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# Buyer Status Under the U.C.C: A Suggested Temporal Definition

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## I. INTRODUCTION

The recognition of private property requires a comprehensive and systematic body of detailed rules to permit and control the transfer of property.[1] Although these rules must necessarily comprehend innumerable transfer scenarios[2] and force choices implicating difficult value judgments, at the most basic level two problems must be confronted: (1) how to accomplish a transfer of an item of property or an interest therein; and (2) how to resolve competing claims to the same item or interest. To deal with the former problem, one finds a history rich in rules clothed in ceremonial garb. The play is everything: a transfer occurs only if properly performed.[3] Assuming a transfer occurs, resolution of the latter problem often depends on a family of rules, all born from what can best be described as the first principle of Anglo-American property law: the transferee of property can receive no greater interest than that possessed by the transferor.[4] This

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1. Because not everyone is capable of producing the property they need or is capable of consuming fully the property they have, any property's enjoyment and value must rest, in part, on its transferability. One, therefore, finds that "[n]early all theories of private property assume that an owner . . . has the power to transfer it. Indeed, it is hard to envision a general scheme of private property without transferability." Baird & Jackson, *Information, Uncertainty, and the Transfer of Property*, 13 J. LEGAL STUD. 299, 299 n.4 (1984).

2. Before being viewed as comprehensive, a set of transfer rules must, at a minimum, provide workable methods for effecting a voluntary transfer of property, both antemortem and postmortem, and to effect its involuntary transfer. A creditor with a claim against a debtor should somehow be able to "get at" the value of the debtor's interest in property as a means of satisfying that claim.

3. The reasons for particular ceremonies are as varied as the ceremonies themselves. For example, an attempted gift of an item capable of delivery is invalid in the absence of its delivery; if actual delivery is impractical, then a symbolic or constructive delivery is necessary. *See generally* Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 341 (1926). One author has suggested that "[t]he survival of the dogma is doubtless due to the perfectly reasonable desire on the part of the courts to protect the property of the individual against ill-founded and fraudulent claims of gift . . . ." R. BROWN, THE LAW OF PERSONAL PROPERTY § 7.2, at 78 (3d ed. 1975). On the other hand, consider the formalities that often precede the involuntary transfer of possession of property. Many of these formalities have their roots in the due process clauses of the Constitution. U.S. CONST. amends. V, XIV § 1. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 82 (1972) (in absence of extraordinary situations, notice and hearing must precede issuance of writ of replevin).

4. This principle has also been labeled the "derivation principle," *see* D. BAIRD & T. JACKSON, SECURITY INTERESTS IN PERSONAL PROPERTY 141 (1984), or, put in more eloquent terms: "Title, like a stream, cannot rise higher than its source." Barthelmess v. Cavalier, 2 Cal. App. 2d 477, 487, 38 P.2d 484, 490 (1934).

Article examines one facet of one exception to this first principle.

It has been trumpeted that "[t]he triumph of the good faith purchaser has been one of the most dramatic episodes in our legal history."[5] With this victory came the correlative commercial doctrine of good faith purchase, a doctrine that allows for the chipping away of "security of ownership" in favor of "security of purchase."[6] The doctrine makes it possible for the transferee of goods to receive under certain circumstances a property interest superior to that of the transferor.[7]

It is not surprising that such a doctrine, antithetical as it is to traditional common-law theory, should have experienced difficulty establishing roots in the common law.[8] Not until the early part of the nineteenth century and the sporadic passage of the nonuniform Factor's Acts was there any show of support for the notion of a good faith purchase doctrine.[9] Softening of the judicial bias in favor of ownership interests soon followed, but was limited to situations in which the transferor had somehow acquired voidable title from the true owner. Voidable title would ripen into good title when the item was later acquired by a good faith purchaser.[10] With the eventual codification of sales law, the good faith purchase doctrine found a

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5. Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057, 1057 (1954).

6. For a discussion of this conflict, see generally Dolan, *The U.C.C. Framework: Conveyancing Principles and Property Interests*, 59 B.U.L. REV. 811 (1979); Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605 (1981); Gilmore, *supra* note 5; Hawkland, *Curing an Improper Tender of Title to Chattels: Past, Present and Commercial Code*, 46 MINN. L. REV. 697 (1962); Warren, *Cutting Off Claims of Ownership Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 469 (1963); Weinberg, *Markets Overt, Voidable Titles, and Feckless Agents: Judges and Efficiency in the Antebellum Doctrine of Good Faith Purchase*, 56 TUL. L. REV. 1 (1981).

When the transferor's title is imperfect because it is subject to an outstanding interest, the tension between security of ownership and security of purchase is readily apparent. To limit the transferee's title to that of the transferor keeps alive the outstanding interest and secures its ownership Conversely, to secure the purchase, a rule is needed that permits the transferee to take free of the interest, resulting in its termination. Whichever approach is taken, someone loses.

7. *See, e.g.*, U.C.C. § 9-307. Although the scope of this Article is limited to transactions in goods, the good faith purchase doctrine is not. *See generally* Gilmore, *supra* note 5.

8. *See* Gilmore, *supra* note 5, at 1057. Returning to the beginning of the story, "[t]he initial common law position was that equities of ownership are to be protected at all costs: an owner may never be deprived of his property rights without his consent." *Id.* The first exception carved into this maxim was the English doctrine of "market overt." As early as the sixteenth century, purchasers of goods would take free of all third party claims provided that the purchase was made in an open fair or market. *See generally* 2 W. BLACKSTONE, COMMENTARIES *449-55; Pease, *The Change of the Property in Goods by Sale in Market Overt*, 8 COLUM. L. REV. 375 (1908); Weinberg, *supra* note 6. American jurisdictions frequently considered but always rejected this exception to the common law's veneration of existing property interests. *See* Hawkland, *supra* note 6, at 698-700; Warren, *supra* note 6, at 470; Weinberg, *supra* note 6, at 5-15.

9. *See* Gilmore, *supra* note 5, at 1057-58. ("[A]nyone buying from a factor in good faith, relying on his possession of the goods, and without notice of limitations on his authority, took good title against the true owner.").

10. *See id.* at 1059-62. The transferor would acquire voidable title and hence the power to transfer good title in those cases in which the true owner, although defrauded, had nevertheless intended to part with title to the goods. *See* Weinberg, *supra* note 6, at 17.

home in the Uniform Sales Act[11] and now resides in the Uniform Commercial Code (the Code or U.C.C.).[12]

Sparsed throughout the Code one finds several characters with different names, but all entitled under appropriate circumstances to good faith purchase treatment.[13] The primary focus of this Article is on "one of the favorites in the dramatis personae of the UCC"[14]: the buyer in ordinary course of business. In particular, the Article asks *when* during the life of a sales transaction will a purchaser qualify as a protected buyer? On this temporal issue, as well as on others, the Code is conspicuously silent.[15]

This Article attempts two different but complementary tasks. First, it offers an answer to the "by no means academic question"[16] asked above. In so doing, the Article considers Code rules that affect the buyer-seller relationship and those that impact on the interests of third parties. The conclusion reached is that buyer status occurs at the moment the purchaser obtains the remedial right to the goods vis-a-vis the seller.[17] In most

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11. The sections of the UNIFORM SALES ACT, 1 U.L.A. 1 (1950) (act withdrawn 1962) relevant to this discussion are:

> (1) Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

*Id.* § 23, 1 U.L.A. at 379.

> Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.

*Id.* § 24, 1 U.L.A. at 387.

> Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

*Id.* § 25, 1 U.L.A. at 390.

12. Unless otherwise indicated, all references and citations to "the Code" or "U.C.C." in this Article are to the text and comments of the UNIFORM COMMERCIAL CODE (1978) (official text with comments).

13. *See, e.g.*, U.C.C. §§ 2-403 (2) (buyer in ordinary course); 3-302 (holder in due course); 7-501 (holder to whom negotiable document of title has been duly negotiated); 8-302 (bona fide purchaser). These characters and others receive their favorable treatment in U.C.C. §§ 2-403(1), 2-403(2), 2-702(3), 2-706(5), 3-119(1), 3-207(2), 3-305, 3-406, 3-407, 3-602, 5-114(2), 6-110(2), 7-205, 7-208, 7-209(3), 7-210(5), 7-308(4), 7-502(1), 7-503(3), 7-504(2)-(3), 8-205, 8-206(1), 8-302(3), 8-311, 9-301(1), 9-306(2), 9-307(1)-(2), 9-308, 9-309, 9-504(4).

14. Skilton, *Buyer in Ordinary Course of Business Under Article 9 of the Uniform Commercial Code (and Related Matters)*, 1974 WIS. L. REV. 1, 2.

15. Others have struggled with the issue of "when" in other contexts. *See, e.g.*, Anzivino, *When Does a Debtor Have Rights in the Collateral Under Article 9 of the Uniform Commercial Code?*, 61 MARQ. L. REV. 23 (1977); Carlson & Shupack, *Judicial Lien Priorities Under Article 9 of the Uniform Commercial Code: Part 1*, 5 CARDOZO L. REV. 287, 299-317 (1984) (discussing when person becomes lien creditor for purposes of U.C.C. § 9-301(1)).

16. Skilton, *supra* note 14, at 15; *see also* Big Knob Volunteer Fire Co. v. Lowe & Moyer Garage, Inc., 338 Pa. Super. 257, 264, 487 A.2d 953, 957 (1985) ("The point at which a person becomes a buyer in ordinary course is subject to considerable controversy because the Code does not specify the moment at which the status is conferred.").

17. *See infra* text accompanying notes 242-62.

instances, therefore, buyer status will inevitably coincide with the moment the remedy of specific performance or, in some cases, replevin becomes available to the buyer. The Article's second purpose is descriptive. It looks behind the rhetoric of the buyer status cases to see how their resolution compares, in fact, with those cases in which the only issue is the buyer's right to obtain possession of the goods from the seller. It then considers whether harmonization of these two lines of cases is possible.[18]

## II. The Need for a Temporal Definition

Section 1-201(9) of the Code is the definitional source of buyer in ordinary course of business:

> [A] person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. All persons who sell minerals or the like (including oil and gas) at wellhead or minehead shall be deemed to be persons in the business of selling goods of that a kind. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents or title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.[19]

This definition and its location within the Code suggest two questions, the answers to which bear directly on the scope of this Article.

If one assumes that the purchase, prior to its interruption, was proceeding "in good faith" and "in ordinary course from a person in the business of selling goods of that kind," then the only task remaining is to determine if buyer status has been reached. Yet the buyer in ordinary course is not the Code's only buyer of goods who is privileged by receiving good faith purchase treatment. Sometimes the privileged buyer is simply the good faith purchaser.[20] Here the Code's nomenclature must be used with care. Sections 1-201(32) and (33) define "purchaser" as a person who obtains an interest in property as the result of any "voluntary transaction."[21] Thus, the term includes and encompasses characters in addition to the usual buyer. When, however, the person claiming to be a purchaser is

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18. *See infra* text accompanying notes 263-73.

19. U.C.C. § 1-201(9).

20. *See, e.g.*, U.C.C. § 2-403(1). This is, perhaps, the Code's most notorious purchaser provision. The subsection begins by sheltering the purchaser's title, giving the purchaser "all title which his transferor had or had power to transfer . . . ." *Id.* But the purchaser's title is not necessarily limited to that of its transferor. By using the term "power to transfer" the subsection "continue[s] unimpaired all rights acquired under the law of agency or of apparent agency or ownership or other estoppel, whether based on statutory provisions or on case law principles." U.C.C. § 2-403 comment 1. Finally it concludes by recognizing the "voidable title" doctrine, *see supra* note 10 and accompanying text, providing "specifically for the protection of the good faith purchaser for value in a number of specific situations which have been troublesome under prior law." U.C.C. § 2-403 comment 1.

21. U.C.C. § 1-201(32)-(33).

also a buyer, should the formula for determining buyer in ordinary course status be used even though the purchase is not in the ordinary course? Although particular statutory language may make consistent harmonization difficult,[22] the test should be the same absent a clear statutory or policy-mandated push in a different direction.[23]

Because the question of buyer in ordinary course status is made relevant by several Code sections,[24] one must similarly ask whether the determination of that status should vary with the particular section. It would appear that by placing the definition in Article I, the drafters intended for uniform construction of the term "buyer in the ordinary course."[25] Moreover, no reason appears for defining the same status differently when it has the same effect of cutting off third party property interests.[26] This conclusion does not, however, preclude imposing requirements *in addition to* buyer in ordinary course status as a requisite to favorable treatment when special or different policy considerations are involved.[27] Section 7-205, for example, refers to "[a] buyer in the ordinary

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22. For example, U.C.C. § 2-403(1) speaks in terms of "title" but the various buyer in ordinary course provisions do not. *See, e.g.*, U.C.C. §§ 2-403(2) (buyer receives "rights" of entruster); 9-307(1) (buyer takes "free" of security interest). For the full text of both subsections, see *infra* note 24. On this basis, an argument can be fashioned that for a buyer to achieve purchaser status under § 2-403(1), title must pass, whereas buyer status under other provisions is not necessarily dependant upon the location of title. The temptation of the approach is rejected in Leary & Sperling, *The Outer Limits of Entrusting*, 35 ARK. L. REV. 50, 81-83 (1981).

23. *See infra* note 262.

24. A determination of this status is most frequently required under U.C.C. §§ 2-403(2) and 9-307(1). The former provides: "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." U.C.C. § 2-403(2). The latter provides:

> A buyer in ordinary course of business (subsection (9) of Section 1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

U.C.C. § 9-307(1).

25. Absent different or additional definitions elsewhere in the Code, the title and preamble to U.C.C. § 1-201 make it clear that, "unless the context otherwise requires," § 1-201 definitions are to apply throughout the Code. The definition of "buyer in the ordinary course" would be particularly inappropriate for "otherwise" treatment because the drafters would have provided, but did not, alternative definitions of the term when making it relevant to the operation of different Code sections.

26. It is true that the degree of sympathy one feels for the party whose interest is being divested will often be greater under U.C.C. § 2-403(2) (unsophisticated consumer entruster) than under U.C.C. § 9-307(1) (sophisticated commercial lender). Although this difference may initially have called for a different statutory response, it does not call for dissimilar construction of identical statutory language. As one commentator aptly put it: "[T]here is much to be said for the proposition that the question whether a person is a buyer in ordinary course of business should be answered irrespective of its setting under section 2-403(2) or 9-307(1)." Skilton, *supra* note 14, at 38. For a case reflecting this attitude, see Big Knob Volunteer Fire Co. v. Lowe & Moyer Garage, Inc., 338 Pa. Super. 257, 264-68, 487 A.2d 953, 957-59 (1985) (cases and commentary involving buyer status under § 9-307(1) referred to without distinction to support finding of buyer status under § 2-403(2)).

27. One other point of potential variance between § 2-403(2) and other buyer in ordinary course provisions should be mentioned. To qualify as a buyer in ordinary course one must act in "good faith," a term the Code defines as "honesty in fact in the conduct or transaction concerned." U.C.C. § 1-201(19). The Code further refines this definition by requiring of a merchant not only honesty in fact but also "the observance of reasonable commercial

course of business of fungible goods sold and delivered by a warehouseman . . . ."[28] Because this section implicates policies not at work in other sections, a delivery requirement exists.[29] This added requirement should not be confused with buyer status, the timing of which is the same as under other sections, but should be seen as an *additional* requirement to that status.[30]

As the preceding discussion has shown, the question of whether one has qualified as a buyer can manifest itself when any one of several Code sections is applicable, including those that protect the interests of good faith purchasers.[31] The context in which most courts have been forced to answer this question, however, has been in the application of U.C.C. section 9-307(1).[32] Therefore, it seems fitting to use that section to illustrate the scope and importance of the problem.

Section 9-307(1) is but one of the Code's numerous exceptions to the presumptive effectiveness of a security interest.[33] The section provides that

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standards of fair dealing in the trade." U.C.C. § 2-103(1)(b). Because the Article 2 refinement of good faith expressly applies only to that article, *see* U.C.C. § 2-103(1), one must ask whether a merchant buyer claiming ordinary course status under a section in another Code article is held to a lower standard of good faith. On this point it should come as no surprise that the courts are not in accord. *Compare* Martin Marietta Corp. v. New Jersey Nat'l Bank, 612 F.2d 745, 751 (3d Cir. 1979) (§ 2-103(1)(b) does not apply to Article 9 cases) *and* General Elec. Credit Corp. v. Humble, 532 F. Supp. 703, 706 (M.D. Ala. 1982) (same) *and* Sherrock v. Commercial Credit Corp., 290 A.2d 648, 651 (Del. 1972) ("We find no basis anywhere for the conclusion that the drafters of the Code intended to make it permissible to 'cross over' to Article 2 for the definition of the term 'good faith' as incorporated by reference in Article 9.") *and* Massey-Ferguson, Inc. v. Helland, 105 Ill. App. 3d 648, 653, 434 N.E.2d 295, 297-98 (1982) (rejecting argument that Article 2 good faith definition applies in Article 9 transaction) *with* Swift v. J.I. Case Co., 266 So. 2d 379, 381 (Fla. Dist. Ct. App. 1972) (objective standard of U.C.C. § 2-103(1)(b) applicable for purposes of U.C.C. § 9-307(1)).

28. U.C.C. § 7-205.

29. As Professors Leary and Sperling explained,

> [a] different policy from that of U.C.C. § 9-307(1) may be at work where stored fungible goods are concerned, as U.C.C. § 7-207(1) permits commingling, and, in the case of an "overissue," a loss is shared by all of the owners in common of the commingled mass. When there has been a delivery to a BIOCOB [buyer in ordinary course of business] out of the commingled mass, thus causing an "overissue" . . . will there be a need to pro-rate a remainder among the holders of warehouse receipts. If there has been no delivery to the BIOCOB, U.C.C. §§ 7-205 and 7-207(2) indicate that the risk of the warehouseman's wrongdoing must be borne by the potential BIOCOB of the goods . . . .

Leary & Sperling, *supra* note 22, at 79-80 n.67.

30. Where there is, as in the case of U.C.C. § 7-205, a delivery requirement, the question of when buyer status is achieved largely disappears. Because delivery will usually signal the completion of the seller's transfer obligation and the removal of the goods from the seller's possession, it would be implausible, at that point, to maintain that buyer status is lacking.

31. Whether the course of buying has progressed to such a degree that the buyer's interest should be protected from those with claims against the seller is an issue that also transcends the Code. For example, an essentially non-Code dispute involving the same question could occur between a buyer and a judicial lien creditor of the seller.

32. For what is probably the best and most complete discussion to date of U.C.C. § 9-307(1), see generally Skilton, *supra* note 14. It should be emphasized that although § 9-307(1) is the section that most frequently necessitates a determination of buyer status, it is not the only section. *See, e.g.*, Schneider v. J.W. Metz Lumber Co., 715 P.2d 329, 333 (Colo. 1986) (deciding buyer status under § 2-403(2)); Big Knob Volunteer Fire Co. v. Lowe & Moyer Garage, Inc., 338 Pa. Super. 257, 267-68, 487 A.2d 953, 958-59 (1985) (same).

