1969

Proceeding under the Uniform Commercial Code

David G. Epstein
University of Richmond, depstein@richmond.edu

Recommended Citation

David G. Epstein, *Proceeding under the Uniform Commercial Code*, 30 Ohio St. L.J. 787 (1969).

"PROCEEDING" UNDER THE UNIFORM COMMERCIAL CODE

DAVID G. EPSTEIN*

The Uniform Commercial Code is the "most important piece of business legislation ever prepared in the United States. . . ."[1] "Article 9 is the most novel and probably the most important article in the Code."[2] "The greatest change under the Code will probably come about in due time because of the so-called 'floating lien' "[3] made possible in part by the Code's proceeds provision, section 9-306. The proceeds provision represents an innovation significant to both debtors and creditors. For example, in order to carry on his business, the borrower who avails himself of inventory financing often desires some right to dispose of goods when they are ready for sale. In many states, however, prior to the Code, a chattel mortgage was fraudulent as a matter of law unless all proceeds resulting from the exercise of the power of sale were applied to reducing the mortgage debt.[4] Similarly, in many states, prior to the Code, failure to "police" the borrower resulted in lender's loss of the lien. Section 9-306 changes these pre-Code rules, and more.[5]

Despite its importance, section 9-306 has received little attention from either the courts or legal commentators.[6] This article will explore three major problem areas under the Code proceeds provision.

I. CREATION AND PERFECTION OF A SECURITY INTEREST IN PROCEEDS

A. *Creation*

In light of the desirability of obtaining a perfected security interest in proceeds it becomes important to determine how such an interest may be obtained. The initial inquiry is whether provision for proceeds must be made in the security agreement.

This question merits consideration for two reasons. First, there pres-

* Member of the Arizona and Texas Bars, B.A., LL.B. University of Texas, LL.M. Harvard.

1 Beutel, *The Proposed Uniform Commercial Code as a Problem in Codification*, 16 LAW & CONTEMP. PROB. 141 (1951).

2 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, WHY YOUR STATE SHOULD ENACT THE REVISED UNIFORM COMMERCIAL CODE 67 (1958).

3 Henson, *The Prospective Effect of the Uniform Commercial Code on Commercial Financing*, 1962 U. ILL. L.F. 349, 355. For a general discussion of the floating lien *see* KLAUS, SOME MODERN PROBLEMS IN INVENTORY AND ACCOUNT RECEIVABLE FINANCING, in PROCEEDINGS OF THE FIRST ANNUAL UNIFORM CODE INSTITUTE 149, 150 (1967).

4 *See generally* Note, *Mortgages on Fluctuating Stocks of Goods—Nature of Mortgagee's Interest*, 28 ORE. L. REV. 376 (1949).

5 *Id.*

6 *See* 3 WILLIER AND HART, UNIFORM COMMERCIAL CODE REPORTER DIGEST 2-1805 *et seq.* (1969).

ently exist a number of security agreements that inadvertently or mistakenly omitted any mention of proceeds. As Lord Devlin has observed,

> Businessmen have always given a lot of work to lawyers, for . . . they do not bother much about the agreements they make until something goes wrong. This habit of mind distresses the lawyers; they look upon the bits of paper which the litigant produces with as much enthusiasm as a doctor surveys a row of patent medicine bottles out of which his patient has been dosing himself.[7]

Second, it has been suggested by several legal writers that inclusion of specific language in the description of collateral pertaining to proceeds of the sale of the collateral may be construed as a grant of permission to sell, exchange or otherwise dispose of the original collateral.[8] Where such permission is given to the debtor by the secured party, the sale, exchange or other disposition of the original collateral terminates the security interest therein leaving the secured party with only a security interest in the proceeds of the collateral.[9] Comment 3 to § 9-306 provides that

> A claim to proceeds in a filed *financing statement* might be considered as impliedly authorizing sale or other disposition of the collateral, depending upon the circumstances of the parties, the nature of the collateral, the course of dealing of the parties and the usage of trade. . . [emphasis added].

While the comment is directed towards language in a financing statement, it would seem that a proceeds provision in a security agreement would be similarly regarded. Perhaps such a provision in a security agreement would be given even more weight as an indication of authorization of sale as the security agreement embodies the understandings of the debtor and secured parties as to their respective rights in the collateral.

Thus, if a perfected security interest in proceeds can be obtained without any language as to proceeds in the security agreement, it would seem advisable to omit any mention of proceeds.

To be enforceable, a written security agreement must contain a description of the collateral. "Collateral" is defined in § 9-105(c) as "the property subject to a security interest . . ." This definition seems all encompassing; if property is subject to a security interest, it must be "collateral". If this is true, then proceeds subject to a security interest are "collateral" and must be described in a written security agreement for

---

[7] P. DEVLIN, SAMPLES OF LAWMAKING 4 (1962). *But cf.*, In re Portland Newspaper Publishing Co., Inc., 271 F. Supp. 395, 400 (Ore. 1967), "Good business practice should be good business law."

[8] *E.g.*, 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 26.11 at 714 (1965), (hereafter referred to as "GILMORE"); W. WILLIER AND F. HART, FORMS AND PROCEDURES UNDER UNIFORM COMMERCIAL CODE, ¶ 926.14 (1969). *But cf.*, Vermillon County Production Credit Ass'n v. Izzard, 249 N.E.2d 352, 354 (Ill. App. 1969); *contra*, Levie, *Security Interest in Chattel Paper*, 78 YALE L.J. 935, 962 (1969).

[9] UNIFORM COMMERCIAL CODE § 9-306(2) (1962 version).

such agreement to be effective. There is language in § 9-203(1)(b) that supports this position:

> In describing collateral, the word "proceeds" is sufficient without further description to cover proceeds of *any character* [emphasis added].

This provision raises a number of questions.[10] What language other than the use of the word "proceeds" is sufficient to create a security interest in proceeds? What is the significance of the concluding phrase, "of any character"? Does this mean that where the proceeds are of the same general description as the original collateral, they are covered by the security agreement irrespective of the agreement's provisions or lack of provisions as to proceeds? For example, the debtor owns and operates a used car lot and the collateral is described in terms of any and all cars held for sale on such lot. The debtor sells car *X* for cash and car *Y*. Debtor places car *Y* on his lot for sale. Does the security agreement cover car *Y* notwithstanding the absence of the word "proceeds" in the security agreement? Neither the Code, its comments, nor cases construing the Code have answered these questions. Rather, the question of whether any provision for proceeds need be made remains largely unresolved.

Professor Gilmore[11] is of the view that it is not necessary that the security agreement contain a proceeds clause. According to Professor Gilmore, "[t]he trouble with the § 9-203 sentence quoted above is that, being embedded in a section dealing with formal requisites, it sounds like an additional formal requisite; that is, there would be no shift to proceeds, perfected or unperfected, unless the security agreement contained a proceeds clause. That was certainly not intended."[12] Section 9-306(2) seems to support the Gilmore view; it provides in pertinent part:

> A security interest continues in . . . any identifiable proceeds including collections received by the debtor.

Again, the language of the Code is broad and all encompassing. The above excerpt from the Code seems to provide that when the debtor sells, exchanges or otherwise disposes of the collateral covered by the security agreement, the secured party obtains automatically a security interest in any proceeds of the sale or exchange regardless of whether the security agreement contained any sort of proceeds provision.

---

10 As Professor Mellinkoff irreverently, but accurately observed, "[F]or all its substantive contributions the UCC is a slipshod job of draftsmanship." Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L. J. 185 (1967). *But cf.*, Surrency, *Research in the Uniform Commercial Code*, 1962 U. ILL. L. F. 404, 406.

11 "It is all but impossible to discuss ambiguous areas in the present Article 9 without finding that . . . Professor Gilmore, like Kilroy . . . [has] been there before." Kripke, *Suggestions for Clarifying Article 9: Intangibles, Proceeds, and Priorities*, 41 N. Y. U. L. REV. 687, 692, (1966).

