the outcome of a struggle between two competing policies: (1) perpetuation of the pre-Code preference for the "equities" of the purchase money interest over those of an antecedent after-acquired property security interest<sup>68</sup> and (2) the obligation of the Florida court to

---

63. UCC § 9-312(4) requires perfection of the interest within the ten-day period. Perfection includes filing a financial statement. UCC § 9-312, Comment 3.

64. *See id.*

65. For a definition of debtor's equity, *see* note 44 *supra*.

66. *See* Coogan, *Relationship of Article 9 of the Uniform Commercial Code to Pre-Code Chattel Security Law*, 51 VA. L. REV. 853, 875 (1965).

67. *See* notes 57, 58 *supra* and accompanying text.

68. 296 So. 2d at 34. Criticism can be made of the Florida court's determination that the equities in this case weigh favorably toward the purchase money interest. *See* note 67 *supra*. International Harvester Credit had constructive notice of the after-acquired security interest's priority (via section 9-312(5)) before filing on September 3. 296 So. 2d at 43. Consequently, even if one were to find inequity

adhere to the clear legislative mandate in Florida's Uniform Commercial Code. The policy favoring the purchase money interest's priority status proved more compelling.

The Florida court markedly departed from both the intent and the plain meaning of the Uniform Commercial Code. First, the Code explicitly sanctions the after-acquired interest in sections 9-108 and 9-204. While these provisions limit in some respects the permissible scope of the security device, nowhere is there mention of any intent or design to limit the priority rights of the after-acquired interest to the debtor's equity. Nor does section 9-312(5) itself state any qualification to the priority granted by the Code. The inclusion of other limitations in section 9-312(5) may be said to indicate affirmatively that the absence of any limitation on the after-acquired property interest's priority is intentional.<sup>69</sup>

The treatment afforded similar conflicts in other jurisdictions is further evidence of error by the Florida court. This issue has been adjudicated on numerous occasions in the past but in none of these decisions has the priority of the after-acquired interest been so delimited as here.<sup>70</sup> In light of such consistent judicial interpretation, one would have expected the Code's Permanent Editorial Board to have included a limitation of the after-acquired property interest's priority among the numerous changes made in section 9-312 since

---

in the antecedent after-acquired interest's winning priority in collateral which it had never relied on, to the detriment of the purchase money seller, the assignee of this seller had ample opportunity to determine that the seller had waived its right to priority under the Code.

69. The maxim of statutory construction, *expressio unius est exclusio alterius*, is appropriate for application in this situation. The maxim may be stated:

[w]here a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions. When what is expressed in a statute is creative, and not in a proceeding according to the course of the common law, it is exclusive, and the power exists only to the extent plainly granted. Where a statute creates and regulates, and prescribes the mode and names the parties granted right to invoke its provisions, that mode must be followed and none other, and such parties only may act.

2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.23 (4th ed. 1972) (footnotes omitted).

70. See *James Talcott, Inc. v. Associates Capital Co.*, 491 F.2d 879 (6th Cir. 1974); *Galleon Industries, Inc. v. Lewyn Mach. Co.*, 50 Ala. App. 334, 279 So. 2d 137 (1973); *Cain v. Country Club Delicatessen*, 25 Conn. Sup. 327, 203 A.2d 441 (1964); *First Nat'l Bank v. Smoker*, 286 N.E.2d 203 (Ind. App. 1972); *National Cash Register Co. v. Firestone & Co.*, 340 Mass. 255, 191 N.E.2d 471 (1963); *James Talcott v. Franklin Nat'l Bank*, 292 Minn. 277, 194 N.W.2d 775 (1972); *North Platte State Bank v. Production Credit Ass'n*, 189 Neb. 44, 200 N.W.2d 1 (1972); *Sunshine v. Sanray Floor Covering Corp.*, 64 Misc. 2d 780, 315 N.Y.S.2d 937 (Sup. Ct. 1970); *National Cash Register Co. v. Mishkin's 125th St., Inc.*, 65 Misc. 2d 386, 317 N.Y.S.2d 436 (N.Y. Civ. Ct. 1970).