33. Section 9-201 provides in part: "Except as otherwise provided by this Act a security agreement is effective according to its terms between the parties, against purchasers of the

"[a] buyer in the ordinary course of business . . . takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence."[34] When section 9-307(1) applies, the original security interest "dies,"[35] a new security interest in identifiable proceeds received by the debtor is born,[36] and the buyer goes merrily along. Because the value of the security interest in the proceeds will usually equal or exceed that of the original collateral, the secured party should, theoretically, have no reason to complain about the Code's particular allocation of interests. The secured party's contentment, however, presupposes two conditions. The first is that the proceeds remain identifiable[37] and available.[38] Second, that, excluding the value of the goods that were the subject of the transaction between the seller and the buyer, the secured party is fully secured at the time it elects to exercise its rights upon the seller's default.[39]

Consider, for example, the much commented upon conflict between the Code's second class citizen,[40] the prepaying buyer, and the secured creditor.[41] For whatever reason, and many are possible, the buyer makes the decision to pay part or all of the purchase price without taking delivery of the goods.[42] If the goods are still in the seller's possession when the

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collateral and against creditors." U.C.C. § 9-201. Thus, unless some exception exists a secured creditor prevails against all other parties. Unfortunately for the secured creditor, the Code provides a host of exceptions scattered throughout Part 3 of Article 9. *See, e.g.*, U.C.C. §§ 9-307, 9-308, 9-309, 9-310, 9-312, 9-313, 9-314, 9-315. Moreover, "despite 9-201's bold assertion that only other provisions in the Uniform Commercial Code override it, obviously other statutory law (such as the Internal Revenue Code and the Bankruptcy Code) must be considered." D. BAIRD & T. JACKSON, *supra* note 4, at 367-68.

34. U.C.C. § 9-307(1).

35. For an intriguing attempt to distinguish between a security interest's death and its subordination in Article 9, see generally Carlson, *Death and Subordination Under Article 9 of the Uniform Commercial Code: Senior Buyers and Senior Lien Creditors*, 5 CARDOZO L. REV. 547 (1984).

36. *See* U.C.C. § 9-306(2).

37. The question whether proceeds are identifiable may arise in a multitude of contexts but is most frequently encountered when cash proceeds are in some way commingled with funds from other sources. *See generally* Skilton, *The Secured Party's Rights in a Debtor's Bank Account Under Article 9 of the Uniform Commercial Code*, 1977 S. ILL. U.L.J. 120.

38. Irrespective of the particular controls placed on the debtor's activities by the secured party, the risk of debtor misbehavior is always present. For an explanation of secured credit premised on this observation, see Jackson & Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143, 1149-58 (1979).

39. If the disposition value of all collateral within the seller's possession is insufficient to satisfy fully the seller's obligation, the secured party will have the incentive to increase that value by also laying claim to collateral previously transferred to third parties.

40. This characterization is borrowed from Gordon, *The Prepaying Buyer: Second Class Citizenship Under Uniform Commercial Code Article 2*, 63 NW. U.L. REV. 565, 565 (1968).

41. *See generally id.*; Jackson & Kronman, *A Plea for the Financing Buyer*, 85 YALE L.J. 1 (1975); Speidel, *Advance Payments in Contracts for Sale of Manufactured Goods: A Look at the Uniform Commercial Code*, 52 CALIF. L. REV. 281 (1964).

42. *See, e.g.*, Thompson v. McMaster, (*In re* Fritz-Mair Mfg. Co.), 16 Bankr. 417, 418 (N.D. Tex. 1982) (good not yet completed by seller); International Harvester Credit Corp. v. Associates Fin. Servs., 133 Ga. App. 488, 491, 211 S.E.2d 430, 432 (1974) (tractor truck held by seller pending buyer's acquisition of trailers); Farmers State Bank v. Webel, 113 Ill. App. 3d 87, 89-90, 446 N.E.2d 525, 527 (1983) (pigs left with seller for care and finishing); Integrity Ins. Co. v. Marine Midland Bank-Western, 90 Misc. 2d 868, 871, 396 N.Y.S.2d 319, 321 (Sup. Ct. 1977) (mobile home left with seller pending buyer's acquisition of lot); Chrysler Credit Corp. v. Sharp, 56 Misc. 2d 261, 263, 288 N.Y.S.2d 525, 527 (Sup. Ct. 1968) (good held by

secured party acquires the right and makes the decision to proceed against its collateral, the secured party will, if undersecured, assert a security interest in both the goods and their proceeds. If the secured party is successful, the buyer loses any claim to the goods, suffers an immediate out-of-pocket loss in the amount of the prepayment, and leaves the deal with a damages claim of probably negligible value against the seller. On the other hand, if the buyer's interest is protected by section 9-307(1), the buyer receives the goods and the secured party loses a windfall for which it never bargained.[43] Moreover, the right to the goods is not the only right at stake. If the buyer takes free of the security interest, the secured party faces the risk of a conversion claim if the secured party acts as though the security interest still exists.[44] Thus, the buyer's status *at the time* the secured party proceeds against the collateral is crucial to the outcome of this type of case.

Other potential scenarios requiring an inquiry into buyer status under section 9-307(1) status deserve brief mention. In these, the section's role is not to resolve a dispute between the secured party and the buyer but rather to settle a dispute between competing secured parties.[45]

One scenario involves the competing claims of the seller's inventory secured party (SP) and a purchaser of chattel paper.[46] Suppose that the sale to the buyer is financed initially by the seller, who receives from the buyer a signed promissory note and a security interest in the goods to secure payment of the note. This newly acquired chattel paper is then transferred by the seller to someone other than SP. If, while the goods are still in the seller's possession, either the seller or the buyer defaults on its secured obligation, a question of priority of liens is likely to arise between SP and the chattel paper purchaser. SP will base its claim to the goods on the security interest received directly from the seller, whereas the purchaser of the chattel paper will claim priority on the basis of the security interest received indirectly from the buyer.[47] Although section 9-308 sorts out the two

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seller pending buyer's receipt of tax refund to be used for downpayment); Holstein v. Greenwich Yacht Sales, Inc., 122 R.I. 211, 213, 404 A.2d 842, 843 (1979) (seller agreed to store boat for winter). Further examples of why a seller might retain possession are set forth in Gordon, *supra* note 40, at 566 n.4.

43. The term "windfall" seems appropriate because it is unlikely that the secured party's expectations at the time the secured transaction was entered into encompassed a claim both to an item of collateral and to its proceeds. This sentiment surfaced in Herman v. First Farmers State Bank, 73 Ill. App. 3d 475, 392 N.E.2d 344 (1979), in which the court thought such a result "would inequitably allow the inventory financer a double recovery." *Id.* at 481, 392 N.E.2d at 347.

44. *See, e.g.*, Martin Marietta Corp. v. New Jersey Nat'l Bank, 612 F.2d 745, 748 (3d Cir. 1979); Chrysler Credit Corp. v. Sharp, 56 Misc. 2d 261, 268-69, 288 N.Y.S.2d 525, 532-33 (Sup. Ct. 1968); Serra v. Ford Motor Credit Co., 463 A.2d 142, 145-47 (R.I. 1983).

45. *See* Skilton, *supra* note 14, at 76. Professor Skilton refers to third party rights that are dependent on the buyer's status as "satellite rights." *Id.*

46. Chattel paper is "a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods . . . . " U.C.C. § 9-105(1)(b).

47. The regularity of this type of dispute can, without reference to reported cases, be confirmed by the court's statement in Chrysler Credit Corp. v. Sharp, 56 Misc. 2d 261, 263, 288 N.Y.S.2d 525, 528 (Sup. Ct. 1968) that "[s]ituations such as this are, moreover, commonplace, according to counsel, in insolvent automobile dealerships and with major appliance dealers." *Id.* at 263, 288 N.Y.S.2d at 528. For cases involving this issue, see, *e.g.*, Rex Fin. Corp. v. Mobile Am. Corp., 119 Ariz. 176, 176-77, 580 P.2d 8, 8-9 (Ct. App. 1978); Wickes

parties' relative rights to the chattel paper, it says nothing about rights to the underlying goods.[48] If the course of the sale has reached the point at which the buyer qualifies under section 9-307(1), then a priority rule is not needed because conflicting security interests do not exist; SP no longer has an interest in the goods and the chattel paper purchaser must necessarily prevail.[49] If, however, the buyer has not yet qualified for protection under section 9-307(1), then, assuming no other section causes the death of SP's interest,[50] SP's interest should have priority.[51]

A similar but conceptually distinct scenario emerges with only a slight change of players. Instead of a buyer who purchases on credit, assume that there is a buyer who pays cash that is provided by a third party lender (Lender). To secure the loan, Lender receives from the buyer a security interest in the goods. If either SP or Lender attempts to enforce its security

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Corp. v. General Elec. Credit Corp., 363 So. 2d 56, 57-58 (Fla. Dist. Ct. App. 1978); International Harvester Credit Corp. v. Assocs. Fin. Servs., 133 Ga. App. 488, 492-94, 211 S.E.2d 430, 433-34 (1974).

48. *But see* Borg-Warner Acceptance Corp. v. C.I.T. Corp., 679 S.W.2d 140, 144 (Tex. Ct. App. 1984) (priority under § 9-308 gives purchaser of chattel paper priority as to good).

49. Oddly enough, U.C.C. § 9-306(5)(a) provides that the chattel paper purchaser's repossession will cause SP's lien to reattach. Priority to the good will then depend on who has priority to the chattel paper. *See* U.C.C. § 9-306(5)(b). If, however, SP wrongfully repossesses following its loss of lien, the lien should not reattach. This distinction, unfortunately, was overlooked in International Harvester Credit Corp. v. Assocs. Fin. Servs., 133 Ga. App. 488, 492, 211 S.E.2d 430, 433 (1974), and in Chrysler Credit Corp. v. Sharp, 56 Misc. 2d 261, 269-70, 288 N.Y.S.2d 525, 533-34 (Sup. Ct. 1968).

50. The secured party must also be concerned with U.C.C. § 9-306(2). This subsection terminates a security interest if the collateral's "disposition was authorized by the secured party in the security agreement or otherwise . . . . " U.C.C. § 9-306(2). Because buyer in ordinary course status under § 1-201(9) requires a buyer to buy "from a person in the business of selling goods of that kind," U.C.C. § 9-307(1) will apply primarily to inventory. This requirement would suggest that most sales by the seller are "authorized" under § 9-306(2), with the buyer taking free of the security interest without regard to U.C.C. § 9-307(1). This does not mean, however, that the issue of when buyer status attaches loses its relevance. It would be anomalous to conclude that a disposition has occurred for purposes of U.C.C. § 9-306(2) prior to the time buyer status is achieved for purposes of U.C.C. § 9-307(1). *See infra* note 262. Moreover, the initial authorization of the seller's disposition is often conditional upon delivery of proceeds to the secured party. When a delivery fails to take place, courts frequently deny protection under U.C.C. § 9-306(2), thus forcing reliance on U.C.C. § 9-307(1). *See, e.g.*, Northwest Livestock Prod. Credit Ass'n v. Coast Trading Co. (*In re* Coast Trading Co.), 31 Bankr. 670, 673 (Bankr. D. Or. 1983) (failure to deliver proceeds to secured party vitiates consent); North Cent. Kan. Prod. Credit Ass'n v. Washington Sales Co., 223 Kan. 689, 696, 577 P.2d 35, 41 (1978) (failure to pay proceeds jointly to debtor and secured party vitiates consent); Farmers State Bank v. Edison Non-Stock Coop. Ass'n, 190 Neb. 789, 794, 212 N.W.2d 625, 628-29 (1978) (debtor's default vitiates consent); Baker Prod. Credit Ass'n v. Long Creek Meat Co., 266 Or. 643, 651, 513 P.2d 1129, 1133 (1973) (nonpayment of buyer's draft vitiates consent).

51. Section 9-306(5)(c) would, in this case, have no role to play because SP's lien did not reattach. Although it appears that U.C.C. § 9-312(5) is the appropriate priority rule to resolve this dispute, at least one commentator has suggested that the first-to-file rule was never meant to apply when, as here, two debtors are involved and that priority should in all cases be awarded to SP. *See* B. CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 3.8(4), at 3-53, 3-54 (1980). Not all courts, however, have accepted this limitation on the scope of U.C.C. § 9-312(5). *See, e.g.*, National Bank of Commerce v. First Nat'l Bank and Trust Co., 446 P.2d 277, 282 (Okla. 1968).

interest before the goods leave the seller's possession and control,[52] a ranking of their respective claims will often be necessary.[53] As before, the issue of who has the senior lien or, for that matter, whether there are in fact competing claims to the goods will depend on the buyer's status at the time either party proceeds against the goods. Lender's interest should be subordinate to that of SP, unless the latter's interest has ceased to exist.[54] This, in turn, depends on whether the buyer has become a buyer for purposes of section 9-307(1).

## III. Temporal Definitions and the Courts

Having briefly outlined the typical contexts in which the need to determine buyer status is likely to arise, it will be helpful to take a critical look at how courts have decided buyer in ordinary course cases. What results from this venture is, unfortunately, a vision of commercial law that is unclear, uncertain, and that totally lacks a persuasive doctrinal foundation. To simplify discussion, consider the commonly accepted alternatives for pinpointing the moment at which buyer status is achieved. They are (1) the date of contract formation; (2) the date the goods are identified to the contract; (3) the date title to the goods passes to the buyer; and (4) the date the buyer obtains possession of the goods.[55] Note that these events are set forth chronologically, mirroring the usual course of the transaction of a sale. Note also that what results is a definitional spectrum running from security of purchase to security of ownership.

### *A. The Possession Date*

At one end of the spectrum lies a rule requiring the buyer to take possession of the goods in order to attain buyer status under the Code.[56]

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52. Although the problem is beyond the scope of this Article, the statement in the text assumes that at some point prior to the repossession the buyer had whatever quantum of interest is needed in the goods to constitute "rights in the collateral" so that Lender's security interest was able to attach. *See* U.C.C. § 9-203(1)(c). Not articulated in those cases involving a purchaser of chattel paper, *see supra* text accompanying notes 46-51, but nevertheless implicit in their holdings is the conclusion that that interest is not dependent upon the buyer's possession. This view, however, has not been universally accepted. *See* Anzivino, *supra* note 15, at 44-45 (sufficient "rights in the collateral" hinges on buyer's possession) *see also infra* text accompanying notes 155-60, 201-06.

53. *See, e.g.*, General Elec. Credit Corp. v. Gayl (*In re* Darling's Homes, Inc.), 46 Bankr. 370, 377 (Bankr. D. Del. 1985); Hamilton County Bank v. Tuten, 250 So. 2d 17, 18-19 (Fla. Dist. Ct. App. 1971); Crystal State Bank v. Columbia Heights State Bank, 295 Minn. 181, 182, 203 N.W.2d 389, 390 (1973).

54. *See supra* note 49. Because a chattel paper purchaser is not involved in this scenario, if SP's lien was lost it cannot be regained under U.C.C. § 9-306(5)(a).

55. *See* Skilton, *supra* note 14, at 16; Note, *The Buyer-Secured Party Conflict and Section 9-307(1) of the U.C.C.: Identifying When a Buyer Qualifies for Protection as a Buyer in Ordinary Course*, 50 Fordham L. Rev. 657, 662 (1982) [hereinafter Note, *Buyer-Secured Party Conflict*]; Note, *When Does a Buyer Become a Buyer in Ordinary Course? U.C.C. §§ 1-201(9), 9-307(1): A Test and a Proposal*, 60 Neb. L. Rev. 848, 852 (1981) [hereinafter Note, *A Test and a Proposal*].

56. A policy justification for mandating possession by the buyer is based on the perceived evils engendered by the seller's continued possession of goods now subject to an interest of which no public notice is given. *See infra* text accompanying notes 171-207. Because possession is at the root of the problem, discussion often centers on a buyer's need to gain possession

This rule is weighted heavily in favor of ownership interests. The chronological moment when the buyer's status becomes relevant is always when progress of the transaction is terminally interrupted.[57] Because, in the typical case, the cause of the interruption is a repossession by the secured party while the goods are still in the seller's possession, buyer status would be invariably denied. If a consensus of judicial opinion exists in this area, the consensus arguably is that a buyer need not take possession to qualify as a buyer in the ordinary course of business;[58] this conclusion is implicit in some cases,[59] explicit in others.[60]

Despite the initial perception of a clear judicial rejection of this end of the definitional spectrum, there is one case that justifies a rethinking of this commonly held assumption. In *Chrysler Corp. v. Adamatic, Inc.*,[61] the court seemed to reject absolutely the notion that buyer status depends on possession,[62] but immediately retreated from this position in the very next paragraph of the opinion:

> While the Commercial Code . . . does not require that in all cases the buyer actually take delivery in order to have a buyer in ordinary course of business status, sound policy considerations in

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rather than on a seller's need to lose possession. *Id.* The latter situation, however, does not depend upon the former. If, for example, the goods are to be shipped by the seller, loss of possession will usually occur upon tender of delivery, *see* U.C.C. §§ 2-503(2), 2-504, yet the buyer will not have gained possession until the goods are received. *See* U.C.C. § 2-103(1)(c). Although the terms "delivery" and "possession" are not synonymous, *see* Mechanics Nat'l Bank v. Goucher, 7 Mass. App. Ct. 143, 148, 386 N.E.2d 1052, 1056 (1979); Integrity Ins. Co, v. Marine Midland Bank-Western, 90 Misc. 2d 868, 871, 396 N.Y.S.2d 319, 321 (Sup. Ct. 1977), they are often treated as such. Note, *Buyer-Secured Party Conflict*, *supra* note 55, at 673 ("Although the concepts thus are not synonymous, they are often used interchangeably."). Absent a reason for distinguishing between "possession" and "delivery," this Article will use the term "possession" expansively to include a tender of delivery where the seller has lost possession.

57. *See supra* text accompanying notes 40-54.

58. *See* Note, *Buyer-Secured Party Conflict*, *supra* note 55, at 673 ("Courts and commentators routinely reject imposition of a delivery or receipt requirement . . . ."); Note, *U.C.C. Section 9-307(1) and the Non-Possessory Buyer: Is the Good Faith Purchaser Always Right?*, 19 GA. L. REV. 123, 139 (1984) [hereinafter Note, *Is the Good Faith Purchaser Always Right?*] ("The courts uniformly conclude that . . . one need not take possession of goods to be a buyer . . . ."); Note, *A Test and a Proposal*, *supra* note 55, at 875 ("One area of judicial agreement . . . is that delivery and thus possession are unnecessary . . . .").

59. *See, e.g.*, Sherrock v. Commercial Credit Corp., 290 A.2d 648, 650-51 (Del. 1972) (without discussion of when buyer status attaches, court permitted buyers to take free of security interest because it was not act of bad faith to leave goods with seller); Tanbro Fabrics Corp. v. Deering Milliken, Inc., 39 N.Y.2d 632, 637, 350 N.E.2d 590, 592-93, 385 N.Y.S.2d 260, 262 (1976) (without discussion of when buyer status attaches, court permitted buyer to take free of security interest even though goods in possession of secured party).

