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The Priority Secured Party/Subordinate Lien Creditor Conflict: Is "Lien-Two" Out in the Cold?

DAVID FRISCH*

INTRODUCTION

WHEN the drafting of the Uniform Commercial Code¹ first began, one issue which had to be addressed was what to do about secured credit.² Though the justification for secured credit has never been clear,³ and its fairness has been doubted,⁴ the drafters of Article 9 provided a simplified structure within which it could be used "with less cost and with greater certainty."⁵ This has apparently resulted in more credit for small businesses being secured rather than unsecured.⁶ However, even if secured credit

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1. Unless otherwise indicated, all references and citations in this Article are to the official text and comments of the Uniform Commercial Code (1978) [hereinafter referred to as the Code or the U.C.C.].

2. See Kripke, *Reflections of a Drafter: Homer Kripke*, 43 OHIO ST. L.J. 577, 578 (1982).

3. One suggested justification is that security interests have aggregate efficiencies which result in savings to the debtor in the form of lower aggregate credit costs. This would occur, however, only if the creditor to whom the security interest is given is also the creditor least able to police against debtor misbehavior. See Jackson & Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143, 1158-61 (1979). Unfortunately, the ability to monitor the debtor is not determinative as to whom a security interest is given. It is suggested that more realistic factors are the economic power of the parties and the financing norms of the particular industry.

4. For discussions regarding the fairness of permitting secured credit, see Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605 (1981); Schwartz, *Security Interests and Bankruptcy Priorities: A Review of Current Theories*, 10 J. LEGAL STUD. 1 (1981).

5. U.C.C. § 9-101, official comment. The principle sections of Article 9 which facilitate the use of secured credit are: § 9-204—"After-Acquired Property; Future Advances"; § 9-205—"Use or Disposition of Collateral Without Accounting Permissible"; and § 9-306—"Proceeds"; Secured Party's Rights on Disposition of Collateral."

6. Soia Mentschikoff, in a brief written on behalf of the Permanent Editorial Board

does predominate within certain sectors of the economy, a debtor, whether a consumer or a business, will always have creditors who are unsecured.⁷

The coexistence of secured and unsecured creditors leads inevitably to conflicts between the two. How these conflicts are resolved depends to a great extent on the context in which they arise. It is not the purpose of this Article to examine the ways in which these conflicting interests are handled in insolvency proceedings, whether common law or statutory. Instead, its focus will be on the clash which occurs when an unsecured creditor armed with a judgment attempts to satisfy that judgment by resort to property of the debtor which is already subject to a perfected security interest.⁸ Assuming the priority of the security interest,⁹ the

for the U.C.C. and submitted in *Adams v. Southern Calif. First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974), concluded that secured credit predominates over unsecured credit among small businesses. For an interesting comment on this brief, see Kripke, *supra* note 2, at 580.

7. If the anticipated indebtedness is not great, the inconvenience and added expense of negotiating a security agreement militates against the use of secured credit.

8. Though it is possible for an unsecured creditor to obtain an interest in property of the debtor prior to obtaining a judgment, this is no longer a simple matter, given constitutional limitations on pre-judgment remedies. See *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1971), and their progeny. If the unsecured creditor does, however, succeed in satisfying the constitutionally mandated requisites for obtaining such an interest, the suggestions offered in this Article would be equally applicable thereto.

The method utilized by the unsecured creditor to satisfy his or her judgment will vary from state to state. See *infra* notes 90-91. Regardless of which particular post-judgment enforcement procedure is employed, a "lien" will attach at some point in time to designated property belonging to the debtor. For excellent discussions of when this lien arises, see Distler & Schubert, *Enforcement Priorities and Liens: The New York Judgment Creditor's Rights in Personal Property*, 60 COLUM. L. REV. 458 (1960); Ward, *Ordering the Judicial Process Lien and the Security Interest Under Article Nine: Meshing Two Different Worlds; Part 1—Secured Parties and Post-Judgment Process Creditors*, 31 ME. L. REV. 223 (1980). Such liens are commonly referred to as judicial liens. These liens should not be confused with consensual liens (i.e., security interests) nor those arising by operation of law in favor of one who furnishes services or materials with respect to goods (e.g., an artisan's lien). In so-called "order of delivery" jurisdictions, the creditor obtains such a lien upon delivery of the writ of execution to the sheriff. In an "order of levy" jurisdiction, the lien does not arise until the sheriff actually levies on the property. *Id.* at 234-47. Once a creditor has obtained a judicial lien, he or she becomes, in the language of Article 9 of the Code, a lien creditor. U.C.C. § 9-301(3).