12 1 GILMORE, § 11.4 at 351; *accord*, Lee, *Perfection and Priorities under the Uniform Commercial Code*, 80 BANK. L.J. 473, 503 (1963); Note, *Perfection of the Security Interest*, 19 S.C. L. REV. 700, 721 (1966-67).

Professor Kripke finds further support for the position of an automatic security interest in proceeds in the language of § 9-306(3) to the effect that a security interest in proceeds is perfected for ten days without any filing.[13] He states:

> A provision for a period of grace within which to file would seem to have been unnecessary if the secured party were alerted to the need for filing by an express reference in his security agreement.[14]

A final argument for "automatic perfection" can be based on the Code's definition of proceeds. Section 9-306(1) defines "proceeds" as what is "received when collateral or proceeds is sold, exchanged, collected or otherwise disposed of." This definition of "proceeds" in terms of both "collateral" and "proceeds" indicates that for some purposes the draftsmen of the Code considered proceeds separate and distinct from collateral. Thus, perhaps the requirement of a description of the "collateral" in § 9-203(1)(b) was not meant to apply to proceeds.

In light of the ambiguity of the Code provisions and the absence of reported cases in the area, it would seem advisable to add to the description of collateral "all proceeds thereof" or other such similar language and to include some form of disclaimer of authorization of sale. For example, the security agreement forms of a large southwestern national bank provide: "so long as any indebtedness remains unpaid, debtor . . . will not . . . sell, transfer, assign, deliver or otherwise dispose of any collateral or any interest thereon without the prior written consent of secured party . . ."[15]

B. Perfection

Some confusion also exists as to whether the financing statements must mention proceeds in order for a security interest therein to be and remain perfected. Under § 9-306(3) a security interest in proceeds "becomes unperfected ten days after receipt of the proceeds by the debtor unless (a) a filed financing statement covering the original collateral also covers proceeds; or (b) the security interest in the proceeds is perfected before the expiration of the ten day period." Again, the language of the Code raises a number of questions: When does a financing statement "cover" proceeds? When does a financing statement "cover" original collateral but not proceeds? How is a security interest in proceeds perfected?

---

[13] Kripke, *supra* note 11, at 703. Other commentators are divided on automatic perfection of proceeds. *Compare, e.g.*, O. SPIVACK, SECURED TRANSACTIONS 101 (1963); *with* Duesenberg, *Financing Inventory under the Uniform Commercial Code: A Resume for Missouri Lawyears*, 29 MO. L. REV. 462, 481 (1964).

[14] Kripke, *supra* note 11, at 703.

[15] Security Agreement of First National Bank of Arizona.

Questions as to perfection by filing are by and large answered in Part Four of Article 9 of the Uniform Commercial Code.[16] Section 9-402 deals with the matter of contents of a financing statement. The following parts of § 9-402 pertain to perfection of a security interest in proceeds:

> (1) A financing statement is sufficient if it . . . contains a statement indicating the types, or describing the items, of collateral . . .
>
> . . .
>
> (3) A form substantially as follows is sufficient to comply with subsection (1):
>
> . . .
>
> 4. (If proceeds or products of collateral are claimed) Proceeds-Products of the collateral are also covered. . . .

The same questions and arguments as were raised with regard to the language of § 9-203 apply to § 9-402. There have, however, been judicial decisions that have considered whether it is necessary to specifically provide for proceeds in a financing statement. In both *The Clovis National Bank v. Thomas*,[17] and *In re Platt*,[18] courts denied claims of security interest in proceeds where the filed financial statement did not expressly claim proceeds. In both decisions the courts relied solely upon the above language from § 9-306(2). In neither case did the court consider the language from § 9-402—the section that is directed to the "formal requisites of financing statement[s]".

While both the *Clovis* and *Platt* courts speak in absolute terms—no security interest in proceeds is perfected unless a financing statement mentions proceeds, neither decision is completely determinative of this question. In *Clovis*, the financing statement described the items of collateral; under § 9-402 a financing statement may either describe the items of collateral or indicate the types thereof.[19] Similarly, in *Platt* the proceeds were cash while the original collateral was accounts receivable. Thus, despite the broad language in both *Clovis* and *Platt*, neither case is controlling as to the situation where the financing statement indicates the type of collateral and the proceeds in question are items of the same type as the original collateral. For example, if Farmer Brown obtains a loan from the local bank, secured by the cows on his farm and the bank's financing statement merely indicates that it covers cows on Farmer Brown's

---

16 Although Part 4 of Article 9 is entitled "Filing" not *all* of the Code's filing provisions are contained therein; *e.g.*, UNIFORM COMMERCIAL CODE § 9-302 (1962 version).

17 77 N.M. 554, 425 P.2d 726 (1967).

18 257 F. Supp. 478 (E.D. Pa. 1966).

19 *See generally*, National Cash Register Co. v. Firestone & Co., Inc., 346 Mass. 255, 191 N.E.2d 471 (1963). For other discussions of perfection of security interests in proceeds *see* Kripke, Braucher, Coogan, Gilmore and Haydock, *Problems of Lenders, Borrowers and Sellers under the Uniform Commercial Code* 67 (1968); Scull, *Accounts Receivable Financing: Operational Problems under the Uniform Commercial Code*, 11 ARIZ. L. REV. 1, 13 (1969).

farm, it would seem that if Farmer Brown traded his cow X for Farmer Jones' cow Y, cow Y would be covered by the financing statement.

II. Scope of a Security Interest in Proceeds

Assuming that the security agreement and the financial statement contain proper provision for proceeds, it becomes necessary to ascertain the scope of protection a security interest in proceeds affords a lender. Section 9-306(2) limits the interest to "*identifiable*" proceeds. While the phrase "identifiable proceeds" is nowhere defined in the Code or its comments, a number of cases have now considered the phrase. All of these cases have simply applied common law tracing principles.[20] For example, in *Girard Trust Corn Exchange Bank v. Warren Lepley Ford, Inc.*,[21] the secured party had a perfected security interest in the new automobiles of debtor-dealer and in any and all proceeds thereof. The debtor sold the automobiles and deposited the proceeds in his bank accounts. Later, he used this money to purchase new automobiles. The court found that the subsequently acquired automobiles constituted identifiable proceeds and so were subject to the bank's security interest. In so holding, the court stated:

> We are of the opinion that the legislature intended to continue the earlier law which permitted a secured creditor to trace his collateral security into any identifiable proceeds, in the event of its disposition by the debtor and the only change that was made was as to cash which came into a receiver's possession.[22]

As the last clause in the above excerpt indicates, the common law doctrine of tracing no longer applies to cash proceeds where there has been a receiver. Rather, § 9-306(4) provides:

> (4) In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest
>
> (a) in identifiable non-cash proceeds;
>
> (b) in identifiable cash proceeds in the form of money which is not commingled with other money or deposited in a bank account prior to the insolvency proceedings;
>
> (c) in identifiable cash proceeds in the form of checks and the like which are not deposited in a bank account prior to the insolvency proceedings; and
>
> (d) in all cash and bank accounts of the debtor, if other cash proceeds have been commingled or deposited in a bank account, but the perfected security interest under this paragraph (d) is
>
> (i) subject to any right of set-off; and

[20] *See generally*, Skilton, *Cars for Sale: Some Comments on the Wholesale Financing of Automobiles*, 1957 Wisc. L. Rev. 352, 407.

[21] 25 Pa. D. & C.2d 395, 1 UCC Rep. Serv. 531 (1958).

[22] 1 UCC Rep. Serv. 531, 535 (1958).

> (ii) limited to an amount not greater than the amount of any cash proceeds received by the debtor within ten days before the institution of the insolvency proceedings and commingled or deposited in a bank account prior to the insolvency proceedings less the amount of cash proceeds received by the debtor and paid over to the secured party during the ten day period.