1962 if, indeed, the courts' failure to create such a limitation judicially were a misinterpretation of the statute.<sup>71</sup> This, however, has not happened.

The general rule governing priority is set forth in subsection 9-312(5), where it is stated that priority is given to the creditor who files first in time.<sup>72</sup> The priority afforded the purchase money interest is an exception to this rule,<sup>73</sup> and so should only be applied in strict accordance with the Code limitations.<sup>74</sup> The proper application of this general rule, however, is not left solely to the tender mercies of a court's application of canons of construction. The Comments following section 9-312 provide Code applications which should remove any doubt regarding the statute's effect in resolving conflicts between purchase money interests and after-acquired interests.<sup>75</sup>

These examples show that, in any conflict between a creditor with an after-acquired property clause and a purchase money creditor who fails to file within the prescribed ten-day period, priority must be awarded to the first party to perfect, which is usually effected by filing.<sup>76</sup> The examples clearly show that the filing rule must be strictly enforced. Where the after-acquired property interest is filed first, it will be awarded priority not only with respect to the first advance, but even with respect to future advances made subsequent to perfection by the purchase money creditor. Nowhere within this example is there any indication that the after-acquired interest priority is limited to the debtor's equity in the collateral. The antecedent after-acquired interest wins unqualified priority unless its competitor is a purchase money interest which was filed either before the debtor receives possession or within ten days thereafter. From the expiration of the grace period, priority must go un-

---

71. Another accepted principle of statutory construction is that

Where a statute has received a contemporaneous and practical interpretation and the statute as interpreted is reenacted, the practical interpretation is accorded greater weight than it ordinarily receives, and is regarded as presumptively the correct interpretation of the law. Because court decisions are readily accessible to public view, the rule has special force where the former construction was made by the judiciary. Thus where the legislature adopts a legislative expression which has received judicial interpretation, such interpretation will be prima facie evidence of the legislative intent.

2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 49.09 (4th ed. 1972).

72. GILMORE § 34.1.

73. UCC § 9-312(5).

74. See *North Platte State Bank v. Production Credit Ass'n*, 189 Neb. 44, 200 N.W. 2d 1 (1972). See note 69 *supra*.

75. UCC § 9-312, Example 4; FLA. ANN. STAT. § 679.9-312 (1966), Example 5.

76. UCC § 9-302 dictates that a security interest in equipment collateral, where the equipment is in the possession of the debtor, must be perfected by filing.

qualified to the interest which has first been filed which, presumably, is the after-acquired property interest. This is the clear statutory mandate.

The chief error in the Florida Supreme Court's reasoning is the court's inability to abandon the common law and its policies in favor of the Code and its policies, as mandated by the Florida legislature. The court's bias in favor of pre-Code law is reflected in its agreement with Judge Rawls' dissent in the lower court.<sup>77</sup> In explicitly adopting Judge Rawls' underlying reasoning that "principles of equity" require that the after-acquired interest's priority be limited to the debtor's equity, the Florida Supreme Court seems also to have implicitly adopted Judge Rawls' citation of a 1969 Florida case stating that the enactment of the Uniform Commercial Code in 1965 could not be deemed to have "[swept] away in one stroke of the legislative broom the jurisprudence of this state."<sup>78</sup> The court's common law bias is even more clearly manifested in its choice of authority, in that the only case cited<sup>79</sup> was one in which Article 9 of the Code is inapplicable, the object of the priority dispute therein having been real property, not personal property or fixtures.<sup>80</sup>

A careful analysis of the court's treatment of "security interest" reveals a rather startling fact: The court, in reality, was not merely influenced by pre-Code law, but actually decided the case on the basis of that law, ignoring the Code. The Supreme Court's reasoning turned, as did Judge Rawls', on the argument that a "security interest" retained by the subsequent (purchase money) creditor never passed to the buyer-debtor and thus "never became subject to the

---

77. The Supreme Court of Florida adopted District Judge Rawls' dissent in stating: "Upon principles of equity and in the avoidance of unjust enrichment, the limitation to the debtor's equity in after-acquired property appears to be the better and more logical rule. We would accordingly agree with Acting Chief Judge Rawls in this respect." 296 So. 2d 32, 34 (Fla. 1974).