9. Unless a section of the U.C.C. provides otherwise, a security interest is effective against all third parties. U.C.C. § 9-201. Subsection 9-301(1)(b) provides for an exception to this rule in certain circumstances involving lien creditors. Though § 9-301 speaks in terms of subordination, it is in effect a priority statement: A lien creditor will have priority if he or she became a lien creditor before the security interest was perfected. The 1962

issue is whether the lien creditor should be permitted to somehow "get at" any equity the debtor may have in the collateral and, if so, how the interest of the secured party is to be protected. On this point, Article 9 is relatively silent.¹⁰ Despite the importance of each of these two competing interests, no theoretical construct of general applicability to resolve conflicts has yet been developed.¹¹ This Article will attempt to supply that construct. Before doing so, however, an overview of the judicial response to the lien creditor/secured party conflict is provided to illuminate some of the issues which any coherent theory must resolve.

I. THE JUDICIAL RESPONSE

Since the clash between these two interests can occur at various points along the judgment-to-satisfaction continuum and can involve parties other than the secured party and the lien creditor, the list of potential issues is not small. Though a substantial number have been presented to courts for resolution, the list certainly has not been exhausted. When this clash will occur depends primarily upon the time at which the secured party chooses to assert whatever rights he or she has as the priority lien holder. This assertion can occur either before or after the execution sale, can

version of § 9-301 required in addition that to have priority the lien creditor must not have had knowledge of the existing security interest. In 1972, the section was amended to eliminate the no-knowledge requirement; the revisers felt that this requirement was inconsistent with the spirit of the rule of priority, under which knowledge plays a very minor role. U.C.C. § 9-301, official comment.

In addition to the foregoing, a secured party's interest, even if unperfected, will have priority over that of a lien creditor if the secured party perfects with respect to a purchase money security interest before or within ten days after the debtor receives possession of the collateral. U.C.C. § 9-301(2). If unperfected because of an improper or insufficient filing, the secured party's interest, though unperfected, will prevail over a lien creditor who has knowledge of the contents of the filed financing statement. U.C.C. § 9-401.

For a more extensive analysis of priorities, see Ward, *supra* note 8.

10. While Article 9 of the Code deals extensively with particular issues of priority, it is nonetheless surprisingly quiet on the overall effects of its ordering of interests. This fact has been recognized by other commentators in different contexts. See, e.g., Nickles, *Enforcing Article 9 Security Interest Against Subordinate Buyers of Collateral*, 50 GEO. WASH. L. REV. 511 (1982).

11. Though this conflict has not altogether escaped the attention of commentators, their attention has usually been focused on specific state codes. See, e.g., Henderson, *The Judicial Creditor Versus The Article Nine Secured Party*, 17 IDAHO L. REV. 193 (1981); Note, *Chattel Mortgages and Judgment Satisfaction—The Security Agreement as an Exemption from Execution in Missouri*, 1962 WASH. U.L.Q. 515, 519 (1962).

involve the lien creditor and/or the purchaser at the execution sale, and can take the form of an action for either possession of the collateral or damages for its conversion.¹² The problem, therefore, is not one involving a single situational setting, but is one which is made up of a number of elements, and the resolution of each directly affects the interests of lien creditors.¹³ Following is an overview of how courts have resolved various aspects of the problem.

A. *The Right of the Secured Party to Vacate the Levy and Recover Possession of the Collateral*

A secured party which discovers a levy prior to the sheriff's disposition of the collateral¹⁴ may wish to vacate the levy and obtain possession of the collateral. Some courts have allowed repossession,¹⁵ while others have not.¹⁶

The most often cited case permitting repossession is *William*

12. An analogous set of litigation possibilities exists when the debtor voluntarily transfers possession of, or an interest in, the collateral without the consent of the secured party. See generally Nickles, *supra* note 10 (discussing the issues which arise when there is a voluntary sale by the debtor of the collateral); and Nickles, *Rights and Remedies Between U.C.C. Article 9 Secured Parties with Conflicting Security Interests in Goods*, 68 IOWA L. REV. 217 (1983) (discussing the issues which arise when a subordinate secured party asserts an interest in the collateral).