Apparently the above provision was drafted so as to avoid the problems that may arise in tracing after the cash proceeds of property subject to a security interest are deposited by the debtor in a bank account.[23] Cash not derived from the sale or exchange of collateral subject to the security agreement is already in this account or is subsequently added thereto. Afterwards, checks are drawn on the account, more funds are deposited. It becomes impossible to say whose cash remains in the account. Section 9-306(4), however, creates a number of new problems.

The workings and misworkings of this subsection can most easily be understood by considering a number of hypothetical situations in which debtor *X*, has disposed of goods subject to a perfected security agreement that "covers" proceeds and has instituted "insolvency proceedings" as defined in § 1-201(22). If the proceeds are identifiable goods other than cash, the secured party, hereafter referred to as *Y*, has a security interest therein.[24] The same is true if the proceeds take the form of cash and the cash has been kept separate and apart from other money.[25] There is some question as to whether *Y*'s security interest will reach the cash if it has been deposited in a bank account, other than to the limited extent provided by § 9-306(4)(d). It would seem that if the cash was not put in *X*'s general account, but in a special separate account "with appropriate restrictions on deposits and withdrawals" that *Y*'s security interest in the proceeds should continue. This is the position of Professor Gilmore.[26] Yet, read literally, § 9-306(4)(b) seems to demand the contrary result: when money proceeds are deposited in a bank account prior to insolvency, the secured party's interest therein does not survive the institution of insolvency proceedings.

Constructional arguments can be made to favor the former view. It can be urged that the word "not" in § 9-306(4)(b) refers only to "commingled" so that the subsection describes two kinds of identifiable cash proceeds: (1) cash proceeds in the form of money which is not commingled with other money and (2) cash proceeds deposited in a bank account. The obvious weakness with this constructional argument is that it results in cash deposited in *X*'s general account as well as that segregated in special accounts being regarded as "identifiable". Another

[23] *See* Everett, *Securing Security*, 16 LAW & CONTEMP. PROB. 49, 52 (1951).
[24] UNIFORM COMMERCIAL CODE § 9-306(4)(a) (1962 version).
[25] UNIFORM COMMERCIAL CODE § 9-306(4)(b) (1962 version).
[26] 2 GILMORE, § 45.9 at 1338.

possible contention can be based on the phrase "cash" and bank accounts in § 9-306(4)(d). From this it can be argued that bank accounts are not cash proceeds and so the question of whether Y's security interest reaches proceeds in the form of cash placed in a separate bank account is governed by § 9-306(4)(a)—not § 9-306(4)(b). Again there is a counter-argument. Section 9-306(4)(d) only indicates that the draftsmen differentiated between cash and bank accounts—not that they excluded bank accounts from the general term "cash proceeds".

The UCC as adopted in California expressly provides for deposits in separate bank accounts; the California version of § 9-306(4)(a) reads: ". . . identifiable noncash proceeds and in a separate bank account containing only proceeds. . .".[27] The Permanent Editorial Board of the Uniform Commercial Code,[28] in rejecting the uniform adoption of this addition said:

> In this variation California has sought to make clear that if commingling of cash proceeds has been avoided by depositing them in a separate bank account containing only proceeds, the cash involved is subject to the same rule as that applicable to identifiable non-cash proceeds and undeposited cash proceeds, rather than the rule applicable to commingled cash. California's problem is no doubt suggested by the exclusion under Section 9-104(k) of 'transfers . . . of any deposit . . . or like account maintained with the bank . . .' But this exclusion in 9-104 must be read with 9-306, which clearly covers bank accounts containing non-proceeds and, by implication, aided by the general definition of 'proceeds,' it must be read as California has more clearly stated it. In short, California has only made explicit what is otherwise the necessary construction of the statute.[29]

Unfortunately, the Permanent Editorial Board is as ambiguous in rejecting additions to the Code as it was in drafting the Code. The first two sentences, along with the last one, indicate an appreciation for the problem and an implicit adoption of the California result. The middle sentences, however, with their references to § 9-104(k) only confuse the matter. "California's problem" is suggested by § 9-306(4)(b), not § 9-104(k).[30]

The same questions and arguments arise where the proceeds take the form of checks and are deposited in a separate bank account.[31]

Where the cash proceeds have been commingled with other cash of

---

[27] CAL. CODE ANN. § 9306(4)(a) (1964).

[28] Professor Mellinkoff describes the Permanent Editorial Board as a "sort of French Academy of the UCC charged with guarding the purity of UCC talk." Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L. J. 185, 224 (1967).

[29] REPORT NO. 2 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 211-12 (1964).

[30] If the Permanent Editorial Board did misunderstand the import of the California modification, they do not lack for company. *See*, C. SMITH & C. BROWN, ARIZONA U.C.C. STUDY COMMENTS 195 (1967).

[31] UNIFORM COMMERCIAL CODE § 9-306(4)(c) (1962 version).

X or deposited in his general bank account, then *Y* has a security interest in all of *X*'s cash and all his bank accounts, subject to an amount limitation described in comment 2(a) to § 9-306 as:

> the amount of cash proceeds received and commingled or deposited within the 10 days before insolvency proceedings were instituted less the amount of cash proceeds received by the debtor and paid over to the secured party during that period . . .[32]

Again, illustration by examples is the best means of explanation. *X* deposits the cash proceeds in the sum of $10,000 in his general bank account in Bank *A* nine days before insolvency proceedings are instituted. *Y*'s perfected security interest would extend to this account subject to the ten thousand dollar limitation. Likewise, if *X* also had bank accounts in Banks *B* and *C*, *Y*'s security interest would extend thereto, notwithstanding the fact that no proceeds had ever been deposited in said accounts.

In the opinion of the California draftsmen this was too favorable to the secured party.[33] Therefore, as enacted in California, § 9-306(4)(d) limits the secured party to a lien on those bank accounts in which proceeds of his collateral have actually been commingled with other funds. In this instance, the California variation is an improper one. Where the debtor has commingled cash proceeds in checking account *A* within ten days of the institution of insolvency proceedings, and at the time of such proceedings, checking account *A* has no funds, but checking account *B* does, the secured party should be able to look to checking account *B*. A secured party's rights should not be diminished because the debtor happened to pick up the check book for account *A* to pay a bill rather than that for account *B*.

If *X* commingles $10,000 of proceeds in a bank account on January 1st and on January 2nd he receives and pays over to *Y* an additional $5,000 in cash proceeds, and insolvency proceedings be instituted by or against *X* on January 3rd, *Y*'s claim to the bank account is secured only up to $5,000. Read literally, § 9-306(4)(d) requires that money representing proceeds of collateral paid over to the secured party must be subtracted from cash proceeds deposited by the debtor in commingled bank accounts in order to determine the secured party's right in such account. But if on January 2, *X* had placed the additional $5,000 in the commingled account, *Y*'s claim would have been secured in the amount of $15,000. In the first situation, *Y* in effect receives $10,000; in the sec-

---

[32] For a more detailed explanation of calculations under § 9-306(4)(d) *see* 2 GILMORE § 45.9 at 1338-9.

[33] *See* SIXTH PROGRESS REPORT TO THE LEGISLATURE BY SENATE FACT FINDING COMMITTEE ON JUDICIARY (1959-61), PART 1, THE UNIFORM COMMERCIAL CODE 571-572. For a contrary view see the statement by Louis Russo, Vice President and Resident Counsel, Chase National Bank, 32 NEW YORK LAW REVISION COMMISSION, STUDY OF THE UNIFORM COMMERCIAL CODE 66 (1954).

ond instance, $15,000. There is no valid policy reason for this difference. To avoid it the word "such" should be added to or read into § 9-306(4)(d) just before the last "cash proceeds." In this way, only proceeds that were first commingled and then paid over will be deducted.

