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Mann and Phillips: Timing of Perfection of Security Interests
THE TIMING OF PERFECTION OF SECURITY INTERESTS
UNDER THE UNIFORM COMMERCIAL CODE
AND THE BANKRUPTCY REFORM ACT

RICHARD A. MANN* AND MICHAEL J. PHILLIPS**

ONE OF THE PRIMARY, if not the primary, purposes of Article 9 of the Uniform Commercial Code is to provide a simple and unified structure within which modern secured financing transactions can be conducted with less expense and greater certainty than under prior law.¹ However, the enactment of Article 9 hopelessly dated² the preference provisions³ of the 1938 Bankruptcy Act.⁴ For example, Article 9 has greatly facilitated the use of the so-called "floating lien"⁵ outside the bankruptcy context, but, because of the incompatibility between Article 9's language and the pre-Code terminology of the Bankruptcy Act's preference provisions, it was possible that floating liens were in serious jeopardy in bankruptcy proceedings.⁶ Such inconsistencies between the Uniform Commercial Code and the Bankruptcy Act prompted the National Bankruptcy Conference to establish a committee to coordinate the two statutes in 1966.⁷ The 1970 report of this "Gilmore Committee" strongly argued the need for a revision

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¹ See U.C.C. § 9-101, Official Comment.

² *Report of the Committee on Coordination of the Bankruptcy Act and the Uniform Commercial Code* (1970), as reprinted in [1978] U.S. CODE CONG. & AD. NEWS 6164 [hereinafter cited as "Gilmore Report," with all page citations to the U.S. CODE CONG. & AD. NEWS]. More specifically, the report stated:

If the structure of security law had remained as it was, the compromise represented by the 1950 revision of § 60 [of the Bankruptcy Act] would have worked perfectly well. With the general enactment of the Code, including Article 9, the situation was radically altered. Arguably, Article 9 contained little or nothing that was revolutionary, or even novel, as a matter of substance. The Article 9 terminology, on the other hand, represented a sharp break with the past. The difficulty of making the two statutes (§ 60 and Article 9) mesh or track with each other was immediately apparent.

Id. at 6167.

³ Chandler Act § 60, 11 U.S.C. § 96 (1976) (current version codified in scattered sections of 11 U.S.C. (Supp. III 1979)). For the current version at the preference provisions specifically, see 11 U.S.C. § 547 (Supp. III 1979).

⁴ For a further discussion of these preference provisions, see notes 17-32 *infra* and accompanying text.

⁵ A "floating lien" is an interest covering property of the debtor obtained after completion of the security agreement, one which "floats over" such after-acquired property. U.C.C. § 9-204(1) specifically authorizes security interests covering such collateral.

⁶ See Mann and Phillips, *Floating Liens as Preferential Transfers Under the Bankruptcy Reform Act*, 85 COM. L.J. 7, 9-12 (1980).

⁷ Gilmore Report, *supra* note 2, at 6164.

of the Bankruptcy Act.⁸ Eight years later Congress enacted the Bankruptcy Reform Act,⁹ which took effect on October 1, 1979. One of the aims of the Reform Act is to refine, if not redefine, the relationship between Article 9 and bankruptcy law.

This article will examine this new relationship as it applies to a specific problem created by the interaction between Article 9 and bankruptcy law: the timing of a "transfer" when a security interest is challenged as preferential in a bankruptcy proceeding. Resolution of this question is often critical for determining the secured party's ability to recover assets pledged as collateral when the debtor goes into bankruptcy. The article will begin by explaining the "timing of transfer" problem as it arose under Article 9 and the Bankruptcy Act. Then it will describe and evaluate the new solution provided by the Bankruptcy Reform Act.

The Timing Problem Under the Bankruptcy Act

Article 9 has considerably simplified the requirements for acquiring an effective security interest. These are set out in section 9-203(1),¹⁰ which requires that: (1) there be a security agreement signed by the debtor, (2) value be given by the creditor, and (3) the debtor have rights in the collateral.¹¹ Once these requirements have been met, the security interest attaches: that is, it is enforceable against the debtor.¹² In addition to desiring a security interest enforceable against the debtor, the seller is particularly interested in protection against third party claimants (including a trustee in bankruptcy).¹³ This can be accomplished by perfecting the security interest, which typically entails filing¹⁴ a financing statement in the appropriate

⁸ See generally *id.* at 6164-79

⁹ 11 U.S.C. § 101 *et seq.* (Supp. III 1979).

¹⁰ U.C.C. § 9-203(1) provides:

(1) Subject to the provisions of Section 4-208 on the security interest of a collecting bank, Section 8-321 on security interests in securities and Section 9-113 on a security interest arising under the Article on Sales, a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless

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

¹¹ As the previous note states, § 9-203(1)(a) also allows attachment by possession, but this possibility is not significant here.

¹² The relevant provision is U.C.C. § 9-203(2), which provides that "[a] security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Attachment occurs as soon as all of the events specified in subsection (1) have taken place unless explicit agreement postpones the time of attaching."