13. Even in a suit brought by a secured party against an execution sale purchaser, the interests of lien creditors are affected. Judgments favorable to secured parties will affect the marketability of collateral and hence its value to lien creditors. For example, if an execution sale purchaser is liable to the secured party for conversion and damages are measured by the value of the collateral, regardless of the amount of the outstanding secured debt, the market for the collateral will disappear. See *infra* notes 219-20 and accompanying text.

14. While U.C.C. § 9-504(3) does mandate, in certain circumstances, that notice be given to one secured party by another secured party who proposes to dispose of the collateral, this section does not mandate notice of either the levy or the proposed sale when the disposing party is a lien creditor. See *Citizens Bank v. Perrin & Sons*, 253 Ark. 639, 488 S.W.2d 14 (1972). Notice of the proposed sale may be mandated, however, by other, non-Code, legislation. See, *infra* note 75.

15. E.g., *Ford Motor Credit Co. v. Shapiro*, 26 U.C.C. Rep. Serv. 1317 (N.Y. Sup. Ct. 1979); *Ford Motor Co. v. City of New York*, 14 U.C.C. Rep. Serv. 211 (N.Y. Sup. Ct. 1974); *Harrison Music Co. v. Drake*, 43 Pa. D. & C. 2d 637 (1967); *William Iselin & Co. v. Burgess & Leigh, Ltd.*, 52 Misc. 2d 821, 276 N.Y.S.2d 659, 3 U.C.C. Rep. Serv. 1168 (Sup. Ct. 1967).

16. *Humble Oil & Refining Co. v. Pathological & Diagnostic Laboratories, Inc.*, 11 U.C.C. Rep. Serv. 386 (N.Y. Civ. Ct. 1972); *Altec Lansing v. Friedman Sound, Inc.*, 204 So. 2d 740 (Fla. Dist. Ct. App. 1967); *First Nat'l Bank v. Sheriff of Milwaukee County*, 34 Wis. 2d 535, 149 N.W.2d 548 (1967).

*Iselin & Co. v. Burgess & Leigh, Ltd.*¹⁷ There the court concluded that:

[o]n default, it would appear that [the secured party] became entitled to immediate possession of the collateral, both by virtue of the express provisions of the security agreement and of section 9-503

After the default, the Debtor lost its right of possession and sale and retained only a contingent right in the surplus, if any, after sale. . . .

Nor can the levy void the [secured party's] statutory right to possession when there is a default¹⁸

It is noteworthy that this court thought the timing of the debtor's default (i.e., before or after the levy) to be irrelevant.¹⁹

In contrast to the straightforward reasoning of those courts allowing repossession from the sheriff, those which have denied the secured party's claim have done so for a variety of reasons. One Florida court held that U.C.C. section 9-203 "may create a prior lien in favor of the person named in the agreement as creditor on the chattels involved but does not exempt them from a forced judicial sale. Said chattel may still be sold by an execution creditor subject to the lien provided in the security agreement."²⁰

The issue of possession received summary treatment in the one New York case which did not allow the levy to be vacated.²¹ One salient fact which may have influenced that decision was that the secured parties happened to be the parents of the president of the debtor corporation, and they acknowledged their reluctance

17. 52 Misc. 2d 821, 276 N.Y.S.2d 659, 3 U.C.C. Rep. Serv. 1168 (Sup. Ct. 1967).

18. *Id.* at 823-24, 276 N.Y.S.2d at 662, 3 U.C.C. Rep. Serv. at 1170-71. U.C.C. § 9-503 provides, in part, that "[u]nless otherwise agreed a secured party has on default the right to take possession of the collateral." The other courts which have permitted repossession have also premised that right principally on the basis of this provision. *See Ford Motor Co. v. City of New York*, 14 U.C.C. Rep. Serv. 211 (N.Y. Sup. Ct. 1974); *Harrison Music Co. v. Drake*, 43 Pa. D. & C.2d 637 (1967).

19. *See* 52 Misc. 2d at 824, 276 N.Y.S.2d at 662, 3 U.C.C. Rep. Serv. at 1171. *But see First Nat'l Bank*, 34 Wis. 2d at 539, 149 N.W.2d at 550; *Ward*, *supra* note 8, at 230.

20. *Altec Lansing*, 204 So. 2d at 741.