III. THE PROCEEDS PROVISION IN BANKRUPTCY[34]

One of the principal reasons a creditor insists upon collateral as security is to protect himself against the default and bankruptcy of the debtor by providing a source for payment of the debt that cannot be utilized by the debtor's trustee in bankruptcy to pay other creditors.[35] Thus, in determining the value of a particular security interest, it is necessary to consider its validity not only as against the debtor and his other creditors but also as against the debtor's trustee in bankruptcy.

For well over a decade, legal writers have questioned the enforcibility of the right created by § 9-306(4)(d) in debtor's bankruptcy proceedings.[36] To date, no reported cases have considered this point. There are, however, cases considering the enforcibility of liens arising under statutes sufficiently similar to § 9-306(4)(d) to merit extended consideration.

A. *Lien or Priority*

Section 9-306(4)(d) of the Uniform Commercial Code is the "lineal descendant"[37] of Section 10 of the Uniform Trust Receipts Act which provided as follows:

> Where, under the terms of the trust receipt transaction, the trustee . . . having liberty of sale . . . is to account to the entruster for the proceeds of any disposition of the goods . . . the entruster shall be entitled, to the extent to which and as against all classes of persons as to whom his security interest was valid at the time of disposition by the trustee, as follows . . . (b) to any proceeds or the value of any proceeds (whether such proceeds are identifiable or not) of the goods . . . if said proceeds were received by the trustee within ten days prior to either application for appointment of a receiver of the trustee, or the filing of a petition in bank-

34 "There is a story that Karl Llewelyn had a five-foot shelf of commercial law books. My impression is that he did not have the Bankruptcy Act in that five-foot shelf." KENNEDY, BANKRUPTCY AND INSOLVENCY PROBLEMS IN RELATION TO THE CODE, in PROCEEDINGS OF THE FIRST ANNUAL UNIFORM COMMERCIAL CODE INSTITUTE 177 (1967). *See generally*, Gillombardo, *The Treatment of Uniform Commercial Code Proceeds in Bankruptcy: A Proposed Redraft of Section 9-306*, 38 U. CIN. L. REV. 1 (1969).

35 The "acid test" of a security interest is whether it stands in bankruptcy. Newman, *The Uniform Commercial Code in the Bankruptcy Environment*, 15 PRAC. LAW. 67, 68 (1969).

36 *E.g.*, Comment, *The Commercial Code and the Bankruptcy Act: Potential Conflicts*, 53 NW. U.L. REV. 411 (1958-59). Mr. Henson finds even earlier "traces" of the problem. "The conceptual problem involved here is at least 2,500 years old." Henson, *"Proceeds" Under the Uniform Commercial Code*, 65 COLUM. L. REV. 232, 233 (1965).

37 2 GILMORE, § 45.9 at 1340.

ruptcy or judicial insolvency proceedings by or against the trustee, or demand made by the entruster for prompt accounting, and to a priority to the amount of such proceeds or value . . .[38]

Note the use of the word "priority". The Bankruptcy Act invalidates all state created priorities except those in favor of landlords' rent claims, which are postponed.[39] On the other hand, state-created statutory liens are valid in bankruptcy and are satisfied after administration expenses and wage priorities have been paid.[40] Thus, the validity of Section 10 of the Uniform Trust Receipts Act in bankruptcy depends upon whether it creates a priority, as its language seems to indicate, or a lien. Two reported cases considered this matter and reached two very different results. In *In re Harpeth Motors*,[41] the creditor held a series of trust receipts, each covering a separate automobile.[42] Prior to instituting bankruptcy proceedings, the trustee dealer mingled the proceeds from the sale of the cars with his other assets. The creditor filed a petition asserting a lien upon the amount of the proceeds of the sale. The court focused upon the wording of the introductory provisions of Section 10 to the effect that the entruster has a right to proceeds ". . . to the extent to which and as against all classes of persons as to whom his security interest was valid at the time of disposition by the trustee . . ."[43] Since such "classes of persons" includes subsequent lien creditors of the trustee-debtor, the security interest of the entruster was held enforceable against the trustee as the representative of such lien creditors.

Subsequently, the same issue arose in *Crosstown Motors, Inc. v. Allen*.[44] There the Seventh Circuit reached the opposite result relying primarily on legislative history and use of the word "priority":

> The Uniform Trust Receipts Act was drafted long prior to 1938. It was adopted by the Illinois legislature in 1935. At that time § 64 of the Bankruptcy Act specifically recognized state-created priorities. Thus the object to be obtained by § 10 of the Illinois Trust Receipts Act was to give to the entruster a priority ahead of general creditors upon insolvency of the trustee. Nothing more was necessary. Nothing more was contemplated. The legislative intent is crystal clear.
>
> When the legislature provided in § 10 that the entruster was entitled,

---

[38] The UTRA has been supplanted by the Uniform Commercial Code. UNIFORM COMMERCIAL CODE § 10-102 (1962 version).

[39] Bankruptcy Act § 64, 11 U.S.C. § 104 (1958), *amending* 52 Stat. 874 (1938). The Bankruptcy Act does not expressly invalidate state priorities, but this is the necessary result since the Act's scheme of distribution is exclusive. *See, e.g.*, Halpert v. Industrial Commission of State of New York, 147 F.2d 375 (2d Cir. 1945); Strom v. Peikes, 123 F.2d 1003 (2d Cir. 1941).

[40] J. MACLACHLAN, HANDBOOK OF THE LAW OF BANKRUPTCY, § 212 at 234 (1956).

[41] 135 F. Supp. 863 (M.D. Tenn., 1955).

[42] For an explanation of trust receipt financing, *see generally*, Bacon, *A Trust Receipt Transaction*: II, 5 FORDHAM L. REV. 240 (1936).

[43] In re Harpeth Motors, 135 F. Supp. 863, 865 (M.D. Tenn. 1955).

[44] 272 F.2d 224 (7th Cir. 1959). Commercial Credit Corp. v. Allen, 363 U.S. 811 (1960).

> on the insolvency of the trustee, "to a priority to the amount of" the proceeds from the goods or the value thereof it meant exactly what it said, *i.e.*, priority. A cursory examination of the entire Act clearly illustrates that when the legislature intended to mean lien the word "lien" was used.[45]

Recognizing that a lien is quite different from a priority, and then considering an interest clearly labeled as a "priority" to be a lien has an "Alice in Wonderland" type air to it.[46] Nevertheless, the reasoning of the *Harpeth* court has been favored by a consensus of the commentators.[47] Essentially, the question seems to be one of which should control, substance or form.[48] The most recent and best reasoned decisions favor the former. For example, *In re Trahan*,[49] found an interest designated "vendor's privilege" to be a lien.

This substance-form dichotomy assumes even greater significance with regard to § 9-306(4)(d) of the Uniform Commercial Code. The Uniform Commercial Code was revised after the *Harpeth* and *Crosstown* decisions and presumably in any light of their implications. Apparently § 9-306(4)(d) was drafted to meet as well as possible the arguments that had been advanced against the invalidity in bankruptcy of Section 10 of the Uniform Trust Receipts Act as it applied to the unidentified proceeds.[50] The problem of semantics has been avoided by the use of the phrase "security interest" instead of "priority". Despite this change and the consideration that obviously must have been given this matter, § 9-306(4)(d) on its face seems much more like a priority provision than Section 10 of the Uniform Trust Receipts Act. The Code provision applies only "in the event of insolvency proceedings". Thus, the problem presented by § 9-306(4)(d) is the mirror image of that presented in

---

45 272 F.2d at 226-27.

46 In Alice in Wonderland, the White Knight tells Alice that he will sing a song and "the name of the song is called Haddocks' Eyes."

"Oh, that's the name of the song, it is?" Alice said, trying to feel interest.