¹³ "[A]n unperfected secured party will invariably have to eat from the general creditors' trough in bankruptcy." WHITE & SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 918 (2d ed. 1980).

¹⁴ But see U.C.C. § 9-302, which lists a number of exceptions to the filing requirement.

place.¹⁵ The security interest is deemed to be perfected once it has attached to the property and all the applicable steps for perfection have taken place.¹⁶

For the most part, Article 9's simplified procedure for obtaining a security interest enforceable against both the debtor and third party claimants has proven to be successful outside of bankruptcy. Prior to 1978, however, the provisions of the Bankruptcy Act, in particular those of section 60,¹⁷ became applicable if the debtor entered into bankruptcy. This section was intended to invalidate certain "preferential" transfers from the debtor to favored creditors before the date of bankruptcy.¹⁸ As will become apparent below, a security interest can be so regarded. Section 60's key provision was section 60(a)(1),¹⁹ which defined a "preference" as:

a transfer, as defined in this title, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this title, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

Under section 60(b), a preference could "be avoided by the trustee if the creditor receiving it or to be benefited thereby . . . has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent."²⁰

Thus, establishing a preference was treated as involving eight necessary elements: (1) a transfer; (2) of the debtor's property; (3) made or suffered by the debtor; (4) within four months of bankruptcy; (5) to or for the benefit of a creditor; (6) for or on account of an antecedent debt; (7) made or suffered while the debtor was insolvent; and (8) enabling the trans-

¹⁵ The appropriate place depends upon the type of collateral and which alternative of U.C.C. § 9-401(1) (i.e., local or central filing) has been adopted in a jurisdiction.

¹⁶ U.C.C. § 9-303(1).

¹⁷ 11 U.S.C. § 96 (1976) (current version codified in scattered sections of 11 U.S.C. (Supp. III 1979)). Also, section 70(c) of the Bankruptcy Act, 11 U.S.C. § 110(c) (1976) (current version at 11 U.S.C. §§ 541(e), 544(a) (Supp. III 1979)), which gave the trustee the status of "ideal lien creditor" as of this date of bankruptcy, enabled the trustee to defeat an unperfected security interest because under U.C.C. § 9-301(b) a lien creditor defeats a party with an unperfected interest. WHITE & SUMMERS, *supra* note 13, at 994 & n.10.

¹⁸ Early attacks upon the Bankruptcy Act of 1898 were soundly repulsed on the floor of Congress by harking back to the evils of grab-law which had led to the almost ceaseless search for a satisfactory Bankruptcy Act during the two decades preceding 1898. [footnote omitted] Besides the evils of the disturbance of business due to the race of diligence with its accompanying midnight attachments and all the other paraphernalia of the race, Congress was reminded of the chilling effect upon credit of the practice of insolvents transferring their assets to friends and relatives.

MACLACHAN, HANDBOOK OF THE LAW OF BANKRUPTCY 284 (1956).

¹⁹ 11 U.S.C. § 96(a)(1) (1976) (current version at 11 U.S.C. § 547 (Supp. III (1979))).

²⁰ *Id.* § 96(b) (current version at 11 U.S.C. §§ 550-51 (Supp. III 1979)). For the Bankruptcy Reform Act's dilution of this requirement, see notes 75-78 *infra* and accompanying

freee to obtain a greater percentage of his debt than some other creditor of the same class.²¹ And satisfaction of the "reasonable cause to believe" test rendered such a preference voidable by the trustee.²² A perfected Article 9 security interest, which otherwise would have been immune from bankruptcy attack,²³ was capable of meeting these tests and thus of being avoided as preferential. The taking of such an interest qualified as a "transfer" under the Bankruptcy Act's broad definition of this term.²⁴ And such an interest obviously was "of the debtor's property", "made or suffered by the debtor", and "to or for the benefit of a creditor". Whether this transfer was made or suffered while the debtor was insolvent would vary with the individual case, but usually posed little problem for the bankruptcy trustee. Also, since the successful secured creditor would be able to obtain the full value of the property securing the debt, there was little doubt that he would fare better than other creditors of the same class. Thus, the key questions under section 60 were usually whether the transfer occurred within four months of bankruptcy and whether the transfer was "for or on account of an antecedent debt." To answer each question,²⁵ it was necessary to ask *when* the transfer actually took place. And it is here that the disharmony between Article 9 and the Bankruptcy Act produced severe problems.

The Bankruptcy Act established the following tests for determining when the transfer was deemed to have been made. First:

Where (A) the applicable law specifies a stated period of time of not more than twenty-one days after the transfer within which recording, delivery, or some other act is required, and compliance therewith is had within such stated period of time; or where (B) the applicable law specifies no such stated period of time or where such stated period of time is more than twenty-one days, and compliance therewith is had within twenty-one days after the transfer, the transfer shall be deemed to be made or suffered at the time of the transfer.²⁶

But if compliance was not had within the relevant time period, the time of the transfer was the time of perfection.²⁷ This language (Paragraph I") worked reasonably well when applied to the filing-type statutes which were customary under pre-code law.²⁸ These statutes typically provided a specific

²¹ MACLACHAN, *supra* note 18, at 285.