21. *Humble Oil & Refining Co.*, 11 U.C.C. Rep. Serv. at 386. The court stated that

[a]ll that Article 9 filing guarantees to the secured creditor is certain rights and remedies against the debtor upon default (Article 9-501 et seq.) and priority in the distribution of the debtor's assets or the proceeds therefrom (Article 9-301 et seq.). It does not bar a subsequent or unsecured creditor from enforcing his rights any more than a second mortgagee is precluded from foreclosing by the existence of a first mortgage.

Id. at 387.

to exercise their rights upon debtor's default.²²

In *First National Bank v. Sheriff of Milwaukee County*,²³ the Wisconsin Supreme Court, relying on section 9-311 and a state execution statute, decided that the secured party could not prevent the execution sale from going forward. It noted that the Wisconsin legislature had responded to the suggestion of section 9-311 by repealing and re-enacting its execution statute to correspond with the new terminology of the Code.²⁴ For some reason this court believed that the secured party's rights were dependent upon whether the debtor was in default at the time of levy.²⁵ Since there was no indication that the debtor was in default when the sheriff seized the collateral,²⁶ the court allowed the execution sale to go forward subject to the lien of the secured party.²⁷

All of the foregoing cases involved a secured party attempting to obtain possession of its collateral. An interesting variation on this theme was presented in an Illinois case in which the secured party attempted to *retain* possession of securities held by him as pledgee.²⁸ The appellate court affirmed a lower court order requiring the secured party to sell the securities. The proceeds were to be applied first to the secured party's costs and debt and then to the creditor's judgment. The court held that the trial court properly exercised its discretion under the supplementary pro-

22. *Id.* It has been suggested that "[i]f the levy had been vacated, the collateral would have been insulated from judicial process." Henderson, *supra* note 11, at 207. This simply is incorrect. See *infra* notes 191-94 and accompanying text.

23. 34 Wis. 2d 535, 149 N.W.2d 548 (1967).

24. U.C.C. § 9-311 provides: "The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default."

For a detailed discussion of the purpose and effect of this section, see *infra* notes 76-107 and accompanying text.

The Wisconsin Supreme Court was obviously of the opinion that § 9-311 has no substantive effect, but merely suggests further legislative action. The legislative response in Wisconsin reads as follows: "Equities sold. When personal property is subject to a security interest, the right and interest of the debtor in such property may be sold on execution against him, subject to the rights, if any, of the secured party." Wis. STAT. § 272.26 (1958).

25. *First Nat'l Bank*, 34 Wis. 2d at 539, 149 N.W.2d at 550.

26. *Id.* at 539 n.6, 149 N.W.2d at 550 n.6.

27. *Id.* at 539, 149 N.W.2d at 551.

28. *North Bank v. F & H Resources, Inc.*, 53 Ill. App. 3d 950, 369 N.E.2d 174 (1977). When a lien creditor is attempting to reach collateral in the possession of the secured party, issues arise which are non-existent when the debtor is in possession. See *infra* note 104 and accompanying text.

ceedings section of the state Civil Practice Act and that supplementary proceedings came within the meaning of section 9-311's "other judicial process" language.²⁹

B. *The Right of the Secured Party to Repossess from the Execution Sale Purchaser*

It is possible that the execution sale will go forward and that the collateral will be purchased by a third party or perhaps the lien creditor. Sometimes the secured party will not discover the act of levy until after the sale or, knowing of the levy, will fail to take the appropriate action or will be unable to prevent the sale.³⁰ Most courts agree that the secured party's interest continues in the collateral notwithstanding the sale.³¹ Whether the secured party is entitled to possession, however, will depend upon whether there has been a default by the debtor. If the debtor defaults prior to the sale, the sheriff cannot convey the continued right of possession to the purchaser,³² because

[t]o hold otherwise would allow a sheriff to acquire greater property rights against the [secured party] than the [debtor] had. Further, the purchaser at the sheriff's sale would acquire the [collateral] subject to the [secured

29. *North Bank*, 53 Ill. App. 3d at 954, 369 N.E.2d at 177. Implicit in this statement is the notion that U.C.C. § 9-311 is not self-executing. It has been suggested that "[s]ince the secured party has the duty to hold a commercially reasonable sale, the result [in *North Bank*] seems sensible because it protects both interests." Henderson, *supra* note 11, at 208. Though the secured party has this duty under U.C.C. § 9-504(3), it does not necessarily follow that a lien creditor is a proper party to complain of a breach. This Article contends that the lien creditor should, in fact, be entitled to complain of such a breach. See *infra* notes 171-94 and accompanying text.