"No, you don't understand," the Knight said, looking a little vexed. "That's what the name is called. The name really is 'The Aged, Aged Man.' "

"Then I ought to have said, 'That's what the song is called'?" Alice corrected herself.

"No, you oughtn't: that's quite another thing! The song is called 'Ways and Means': but that's only what it's called, you know."

"Well, what is the song, then?" said Alice, who was by this time completely bewildered.

"I was coming to that," the Knight said. "The song really is 'A-sitting on a Gate': and the tune's my own invention."

47 *E.g.*, Duesenberg, *Lien or Priority under Section 10, Uniform Trust Receipts Act*, 1 B.C. IND. & COM. L. REV. 73 (1959-61). Hanna, *The Secured Creditor in Bankruptcy*, 14 RUTGERS L. REV. 471, 478 (1959-60); *contra*, Comment, *Bankruptcy—Uniform Trust Receipts Act Section 10(b)—Security Interest in the General Assets of the Trustee not Created*, 35 N.Y.U.L. Rev. 948 (1960).

48 For a discussion of the "substance of a lien" *see generally*, MacLachlan, *Improving the Law of Federal Liens and Priorities*, 2 B.C. IND. & COM. L. REV. 73 (1959-61).

49 283 F. Supp. 620 (W.D. La. 1968).

50 *See* Rudolph, *Judicial Construction of the Trust Receipts Act and Its Reflection in the Commercial Code*, 19 U. PITT. L. REV. 1, 17 (1957-58).

Section 10 of the Uniform Trust Receipts Acts: form indicates a lien while substance seems to indicate priority. No cases have considered this point and the secondary authority is divided.[51]

It is suggested that this problem can be solved, or at least avoided, by looking to other sections of the Bankruptcy Act.[52] Section 67c(1)(A) invalidates:

> every *statutory lien* which first becomes effective upon the insolvency of the debtor, or upon distribution or liquidation of his property, or upon execution against his property levied at the instance of one other than the lienor [emphasis added].

This provision was added to the Bankruptcy Act in 1966;[53] the legislative history of the provision indicates that its invalidation standards were adopted in order to separate the true lien from those spurious devices which are priorities disguised as liens.[54] Its standards, however, operate only upon devices that are for purposes of the Bankruptcy Act statutory liens. This indicates a legislative intent that "lien" as used in the Bankruptcy Act include interests which first become effective on insolvency. Further, a narrow construction of the term "lien" based upon the substantive tests of the *Harpeth* case frustrates this congressional policy by making the invalidation standard inapplicable to the very devices which the standards were intended to invalidate. Thus, it is suggested that the term "lien" should encompass every device which has been denominated lien as well as all those devices which have the substantive characteristic of liens. So, assuming that the interest created by § 9-306 (4)(d) is for Bankruptcy Act purposes a lien, it becomes necessary to determine whether this lien is a "statutory lien." It it is, it seems clear that it will be invalidated by § 67c(1)(A), set out above, as it becomes effective upon the insolvency of the debtor.[55]

B. *Statutory Lien*

Section 9-102(2) provides in part: "This article does not apply to statutory liens except as provided in Section 9-310."[56] From this it would

---

[51] *Compare* 2 GILMORE, § 45.9 at 1336, *with* Comment, *Bankruptcy—Uniform Trust Receipts Act Section 10(b)—Security Interest in the General Assets of the Trustee not Created,* 35 N.Y.L.U. REV. 948, 953 n. 40 (1960).

[52] Bear in mind the recent concession by Senator Ervin: "I will admit if you start reading all of the sections of the bankruptcy law you reach a state of great intellectual confusion." *Hearings on S. 976 (H.R. 3438) and S. 1912 (H.R. 136) Before the Senate Committee on Finance,* 89th Cong., 1st Sess. 21 (1965).

[53] *See generally,* Kennedy, *The Bankruptcy Amendments of 1966,* 1 GA. L. REV. 149 (1966-67).

[54] S. Rep. No. 1159, 89th Cong., 2d Sess. 6 (1966).

[55] *Cf.* Elliott v. Bumb, 356 F.2d 749 (9th Cir. 1966).

[56] *See generally,* Comment, *Nonconsensual Liens Under Article 9,* 76 YALE L.J. 1649 (1966-67).

seem that the lien created by § 9-306(4)(d) is not a statutory lien. The Bankruptcy Act, however, contains a definition of statutory lien and under the Supremacy Clause if the interest created by § 9-306(4)(d) comes within the Bankruptcy Act's definition of statutory lien, it is a statutory lien regardless of what the Code itself provides.[57]

Section 1(29a) defines statutory lien as:

> [A] lien arising solely by force of statute upon specified circumstances or conditions, but shall not include any lien provided by or dependent upon an agreement to give security, whether or not such lien is also provided by or is also dependent upon statute and whether or not the agreement or lien is made fully effective by statute.

The controlling phrases in this definition seem to be "solely by force of statute" and "provided by or dependent upon an agreement to give security."

There must be a security agreement before § 9-306(4)(d) comes into existence. Thus, it can be said that this section is "dependent upon an agreement to give security." On the other hand, as previously discussed, it is unsettled whether a proceeds provision in the security agreement is a prerequisite to rights under § 9-306(4)(d); if not, and if there is no proceeds provision, then it is at least arguable that the lien created is a statutory lien—that it is not dependent upon an agreement to give security. The argument becomes more difficult, however, when the security agreement contains a proceeds provision even though none is required. Reading "provided by or dependent upon an agreement to give security" literally, a statutory lien such as an artisan's lien could be converted into a non-statutory, consensual claim for Bankruptcy Act purposes by mere incorporation of the relevant statutory lien language into the contract signed by the party.

The necessity for and presence of a mention of proceeds in the financing statement is no evidence of a statutory nature of § 9-306(4)(d). The legislative history of § 1(29a) indicates that:

> The definition is directed at preventing a reoccurrence of the misapplication which appeared in the first decision in the *Quaker City* case. There the court held that since the chattel mortgage depended upon the Pennsylvania recording statute for its effectiveness against subsequent transferees, the chattel mortgage was a statutory lien.[58]

On balance, § 9-306(4)(d) should not be regarded as a statutory lien.[59] Although it may not always be "provided by" the agreement be-

---

[57] *See, e.g.*, Moore v. Bay, 284 U.S. 4, 5 (1931); Comment, *The Commercial Code and the Bankruptcy Act: Potential Conflicts*, 53 NW. U.L. REV. 411, 412 (1958-59); but *cf.* Viles, *The Uniform Commercial Code v. the Bankruptcy Act*, 15 KY. L.J. 636, 661 (1966-67).

[58] S. Rep. No. 1159, *supra* note 54, at 5.

[59] *Contra, e.g.*, Kennedy, *The Impact of the Uniform Commercial Code on Insolvency: Article 9*, 67 COM. L. J. 113, 117 (1962); Note, *Creditors Rights—Amendment to Bankruptcy*

tween the parties, it is always "dependent upon" the existence of a basic security agreement between the parties. Additionally, the term "statutory" contemplates and implies devices which arise primarily from a legislatively defined economic relationship.[60] The interest created by § 9-306 (4)(d) will always, of course, arise from a consensual relationship.

C. Section 70c

The lien of § 9-306(4)(d) is vulnerable, in some instances under § 70c of the Bankruptcy Act. Section 70c endows the bankruptcy trustee with four separate powers with which to challenge the interests of other persons in the property of the bankrupt: the trustee may assert the rights of the bankrupt himself or, regardless of whether such a creditor actually exists, the rights of a hypothetical judgment creditor, a hypothetical creditor with an unsatisfied execution, or a hypothetical lien creditor with a lien obtained by legal or equitable proceedings on all the bankrupt's property.[61] The choice of which of these powers the trustee will use in a given case is left up to him. Consideration of only the last alternative—hypothetical lien creditor—points up the § 70c problem.

