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Impact of Revised Article 9 on Missouri's Fixture Financing Scheme, The

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THE IMPACT OF REVISED ARTICLE 9 ON MISSOURI'S FIXTURE FINANCING SCHEME

WILLIAM H. HENNING*

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I. INTRODUCTION

In 1963, Missouri adopted the Uniform Commercial Code,¹ including

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1. 1963 Mo. Laws 503 (codified at MO. REV. STAT. §§ 400.1-101 to 400.10-102 (1978)). Missouri's present version of Article 9 is based on the 1962 Official Text of the Uniform Commercial Code, with certain non-uniform provisions regarding the filing of financing statements as a method of perfecting fixture interests. The non-uniform filing provisions are discussed in Part IV.A *infra*. For convenience, Missouri's current U.C.C. provisions will be referred to as the current, present, or 1962 version of the Code and will be cited to the current version of Missouri Revised Statutes. The provisions of revised Article 9 will be referred to as the new, revised, or 1972 Code.

Article 9, which integrated the existing state laws governing the use of personal property as security. Since that time, significant revisions of Article 9 have been approved by the Code's national sponsors, representing substantial changes in the law of secured transactions.² These revisions have been introduced in the Missouri legislature but have not yet been enacted.³ It seems reasonably certain that they will be enacted in the near future.

The area that has been more extensively revised than any other is Article 9's treatment of security interests in fixtures. These revisions stem from widespread dissatisfaction with the original version's fixture provisions.⁴ "Fixtures" is a hybrid classification, encompassing chattels that have been connected with realty in such a manner that, while not losing their separate identity, they would be considered a part of the realty by a disinterested observer.⁵ Thus, fixtures have characteristics of both realty and personalty, and while they may be subject to Article 9 security interests, they may also be subject to the interests of a variety of other parties with rights in the real estate to which they are affixed. The Article 9 secured party may be competing for priority rights with prior or subsequent owners, mortgagees, or lien creditors, including a trustee in bankruptcy. Both versions of Article 9 set out a complex series of rules designed to resolve these potential conflicts,

2. A Permanent Editorial Board was established in 1961 by an agreement between the Code's sponsoring organizations, the American Law Institute and the National Conference of Commissioners on Uniform State Laws. In 1966, the Board issued a report in which it stated:

By the time the November meeting was held, 337 non-uniform, non-official amendments had been made to the various sections of Article 9. . . . 47 of the 54 Sections of Article 9 had been non-uniformly amended.

In view of this distressing situation and in view also of the fact that various practicing lawyers and law teachers have written articles or textbooks pointing out certain respects in which Article 9 might be improved, the Board decided that the time had arrived for a restudy in depth of Article 9 on Secured Transactions.

Permanent Editorial Board for the Uniform Commercial Code, Report No. 3 (Dec. 15, 1966). In accordance with this decision, the Board established a Review Committee for Article 9. This committee's 1971 Final Report recommended a variety of changes in the 1962 Official Text. These recommendations formed the basis for a revised Article 9, which was approved by the sponsors and became part of the 1972 Official Text of the Uniform Commercial Code.

3. See H.R. 1030, 81st Gen. Assem., 2d Sess. (1982).

4. Some of the non-uniform amendments to § 9-313 of the original Code are discussed in note 55 *infra*.

5. This definition is derived from 5 AMERICAN LAW OF PROPERTY § 19.1, at 3-4 (A. Casner ed. 1952). For excellent discussions of the law of fixtures generally, see *id.* §§ 19.1-14; R. BROWN, PERSONAL PROPERTY §§ 16.1-19 (3d ed. 1975); G. OSBORNE, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW §§ 9.4-6 (1979); 5 R. POWELL & P. ROHAN, REAL PROPERTY ¶¶ 651-660 (1981).

but there are major differences between the current and the revised Code.⁶

This Article examines the fixture provisions of both versions of the Code and comments on the changes made by the revisions. In the process, the Article examines Missouri's rather sketchy non-Code law of fixtures and discusses how this law interacts with both versions of the Code. In addition, the Article deals briefly with the interrelationship between the fixture provisions of Article 9 and relevant provisions of bankruptcy law. The Article was written at this time because of the adverse reaction generated in other states by the Code's original provisions. Fixtures fall at the nexus between real and personal property security systems, and had the Code's original rules been fully analyzed in terms of their impact on state real property regimes, much of the criticism could have been avoided. Before a new set of rules is enacted, it may be beneficial to examine Missouri's fixture scheme to determine whether the revisions are, in fact, advisable.

II. DEFINITION OF FIXTURES

A. Article 9

Both versions of Article 9 permit a secured party to obtain a security interest⁷ in goods⁸ that are or will be affixed to realty⁹ in such a manner that they qualify as fixtures, but both versions defer to non-Code state law to determine whether a particular item qualifies as a fixture.¹⁰ The original Code defines the outer limits of fixtures by providing that "goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass,

6. See U.C.C. § 9-313 (1962); *id.* (1972); MO. REV. STAT. § 400.9-313 (1978). Both versions of § 9-313 are set out in full in the Appendix to this Article.

7. "Security interest" is defined at U.C.C. § 1-201(37) (1962); *id.* (1972); MO. REV. STAT. § 400.1-201(37) (1978).

8. "Goods" is defined at U.C.C. § 9-105(h) (1962); *id.* (1972); MO. REV. STAT. § 400.9-105(f) (1978), as "all things which are movable at the time the security interest attaches or which are fixtures."

9. In both versions of the Code, § 9-102(1)(a) specifically includes fixtures within the scope of Article 9. Sections 9-203(1) and 9-204(1) of the 1962 Code govern the manner in which the secured party obtains an enforceable security interest that attaches to fixtures. These two provisions have been consolidated and appear in the 1972 Code at § 9-203(1). The requirements are that there be a security agreement signed by the debtor containing a description of the collateral, that the secured party give value as defined at § 1-201(44), and that the debtor have rights in the collateral. It is highly unlikely in the context of fixture financing that the secured party would retain possession of the collateral, obviating the need for a signed writing.

10. U.C.C. § 9-313(1) (1962) excludes certain common building materials from the category of fixtures and then states that "[t]he law of this state other than this Act determines whether and when other goods become fixtures." *Id.* § 9-313(1)(a) (1972) states that "goods are 'fixtures' when they become so related to particular real estate that an interest in them arises under real estate law."

metal work and the like"¹¹ are excluded from treatment as fixtures "unless the structure remains personal property under applicable law."¹² This formulation raises an inference that common building materials fall outside the definition of fixtures for purposes of Article 9, but it is confusing in light of the overall policy of referring to non-Code law for the definition of fixtures. Original section 9-313, then, employs a tripartite classification scheme: (1) goods that remain personalty; (2) goods that are so affixed to realty as to qualify as fixtures under non-Code state law; and (3) goods that are so integrally incorporated into a structure that they are to be treated as pure realty regardless of their classification in non-Code law.¹³ Conflicts

11. U.C.C. § 9-313(1) (1962).

12. *Id.* Presumably, security interests in ordinary building materials incorporated into a structure placed on land but not so affixed as to qualify as fixtures (such as mobile homes and prefabricated structures) would be governed under both the old and new Codes by § 9-315, which deals with priorities in goods which "have become part of a product or mass." Security interests in other items affixed to such a structure but retaining their separate identities would be governed under both versions of the Code by § 9-314, which deals with priorities in goods that have become accessories.

MO. REV. STAT. § 700.110 (Cum. Supp. 1982) establishes a procedure by which mobile homes can be converted to real estate:

If a lien is noted on the certificate of title, [the owner may convert by] tendering to the secured party a deed of trust or mortgage on the real estate upon which the mobile home is to be located in the unpaid amount of the secured debt, and with the same priority as or a higher priority than the secured party's lien, or obtaining written consent of the secured party to the conversion.

Id. § 700.110.1(3). By inference, the mobile home remains personalty until this and the other required steps have been taken, and no conflict can arise between the secured party and other parties whose rights are based on interests in the underlying real estate. In cases where the mobile home is placed on leased property, a similar result can be reached under new § 9-313. It is usually clear in such situations that the lessee has the right to remove the mobile home as against his lessor, and new § 9-313(5)(b) gives even an unperfected secured party priority over conflicting interests where "the debtor has a right to remove the goods as against the encumbrancer or owner." U.C.C. § 9-313(5)(b) (1972). For a more complete discussion of the impact of new § 9-313(5)(b), see Part V.B *infra*.

13. See Review Committee for Article 9 of the Uniform Commercial Code, Final Report, Appendix A-3, at 198 (April 15, 1971). This classification is based on § 7 of the Uniform Conditional Sales Act (U.C.S.A.), which distinguished between "goods . . . so affixed to realty . . . as to become a part thereof and not to be severable wholly or in any portion without material injury to the freehold" and "goods . . . so affixed to realty . . . as to become part thereof but to be severable without material injury to the freehold." U.C.S.A. § 7 (1919), 2 U.L.A. 12 (1922). As to the first category, "the reservation of . . . [an interest by the conditional seller] . . . shall be void after the goods are so affixed, as against any person who has not expressly assented to the reservation." *Id.* Thus, the conditional seller lost to all non-assenting parties, prior or subsequent, where goods could not be removed with-

between a secured party and a party with rights in the realty can only occur over goods in the second classification. If goods fall into the first category, only the secured party has rights in them, and if they fall into the third category, only the party with an interest in the realty has rights in them.

Revised Article 9 retains a tripartite classification scheme but is more

out material injury to the realty. As to the second category, the conditional seller could defeat prior interests by a proper filing made before affixation and could defeat subsequent interests by a proper filing made before or after affixation.

The Code's classification scheme created problems in some non-U.C.S.A. states, primarily Massachusetts and Ohio, that had adopted a minority rule derived from the English law of fixtures. These "Massachusetts Rule" states presumed that anything affixed to the realty became a part of it for all purposes and that chattel financiers, including purchase money vendors, had no interest at all after affixation. For example, the Ohio Supreme Court stated, "A removable fixture as a term of general application is a solecism—a contradiction in words. . . . A fixture is an article which was a chattel, but which by being physically annexed or affixed to the realty, became accessory to it and part and parcel of it." *Teaff v. Hewitt*, 1 Ohio St. 511, 524, 527 (1853). The *Teaff* court was also the first to set out the three-part test for fixtures (intent, annexation, and adaptation) that has found almost universal acceptance in this country. *See id.* at 530; text accompanying notes 21-42 *infra*. *See also Clary v. Owen*, 81 Mass. (15 Gray) 522, 524 (1860); Niles, *The Rationale of the Law of Fixtures: English Cases*, 11 N.Y.U. L. REV. 560 (1934); Niles, *The Intention Test in the Law of Fixtures*, 12 N.Y.U. L. REV. 66 (1934).

The problems created by § 9-313 in minority rule states are thoroughly discussed in 2 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* §§ 30.1-6 (1965); Coogan, *Security Interests in Fixtures Under the Uniform Commercial Code*, 75 HARV. L. REV. 1319, 1325-28 (1962); Coogan & Clovis, *The Uniform Commercial Code and Real Estate Law: Problems for Both the Real Estate Lawyer and the Chattel Security Lawyer*, 38 IND. L.J. 535, 556-62 (1963); Gilmore, *The Purchase Money Priority*, 76 HARV. L. REV. 1333, 1355-58, 1394-96 (1963); Kripke, *Fixtures Under the Uniform Commercial Code*, 64 COLUM. L. REV. 44, 51-70 (1964); Shanker, *An Integrated Financing System for Purchase Money Collateral: A Proposed Solution to the Fixture Problem Under Section 9-313 of the Uniform Commercial Code*, 73 YALE L.J. 788, 792-97 (1964). Several of these articles make the point that because of the harshness of the minority rule, the courts frequently avoided its application by holding that goods were not fixtures even when they were firmly affixed to the realty. For example, in Massachusetts,

it became the customary ritual for the court to start by announcing . . . [the general rule]. Having satisfied the ritual the court would then look around, in an appropriate case, for an escape: this was typically a finding that the goods furnished by the purchase money claimant had not become fixtures.