30. Some courts simply do not permit a secured party to vacate a levy. See *supra* notes 20-29 and accompanying text.

31. See *United States v. Newton Lake Estates, Inc.*, 489 F. Supp. 432 (M.D. Pa. 1979); *Memphis Bank & Trust Co. v. Pate*, 362 So. 2d 1245 (Miss. 1978); *Smith v. Guzman*, 16 U.C.C. Rep. Serv. 852 (N.Y. Sup. Ct. 1975); *Cooper v. Citizens Bank*, 129 Ga. App. 261, 199 S.E.2d 369 (1973); *Stearns Mfg. Co. v. National Bank & Trust Co.*, 12 U.C.C. Rep. Serv. 189 (Pa. C.P. 1972); *Powell v. Whirlpool Employees Fed. Credit Union*, 42 Mich. App. 228, 201 N.W.2d 683 (1972); *Platte Valley Bank v. Krace*, 185 Neb. 168, 174 N.W.2d 724 (1970); *General Motors Acceptance Corp. v. Stotsky*, 60 Misc. 2d 451, 303 N.Y.S.2d 463 (Sup. Ct. 1969). But see *Moorehead v. John Deere Indus. Equip. Co.*, 194 Colo. 398, 572 P.2d 1207 (1978); *Maryland Nat'l Bank v. Porter-Way Harvester Mfg. Co.*, 300 A.2d 8 (Del. 1972). It is interesting to note that Oklahoma has modified § 9-311 to make explicit that the secured party's interest will survive the sale. See OKLA. STAT. ANN. tit. 12A, § 9-311 (West 1963).

32. *Smith*, 16 U.C.C. Rep. Serv. at 852; *General Motors Acceptance Corp. v. Stotsky*, 60 Misc. 2d 451, 303 N.Y.S.2d 463 (Sup. Ct. 1969).

party's] immediate right to possession. In effect, the purchaser would get the [debtor's] right of redemption.³³

On the other hand, if the sale precedes the debtor's default, the purchaser has the superior right of possession, but only until an event of default has occurred.³⁴

In at least one state, the right to possession upon debtor's default vis-a-vis an execution sale purchaser is not one of the privileges of priority accorded to a secured party. In a much criticized opinion,³⁵ the Delaware Supreme Court held that the purchaser takes free of all prior liens and that the secured party retains only a priority position as to the proceeds.³⁶ The court reasoned that, since "[i]t is left to the law of each state to determine the form of 'appropriate process,'"³⁷ and since "[t]here is no statutory provision in Delaware for the appropriate process to be followed by a creditor intending to limit the interest in secured property acquired by a purchaser at a sale,"³⁸ pre-Code law remains in effect with the result that the purchaser takes free of all encumbrances.³⁹ The court further suggested that this approach is pref-

33. *Smith*, 16 U.C.C. Rep. Serv. at 855 (quoting *General Motors Acceptance Corp. v. Maloney*, 46 Misc. 2d 251, 252, 259 N.Y.S.2d 211, 213 (Sup. Ct. 1965)).

34. *Smith*, 16 U.C.C. Rep. Serv. at 856; *Platte Valley Bank*, 185 Neb. at 172-73, 174 N.W.2d at 727-28. The execution sale purchaser in *Platte* invoked the equitable doctrine of marshalling of assets in an unsuccessful attempt to evade the secured party's possessory rights. Though comment 3 to U.C.C. § 9-311 suggests the application of marshalling under appropriate circumstances, the *Platte* court stated that "the rule is well settled in equity that the doctrine of marshalling assets is not an absolute right, and cannot be invoked or applied so as to defeat *statutory rights*." 185 Neb. at 173, 174 N.W.2d at 729. See also *infra* note 117. For an interesting, but somewhat confusing, case, see *Stearns Mfg. Co. v. National Bank & Trust Co.*, 12 U.C.C. Rep. Serv. 189 (Pa. 1972), in which the court, though acknowledging that the secured party's interest survived the execution sale, nevertheless permitted the execution sale purchaser to retain possession.

35. See Henderson, *supra* note 11, at 208; Justice, *Secured Parties and Judgment Creditors—The Courts and Section 9-311 of the Uniform Commercial Code*, 30 Bus. LAW. 433 (1975).

36. *Maryland Nat'l Bank v. Porter-Way Harvester Mfg. Co.*, 300 A.2d 8 (Del. 1972).