While it was once asserted that § 70c gave the trustee rights of a hypothetical lien creditor who had obtained his lien any time before bankruptcy,[62] it is now settled that the lien is one which occurs at the time of bankruptcy.[63] Where the initial insolvency proceeding is the filing of the bankruptcy petition, the lien of § 9-306(4)(d) would not come into existence until this time, thus the secured party's lien would attach simultaneously with the trustee's lien right. Again, there has been no case law to settle the question of which lien or claim should prevail in such an instance. Mr. Henson opts for the secured creditor because the trustee's lien cannot be superior.[64] This seems to beg the question. Two

---

Act, Invalidates and Postpones Many Statutory Liens and Clarifies Priority among Liens in Bankruptcy, 45 TEXAS L. REV. 374, 377 (1966-67).

[60] *See, e.g.*, Lawrence v. United States, 378 F.2d 452, 467, (5th Cir. 1962); 4 J. MOORE AND R. OGLEBAY, COLLIER ON BANKRUPTCY, ¶ 67.20[2] at 217 (14th ed. 1968) [cited hereafter as COLLIER ON BANKRUPTCY].

[61] *See generally*, V. COUNTRYMAN, DEBTOR AND CREDITOR, 481-504 (1964).

[62] *See* Constance v. Harry, 215 F.2d 571 (2d Cir. 1954), *cert. denied*, 348 U.S. 913 (1955); V. COUNTRYMAN, DEBTOR AND CREDITOR 494 (1964).

[63] *See* Treister, *The Rise and Fall of Constance v. Harvey*, 36 CALIF. S.B.J. 194, 202 (1961). *But cf.* Pacific Finance Corp. v. Edwards, 304 F.2d 224 (9th Cir. 1962). The statute there involved made delayed recordings invalid as to all subsequent creditors. There was a real subsequent creditor but he had been paid off by the secured creditor. The court was thus faced with construction of "whether or not such a creditor actually exists" in § 70c. The court read this as requiring an actual creditor even though it was not necessary for the actual creditor to have a lien. No other circuit has taken this position and the decision has been severely criticized. *See* King, *Pacific Finance Corporation v. Edwards: Another Misreading of Section 70c of the Bankruptcy Act*, 63 COLUM. L. REV. 232 (1963).

[64] Henson, *"Proceeds" Under the Uniform Commercial Code*, 65 COLUM. L. REV. 232 (1965).

other law review writers have stated that the trustee's interest is superior.[65] While general notions of Federalism and the Supremacy Clause would indicate that this result is a proper one, the authority relied upon in the two law review writings is questionable.

Professor Marsh, a leading bankruptcy authority, relies directly on *N.W. Day Supply Co. v. Valenti*,[66] which is at best indirectly relevant to the matter at hand. The case involved a Massachusetts statute that gave a lien to materialmen on sums due to a contractor out of the particular contract for which they supplied work or materials in the event of appointment of a receiver, and assignment to the benefit of creditors, or an adjudication bankruptcy of the contractor. The attempt of the statutory lienors to assert their lien in a bankruptcy proceeding was rejected in a brief opinion by the Court of Appeals, which characterized the statute as an attempt to impose a different order of distribution after the rights of the parties had been fixed by the filing of the petition.

A student writer tried to use a series of hypotheticals to support the trustee's superiority. He reasoned that (1) if on the day bankruptcy proceedings were instituted, a creditor obtained a lien on the proceeds and bankruptcy proceedings were not instituted, this creditor would have priority over the secured creditor, as the secured creditor's § 9-306(4)(d) lien does not arise until the institution of the insolvency proceedings.[67] Second, "a trustee in bankruptcy shall have the rights of a hypothetical lien creditor at the *date* of bankruptcy."[68] (emphasis added). Thus, the bankruptcy trustee's § 70 claim prevails over § 9-306(4)(d) lien. This reasoning breaks down in the second premise. While a number of cases and secondary authorities use the phrase "date of bankruptcy" as the time from which the trustee's § 70c rights are to be measured,[69] the Supreme Court in *Lewis v. Manufacturers National Bank of Detroit*,[70] refined the concept of "date of bankruptcy" to "the time when the petition in bankruptcy is filed."[71]

Even assuming that the "tie goes to the trustee" § 70c will not always invalidate a § 9-306(4)(d) lien. Where bankruptcy is preceded by an

---

[65] Marsh, *Triumph or Tragedy? The Bankruptcy Act Amendments of 1966*, 42 WASH. L. REV. 681, 715 (1966-67); Comment, *Toward Commercial Reasonableness: An Examination of Some of the Conflicts Between Article 9 of the Uniform Commercial Code and the Bankruptcy Act*, 19 SYR. L. REV. 939, 953 (1967-68); *cf.* KENNEDY, BANKRUPTCY, AND INSOLVENCY PROBLEMS, in PROCEEDINGS OF THE FIRST ANNUAL UNIFORM COMMERCIAL CODE INSTITUTE, 177, 185 (1967).

[66] 343 F.2d 756 (1st Cir. 1965).

[67] Comment, *supra* note 65, at 954.

[68] *Id.*

[69] *E.g.*, Pacific Finance Corp. v. Edwards, 304 F.2d 224 (9th Cir. 1962); 76 HARV. L. REV. 1296, 1298 (1962-63).

[70] 364 U. S. 603 (1961).

[71] *Id.* at 606. *See also* In re Babcock Box Co., 200 F. Supp. 80, 82 (Mass. 1961); Marsh, *Book Review*, 13 U.C.L.A. L. REV. 898, 908 (1965-66).

assignment for the benefit of creditors or other state insolvency proceedings, the § 9-306(4)(d) lien will arise at the time of the state insolvency proceeding and therefore not be vulnerable to a lien creditor whose lien arises at the time of bankruptcy. The same is the case where the cash in bank accounts are identifiable up until the time of bankruptcy.[72] Thus it becomes necessary to consider still another bankruptcy provision.

D. *Section 60*

The notion underlying § 60 of the Bankruptcy Act is that "an insolvent debtor contemplating bankruptcy should not be able to defeat the bankruptcy policy of equality in distribution by transferring his property to favored creditors shortly before the bankruptcy petition is filed."[73] The Bankruptcy Act details an order of distribution of the debtor's assets in the event of his bankruptcy. This order, and the Bankruptcy Act itself would be of little importance if immediately before instituting bankruptcy proceedings the debtor could simply decide which of his creditors he should favor and pay them the assets that he then has. To prevent such conduct on the part of the debtor, § 60 invalidates certain preferential transfers made by the debtor immediately prior to bankruptcy.

There are six commonly recognized elements in the § 60 preferential transfer:

(1) Transfer of non-exempt property of the debtor;
(2) To a creditor;
(3) For or on account of antecedent debt;
(4) Within four months of the filing of bankruptcy petition;
(5) Enabling the creditor to obtain a greater percentage of his debt than some other creditor of the same class;[74]

---

[72] *See infra* note 73.

[73] Countryman, *The Secured Transactions Article of the Commercial Code and Section 60 of the Bankruptcy Act*, 16 LAW & CONTEMP. PROB. 76, 77 (1951).

[74] While it is true that the bankrupt act does not define the word "class," nor in terms state what creditors are of the same class, it creates some classes, and specifies others, and it seems to us that the meaning of the word "class" in the act should, if possible, be derived from the statute itself. Section 64, after directing the payment of certain expenses of administration, creates three classes of creditors,—parties to whom taxes are owing, employes holding claims for certain wages, and those who, by the laws of the state or of the United States, are entitled to priority. Sections 56b, 57e, and 57h provide for the treatment and disposition of claims secured by property, and of claims which have priority. The creditors who hold these various claims; and the general creditors of the estate, constitute the classes of creditors of which the bankrupt act treats. Now, if any one of these various classes is taken by itself and examined, it will be seen that each one of the creditors in the same class always receives the same percentage upon his claim, out of the estate of the bankrupt, that every other creditor of his class receives. Where the estate is insufficient to pay the claims of different classes in full, the classes receive, out of the bankrupt estate, different percentages of their claims, but creditors of the same class receive the same percentage. The test of classification is the percentage paid upon the claims out of the estate of the bankrupt.