²² *Id.*

²³ *E.g.*, WHITE & SUMMERS, *supra* note 13, at 918.

²⁴ See 11 U.S.C. § 1(30) (1976) (current version at 11 U.S.C. § 101(40) (Supp. III 1979)); and WHITE & SUMMERS, *supra* note 13, at 1002.

²⁵ Also, the timing question occasionally might have been important for determining whether the debtor was insolvent when the transfer took place.

²⁶ 11 U.S.C. § 96(a)(7)(I) (1976) (current version at 11 U.S.C. § 547 (Supp. III 1979)). [hereinafter called "Paragraph I."]

²⁷ *Id.* § 96(a)(7)(II) (1976) (current version at 11 U.S.C. § 547 (Supp. III 1979)).

²⁸ 2 GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 1326 (1965).

time period within which filing was to be made.²⁹ Under Paragraph I, if the grace period specified by the state statute was 21 days or less, it controlled; if greater than 21 days, it was cut back to 21 days; and if no grace period was provided, the Bankruptcy Act provided a 21-day grace period. Thus, if the secured party perfected within the applicable grace period, the time of the transfer for Bankruptcy Act purposes was the time of the "actual" transfer: that is, the time of attachment or the time when the creditor obtained his interest in the debtor's property. If at this time some consideration (e.g. the loan secured by the debtor's property) passed from the creditor to the debtor, the transfer could not have been "for or on account of an antecedent debt" and there was no preference. Also, if the security agreement took place *before* the four-month preference period and perfection occurred *within* that period but *also* within the grace period, there could be no preference because the time of the transfer was the time of the security agreement.³⁰ But if the creditor failed to perfect within the grace period, the security interest was likely to be regarded as preferential because in this case the time of the transfer was the time of perfection.³¹ This of course assumes that the secured party also had reason to believe in the debtor's insolvency at the time of the transfer.³²

The differing policies and language of Article 9 of the Code, however, introduced difficulties in the application of Paragraph I. Article 9 generally provides *no* grace period for security interests in order to encourage the greater use of advance filing authorized by the Code.³³ For instance, U.C.C. section 9-301(1)(b)³⁴ makes an unperfected security interest subordinate to the rights of a lien creditor,³⁵ thus giving the secured party who delays perfection no protection.³⁶ Purchase money security interests,³⁷ on the other

²⁹ *Id.*

³⁰ Suppose for instance that C obtained a security interest from D (and thus attached) on July 15, but did not perfect until August 3. Suppose also that D went bankrupt on December 1. If, say, a 21-day grace period applied, the time of the transfer would have been the time of attachment, and not the time of perfection. Thus, the transfer would have occurred outside the four-month preference period, despite the fact that perfection occurred within that period.

³¹ See note 27 *supra* and accompanying text.

³² See notes 20 & 22 *supra* and accompanying text.

³³ GILMORE, *supra* note 28, at 1327.

³⁴ "[A]n unperfected security interest is subordinate to the rights of . . . (b) a person who becomes a lien creditor before the security interest is perfected." U.C.C. § 9-301(1)(b).

³⁵ In relevant part, U.C.C. § 9-301(3) defines a lien creditor as "a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes . . . a trustee in bankruptcy from the date of the filing of the petition."

³⁶ This was also true with respect to the trustee, who under section 70(c) of the Bankruptcy Act, 11 U.S.C. § 110(c) (1976) (current version at 11 U.S.C. §§ 541(e), 544(a) (Supp. III (1979))), became an "ideal lien creditor" as of the date of bankruptcy. See WHITE, & SUMMERS, *supra* note 13, at 918, and note 17 *supra*.

³⁷ A "purchase money security interest" typically occurs when: 1) the seller of the collateral uses the collateral to secure payment of its price; or 2) a party financing a sale uses as collateral the property obtained by the debtor in the sale. See U.C.C. § 9-107. The first situation involves the Code's version of the common law conditional sale. In both cases, of

hand, have been specifically granted a ten-day grace period by section 9-301(2):

If the secured party files with respect to a purchase money security interest before or within ten days after the debtor receives possession of the collateral, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing.

Under this section a purchase money security interest that is filed within ten days after the debtor receives possession of the collateral will cut off any intervening rights of a lien creditor³⁸ because the filing "relates back" to the time when the security interest attached.³⁹ This section reflects the manifest intent of the Code drafters to favor purchase money security interests over non-purchase money security interests.⁴⁰

Interpretative difficulties arose when the Bankruptcy Act's Paragraph I test was applied to this Code language. The purpose behind the Bankruptcy Act's test was to allow the secured party a reasonable amount of time to perfect the transfer.⁴¹ This policy conflicted with section 9-301(1)'s goal of encouraging immediate or advance filing of non-purchase money security interests. Since Article 9 does not provide a specified time period for perfecting *non-purchase money* security interests and since Paragraph I seemed to contemplate this possibility,⁴² bankruptcy commentators had generally concluded that a 21-day grace period was appropriate.⁴³ This allowed a lien creditor to defeat the non-purchase money secured party when the trustee could not do so. Professor Lawrence King analyzed the situation as follows:

Assume a loan is made and a security agreement is entered into on January 2, but that the financing statement which is required for full perfection is not filed until January 20. The debtor files a petition in bankruptcy on May 15. If there had been a creditor who obtained a judgment lien on the collateral between January 2 and January 20,

course, the key factor differentiating the purchase money security interest from other sorts of interests is that the property purchased is used as collateral.