2 G. GILMORE, *supra*, § 28.4, at 761. While Missouri never adopted the U.C.S.A., it was not a minority rule jurisdiction and thus adoption of the original Code fixture provisions did not drastically alter existing law. *See, e.g., Holtgreve v. Sobolewski*, 326 Mo. 412, 31 S.W.2d 993 (1930); *General Motors Acceptance Corp. v. Farm & Home Savings & Loan Ass'n*, 227 Mo. App. 832, 58 S.W.2d 338 (K.C. 1933); *Fred W. Wolf Co. v. Hermann Savings Bank*, 168 Mo. App. 549, 153 S.W. 1094 (K.C. 1913).

consistent with its definitional reference to non-Code law. Rather than exclude common building materials from the category of fixtures by definition, the new version simply states that "no security interest exists under this Article in ordinary building materials incorporated into an improvement on land."¹⁴ The result is that non-Code law determines whether goods affixed to realty, including ordinary building materials, are fixtures, but a security interest in ordinary building materials ceases to be effective after their incorporation into the structure even if they would technically qualify as fixtures under state real estate law. The three categories under the revised Code are: (1) goods that remain personalty; (2) goods that are so affixed to realty as to qualify as fixtures under non-Code state law and that do not qualify as ordinary building materials; and (3) goods that are so integrally incorporated as to be pure realty under non-Code law or which qualify as ordinary building materials.¹⁵ A security interest is not effective as to goods in the third category. Conflicts between secured parties and parties with interests in the real estate can only occur with respect to goods in the second category.

The changes made by the new classification scheme are more cosmetic than real and they operate on a conceptual rather than a practical level. Under the new Code, the secured party with an interest in ordinary building materials will lose to parties with interests in the realty because his interest ceases to be effective after affixation, while under the original version he would lose because the materials would be defined as non-fixtures. The new Code leaves the determination as to whether items fall within the definition of fixtures entirely to non-Code law.

14. U.C.C. § 9-313(2) (1972).

15. This is consistent with the Code rules governing security interests in proceeds, which cease to be enforceable when the proceeds lose their identity. *See id.* § 9-306(2). The 1962 provision is identical. The classification schemes suggested by this Article differ slightly from the scheme described in the Final Report of the Review Committee:

Thus both the existing section and the Committee proposal recognize three categories of goods: (1) those which retain their chattel character entirely and are not part of the real estate; (2) ordinary building materials which have become an integral part of the real estate and cannot retain their chattel character for purposes of finance; and (3) the intermediate class which has become real estate for certain purposes, but as to which chattel financing may be preserved.

Review Committee for Article 9 of the Uniform Commercial Code, Final Report, Appendix A-3, at 198 (April 15, 1971). While there is nothing technically wrong with this classification, it is based on the premise that "goods integrally incorporated into the real estate are clearly fixtures." *Id.* at 200. This statement is as much at odds with the policy of referring to state law for the definition of fixtures as the formulation adopted in the original version of § 9-313; it is believed that the classification scheme suggested in this Article is more consistent with that policy.

B. Missouri's "Essential Part" Doctrine

Both the present and the revised U.C.C. classification schemes largely are consistent with Missouri's decisional law, which had accepted the idea that goods could become incorporated into a structure in such a way that they lost their separate identity and became an "essential part"¹⁶ of the realty for all purposes. In *General Motors Acceptance Corp. v. Farm & Home Savings & Loan Association*,¹⁷ the plaintiff sought to replevy parts of a refrigeration system as assignee of the conditional seller. The defendant's interest arose under a prior mortgage on the real estate. The conditional sales contract provided that the conduits and tubing should become a part of the building but that the compressors, cooling coils, and refrigerators should remain personalty. The court of appeals held in the plaintiff's favor on the theory that, in a contest between a prior mortgagee and a conditional seller, the mortgagee stands in the shoes of the owner of the real estate and is bound by the owner's agreement that the property remain personalty "unless it becomes so builded into the structure as to become an essential part thereof."¹⁸ The court ultimately determined that the essential part doctrine did not apply to the case and thus its statements are dictum. The court, however, described the essential part doctrine and made it clear that the rationale behind the limitation was to prevent waste and diminution of the value of the mortgagee's interest by prohibiting the dismantling of a completed structure:

As to a prior mortgagee of the building, in relation to the party installing the building he stands in the same position as the owner, except that [sic] the article does not retain its character as personalty, if to remove it would materially damage the structure or impair the security of the mortgage.¹⁹

16. The cases do not consistently use this term to describe the doctrine, but it seems descriptive of the concept and has been adopted in this Article for purposes of convenience.

17. 227 Mo. App. 832, 58 S.W.2d 338 (K.C. 1933).

18. *Id.* at 838, 58 S.W.2d at 341. The best statement of the rule appears as dictum in *Patton v. Phoenix Brick Co.*, 167 Mo. App. 8, 150 S.W. 1116 (K.C. 1912), where the court quoted with approval from an Indiana case:

[I]f, in the course of constructing a house, brick should be placed in the walls, and joists and beams in their proper places, the brick maker and sawyer would not be permitted to despoil the house by asserting an agreement with the owner that the brick and beams were to retain their character as personalty, notwithstanding their annexation.

Id. at 8, 150 S.W. at 1117 (quoting *Binkley v. Forkner*, 117 Ind. 176, 181, 19 N.E. 753, 755 (1888)). See also *General Motors Acceptance Corp. v. Farm & Home Savings & Loan Ass'n*, 227 Mo. App. 832, 58 S.W.2d 338 (K.C. 1933); *American Clay Machine Co. v. Sedalia Brick & Tile Co.*, 174 Mo. App. 485, 160 S.W. 902 (K.C. 1913); *Fred W. Wolf Co. v. Hermann Savings Bank*, 168 Mo. App. 549, 153 S.W. 1094 (K.C. 1913).

19. 227 Mo. App. at 838, 58 S.W.2d at 341 (emphasis added).

While the current version of section 9-313 mandates the equivalent of this essential part doctrine by its exclusion of goods incorporated into the structure in a certain manner from the category of fixtures, new section 9-313 will achieve the same result because its reference to the decisional law will incorporate the essential part test. Presumably, goods that would fall within the essential part doctrine under non-Code law will be classed as ordinary building materials under revised Article 9.

It is clear under the new Code that a security interest in ordinary building materials ceases to be effective after their affixation, but the term "ordinary building materials" is not defined. It is reasonably certain that items such as those enumerated in the current provision—e.g., lumber, bricks, tile—and those that would be considered an essential part of the realty under non-Code law will fall within the category, but the place to draw the line is unclear. A functional approach might be to evaluate each case on an ad hoc basis, prohibiting removal where the item is necessary to the building's function and the cost of replacing it would be grossly disproportionate to its value in the hands of the secured party. Applying this test, a court might find, for example, that wiring is an ordinary building material because of the high cost of rewiring as compared with the value of used wire, but that exposed sections of pipe that can be easily removed are not ordinary building materials and remain subject to an Article 9 security interest. This approach is consistent with the policy of preventing waste that is at the core of the essential part doctrine, and its adoption in Missouri would help synthesize Code and non-Code law. In any event, substitution of the term "ordinary building materials" for the more cumbersome phrase "goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work and the like" represents an improvement in drafting.

The importance of the issue raised in the preceding paragraph is diminished as a practical matter because both versions of Article 9 create a right of reimbursement in any third party (i.e., non-debtor) encumbrancer or owner for the cost of repairing physical damage caused by the removal.²⁰

20. Both U.C.C. § 9-313(5) (1962) and *id.* § 9-313(8) (1972) permit the secured party to remove his collateral following default,

but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them.

This provision appears to alter pre-Code law in Missouri, which generally permitted some minor damage in the removal of fixtures but did not permit removal in situations where it would cause material injury to the underlying estate or would impair the security of the mortgage even though the removal caused some incidental damage to the underlying estate. *See, e.g.*, *General Motors Acceptance Corp. v. Farm & Home Savings & Loan Ass'n*, 227 Mo. App. 832, 58 S.W.2d 338 (K.C. 1933); *Fred W. Wolf Co. v. Hermann Savings Bank*, 168 Mo. App. 549, 153 S.W.

If the cost of reimbursement becomes too high in relation to the value of the collateral, the secured party will undoubtedly decide not to remove. The issue is more likely to arise in cases where the debtor owns the underlying estate since the debtor is not entitled to reimbursement for damages. If the courts are mindful of the underlying policy, the prevention of waste, there should be few problems in this area.

III. PRE-CODE PRIORITY RULES

A. *Ordinary Fixtures*

The test for determining when goods become fixtures in Missouri is easy to state but difficult to apply to specific fact situations. The recent case of *Marsh v. Spradlin*²¹ states that:

A fixture is an article of personal property which has been so annexed to the real estate that it is regarded as a part of the land; its status may depend on the facts and circumstances, but the principal elements for consideration are: (1) the annexation; (2) the "adaption" of the article to the location; and (3) the intent

1094 (K.C. 1913). An innovation that appears in both U.C.C. § 9-313(5) (1962) and *id.* § 9-313(8) (1972) deals with the impairment of security problem: "A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation."

The U.C.C. provisions on removal differ significantly from the approach of the U.C.S.A., which prohibited removal by the conditional seller if the result would be a "material injury to the freehold," a test similar to that adopted by Missouri decisional law. *See* U.C.S.A. § 7 (1925), 3 U.L.A. 123 (1929). This provision led to inconsistencies among states that had adopted the U.C.S.A., as illustrated by the following passage from Professor Gilmore:

Under the New Jersey "institutional doctrine" and the Pennsylvania "plant mortgage doctrine," at least as those doctrines were generally understood, there was "material injury to the freehold" if the removal of conditionally sold goods jeopardized the "economic integrity" of the factory, apartment house, office building, or whatnot, even if the removal could be accomplished without physical injury to the structure. In other U.C.S.A. states "material injury to the freehold" had been construed to mean "irreparable physical injury": anything could be removed unless the removal, in effect, destroyed the structure.

2 G. GILMORE, *supra* note 13, § 30.2, at 804. Both versions of the Code refer to removal in the context of "physical injury" and delete the "material injury" requirement of the U.C.S.A. by providing for reimbursement of the non-debtor owner or encumbrancer. In cases of extreme injury, however, the courts are free to denominate an item as an "ordinary building material" and thus not subject to the Article 9 security interest. Use of the word "physical" in the Code was apparently intended to overrule the economic injury tests in Pennsylvania and New Jersey. *See* U.C.C. § 9-313 comment 9 (1972).

21. 537 S.W.2d 402 (Mo. 1976).

of the annexor at the time of the annexation.²²

Of these elements, the most important is the intent of the annexor.²³ Where that intent is clear, as in an installment sales contract with a specific clause stating that the property is to remain personalty for all purposes, the only circumstance that would render the goods realty, as between seller and purchaser, would be incorporation into the structure in such a manner as to cause the goods to lose their identity.²⁴ Where third parties are involved, however, the courts have frequently taken the position that the intent of the seller and purchaser is not binding on third parties and have given more weight to the elements of annexation²⁵ and adaptation;²⁶ the emphasis var-

22. *Id.* at 404.