60. *See, e.g.*, Thompson v. McMaster (*In re* Fritz-Mair Mfg. Co.), 16 Bankr. 417, 420 (Bankr. N.D. Tex. 1982); Rex Fin. Corp. v. Mobile Am. Corp., 119 Ariz. 176, 178, 580 P.2d 8, 10 (Ct. App. 1978); Herman v. First Farmers State Bank, 73 Ill. App. 3d 475, 478, 392 N.E.2d 344, 345-46 (1979); Integrity Ins. Co. v. Marine Midland Bank-Western, 90 Misc. 2d 868, 871, 396 N.Y.S.2d 319, 321 (Sup. Ct. 1977); Serra v. Ford Motor Credit Co., 463 A.2d 142, 148 (R.I. 1983).

61. 59 Wis. 2d 219, 208 N.W.2d 97 (1973).

62. The *Adamatic* court first said: "It seems clear that, if there is a sale and the buyer has obtained title to the goods, his status as a buyer in ordinary course will not be defeated merely because he has not taken possession." *Id.* at 239, 208 N.W.2d at 107.

> the instant situation would seem to dictate that the rights of a secured creditor ought not be impaired in the absence of a physical transfer or assignment of the goods.[63]

The *Adamatic* court's rationale is familiar. If the seller were permitted to retain, as part of its inventory, property no longer subject to the secured party's lien, the secured party could not rely on the status of that inventory.[64] This thinking smacks of the law's historical sensitivity to the separation of ownership and possession, now frequently referred to as the "ostensible ownership" problem.[65]

It is particularly difficult to understand why the court picked this case to embrace openly what is so clearly a prosecured party position.[66] Contrary to the situation in most cases, the secured party in *Adamatic* actively participated throughout the entire course of the sales transaction and was not misled by the seller's retention of possession.[67] If the "instant situation" referred to by the court[68] is one that requires a transfer of the goods, then it is hard to imagine one that would not.[69] Because *Adamatic* departs so

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63. *Id.* at 240, 208 N.W.2d at 107.

64. According to the court, "the Code generally gives preference to property interests which are evidenced either by recording or possession and that, to adopt the view of Chrysler, the financier of an inventory would no longer be able to rely on recorded interests and the status of his debtor's inventory." *Id.*, 208 N.W.2d at 107.

65. For more on this problem and the potential role, if any, ostensible ownership concerns should play in pinpointing when buyer status is achieved, see *infra* text accompanying notes 171-207. For now, it is sufficient that other courts have routinely rejected the secured party's assertion that the integrity of the debtor's inventory as a source of information must be maintained. The court's response in Chrysler Credit Corp. v. Sharp, 56 Misc. 2d 261, 270, 288 N.Y.S.2d 525, 534 (Sup. Ct. 1968) is typical: "If there is a usage of trade which exposes an entruster on floor plan to certain risks, these are risks against which he can guard by audits and accounting procedures or he can refuse to knowingly expose himself to the risk with the particular dealer." For a similiar point of view, see Rex Fin. Corp. v. Mobile Am. Corp., 119 Ariz. 176, 178, 580 P.2d 8, 10 (1978); Farmers State Bank v. Webel, 113 Ill. App. 3d 87, 94-95, 446 N.E.2d 525, 530 (1983); Herman v. First Farmers State Bank, 73 Ill. App. 3d 475, 480-81, 392 N.E.2d 344, 347 (1979); Holstein v. Greenwich Yacht Sales, Inc., 122 R.I. 211, 216-17, 404 A.2d 842, 845 (1979). In the foregoing cases there was no evidence that the creditor had actually relied on the debtor's physical inventory. The secured party, however, fared no better when such evidence did exist. *See* General Elec. Credit Corp. v. Gayl (*In re* Darling's Homes, Inc.), 46 Bankr. 370, 373 (Bankr. D. Del. 1985); Wilson v. M & W Gear, 110 Ill. App. 3d 538, 543-44, 442 N.E.2d 670, 673-74 (1982).

66. Although one commentator suggested "that the secured party should not have his cake and eat it too," Skilton, *supra* note 14, at 17 n.50, that was the secured party's fortune in *Adamatic*. The secured party obtained the progress payments made by Chrysler and was also permitted to lay claim to the subject matter of the sale. Even the court's conscience seemed slightly troubled: "From the viewpoint of equity, this is an unsatisfactory result, for the record shows that . . . Chrysler had substantially paid the contract price for all the goods involved." 59 Wis. 2d at 241-42, 208 N.W.2d at 108. But the court's conscience was soothed by the observation that a prepaying buyer has means of self-protection. *Id.* at 242, 208 N.W.2d at 108. ("The Code, however, gives broad latitude whereby a prepaying buyer, acting timely, can enter into suitable arrangements for his own protection."). Unfortunately for the buyer, this protection might not be as easily attainable as the court would lead us to believe. *See generally* sources cited *supra* note 41.

67. In fact, it was upon the secured party's suggestion that the buyer agreed to make progress payments on the contract. 59 Wis. 2d at 225-26, 208 N.W.2d at 100.

68. *See supra* text accompanying note 63.

69. The discussion so far has centered on the *Adamatic* court's resolution of conflicting rights with respect to only one contract of sale when the case actually involved two. The buyer

dramatically from what would otherwise be a uniform judicial position, it is tempting to pass it off as a decisional aberration without much precedential value.[70] That, however, would be a mistake. The case has been discussed too often by both courts and scholars to ignore it.[71]

### *B. The Contract Date*

At the security of purchase end of the spectrum, one possibility is that attainment of buyer status could occur concurrently with the formation of the sales contract.[72] It is difficult to say whether there are cases supporting this view.[73] A major problem in drawing conclusions about these cases, aside from piercing the opaqueness of their language,[74] is that each case is inextricably entwined with its facts, facts that may or may not be legally relevant.

To illustrate, consider two opinions emanating from the same Illinois appellate court. In the first case, *Herman v. First Farmers State Bank*,[75] the buyer contracted to purchase fertilizer, paid the full purchase price, but did not take possession. Then, true to form, the seller's secured creditor appeared, took possession of and sold the inventory of fertilizer, including the buyer's unspecified share. The buyer brought suit to recover from the

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was permitted to take free of the secured party's interest in the goods covered by the so-called "first contract" under which the buyer actually received the goods and title passed. The goods, however, subsequently were returned to the seller for alterations but, according to the court, the secured party's lien never reattached because the seller never reacquired rights in those goods. 59 Wis. 2d at 233-34, 208 N.W.2d at 104. Notice that while the goods were in the seller's possession their potential to mislead the secured party was the same as though they had never been removed. Curiously, the court never addressed this point.

70. The court's emphasis on ostensible ownership is the crucial factor that separates this case from others. If the opinion is read to require no more than that title must pass before buyer status attaches, then the court does enjoy judicial company. *See infra* notes 105-17 and accompanying text.

71. *See, e.g.*, Gary Aircraft Corp. v. General Dynamics Corp., 681 F.2d 365, 374 (5th Cir. 1982); General Elec. Credit Corp. v. Gayl (*In re* Darling's Homes, Inc.), 46 Bankr. 370, 378 (D. Del. 1985); Thompson v. McMaster (*In re* Fritz-Mair Mfg. Co.), 16 Bankr. 417, 420 (N.D. Tex. 1982); Integrity Ins. Co. v. Marine Midland Bank-Western, 90 Misc. 2d 868, 871, 396 N.Y.S.2d 319, 321 (1977); Carey Aviation, Inc. v. Giles World Mktg., Inc., 46 Bankr. 458, 462 (D. Mass. 1985); Big Knob Volunteer Fire Co. v. Lowe & Moyer Garage, Inc., 338 Pa. Super. 257, 264-65, 487 A.2d 953, 957 (1985); Anzivino, *supra* note 15, at 37; Baird & Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175, 210 (1983); Coogan, *Article 9—An Agenda for the Next Decade*, 87 YALE L.J. 1012, 1034 (1978); Jackson, *Embodiment of Rights in Goods and the Concept of Chattel Paper*, 50 U. CHI. L. REV. 1051, 1072 (1983); Jackson & Kronman, *supra* note 41, at 27; Skilton, *supra* note 14, at 16; Skilton, *Security Interests in After-Acquired Property Under the Uniform Commercial Code*, 19 WIS. L. REV. 925, 951.

72. This section will disprove the observation that "[t]he time of contracting, the earliest point at which a buyer could conceivably sever a secured party's security interest, is usually not seriously considered as an alternative." Note, *Buyer-Secured Party Conflict*, *supra* note 55, at 675.

73. One court, however, explicitly rejected time of contracting as a suitable test. *See* Chrysler Corp. v. Adamatic, Inc., 59 Wis. 2d 219, 238-41, 208 N.W.2d 97, 106-07 (1973).

74. *See* Waits, *Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction*, 1983 U. ILL. L. REV. 917, 935 ("Even if all judges were Solomons, and all opinions were written in the grandest of the Grand Style, problems would remain, for no amount of wisdom or effort can eliminate completely the ambiguity of words.").

75. 73 Ill. App. 3d 475, 392 N.E.2d 344 (1979).

secured party the amount paid to the seller, asserting buyer in ordinary course status under section 9-307(1).[76]

Rejecting the applicability of the Code's passage-of-title rules, the *Herman* court instead chose to believe that "the focus in a case such as this should be on the 'ordinary course of business' requirement of section 9-307."[77] Because the transaction between buyer and seller was customary, the buyer prevailed. Although the opinion can be read as adopting a time of contracting approach, it can also be read as requiring more than just a mere contract. It bears repeating that cases cannot be read in isolation from their facts.[78] In *Herman* the goods arguably were identified to the contract[79] and the purchase price was paid; one cannot say whether either fact is relevant.

In the second case, *Wilson v. M & W Gear*,[80] the Illinois court refused to deviate from *Herman* even though the good that the buyer had purchased had not yet been identified to the contract when the secured party took possession. *Wilson* involved the purchase of a grain drill for which the buyer had paid in full. When the secured party took possession, the seller had an inventory of only two drills, one of which was earmarked for delivery to a third party.[81] There was no documentation indicating that the one remaining drill was to go to the buyer.[82] Downplaying the role of identification,[83] the court could see no reason for affording this buyer of equipment less protection than a *Herman*-type buyer of fungibles.[84] But once again, in light of the facts of the case, it would not be wise to conclude with any degree of certainty that a contract alone is sufficient to protect a

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76. *See id.* at 477, 392 N.E.2d at 345.

77. *Id.* at 479, 392 N.E.2d at 346. The court continued:

> Whether the buyer is a buyer in the ordinary course is not affected by whether there has been a completed sale or merely the making of the contract to sell, since the fact that title has not yet been transferred as between the dealer and the purchaser does not prevent the latter from being regarded as a buyer in the ordinary course of business, insofar as the secured creditor of the dealer is concerned, where the transaction between the dealer and the purchaser is ordinary or typical in the trade.

*Id.*, 392 N.E.2d at 346 (quoting ANDERSON, UNIFORM COMMERCIAL CODE § 1-201:25 (2d ed. 1970)).

78. *See* K. LLEWELLYN, THE BRAMBLE BUSH 47 (1930):

> Surely this much is certain: the actual dispute before the court is limited as straitly by the facts as by the form which the procedural issue has assumed. What is not in the facts cannot be present for decision. *Rules which proceed an inch beyond the facts must be suspect.*

*Id.* (emphasis added).

79. Comment 5 to § 2-501 provides in pertinent part:

> Undivided shares in an identified fungible bulk, such as grain in an elevator or oil in a storage tank, can be sold. The mere making of the contract with reference to an undivided share in an identified fungible bulk is enough under subsection (a) to effect an identification if there is no explicit agreement otherwise.

U.C.C. § 2-501 comment 5. Thus, the buyer in *Herman* had a strong argument under § 2-501 that the fertilizer was identified to the contract.

80. 110 Ill. App. 3d 538, 442 N.E.2d 670 (1982).

81. *Id.* at 539-40, 442 N.E.2d at 671.

82. *Id.* at 539, 442 N.E.2d at 671.

83. *See id.* at 543-44, 442 N.E.2d at 674 ("substantive rights . . . should not turn upon a concept so elusive and ephemeral.").

84. *Id.*

buyer. True, the drill had not been identified to the contract but only a mere formality was lacking. Clearly, the drill seized by the secured party was the drill awaiting delivery to the buyer.[85] Also potentially important is the fact of full payment. In the court's own words: "[t]here is no sensible reason to deviate from *Herman*, especially where the retail purchaser has *fully performed* his obligations of the contract."[86]

In addition to the foregoing cases, several other cases also have been interpreted as endorsing a time of contracting test for determining buyer status.[87] But once again, the facts of each make the accuracy of that conclusion doubtful. In *Troy Lumber Co. v. Williams*[88] the buyers signed a "proposal" to purchase a mobile home and made a down payment of $600.[89] When the seller's president left town with the company's cash, the buyers, having lost interest in going through with the sale, brought suit to recover their downpayment.[90] At their behest and pursuant to a writ of attachment, the sheriff randomly levied upon a mobile home on the seller's lot, thereby prompting the secured party's intervention.[91] The court dismissed the buyers' assertion that their contract gave them priority:

> This would be a valid argument if the plantiffs were in fact buyers, i.e., if they were either attempting to enforce the contract of sale or defending their right to free possession of the property after having performed under the contract. However, the plaintiffs have, in effect, rescinded this contract by demanding refund of their downpayment.[92]

What the court meant by this statement is anyone's guess. One possibility is that the court intended only to dismiss the relevance of section 9-307(1),[93] and not, as some have assumed, to indicate that the buyers would prevail if the section were relevant.[94]

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85. Maybe what the court believed to be "elusive and ephemeral," *see supra* note 83, and meant to reject were the technicalities of identification rather than the need somehow to pick out the goods destined for the buyer. This view would explain and add content to the conclusion of the opinion that "goods need [not] be identified *by number* before section 9-307 will protect the retail purchasers." 110 Ill. App. 3d at 546, 442 N.E.2d at 675 (emphasis added).

86. *Id.* at 545-46, 442 N.E.2d at 675 (emphasis added).

87. This characterization of the *Herman* and *M & W Gear* opinions can be found in Note, *Is the Good Faith Purchaser Always Right?*, *supra* note 58, at 144-46.

88. 124 Ga. App. 636, 185 S.E.2d 580 (1971). In *M & W Gear* the Illinois court read *Troy* as "implicitly reject[ing] any necessity for identification as a prerequisite to relief and protection under section 9-307." 110 Ill. App. 3d at 545, 442 N.E.2d at 674.

89. 124 Ga. App. at 636, 185 S.E.2d at 581.

90. *Id.*, 185 S.E.2d at 581.

91. *Id.*, 185 S.E.2d at 581.

92. *Id.* at 637-38, 185 S.E.2d at 582.

93. Because the buyers no longer wished to be buyers, but chose instead to become judicial lien creditors, U.C.C. § 9-301(b) would supply the governing priority rule rather than U.C.C. § 9-307(1). *See* 124 Ga. App. at 638, 185 S.E.2d at 582.

94. *See, e.g.*, Note, *A Test and a Proposal*, *supra* note 55, at 855 ("[T]he *[Troy]* court suggested that the process of buying has progressed sufficiently to support buyer in ordinary course status when there has merely been partial payment under a contract in unidentified goods.").

Another opinion defying easy categorization is *Chrysler Credit Corp. v. Sharp*.[95] In *Sharp* the buyer was a disinterested party but, because the rights of a third party were involved,[96] her section 9-307(1) qualifications were nevertheless the center of attention.[97] She had signed an installment sales contract, which included a security agreement, to purchase a specific identifiable car and had traded in her old car. Although the court held this was sufficient to elevate her to the status of a buyer, its reasoning was muddled. As Professor Skilton points out, it is impossible to say whether the court found that she was a buyer because it wanted the chattel paper purchaser to prevail or whether the chattel paper purchaser prevailed because the court felt she was, in fact, a buyer.[98] The court's language suggests the former.[99] If the latter reason correctly states the court's position, however, it must be understood that this is more than a mere contract to purchase case. There was full or at least partial payment[100] and

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95. 56 Misc. 2d 261, 288 N.Y.S.2d 525 (Sup. Ct. 1968). In Herman v. First Farmers State Bank, 73 Ill. App. 3d 475, 392 N.E.2d 344 (1979), the court cited *Sharp* for the proposition that a buyer need not receive possession or title to qualify under § 9-307(1). *Id.* at 478, 392 N.E.2d at 345-46. Although it is difficult to fault this reading of *Sharp*, the same cannot be said for the apparent conclusion in Rex Fin. Corp. v. Mobile Am. Corp., 119 Ariz. 176, 177, 580 P.2d 8, 9 (Ct. App. 1978), that the *Sharp* court held that one who signs a sales contract and security agreement, without more, becomes a buyer. The *Rex Financial* case is discussed *infra* text accompanying notes 101-04.

96. For a discussion of "satellite rights," see *supra* notes 45-54 and accompanying text. The suit was a conversion action brought by the assignee of the sales contract and security agreement, *i.e.*, chattel paper, against the seller's secured creditor who had seized and sold the collateral. 56 Misc. 2d at 262, 288 N.Y.S.2d at 526-27.

97. Although a named defendant, the buyer vanished and was never served. 56 Misc. 2d at 262, 288 N.Y.S.2d at 527. Not all buyers in all satellite cases will, however, be disinterested in the dispute between the secured party and the holder of the chattel paper. Even if the buyer's liability for the purchase price would not be discharged regardless of which party prevails, *see* U.C.C. § 9-206(1), quoted *infra* note 100, the buyer's stake in the litigation is real. If the seller's secured party wins, the buyer loses the goods but continues to owe the purchase price. If the holder of the chattel paper wins, the buyer is still responsible for the unpaid purchase price yet obtains the benefit of the proceeds received from the subsequent disposition of the goods. *See* U.C.C. § 9-504(1).

98. Skilton, *supra* note 14, at 84. Professor Skilton finds that "[t]his tie-in with the buyer's status illustrated in *Chrysler Credit Corporation v. Sharp* is not completely persuasive." *Id.* He points to U.C.C. § 9-308 and suggests that its application should control the outcome when, as here, the chattel paper purchaser is asserting rights as the seller's assignee, not as a retail financer who received a security interest directly from the buyer. *Id.* at 84-85. Professor Skilton would be correct if the seller's secured party were basing its claim to the car on its interest in the chattel paper. But U.C.C. § 9-308 is irrelevant when the asserted interest derives directly from the seller, secures the seller's obligations, and when the secured party repossesses the good. *See supra* note 49.

99. The court stated:

> The court feels a buyer who makes a purchase on a printed form contract in good faith with a full understanding it is a binding contract, who knowingly signs a retail installment payment obligation and trades in an old car in addition must, certainly *as to a retail financer furnishing new value on the strength of such contract* and as to an entruster giving the dealer wide latitude of sale goods [sic], be deemed a buyer in the ordinary course of business, without regard to the technicalities of when title [passes] . . . .