Swarts v. Fourth National Bank of St. Louis, 117 F. 1, 6-7 (8th Cir. 1902). *See also*, Comment,

(6) Insolvency[75] on the part of the debtor at the time of the transfer and knowledge of the same on the part of the creditor.

The initial element is here controlling; if for purposes of the Bankruptcy Act, § 9-306(4)(d) constitutes a transfer of property of the debtor, it is a preferential transfer.[76]

The term "transfer" is defined in most comprehensive terms by section 1, clause 30 of the Bankruptcy Act. It includes every manner direct or indirect, of parting with property. It also covers the affixing of a lien upon property. A transfer may be effected irrespective of any voluntary action of the debtor with reference to the disposition of his property, since the transfer may be voluntary or involuntary, with or without judicial proceedings. Thus, it would seem that a transfer for purposes of § 60 of the Bankruptcy Act generally would occur at the time of institution of insolvency proceedings even though involuntarily by force of statute. This transfer would be to a creditor, for or on account of an antecedent debt within four months of the filing of the bankruptcy petition while the debtor was insolvent.[77] Generally, at the time insolvency proceedings are instituted a creditor will have reasonable cause to believe that the debtor is insolvent. Finally, unless the creditor was fully secured, this transfer will have a preferential effect.

Mr. Henson, a member of the Review Committee for Article 9 of the Uniform Commercial Code, contends that no transfer for purposes of § 60 occurs at the time of insolvency proceedings; rather, there is no transfer after the date the original secured transaction has been perfected.[78] In essence, he views the original collateral, identifiable proceeds and § 9-306(4)(d) proceeds as a mass or an entity the transfer of which takes place at the time the perfected security interest attaches to the initial components of the mass.[79] This "entity" theory has been most commonly raised in a related context—the conflict between the after acquired property provision of the Code and § 60.

Section 9-204(3) of the Uniform Commercial Code permits a creditor to obtain a security interest in collateral which the debtor may acquire in the future. This "floating lien" is of particular importance where the collateral is in a shifting form such as accounts receivable or inventory of

---

"Class"—The Forgotten Element of Section 60(a)(1) of the Bankruptcy Act, 11 ARIZ L. REV. 360 (1969).

75 The question of insolvency is dealt with by § 1(19) of the Bankruptcy Act; it is "balance sheet" insolvency as opposed to insolvency in the "equity sense." *See generally* Burchfield, *The Balance Sheet Test of Insolvency*, 23 U. PITT. L. REV. 5 (1961-62).

76 *See generally* 3 COLLIER ON BANKRUPTCY § 60.34 at 902.

77 All elements are tested as of the time of transfer. *See* Palmer Clay Prods. Co. v. Brown, 297 U.S. 227 (1936).

78 Henson, *"Proceeds" Under the Uniform Commercial Code*, 65 COLUM. L. REV. 232, 248-52 (1965).

79 This theory apparently finds its origin in dictum in Manchester Nat'l Bank v. Roche, 186 F.2d 827, 831 (1st Cir. 1951), a decision involving the New Hampshire Factor's Lien Act.

a retail business. The security interest in the after acquired property has equal status with an interest in existing property except that the Code permits subsequent purchase money security interest to take priority if certain notice requirements are met.[80]

The time the transfer of after acquired property occurs is of crucial importance in the event of the bankruptcy of the debtor. If such transfer occurred within six months of insolvency, there is a strong likelihood that it constitutes a § 60 preferential transfer. Section 60(a)(2) of the Bankruptcy Act fixed the date on which the transfer of the debtor's property is deemed to occur:

> A transfer of real property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee.

Perfection under the Code requires that the security interest attach to the collateral. Under § 9-204(1) a security interest does not attach until (1) there is a written agreement that it attach, (2) an advance or payment is made pursuant to the agreement, and (3) the debtor obtains rights in the collateral described in the agreement. Section 9-402(2) provides that a debtor can have no rights in accounts until they come into existence.

From the above Code provisions, it would seem that the transfer of after acquired property does not occur for purposes of § 60 until the debtor receives this property. To date, however, every court that has considered this question has adopted Henson's "entity theory" and found the date of transfer to be the date of perfection of the security agreement.[81] While this is perhaps sound policy, it is questionable statutory construction.[82]

The policy relied on in these cases—"[t]he business community has

---

80 UNIFORM COMMERCIAL CODE § 9-312(3),(4) (1962 version).

81 *See*, Du Bay v. Williams, CCH SECURED TRANS. REP. ¶ 51, at 148 (9th Cir. 1969); Grain Merchants of Indiana, Inc. v. Union Bank & Savings Co., 6 UCC REP. SERV. 1 (7th Cir. 1969); Rosenberg v. Rudnick, 262 F. Supp. 635 (D. Mass. 1967). *See generally* Healy, *The Floating Lien Controversy in the Courts: Judicial Response to the Preference Problem*, 10 B.C. IND. & COM. L. REV. 265 (1969).

82 In addition to the problems raised by the code sections mentioned in the text above, there is a problem as to whether the entity theory was adopted by the Code. There is no mention of it therein. Rather, in § *9-108* the Code seeks to avoid the preference problem by stating that the transfer of an interest in these after-acquired items shall not be deemed to be for an "antecedent debt." It has been argued from this that the draftsman believed that the security interest in the after-acquired property did not become fully perfected until the debtor obtained rights in the individual items of such property. *See* Gordon, *The Security Interest in Inventory Under Article 9 of the Uniform Commercial Code and the Preference Problem*, 62 COLUM. L. REV. 49, 54-55 (1962); *Contra* 2 GILMORE § 45.5 at 1305; *but cf.* Hogan, *Games Lawyers Play with Bankruptcy Preference Challenge to Accounts and Inventory Financing*, 53 CORNELL L.Q. 553, 560 (1967-68).

depended upon a revolving or flow type of accounts receivable financing for many years."[83]—is not applicable. There has been no long standing dependency upon liens on unidentifiable proceeds; such a lien was largely unavailable until the adoption of the Code.[84] Further, application of the "entity theory" to a § 9-306(4)(d) lien on proceeds subverts not only § 60 of the Bankruptcy Act and the relevant Code provisions but the "entity theory" itself. Regarding identifiable proceeds as a part of the original mass is one matter; treating unidentifiable proceeds requires an even greater "imagination".

There is another "floating lien argument" that can be raised here, substitution of collateral. Mere substitution or exchange of property is preferential only to the extent that the value of the creditor's interest in the substituted property exceeds the value of the creditor's interest in the original property.[85] Thus, where the value of the identifiable proceeds in the form of cash and bank accounts immediately before bankruptcy equals or exceeds the value of the lien on unidentifiable proceeds created by § 9-306(4)(d) there has been no preferential transfer. Often, however, the value of the identifiable proceeds immediately prior to insolvency will be less than § 9-306(4)(6)'s measure of unidentifiable proceeds. In such instances, the substitution theory should not bar the operation of § 60.

Note, however, the time the value of the identifiable proceeds should be measured—immediately prior to bankruptcy. Pre-Code case law requires that the substitution be simultaneous and for equal value.[86] Recently, however, the Seventh Circuit in *Grain Merchants of Indiana, Inc. v. Union Bank and Savings Company*[87] indicated that:

> As previously observed under Section 9-205 of the Commercial Code, it was unnecessary for the Bank to assume dominion over individual accounts

---

[83] Grain Merchants of Indiana, Inc. v. Union Bank & Savings Co., 6 UCC REP. SERV. 1, 10 (7th Cir. 1969).