23. *Id.* See also *Manufacturers Bank & Trust Co. v. Lauchli*, 118 F.2d 607 (8th Cir. 1941); *Hatton v. Kansas City, C. & S. Ry. Co.*, 253 Mo. 660, 162 S.W. 227 (1913); *Leawood Nat'l Bank v. City Nat'l Bank & Trust Co.*, 474 S.W.2d 641 (Mo. App., K.C. 1971); *Banner Iron Works v. Aetna Iron Works*, 143 Mo. App. 1, 122 S.W. 762 (St. L. 1909).

24. See note 18 *supra*. Even though intent is the most important element, there is some authority that intent alone will not be sufficient to transform a chattel into a fixture where there is no physical affixation whatsoever. See *Sears, Roebuck & Co. v. Seven Palms Motor Inn*, 530 S.W.2d 695, 696-97 (Mo. En Banc 1975); *Loan v. Gregg*, 55 Mo. App. 581, 589 (St. L. 1894). However, where the object is heavy and there is a high degree of adaptation, the courts may ignore the fact that the item has not actually been fastened to the realty. This may explain decisions like *Glueck & Co. v. Powell*, 227 Mo. App. 1226, 61 S.W.2d 406 (K.C. 1933), where 500-pound refrigerators adapted to use in apartments were held to be fixtures even though the only actual attachment to the realty was the electric cords. This case is discussed in more detail in text accompanying notes 28-31 *infra*. It also helps to explain the decision in *Rogers v. Crow*, 40 Mo. 91 (1867), where a church organ that fitted into a special recess in the structure was held to be a fixture. The court ignored the fact that there was some minor physical annexation and based its decision entirely on the degree of adaptation, noting the fact that a high degree of adaptation would mislead a subsequent purchaser into believing that the item passed with the land:

The character or permanency of the annexation in this particular case can have no controlling or preponderating weight. Upon an examination of the design, use and adaptability, the evidence of intention was manifest and unmistakable, and the purchaser had a right to be governed by these considerations in regarding it as a fixture.

Id. at 96. The interrelationship between adaptation and intent is discussed further in note 30 *infra*.

25. Annexation refers to the degree of physical affixation to the real estate. The more firmly goods are annexed, the more likely that they will be considered fixtures. However, there is no set formula and courts are far more likely to be persuaded by intent and adaptation than by degree of annexation. White and Summers have facetiously suggested two objective tests to determine whether particular goods are fixtures:

An excellent candidate for a certain rule is the half-inch formula. Under this formula anything which could be moved more than a half-inch by one blow with a hammer weighing not more than five pounds and swung

ies depending on the nature of the interests involved.

The most common priority questions involve conflicts between purchase money sellers of goods that become affixed to realty and parties with real estate interests. Missouri's pre-Code decisions generally favored the seller over existing realty interests²⁷ but subordinated him to subsequent

by a man weighing not more than 250 pounds would not be a fixture. Another formula might be the screwdriver-crescent-wrench-one-hour rule. Under such a rule anything affixed to the realty would be regarded as a fixture unless one man with a screwdriver and a crescent wrench could loosen it from the floor or wall within one hour.

J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 1056 n.66 (2d ed. 1980).

26. Adaptation refers to the degree to which goods are especially appropriate to the use being made of the particular realty. For example, special carpentry may have been necessary to make machinery fit precisely into an area within a building, or the machinery itself may have been specially constructed to match the contours of the building. The doctrine, also called "constructive annexation," was thoroughly discussed in *Sears, Roebuck & Co. v. Seven Palms Motor Inn*, 530 S.W.2d 695 (Mo. En Banc 1975). In that case, the Missouri Supreme Court adopted the following definition: "The doctrine of constructive annexation recognizes that a particular article, not physically attached to the land, 'may be so adapted to the use to which the land is put that it may be considered an integral part of the land' and 'constructively annexed' thereto." *Id.* at 697. *Seven Palms* involved a dispute over whether the plaintiff's accounting for purposes of obtaining a mechanic's lien was proper when it included drapes and bedspreads in motel rooms. The drapes had been designed to hang from traverse rods, and the bedspreads matched the drapes but were simply placed on the beds. The plaintiff claimed that both were fixtures because they were made especially for those rooms; the court agreed with respect to the drapes but held that the bedspreads were pure personalty. 530 S.W.2d at 697-98.

The Pennsylvania courts developed the "industrial plant mortgage doctrine," which carried the concept of adaptation to its theoretical limits. Under the doctrine, established in *Voorhis v. Freeman*, 2 Watts & Serg. 116 (Pa. 1841), all the machinery of a plant, whether fastened to the realty or not, was treated as fixtures. See Leary, *Financing New Machinery for Mortgaged Pennsylvania Industrial Plants*, 4 VILL. L. REV. 498 (1959); Robinson, McGough & Scheinholtz, *The Effect of the Uniform Commercial Code on the Pennsylvania Industrial Plant Doctrine*, 16 U. PITT. L. REV. 89 (1955).

The majority rule in this country appears to be that "ordinary movable chattels, affixed slightly if at all, and usable in any place where they might happen to be placed, are not fixtures, no matter how adapted to and necessary for the use of the realty they may be." R. BROWN, *supra* note 5, § 16.4, at 534. Missouri decisions seem to follow this majority rule, although the language of the opinions occasionally suggests that where the item is heavy and the degree of adaptation particularly high, an item may be treated as a fixture even though there is no physical affixation. See note 24 *supra*.

27. It is assumed in this Article that prior mortgagees of the realty acquire an interest in subsequently attached fixtures under an after-acquired property clause.

purchasers and mortgagees who took without notice. In addition, the courts were more likely to find initially that an article fell within the fixture definition when the rights of subsequent parties who might be misled by the article's physical presence on the property were involved. For example, in *Glueck & Co. v. Powell*,²⁸ the plaintiff sold electric refrigerators to the owner of an apartment house for installation in the apartments. The agreement between seller and owner was oral and amounted to a conditional sale in which the plaintiff retained title pending payment. The refrigerators weighed five hundred pounds each but were attached to the apartments only by an electrical cord. The owner subsequently conveyed the property to Bradshaw, who executed a deed of trust in favor of the defendant. Bradshaw defaulted and the defendant bought the property at the foreclosure sale. The plaintiff then tried to replevy the refrigerators and the defendant resisted on the ground that they had become fixtures and he was entitled to priority as a subsequent purchaser without notice of plaintiff's agreement with the original owner. In deciding for the defendant, the court stated:

As between the parties to the sale of an article installed in a building, much depends upon the agreement between them as to whether it is to become a fixture or remain personalty, but as between the seller of such an article and a subsequent purchaser or mortgagee of the real estate, such an agreement plays no part.²⁹

The court then went on to hold that because the refrigerators were customary in modern apartments and were adapted to use in the building,³⁰ they qualified as fixtures even though physical annexation was slight.³¹ A find-

28. 227 Mo. App. 1226, 61 S.W.2d 406 (K.C. 1933).

29. *Id.* at 1230, 61 S.W.2d at 408.

30. The court cited *Banner Iron Works v. Aetna Iron Works*, 143 Mo. App. 1, 6, 122 S.W. 762, 764 (St. L. 1909), as follows:

If the thing furnished was necessary to that work or business, or necessary to the purpose for which the building was designed and used, or was a convenient accessory, or commonly employed in connection with such business, *the intention of the proprietor of the establishment to annex it permanently to the realty may be inferred.*

227 Mo. App. at 1229, 61 S.W.2d at 408 (emphasis added). The first part of this passage describes the concept of adaptation and the italicized portion suggests an interrelationship between intent and adaptation. Where intent cannot be ascertained it may be inferred, and one basis for making such an inference is the degree of adaptation involved. Of course, in many cases the intent of the original owner that the article remain personalty is clearly expressed in a sales agreement, but that is irrelevant in a contest with a subsequent purchaser and, in fact, an opposite intent may be inferred. For other cases holding intention between seller and purchaser to be irrelevant in contests with subsequent purchasers and mortgagees, see *Leawood Nat'l Bank v. City Nat'l Bank & Trust Co.*, 474 S.W.2d 641 (Mo. App., K.C. 1971); *Grinnell Co. v. Farm & Home Savings & Loan Ass'n*, 75 S.W.2d 409 (Mo. App., Spr. 1934); *Kelvinator St. Louis, Inc. v. Schader*, 225 Mo. App. 479, 39 S.W.2d 385 (St. L. 1931).

31. 227 Mo. App. at 1230, 61 S.W.2d at 408.

ing that the article was a fixture was therefore outcome determinative because of the priority rule. Had the court decided that the refrigerators were not sufficiently attached to the building to qualify as fixtures, the defendant would have had no basis for asserting a claim to them. The plaintiff would have been allowed to replevy the refrigerators, but not because of a priority rule.

The rationale for holding goods to be fixtures and applying the priority rule was the protection of parties who had relied on the presence of the goods in making their investments. Where goods were affixed to the realty at the time the subsequent purchaser's or mortgagee's interest arose and were of a type that a reasonable person would have believed constituted a part of the realty, the subsequent party's expectations were protected unless he had notice. In this regard, Missouri cases adopted a rule that filing a notice of the seller's purchase money interest under the provisions of the Conditional Sales Act³² did not give constructive notice to parties with subsequent real estate interests. A filing in the real estate records was necessary. The result was that subsequent real estate purchasers and mortgagees could rely on the physical appearance of the property unless their search of the real estate records revealed the existence of the conditional seller's interest.³³ Again, the reason for the rule was to protect the reasonable expecta-

32. Both the Conditional Sales Act, MO. REV. STAT. §§ 428.100-110 (1959), and the Chattel Mortgage Recording Act, *id.* §§ 443.450-520, were repealed by the Uniform Commercial Code, § 10-102, 1963 MO. LAWS 503, 637. Section 428.100 of the Conditional Sales Act required a filing that would satisfy the requirements of the Chattel Mortgage Recording Act, and § 443.460 of the latter act did not require that chattel findings be indexed into the real estate records.

In *Kelvinator St. Louis, Inc. v. Schader*, 225 Mo. App. 479, 39 S.W.2d 385 (St. L. 1931), the creditor had filed a proper notice of its interest under chattel security law, but the court held that this filing did not give constructive notice to a subsequent purchaser of the realty because there was no recording in the real estate records. *See also* *General Motors Acceptance Corp. v. Farm & Home Savings & Loan Ass'n*, 227 Mo. App. 832, 58 S.W.2d 338 (K.C. 1933). The continuation of this result under the 1962 version of the Code occasioned the special non-uniform filing and recording rules adopted by Missouri, and similar concerns may have motivated non-uniform provisions in other jurisdictions. *See* discussion at Part IV.A *infra*.

33. The 1962 version of the Code at § 9-313(3) provides for granting security interests in property already affixed to realty as collateral for loans. The pre-Code Missouri case law did not deal with this situation, apparently because there was no practice of taking chattel security interests in property that would pass as realty under a deed. The party seeking security would have been better off with a mortgage on the entire realty, even if it was a second or subsequent mortgage. Professor Gilmore notes the unrealistic nature of original § 9-313(3) and states: "All pre-Code chattel financing of so-called fixtures has represented purchase-money financing of new equipment. . . . There seems to have been no reason whatever for . . . § 9-313 to have introduced the uncalled-for novelty of the post-affixation chattel interest." 2 G. GILMORE, *supra* note 13, § 30.3, at 810.

tions of subsequent investors.