37. *Maryland Nat'l Bank*, 300 A.2d at 11 (quoting U.C.C. § 9-311, comment 2) (emphasis deleted).

38. *Id.*

39. The court reasoned:

It appears . . . that it was the intent of the Legislature to forbear concerning the enactment of any statutory provision for the "appropriate process" contemplated by § 9-311, in order that our case law remain determinative of the issue of alienability of debtor's rights. The silence of the commentators as to any change made by § 9-311 to existing Delaware law contributes to the conclusion that § 9-311 made no change in Delaware's long-standing policy in the matter. Certainly, if a reversal of law was sought the Act itself or the commentators

erable since it stimulates bidding and thus ensures the highest price possible.⁴⁰

C. Conversion of the Collateral

As an alternative to an action for possession of the collateral, the secured party may wish to assert a claim for conversion against either the lien creditor or third party purchaser. This is especially true when, for one reason or another, the collateral is no longer available. Whether such an action will be successful will depend upon the circumstances of the particular case and the court in which the claim is asserted.

1. *The lien creditor's liability for conversion.* The notion that merely setting the wheels of a sheriff's sale in motion constitutes a conversion was squarely rejected in *Citizens Bank v. Perrin & Sons*.⁴¹ Relying on section 9-311, the Arkansas Supreme Court concluded that the action of a creditor in causing collateral to be sold under attachment could not in itself be wrongful.⁴² The court, however, made it clear that its holding was limited to just the "bare sale of the property."⁴³ It distinguished the situation before it, in which the security interest was in no way adversely affected, from those involving the impairment of the secured party's position to some degree.⁴⁴

Whether any court is prepared to hold that merely causing the sale of collateral is in fact a conversion is not without doubt.

would have made mention of such an important change.

Id. at 12. Thus, the court was definitely of the opinion that U.C.C. § 9-311 is not self-executing. The court distinguished *Altec Lansing v. Friedman Sound, Inc.*, 204 So. 2d 704 (Fla. Dist. Ct. App. 1967), and *First Nat'l Bank v. Sheriff of Milwaukee County*, 34 Wis. 2d 535, 149 N.W.2d 548 (1967), on the fact that the Florida and Wisconsin legislatures "sanctioned the continuance of the security interest for the lien holder . . ." *Maryland Nat'l Bank*, 300 A.2d at 12.

40. *Maryland Nat'l Bank*, 300 A.2d at 12.

41. 253 Ark. 639, 488 S.W.2d 14 (1972).

42. *Id.* at 640-41, 488 S.W.2d at 15.

43. *Id.*

44. As examples of what the case before it did not involve, the court referred to *First Nat'l Bank v. Stamper*, 93 N.J. Super. 150, 225 A.2d 162 (1969) ("the transportation of a car to another state, where title was registered in the name of an innocent purchaser"); *United States v. McCleasky Mills*, 409 F.2d 1216 (5th Cir. 1969), and *United States v. Pete Brown Enters.*, 328 F. Supp. 600 (D. Miss. 1971) ("the sale of commodities subject to processing, such as slaughtered chickens or raw peanuts"). See *Citizens Bank*, 253 Ark. at 641, 488 S.W.2d at 15.

Though some cases appear to have so held, there were additional facts in these cases which arguably led the courts to reach that result. In affirming a finding of conversion against a levying creditor, the court in *Murdock v. Blake*⁴⁵ explained, in what would become a much-quoted passage, that

[o]ne who has possession or an immediate right to possession, such as a chattel mortgagee or conditional seller after default, may maintain an action for conversion against one who has exercised unauthorized acts of dominion over the property of another in exclusion or denial of his rights or inconsistent therewith.⁴⁶

One fact noted by the court was that the secured party informed the levying creditor's attorney of the security interest and admonished him that legal action would be taken if the sale was consummated.⁴⁷ One could argue that the case would not have been decided the same way had this fact been absent. Similar facts may have caused other courts to reach similar conclusions.⁴⁸

In *Cooper v. Citizens Bank*,⁴⁹ the levying creditor's undoing may have been caused not by the mere act of levy but by the fact that the levy occurred in Georgia after the debtor removed the collateral from Florida.⁵⁰ Perhaps what swayed the court was that the levy impaired the secured party's position by making a bad

45. 26 Utah 2d 22, 484 P.2d 164, 8 U.C.C. Rep. Serv. 956 (1971).