³⁸ And those of the § 70(c) trustee as well, even where bankruptcy occurred between attachment and perfection. See WHITE & SUMMERS, *supra* note 13, at 998. On § 70(c), see notes 17 & 36 *supra*.

³⁹ King, *Voidable Preferences and the Uniform Commercial Code*, 52 CORNELL L.Q. 925, 931-32 (1967). This raises another interpretative issue: from what moment does the grace period begin? Paragraph I makes this time "twenty-one days after the transfer," while U.C.C. § 9-301(2) makes it "within ten days after the debtor receives possession of the collateral." Again, the terminology of the two statutes is dissimilar. For a possible implication of this, see note 53 *infra*.

⁴⁰ *E.g.*, GILMORE, *supra* note 28, at 1328.

⁴¹ King, *supra* note 39, at 928.

⁴² See the text accompanying note 26 *supra*.

⁴³ I COOGAN, HOGAN AND VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE, chs. 9 & 19 (1966); GILMORE, *supra* note 28, at 1327.

by application of section 9-301 [(1)(b)] the judgment creditor would clearly prevail over the secured creditor. The result is not so certain under the Bankruptcy Act. Most authorities take the position that the trustee cannot set aside the security interest when the financing statement has been filed within twenty-one days after the security interest was granted. Under section 60(a)(7)(I)(B), therefore, the transfer must be deemed made for a contemporaneous consideration on January 2, more than four months before the filing of the petition in bankruptcy.⁴⁴

Even the most plausible reading of Paragraph I led to strange results for the non-purchase money secured party under Article 9.⁴⁵ A possible way out of the dilemma was to view section 9-301(1) as giving a *specified* period of zero days,⁴⁶ in which case the secured party could not have triumphed. Professor King further stated:

If . . . the grace period is inapplicable, the transfer must be deemed made on January 20. Two crucial elements of a voidable preference could therefore be proven: (1) the date of filing, May 15, is within four months of the transfer; and (2) since no consideration passed on January 20, the transfer was for an antecedent debt. (The other elements comprise fact questions not material to the present discussion.) It seems clear that the result in bankruptcy proceedings would differ from that under the Code only if the twenty-one day grace period is applicable.⁴⁷

But this symmetry in treatment of the trustee and the lien creditor was achieved only through a very forced reading of section 9-301 and Paragraph I.⁴⁸

Even greater problems arose when the Code's rules regarding *purchase money* security interests were considered. Here, the main difficulty was a disparity in the status of different types of secured parties. Since the Code provides purchase money security interests with a "stated period" of ten days in which to be perfected, purchase money security interests would only have enjoyed a ten-day grace period under the language of Paragraph I. If it is assumed, as the dominant view did assume,⁴⁹ that *non-purchase money* security interests got a 21-day grace period, purchase money security interests would have had a shorter grace period than non-purchase money security interests.⁵⁰ But this result clearly undermined the Code's policy of preferring

⁴⁴ King, *supra* note 39, at 929.

⁴⁵ Section 70(c), it might be noted, would have been of no use to the trustee in this case, because the secured party perfected before the date of bankruptcy. See notes 17 & 36 *supra*.

⁴⁶ GILMORE, *supra* note 28, at 1327-28. See note 54 *infra*.

⁴⁷ King, *supra* note 39, at 929.

⁴⁸ See the text following note 55 *infra*.

⁴⁹ See notes 42-43 *supra* and accompanying text.

⁵⁰ "This is an obviously anomalous result since the purchase-money party, who is singled out for favored treatment under Article 9, gets the axe under § 60(a)(7) 11 days sooner than his non-purchase-money competitor." GILMORE, *supra* note 28, at 1328.

purchase money security interests. It also meant, once more, that a creditor's priority in cases outside bankruptcy differed from that obtained in a bankruptcy proceeding.⁵¹

This anomalous disparity between purchase money and non-purchase money security interests could have been avoided in at least two ways. The first solution was to interpret Paragraph I as permitting a 21-day grace period for purchase money security interests also.⁵² This solution would have given *equal* treatment to purchase money security interests and non-purchase money security interests, but it took interpretative liberties with the Bankruptcy Act and section 9-301(2).⁵³ The second solution was to interpret section 9-301(1) as providing non-purchase money security interests with a stated period of zero days.⁵⁴ This solution would have extended

⁵¹ That is, the relation-back language of § 9-301(2) allowed the purchase money secured party to defeat a lien creditor, while not affording this advantage to other secured parties. In bankruptcy, though, the purchase money secured party would receive less of grace period within which to defeat the trustee than would the nonpurchase money secured party.