78. *Ford Motor Co. v. Pittman*, 227 So. 2d 246, 249 (Fla. App. 1969), *quoted in* *American Nat'l Bank v. International Harvester Credit Corp.*, 269 So. 2d 726, 732 n.3 (Fla. App. 1972). Upon a reading of section 9-102, one will discover that the legislative broom was intended by the Code draftsmen to have been so used. The Note at the end of § 9-102 reads in part: "The adoption of this Article should be accompanied by the repeal of existing statutes dealing with conditional sales . . . and generally statutes regulating security interests in personal property."

79. *County of Pinellas v. Clearwater Fed. Savings & Loan Ass'n*, 214 So. 2d 525 (Fla. App. 1968).

80. UCC § 9-102 states:

(1) Except as otherwise provided in section 9-104 on excluded transactions, this Article applies

(a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures . . . .

earlier creditor's claim."<sup>81</sup> If one were to substitute the word "title" for the phrase "security interest," the court's interpretation would be indistinguishable from the "title doctrine" upon which so many pre-Code interpretations were based.<sup>82</sup> The Florida court adopted this pre-Code device simply by dressing pre-Code law in Code terminology. In applying the various devices designed to maintain purchase money priority, however, the pre-Code courts did not find it necessary, as did the Florida court, to state explicitly that the antecedent after-acquired interest would have priority in the debtor's equity. Rather, the priority of the after-acquired interest was understood.<sup>83</sup>

The effects of the Florida court's distortion of statutory language are, unfortunately, not limited to producing an incorrect resolution of the case. Nor are the consequences limited to creating an incorrect precedent in the interpretation of a single statutory provision. In a well-drafted and carefully integrated statutory scheme such as Article 9, such a grievous departure from the clear statutory mandate in one provision creates ripples throughout the entire statute, raising doubts as to the validity, meaning, and operation of many otherwise clear and self-executing provisions.

The most obvious effect of the *International Harvester* decision outside of its effect on section 9-312 is the doubt cast on the Code's treatment of the concept of "title." In anticipation of attempts to invoke the title doctrine to defeat the priority rules of Part 3 and the default provisions of Part 5, the draftsmen of Article 9 explicitly provided that "each provision of this Article with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor."<sup>84</sup> This rejection of title as an operative concept in Article 9 is further bolstered in the Code's definition of a security interest which provides, in part, that the pre-Code phrase "retention of title" "means nothing more than a security interest"<sup>85</sup> which secures payment or performance of an obligation."<sup>86</sup>

---

81. 296 So. 2d at 34; 269 So. 2d at 731-32.

82. See notes 38, 39 *supra* and accompanying text. See also *United States v. New Orleans R.R.*, 79 U.S. (12 Wall.) 362, 365 (1870).

83. See notes 44, 45 *supra* and accompanying text. For authority demonstrating that the effect under the Code would have been the same if the after-acquired interest had been awarded no priority whatsoever, see notes 65, 66 *supra* and accompanying text.

84. UCC § 9-202.

85. UCC § 2-401 states that even if a seller of property does specifically provide for his retention of title in goods delivered to the buyer, such provision is "limited in effect to a reservation of a security interest."

86. UCC § 1-201(37) states:

"Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery

The Code draftsmen quite clearly and explicitly indicated that pre-Code devices and theories of title retention were not to interfere with the realization of the statutory design. The *International Harvester* decision, by treating "security interest" in the same manner as pre-Code cases treated "title," may well indicate that the Florida Supreme Court is rejecting the Code's treatment of title. Through its treatment of "security interests," the court may well be thought to have resurrected the operative effect of a body of law that, under the clear language of the statute, had presumably been laid to rest.