56 Misc. 2d at 270, 288 N.Y.S.2d at 534 (emphasis added).

100. Trading in the old car quite obviously constituted partial payment. Indeed, the Code itself recognizes that " '[b]uying' may be . . . by exchange of other property," *see* U.C.C. § 1-201(9), and the *Sharp* court labelled the trade-in "valuable consideration." 56 Misc. 2d at 267,

the good was clearly identified to the contract.

In contrast to the preceeding cases, *Rex Financial Corp. v. Mobile America Corp.*,[101] did not involve partial or full payment *by the buyers*,[102] yet the court found that the buyers were buyers in the ordinary course.[103] Still, the case does not resolve whether a valid contract alone is enough to protect the buyer. Although the buyers in *Rex Financial* did not take possession or *themselves* make a payment to the seller, one relevant fact, completely overlooked by the court, is that title to the good had passed.[104] One can only guess whether the court would have felt the same if this fact, which necessarily assumes the identification of the good to the contract, were absent from the transactional picture.

To summarize, judicial opinions and academic literature recognize that there are cases standing for the proposition that contract formation alone is a sufficient prerequisite for buyer status. But when each case is examined, one finds an additional fact or two that makes one suspect that the court is not giving its true thinking or perhaps that the court has yet to focus on what its true thinking really is. Because a pure "contract formation only" case has yet to appear in print, there is simply no way to know whether any court would sanction an approach that defines buyer status solely in terms of "a contract to buy."

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288 N.Y.S.2d at 531. *But see* Rex Fin. Corp. v. Mobil Am. Corp., 119 Ariz. 176, 178, 580 P.2d 8, 10 (Ct. App. 1978) (no downpayment in *Sharp*; trade-in merely act of good faith). It should be noted that although the contract in *Sharp* recited that, in addition to the trade-in, a cash downpayment of $443.00 was made, the downpayment was not in fact made. 56 Misc. 2d at 263, 288 N.Y.S.2d at 527. Because the seller agreed to defer the payment until Mrs. Sharp received an anticipated tax refund, the court did not think that the nonpayment impugned her good faith. *Id.* at 267, 288 N.Y.S.2d at 531-32. Although more facts are needed, one could argue that *Sharp* is not a part payment case but rather one involving full payment. The seller received the car's price (except for the $433.00 due from Mrs. Sharp) from the chattel paper purchaser and Mrs. Sharp quite possibly, lost her defense of failure of consideration. *See* U.C.C. § 9-206(1), which provides:

> Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under . . . [Article 3]. A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement.

U.C.C. § 9-206-1.

101. 119 Ariz. 176, 580 P.2d 8 (Ct. App. 1978). *Rex Financial* was, however, another satellite rights case in which the seller had been paid by the chattel paper purchaser, and the buyers might have lost their personal defenses. *See supra* note 100. Nevertheless, the case has been said to support the view that a buyer is a buyer if there is a valid contract and if the transaction is typical in the seller's business. *See* Note, *A Test and a Proposal*, *supra* note 55, 859-60.

102. 119 Ariz. at 176-77, 580 P.2d at 8-9.

103. *Id.* at 178, 580 P.2d at 10.

104. The contract provided that title passed when the security agreement was signed. *Id.* at 176-77, 580 P.2d at 8-9; *see* U.C.C. § 2-401(1) ("[T]itle to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.").

### C. *The Passage of Title Date*

A requirement that title pass before buyer status arises lies close on the spectrum to a definition of buyer in ordinary course that is grounded on the buyer's possession, but more to the center.[105] The nonleading case of *Integrity Insurance Co. v. Marine Midland Bank-Western*[106] nicely displays the reasoning underlying this position and how acceptance of the position often forces the manipulation of doctrine to serve "the ends of justice."

In *Integrity Insurance Co.* the buyers executed a retail installment contract for the purchase of a mobile home, made a cash downpayment of more than $400,[107] and gave the seller a security interest[108] in the home. Contrary to the contract's recitation that delivery had occurred, the home remained with the seller pending buyers' acquisition of a site on which to install it. Not until after a site was found did the buyers learn that the seller's secured creditor had taken their home.

If the court's rhetoric is believed, then the issue of who had title when the home was seized was decisive of the outcome. The court based its holding on a questionable piggy-backing of Code provisions: "To be a buyer in the ordinary course of business . . . [section 1-201(9)], there must be a sale, which consists in the passing of title from the seller to the buyer for a price . . . [section 2-106(1)]. . . ."[109] Once the court picked the test, the

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105. When the goods are to be shipped to the buyer it would normally be of little consequence whether a court selects a passage of title or possession approach. In either instance, the buyer is probably unprotected until the seller loses possession. *See* U.C.C. §§ 2-401(2) ("[U]nless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods . . . ."); 2-503(2), (3); 2-504. A passage of title approach would be more favorable to a buyer than one requiring possession only if, by agreement, the transfer of title precedes the seller's loss of possession or the delivery of the goods is to occur without the goods being moved. *See* U.C.C. § 2-401(3).

106. 90 Misc. 2d 868, 396 N.Y.S.2d 319 (Sup. Ct. 1977). If frequency of discussion and citation are what make a case a "leading case," then the status of "leading title theory case" belongs to Chrysler Corp. v. Adamatic, Inc., 59 Wis. 2d 219, 208 N.W.2d 97 (1973). *See supra* note 71 and accompanying text. This status, however, may be the result of an erroneous reading of the opinion. *See supra* text accompanying notes 61-70. Two other cases that also may or may not be title theory cases are Thompson v. McMaster (*In re* Fritz-Mair Mfg. Co.), 16 Bankr. 417, 419-20 (Bankr. N.D. Tex. 1982) (unclear from opinion whether title must pass to qualify under § 9-307(1) or whether title's passage only conditions buyer's right to obtain possession of good from seller's bankruptcy trustee) and Levine v. Ficke, 5 U.C.C. Rep. Serv. 1059, 1060 (N.Y. Sup. Ct. 1968) (title passed but unclear whether occurrence of passage is necessary or merely sufficient).

107. Although the contract mentioned a $1400 downpayment the buyers actually parted with less than that. There was a cash payment of $400 plus an undisclosed amount for the cost of installing the unit. 90 Misc. 2d at 869, 396 N.Y.S.2d at 320.

108. Although the result of the case hinged on the buyers' status, the opinion does not illuminate whether they had an interest in the outcome. It was the chattel paper purchaser who claimed that the buyers were buyers in the ordinary course. *See id.* at 869-70, 396 N.Y.S.2d at 320. Unlike the opinion in Chrysler Credit Corp. v. Sharp, 56 Misc. 2d 261, 288 N.Y.S.2d 525 (Sup. Ct. 1968), *see supra* notes 98-99 and accompanying text, there is nothing in *Integrity Insurance Co.* that cautions the reader that the court's analysis rested on the absence of the buyers as claimants.

109. 90 Misc. 2d at 870, 396 N.Y.S.2d at 320. Those courts explicitly rejecting title as a test did so, not because they were troubled with the test's definitional source, but because of the Code's general rejection of title as a means of sorting out respective property interests. *See, e.g.*, General Elec. Credit Corp. v. Gayl (*In re* Darling's Homes, Inc.), 46 Bankr. 370, 377 (Bankr.

court was determined to find that title had passed to the buyers. *Integrity Insurance Co.*, however, fails to articulate *why* title had passed. Because the agreement did not specify when title passed, the question of who had title had to be answered by looking at either section 2-401(2)[110] or section 2-401(3)[111] depending upon whether delivery was to involve moving the home. Unfortunately, the court never specified which subsection applied. Without explanation, the court cryptically reasoned that the seller's continued possession of the home was in reality constructive possession by the buyers because there had been constructive delivery by the seller.[112] The court then cited section 2-308[113] and stated that "delivery took place at the dealer's place of business, where the contract was executed, payment made and the certificate of sale . . . executed and delivered."[114] Forgotten was the seller's installation obligation, which another court in another case thought required the application of section 2-401(2) and the conclusion that title remained with the seller until the actual installation of the home.[115] Although the *Integrity Insurance Co.* opinion is a sloppy one, the court had no apparent doubt about the outcome it wanted and why: "All of [the buyers'] obligations under the contract had been performed."[116]

A passage of title approach, when applied, is not much different from the other solutions to the buyer in ordinary course problem. It is less a satisfying theory of buyer in ordinary course status than it is a vehicle for legitimating an opinion and achieving a desired result. Regardless of

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D. Del. 1985); Wilson v. M & W Gear, 110 Ill. App. 3d 538, 542, 442 N.E.2d 670, 672 (1982); Big Knob Volunteer Fire Co. v. Lowe & Moyer Garage, Inc., 338 Pa. Super. 257, 266, 487 A.2d 953, 958 (1985). For a discussion of the Code's displacement of title location as a relevant inquiry, see *infra* text accompanying notes 216-25.

110. Section 2-401(2) provides in part:

> Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place . . . .

U.C.C. § 2-401(2).

111. Section 2-401(3) provides:

> Unless otherwise explicitly agreed where delivery is to be made without moving the goods,
>
> (a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or
>
> (b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

U.C.C. § 2-401(3).

112. 90 Misc. 2d at 870-71, 396 N.Y.S.2d at 321.

113. Section 2-308 makes the seller's place the place for delivery in the absence of an agreement otherwise. *See* U.C.C. § 2-308.

114. 90 Misc. 2d at 871, 396 N.Y.S.2d at 321. The court's reference to § 2-308 makes it appear that § 2-401(3)(b) was the pertinent passage of title rule, with the result that title passed at the time and place of contracting. *See* U.C.C. § 2-401(3)(b), quoted *supra* note 111. If that were true then there was no reason for the court to indulge in its constructive delivery/constructive possession discussion and the place where payment was made and the certificate of sale delivered was irrelevant.

115. *See* General Elec. Credit Corp. v. Gayl (*In re* Darling's Homes, Inc.), 46 Bankr. 370, 377 (Bankr. D. Del. 1985).

116. 90 Misc. 2d at 871, 396 N.Y.S.2d at 321. This observation is also superfluous. Performance by the buyer of its obligations does not determine the location of title.

whether the result in *Integrity Insurance Co.* is correct, this sort of malleable lawmaking process tends to distort doctrine, making its future uncertain and foreshadowing future distortions to accommodate contextual and factual differences.[117]

### D. *The Identification Date*

Beginning with *Holstein v. Greenwich Yacht Sales, Inc.*,[118] several courts ostensibly have held that one becomes a buyer the moment the good is "identified" to the contract of sale.[119] From the buyer's perspective this solution is the next best thing to a time of contracting approach. Identification under section 2-501 occurs when a particular good is in some way earmarked for a particular buyer. This happens "when the contract is made if it is for the sale of goods already existing and identified"[120] or, if the sale is of future goods, "when [they] are shipped, marked or otherwise designated by the seller as goods to which the contract refers."[121] To the joy of the buyer and the chagrin of the secured party, identification will, therefore, frequently pre-date the passage of title and always pre-date the delivery of the goods to the buyer.[122]

Courts have offered four principal rationales for making identification the event that frees the goods from the secured party's lien. First, identification occurs when the buyer begins to acquire those property sticks which, when bundled together, will eventually signal what is commonly

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117. To appreciate this observation one need only consider the court's effort to distinguish *Integrity Insurance Co.* in Mechanics Nat'l Bank v. Gaucher, 7 Mass. App. Ct. 143, 147-49, 386 N.E.2d 1052, 1056 (1979). The *Gaucher* court did so on the suspect basis that § 2-401(2) applied in *Integrity Insurance Co.* only because "the purchase price ha[d] been paid and the seller [was] holding the goods for the convenience of the buyer." *Id.* at 147, 386 N.E.2d at 1056. On this same point, a recent article suggests that similar concerns had prompted Karl Llewellyn's push for the special merchant rules of Article 2. According to the author, "Llewellyn did not like the judicial torture, manipulation and misconstruction of contractual language or intent to which courts resorted to achieve their desired result. He referred to these exercises as 'covert tools' of intentional and creative misconstruction. . . ." Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve The Good, The True, The Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1169 (1985) (citation omitted).

118. 122 R.I. 211, 404 A.2d 842 (1979).

119. *See, e.g.*, Martin Marietta Corp. v. New Jersey Nat'l Bank, 612 F.2d 745, 749 (3d Cir. 1979) (dictum); General Elec. Credit Corp. v. Gayl (*In re* Darling's Homes, Inc.), 46 Bankr. 370, 378 (Bankr. D. Del. 1985); Big Knob Volunteer Fire Co. v. Lowe & Moyer Garage, Inc., 338 Pa. Super. 257, 267, 487 A.2d 953, 958 (1985); Serra v. Ford Motor Credit Co., 463 A.2d 142, 148 (R.I. 1983).

120. U.C.C § 2-501(1)(a). At least one commentator has shown an appreciation for the circular nature of this definition. *See* Note, *A Test and a Proposal*, *supra* note 55, at 867 n.80.

121. U.C.C. § 2-501(1)(b).

122. The Code's definitional approach to when identification takes place assumes the nonexistence of an explicit agreement contrary to the Code's definition. The parties remain free to establish their own rules. *See* U.C.C. § 2-501(1). The absence of a constraint on definition is also evidenced by the recognition that an identification, once made, is reversible. *See id.* comment 2 ("It is possible, however, for the identification to be tentative or contingent."); General Elec. Credit Corp. v. Gayl (*In re* Darling's Homes, Inc.), 46 Bankr. 370, 380 (Bankr. D. Del. 1985) ("[Seller] had the right to substitute the goods under . . . § 2-501(2)."). Also, identification does not require that the goods be in a deliverable state. *See* U.C.C. § 2-501, comment 4; Holstein v. Greenwich Yacht Sales, Inc., 122 R.I. 211, 215, 404 A.2d 842, 844 (1979).

looked upon as absolute ownership of the goods.[123] Although never clearly articulated in the cases, these sticks presumably are being acquired without the taint of outstanding interests that were not meant to survive full performance of the contract.[124] Second, courts have not been shy about expressing their pro-buyer orientation. By making priority depend upon identification of the goods to the contract, courts naturally foster this one-sided solicitude.[125] Third, some courts have thought that a comparison of section 9-307 and section 2-403 with their statutory antecedents supports the view that the Code was intended to improve the buyer's plight.[126] Finally, there is the undeniable fact that the Code de-emphasizes title.[127] Rather than breathe added life into the doctrine by making title the determinant of buyer status, some courts have relied instead on the concept of identification.[128]

Ignoring for the present the correctness of defining buyer status in terms of identification, one should note that the cases supporting this view are not without their flaws. Probably the most powerful general criticism is that each case lacks a theoretical underpinning. Although courts identify specific reasons for choosing identification as the buyer's safe harbor, these reasons provide less support for this particular solution than they do for the rejection of certain alternative solutions and an end result favorable to the buyer. Another problem with these cases, and one that makes their categorization suspect, is that they leave the legal and business communities in the dark concerning the extent to which the buyer's prepayment matters.[129]

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123. Identification occurs the moment the buyer first acquires "a special property and an insurable interest in goods . . . ." U.C.C. § 2-501(1). From these two sticks flow several property rights. *See, e.g.*, U.C.C. §§ 2-502 (right to goods on seller's insolvency); 2-716(3) (right to seek remedy of replevin); 2-722(a) (right to sue third parties who damage goods).

124. For cases in which this view has surfaced, see Martin Marietta Corp. v. New Jersey Nat'l Bank, 612 F.2d 745, 749 (3d Cir. 1979); Big Knob Volunteer Fire Co. v. Lowe & Moyer Garage, Inc., 338 Pa. Super. 257, 267, 487 A.2d 953, 958 (1985). *But see* Wilson v. M & W Gear, 110 Ill. App. 3d 538, 543, 442 N.E.2d 670, 673 (1982) (using comments to § 2-501 to show relative unimportance of identification and hence its inappropriateness as test for buyer status).

125. *See, e.g.*, Holstein v. Greenwich Yacht Sales, Inc., 122 R.I. 211, 217, 404 A.2d 842, 845 (1979) ("The identification approach requires inventory financiers to become better acquainted with the inventory and marketing practices of their borrowers. The risk of loss in such situations quite properly should be on the lender rather than on the buyer."); *see also supra* note 65.

126. *See, e.g.*, Big Knob Volunteer Fire Co. v. Lowe & Moyer Garage, Inc., 338 Pa. Super. 257, 266-67, 487 A.2d 953, 958 (1985); Holstein v. Greenwich Yacht Sales, Inc., 122 R.I. 211, 216, 404 A.2d 842, 845 (1979). For a comparison of the present statutes with their antecedents, *see infra* notes 161-64 and accompanying text.

127. *See infra* text accompanying notes 216-25.

128. *See, e.g.*, Big Knob Volunteer Fire Co. v. Lowe & Moyer Garage, Inc., 338 Pa. Super. 257, 266, 487 A.2d 953, 958 (1985) ("[T]he Code expressly diminishes the importance of title in ascertaining rights in property . . . .").

129. With the exception of Martin Marietta Corp. v. New Jersey Nat'l Bank, 612 F.2d 745 (3d. Cir. 1979), which is silent regarding payment, each identification case involves a seller who, because of the buyer's payment in cash, paper, or property, has received a portion of or all of the purchase price. *See* General Elec. Credit Corp. v. Gayl (*In re* Darling's Homes, Inc.), 46 Bankr. 370, 373 (Bankr. D. Del. 1985); Big Knob Volunteer Fire Co. v. Lowe & Moyer Garage, Inc., 338 Pa. Super. 257, 261, 487 A.2d 953, 955 (1985); Serra v. Ford Motor Credit Co., 463 A.2d 142, 143 (R.I. 1985).

Several cases hint that it matters a good deal.[130]

## IV. Weaknesses in the Conventional Definitions

As discussed above, the issue of when buyer status attaches has received frequent attention from the courts.[131] Not surprisingly, this attention has resulted in the expression of four divergent views on the issue,[132] a situation that, although unfortunate in itself, is made more troubling by the absence of any attempt to develop a conceptual framework or to articulate a valid policy ground upon which to justify the selection of a particular approach. The next two sections demonstrate that all four solutions must be rejected.[133] Each solution is unacceptable for reasons peculiar to it and for one reason common to all.

### *A. The Contract Date*

Of the four solutions, the one easiest to reject is that which would define buyer status in terms of the contract's formation.[134] Quite clearly one cannot be a buyer absent a contract. Yet a condition necessary to buyer status need not be a sufficient condition. Something more than a contract is needed. Just what more is needed is left for later discussion.[135]

A natural starting point for analyzing the contract formation theory, and one that seemingly lends itself to a time of contracting approach is the Code's definition of "buyer." Section 2-103(1)(a), in not atypical circular fashion, informs us that "a person who buys or *contracts to buy* goods"[136] is a buyer. Thus, the Code apparently recognizes that buyer status attaches

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130. Consider, for example, the following expression of sensitivity to the buyer's predicament in Big Knob Volunteer Fire Co. v. Lowe & Moyer Garage Inc., 338 Pa. Super. 257, 487 A.2d 953 (1985):

> The Volunteer Fire Department is a non-profit organization, the revenues of which are derived mainly from functions to raise money and direct solicitation of donations. After choosing the lowest bidder to supply the fire truck, the Department paid $48,000, in advance, on the total purchase price of some $51,000. This prepayment resulted under the contract in a 5 percent discount on the price. This evidence may indicate limited resources and an attempt to make the best use of those resources by reducing the total outlay for the fire truck.