⁵² 1 COOGAN, HOGAN AND VAGTS, *supra* note 43, § 9.03(5)(c), at 995. Professor Gilmore commented on this suggestion as follows:

If we accept the proposition that a non-purchase-money secured party gets the full 21 days for filing, we come next to the observation that the purchase-money secured party gets only 10 days when § 9-301(2) is read against the "stated period" language of § 60(a)(7). This is an obviously anomalous result since the purchase-money party, who is singled out for favored treatment under Article 9, gets the axe under § 60(a)(7) 11 days sooner than his non-purchase-money competitor. The anomaly can be avoided by saying that, despite the "stated period" of § 9-301(2), the holder of a purchase-money interest, like the holder of any other interest, should have the full 21 days. This suggestion has, indeed, been made, and by an eminently respectable source, but there is some difficulty in squaring it with the (at this point) quite precise language of § 60(a)(7).

GILMORE, *supra* note 28, at 1328.

⁵³ For one thing, § 9-301(2) obviously gives a ten-day grace period. See the text following note 37 *supra*. And Paragraph I clearly contemplated such a grace period. See the text accompanying note 26 *supra*. However, § 9-301(2) dates the grace period from the time the debtor receives possession of the collateral, and not from the time of transfer. See note 39 *supra*. Apparently aware of this, Gilmore noted the following possibilities:

Or are we to say that, at least in such a case, § 9-301(2) does not "specify" a "stated period" running from the date of transfer so that the purchase-money party who delays delivery gets 21 days while the party who makes an immediate delivery gets only 10 days? Perhaps the suggestion that all purchase-money filing should have the benefit of the 21-day period can be reinforced by the observation that § 9-301(2), read literally, does not specify a stated period running from the date of transfer and therefore should not be held to cut back the full period in any case.

GILMORE, *supra* note 28, at 1329.

⁵⁴ GILMORE, *supra* note 28, at 1327-28:

If the underlying policy of § 60(a)(7) is thought to be the adoption of any state filing requirement which is shorter than the 21-day maximum, it would be entirely possible to conclude that any filing delay after the security interest had attached would make the transaction a transfer for antecedent debt under § 60(a)(7). The language of § 60(a)(7) is that the filing must be made within whatever "stated period," less than 21 days, may be "specified" in the "applicable law." Article 9 could be taken as a statute which specified a stated period of zero days.

This argument has been amplified as follows by Professor King:

Nevertheless, the problem is capable of a logical solution. The Bankruptcy Act defers to state law for a determination of when a security interest is perfected Under state law there is no period of grace for perfecting non-purchase-money security interests and there is a ten-day grace period for perfecting purchase-money security in-

favored treatment to purchase money security interests.⁵⁵ But it also probably involved tenuous interpretations of section 9-301(1) (which does not explicitly say anything of the sort) and of Paragraph I (which contemplates situations in which the state statute says nothing about a grace period).⁵⁶ Confronting these anomalies, Gilmore concluded that this problem "is not capable of a logical solution; the courts may as well decide the case by rolling the dice."⁵⁷ The only satisfactory way out of the impasse was a clarifying amendment to either the Bankruptcy Act or Article 9.

The Bankruptcy Reform Act Solution

The problems discussed above have been addressed—and largely resolved—by the Bankruptcy Reform Act. After briefly sketching the legislative history of the Reform Act,⁵⁸ this section will describe the solution it provides. On July 24, 1970, Congress established the Commission on the Bankruptcy Laws of the United States to study federal bankruptcy legislation and to recommend necessary changes.⁵⁹ After a two-year effort, the Commission submitted its Report to Congress on July 30, 1973.⁶⁰ Not long after this, bills embracing the Commission's recommendations for a new federal bankruptcy law were introduced in both the House⁶¹ and the Sen-

interests. For purposes of Section 60 of the Bankruptcy Act, the same conclusions should be reached in a bankruptcy proceeding. Such an interpretation does not derogate from the concept of federal supremacy over state law, since the Bankruptcy Act clearly *refers* to state law for application of the transfer test.

King, *supra* note 39, at 932-33 (emphasis in original).

⁵⁵ This is so because purchase money security interests would still get the 9-301(2) ten-day grace period under this reading of section 9-301.

⁵⁶ See the text accompanying note 26 *supra*, and note 34 *supra*.

⁵⁷ GILMORE, *supra* note 28, at 1329. Expressing a similar idea is the Gilmore Report, *supra* note 2, at 6170:

The Committee also feels that there is much to be said for a current revision of § 60 quite apart from the desirability of arriving at a fair settlement of the problem just discussed. Present § 60, as even its dearest friends will concede, is, as a matter of language, intolerably and unnecessarily complex. Furthermore, as has already been pointed out, present § 60 was, necessarily, written in pre-Code terminology, which leads to difficult, indeed logically insoluble, problems of statutory construction in applying the § 60 rules to Article 9 security interests. For example, present § 60a(7) deals with the problem of late filing of security interests subject to a filing perfection requirement. The Article 9 filing system is quite different from the filing systems set up under the pre-Code security statutes. For one thing, there is no grace period for filing under Article 9, except for purchase money security interests which get a 10-day grace period. Present § 60a(7) clearly assumes that all filing statutes have grace periods for all required filings. Consequently no one really knows what § 60a(7) means when it is applied to Article 9 filings and, indeed, the commentators who have discussed the point have proposed divergent and contradictory solutions.