The Florida court's unfortunate interpretation of subsection 9-312(5) priority, as applied to the after-acquired interest, must also have profound effects on the operation of the "default" provisions in Part 5 of Article 9. Part 5 of Article 9 was drafted so that only one creditor—either the lone creditor or, in the case of two or more competing creditors, the one awarded priority—may invoke the rights and responsibilities of the secured party upon default,<sup>87</sup> *i.e.*, the costs of taking, preserving, preparing for sale, selling the property in a "commercially reasonable"<sup>88</sup> manner, and the payment of attorney fees.<sup>89</sup> Subsection 9-504(1)(b) describes the party who has priority rights in all proceeds (beyond the payment of subsection 9-504(1)(a) disposition expenses) as the party holding "the security interest under which the disposition is made."<sup>90</sup> Creditors with inferior rights in the collateral are described in subsection 9-504(1)(c) as those having "subordinate security interests" and are provided for therein.<sup>91</sup> The problem thus created by giving one party the name of priority creditor while severely restricting the value of the underlying collateral to which he has priority is that the priority creditor may have little in the way of financial incentive which could outweigh the costs and risks of holding the "security interest under which the disposition is made."<sup>92</sup> Having rights in the collateral limited to the debtor's equity will, in many cases, be tantamount

---

to the buyer (section 2-401) is limited in effect to a reservation of a security interest.

87. UCC § 9-504(1).

88. UCC § 9-504(3) recites the standard of "commercial reasonableness" plus numerous other responsibilities of the party conducting disposition proceedings.

89. UCC § 9-504(1)(a).

90. UCC § 9-504(1)(b). It is conceivable that a subordinate security interest might take possession of the collateral upon default and initiate proceedings for public or private sale. However, once such party's rights are adjudicated and held subordinate to another creditor, it would be ludicrous to assume that anyone other than the party awarded priority was intended to satisfy its interest with the proceeds remaining after payment of the § 9-504(1)(a) default expenses and before any proceeds were passed to a "subordinate security interest" under § 9-504(1)(c).

91. UCC § 9-504(1)(c).

92. UCC § 9-504(1)(b).

to having no rights at all. Consequently, the creditor adjudicated the priority party may wish to have no connection whatsoever with the responsibilities of Part 5 disposition and the liabilities for breach of such duties, as enumerated under section 9-507.<sup>93</sup> Under the situation created by the Florida court, it is unlikely that any party other than the purchase money creditor would have enough incentive to conduct disposition proceedings, but this creditor does not appear to be the priority creditor since the court gave that status to the creditor with the after-acquired property interest.<sup>94</sup> The problem then becomes how to reconcile this anomalous situation with the plain meaning of the words in section 9-504.

There are four alternatives from which the court could choose in attempting to resolve this dilemma. Unfortunately, each compels further distortion of the language of section 9-504. First, because the court claims to have extended priority to the after-acquired interest here, it may be inferred that such interest should be held responsible under section 9-504 to dispose of the property upon default and to allocate the proceeds of the sale as specified therein. But if subsection 9-504(1)(a) is to be executed as prescribed, the party having priority must be allowed to satisfy his own interest with any proceeds remaining after the disposition expenses are paid. This, in effect, would endow the after-acquired interest creditor with priority beyond the debtor's equity and thus come into conflict with the Florida court's holding in *International Harvester*.

The second alternative would be to allow the "subordinate" purchase money interest to carry all of the rights and responsibilities of the priority party upon default. As it was the purchase money interest holder who repossessed the farm equipment in *International Harvester*, this second alternative may be what was proposed. However, such a course is tantamount to denying that the after-acquired interest ever had priority with the accompanying rights afforded to it under subsection 9-504(1)(b). While this would be a more honest interpretation, there could then be no denying an open defiance of the Code.

There is a third alternative that would require redefining the after-acquired interest, for purposes of subsection 9-504(1)(b), as equal to the debtor's equity. The monetary value of the after-acquired interest would thus fluctuate for these purposes with the increases and decreases in the amount of the debtor's equity. This

---

93. UCC § 9-507 imposes liability upon the secured creditor involved in administering default proceedings for any breach of its Part 5 responsibilities to the debtor and other creditors entitled to notice under § 9-504(3).