[84] UNIFORM COMMERCIAL CODE § 9-306, Comment 2, (1962 version).

[85] *See, e.g.*, Walker v. Commercial Nat'l Bank of Little Rock, 217 F.2d 677, 680 (8th Cir. 1954); Hogan, *supra* note 81, at 562.

[86] *See* In re Pusey-Maynes-Breish Co., 38 F. Supp. 316, 321 (E. D. Pa.), *aff'd* 122 F.2d 606 (3d Cir. 1941). Section 60 (a) (8) of the Bankruptcy Act seems to codify this result by providing:

> If no such requirement of applicable law specified in paragraph (7) of this subdivision exists, a transfer wholly or in part, for or on account of a new and contemporaneous consideration shall, to the extent of such consideration and interest thereon and the other obligations of the transferor connected therewith, be deemed to be made or suffered at the time of the transfer. A transfer to secure a future loan, if such a loan is actually made, or a transfer which becomes security for a future loan, shall have the same effect as a transfer for or on account of a new and contemporaneous consideration.

The quoted section reflects both requirements; the collateral must be given for a present or future loan, and the transfer is valid only to the extent of the new consideration.

[87] Grain Merchants of Indiana, Inc. v. Union Bank & Savings Co., 6 UCC REP. SERV. 1 (7th Cir. 1969).

> receivable. Therefore, it is no longer appropriate to apply strict timing or value rules . . .[88]

This is a *non-sequitur.* Section 9-205 only abolishes the rule of *Benedict v. Ratner.*[89] There the Court held that a financing arrangement which gave the debtor unfettered dominion over the collateral was fraudulent as to the third parties and hence void. *Benedict v. Ratner* had no connection with the timing and value limitations under § 60 of the Bankruptcy Act. Transactions in violation of the rule of *Benedict v. Ratner* could be voided by the trustee as fraudulent conveyances—not preferential transfers. Thus, the abolishment of *Benedict v. Ratner* did not abolish the timing and value requirements of § 60.[90]

This above excerpt and the discussion that follows it in the *Grain Merchants* opinion seems to indicate that the court is prematurely applying the revision of § 60 of the Bankruptcy Act proposed by the National Bankruptcy Conference Committee on Coordination of the Uniform Commercial Code and Bankruptcy Act. The amendment provides that transfer of inventory and receivables pursuant to the terms of a properly perfected security agreement, and within four months prior to bankruptcy, shall not constitute preferences, provided that the receivables arose and the inventory was acquired by the debtor in the ordinary course of his business. This rule is qualified by a *"two-point test"*: there shall be a preference to the extent that the aggregate value of the inventory or receivables or both, subject to the security agreement precisely four months earlier. Under the two-point test, a preference is measured solely by reference to these two points in time, irrespective of fluctuations in the collateral which may occur within the four-month period.[91] While this proposal may one day become law, it is not now law[92] and until it becomes law, § 60 requires that the substitution be simultaneous.

E. *Resolution*

No court has yet considered any of the bankruptcy challenges to § 9-306(4)(d) and law review writers differ as to how this matter will be

---

[88] *Id.* at 12. In re Hygrade Envelope Corp. v. Gibralter Factors Corp., 393 F.2d 60 (2d Cir. 1968).

[89] 268 U.S. 353 (1925); *see generally* 1 GILMORE § 8.2 at 253.

[90] *See* Gordon, *The Security Interest in Inventory Under Article 9 of the Uniform Commercial Code and the Preference Problem,* 62 COLUM. L. REV. 49, 63 (1962); *but cf.* Coogan & Bok, *The Impact of Article 9 of the Uniform Commercial Code on the Corporate Identure,* 69 YALE L. J. 203, 244-45 (1959-60).

[91] *See generally* Kohn, *Preferential Transfers on the Eve of The Bankruptcy Amendments,* 2 PROSPECTUS 259 (1968).

[92] *Cf.* Krause, *The Code and The Bankruptcy Act: Three Views on Preferences and After-Acquired Property,* 42 N.Y.U. L. REV. 278, 300 (1967). KING, SPECIAL PROBLEMS ON LOAN AGREEMENTS UNDER THE CODE, in PROCEEDINGS OF THE FIRST ANNUAL UNIFORM COMMERCIAL CODE INSTITUTE, 167, 173 (1967).

resolved.[93] However, even the most staunch advocate of the Code must concede that § 9-306(4)(d) may infringe upon the Bankruptcy Act.[94]

As adverted to above, § 9-306(4)(d) is not the only Code provision that presents problems as to possible conflicts with the Bankruptcy Act;[95] nor is the problem limited to Article 9.[96] Ideally, reconcilliation of all of these possible conflicts should be achieved by simultaneous and extensive amendments to both acts.[97] There are, however, a number of obstacles to the achievement of this ideal. The relationship between the bankruptcy bar and the lawyers that represent secured creditors is at best less than cordial.[98] These differences are in part attributable to sociological factors[99] and in part to the basic differences in the positions of their respective clients. The basic premise upon which Article 9 is founded runs contrary to the underlying principles of proceedings in bankruptcy. Article 9 rather than "lumping" all creditors together in a non-differentiated class as does the Bankruptcy Act, permits the creation of security interest in personal property, thereby creating the preferred creditor. These obstacles are not insurmountable though. Since June, 1966, the National Bankruptcy Conference's Committee on Coordination of the Uniform Commercial Code and the Bankruptcy Act has been attempting to reconcile the two acts.[100] Even should this Committee eventually achieve an accommodation satisfactory to both camps, action by both Congress and the legislatures of forty-nine states will be needed. As the ideal solution will not be soon achieved, it is submitted that the problem of the proceeds provision vis a vis the Bankruptcy Act presently be resolved by abolishing the distinction between the secured party's rights to proceeds under § 9-306(4)(d) before debtor's insolvency and after insolvency.[101] This not only will eliminate possible challenges by the bankruptcy trustee under §§ 67, 70(c) and 60, but also the bizarre situations described in Part II above.

---

93 *Compare* 2 GILMORE § 45.9 at 1336, *with* Marsh, *Book Review*, 13 U.C.L.A. L. REV. 898 (1965-66).

94 *See* Statement of Professor Grant Gilmore, in 32 NEW YORK LAW REVISION COMMISSION, STUDY OF THE UCC 155 (1954).

95 *See generally*, Note, *Some Problems Presented by the U.C.C. and The Bankruptcy Act*, 29 PITT. L. REV. 446 (1967-68).

96 *See* Note, *Bankruptcy and Article Two of the Uniform Commercial Code: The Right to Recover the Goods Upon Insolvency*, 79 HARV. L. REV. 598 (1965-66).

97 King, *Some Thoughts on Article 9 of the Uniform Commercial Code and The Bankruptcy Act*, 72 COM. L. J. 203, 208 (1967).

98 *See* Henson, *The Interpretation of the Uniform Commercial Code: Article 9 in The Bankruptcy Courts*, 22 U. MIAMI L. REV. 101, 118 (1967-68).

99 *See* M. MAYER, THE LAWYERS 409-414 (1967); *cf.* V. COUNTRYMAN & A. KAUFMAN, CASES AND MATERIALS OF COMMERCIAL TRANSACTIONS 189 (temp. ed. 1968).

100 For a discussion of the Committee's progress, *see* Kohn, *Preferential Transfers on the Eve of the Bankruptcy Amendments*, 2 PROSPECTUS 259 (1968).

101 *But cf.* Steinheimer, *The Uniform Commercial Code Comes of Age*, 65 MICH. L. REV. 1275, 1279 (1966-67).

OHIO STATE LAW JOURNAL

Volume 30 | Fall 1969 | Number 4

Published Quarterly by Students of the College of Law
The Ohio State University
Columbus, Ohio 43210
Member, National Conference of Law Reviews

Subscription: $8.00 | *$3.00 per copy*