On the other hand, when the third party asserting the claim was a party with an interest that arose prior to affixation, the courts were much more inclined to find that an item remained personalty in accordance with the expressed intent of the annexor. *Fred W. Wolf Co. v. Hermann Savings Bank*³⁴ involved a suit in equity to enforce a chattel vendor's lien against a prior real estate mortgagee. Even though the machinery involved was affixed to the realty in a more significant manner than the refrigerators in *Glueck & Co.* and was bought to replace worn out machinery that was clearly subject to the mortgage, the court held that it remained personalty and was not subject to the prior mortgage. The court stated:

[A] conditional sale of machinery put into a plant, covered by a prior mortgage, will be enforced in face of the opposition of the mortgagee, where such machinery may be removed without substantial injury to the freehold, or, to express it differently, *without substantial injury to the security the mortgagee had at the time of such addition to the plant.*³⁵

Again, the decision that the property remained personalty was outcome determinative, this time in favor of the chattel security interest. This result was in line with the majority approach of American courts favoring the conditional vendor over the prior real estate interest,³⁶ but it was based on a finding that the article was not a fixture rather than by application of the priority rule.

Despite the language in the opinions suggesting that the property remained personalty, it seems likely that the courts were simply taking a shortcut—reaching the right result while leaving out one step in the analysis. If the courts had applied the full test, they would have found that the article was a fixture but that the chattel vendor had priority because the prior mortgagee was not a reliance creditor. Use of the shortcut, in theory, could lead to awkward results. The courts should avoid creating the impression that identical goods, affixed to the realty in the same manner and with the same quantum of intent, can be classified as fixtures for some purposes and personalty for others. Since “fixtures” serves as an intermediate category between pure personalty and pure realty, it makes sense to utilize the concept fully and decide contests on the basis of priority rules rather than by manipulating the definition of fixture. Nonetheless, a careful reading of the cases suggests that the courts have been less concerned with theoretical purity than with reaching the proper result. Many items that would be classified as fixtures in a contest between a party with a chattel security interest and a party with a subsequent real estate interest were classified as personalty where a prior real estate interest was involved. In such cases the conditional seller's failure to record properly under the Conditional Sales

34. 168 Mo. App. 549, 153 S.W. 1094 (K.C. 1913).

35. *Id.* at 554, 153 S.W. at 1096 (emphasis added).

36. 5 AMERICAN LAW OF PROPERTY § 19.12, at 49-52 (A. Casner ed. 1952).

Act was irrelevant because the item remained personalty and the prior real estate mortgagee had no interest to assert. The terms of the conditional sales agreement were binding between seller and purchaser unless there was a loss of identity.³⁷

As with the cases involving subsequent real estate interests, the key factor in the decisions favoring the conditional seller over prior real estate interests was reliance. The prior party's nonreliance on the particular item in acquiring its interest seems to have been more important than the annexor's intent and the degree of adaptation and annexation. Although the cases involving prior mortgagees emphasized the intent of seller and purchaser that the item in question remain personalty, similar intent would have been considered irrelevant with respect to subsequent purchasers. It is unlikely that intent was really the controlling factor. Where there was no reliance, the courts would find that an article was not a fixture and award it to the competing chattel interest even though firm annexation and adaptation were present.

The reliance concept explains decisions like *American Clay Machinery Co. v. Sedalia Brick & Tile Co.*,³⁸ where machinery used in grinding and drying clay was held to remain personalty as against a *subsequent* purchaser with *actual knowledge* of the conditional seller's interest even though the machinery was embedded in cement and was so bulky that a building had to be constructed around it.³⁹ Since a subsequent party with actual knowledge or

37. See, e.g., *Greene County Bldg. & Loan Ass'n v. Holland Furnace Co.*, 227 Mo. App. 972, 59 S.W.2d 749 (K.C. 1933); *General Motors Acceptance Corp. v. Farm & Home Savings & Loan Ass'n*, 227 Mo. App. 832, 58 S.W.2d 338 (K.C. 1933).

38. 174 Mo. App. 485, 160 S.W. 902 (K.C. 1913).

39. *Id.* at 492, 160 S.W. at 907. The court acknowledged the existence of the essential part test but declined to apply it despite the high degree of physical affixation. *Id.* at 488, 160 S.W. at 906. *Holtgreve v. Sobolewski*, 326 Mo. 412, 31 S.W.2d 993 (1930), represents the furthest extreme of this rationale. The plaintiff sued to prevent Sobolewski from removing a dwelling house which he had erected on his wife's property. The house had been built pursuant to an agreement by which his wife had stipulated that the house would remain personalty. The agreement stated in part that:

I will build the House on ground or Farm or land this agreement, that the House Will and must remain at all times as my Personal property and at no time let it Ever Enter In your mind that the House Is yours, under these conditions, my Dear I will Erect the House

Id. at 416, 31 S.W.2d at 994. The land was subject to a prior deed of trust, and the promissory notes which it secured were purchased by the plaintiff after the agreement but before the house was erected. After default, the plaintiff bought in at the foreclosure sale and claimed the house as well as the land. The court held that the house remained personalty and gave Sobolewski a reasonable time to remove it. The key to the decision seems to have been the fact that the house had not been erected at the time the plaintiff made his initial investment in the promissory notes.

constructive notice through a real estate filing could no more be said to rely than a prior party, the decision is consistent with the reliance theory. Reliance, then, appears to have been the largely unarticulated key to analyzing the cases in this area. As will be seen, reliance also plays an important role in the priority rules of both versions of section 9-313. Discussion of the Code's priority rules, however, is postponed until after an examination of the concept of perfection as it relates to fixtures.⁴⁰

A related reason for favoring the conditional seller over prior real estate interests where the item could be removed without serious damage to the underlying estate was to promote commerce and encourage improvements to land. Since the prior mortgagee did not rely on the item in making his investment and was not damaged by its removal, it made sense to promote commerce by favoring the conditional seller. In fact, in many cases, the prior mortgagee was actually benefited because the item purchased enhanced the mortgagor's revenue and thus made it more likely that the mortgage would be paid. As stated in *Fred W. Wolf Co. v. Hermann Savings Bank*,⁴¹ "The old rule that whatever is annexed to the freehold becomes a part of it has been greatly relaxed to meet the exigencies of modern trade and industry."⁴²

B. Trade Fixtures

Along with the majority of jurisdictions, Missouri has adopted special rules with respect to items placed on leased property by the lessee. These rules have traditionally been considered part of the "trade fixture" doctrine under which items affixed to premises leased for business purposes remained personalty as between landlord and tenant if they were affixed to advance the purpose for which the tenant rented the building.⁴³ The doctrine has expanded, however, to include tenants' fixtures generally.⁴⁴ In such cases, there is a presumption that the parties to the lease intended that the property remain personalty even though there is significant adaptation and annexation.⁴⁵ The presumption can be overcome by a showing that removal

40. See Part V *infra*.

41. 168 Mo. App. 549, 153 S.W. 1094 (K.C. 1913).

42. *Id.* at 552, 153 S.W. at 1096.

43. See, e.g., *Blackwell Printing Co. v. Blackwell-Wielandy Co.*, 440 S.W.2d 433 (Mo. 1969); *Matz v. Miami Club Restaurant*, 127 S.W.2d 738 (Mo. App., St. L. 1939). The trade fixture doctrine dates back to *Hunt v. Mullanphy*, 1 Mo. 361 (1825), at which time it was based on the public policy of encouraging businessmen to use leased premises in the most productive manner possible. Some aspects of the trade fixture doctrine are traced in 21 MO. L. REV. 309 (1956).

44. For a thorough discussion of tenants' fixtures, see 5 AMERICAN LAW OF PROPERTY § 19.11, at 39-46 (A. Casner ed. 1952); R. BROWN, *supra* note 5, §§ 16.8-.13 (3d ed. 1975).

45. There are limitations on the trade fixture doctrine. If the article is firmly annexed and is so peculiarly adapted that it makes the building itself especially

would cause serious injury to the building.⁴⁶

In a sense, use of the term "trade fixtures" is misleading since they are largely treated as pure personalty. The area of trade fixtures is an exception to the policy favoring subsequent purchasers and mortgagees over competing chattel interests. The cases rationalize the exception by stating that since purchasers and mortgagees take the property subject to the lease, they also take it subject to the tenant's right of removal as against the original landlord.⁴⁷ This is a reasonable basis for the holdings; it is also consistent with the idea that "trade fixtures" is a misnomer applied to items that would otherwise be treated as fixtures but that will be treated as pure personalty in the leasing context. The original version of Article 9 is silent on the subject of trade fixtures, and courts attempting to apply its rules to a trade fixtures case may fall into a conceptual trap by treating the collateral as true fixtures and applying the ordinary priority rules.⁴⁸

Trade fixtures should cause little difficulty under the new version of section 9-313. Treating trade fixtures as true fixtures for analytic purposes will yield a result consistent with the holdings in non-Code cases because the revised Code gives the secured party priority against the owner or encumbrancer of real property, whether or not he has perfected his security interest, where "the debtor has a right to remove the goods as against the encumbrancer or owner."⁴⁹ This would be the situation in a trade fixture case.

The section goes on to provide that "[i]f the debtor's right terminates,

suitable for a particular kind of business, it is not removable. Thus, in *Stockton v. Tester*, 273 S.W.2d 783, 789 (Mo. App., Spr. 1954), the court held that insulated doors installed in a building used for refrigeration purposes were not removable by the tenant.

46. See, e.g., *Stockton v. Tester*, 273 S.W.2d 783 (Mo. App., Spr. 1954); *Red Diamond Clothing Co. v. Steidemann*, 169 Mo. App. 306, 152 S.W. 609 (St. L. 1912). This doctrine seems related to the essential part doctrine employed in Missouri to prevent waste as a limitation on the concept of fixtures generally. See note 18 *supra*.

47. *Blackwell Printing Co. v. Blackwell-Wielandy Co.*, 440 S.W.2d 433 (Mo. 1969); *State ex rel. State Highway Comm'n v. Wally Hutter Oil Co.*, 467 S.W.2d 279 (Mo. App., St. L. 1971).

48. For example, suppose *M* has a recorded mortgage containing an after-acquired fixture clause covering real property owned by *O* and leased to *L*. Assume further that a secured party *S* takes an unperfected purchase money security interest in goods sold to *L*, who attaches them to the realty in such a manner that they qualify as trade fixtures. If *M* then makes an advance to *O* and the rules of current § 9-313(4)(c) are applied, *M* will have priority over *S* to the extent of the advance even though *L* has a right to remove the fixtures as against *M*. This result is inconsistent with pre-Code law, and new § 9-313(5)(b) makes it clear that *S*'s right of priority is contingent on *L*'s right of removal.

49. U.C.C. § 9-313(5)(b) (1972).

the priority of the security interest continues for a reasonable time.⁵⁰ This is important in Missouri because the tenant's right to remove trade fixtures terminates when the lease or the period in which the tenant holds over with the landlord's consent expires.⁵¹ Since a struggling debtor may begin to default on all his obligations including his lease at about the same time, his right to remove trade fixtures as against the landlord may well expire before the secured party has had an opportunity to take possession of them. The new Code gives the secured party an additional, reasonable time in which to act to protect his interests,⁵² and it represents an improvement over the current version of Article 9.

IV. PERFECTION

One of the major changes in revised section 9-313 involves the method

50. *Id.*

51. *See, e.g.,* *Matz v. Miami Club Restaurant*, 127 S.W.2d 738 (Mo. App., St. L. 1939); *Idalia Realty & Development Co. v. Norman*, 183 S.W. 348 (Mo. App., Spr. 1916). In *Thomas v. Utilities Bldg. Corp.*, 335 Mo. 900, 74 S.W.2d 578 (1934), the lease terminated on December 31, 1928, and the tenant stayed on as a tenant from month to month. The landlord sent a notice on January 30, 1929, instructing the tenant to vacate on March 1, and this was sufficient to entitle the landlord to fixtures that remained on the premises on March 2. *Id.* at 905, 74 S.W.2d at 584.