94. See note 13 *supra* and accompanying text.

redefinition would only be effective in cases where an antecedent after-acquired property interest had priority over a purchase money interest. However, as suggested above,<sup>95</sup> if the after-acquired interest is recognized as the priority interest "under which the disposition is made" and thus left responsible for executing the disposition duties, it would be unfair to leave it with a mere debtor's equity. Even where the value of the property exceeds the amount still owing on the purchase price, the costs of disposition in many cases are likely to consume a substantial portion of this sum.<sup>96</sup> Consequently, the creditor with priority in the debtor's equity would be given incentive to evade the duties specified under section 9-504. It may be assumed that the purchase money interest would then be delegated these responsibilities. Surely, however, if the draftsmen had contemplated such limitation of the priority party's rights in the collateral and the preemption of the priority interest by a "subordinate security interest" as the "security interest under which the disposition is made," it seems that they would have made specific provision for such problems and provided some guidelines for just resolution.

A fourth alternative could require a ratable sharing of expenses equal to the creditor's rights in the value of the collateral. Although this alternative is probably the fairest of the four, it is also more exotic and complex. Article 9 only uses such a formula in one other place and there, in reference to divided priorities, it is explicitly set forth.<sup>97</sup> The fact that the Code makes no provision for a similar multiple-party sharing in the instant case is a strong indication that such an interpretation was not intended.

If full priority had been assigned to one party or the other in *International Harvester*, the procedural routine of the default provisions would not have appeared to be so jumbled. The disposition

---

95. See notes 87-93 *supra* and accompanying text.

96. In situations where the value of the property is greater than the amount still owing on the purchase price (positive debtor's equity), the unfairness may be compounded, depending upon whether the party with priority in the debtor's equity can satisfy those rights irrespective of the reduction in proceeds resulting from the payment of the § 9-504(a) expenses. For example, if the value of the property is \$1,000 and the amount still owing is \$800, the debtor has a pre-default equity of \$200. But if the default costs are \$200 also, will these expenses be allowed, for the purposes of computing debtor's equity, to reduce the value of the property to \$800 and so cancel out all \$200 of the debtor's equity? In other words, once the proceeds are reduced from \$1000 to \$800 in payment of default expenses, the problem becomes whether the creditor with priority in debtor's equity retains the rights to the pre-default amount of \$200. Indications from pre-Code authority would suggest that the debtor's equity in conditional sales situations would be reduced by the expenses of retaking and foreclosure. See note 44 *supra*.

97. UCC § 9-315(2).

could have then have proceeded according to the letter of the statute. Given the problems that the decision creates, one can only conclude that the Florida court's judicial gloss is contrary to the spirit, as well as the letter, of the Code.

The last, and by no means least, of the adverse consequences of the *International Harvester* decision is that it is in clear conflict with the settled interpretation of section 9-312 in other jurisdictions. Prior to this decision, the overwhelming weight of authority held that neither retention of title<sup>98</sup> nor retention of any other interest by a purchase money creditor who failed to comply with the filing requirements could frustrate the vesting of full and unqualified priority rights in a creditor with a perfected after-acquired property interest.<sup>99</sup> Only timely filing could preserve for the purchase money creditor the full priority which, under pre-Code law, had been his by virtue of some title retention device.<sup>100</sup> By treating a "security interest" in the same manner as pre-Code courts treated title and applying the old title retention theories, the Florida court has ignored the Code goal of a uniform commercial law in all states and territories. It has pulled Florida out of the mainstream of the Uniform Commercial Code into the historical backwater of the common law. Such a retrograde movement carries with it the danger of other courts following Florida's example, and thus the real threat of a return to the days of different and conflicting laws among the states.