*Id.* at 271-72, 487 A.2d at 961 (citations omitted). *See also* General Elec. Credit Corp. v. Gayl (*In re* Darling's Homes, Inc.), 46 Bankr. 370, 378 (Bankr. D. Del. 1935) in which the court approved of subjecting the inventory financer "to the risk that a security interest in a dealer's inventory will be defeated by *those who have made payments* on account and don't receive their goods." *Id.* (emphasis added).

131. *See supra* text accompanying notes 55-130.

132. *See supra* text accompanying notes 56-71 (possession date), 72-104 (contract date), 105-17 (passage of title date) & 118-30 (identification date).

133. *See infra* text accompanying notes 134-262.

134. The author of a student Note would take grave exception with the statement in the text. The Note argues that an enforceable contract is all that is needed to cut off a valid security interest. *See* Note, *A Test and a Proposal*, *supra* note 55, at 878. Concerned, however, with the problems the seller's continued possession might cause the secured party following the seller's default, the Note's author would condition the buyer's priority on the existence of records, markings, or labelings which would inform the secured party that the goods have been sold. *Id.* at 876-79.

135. *See infra* text accompanying notes 242-62.

136. U.C.C. § 2-103(1)(a) (emphasis added).

concurrently with contract formation.[137] Apart from theoretical difficulties, serious interpretive problems arise when assigning to this Code section the role of authoritative source for a temporal definition of buyer status.

Article 1, for example, defines the term central to the inquiry: buyer in ordinary course.[138] Several Code articles employ this term.[139] Section 2-103(1)(a), on the other hand, is an Article 2 definition of buyer that except by analogy applies only to Article 2.[140] Absent a legitimate justification for doing so, one should not muster section 2-103(1)(a) into Article 1.[141] Indeed, if the definitional ambiguity of buyer in ordinary course is to be clarified by drawing upon Article 2 definitions, the definition of "sale" in section 2-106(1)[142] is the far more logical candidate for the job. This conclusion is reinforced by the fact that both courts and commentators have succumbed to this temptation.[143]

To say that no compelling definitional basis exists for making the moment of contracting the critical event is not to say that such an approach is erroneous. In assessing the utility of a time of contracting definition, turn again to the position taken by one Illinois appellate court that "the focus in a case such as this should be on the 'ordinary course of business' requirement of section 9-307."[144] In short, this court seemed to require for the buyer's protection no more than a typical contract in an ordinary business transaction. The assumption underlying this position is that it best effectuates the legitimate expectations of the buyer.[145]

Given this assumption, it is reasonable to ask just what are the buyer's

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137. Moreover, U.C.C. § 2-106(1) defines "present sale" as a "sale which is accomplished by the making of the contract." One should, however, be cautious of overemphasizing this definition. Because a "sale" takes place when title passes from the seller to the buyer, *id.*, and because title can pass at the time of contracting, *see* U.C.C. § 2-401(3)(b), the definition may simply mean that a present sale requires the concurrence of *two* events—formation of a contract and passage of title.

138. *See supra* text accompanying note 19.

139. *See supra* notes 13, 24.

140. Indeed, by use of the phrase "unless the context otherwise requires," the preamble to U.C.C. § 2-103(1) invites, on occasion, disregard of that section's definitions even if the problem at hand is solely within the confines of Article 2.

141. For a similar thought, see Jackson & Peters, *Quest for Uncertainty: A Proposal for Flexible Resolution of Inherent Conflicts Between Article 2 and Article 9 of the Uniform Commercial Code*, 87 YALE L.J. 907, 952 n.162 ("It is not an easy jump, however, to conclude that the definition of the term 'buyer' should influence the definition of the separate term 'buyer in ordinary course.' "). In this case, a general reluctance to indulge in the transportation of definitions from one article to another is reinforced by the fact that the term "contracts to buy" is absent from the definition in § 1-201(9) of buyer in ordinary course; the section refers only to a person who buys. This point was noted by the New York Law Revision Commission, 1 N.Y.L. REVISION COMM'N STUDY OF THE UNIFORM COMMERCIAL CODE 231 (1955), and in Note, *Buyer-Secured Party Conflict*, *supra* note 55, at 675.

142. The word "sale" does appear in U.C.C. § 1-201(9). Because a sale presupposes a transfer of title, merely contracting to buy will not necessarily result in a sale.

143. *See supra* notes 106-09 and accompanying text; *see also infra* note 209.

144. Herman v. First Farmers State Bank, 73 Ill. App.3d 475, 479, 392 N.E.2d 344, 346 (1979). For a discussion of *Herman*, see *supra* text accompanying notes 75-79.

145. *See* Note, *A Test and a Proposal*, *supra* note 55, at 860 ("The determination of buyer in ordinary course status upon the initial contract formation date respects the legitimate transactional interest that the buyer has acquired in the goods, whether or not identified to the contract.").

expectations. Since the buyer can expect no more than the seller's performance of its contractual obligations, one should consider, for a moment, these obligations. The seller's basic obligation is to tender conforming goods when and where the contract requires that they be tendered.[146] Moreover, the buyer has every reason to believe that this expectation will remain unimpaired pending the agreed upon time for performance.[147] To preserve these twin expectations, it is hardly necessary to confer buyer status at the time of contract formation regardless of the contract's typicality. This would be out of step with other Code provisions and would give the security of purchase ideal a bit too much security.

Aside from the need for the goods to conform to the warranties of quality that have become part of the contract,[148] one should note that the drafters of the Code also made sure that, unless expressly excluded, every contract will carry with it a basic title warranty that title, *when conveyed*, will be good and that the goods, *when delivered*, will be free from any security interest.[149] This Code provision is intended to mirror what is presumably every buyer's basic title expectation: When the deal is done and the goods are in hand, the goods are free from unbargained-for claims and encumbrances.[150] While it does not follow from this that buyer status must await delivery, the provision does detract from the persuasiveness of an expectation justification for a contract date definition.[151]

Maintenance of the Code's structural harmony suggests further rea-

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146. U.C.C. § 2-301 ("The obligation of the seller is to transfer and deliver . . . in accordance with the contract.").

147. U.C.C. § 2-609(1) ("A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired."). If this expectation is impaired, § 2-609(1) gives the aggrieved party the right to demand adequate assurance of future performance and, until assurances are received, to suspend performance of the contract. *Id. See generally* Leary & Frisch, *Is Revision Due for Article 2?*, 31 VILL. L. REV. 399, 463, 463 & nn. 237-38 (1986).

148. The Code contains several sections which bear upon the existence and scope of warranties of quality. *See* U.C.C. §§ 2-313 (creation of express warranties); 2-314 (creation of implied warranty of merchantability); 2-315 (creation of implied warranty of fitness for particular purpose); 2-316 (exclusion or modification of warranties); 2-317 (cumulation and conflict of warranties); 2-318 (third party beneficiaries of warranties).

149. U.C.C. § 2-312(1). This warranty is not designated as one of the Code's implied warranties. The reason, we are told, is to prevent its exclusion by a general disclaimer of implied warranties under § 2-316(3). U.C.C. § 2-312 comment 6. If the warranty is to be excluded by contract the exclusion must be by specific language. U.C.C. § 2-312(2).

150. As Professor Nordstrom observed:

> The Code does not contain a seller's warranty that the goods are free from a security interest while they are in the possession of the seller—only that the goods are *delivered* free from a security interest. Thus, if there are some security interests which are terminated in the goods at the time of the delivery, there would be no default in the warranty of title even though the goods were subject to a security interest while they were held by the seller.

R. NORDSTROM, LAW OF SALES 187-88 (1970).

151. If the buyer has reasonable grounds to doubt the seller's future ability to deliver good title, the Code sufficiently protects the buyer's expectation by giving the buyer the right to demand adequate assurances from the seller and, in the interim, to suspend its own performance. *See* U.C.C. § 2-609; *see also* Clem Perrin Marine Towing v. Panama Canal Co., 730 F.2d 186, 190-91 (5th Cir. 1984) (doubt as to seller's future ability to deliver good title justifies demand for adequate assurance and, if not forthcoming, suspension of performance is justified).

sons for refusing to accord buyer status at time of contracting.[152] First, the Code explicitly states that "[g]oods must be both existing and identified before any interest in them can pass."[153] Thus, to say that one becomes a buyer prior to this time means that certain outstanding interests in unidentified goods can be terminated in favor of one who lacks an interest in particular goods. It is incentive enough to demand more than just a contract in order to avoid this sort of nonsensical doctrine.[154]

Second, time of contracting as a definition would, in some cases, foster a degree of discord between the creation of an interest under the Code and the severance of that interest. Suppose, for example, that the buyer wishes to finance a purchase through a third party lender who intends to secure its advance by taking a security interest in the purchased item. Before the security interest can attach, the buyer must acquire "rights in the collateral."[155] Although the meaning of this phrase is notably obscure,[156] the phrase clearly contemplates that the buyer must have some interest in the collateral.[157] It would be paradoxical to find a sufficient quantum of rights in the collateral for purposes of attachment, yet, at the same time, find that the buyer has no interest in the collateral under Article 2.[158] Having concluded that the buyer must, at the very least, have an interest in the goods before the lender's security interest can attach, one queries whether it is theoretically sound to conclude in turn that the buyer, without an interest, can successfully cause the elimination of certain third party interests in the goods. More to the point, a period of time would exist during which the buyer's priority is not shared by the lender. This result would be strikingly at odds with the Code's basic conveyancing principle that a transferee receives no less than what the transferor had and intended

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152. As I argued earlier:

> [T]he Code is not an ad hoc collection of commercial statutes, each operating within its own sphere of influence, but is rather a system of interlocking parts woven together by strands of common policy concerns. It is, therefore, highly desirable that a construction of [one] section . . . should be congruent with perceived policy determinations evidenced by other Code sections.

Frisch, *U.C.C. Section 9-315: A Historical and Modern Perspective*, 70 MINN. L. REV. 1, 42 (1985).

153. U.C.C. § 2-105(2). In this respect Article 2 is consistent with its statutory precursor, the Uniform Sales Act. The latter provided that "no property passes until the goods are ascertained." UNIFORM SALES ACT § 17, 1 U.L.A. 309 (1950) (act withdrawn 1962).

154. If the problem of ostensible ownership arising from the seller's continued possession, *see infra* text accompanying notes 171-207, were a concern, the absence of identifiable goods earmarked for future delivery to the buyer would certainly exacerbate the problem. *See generally* Wilson v. M & W Gear, 110 Ill. App.3d 538, 442 N.E.2d 670 (1982) (Heiple, J., dissenting) (secured party on repossession would have no way of ascertaining existence of claims to particular item).

155. U.C.C. § 9-203(1)(c).

156. Although U.C.C. § 1-201(36) states that "rights" include remedies, the Code is silent on the meaning of the phrase "rights in the collateral." The drafters were of the opinion that its meaning should be left for the courts to work out on a case-by-case basis. *See* U.C.C. § 9-204 app. I (Reasons for 1972 Change).

157. *See, e.g.*, Mother Lode Bank v. GMAC, 46 Cal. App. 3d 807, 814, 120 Cal. Rptr. 429, 433 (1975) (seller's possession of collateral does not give seller rights); Manger v. Davis, 619 P.2d 687, 680 (Utah 1980) (same).

158. At least one commentator has noted "the anomaly inherent in extending rights to buyers under Article 9 in goods in which they have *no* rights under Article 2." Smith, *U.C.C. Survey: Secured Transactions*, 39 BUS. LAW. 1395, 1417-18 (1984).

to convey.[159] At a minimum, a secured party should succeed to whatever priority rights are enjoyed by its debtor. But if the buyer has yet to obtain an Article 2 interest in the collateral, this logical result is possible only at the expense of logical reasoning.[160]

The only justification which surfaces for making buyer status coincident at all times with the contract date is that this definition affords maximum protection to the buyer. But affording maximum protection without a reason is no justification. Needless to say, such a solution is unsatisfactory when, as here, it is decidedly out of step with other Code provisions.

### *B. The Possession Date*

If one rejects a contract formation definition of buyer status because it is prematurely solicitous of the buyer's interests, perhaps the other extreme—extending protection only when the seller has delivered possession—is acceptable. Although historical support exists for this position, the support cuts both ways and thus serves as argumentative fodder for both proponents and opponents of a possession rule.

Comment 9 to section 1-201(9) indicates that the present definition of buyer in ordinary course is predicated upon Section 1 of the Uniform Trust Receipts Act's definition of "buyer in ordinary course of trade," which explicitly required a delivery.[161] Delivery as a watershed event evidently was also an attractive idea to at least some of the drafters of the Code. The Code initially made delivery a part of buying in ordinary course. Before the definition was moved to Article 1, section 2-403(4) of the Code's 1950 draft defined buyer in ordinary course as one "to whom goods are shipped pursuant to a pre-existing contract or one to whom they are delivered on credit."[162]

This earlier version of the Code suggests that the drafters intended to omit a delivery requirement from section 1-201(9). But did they omit that

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159. This is no more than a corollary of the derivation principle, *see supra* note 4 and accompanying text, and has been variously referred to as the "shelter" or "umbrella" principle. *See* Dolan, *supra* note 6, at 812-13. For example, Article 2's shelter principle is embodied in U.C.C. § 2-403(1) which begins with the statement that "[a] purchaser of goods acquires all title which his transferor had . . . ."

160. It has been assumed without question that the foundation for Article 9 "rights" is an Article 2 "interest." *See, e.g.*, B. CLARK, *supra* note 51, § 2.4, at 2-14 ("To a large extent, the secured creditor must turn to U.C.C. Article 2 to measure the debtor's 'rights' to goods used as collateral."); Smith, *supra* note 158; *see also infra* notes 201-06 and accompanying text.

161. The Uniform Trust Receipts Act codified the pre-Code personal property security device commonly referred to as the "trust receipt." Trust receipt financing was used primarily to finance a dealer's acquisition of inventory and like the Code, the Act recognized the need for certain buyers to take free of the lender's lien. Section 9-2 of the act gave this protection to a buyer in the ordinary course of trade which meant "a person to whom goods are *sold and delivered* for new value and who acts in good faith and without actual knowledge of any limitation on the trustee's liberty of sale . . . ." UNIF. TRUST RECEIPTS ACT § 1, 9C U.L.A. 231 (1957) (emphasis added). Also worthy of attention is § 25 of the *Uniform Sales Act*, a direct antecedent of U.C.C. § 2-403(2). Unlike § 2-403(2), however, § 25 did make delivery to the buyer an explicit predicate for protection. For the full text of § 25, see *supra* note 11.

162. U.C.C. § 2-403(4) (Proposed Final Draft 1950). The drafters gave no reason for their subsequent redrafting of the definition.

requirement because they intended to change prior law[163] or because they thought the obvious needed no explicit recognition?[164] Notwithstanding assertions to the contrary the former conclusion rests on firmer ground. Significantly, a number of Code sections specifically depend for their operation on a buyer who takes delivery.[165] If delivery is an integral part of buying why then the coupling of terms in these sections? Since it is doubtful that the drafters sought to be redundant, a reasonable assumption is that they never intended buying to depend upon a delivery or change of possession.[166]

Another issue concerning the drafters' intent is that an explanation is needed for the perplexing reference in section 1-201(9) to "receiving goods or documents of title under a pre-existing contract for sale . . . ." This language possibly means that the buyer must receive delivery of the goods or at least receive delivery in those situations involving a "pre-existing contract for sale."[167] This reading is troubling, however, because it ignores both the language and the substance of the remainder of the sentence, which provides that buying "does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt."[168] This last clause of the definition has a two-fold purpose: to set forth what buying does include and what it does not include. Because the concept *includes* the "receiving goods" situation, the clear implication is that other situations—some not involving receipt—are also included. But if that is true, then why specify only one situation for statutory reference? The answer may lie in that same sentence's exclusion of transfers "in total or partial satisfaction of a money debt." Perhaps, out of an abundance of caution, the drafters had hoped to make clear that the future delivery of goods pursuant to both a prior-in-time contract and payment by the buyer is not within the scope of the exclusion.[169] Viewed in this light, the provision means only that the

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163. For the view that the change manifested the belief that buyer protection need not await delivery, see 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 26.6, at 696 (1965); Warren, *supra* note 6, at 473 n.23; 1 N.Y.L. REVISION COMM'N STUDY OF THE UNIFORM COMMERCIAL CODE 232 (1955).

164. Those who believe that the history of the Code does not suggest a deliberate modification of prior law include Smith, *Title and the Right to Possession Under the Uniform Commercial Code*, 10 B.C. INDUS. & COM. L. REV. 39, 61 (1968); Note, *Is the Good Faith Purchaser Always Right?*, *supra* note 58, at 137. Justice Robert Braucher had the vague recollection that the drafters, led by Karl Llewellyn, thought it clear that buying includes delivery and that on this point the text was explicit enough. *See* Letter from Robert Braucher to Homer Kripke (Jan. 15, 1978) (reproduced in part in D. BAIRD & T. JACKSON, *supra* note 4, at 767).

165. *See, e.g.*, U.C.C. §§ 7-205, 7-504(2)(b), 9-301(1)(c).

166. This same thought has been expressed by others. *See, e.g.*, Dolan, *The Uniform Commercial Code and the Concept of Possession in the Marketing and Financing of Goods*, 56 TEX. L. REV. 1147, 1188 (1978); Jackson & Peters, *supra* note 141, at 950; Leary & Sperling, *supra* note 22, at 80-81.

167. Jackson & Kronman, *supra* note 41, at 23, 24 n.96 ("the 'receiving goods' language might suggest that delivery *is* required in the special situation involving a 'pre-existing contract for sale.' ").

168. U.C.C. § 1-201(9).

169. Commenting on the "receiving goods" language, the New York Law Revision Commission had this to say:

> The theory seems to be that where there is a previously made bilateral contract for the purchase, the buyer's obligation, while it is given in exchange for the seller's promise to sells [sic] and deliver, and not for the goods, [or] documents . . . becomes referable

reason for the exclusion in section 1-201(9) does not pertain when the goods transferred and the obligation satisfied are transactionally inseparable.[170]

Despite the fact that nothing in the relevant Code sections or their history compels the choice of a possession-based definition, some commentators argue strenuously for its acceptance.[171] The policy-based talisman for their position is the now venerable doctrine of ostensible or, as it is sometimes called, reputed ownership. This doctrine, with its genesis in the celebrated *Twyne's Case*,[172] is premised on the simple idea that third parties rely on a person's possession of property as a signal of ownership.[173] Because courts have sought to maintain the accuracy of this signal, they have viewed as fraudulent any separation of ownership and possession,

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to the latter within the policy of the value requirement for good faith purchasers without notice when the goods, [or] documents . . . are delivered.