⁵⁸ Summaries of this history can be found at 124 CONG. REC. S 14718-19 (daily ed. Sept. 7, 1978) (remarks of Sen. DeConcini); 123 CONG. REC. H 11700-01 (daily ed. Oct. 27, 1977) (remarks of Rep. Butler).

⁵⁹ Pub. L. No. 91-354, 84 Stat. 468 (1970).

⁶⁰ REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 137, 93d Cong., 1st Sess. (1973).

⁶¹ H.R. 10,792, 93d Cong., 1st Sess. (1973).

ate.⁶² There was little immediate action on these bills, and they were reintroduced without significant amendment in 1975.⁶³ At this time, however, parallel bills reflecting the recommendations of the National Conference of Bankruptcy Judges were also introduced.⁶⁴ House subcommittee hearings on both its bills began in 1975 and continued into 1976,⁶⁵ while the corresponding Senate hearings were completed during 1975.⁶⁶ After further committee work—some of it in consultation with the National Conference of Bankruptcy Judges and the National Bankruptcy Conference—revised bills were introduced in the House⁶⁷ and Senate⁶⁸ in January and October of 1977, respectively. The House passed its version on February 1, 1978, and the Senate did so on September 7, 1978. After some work to reconcile differences between the two bills, the Bankruptcy Reform Act finally became law on November 6, 1978.⁶⁹ The portions of the Act relevant here took effect on October 1, 1979.⁷⁰

Section 547 of the Bankruptcy Reform Act,⁷¹ the successor to Bankruptcy Act section 60, substantially modifies its predecessor's treatment of voidable preferences. Many of the changes it makes are responses to the problems created by section 60's confused interaction with Article Nine of the Uniform Commercial Code.⁷² The operative provision of section 547 is its subsection (b), which generally preserves section 60's listing⁷³ of the elements necessary to establish a preference.⁷⁴ However, section 547(b) does change

⁶² S. 2565, 93d Cong., 1st Sess. (1973).

⁶³ See H.R. 31, 94th Cong., 1st Sess. (1975); S. 235, 94th Cong., 1st Sess. (1975).

⁶⁴ See H.R. 32, 94th Cong., 1st Sess. (1975); S. 236, 94th Cong., 1st Sess. (1975); H.R. 16643, 94th Cong., 1st Sess. (1975).

⁶⁵ *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st & 2d Sess. (1975-76).

⁶⁶ *Hearings on S. 235 and S. 236 Before the Subcomm. on the Improvement of Judicial Machinery of the Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975).

⁶⁷ See H.R. 6, 95th Cong., 1st Sess. (1977). After this came H.R. 7330, 95th Cong., 1st Sess. (1977). H.R. 8200, 95th Cong., 1st Sess. (1977). H.R. 8200 was the bill eventually passed by the House.

⁶⁸ See S. 2266 95th Cong., 1st Sess. (1977).

⁶⁹ Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101 to 151326 (Supp. III 1979)).

⁷⁰ *Id.* § 402.

⁷¹ *Id.* § 547.

⁷² In addition to the problems discussed in this article, see Mann & Phillips, *supra* note 5.

⁷³ See notes 21-22 *supra* and accompanying text.

⁷⁴ 11 U.S.C. § 547(b) (Supp. III 1979). The full text of § 547(b) is as follows:

Except as provided in subsection (c) of this section, the trustee may avoid any transfer of property of the debtor —

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made —

(A) on or within 90 days before the date of the filing of the petition; or

(B) between 90 days and one year before the date of the filing of the petition, if

section 60's four-month time period, and it also substantially dilutes the requirement that the transferee have reasonable cause to believe in the insolvency of the debtor for the transfer to be voidable.⁷⁵ Under the Reform Act, if the preferential transfer occurs on or within ninety days before the filing of the bankruptcy petition, no "reasonable cause to believe" is required.⁷⁶ However, the reasonable cause test is retained to render voidable by the trustee transfers to "insiders"⁷⁷ which occur between ninety days and one year before the day of bankruptcy.⁷⁸

Despite these changes, though, section 547(b) would still seem to present the timing problems discussed above, since the antecedent debt requirement still remains and there still is a definite (albeit different) time period applicable. But in paragraphs (2) and (3) of subsection 547(e),⁷⁹ the Reform Act substantially modifies section 60's timing-of-transfer provision.⁸⁰

- (2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made —
- (A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time;
- (B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or
- (C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of —
- (i) the commencement of the case; and
- (ii) 10 days after such transfer takes effect between the transferor and the transferee.

such creditor, at the time of such transfer —

- (i) was an insider; and
- (ii) had reasonable cause to believe the debtor was insolvent at the time of such transfer; and
- (5) that enables such creditor to receive more than such creditor would receive if —
- (A) the case were a case under chapter 7 of this title;
- (B) the transfer had not been made; and
- (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

⁷⁵ See notes 20 & 22 *supra* and accompanying text.