A second issue of the *International Harvester* case was whether a seller of farm equipment must file a financing statement to perfect his purchase money security interest in farm equipment sold under one contract when the purchase price of each item is less than \$2,500, but the total amount of the contract for all items exceeds \$2,500. The applicable Florida law (which retains section 9-302(1)(c) from the 1962 Official Draft) states that a financing statement must be filed to perfect all security interest except purchase money security interests in farm equipment having a purchase price not in excess of \$2,500.<sup>101</sup> In applying this statute the court held

---

98. Mere delivery of possession under subsections 9-312(4) and (5) is sufficient to transfer title under the Code. UCC § 2-401 states that even if the seller of the property does specifically provide for his retention of title in goods shipped or delivered to the buyer, such act "is limited in effect to a reservation of a security interest." UCC § 1-201(37) defines a Code security interest as that which "secures payment or performance of an obligation."

99. See note 70 *supra*.

100. UCC § 9-312(4).

101. UCC § 9-302(1)(c), as stated prior to the 1972 Amendments, was completely eliminated from the 1972 Official Text. The pre-1972 Official Text of § 9-302(1)(c) and the current FLA. STAT. ANN. § 679.9-302(1)(c) (1966) state:

that the seller of farm equipment does not have to file a financing statement to perfect a security interest so long as no single item in the sales contract exceeds \$2,500.<sup>102</sup>

The reasons for the deletion of the former subsection 9-302(1)(c) from the 1972 Official Text of the Uniform Commercial Code are expressive of the framers' general attitudes concerning the necessity of filing the purchase money interest. By not requiring the filing of purchase money contracts in the sale of farm equipment having a purchase price not in excess of \$2,500, the pre-1972 Code (*i.e.*, old section 9-302(1)(c)) was more consistent with the pre-Code philosophy of affording special treatment to the purchase money interest.<sup>103</sup> The Uniform Commercial Code's Permanent Editorial Board has determined in the 1972 Amendments that this rule was detrimental in the context of the Code and should be eliminated because it did not require filing of the purchase money interest.

In stating the "Reasons for 1972 Change" to section 9-302, the Permanent Editorial Board explains that "the effect of the rule was to make farmers' equipment unavailable to them as collateral for loans from some lenders."<sup>104</sup> These lenders were hesitant to advance money on any farm equipment out of fear that a superior unfilled purchase money interest of up to \$2,500<sup>105</sup> would appear and deprive even the most cautious creditor of priority.<sup>106</sup> Such considerations prompted some states to lower the dollar limit from \$2,500 or to delete the provision altogether even before the 1972 Amendments.<sup>107</sup> But regardless of the size of the dollar limit, the

(1) A financing statement must be filed to perfect all security interests except the following:

(c) a purchase money security interest in farm equipment having a purchase price not in excess of \$2,500 . . . .

102. Consequently, the first contract (which was not assigned to International Harvester) was perfected as a bona fide purchase money interest without the necessity of filing a financing statement. See *International Harvester Credit Corp. v. American Nat'l Bank*, 296 So. 2d 32, 33-34 (Fla. 1974).

The court's approach to this issue, discussed in 3 FLA. ST. U.L. REV. 150 (1975), need not be pursued for purposes of this analysis.

103. Hogan, *Purchase-Money Security Interests*, in 1A SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 19.02[2], (1974). This consistency of the pre-1972 § 9-302 with the pre-Code special treatment of the purchase money interest may explain why Florida has determined to retain the filing exemption in its Article 9 equivalent.

104. UNIFORM COMMERCIAL CODE, 1972 OFFICIAL TEXT 767 (1972).

105. The *International Harvester* holding illustrates that even sales contracts for farm equipment totaling more than \$2,500 might be perfected without filing.

106. R. HENSON, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 69 (1963).

107. Hogan, *supra* note 103, § 19.02[2] n.31 (1974).



filing exemption has often been criticized for inhibiting the extension of credit to farmers.<sup>108</sup> The experience with such purchase money filing exemptions has further demonstrated the necessity of strictly enforcing filing requirements and maintaining a credible filing system.