1 N.Y.L. REVISION COMM'N STUDY OF THE UNIFORM COMMERCIAL CODE 235 (1955).

170. Because of their nature, the three transactions excluded by the last sentence of § 1-201(9) have in common the potential for an inequality of value flow. That is, what the seller receives is likely to be worth considerably less than what is sold. *See* Leary & Sperling, *supra* note 22, at 65 ("[T]ransactions entered into under economic pressure, as in the case of sales in bulk to one who buys in bulk regularly by one who does not customarily so sell, or exchange of goods for release of debt, or the giving of security for money borrowed, usually go at a reduced price."). This risk is not usually present when the components of the exchange are simultaneously agreed upon.

171. *See, e.g.*, Baird & Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175, 210-12 (1983); Note, *Is The Good Faith Purchaser Always Right?*, *supra* note 58, at 153-57.

A related but conceptually distinct question is whether § 9-307(1) should protect a buyer when the seller's secured party retains possession. The seminal case, Tanbro Fabrics Corp. v. Deering Milliken, Inc., 39 N.Y.2d 632, 350 N.E.2d 590, 385 N.Y.S.2d 260 (1976), held that it does. *Id.* at 636-37, 350 N.E.2d at 592-93, 385 N.Y.S.2d at 262. For a sampling of academic views on this question, see Birnbaum, *Section 9-307(1) of the Uniform Commercial Code Versus Possessory Security Interests—A Reply to Professor Homer Kripke*, 33 BUS. LAW. 2607, 2609 (1978) (section 9-307(1) should protect buyer regardless of possessor's identity); Dolan, *supra* note 166, at 1189 (secured party in possession should always prevail); Gottlieb, *Section 9-307(1) and Tanbro Fabrics: A Further Response*, 33 BUS. LAW. 2611 (1978) (§ 9-307(1) should protect buyer when secured party has possession); Kreindler, *The Uniform Commercial Code and Priority Rights Between the Seller in Possession and a Good Faith Third- Party Purchaser*, 82 COM. L.J. 86, 89 (1977) (secured party in possession should always prevail); Kripke, *Should Section 9-307(1) of the Uniform Commercial Code Apply Against a Secured Party in Possession?*, 33 BUS. LAW. 153, 156 (1977) (secured party in possession should always prevail). The important point is that the arguments supporting the *Tanbro* holding do not by their own force pertain to the need for change of possession in *all* cases. To say that a secured party in possession is super-perfected, and hence § 9-307(1) is inapplicable, is not to say that buying requires possession when § 9-307(1) is applicable.

172. 76 Eng. Rep. 809 (Star Chamber 1601). In *Twyne's Case*, the court applied the then recently enacted Statute of Elizabeth, 13 Eliz. 13 c.5 (1570), to a transfer of goods by a debtor named Pierce to a creditor named Twyne to satisfy a preexisting debt. 76 Eng. Rep. at 810-11. Because the goods never left the possession or control of Pierce and the transfer was, therefore, secret, the court held that the transaction was void as to Pierce's other creditors and that the transfer justified a criminal action for fraud against the transferee Twyne. *Id.* at 813-14. From this case comes the often stated principle of common law that a seller's continued possession of sold goods is fraudulent and that the sale is invalid as to creditors and purchasers. *See, e.g.*, Ryall v. Rowles, 27 Eng. Rep. 1074, 1081 (1749-50); Sturtevant & Keep v. Ballard, 9 Johns. 336, 339-40 (N.Y. 1811).

173. *See, e.g.*, Martin v. Mathiot, 14 Serg. & Rawle 214, 216 (Pa. 1826) ("It is a rule of general policy, which declares possession to be the evidence of property, and the presumption is, that every man is trusted according to the property in his possession.").

with the result that the ostensible or apparent owner of the property has been treated as the true and exclusive owner.[174]

It is not difficult to see how the issue of when one qualifies as a buyer contains within it the seed of deceptive appearances. Whatever interest is received by the buyer prior to a change of possession will, lacking notoriety, be ascertainable only from the seller and occasionally from business records within the seller's control. Because the seller cannot be trusted to disclose this information to affected third parties,[175] the concern is that the stage is now set not only for deliberate deception but also for the innocent misleading of those foolish enough not to solicit this information from an honest seller.[176] Referring in particular to section 9-307(1), commentators have argued that those secured parties who conduct spot inspections of their debtor's inventory should be able to rely on the presence of an item within that inventory as an assurance that the lien still exists and that the original priority of the lien continues.[177]

The validity of the view that our legal system should continue to give primacy to possession, and its natural corollary that buyers must take possession to enjoy the Code's protection, can be tested on two quite different levels: the empirical and the doctrinal. The empirical correctness of the view depends, in large measure, on whether the underlying presumption of reliance on possession, which is at the core of *Twyne's Case* and the doctrine of ostensible ownership, is in touch with the realities of modern day commercial life. There is evidence that it is not.[178] Powerful empirical observation supports the conclusion that factors such as financial statements, earnings history, commercial credit reports, and credit interchange bureau reports, rather than the possession of specific goods, are the subject of scrutiny and source of reliance when decisions are made whether to extend credit or make a loan.[179] Also, it is unlikely the creditor's behavior

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174. One source of conflict that surfaced among American jurisdictions was whether the seller's possession foreclosed inquiry into the reason for that possession. According to some courts, the presumption of fraud was irrebuttable, *see, e.g.*, Southern Cal. Collection Co. v. Napkie, 106 Cal. App. 2d 565, 569, 235 P.2d 434, 437 (1951); Enterprise Wall Paper Co. v. Rantoul Co., 260 Pa. 540, 543, 103 A. 923, 924 (1918), whereas others considered the presumption rebuttable, *see, e.g.*, Wooley v. Crescent Auto. Co., 83 N.J.L. 244, 246, 83 A. 876, 877 (1912). For further discussion of this and other aspects of the ostensible ownership doctrine, see 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES §§ 344-363 (rev. ed. 1940).

175. This cynicism is perhaps unfortunate but, no doubt, often justified. *See* Baird & Jackson, *supra* note 171, at 179 ("[B]ecause of the possibility of debtor misbehavior, it is undesirable to rely on the debtor for information about claims to his own assets.").

176. *See* Dolan, *supra* note 6, at 817 ("The doctrine originated to counteract deliberate deception of creditors but has been extended to situations where specific fraudulent intent is absent").

177. *See, e.g.*, Baird and Jackson, *supra* note 171, at 210-12.

178. In recent years, scholars have frequently criticized the doctrine of ostensible ownership as being out-of-date. *See, e.g.*, 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 15.1, at 463-64 (1965); Gordon, *supra* note 40, at 576-81; Helman, *Ostensible Ownership and the Uniform Commercial Code*, 83 COM. L.J. 25, 32 (1978); Phillips, *Flawed Perfection: From Possession to Filing Under Article 9* (pt. 1), 59 B.U.L. REV. 1, 35-41 (1979); Note, *The Uniform Commercial Code and an Insolvent Seller's Possession of Goods Sold*, 104 U. PA. L. REV. 91, 91-93 (1955).

179. Summarizing what is thought to be prevailing business practices, Professor Gordon's comments are typical of those authors who insist that legal rules premised on the importance of possession are inconsistent with what people actually do. He insists that today's creditor

will change merely because the transaction involves the acquisition of a security interest.[180] Whatever information is needed with respect to the debtor's assets will come, in most cases, from what is written and not from what is seen during an on-site examination of the debtor's premises.[181]

It is also unlikely that creditors, following the initial extension of credit, will be heavily influenced by possessory evidence of ownership when they make decisions to advance additional credit or to press for payment.[182] Even if the creditor were to visit the debtor's place of business, the information the creditor would gain from "looking around" would be a far cry from the accurate information needed to evaluate the debtor's current state of financial health.[183] Moreover, if the creditor is concerned with inventory—what a buyer in the ordinary course buys—its ephemeral presence will exacerbate the unreliability of whatever the creditor supposedly learned from the debtor's possession.[184]

While, as a matter of general business practices, there seems to be little need for an absolute requirement that a buyer "cure" the ostensible ownership problem (there is no real problem) before being able to assert priority over other parties, there are strong doctrinal reasons for rejecting

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> seldom counts or inspects the property in the debtor's possession before he gives credit. Credit is usually given on the strength of the debtor's financial statements, particularly his profit and loss statement (indicating the debtor's potential to pay the debt from earnings). The creditor also looks at the current ratio and net asset position as shown on the balance sheet to satisfy himself that assets will be available to meet his claims if the seller suffers reverses. In addition, a creditor relies on information from other creditors and from credit agencies as to how the debtor meets his obligations.

Gordon, *supra* note 40, at 577-78.

180. There is even the real possibility that the perceived value of a security interest to a creditor lies not in the right to liquidate specific collateral upon default but in the security interest's tendency to prompt voluntary repayment and make the acquisition of further debt more difficult. *See* N. JACOBY & R. SAULNIER, TERM LENDING TO BUSINESS 80-81 (1942).

181. Although the case against the doctrine of ostensible ownership "seems incontrovertible—business people look to written, not possessory evidence of ownership," Phillips, *supra* note 178, at 35, the discussion in the text has ignored the argument that even if creditors do not themselves check the debtor's possessions, they often rely on auditors who do check. *See* Baird & Jackson, *supra* note 171, at 184 n.32. Addressing this contention, Professor Phillips argues convincingly that available evidence shows that the vast majority of creditors rely on unaudited financial statements that are not normally based on a physical inventory. As a result, whatever a visit to the debtor's plant discloses to the creditor or any third party will inevitably deviate from what a *formal* audit of inventory, equipment, and commercial paper would indicate. *See* Phillips, *supra* note 178, at 37-38. Admittedly there will be cases in which a creditor does rely on possession of specific property. But legal rules should assume the common, not the exceptional, case. For this reason, "law premised on a behavioral model that assumes reliance upon the debtor's possession of certain assets would mislead that greater number of creditors who do not observe and then tally the debtor's possession." *Id.* at 37.

182. What matters to creditors are external indicators of financial distress. These indicators include the creation of security interests, the filing of lawsuits against the debtor, and a drop in credit rating. *See* Gordon, *supra* note 40, at 578 n.55; Note, *supra* note 178, at 92.

183. *See supra* note 181.

184. Referring to an inventory secured party, Professor Dolan has articulated the inherent unreliability of even a formal inventory count:

> The holder of a security interest in inventory cannot long rely on a debtor's possession because the debtor may soon sell the collateral or have sold it already. Reliance on a debtor's possession of inventory is always precarious. An inventory check on Monday will not protect against sales on Tuesday . . . .

Dolan, *supra* note 166, at 1158-59.

possession as the *sine qua non* of buying. First, the Code's drafters were aware of and did respond to *Twyne's Case* and its common law and statutory progeny.[185] The seller's possession of sold goods is the subject of section 2-402(2).[186] This section takes an approach that can almost be described as a nonapproach. The section's basic design is to preserve for non-Code law the resolution of the rights of the seller's creditors in sold but retained goods.[187] By employing existing law as the starting point, the Code leaves intact, in each jurisdiction, the "*Twyne* rule" in whatever form it exists at present. The section does not, however, incorporate law external to the Code in one situation: creditors have no right to void as fraudulent the "retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification."[188]

Section 2-402(2) implicitly recognizes that rights in the goods, superior to those obtainable by the seller's creditors, begin to flow to the buyer prior to delivery.[189] If this were otherwise, there would be no need to give explicit approval of the use of a state's *Twyne* rule to upset the sale. Also, the exception would not make sense. Why bother to have a rule that it is not fraudulent under certain circumstances to leave goods with the seller unless an interest has already been obtained that will have priority over the later claims of the seller's creditors?[190]

Moreover, the Code's definition of "creditor" encompasses a secured creditor.[191] Although section 2-402(3)(a) states that the section was not meant to impair the rights of secured creditors under Article 9, it does not preclude the expansion of those rights.[192] As Professors Jackson and Kronman cogently argue, this might be the case if one accepts that section

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185. In addition to the impact of *Twyne's Case* on the common law, the vast majority of states enacted statutes that, to varying degrees, responded to the perceived evils engendered by the seller's continued possession of goods sold. *See generally* 2 S. WILLISTON, SALES §§ 349-404 (rev. ed. 1948).

186. Section 2-402(1) will be the subject of later discussion. *See infra* note 261.

187. Subsection (2) of § 2-402 provides:

> A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale . . . is not fraudulent.

U.C.C. § 2-402(2).

188. *Id.*

189. What is implicit in § 2-402(2) is explicit in § 2-402(1). Subsection (1) quite clearly subordinates the rights of some creditors of the seller to certain remedial rights of certain buyers. *See infra* note 261.

190. Professor Dolan takes this analysis a step further. He argues that because of § 2-402(2) "creditors must assume that merchant sellers—the sellers to whom section 9-307(1), the Article 9 buyer in ordinary course rule applies—may retain possession of sold goods for a commercially reasonable time." Dolan, *supra* note 166, at 1156. Hence, the subsection gives fair warning to creditors that reliance on the seller's possession of goods is, at best, risky business.

191. *See* U.C.C. § 1-201(12) (" 'Creditor' includes . . . a secured creditor . . . .").

192. U.C.C. § 2-402(3)(a) provides: "Nothing in this Article shall be deemed to impair the rights of creditors of the seller (a) under the provisions of the Article on Secured Transactions (Article 9) . . . ."

9-307(1) and section 2-402 depend upon one another.[193] What one witnesses is the less than novel phenomenon that a priority previously obtained can be lost.[194] The buyer is, at first, given priority under section 9-307(1). But the goods remain with the seller, and the possibility exists that someone, including the secured party, will be misled by the seller's possession. At this point in the transaction, and not before, the doctrine of ostensible ownership plays its part.[195] If the "except" clause in section 2-402(2) does not apply and if the seller's possession is fraudulent under applicable state law then the buyer's priority under section 9-307(1) will be lost and the secured party will once again enjoy its original priority.[196] The point is not that recognition of the buyer's secret interest does not involve a certain amount of risk for uninformed third parties. Rather, the argument is that whatever risks do exist are easily minimized; indeed, the risks seem to be ones that the drafters in other situations thought acceptable.

Article 9, for example, which does much to reduce the uncertainty of property interests, leaves secret interests intact and enforceable in a variety of cases.[197] Admittedly, most of these cases result from what the drafters no

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193. Of the opinion that buyer status occurs when title passes, Jackson and Kronman note the absurdity of a system which would permit general creditors to win by voiding the sale under § 2-402(2) and non-Code law, but preclude secured parties from doing the same. Thus,

> [t]he assumption that a person who takes an Article 9 security interest should not be left in a worse position than if he had taken no Article 9 security interest at all, suggests that § 9-307(1) cannot be read to insulate a buyer who leaves goods in the possession of his seller from attack under § 2-402(2).

Jackson & Kronman, *supra* note 41, at 25.

194. Article 9 provides for a turnabout of priorities in several instances. Suppose, for example, that a bona fide purchaser buys equipment subject to a perfected security interest immediately following the equipment's removal from State A to State B. Absent a timely refiling by the secured party in State B, the secured party's initial priority over the buyer will be lost. *See* U.C.C. § 9-103(1)(d)(ii); *see also* U.C.C. § 9-403(2) (change of priorities possible if continuation statement not timely filed).

195. The principle at work is not, as Professor Dolan reasons, that the buyer takes less than the seller had to give, *see* Dolan, *supra* note 6, at 817, but rather it is that the buyer forfeits what was actually received.

196. *See* Jackson & Kronman, *supra* note 41, at 25 ("[B]y acquiescing in [seller's] retention of possession, [buyer] may be deemed to have relinquished any 'priority' claim it might otherwise have had under § 9-307(1)."). Section 2-402 is not the only road to the buyer's loss of priority. When the purchased good, left with the seller, is subsequently bought by another party, U.C.C. § 2-403(2) may work to divest the first buyer of its interest in the good. *See, e.g.*, Metalworking Mach. Co. v. Fabco, Inc., 17 Ohio App. 3d 91, 94, 477 N.E.2d 634, 638 (1984). Moreover, U.C.C. § 1-103 offers courts the opportunity to fill whatever gaps are perceived to exist in §§ 2-402(2) and 2-403(2) by drawing upon non-Code law, particularly the malleable doctrine of equitable estoppel. An often quoted formulation of this doctrine is the following:

> Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, or of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy.

3 J. POMEROY, EQUITY JURISDICTION § 804, at 189 (5th ed. 1941).

197. *See, e.g.*, U.C.C. §§ 1-201(37) (true lease not subject to notice provisions of Article 9); 9-302(1)(d) (purchase money security interest in consumer goods can usually be perfected without filing or possession); 9-304(4), (5) (certain security interests can be perfected for 21 days without filing or possession); 9-306(2) (in many instances security interest will survive

doubt perceived as pragmatic compromise. But the cases do prove a willingness to tolerate misleading appearances in the "right" situations. It is, therefore, no solution to the problem of buyer status to say simply that the buyer should be prevented from attaining priority because of the troublesome problems its secret interest may cause. The inquiry is whether this is another proper situation for tolerating these problems.

Consider once again the plight of the retail financer who directly or indirectly finances the buyer's purchase.[198] Typically, the financer demands and expects to receive a security interest in the item that is effective against third parties, including an earlier secured party with an interest in the seller's inventory. This should be easily attained if the financer complies with Article 9's attachment requirements[199] and the sale goes according to plan. But it is precisely because not all transactions go according to plan that a security interest is needed. Since things can go awry at any time, the financer is necessarily interested in obtaining a lien and priority at the moment the advance is made, which, quite frequently, predates the buyer's possession of the goods. When this is the case, the financer's willingness to participate will depend on the answers to two questions. First, will the buyer have "rights in the collateral"[200] while the goods are still with the seller? Second, if the security interest can attach at that time, what priority will that interest have relative to others?

To answer the first question one need only look at the flow of property interests from seller to buyer that can pass irrespective of the physical location of the goods. These interests include a special property interest[201] and insurable interest,[202] title,[203] and the right to immediate possession.[204] Surely, the existance of these rights must be sufficient to support an enforceable security interest.[205] With the seller's bundle of rights stripped

collateral's transfer to third party); 9-402(7) (security interest in collateral acquired within four months following debtor's change of name will be perfected). *See generally* McLaughlin, *"Seek But You May Not Find": Non-UCC Recorded, Unrecorded and Hidden Security Interests Under Article 9 of the Uniform Commercial Code*, 53 FORDHAM L. REV. 953 (1985).

198. *See supra* text accompanying notes 46-54.

199. *See* U.C.C. § 9-203.

200. Before the financer's security interest can attach, the buyer must have "rights" in the good. *See id.* § 9-203(1)(c).

201. *See id.* § 2-401(1).

202. *See id.* § 2-501(1).

203. *See id.* § 2-401(3).

204. *See id.* § 2-716(3).