⁷⁶ 11 U.S.C. § 547(b)(4)(A) (Supp. III 1979), quoted in note 74 *supra*.

⁷⁷ See *id.* § 101(25). If the debtor is a corporation, "insiders" are its directors, officers, controlling persons, and general partners; partnerships in which the debtor-corporation is a general partner; and relatives of the debtor's general partners, directors, officers, or controlling persons. The section defines "insider" status for debtors who are individuals or partnerships in a roughly similar fashion. The definition also includes affiliates of the debtor, or the "insider of an affiliate as if such affiliate were the debtor," as well as the managing agent of the debtor.

⁷⁸ *Id.* § 547(b)(4)(B), quoted in note 74 *supra*.

⁷⁹ *Id.* § 547(e)(2) & (3).

⁸⁰ For a comparison to § 547(e)(2), see the text accompanying notes 26-27 *supra*.

- (3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

Subsection (e)(2) obviously changes the grace period allowed by the Bankruptcy Act for perfection⁸¹ of security interests and other transfers. If the transfer is perfected at the time it takes place or *within ten days* thereafter, then the transfer is deemed to have been "made" for the purposes of the Reform Act at the time it takes effect between the parties—i.e., the time of attachment.⁸² Thus, the twenty-one day grace period of the Bankruptcy Act⁸³ has been replaced by a ten-day period.⁸⁴ Even more significantly, the Reform Act's grace period applies to *all* transfers without regard to any grace period provided by state law. Thus, the first problem created by section 60's interaction with Article 9—whether the secured party had a grace period within which to perfect⁸⁵—is resolved by the Reform Act. If such a party perfects within ten days of attachment, the time of transfer is the time of attachment. As a result, the transfer cannot be for an antecedent debt, because value must be given for attachment to occur or for the transfer to be effective.⁸⁶ Moreover, except for the "insider" situation,⁸⁷ the transfer will be deemed to have occurred outside the new 90-day preference period in situations where attachment takes place at that time and perfection occurs within ten days, even if this perfection occurs *within* the 90-day period.⁸⁸ In addition, the creditor seems to be protected even if perfection occurs after bankruptcy but within the ten-day grace period. In such a situation, the time of transfer will still be the time of attachment.⁸⁹ On the other hand, if the

⁸¹ 11 U.S.C. § 547(e)(1)(B) (Supp. III 1979) provides that "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." Because a party who has perfected under Article 9 will defeat such a creditor, this definition is substantially in accord with that of Article 9. WHITE & SUMMERS, *supra* note 13, at 1002.

⁸² *Id.* § 547(e)(2)(A), quoted in the text following note 80 *supra*, clearly specifies the moment when the grace period begins and to which subsequent perfection "relates back": it is the moment that the transfer takes effect between the transferor and the transferee. For Article 9 security interests this occurs when the security interest attaches. See U.C.C. §§ 9-203(1)-(2). Attachment requires that the debtor have rights in the collateral, U.C.C. § 9-203(1)(c), and U.C.C. 9-301(2)'s grace period begins when the debtor gets possession of the collateral. Thus, § 547(e)(2) establishes a starting point for measuring grace periods similar to that of U.C.C. § 9-301(2), thereby substantially eliminating yet another inconsistency that formerly existed between the Bankruptcy Act and Article 9. On this inconsistency, see note 39 *supra*.

⁸³ See notes 26, 42-44 *supra* and accompanying text.

⁸⁴ The Gilmore Report proposed a 21-day grace period. See Gilmore Report, *supra* note 2, at 6169-70, 6672-73.

⁸⁵ See notes 42-48 *supra* and accompanying text.

⁸⁶ See U.C.C. § 9-203(1) and note 10 *supra*.

⁸⁷ See notes 74 & 77 *supra*.

⁸⁸ However, this situation will not be especially significant because even here the transfer typically will not be for an antecedent debt.

⁸⁹ If the ten-day period for perfection has not yet expired when the petition is filed, it can still be utilized to relate back to the actual time of transfer. In other words, if the petition is filed a week after a transfer was made, three days are still left to perfect it.

security interest is perfected *after* the grace period has elapsed, then the transfer will be deemed to have been made at either the time of perfection or immediately before bankruptcy, whichever is earlier.⁹⁰ Here, of course, the taking of a security interest will usually be preferential unless perfection occurs before the beginning of the relevant time period for a preference.⁹¹

Section 547(e) also disposes of the second difficulty noted above: section 60's tendency to favor non-purchase money security interests over purchase money security interests in violation of established Article 9 policies.⁹² By not employing state law to set the grace period, section 547(e)(2) effectively equates these two types of security interests for timing-of-transfer purposes. Of course, this still offends the Code policy of *favoring* purchase money secured parties.⁹³ But the drafters of section 547 made some provision for this difficulty as well. Section 547(c)(3),⁹⁴ one of the provisions creating exemptions from section 547's general ban on preferential transfers, states that:

The trustee may not avoid under this section a transfer —

. . .