In applying the Florida court's interpretation to the facts of a few hypothetical situations, one can best comprehend both the adverse impact of such an interpretation on the development of a dependable filing system as well as the problems created by the decision with respect to default proceedings. Under the facts and interpretation of *International Harvester*, the Bank would have recognized priority only to the extent of the debtor's equity. This equity would equal the value of the property less the amount still owing to the purchase money creditor. Assume for purposes of this first hypothetical that the total cost of three items of farm equipment<sup>109</sup> equals \$10,000 and that the debtor paid \$1,000 on these three items. If at public sale<sup>110</sup> the three items sell for the full purchase price of \$10,000, the debtor's equity would equal \$1,000. If the expenses to be paid under subsection 9-504(1)(a) amount to \$500 and are satisfied first, as required by section 9-504, the remaining \$9,500 must be divided between the competing creditors. As the after-acquired property interest appears to have been subrogated to the rights of the debtor under section 9-504(2),<sup>111</sup> it is arguable that the \$500 could be deducted from the after-acquired interest's share of \$1,000. This may be preferred, as the debtor's equity has in the past been reduced to the extent of the cost of disposition.<sup>112</sup> The purchase money interest, by rule of subsection 9-504(1)(c), would be left with the remaining \$9,000, in full satisfaction of its interest.

In the alternative, if it is determined that the after-acquired

---

108. R. HENSON, *supra* note 106, at 69, 88.

109. In recognition of the court's response to the secondary issue of the case (see notes 102, 103 *supra* and accompanying text), one may infer that the four items of collateral within the second contract (contract assigned to *International Harvester*) which individually did not exceed the price of \$2,500 were also immediately perfected as bona fide purchase money interests pursuant to UCC section 9-302 (pre-1972 version of Official Text) without the necessity of filing. Although never explicitly asserted by the Florida court, one may thus assume that the only items which were subject to the antecedent after-acquired interest's priority in the debtor's equity were the three items individually having a purchase price exceeding \$2,500. Hence, even items within the same contract would be subject to different rules.

110. UCC § 9-505(2) dictates that public sale is the only available alternative here as neither secured party would have been allowed to retain the collateral in satisfaction of the secured debts.

111. UCC § 9-504(2) requires that: "If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus . . . ."

112. See note 44 *supra* and accompanying text.

property interest may satisfy its claim to the full measure of the debtor's equity (extent to which the value of the equipment exceeds the amount still owing), \$1,000 would be awarded to this party and the purchase money interest would be left with \$8,500.

If at public sale the three items sell for only \$9,000, the debtor's equity would be nothing and all proceeds would go to the satisfaction of the subordinate security interest. In this situation, the party awarded priority has nothing to gain in a default proceeding. Only to the extent that the debtor's equity exceeds the subsection 9-504(1)(a) expenses will the priority awarded to the after-acquired interest be of any value at all. If the party awarded priority has realized the folly of engaging in these proceedings, the after-acquired interest is likely to leave the collateral in the hands of the defaulting debtor or leave it to the purchase money creditor to incur the obligations. However, a situation in which the subordinate purchase money interest is forced to perform these duties seems contrary to the formula of section 9-504, which indicates that the secured party with priority is so obligated.

These examples serve to illustrate that where the after-acquired interest has been forced to relinquish full priority to a *timely filed* purchase money interest, the end results above would have been, in all probability, exactly the same. This results because where the purchase money interest complies with the subsection 9-312(4) filing requirement, it will upon default by the common debtor be entitled to apply all proceeds remaining after payment of section 9-504(1)(a) expenses to the satisfaction of its interest.<sup>113</sup> In this situation where the purchase money interest perfects, even a non-priority after-acquired property clause would "operate automatically upon the debtor's equity in the new collateral."<sup>114</sup>

For purposes of a second hypothetical, assume all of the variables of the above hypothetical, but with the additional factor that the after-acquired interest provides for future advance lending.<sup>115</sup> Suppose further that the holder of the after-acquired interest, aware of debtor's possession of the equipment but unaware of the still-unfiled purchase money interest, advances an additional \$4,000 to the debtor. It is arguable, by reference to pre-Code law, that the second advance made by the after-acquired property interest holder will not meet the same fate in the Florida court as the ante-