There are theoretical problems with the limitation on the tenant's right of removal. In England, the fixtures are the property of the landlord subject to a right of removal, and limiting that right to the lease term is not unreasonable. *See Niles, The Rationale of the Law of Fixtures: English Cases*, 11 N.Y.U. L. REV. 560 (1934). In Missouri, however, the items are largely treated as the personal property of the tenant. Absent abandonment, a tenant would not lose his right to possession of other goods left on the property after the lease term, but he can lose his right to trade fixtures even though the decisions indicate that as between landlord and tenant they remain personalty. Apparently the courts have never fully recognized the theoretical inconsistencies inherent in their handling of trade fixtures.

52. This right apparently differs from Missouri decisional law under which the right to levy on trade fixtures expired with the tenant's right of removal. *See Donnewald v. Turner Real-Estate Co.*, 44 Mo. App. 350 (St. L. 1891). However, the rights of levying creditors are derivative in nature and it is not entirely clear that a court would reach the same result in a case involving a conflict between a lessor and a party with a chattel security interest arising under a separate contract with the lessee. The 1962 version of Article 9 does not address this issue, but the result under new § 9-313(5)(b) seems clear.

New § 9-313(5)(b) would also come into play in the event that a secured party obtained a security interest in goods affixed to the real estate of a licensor by a licensee. Since Missouri law permits removal by the licensee, the section would give the secured party priority in a contest with the licensor even if he failed to perfect his security interest. For cases discussing the rights of licensees in fixtures which they have placed on their licensors' land, see *Priestley v. Johnson*, 67 Mo. 632 (1878); *Laclede Gaslight Co. v. Consumers' Ass'n*, 127 Mo. App. 442, 106 S.W. 91 (St. L. 1907).

of perfecting⁵³ security interests in fixtures. The 1962 Official Text was frequently criticized for two reasons. First, it did not require that financing statements covering fixtures be integrated into the states' real estate recording systems.⁵⁴ Second, it did not require that financing statements give the name of the record owner of the property, and without such a provision even a system requiring integration would not help real estate searchers where neither the secured party nor the debtor had a recorded real estate interest. Numerous states, including Missouri, passed non-uniform provisions to correct these deficiencies.⁵⁵

53. Perfection is not defined in the Code, but the methods and effect of perfection are clear. Section 9-303(1) in both versions states:

A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. Such steps are specified in Sections 9-302, 9-304, 9-305 and 9-306. If such steps are taken before the security interest attaches, it is perfected at the time when it attaches.

Once a security interest is perfected, the secured party has obtained the maximum protection from third party interests available under Article 9, but perfection is not "perfect" and the secured party may still be subordinated to certain third parties. The concept of perfection as it is used in Article 9 apparently derives from § 96(a)(2) of the former Bankruptcy Act, 11 U.S.C. § 96(a)(2) (1976) (repealed 1978), under which it meant, with respect to personalty, the point in time at which no creditor of the bankrupt could obtain a lien by legal or equitable proceedings on a simple contract which would defeat a secured party.

54. In the 1962 Official Text, § 9-401 required that financing statements covering fixtures be filed "in the office where a mortgage on the real estate concerned would be recorded" but did not require that the filings actually be indexed to or recorded in the real estate records. *See* U.C.C. § 9-401 (1962). The perceived danger was that the filing officer would file them in the chattel files and a real estate searcher would not locate them in the chain of title. Apparently this represented a real problem in some areas. *See* Kripke, *supra* note 13, at 53.

The language of § 9-401 originated with § 7 of the Uniform Conditional Sales Act, under which a chattel security interest was void as to subsequent purchasers without notice unless the conditional sales contract or a copy was "filed in the office where a deed of the realty would be recorded or registered." *See* U.C.S.A. § 7 (1919), 2 U.L.A. 12 (1922).

55. Alabama, Connecticut, Florida, Georgia, Hawaii, Kansas, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Rhode Island, Tennessee, Texas, Utah, Virginia, and Wisconsin amended the 1962 Official Text at § 9-402 to require that a financing statement filed with respect to fixtures contain the name of the record owner of the underlying real estate. *See* 3 U.L.A. 256-62 (1968). California omitted § 9-313 in its entirety and omitted all references to filing as to fixtures from its version of § 9-402. *Id.* A number of states, including Alabama, Connecticut, Florida, Georgia, Hawaii, Kansas, Maryland, Massachusetts, Missouri, Montana, and Ohio, passed non-uniform provisions specifically requiring the filing officer to index financing statements covering fixtures in the real estate records. Maine, Minnesota, and New York required that there be indexing in the name of

A. *The 1962 Code and Missouri's Non-Uniform Amendments*

In Missouri, the current version of Article 9 contains several references to perfection of security interests in fixtures. Subsections (2) and (3) of section 9-313 set out general priority rules governing conflicts between secured parties and parties with *prior* real estate interests⁵⁶ and conflicts are generally resolved independently of the concept of perfection. Subsection (4) then states the following rule with respect to certain *subsequent* real estate interests:

The security interests described in subsections (2) and (3) do not take priority over

- (a) a subsequent purchaser for value of any interest in the real estate; or
- (b) a creditor with a lien on the real estate subsequently obtained by judicial proceedings; or
- (c) a creditor with a prior encumbrance of record on the real estate to the extent that he makes subsequent advances if the subsequent purchase is made, the lien by judicial proceedings is obtained, or the subsequent advance under the prior encumbrance is made or contracted for without knowledge of the security interest and before it is perfected.⁵⁷

Thus, the security interest must be perfected to protect the secured party against these subsequent interests. Having established the need to perfect, it is necessary to determine how perfection is accomplished under the 1962 Code.

Section 9-302(1) states, "A financing statement must be filed to perfect all security interests except . . . a purchase money security interest in consumer goods; but filing is required for a fixture under section . . . [9-313]"⁵⁸ Since there is no other exception applicable to fixtures in section 9-302,⁵⁹ a financing statement is necessary to perfect a security interest in fixtures, including purchase money security interests in fixtures that are "used or bought for use primarily for personal, family or household purposes."⁶⁰

the record owner of the real estate but did not specify indexing in the real estate records. *Id.*

56. MO. REV. STAT. § 400.9-313(2), (3) (1978).

57. *Id.* § 400.9-313(4).

58. *Id.* § 400.9-302(1)(d).

59. Presumably, a secured party could perfect by taking possession of the fixtures since fixtures are goods in the Code's definitional scheme. Sections 9-302(1)(a) and 9-305 in both versions permit perfection of security interests in goods by possession, but such a procedure would be highly atypical since by definition the fixtures are going to be attached to real estate and invariably that real estate is being used by the debtor as owner, lessee, or in some other capacity.

60. MO. REV. STAT. § 400.9-109(1) (1978). Both the 1962 and 1972 versions of § 9-105(1) define goods as "all things which are movable at the time the security interest attaches or which are fixtures." U.C.C. § 9-105(1)(f) (1962); *id.* § 9-

Section 9-401(1)(b) retains the uniform wording of the 1962 Official Text to the effect that the proper place to file as to “goods which at the time the security interest attaches are or are to become fixtures” is the “office where a mortgage on the real estate concerned would be filed for record.”⁶¹ In conjunction with this provision, section 9-402(1) contains non-uniform language: “When the financing statement covers . . . goods which are or are to become fixtures, the statement must also contain a description of the real estate concerned and if fixtures, also the name of the record owner.”⁶² These provisions tie in with section 9-408, a wholly non-uniform provision⁶³ that establishes special rules for cases “where a financing statement is required by section . . . [9-401(1)(b)] to be filed for record in the office where a mortgage on the real estate concerned would be filed for record.”⁶⁴ This includes any financing statement covering fixtures. The key requirement is in section 9-408(3):

Such financing statements and such other statements incidental thereto shall be recorded in the real estate mortgage records, and shall be indexed as real estate mortgages. If any statement shows the name of a record owner of the real estate which is other than the name of the debtor or the secured party, the statement also shall be indexed in the mortgagor index according to the name of such record owner.⁶⁵

The net result of these sections is that both of the perceived difficulties in the perfection provisions of the 1962 Official Text are avoided in Missouri. Fixture filings are recorded and indexed directly into the real estate recording system,⁶⁶ so there is no danger that the financing statements, al-

105(1)(h) (1972). Both versions of § 9-109 classify goods as consumer goods, equipment, farm products, or inventory depending on the use to which they are put. Thus, fixtures are goods which can be subclassified under § 9-109, and they will invariably be either consumer goods or equipment.

61. MO. REV. STAT. § 400.9-401(1)(b) (1978). Missouri’s version of Article 9 was significantly revised in 1965, *see* 1965 Mo. Laws 595, § 1, and references in the text to Missouri’s original Article 9 are in fact to the 1978 Missouri Revised Statutes, which incorporate the 1965 amendments.

62. MO. REV. STAT. § 400.9-402(1) (1978).

63. There is no § 9-408 in the 1962 Official Text.

64. MO. REV. STAT. § 400.9-408 (1978).

65. *Id.* § 400.9-408(3). In addition, § 400.9-408 provides in subsections (1) and (2) that additional incidental filings such as amendments, continuation statements, and statements of assignment and release are to be filed for record in the same office as the original financing statement and are to refer to the original by book and page number. After stating the rule quoted in the text, subsection (3) provides for recording in the real estate records even though the financing statements are not “proved or acknowledged and certified,” and subsection (5) makes it clear that a true mortgage or deed of trust with a clause covering fixtures does not have to meet the special requirements for financing statements set out in § 400.9-402.

66. Neither version of Article 9 prevents parties from financing fixtures through mortgages or deeds of trust. U.C.C. § 9-313(1) (1962) states that “[t]his Act does

though filed *in* the office where real estate records would be filed, will not be found by a party searching only those records. To facilitate this integration, the name of the record owner of the real estate must appear on the financing statement and the statement must be indexed in the name of the record owner even if he is not a party to the security agreement.⁶⁷ This alleviates the problem of a subsequent real estate purchaser or mortgagee being unable to obtain notice in the chain of title of a security interest in fixtures attached by a lessee, licensee, or other party with an unrecorded interest in the real estate.⁶⁸

The rationale for requiring that the financing statements not only be indexed into the real estate recording system but also recorded has to do with the methods used by abstractors in searching titles in Missouri. While amateur searchers may use the name indexes, professional abstractors who maintain their own records regarding tracts of real property generally do not. It is essential that the financing statements be filed in the records so that they will come to the abstractors' attention initially and that they contain a description of the real estate sufficient to allow the abstractors to integrate them into their own tract indexes. Any other system might lead to a situation where professional abstractors would routinely omit fixture interests from their reports, which would defeat the purpose of the fixture filing scheme.

While Missouri's non-uniform amendments resolve most of the difficulties, they create at least one interpretive problem. Section 9-403(1), a uniform provision, provides that filing is effective upon presentation of the financing statement and tender of the fee to the filing officer or upon the officer's acceptance of the statement.⁶⁹ This protects the secured party if the filing officer fails to file the statement properly. However, non-uniform section 9-408(4) provides:

The recorder of deeds shall not be liable for any loss of a security interest resulting from failure of the recorder to record and index a financing statement or other statement incidental thereto as a mortgage on real estate unless it is clearly evident that such recording is desired, either by written instructions indorsed on the financing statement or other statement incidental thereto di-

not prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate," and *id.* § 9-313(3) (1972) states that "[t]his Article does not prevent creation of an encumbrance upon fixtures pursuant to real estate law." What Article 9 does, of course, is establish an independent financing vehicle that does not require the consent of parties with interests in the real estate.