205. The certitude of the statement in the text belies what is, in fact, a point of contention among courts. Some courts have reached a conclusion similar to that in the text, *see, e.g., In re* Pelletier, 5 U.C.C. Rep. Serv. (Callaghan) 327, 337 (D. Me. 1968); Rex Fin. Corp. v. Mobile Am. Corp., 119 Ariz. 176, 177-78, 580 P.2d 8, 9-10 (Ct. App. 1978); International Harvester Credit Corp. v. Associates Fin. Servs. Co., Inc., 133 Ga. App. 488, 492-94, 211 S.E.2d 430, 433-34 (1974), while some courts have not. *See, e.g., In re* Dennis Mitchell Indus., Inc., 419 F.2d 349, 356-58 (3rd Cir. 1969); Galleon Indus., Inc. v. Lewyn Mach. Co., 50 Ala. App. 334, 338-39, 279 So. 2d 137, 141, *cert. denied*, 291 Ala. 779, 279 So. 2d 142 (1973); First Nat'l Bank & Trust Co. v. Smithloff, 119 Ga. App. 284, 288-89, 167 S.E.2d 190, 195-96 (1969); Evans Prods. Co. v. Jorgensen, 245 Or. 362, 365-66, 421 P.2d 978, 980-81 (1966) (in banc). Contrary viewpoints can also be found among commentators. *Compare* Anzivino, *supra* note 15, at 44-45 ("It is this writer's opinion that possession is the second required element entitling the debtor to rights in the collateral.") (footnote omitted) *with* B. CLARK, *supra* note 51, at 2-14 ("[I]t would seem that the debtor has rights to a piece of equipment which he has purchased from a dealer but which has not yet been delivered to him.") (footnote omitted).

to naked possession[206] the situation is conceptually no different from that in which a true owner attempts to grant a security interest in an item temporarily bailed with another. No one would doubt the owner's ability to do so even though the owner has temporarily given up possession. If this is so, what sense does it make to deny the same power to an owner who has yet to gain possession? To be sure, this does not reveal what rights must flow to the buyer to satisfy section 9-203(1)(c), but it does indicate that possession is not essential.

From the financer's perspective, knowledge that a lien can attach without the need for the buyer to take possession is not comforting without the corresponding knowledge that the lien will have, at a minimum, priority over the seller's secured creditor. The lien will, of course, have priority the moment section 9-307(1) applies. To forestall its application until the buyer acquires possession would, as one court admonished, "make it impossible for retail finance companies to do business with any dealer unless the [seller's secured creditor] were directly a participant. . . . The proliferation of paperwork would be a giant step backwards in modern commercial practice."[207] In short, one has another "right" situation for suffering whatever evils the seller's ostensible ownership brings.

### *C. The Title Date*

The choice of title as the determinate of buyer status is said to be compelled by a combination of several of the Code's definitions: the section 1-201(9) definition of "buyer in ordinary course" comtemplates a "sale" and, according to section 2-106(1), "a 'sale' consists in the passing of title from the seller to the buyer for a price (Section 2-401)."[208] The legitimacy of this definitional piggy-backing depends on the tacit assumption that the definition of sale in Article 2 applies equally to terms defined in Article 1.[209] This assumption might be questioned. As argued above, the transportation of definitions from one Code article to another must be made with caution.[210] Even if transportation were acceptable in this case, perhaps one should not overemphasize the appearance of "title" in the definition of sale.

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206. If the seller has been paid in full, also lacking would be those rights that were incident to the seller's lien in pre-Code days but are now the subject matter of the Code. *See* U.C.C. §§ 2-507(2), 2-702(1), 2-703(a), (f), 2-705(1). Although a buyer with an insurable interest and title was hypothesized, it is, nevertheless, possible that the seller still retains an insurable interest. This would be the case where the risk of loss has yet to shift to the buyer. *See* Jason's Foods, Inc. v. Peter Eckrick & Sons, Inc., 774 F.2d 214, 216-19 (7th Cir. 1985).

207. Chrysler Credit Corp. v. Sharp, 56 Misc. 2d 261, 270, 288 N.Y.S.2d 525, 534 (Sup. Ct. 1968).

208. *See supra* text accompanying notes 109-16.

209. Given this underpinning, it is understandable that Professor Jackson, once a supporter of title as the test for buyer status, Jackson & Kronman, *supra* note 41, at 23, seemingly abandoned the title test for one that is not the product of such a mechanical analysis. *See* Baird & Jackson, *supra* note 171, at 210-12.

210. *See supra* text accompanying notes 140-43. Before one argues that the Article 2 definition of sale is inapplicable to Article 1 definitions, one must be prepared to answer Professor Smith's interesting riddle: "[W]hat happens to a term that is defined in Article 1 in terms of 'sale' when it is applied in Article 2?" Smith, *supra* note 164, at n.88.

It could be that its only purpose is to differentiate those transactions that are within the intended scope of Article 2 from those that are not.[211]

On a purely textual level, other arguments have been made against adopting a definitional solution that is itself entirely textual. One argument follows from a comparison of the language of subsections 2-403(1)[212] and 2-403(2)[213] and the other from a literal reading of section 2-403(2) alone. The argument based on a comparison of the two subsections is that because subsection (2) refers to the entrusting of possession of goods to a merchant, and subsection (1) speaks of title, voidable title, and good faith purchasers, the drafters meant for title to be material only to the operation of the latter subsection.[214] The second argument rests on the paradoxical situation which would result if title were decisive. As described by Professors Peters and Jackson:

> Since an "entrusting" includes retention of possession without title, it would be impossible for such an entrustee to pass title. That is, if title were indeed crucial, no buyer in the ordinary course of business could ever arise until *after* § 2-403(2) had operated, which it could not do for lack of a buyer in the ordinary course of business.[215]

While these arguments may have merit, their persuasiveness is undercut by the same weakness inherent in the position they seek to counter, that is, an overreliance on literalism. This approach is particularly inappropriate in this case because the approach moves in two different directions. A more fruitful inquiry would be to look at some of the broader policy implications of defining buyer in terms of title.

In pre-Code days the concept of title served as the jack-of-all-trades in sales law. One had only to decide who had title and then the answers would neatly follow to such diverse questions as where the risk of loss lay, whether the seller could maintain an action for the price, whether the buyer could replevy the goods, and whether the seller's or buyer's creditors could levy on the goods.[216] But for Karl Llewellyn the neatness of such a singularity of issue was not worth its price:

> The quarrel thus is, first, with the use of Title for purposes of decision as if the *location* of Title *were* determinable with certainty; and second, with the insistence on reaching for a single lump to solve all or most of the problems between seller and buyer—and even in regard to third parties.[217]

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211. T. QUINN, UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST § 2-106[A][1] (1978); *see also* Note, *Buyer-Secured Party Conflict*, *supra* note 55, at 678.

212. For an overview of the text of this subsection, see *supra* note 20.

213. For the text of this subsection, see *supra* note 24.

214. Smith, *supra* note 164, at 61. *But see* Leary & Sperling, *supra* note 22, at 81 ("Section 2-403(1) does use the word 'title' . . . but section 2-403(2) speaks of rights, not of title. Thus it is not clear whether the question of title is 'covered by' section 2-403, nor that title is material.").

215. Jackson & Peters, *supra* note 141, at n.163.

216. 1 N.Y.L. REVISION COMM'N STUDY OF THE UNIFORM COMMERCIAL CODE 445 (1955). *See generally* Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L.Q. REV. 159 (1938).

217. Llewellyn, *supra* note 216, at 166.

Thus, when the drafting of the Code began, Llewellyn was convinced that the time had come to scrap title as a means to resolve sales controversies. The unpredictability of application[218] and emptiness of rational content[219] of title led Llewellyn to fear that if its then role of prominence were enshrined in the Code the effects would be intolerable. As he saw it, elimination of the doctrine was "one of the great clarifications that has been offered to the law of these United States over many years."[220] Making the most of their opportunity, Llewellyn and his crew of drafters made the bold move of relegating title to backseat status in the Code.[221] In its place are specific rules premised on considerations peculiar to the problem at hand.[222] Gone is the one-issue-fits-all approach of pre-Code law. But the drafters did not completely ignore the concept of title: Section 2-401 provides rules for determining who has title, if that matters. The preamble to the section indicates the limited relevance of the section's rules. The rules should be consulted only if a Code "provision refers to such title"[223] or when "situations are not covered by the other provisions of this Article and matters concerning title become material. . . ."[224] The reference in the official comment to the class of relevant title situations serves only to remind one that title will no longer be used to solve *sales* problems. It still may be necessary, however, to the application of various regulatory statutes.[225]

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218. Llewellyn explained: "Nobody ever saw a chattel's Title. Its location in Sales [sic] cases is not discovered, but created, often *ad hoc*." *Id.* at 165.

219. Referring to the concept of "title" or "property," Llewellyn fancifully wrote: "when, in addition, 'the property' bounces around from party to party according to the issue, it begins to look as if 'the property in the goods,' as an issue-determiner, were in the merchantile cases, a farmer far from the dell, and none too well adjusted to the new environment." Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725, 733 (1939).

220. 1 N.Y.L. REVISION COMM'N STUDY OF THE UNIFORM COMMERCIAL CODE 160 (1955).

221. The unimportance of the location of title is a theme the Code's drafters thought worthy of repetition. *See* U.C.C. §§ 2-401 & comment 1, 2-505 comment 1, 2-706 comments 3, 11, 9-101 comment, 9-202 & comment, 9-311 comment 2. Although most members of the academic community were pleased with the Code's reformation of existing law, *see, e.g.*, Corbin, *The Uniform Commercial Code-Sales; Should it be Enacted?*, 59 YALE L.J. 821, 824-27 (1950); Latty, *Sales and Title and the Proposed Code*, 16 LAW & CONTEMP. PROBS. 3, 3-8 (1951), there were those who were not. *See* Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 562-72 (1950).

222. For example, the Code prescribes a separate set of rules on risk of loss, *see* U.C.C. §§ 2-509, 2-510, buyer's right to replevin, *see* U.C.C. § 2-716, and seller's right to recover the full price, *see* U.C.C. § 2-709.

223. U.C.C. § 2-401. Several Code sections, typically of little importance, do contain a reference to title. *See* U.C.C. §§ 2-312 (warranty of title); 2-326(3), 2-327(1) (incidents of sale or return); 2-501(2) (seller's insurable interest in goods); 2-722 (cause of action for injury to goods). U.C.C. § 2-403(1) (security of purchase and good faith purchase rules) is also a title provision, but it is omitted from this list because of the relative importance of the section.

224. U.C.C. § 2-401.

225. Section 2-401 comment 1 provides:

> This section, however, in no way intends to indicate which line of interpretation should be followed in cases where the applicability of "public" regulation depends upon a "sale" or upon location of "title" without further definition .... It is therefore necessary to state what a "sale" is and when title passes under this Article in case the courts deem any public regulation to incorporate the defined term of the "private" law.

In concluding that the demise of title was an integral part of Llewellyn's plan to rationalize and modernize commercial law, should one also conclude that he and the other drafters would have wished the invigoration of title by making a buyer's protection depend on having received it?[226] Although evidence suggests that the Code is not the panacea Llewellyn dreamed it would be,[227] other evidence suggests that the abolition of reliance upon title has been beneficial. Take, for example, the issue of risk of loss. Once a frequent subject of appellate opinions, it now so infrequently surfaces in print that its appearance is worthy of comment.[228]

### *D. The Identification Date*

Of the four commonly discussed points along the spectrum for defining buyer status, the most reasonable choice seems to be that of "identification."[229] Although the event of identification itself is independently insignificant,[230] it becomes significant through the application of various Code sections.[231] In particular, identification signifies the moment when the buyer acquires a "special property" in the goods.[232] Unlike identification,[233] the concept of special property is not created by the Code, but has long been part of the common law.[234] The concept has traditionally heralded that point in the sales transaction at which the buyer begins to accumulate those rights that will eventually constitute absolute ownership

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U.C.C. § 2-401 comment 1. *See* State v. Delta Airlines, Inc. 356 So. 2d 1205, 1207 (Ala. Civ. App. 1978) (§ 2-401 used to decide sales tax issue); Elliot v. State, 149 Ga. App. 579, 580-81, 254 S.E.2d 900, 901 (1979) (§ 2-401 used to decide criminal law issue).

226. Even absent the Code's formal de-emphasis of title, a title approach to the buyer status problem is inappropriate for the same reason that all of the previously discussed tests are inappropriate: use of a title approach is unsupported by any convincing transactional theory. On the relationship between title and rational decisionmaking, see Dolan, *supra* note 166, at 1193 n.243 ("[the] buyers' and sellers' rights emanate from contracts of sale and Article 2, not from metaphysical presumptions conjured up by freighted language."); *see also* Gordon, *supra* note 40, at 587 (title approach objectionable because "it sets up an artificial barrier between the analysis and the issue to be decided").

227. *See generally* White, *Evaluating Article 2 of the Uniform Commercial Code: A Preliminary Empirical Expedition*, 75 MICH. L. REV. 1262 (1977) (examining impact of recodification of sales law under U.C.C. Art. 2).

228. Professors White and Summers note that a "cursory search" has revealed 59 pre-Code risk of loss cases and a "trickle" of post-Code cases. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE, § 5-1, at 176 n.6, 177 n.8 (2d ed. 1980). For comments on recent risk of loss cases, see Frisch, Leary & Wladis, *Uniform Commercial Code Annual Survey: General Provisions, Sales, Bulk Transfers, and Documents of Title*, 41 BUS. LAW. 1363, 1380-82 (1986).

229. *See* U.C.C. § 2-501; *supra* text accompanying notes 118-28.

230. U.C.C. § 2-501 is primarily definitional. With the exception of equating identification with a special property and an insurable interest in the goods, the section's basic purpose is to prescribe when identification occurs. *Id.* at comment 3.

231. *See, e.g.*, U.C.C. §§ 2-401(1) (title cannot pass prior to identification); 2-502 (identification, in part, conditions buyer's right to recover goods from an insolvent seller); 2-716(3) (identification central to buyer's replevin rights).

232. *See* U.C.C. § 2-501(1).

233. Identification as a separate concept appeared for the first time in the Code. It does, however, have its statutory antecedents. *See* UNIFORM SALES ACT § 18(1), 1 U.L.A. 8 (1950) (act withdrawn 1962) (reference to "specific or ascertained" goods).

234. *See* Dolan, *supra* note 6, at 822.

in the goods.[235] This conceptual springboard, which takes the buyer from a mere expectation of receiving conforming goods to a cognizable interest in particular goods, is continued under the Code.[236]

Given the fact that the *raison d'être* of the buyer in ordinary course doctrine is the important economies that are achieved by making goods quasi-negotiable,[237] one finds compelling the temptation to conclude that whatever protection is afforded to the buyer was meant to begin when the buyer's interest begins. No acceptable justification exists for forcing the buyer to shoulder the risk of an innocent purchaser until the buyer is lucky enough to have seen the transaction through to its completion.[238] Furthermore, in some cases, section 2-402(1) protects the buyer's specific proprietary interest in goods against the interests of the seller's creditors at the instant the buyer's interest arises.[239] This, for some, reinforces the view that the Code contemplates identification as the event that starts to shift the risk of the innocent purchaser from the buyer to others who deal with or claim through the seller.[240]

It would be a mistake, however, to adopt this approach. While making identification the reference point for buyer status would further the basic purpose of the buyer in ordinary course doctrine,[241] it would also do so when unnecessary and with anomalous consequences. For reasons that will soon become apparent, a buyer's proprietary *interest in* goods needs no protection unless the buyer also has a proprietary *power over* the goods.

## V. A Suggested Temporal Definition

This Article has looked at the several contemporary views of when buyer status attaches and has found that each lacks a persuasive justification

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235. *Id.* at 822-23.

236. *See* U.C.C. §§ 2-105(2) ("Goods must be both existing and identified before any interest in them can pass."); 2-501(1) ("The buyer obtains a special property . . . in goods by identification . . . .").

The Code is silent on the nature of the residual property interest in the seller once the special property is obtained by the buyer. There is only the noncommittal statement in § 9-113 comment 4 that

> [t]he seller's interest after identification and before delivery may be more than a security interest by virtue of explicit agreement under Section 2-401(1) or 2-501(1), by virtue of the provisions of Section 2-401(2), (3) or (4), or by virtue of substitution pursuant to Section 2-501(2). In such cases, Article 9 is inapplicable by the terms of Section 9-102(1)(a).

U.C.C. § 9-113 comment 4.

237. *See generally* Hawkland, *supra* note 6 (discussing commercial law remedies for improper tender of title to chattels).

238. The statement in the text naturally assumes the unpersuasiveness of the argument that ostensible ownership concerns are of paramount importance. *See supra* text accompanying notes 171-207.

239. U.C.C. § 2-402(1) provides: "Except as provided in subsections (2) and (3), rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this Article (Sections 2-502 and 2-716)." *See also infra* note 261.

240. *See, e.g.*, Dolan, *supra* note 166, at 1156.

241. *Id.* at 1157 ("By opting for identification, the Code appears to promote the interests of buyers. In fact, it promotes the interests of a commercial society. It fosters sales. It encourages buyers to buy and pay early.").

for its adoption.[242] But the separate criticisms heaped upon each fail to suggest a convincing alternative. It is only when the deficiency common to all accepted definitions is realized that the necessary materials for constructing a theoretically sound temporal definition become apparent.

*Kwikset Division of Emhart, Industries v. Mohawk Industrial Design Enterprises (In re Pennsylvania Conveyor Co.)*[243] may clarify the problem. Kwikset had contracted to purchase a customized press from Mohawk Industrial Design Enterprises, for a price of $69,375.25.[244] When the press was substantially completed and after Kwikset had paid $54,377.25 toward the purchase price, the press was repossessed by Mohawk's secured creditor, PennBank.[245] Kwikset brought suit seeking possession of the press upon payment of the remainder of the purchase price.[246] PennBank argued that Kwikset had no right of possession because the stringent prerequisites of section 2-502 had not been satisfied.[247]

The bankruptcy court found for Kwikset.[248] In so doing, it drew a sharp distinction between rights under section 2-502 and rights under section 9-307(1).[249] Acknowledging Kwikset's inability to recover from its seller under section 2-502, the court concluded that if Kwikset were to pay the balance of the purchase price it would qualify for buyer in ordinary course protection under section 9-307(1).[250]

The *Kwikset* approach illustrates how courts and commentators have consistently failed to perceive the anomaly that one can be a buyer in ordinary course absent the availability of a possessory remedy against the immediate seller.[251] Had Mohawk remained in possession of the press,

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242. *See supra* text accompanying notes 131-241.

243. 31 Bankr. 680 (Bankr. W.D. Pa. 1982).

244. *Id.* at 681.

245. *Id.*

246. *Id.*

247. Id. at 682. Section 2-502 provides:

> Buyer's Right to Goods on Seller's Insolvency
>
> (1) Subject to subsection (2) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if the seller becomes insolvent within ten days after receipt of the first installment on their price.
>
> (2) If the identification creating his special property has been made by the buyer he acquires the right to recover the goods only if they conform to the contract for sale.

U.C.C. § 2-502.

248. 31 Bankr. at 683.

249. *Id.* at 682-83.