- (3) of a security interest in property acquired by the debtor —
- (A) to the extent such security interest secures new value that was —
- (i) given at or after the signing of a security agreement that contains a description of such property as collateral;
 - (ii) given by or on behalf of the secured party under such agreement;
 - (iii) given to enable the debtor to acquire such property; and
 - (iv) in fact used by the debtor to acquire such property; and
- (B) that is perfected before 10 days after such security interest attaches.

This subsection clearly protects purchase money security interests perfected within ten days of attachment from any sort of preference attack.⁹⁵ On its face, it would seem to add little to the protection already afforded the purchase money secured party by section 547(e).⁹⁶ But because section 547(e) effectively states that a transfer cannot occur until the debtor acquires rights in the collateral,⁹⁷ it would not protect a purchase money se-

⁹⁰ See 11 U.S.C. § 547(e)(2)(B)-(C) (Supp. III 1979), in the text following note 80, *supra*.

⁹¹ That is, unless it occurs within 90 days in the normal case, or within one year if the transfer is to an "insider."

⁹² See notes 49-56 *supra* and accompanying text.

⁹³ See notes 33-40 *supra* and accompanying text.

⁹⁴ 11 U.S.C. § 547(c)(3) (Supp. III 1979).

⁹⁵ WHITE & SUMMERS, *supra* note 13, at 1006-07.

⁹⁶ "Because of the ten day grace period in subsection (e), it will seldom be necessary for even a purchase money lender to invoke this exception. Normally he will protect himself by filing within ten days of the time the security agreement is signed." *Id.*

⁹⁷ See 11 U.S.C. § 547(e)(2) (Supp. III 1979) quoted in the text following note 80 *supra*;

cured party where the debtor does so well after the completion of the security agreement.⁹⁸ In this case, the transfer would clearly be for an antecedent debt. However, under section 547(c)(3), such a secured party will still not be subject to preference attack if he perfects in time.⁹⁹ Thus, section 547(c)(3) manages to give the purchase money secured party some additional protection. But it is still not clear that this amounts to much of an advantage over other sorts of secured parties.¹⁰⁰

CONCLUSION

Unlike its efforts in some other contexts,¹⁰¹ Congress' revisions of section 60 of the Bankruptcy Act seems to have resolved most of the *interpretative* problems created by section 60's interaction with Article 9 of the Uniform Commercial Code.¹⁰² Section 547 effectively provides that security interests perfected within ten days of attachment will not be preferential. It has also made it clear that this requirement applies to purchase money and non-purchase money security interests alike. On the other hand, the Reform Act has not eliminated all of the *policy* conflicts existing under the prior law. Despite virtually removing purchase money security interests perfected within ten days of attachment from attack by the trustee, it does not give them the advantage over other sorts of security interests envisioned by the Code. And giving non-purchase money security interests a ten-day grace period for filing still subverts the Code's policy of encouraging immediate or advance filing. But in the commercial context at least, clarity is often more valuable than case-by-case justice, and in bringing some certainty to this area section 547's drafters have performed a signal service for commercial lawyers.

⁹⁸ [I]t is possible to have a purchase money case that is not covered by the relation back provisions. Assume for example that a bank agrees to lend a million dollars to debtor for the debtor's purchase of some expensive equipment. The parties sign the security agreement and the loan is made on day one but the collateral is not actually purchased until day 30 and the filing is not made until day 31. But for the purchase money exception, that transaction could be attacked as a voidable preference notwithstanding the ten day grace period. Since no transfer can occur until the debtor acquires rights in the collateral and since the debtor acquired such rights only on the 30th day, the transfer would be for the antecedent debt that had arisen on day one. Subsection 547(c)(3) will save that transaction; the ten day relation back rule would not save it.

WHITE & SUMMERS, *supra* note 13, at 1007.

⁹⁹ *Id.*

¹⁰⁰ The example given in note 98 *supra* would not appear to be readily replicable in the non-purchase money context, since it involves the acquisition of collateral well after the giving of value by the creditor. The principal exception to this generalization would be a security interest in after-acquired property, the so-called "floating lien", but this too is generally protected under the Reform Act. See Mann & Phillips, *supra* note 6, at 12-16.

¹⁰¹ One example is the Reform Act's treatment of the clash between the reclaiming seller of goods and the trustee under § 546(c), 11 U.S.C. § 546(c) (Supp. III 1979). See Mann & Phillips, *Section 546(c) of the Bankruptcy Reform Act: An Imperfect Resolution of the Conflict Between the Reclaiming Seller and the Bankruptcy Trustee*, 54 AM. BANKER. L.J. 239 (1980); Mann & Phillips, *The Reclaiming Seller Under Bankruptcy Reform Act: Resolution or Renewal of an Old Conflict?* 33 VAND. L. REV. 1 (1980).

¹⁰² For another Article 9 problem eliminated by the Reform Act, see Mann & Phillips, *supra* note 6.