67. MO. REV. STAT. § 400.9-408 (1978).

68. Objections to the original perfection scheme appeared in a variety of articles. See, e.g., Coogan & Clovis, *supra* note 13; Pfeiler, *Uniform Commercial Code—Adverse Effect on Real Estate Mortgages*, 29 LEGAL BULL. U.S. SAVINGS & LOAN LEAGUE 201 (1963); Shanker, *A Further Critique of the Fixture Section of the Uniform Commercial Code*, 6 B.C. IND. & COM. L. REV. 61 (1964).

69. MO. REV. STAT. § 400.9-403(1) (1978).

recting that it be recorded and indexed as a mortgage on real estate, by payment of the recording fee, or otherwise.⁷⁰

Sections 9-403(1) and 9-408(4) are potentially inconsistent. If acceptance of the financing statement by the officer constitutes filing, then a secured party would never lose his perfected status through the officer's subsequent failure to file. The purpose of section 9-408(4) is clear: it is designed to require the secured party to advise the officer that the financing statement covers fixtures and needs to be handled differently than other financing statements. If the secured party fails to do so and the officer consequently files the statement in the chattel records rather than recording it in the real estate records, the secured party will be deemed unperfected and without recourse against the officer.

It is not clear that section 9-408(4) is sufficient to accomplish its objective. Section 9-402(1), a uniform provision, lists the formal requisites of a financing statement and does not require that the secured party give directions to the filing officer for fixture filings.⁷¹ Subsection (5), also uniform, states, "A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading."⁷² Since the inclusion of filing directions is not mandatory, it appears that a financing statement that substantially complies with section 9-402(1) and is not filed in the real estate records by the filing officer is nevertheless effective to perfect the secured party's interest once it has been accepted by the filing officer. Section 9-408(4) never comes into play.

Even if the courts construe section 9-408(4) as requiring the inclusion of filing instructions, it is not clear that the provision would be effective. First, the section does not state that an improperly filed financing statement not containing proper instructions is insufficient to perfect a security interest in fixtures but simply states that the filing officer incurs no liability. It can be argued that this statement is not ambiguous because the filing officer would never incur liability if the filing was sufficient, but this strains the limits of proper statutory construction. Second, the statute provides troublesome language to the effect that the filing officer incurs no liability "for any loss of a security interest" caused by the misfiling of the financing statement. If a financing statement devoid of filing instructions was deemed to be insufficient, the result would be that the secured party would lose his perfected status, not his security interest. No doubt the phrase is intended to refer to the situation where a third party might take free of an unperfected security interest, but its use adds an additional layer of ambiguity to the statutory construction process.

Another and more serious problem under both the Missouri and the official versions of the 1962 Code is that the secured party must include a

70. *Id.* § 400.9-408(4).

71. *Id.* § 400.9-402(1).

72. *Id.* § 400.9-402(5).

description⁷³ of the real property and, in Missouri, the name of the record owner on his financing statement in order to defeat *all* subsequent parties, including subsequent lien creditors and a trustee in bankruptcy.⁷⁴ For relatively inexpensive fixtures the cost of obtaining the necessary information

73. Some states, such as Arizona, Florida, Kansas, and Mississippi, required that the financing statement contain the full legal description of the property. *See* 3 U.L.A. 256-62 (1968). To ensure accuracy under such a requirement, full-blown title searches with their concomitant expense might be required. Missouri did not adopt a similar non-uniform provision. MO. REV. STAT. § 400.9-402(1) (1978) simply refers to a "description of the real estate concerned," and this provision is supplemented by *id.* § 400.9-110, which states that "[f]or purposes of this Article any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described."

The precise quantum of information necessary to comply with the description requirement of the 1962 Code has never been worked out by the Missouri cases. However, in the analogous situation involving a financing statement covering crops, the United States Court of Appeals for the Eighth Circuit affirmed a district court holding that the description requirement was satisfied by a financing statement that referred to the property as 880 acres "located in Jasper County, Missouri, approximately 15 miles northwest of Carthage, Missouri." *United States v. Newcomb*, 682 F.2d 758, 762 (8th Cir. 1982). The holding in this case conflicts with the views of one commentator who has suggested that it is imperative that full legal descriptions be included. "If they are not, the results could be chaotic, particularly for anyone searching the land records for encumbrances against the real estate. . . ." Donnellan, *Notice and Filing Under Article 9*, 29 MO. L. REV. 517, 530 (1964).

A full legal description is clearly not called for by § 9-110, and its inclusion could dramatically increase the secured party's costs. The majority of state courts that have ruled on this question have held that all that is required is a description sufficient to place third parties on constructive notice as to the property involved. *See In re Belmont Industries*, 1 Bankr. 608 (E.D. Tenn. 1979); *Architectural Cabinet, Inc. v. Manley*, 3 U.C.C. Rep. Serv. (Callaghan) 263 (Pa. Ct. Com. Pl. 1966); *Home Savings Ass'n v. Southern Union Gas Co.*, 486 S.W.2d 386 (Tex. Civ. App. 1972). *Cf. Corning Bank v. Bank of Rector*, 265 Ark. 68, 576 S.W.2d 949 (1979). Such a requirement would obviously entail the inclusion of more information than that required in *Newcomb*.

The description requirements are more precise in the new version of Article 9. Section 9-402(5) contains optional language that Missouri should adopt which states that "the financing statement must contain a description of the real estate sufficient if it were contained in a mortgage of the real estate to give constructive notice of the mortgage under the law of this state." U.C.C. § 9-402(5) (1972). This provision is appropriate since it assures a sufficient description to bring fixture filings to the attention of abstractors but, under Missouri real estate law, does not require a full metes and bounds description.

74. Under § 9-301(3) of both the old and new Codes, the term lien creditor is defined as:

a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for the benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of

could be prohibitive. While the fixture financier might be willing to risk losing his priority to a subsequent purchaser or mortgagee, very few financiers who insist on security are willing to risk losing to a trustee in bankruptcy. Another problem is that the determination that an item is a fixture will be made by a court long after the secured party files. At the time of filing, the secured party may reasonably believe that the item will not be classified as a fixture. It is all well and good to penalize him for his error in a contest with a third party who may have relied on the records, but it seems unfair to penalize him for an innocent and understandable mistake in a contest with a non-reliance creditor.

The inadvertent effect of requiring the additional information may be to discourage some fixture financing. An ideal system would allow the secured party to defeat a bankruptcy trustee and other lien creditors without going to such expense. This is not unfair since lien creditors are not reliance creditors who are likely to have checked the filings at the time of their decision to extend credit, and reliance is the key to both the pre-Code and Code priority schemes in Missouri. Lien creditors are unsecured creditors who have obtained a lien by legal proceedings⁷⁵ or, in the case of the bankruptcy trustee, by operation of law.⁷⁶

the filing of the petition or receiver in equity from the time of appointment.

U.C.C. § 9-301(3) (1962); *id.* (1972). In this Article, trustees in bankruptcy will frequently be treated separately from other lien creditors.

75. In Missouri, judgments and decrees of courts of record other than the associate, small claims, and municipal divisions of the circuit courts can become liens on the judgment debtor's realty in the county where the court is located if an abstract of the judgment is entered in the records of the clerk of the circuit court for that county. MO. REV. STAT. §§ 511.350, .500 (1978 & Cum. Supp. 1982). Judgments and decrees rendered in the associate division can become liens if a transcript of the judgment is filed with the circuit court clerk. *Id.* § 511.350.2.

76. Under 11 U.S.C. § 544(a)(1) (Supp. V 1981), the trustee has, as of the commencement of the case, and without regard to the knowledge of the trustee or of any creditor, the rights and powers of . . .

- (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained a judicial lien, whether or not such a creditor exists.

The trustee, then, has the rights of a "hypothetical lien creditor" but is not a reliance creditor. Under *id.* § 544(a)(3), the trustee also has the rights and powers of a bona fide purchaser of real property from the debtor. Even though he has this status, it arises by operation of law and does not make the trustee a reliance creditor. The trustee's use of this status in the context of fixture financing is discussed in more detail in Part V.B.4 *infra*.

B. *The 1972 Code*

The new version of Article 9 resolves most of the difficulties inherent in the 1962 Official Text and avoids the residual problems inherent in Missouri's non-uniform system of perfection. First, a secured party whose only concern is lien creditors, particularly a bankruptcy trustee, can ignore the special rules on filing financing statements covering fixtures, classify the items involved under section 9-109's classification scheme for goods, and perfect as he would perfect if the goods in question were not fixtures. Thus, if the goods involved would be equipment, the secured party can file a financing statement describing the equipment with the secretary of state,⁷⁷ but the financing statement would not need a description of the real property or the name of the record owner. Once this step has been taken, the secured party can rely on section 9-313(4)(d), which states that:

A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where

(d) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this Article.⁷⁸

In addition, section 9-302(1)(d) has been amended so that a secured party with a purchase money security interest in consumer goods that qualify as fixtures can rely on the normal automatic perfection rule in a contest with lien creditors, including a bankruptcy trustee.⁷⁹ This system also gives some protection to the secured party who does not know where the debtor will affix the goods, as in cases where a debtor owns or leases more than one tract of real property and has not decided where to affix the goods at the time the secured party perfects his security interest. It also affords limited protection for the secured party who miscalculates and files, or relies on automatic perfection, on the assumption that the goods are not and will not become fixtures.

Where the secured party wants additional protection against other parties with interests in the real estate, primarily mortgagees and purchasers, he must take the additional step of making a fixture filing. "[A] 'fixture filing' is the filing in the office where a mortgage on the real estate would be

77. U.C.C. § 9-401(1)(c) (1972). The filing system will be significantly simplified if Missouri adopts the second alternative to § 9-401(1) in the revised Article 9.

78. *Id.* § 9-313(4)(d). For a more complete discussion of priorities between secured party and bankruptcy trustee, see Part V.B.4 *infra*.

79. U.C.C. § 9-302(1)(d) (1972) ("fixture filing is required for priority over conflicting interests in fixtures to the extent provided in Section 9-313"). Since § 9-313 does not require a fixture filing to obtain priority over lien creditors, the ordinary rule of § 9-302(1)(d) granting automatic perfection comes into play. See Review Committee for Article 9 of the Uniform Commercial Code, Final Report, Appendix A-16, at 204 (April 15, 1971).

filed or recorded of a financing statement covering goods which are or are to become fixtures and conforming to the requirements of subsection (5) of Section 9-402.”⁸⁰ As might be expected, section 9-402(5)⁸¹ requires a description of the real property and the name of the record owner. In addition, the financing statement “must recite that it is to be filed in the real estate records,”⁸² thereby making the inclusion of directions to the filing officer mandatory and correcting the defect in the prior non-uniform provisions of section 9-408(4). The model form set out in new section 9-402(3) contains sections designed to assure compliance with these requirements.⁸³

Finally, section 9-401(1) requires that fixture filings be made “in the office where a mortgage on the real estate concerned would be filed for record” and also contains an optional requirement that “any such filing be for record.”⁸⁴ This optional language should be adopted because of the abstractors’ reliance on recording in Missouri. Section 9-403(1) continues the policy of protecting the secured party where the filing officer fails to file the financing statement properly, but this should not present any problems since the new Code makes the inclusion of filing instructions mandatory.⁸⁵

Of course, even though it is clear under the current system that the only way to perfect as to fixtures is by a financing statement recorded and indexed into the appropriate real estate records, the secured party can never be sure that a court will ultimately determine that a particular item is, in fact, a fixture. If it is ultimately determined that the item remains pure personalty, filing under the fixture provisions will not amount to an act of perfection. The cautious lawyer might have to file in two or even three places under Missouri’s present filing scheme. This remains a real problem under revised Article 9, although under the new filing system no more than two filings will ever be necessary.⁸⁶

In summary, the perfection system under new Article 9 is an improvement over the non-uniform provisions adopted in Missouri, just as those provisions were a significant improvement over the 1962 Official Text. New Article 9 establishes a dual perfection system⁸⁷ so that a secured party

80. U.C.C. § 9-313(1)(b) (1972).

81. *Id.* § 9-402(1), which states the formal requirements for a financing statement, has also been amended to make it clear that a financing statement covering fixtures must comply with § 9-402(5).