250. The court based its conclusion on notions of equity: "The purchaser in the instant case paid all but $15,000 of the $69,375.25 purchase price, the goods were identified to the contract and were left in the manufacturer's possession for the sole and only purpose of the making of two minor corrections and the shipping of the completed article." *Id.* at 683.

251. Most courts never consider the link between a buyer in the ordinary course and his or her possessory right against the immediate seller, but on occasion a court will assert that no such link exists. *See, e.g.*, Carey Aviation, Inc. v. Giles World Mktg., Inc., 46 Bankr. 458, 460-61 (Bankr. D Mass. 1985) ("[T]he rights of a buyer against a secured party are not determined by the buyer's rights against the seller."); Wilson v. M & W Gear, 110 Ill. App. 3d 538, 540, 442 N.E.2d 670, 672 (1982) (noting that U.C.C. § 9-307(1) protects buyer irrespective of right to

Kwikset, because it failed to meet the requirements of section 2-502, would have been relegated to that hapless class of unsecured creditors for whom full recovery is seldom a reality. Instead, because of the fortuitous circumstance of PennBank's repossession, Kwikset was assured the benefit of its original bargain.

Another version of the same objection to the separability of a possessory remedy from the rights of a buyer in ordinary course views the situation from the secured party's perspective. Before the repossession, PennBank, not Kwikset, had a property interest in the press.[252] And PennBank, not Kwikset, had the legal right of possession.[253] But all this changed once the right of possession was exercised. When PennBank exercised its exclusive right to repossess the printing press, the exclusivity of that right was destroyed. In other words, once a secured party with the sole and exclusive right of possession repossesses the collateral, its right to retain possession is lost. This is not only bad policy,[254] but also logically inconsistent[255] and linguistically incoherent.

A second argument in favor of defining buyer status in terms of buyer remedies is that such a definition, more than any other, comports with the scope and purpose of the good faith purchase doctrine embodied in the Code. Because the doctrine seeks to facilitate market trading by reducing title uncertainty, its application is premised on the implicit assumption that a point in the sales transaction has been reached at which the buyer has a

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maintain replevin action); Gordon, *supra* note 40, at 575 ("[T]he rights of the buyer against the seller's creditors should not turn on his rights against the seller.").

252. PennBank had a perfected security interest in all of the debtor's inventory, accounts receivable, machinery, equipment, and proceeds. *Kwikset*, 31 Bankr. at 681. A security interest is defined by the U.C.C. as a property interest. *See* U.C.C. § 1-201(37) (" 'Security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation.").

253. *Kwikset*, 31 Bankr. at 681; *see also* U.C.C. § 9-503 ("[U]nless otherwise agreed a secured party has on default the right to take possession of the collateral.").

254. Remember that not all buyer in ordinary course scenarios involve a secured party. If the contestant is an "owner" who has entrusted goods with a merchant having § 2-403(2) power to transfer the owner's interest in the goods, clearly divorcing the buyer's rights from the buyer's remedies is absurd. A court would be in the position of having to tell the owner that what is his is his until he takes it. That is, while the goods are with the merchant, only the owner has the legally cognizable right to remove them from the merchant's possession. Once the owner has done so, however, the right to retain possession is subordinated to the *then* superior possessory right of the buyer in ordinary course. The result of this would be that the merchant or seller who least deserves possession would retain possession. Because the owner or secured party could be made to deliver the goods to the buyer, there would be little incentive for either party to want possession. And the buyer cannot get possession until either obtains possession.

255. Professor Skilton makes the following potent observation:

> But, you may ask, how may the buyer in ordinary course of business, with the seller still in possession, assert his rights against his seller's secured creditor, if he does not have property rights under sections 2-716 and 2-502? . . . By an action based in appropriate cases on conversion? By an equitable decree? The answer must be, by some remedy under section 1-106(2) to carry out section 9-307(1). However, if the court decides that he is a buyer in ordinary course of business without rights in identified goods which are enforceable, the buyer is a man without a remedy until he receives delivery.

Skilton, *supra* note 14, at 20-21. Surprisingly, this excerpt indicates that Professor Skilton seems to have begrudgingly accepted the inevitability of this state of affairs.

title expectation needing protection. In assessing where that point lies, it is helpful to think of a sale as the movement of a variety of property sticks from seller to buyer. Absent a stick in the buyer's bundle that gives the right to take possession of the goods, the state of the seller's title is immaterial. If the seller breaches, the buyer's expectations are satisfied by an award of monetary damages. If there is no breach, more sticks will come and the cleansing of the seller's title can wait. The buyer's title concerns crystallize, however, once the buyer obtains the legally cognizable right to compel the seller's performance. It is with this stick in hand that the buyer's legitimate claim to good faith purchase treatment materializes.

To see why this is so, one need only understand the Code's approach to buyer's remedies. A central assumption of Article 2 is the homogeneity of goods. If the seller does not deliver the goods, the buyer will, most often, be able to obtain similar goods elsewhere. As a result, the buyer's expectation interest is fully vindicated by a damages award based on an imagined[256] or actual substitute purchase.[257] There are, however, situations, sufficiently out of the ordinary, in which protection of the buyer's expectation demands that the remedy be the right to obtain possession of the goods from the seller. Thus, the buyer has the limited right to recover the goods in certain insolvency situations under section 2-502,[258] the right to specific performance under section 2-716(1),[259] and the right to replevin under section 2-716(3).[260]

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256. One Code formula for measuring buyer's damages is the difference between the market price at the time when the buyer learned of the breach and the contract price. *See* U.C.C. § 2-713. The import of this remedy is that a market exists giving the buyer the opportunity to enter into substitute transactions if the goods are still desired. If the buyer is forced to pay more that the contract price, the excess is recoverable from the seller. While in theory this calculation should put the buyer in the position he would have occupied had the seller performed, in practice it may not. *See* Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 258-60 (1963).

257. A measure of damages more accurate than the speculative market price/contract price formula is a calculation based on an actual substitute purchase. Section 2-712 permits a buyer to "cover" by buying elsewhere and to recover from the seller the difference between the cover price and the contract price. *See* U.C.C. § 2-712.

258. For the full text of § 2-502, see *supra* note 220. The purpose of the section is to give the buyer a right to the goods when, because of the seller's insolvency, a monetary claim would be less valuable at best and valueless at worst. But the stringent requirements of § 2-502 make the section more a remedial mirage than a viable alternative to damages.

259. According to § 2-716(1) specific performance is available "where the goods are unique or in other proper circumstances." Apparently hoping to foster a liberalization of the remedy, *see* U.C.C. § 2-716 comment 1, the drafters offered an expanded definition of "uniqueness" that takes into account "the total situation which characterizes the contract. . . . and 'other proper circumstances' " that might include the inability to cover. U.C.C. § 2-716 comment 2. Despite the ambiguity of the tests chosen by the drafters, the tests indicate that the remedy of § 2-716(1) was never intended to be available absent the buyer's actual or practical inability to tap an alternative source of supply. For a valuable analysis of § 2-716(1) and the buyer's right of specific performance, see generally Greenberg, *Specific Performance Under Section 2-716 of the Uniform Commercial Code: "A More Liberal Attitude" In the "Grand Style,"* 17 NEW ENG. L. REV. 321 (1982); Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978).

260. Section 2-716(3) provides:

> The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been

Observe the similarity of purpose between the good faith purchase doctrine and the Code's possessory remedies. The essence of both is the perceived utility of protecting the buyer's expectation interest. As a matter of logical consistency, it is impossible to square this common goal with a decision to withhold buyer in ordinary course status until some time after the buyer becomes legally entitled to the goods. Odd indeed would be a legal regime that bestows a possessory right to protect the expectation interest but, at the same time, leaves that right unprotected because of the inapplicability of a doctrine specifically designed to protect that very same interest.[261] Conversely, if one is unwilling to say that the buyer, not the seller, has the superior right of possession, what justification is there for terminating, in favor of that same buyer, third party claims to the goods? It is this constant interplay between remedies and expectations that calls for a definition of buyer status based on remedies. Only when the buyer's expectation interest requires, for its satisfaction, an award of a possessory remedy, should buyer status be recognized.[262]

## VI. THE BUYER'S POSSESSORY REMEDIES AND THE COURTS

The previous section has shown that to effectuate the policy underlying sections 2-403(2) and 9-307(1), the rights of the buyer should turn on the existence of a proprietary power over the goods. Only if the buyer can compel delivery by the seller do the buyer's expectations justify the elimination of certain classes of third party claims to the goods. Although courts have not explicitly decided buyer in ordinary course cases on this basis, one might reasonably suspect that nothing would change if they would have. The factual denominators common to most of the decided cases, the buyer's full or substantial prepayment and the seller's insolvency, have long been thought to be of potential significance in determining the buyer's right to take the goods from the seller.[263] In short, the possibility

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shipped under reservation and satisfaction of the security interest in them has been made or tendered.

U.C.C. § 716(3). As with specific performance, replevin was never intended to be a run-of-the-mill remedy available to run-of-the-mill buyers. It too presupposes some impediment to the buyer's ability to effect a replacement purchase.

261. Preventing this anomaly probably explains the presence of § 2-402(1). Neither § 2-403(2) nor § 9-307(1) protects the buyer's possessory remedies against intervening claims of the seller's unsecured creditors (presumably judicial lien creditors), but § 2-402(1) substitutes for the good faith purchase doctrine a general right of recovery in the buyer. For the text of § 2-402(1), see *supra* note 239.

262. The viewpoint expressed in the text is equally applicable whenever a rule of law secures the buyer's purchase. For example, U.C.C. § 9-306(2) provides that a disposition of collateral pursuant to the secured party's authorization terminates the security interest. One obvious issue is the meaning of the term "disposition." A disposition includes, as the subsection tells us, a "sale" or "exchange," but "disposition" should also include the moment a buyer becomes entitled to possessory relief, although some courts have found to the contrary. *See, e.g.*, Weisbart & Co. v. First Nat'l Bank, 568 F.2d 391, 395 (5th Cir. 1978) (failing to give word "disposition" any meaning independent of sale or exchange); Mechanics Nat'l Bank v. Gaucher, 7 Mass. App. Ct. 143, 146-49, 386 N.E.2d 1052, 1055-57 (1979) (no "disposition" without completed sale or right to payment).

263. *See generally* Horack, *Insolvency and Specific Performance*, 31 HARV. L. REV. 702 (1918); Newman, *The Effect of Insolvency on Equitable Relief*, 13 ST. JOHN'S L. REV. 44 (1938); Note, *The Effect of Prepayment Upon the Buyer's Right to the Goods*, 37 COLUM. L. REV. 630 (1937). In recent

exists that the presence of this right has been both a necessary and sufficient condition for a finding of buyer status regardless of the particular definition a court *says* it is applying. It is impossible, quite obviously, to test accurately this suspicion, but one should examine relevant cases[264] in which the only issue for decision was the buyer's entitlement to a possessory remedy.[265] Do these cases evidence an apparent pattern of recognition of a possessory remedy factually coincident to the pattern that convincingly suggests itself in the resolution of the buyer cases? An affirmative answer would go a long way toward reinforcing the belief that the paramount concern of courts in both lines of cases has been the protection of the buyer's expectation interest and that that interest commands an equality of protection irrespective of whether the buyer seeks a possessory remedy or buyer status.

Consider *Proyectos Electronicos, S.A. v. Alper*.[266] Proyectos had ordered certain electronics equipment from Ram Manufacturing. The full purchase price was paid and the equipment was segregated from the rest of Ram's inventory. Unfortunately for Proyectos, Ram's bankruptcy occurred before the equipment was shipped.[267] Recognizing Proyectos' right to recover the goods from the trustee in bankruptcy,[268] the district court specifically considered the cumulative effect of prepayment and insolvency:

> In this case Proyectos has already paid the debtor the full price for the goods. To require Proyectos to cover would require it to pay for identical goods a second time and then stand in line with other unsecured creditors of the debtor, now bankrupt, with the illusory hope that it would get reimbursed for the difference between the cost of cover and the original contract price, plus the money already paid to debtor. Such a result would not be in keeping with the purpose of the Commercial Code to make a non-breaching party whole.[269]

If it were possible to characterize the opinion in *Proyectos* as typical, the inquiry would be at an end and one would be a bit wiser for having made the effort. One would know that a buyer can establish a right to possession,

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years, several commentators have rejected the notion that the drafters of the Code may have made available the remedy of specific performance under the "other proper circumstances" test of § 2-716(1) to protect the buyer who has paid in advance. *See* Gordon, *supra* note 40, at 575-76 (viewing this theory as "difficult to sustain"); Speidel, *supra* note 41, at 286-87 (seeing little support for this theory in view of § 2-716's emphasis on feasibility of replacement rather than commitment by the buyer) *But see* Peters, *supra* note 256, at 232-33 (suggesting that "unique" can be read subjectively to take "into account the resources and commitments of the party seeking specific performance.").

264. In order to maintain a factual harmony with the buyer in ordinary course cases, relevant cases for present purposes consist of those involving contracts for single performances. Ignored are the otherwise important supply or requirements contract cases.

265. The remedy most often sought is specific performance. This results from the Code's perceived liberalization of the use of specific performance and the inflexibility of the buyer's other possessory remedies. *See supra* notes 258-60 and accompanying text.

266. 37 Bankr. 931 (E.D. Pa. 1983).

267. *See id.* at 932.

268. Proyectos asserted, and the court agreed, that specific performance was the appropriate remedy. *See id.* at 933.

269. *Id.*

at least against an insolvent seller, by showing a substantial prepayment. The buyer in ordinary course cases could then be viewed as a reaffirmation and extension of this principle, despite the dissimilarity of rhetoric, to similar situations distinguishable only as to the identity of the party contesting the buyer.

Although this logic deduces a pervasive judicial bias in favor of the prepaying buyer, the deduction is premised on the typicality of *Proyectos*. Yet, the majority of courts continue to couch their opinions on possessory remedies in the traditional orthodoxy of uniqueness or peculiarity.[270] The fact remains, however, that prepayment and insolvency are recurrent factual themes in most cases in which the buyer is, for some other stated reason, awarded possession; and prepayment and insolvency are absent in most cases in which possession is withheld.[271] Because this alignment of result is not inevitable,[272] the proposition that the buyer in ordinary course and the right to possession cases are readily explicable as a consequence of a preexistent bias is only tentatively offered. Yet, until courts articulate the relevancy, if not the determinancy, of prepayment and insolvency, intuition suggests that these facts have a part to play in determining buyer status, and that the best guess is that they play the leading role.

## VII. CONCLUSION

The Code's silence on the temporal issue of buyer in ordinary course status illuminates the drafters' failure to foresee that the critical moment of

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270. *See, e.g.*, Weathersby v. Gore, 556 F.2d 1247, 1257-58 (5th Cir. 1977) (specific performance denied; cotton not unique); Fast v. Southern Offshore Yachts, 587 F. Supp. 1354, 1357 (D. Conn. 1984) (specific performance granted; yacht was unique); Abbott v. Blackwelder Furniture Co., 33 Bankr. 399, 404 (W.D.N.C. 1983) (specific performance denied; furniture not unique); Pierce-Odom, Inc. v. Evenson, 632 S.W.2d 247, 248-49 (Ark. Ct. App. 1932) (specific performance denied; mobile home not unique); Gay v. Seafarer Fiberglass Yachts, Inc., 14 U.C.C. Rep. Serv. (Callaghan) 1335, 1335-33 (N.Y. Sup. Ct. 1974) (specific performance appropriate; yacht was unique); Stephan's Mach. & Tool, Inc. v. D & H Mach. Consultants, Inc., 65 Ohio App. 2d 197, 201, 417 N.E.2d 579, 583 (1979) (specific performance granted; machine was unique); Belleville v. Davis, 262 Or. 387, 395, 498 P.2d 744, 748 (1972) (en banc) (specific performance granted; one-half interest in taxi was unique); Madariaga v. Morris, 639 S.W.2d 709, 712-13 (Tex. Ct. App. 1982) (specific performance granted; Albert's Famous Mexican Hot Sauce was unique).

271. *Compare* Weathersby v. Gore, 556 F.2d 1247, 1258-59 (5th Cir. 1977) (specific performance denied; no prepayment) *and* Pierce-Odom, Inc. v. Evenson, 632 S.W.2d 247, 248 (Ark. Ct. App. 1982) (specific performance denied; insignificant [$100] prepayment) *and* Tower City Grain Co. v. Richman, 232 N.W.2d 61, 66-67 (N.D. 1975) (specific performance denied; no prepayment) *and* Scholl v. Hartzell, 20 Pa. D. & C. 3d 304, 306-09 (1981) (replevin denied; insignificant [$100] prepayment) *with* Fast v. Southern Offshore Yachts, 587 F. Supp. 1354, 1356-57 (D. Conn. 1984) (specific performance granted; significant [$89,614] prepayment) *and* Tatum v. Richter, 280 Md. 332, 333, 373 A.2d 923, 924 (1977) (replevin granted; significant [$15,000] prepayment) *and* Gay v. Seafarer Fiberglass Yachts, Inc. 14 U.C.C. Rep. Serv. (Callaghan) 1335, 1336-38 (N.Y. Sup. Ct. 1974) (specific performance granted; significant [$6846.00] prepayment) *and* Belleville v. Davis, 262 Or. 387, 399-400, 498 P.2d 744, 750 (1972) (specific performance granted; $1200 prepayment plus further monthly payments) *and* Madariaga v. Morris, 639 S.W.2d 709, 710-11 (Tex. Ct. App. 1982) (specific performance granted; full payment).

272. *See, e.g.*, Abbott v. Blackwelder Furniture Co., 33 Bankr. 399, 403-04 (W.D.N.C. 1983) (specific performance denied; full payment).

conflict over goods often takes place when goods are still with the seller.[273] The unfortunate result of this lack of foresight is a judicial muddle that shows no sign of abating. Reaching divergent conclusions, the many opinions in this area are characterized by little judicial creativity and a heavy dose of formalistic legal thinking. Overlooked is the common theme that underlies both the good faith purchase doctrine and Code's approach to the buyer's remedies: protection of the buyer's expectation interest. This theme supports the conclusion that deciding when buyer status is attained is no different from deciding when to afford the buyer a possessory remedy in a case involving a recalcitrant seller.

Yet, one wonders whether this has not been the instinctive mode of analysis being subconsciously applied by most courts. Certainly the courts in buyer in ordinary course cases admit a policy preference for buyers. This Article suggests that sympathies heavily slanted toward the substantially prepaying buyer are also evident in those cases in which the contestant for possession is the seller. Indeed, if this is true, then the fact of the buyer's prepayment, and perhaps that of the seller's insolvency, take on a practical importance that has heretofore been overlooked. Admittedly, courts' traditional focus on result leaves the accuracy of this observation open to question, but this fact does not mean that it is without value. Even if all one has is an impressionistic picture of the relevant factors that underlie the decisions, this picture is far better than none at all.

273. *See* Jackson & Kronman, *supra* note 41, at 25 n.104 ("Section 9-307 clearly did not contemplate the problem of the financing buyer, who leaves the goods in the possession of the seller. Rather, the situation envisioned by the draftsmen was that of a person who 'buys' inventory and carries it off at the time of sale.").