---

113. See UCC § 9-504(1)(b).

114. Coogan, *supra* note 66, at 875.

115. By virtue of UCC §§ 9-204 (1) & (3) and 9-312(7), an after-acquired property interest may secure future as well as present advances under the same financing statement when the security agreement so provides.

cedent interest,<sup>116</sup> for it cannot be denied that the after-acquired interest holder was misled by the seller's failure to record. In this case the court should at least hold that the after-acquired interest would have priority in the debtor's equity, \$1,000, plus the amount of the second advance, \$4,000. From this would be subtracted the expenses of \$500, for a remainder of \$4,500. But the purchase money interest holder would still be allowed to recover \$5,000.

This outcome, however, would be in direct conflict with the objectives of the Code as they are explicitly exemplified in Example 4 under section 9-312. It is there demonstrated, with respect to this fact situation, that when the purchase money interest holder fails to file within ten days after the debtor receives possession, the after-acquired interest has unqualified priority as to both of his advances by virtue of his priority in filing. Nowhere within this example is there any mention of limiting the priority of the after-acquired interest with respect to either of the advances. Moreover, in recognition of all of the other considerations mentioned above, it can hardly be alleged that the draftsmen simply misinterpreted the Code in its application to Example 4 under section 9-312.

## V. CONCLUSION

The *International Harvester* decision may not greatly discourage the utilization of after-acquired property security devices. The real danger is that a substantial inducement to timely filing of financing statements will be neutralized. In addition, the Code's qualities of consistency in national interpretation and internal continuity among the various provisions have been jeopardized.<sup>117</sup>

On an individual level, such result will adversely affect all those seeking to appraise the value of present and future security transactions with a debtor whose collateral is subject to the unfiled purchase money interest. Further, the mere suspicion that a debtor's property is encumbered with an unfiled purchase money interest may dissuade the extension of such credit. This reaction could result from fears of a further retreat toward pre-Code purchase

---

116. See notes 39-42 *supra* and accompanying text.

117. See note 70 *supra* for a partial list of those cases and jurisdictions in disagreement with the *International Harvester* holding. The possible ramifications of the judicial gloss placed upon UCC section 9-312 by the *International Harvester* decision may be analogized to the various unfounded challenges to UCC section 2-207 resulting from the infamous case of *Roto-Lith v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962). See Note, *UCC Section 2-207 and the "Counteroffer": Acceptance Unlimited?*, 57 Nw. U.L. REV. 477 (1962); Comment, *Nonconforming Acceptances Under Section 2-207 of the Uniform Commercial Code: An End to the Battle of the Forms*, 30 U. CHI. L. REV. 540 (1963); 76 HARV. L. REV. 1481 (1963).

money biases or the mistrust of a nonuniform enforcement of the filing rules. Should it become common knowledge that the penalty for a 9-312(4) delinquent filing is not universally and strictly applied, it is possible that creditors will come to doubt any past beliefs that a delinquently filed purchase money interest could not defeat them. Such doubts would surely impact on the availability of financing or, at the very least, increase its cost.

The extent to which the Florida court's interpretation will be adopted by other states is not readily ascertainable. Certainly, it will be a formidable temptation and/or a convenient justification for those courts with well-ingrained pre-Code preferences for the purchase money interest. That it pays superficial deference to the Code makes the interpretation all the more enticing.

Among the forces which militate against the adoption of the Florida interpretation, however, are 1) the interdependent and symmetrical qualities of the Code provisions, 2) the value of maintaining the credibility and dependability of the filing system and the concomitant necessity of convincing prospective lenders of the value of such qualities, and 3) authority in every other jurisdiction that has interpreted the meaning of section 9-312.<sup>118</sup> On balance, one may only speculate as to the eventual influences of the *International Harvester* holding, but there need be no speculation in the observation that the Code has suffered a setback.

PATRICK A. GUIDA

---

118. See note 70 *supra* and accompanying text.