82. *Id.* § 9-402(5).

83. *See id.* § 9-402(3).

84. *Id.* § 9-401(1).

85. *Id.* § 9-402(5).

86. *Id.* § 9-402(6) also provides that a duly recorded mortgage that meets the requirements for a financing statement is effective as a financing statement. Unlike other financing statements which lapse after five years unless a continuation statement is filed, however, a mortgage continues effective as a fixture filing “until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real estate.” *Id.*

87. The dual perfection system was first suggested by Professor Kripke, and his

can obtain priority over lien creditors, including a bankruptcy trustee, easily and inexpensively. He can also obtain priority over other parties by making a fixture filing. The fixture filing must give a description of the real estate, must direct the filing officer to index it into the real estate records and, if the optional language of section 9-401(1) is adopted, must actually be recorded in those records. A separate provision requires that the officer comply.⁸⁸ A secured party who gives the appropriate instructions to the officer is protected from the officer's subsequent mistakes.⁸⁹

V. PRIORITIES UNDER THE CODE

A. *The 1962 Code*

Priorities under the current version of Article 9 are similar in many respects to priorities under Missouri's decisional law. The basic rule⁹⁰ is that if the secured party's interest attaches⁹¹ to an item of goods before it becomes a fixture,⁹² the security interest has priority over all parties with competing real estate interests, whether or not the secured party perfects his interest, unless the competing interests fall within a series of exceptions that deal with subsequent real estate interests.⁹³ The effect of these provisions is to preserve the pre-Code rule favoring conditional vendors over prior owners and encumbrancers regardless of filing under the Conditional Sales Act. Since a purchase money security interest⁹⁴ under Article 9 invariably attaches before the goods are affixed to the realty, the purchase money secured party will have priority over prior realty interests regardless of

suggestion persuaded Professor Gilmore. See 2 G. GILMORE, *supra* note 13, § 30.5, at 820; Kripke, *supra* note 13, at 57.

88. U.C.C. § 9-403(7) (1972).

89. Where the filing officer misfiles a fixture filing or any other financing statement, the secured party can prove compliance with the Code's filing provisions by availing himself of *id.* § 9-407(1): "If the person filing any financing statement . . . [or other statement] furnishes the filing officer a copy thereof, the filing officer shall upon request note upon the copy the file number and date and hour of the filing of the original and deliver or send the copy to such person."

90. See U.C.C. § 9-313(2) (1962); MO. REV. STAT. § 400.9-313 (1978).

91. U.C.C. § 9-204(1) (1962); MO. REV. STAT. § 400.9-204(1) (1978) state that, unless the agreement provides otherwise, a security interest attaches as soon as three events occur—agreement between secured party and debtor, value given by secured party, and acquisition of rights in the collateral by debtor. The requirements are the same in the 1972 Code. U.C.C. § 9-203(1), (2) (1972).

92. Of course, the item does not become a fixture until there is sufficient intent, adaptation, and/or annexation to satisfy the requirements of Missouri's non-Code law.

93. U.C.C. § 9-313(4) (1962); MO. REV. STAT. § 400.9-313(4) (1978). This provision is set out in the text accompanying note 57 *supra*.

94. "Purchase money security interest" is defined at U.C.C. § 9-107 (1962); MO. REV. STAT. § 400.9-107 (1978). The 1972 Code provision is identical.

perfection.⁹⁵

Perfection becomes relevant when the rights of subsequent parties with interests in the real estate become involved. Once again, the rules closely parallel pre-Code law. The secured party can obtain priority only by perfecting⁹⁶ and, under Missouri's non-uniform provisions, this means that the subsequent party will be able to obtain notice from the real estate records. Accordingly, no subsequent party can claim to be a true reliance creditor if the secured party files properly. Even if the secured party fails to perfect, he will take priority over subsequent parties unless "the subsequent purchase is made, the lien by judicial proceedings is obtained, or the subsequent advance under the prior encumbrance is made or contracted for without knowledge of the security and before it is perfected."⁹⁷ Subordinating subsequent parties with actual knowledge of the security interest is wholly consistent with the concept of limiting protection to reliance creditors.

There are at least three major problems with the original priority formulation. First, as previously mentioned, it requires a full-blown fixture financing statement with the name of the record owner and a description of the real property to assure priority against subsequent lien creditors,⁹⁸ even though such creditors are generally not reliance creditors. Since the bankruptcy trustee is a lien creditor, it also requires such a financing statement to obtain priority over the trustee.⁹⁹ The trouble and expense of compliance make fixture financing less attractive. This problem is compounded by the fact that the secured party cannot rely on the automatic perfection provision for purchase money security interests in consumer goods that become fixtures.¹⁰⁰

Second, there are interpretive problems with the rules. Section 9-313(2) establishes a rule of absolute priority, regardless of perfection, where

95. U.C.C. § 9-313(3) (1962); MO. REV. STAT. § 400.9-313(3) (1978) set out a rule to govern priorities where the Article 9 security interest does not attach until after the goods become fixtures. There has never been any practice of granting security interests in existing fixtures, and the section is superfluous. In the event such an interest was created, it would be subordinate with respect to existing interests but could be prior to subsequent interests unless they fall within the parameters of § 9-313(4). In short, what this means is that priority over subsequent real estate interests can be obtained by filing.

96. U.C.C. § 9-313(4) (1962); MO. REV. STAT. § 400.9-313(4) (1978).

97. U.C.C. § 9-313(4) (1962); MO. REV. STAT. § 400.9-313(4) (1978). U.C.C. § 1-201(25) (1962); MO. REV. STAT. § 400.1-201(25) (1978) define "knowledge" to mean "actual knowledge."

98. U.C.C. § 9-313(4)(b) (1962); MO. REV. STAT. § 400.9-313(4)(b) (1978).

99. See text accompanying notes 126-27 *infra*.

100. U.C.C. § 9-302(1)(d) (1962); MO. REV. STAT. § 400.9-302(1)(d) (1978). See text accompanying notes 58-60 *supra* for a more complete discussion of this provision.

the security interest attaches before the goods become fixtures.¹⁰¹ There are important exceptions for certain subsequent parties in section 9-313(4).¹⁰² However, this formulation is ambiguous since it is unclear whether the word "subsequent" means subsequent to attachment of the security interest or subsequent to the time the goods become fixtures. For example, suppose the secured party's security interest attaches prior to affixation and the secured party fails to file. If a purchaser for value then acquires the real estate prior to affixation, he is entitled to priority under sections 9-313(2) and 9-313(4)(a) unless "subsequent" is construed to mean subsequent to the date the goods become fixtures, in which case the secured party has priority under section 9-313(2).¹⁰³ Since the purchaser is not a reliance creditor, it would seem that the secured party should prevail, but the ambiguity creates potential problems. The same rationale applies to prior non-construction money mortgagees who make subsequent advances prior to affixation.¹⁰⁴

Third, where the competing party has a previously recorded construction mortgage it can be said to be a reliance creditor from the outset of the construction project and thus it should have priority over competing chattel interests that arise during construction, even purchase money interests. The construction lender expects that items installed as fixtures will be part of its security, and even though the purchase money secured party advances credit that goes into the project, it must be recognized that fixture security is in many respects a "second rate" type of security.¹⁰⁵ In a contest with a construction lender, policy dictates that the construction lender be favored. However, the 1962 Code limits the construction money mortgagee's priority to "subsequent advances."¹⁰⁶ This rule is objectionable whether subsequent is construed to relate to the time of attachment or the time of affixation. Even this limited priority only applies as to advances "made or contracted for without knowledge of the security interest and before it is perfected."¹⁰⁷ Thus, a properly perfected secured party will defeat a prior

101. U.C.C. § 9-313(2) (1962); MO. REV. STAT. § 400.9-313(2) (1978).

102. U.C.C. § 9-313(4) (1962); MO. REV. STAT. § 400.9-313(4) (1978).

103. U.C.C. § 9-313(2) (1962); MO. REV. STAT. § 400.9-313(2) (1978).

104. See *Babson Credit Plan, Inc. v. Cordele Production Credit Ass'n*, 146 Ga. App. 266, 273, 246 S.E.2d 354, 360 (1978) (unperfected secured party would not have priority over prior mortgagee as to advances made subsequent to date security interest attached). But see *House v. Long*, 244 Ark. 718, 724, 426 S.W.2d 814, 818 (1968) ("significant time in determining the extent of priority is the time the goods were affixed to the real property, for it is only after this has been done that a prior mortgagee may be induced to make further advancements by seeing the fixtures in place."). While the rule of *House v. Long* seems preferable as to non-construction money mortgages, the case itself involved a construction money mortgage, and the court's conclusion that a lender in this situation is not a reliance creditor is doubtful.

105. See Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477, 484 (1973).

106. U.C.C. § 9-313(4)(c) (1962); MO. REV. STAT. § 400.9-313(4)(c) (1978).

107. U.C.C. § 9-313(4) (1962); MO. REV. STAT. § 400.9-313(4) (1978).

construction money mortgagee even to the extent of subsequent advances.¹⁰⁸

B. *The 1972 Code*

1. The Basic Priority Rule

The basic fixture priority rule of the new Code fixture provisions is as follows:

A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where

. . . .

(b) the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate.¹⁰⁹

This section establishes a "pure race" priority system between secured parties and competing realty interests. The only way for the secured party to obtain priority is by making a full-fledged fixture filing before the competing interest is of record.¹¹⁰ Thus, a secured party who makes a fixture filing will always defeat a subsequent owner or encumbrancer unless the subsequent realty interest is the successor in title to a party who would have had priority over the secured party. This qualification is to make it clear that if the security interest is subordinate to a recorded mortgage or to a non-debtor owner's recorded interest, it will remain subordinate as against an assignee of the mortgage or a purchaser from the owner.¹¹¹

2. Purchase Money Interests

Without more, the basic priority rule set out above would always subject the secured party to prior interests of record, which would be at odds with the reliance concept that is so integral to the field of fixture financing. Accordingly, the rule is subject to several exceptions, the most important of which is a special purchase money priority rule.¹¹² Under this rule, if a

108. For articles critical of the 1962 Code treatment of construction lenders, see Coogan, *supra* note 105; Kratovil, *The Uniform Commercial Code and The Real Property Lawyer*, 18 DE PAUL L. REV. 101 (1968); Prather, *A Savings Association View of the Review Committee's Proposals*, 25 BUS. LAW. 327 (1969).

109. U.C.C. § 9-313(4) (1972).

110. The pure race nature of the rule is further supported by *id.* § 9-313(7), which provides that unless the secured party comes within a specific provision granting him priority, his interest will be subordinate to competing realty interests.

111. See Review Committee for Article 9 of The Uniform Commercial Code, Final Report, Appendix A-7, at 200 (April 15, 1971).

112. U.C.C. § 9-313(4)(a) (1972).

purchase money secured party perfects by a fixture filing before the goods become fixtures or within ten days after such time, the secured party will have priority over competing interests that arose before affixation whether such interests are of record or not.¹¹³

The purchase money priority rule represents a change from the 1962 Code and prior Missouri law in that it requires a fixture filing to defeat prior non-reliance realty interests, and it is subject to some criticism in this respect. However, the impact is ameliorated by section 9-313(4)(d), which relaxes the perfection requirements with respect to lien creditors.¹¹⁴

The ten-day grace period for making the fixture filing parallels the grace period granted purchase money secured parties as against lien creditors,¹¹⁵ bulk transferees,¹¹⁶ and other non-inventory secured parties,¹¹⁷ but unlike these provisions it does not permit the secured party's fixture filing to relate back and cut off the priorities of competing parties whose interests in the real estate arose during the grace period. For example, if the secured party fails to file prior to affixation and the real property is conveyed or mortgaged during the ten-day period, section 9-313(4)(a) will not protect the secured party since by its terms it only applies where "the interest of the encumbrancer or owner arises before the goods become fixtures."¹¹⁸ In such a case, the secured party is not subordinated to the competing interest a fortiori, but the analysis will proceed under section 9-313(4)(b) and the first to record will prevail. The same analysis applies in conflicts between the secured party and competing third parties whose interests arose prior to affixation where the secured party fails to file during the ten-day grace period. Since the prior interest will usually already be of record, failure to make the required fixture filing before or during the ten-day period will ordinarily be fatal.

The revised Code's failure to allow a fixture filing made during the grace period to relate back to the date of affixation is fully justified from a reliance standpoint, but requiring a fixture filing to obtain protection against prior owners or encumbrancers is not; nor is the pure race analysis under section 9-313(4)(b). Of course, the secured party can make a fixture filing before affixation and obtain protection from both prior and subsequent interests with the exception of prior construction money mortgagees, but requiring such a filing as against prior interests, even with the grace period, makes little sense. The rule does, however, promote certainty, and perhaps in an area as confused as fixture financing there is value in that.

113. Like § 9-313(4)(b), the purchase money priority rule is only available where the debtor has an interest of record in the underlying real estate or is in possession of it.

114. U.C.C. § 9-313(4)(d) (1972).

115. *Id.* § 9-301(2). The 1962 provision is identical.

116. *Id.*

117. *Id.* § 9-312(4).

118. *Id.* § 9-313(4)(a).

3. Construction Money Mortgages

As indicated above, the special purchase money priority rule does not apply where the competing interest is that of a construction money mortgagee.¹¹⁹ In such cases priorities are determined under the basic first-to-record rule.¹²⁰ In one of the Code's most striking examples of unnecessarily convoluted drafting, section 9-313(6) states that:

Notwithstanding paragraph (a) of subsection (4) but otherwise subject to subsections (4) and (5), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.¹²¹

Since the prudent construction money mortgagee will have recorded its interest before construction began, the effect of this provision is to subordinate the fixture financier unless the construction mortgagee consents to the secured party's priority in writing¹²² or unless the fixtures fall within a limited class of readily removable goods to which a special priority rule applies.¹²³

This priority rule favoring construction money lenders is justified, as is

119. *Id.* § 9-313(1)(c) states that "a mortgage is a 'construction mortgage' to the extent that it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates."

120. *Id.* § 9-313(6).

121. *Id.* All the section really needs to say in order to effectuate the drafters' intent is that the special purchase money priority rule of § 9-313(4)(a) does not apply where the competing interest is that of a construction money mortgagee or take-out lender and the goods are affixed before construction is completed.

122. *Id.* § 9-313(5)(a).

123. *Id.* § 9-313(4)(c) gives the secured party priority over encumbrancers or owners where "the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any method permitted by this Article." Thus, if fixtures fall into this category the secured party can perfect before affixation by a method other than fixture filing (another example of revised § 9-313's dual perfection system) and obtain priority over both prior and subsequent conflicting realty interests. Since the construction money mortgagee's interest is subject to all the rules of § 9-313 except § 9-313(4)(a), its interest can be defeated by a secured party who complies with § 9-313(4)(c).

This provision, like § 9-313(4)(d), is designed to ameliorate the costs of fixture financing by not requiring the filing of a full fixture financing statement in order to obtain priority in certain types of goods that are affixed to the realty but which are unlikely to be relied on by third parties when they invest in the real estate. However, its unusual definition of covered collateral makes it unlikely that financiers will rely on it, and if they are concerned about third parties other than the bankruptcy trustee they will want to make a fixture filing. Thus, § 9-313(4)(c) is more likely to

the rule extending the construction money mortgagee's priority to the take-out lender. The mortgagee's expectation is that its advances are being used to purchase all the goods that are integrally incorporated into or affixed to the structure. In this respect it is a reliance creditor from the outset. Unless it consents to a subordinate position, its expectations should be protected. Where the construction money mortgagee or take-out lender acquires an interest in fixtures placed on the property after the construction is completed under an after-acquired fixture clause, the rationale for protecting their interests breaks down. Revised Article 9 recognizes this distinction, and its special construction money rule only applies to goods affixed before the construction phase is completed.¹²⁴ As to improvements made during ensuing years, the construction or take-out lender is not a reliance creditor and takes subject to purchase money security interests that are recorded before the end of the ten-day grace period, just like other prior mortgagees.

4. Bankruptcy Rules

As has been previously indicated, section 9-313(4)(d) was designed to implement the dual perfection system and allow the secured party to obtain priority over non-reliance creditors, particularly the trustee in bankruptcy. It is not absolutely clear, however, that this provision will provide protection against the bankruptcy trustee. Under section 544(a)(3) of the Bankruptcy Reform Act of 1978,¹²⁵ the trustee has the rights of a bona fide purchaser of real property as well as the rights of a hypothetical lien creditor.¹²⁶ If bankruptcy courts apply the bona fide purchaser provision instead of the lien creditor provision in determining the trustee's interest, priorities will be determined under section 9-313(4)(b) and a fixture filing will be necessary to defeat the trustee.¹²⁷

Comment 3(c) to new section 9-313 addresses this potential difficulty with reference to the similar tests under prior bankruptcy law and concludes that "[s]ince the fixture security interest arises against the goods in their capacity as chattels, the bankruptcy courts should apply the judgment creditor test."¹²⁸ To date, this issue has not been worked out in the bankruptcy courts. However, the Bankruptcy Reform Act has accepted the classification of fixtures as chattels and applied the judicial lien creditor test in section 547 dealing with preferential transfers.¹²⁹ This should be persuasive authority for similar treatment under section 544(a). Section 547(e)(1) provides as follows:

work retrospectively to provide a legal theory for saving a secured party from a mistake than it is to achieve its goal of lowering transactional costs.

124. U.C.C. § 9-313(6) (1972).

125. 11 U.S.C. § 544(a)(3) (Supp. V 1981).

126. *See* note 76 *supra*.

127. U.C.C. § 9-313(4)(b) (1972).

128. *Id.* § 9-313 comment 3(c).

129. 11 U.S.C. § 547(e)(1) (Supp. V 1981).

For the purposes of this section—

(A) a transfer of real property *other than fixtures* . . . is perfected when a *bona fide purchaser* of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a *fixture* or property other than real property is perfected when a creditor on a simple contract cannot acquire a *judicial lien* that is superior to the interest of the transferee.¹³⁰

Since Congress has indicated that the lien creditor test should be adopted for purposes of setting aside preferential transfers, it would be logically inconsistent to apply the bona fide purchaser test to fixtures under section 544(a)(3). Of course, it can be argued that the failure to be specific in section 544 stands in contrast to section 547 and indicates that Congress intended that a different test be used, but a more likely explanation is that the omission of any reference to fixtures in section 544 was an oversight. In any event, in light of the fact that the trustee is not a reliance creditor, bankruptcy courts should respect the state law determination that perfection by any permissible Code method is valid against the trustee. They should not require a fixture filing in the bankruptcy context.

VI. CONCLUSION

Revised section 9-313 represents a distinct improvement over its predecessor. While it does not, as a practical matter, alter the definition of fixtures, it does clean up some conceptual problems inherent in the tripartite classification scheme adopted by the original section. In the area of perfection, it resolves the insufficiencies of the 1962 Code without the ambiguities that are created by Missouri's non-uniform amendments. It also creates a dual perfection system that protects the secured party from non-reliance creditors without going to the trouble and expense of making a fixture filing. In the area of priorities, it departs somewhat from the traditional reliance concept, and this is a weakness. On the other hand, its rules are clear and represent a significant improvement in that they provide for construction mortgage priority and offer additional protection to the secured party in the area of trade fixtures. The departure from a reliance basis is significantly ameliorated by the dual perfection system. In sum, revised section 9-313 is a clearly superior provision and its adoption in Missouri would be beneficial.

VII. APPENDIX

MO. REV. STAT. § 400.9-313 (1978). Priority of Security Interests in Fixtures [1962 Code].

(1) The rules of this section do not apply to goods incorporated into a

130. *Id.* (emphasis added).

structure in the manner of lumber, bricks, tile, cement, glass, metal work and the like and no security interest in them exists under this article unless the structure remains personal property under applicable law. The law of this state other than this chapter determines whether and when other goods become fixtures. This chapter does not prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate.

- (2) A security interest which attaches to goods before they become fixtures takes priority as to the goods over the claims of all persons who have an interest in the real estate except as stated in subsection (4).
- (3) A security interest which attaches to goods after they become fixtures is valid against all persons subsequently acquiring interests in the real estate except as stated in subsection (4) but is invalid against any person with an interest in the real estate at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as fixtures.
- (4) The security interests described in subsections (2) and (3) do not take priority over
 - (a) a subsequent purchaser for value of any interest in the real estate; or
 - (b) a creditor with a lien on the real estate subsequently obtained by judicial proceedings; or
 - (c) a creditor with a prior encumbrance of record on the real estate to the extent that he makes subsequent advances
 if the subsequent purchase is made, the lien by judicial proceedings is obtained, or the subsequent advance under the prior encumbrance is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the real estate at a foreclosure sale other than an encumbrancer purchasing at his own foreclosure sale is a subsequent purchaser within this section.
- (5) When under subsections (2) or (3) and (4) a secured party has priority over the claims of all persons who have interests in the real estate, he may, on default, subject to the provisions of part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.

U.C.C. § 9-313. Priority of Security Interests in Fixtures [1972 Code].

- (1) In this section and in the provisions of Part 4 of this Article referring to fixture filing, unless the context otherwise requires
 - (a) goods are "fixtures" when they become so related to particular real estate that an interest in them arises under real estate law

- (b) a "fixture filing" is the filing in the office where a mortgage on the real estate would be filed or recorded of a financing statement covering goods which are or are to become fixtures and conforming to the requirements of subsection (5) of Section 9-402
 - (c) a mortgage is a "construction mortgage" to the extent that it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates.
- (2) A security interest under this Article may be created in goods which are fixtures or may continue in goods which become fixtures, but no security interest exists under this Article in ordinary building materials incorporated into an improvement on land.
 - (3) This Article does not prevent creation of an encumbrance upon fixtures pursuant to real estate law.
 - (4) A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where
 - (a) the security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within ten days thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate; or
 - (b) the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate; or
 - (c) the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any method permitted by this Article; or
 - (d) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this Article.
 - (5) A security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where
 - (a) the encumbrancer or owner has consented in writing to the security interest or has disclaimed an interest in the goods as fixtures; or
 - (b) the debtor has a right to remove the goods as against the encumbrancer or owner. If the debtor's right terminates, the priority of the security interest continues for a reasonable time.
 - (6) Notwithstanding paragraph (a) of subsection (4) but otherwise subject

to subsections (4) and (5), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.

- (7) In cases not within the preceding subsections, a security interest in fixtures is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor.
- (8) When the secured party has priority over all owners and encumbrancers of the real estate, he may, on default, subject to the provisions of Part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.