46. *Id.* at 30, 484 P.2d at 169, 8 U.C.C. Rep. Serv. at 961 (citing *First Nat'l Bank*, 93 N.J. Super. at 156-57, 225 A.2d at 165-66). The opinion emphasized "that [the secured party] was entitled to possession based on [debtor's] default; if [the debtor] had not been in default, [the secured party] would merely be entitled to assert its priority and right to the proceeds." 26 Utah 2d at 30 n.14, 484 P.2d at 170 n.14, 8 U.C.C. Rep. Serv. at 961 n.14. The secured party's right to receive proceeds is discussed *infra* notes 123-45 and accompanying text.

47. *Id.* at 25, 484 P.2d at 166, 8 U.C.C. Rep. Serv. at 958.

48. *E.g.*, *American Fin. Co. v. First Nat'l Bank*, 134 Ga. App. 24, 24, 217 S.E.2d 364, 365 (1975) ("[o]ne hour before the scheduled sale, [the secured party] advised [the lien creditor] by telephone of its security interest in the seized automobile and requested that the sale should not take place"). In both *American Fin. Co.* and *Murdock* the measure of conversion damages was apparently the market value of the collateral on the day of the execution sale. This presupposes that the act of conversion was the sale, not the levy. Perhaps, but for the preceding demand by the secured party, neither court would have been prepared to base liability solely on the act of sale.

49. 129 Ga. App. 261, 199 S.E.2d 369 (1973).

50. *Id.* at 261-62, 199 S.E.2d at 371. One interesting facet of this case was the court's reluctance to impose liability on the execution sale purchaser without a showing that he in some way participated in the levy or in the diminution of the value of the collateral. *Id.* at 263, 199 S.E.2d at 372. Implicit in this position is the idea that the conversion occurs at the time of levy.

situation worse.

2. *The execution sale purchaser's liability for conversion.* It is unlikely that any court would hold that the mere act of purchase at a sheriff's sale gives rise to a cause of action for conversion.⁵¹ This is especially true if at the time of purchase the debtor is not in default.⁵² Courts, however, have not permitted a purchaser to escape liability if in addition to purchasing the collateral he or she does more than nominally impair the secured party's interest.⁵³

3. *Measure of damages.* The measure of damages for conversion is usually stated to be the value of the property at the time of conversion.⁵⁴ The apparent simplicity of this rule tends to belie difficulties which can arise in its application, and as a result courts have not given the issue of damages the attention it deserves. Since the valuation date depends upon the conversion date, a determination of the time the conversion occurred is critical. With no explanation courts have not always attached the same legal significance to the same act.⁵⁵

It also is not clear whether courts really intend that the dam-

51. *Id.* One case which arguably supports the proposition that the mere act of purchase constitutes a conversion is *National Shawmut Bank v. Vera*, 352 Mass. 11, 223 N.E.2d 515 (1967), the facts of which do not disclose any conduct by the purchaser, other than the purchase itself, which adversely affected the interests of the secured party. However, after concluding that the purchaser took subject to the lien of the secured party, the court remanded the case for a new trial. *Id.* at 17-18, 223 N.E.2d at 518-19. If the act of purchase alone constituted a conversion, why was a new trial necessary? The opinion does not provide an answer.

52. *Smith v. Guzman*, 16 U.C.C. Rep. Serv. 852 (N.Y. Sup. Ct. 1975); *Royal Store Fixture Co. v. New Jersey Butter Co.*, 114 N.J. Super. 263, 276 A.2d 153, 8 U.C.C. Rep. Serv. 1391 (1971); *Murdock v. Blake*, 26 Utah 2d 22, 484 P.2d 164, 8 U.C.C. Rep. Serv. 956 (1971).

53. *E.g., Royal Store Fixture Co.*, 114 N.J. Super. at 267, 276 A.2d at 156, 8 U.C.C. Rep. Serv. at 1394 (1971) (after purchase the collateral was removed from Pennsylvania to New Jersey); *Smith*, 16 U.C.C. Rep. Serv. at 852 (the purchaser resold the collateral knowing of the secured party's interest).

54. *Cooper*, 129 Ga. App. at 262, 199 S.E.2d at 371-72; *Murdock*, 26 Utah 2d at 30, 484 P.2d at 169-70, 8 U.C.C. Rep. Serv. at 961. For further discussion of this issue, see *infra* notes 168-70 and accompanying text.

55. Compare *Cooper*, 129 Ga. App. at 262, 199 S.E.2d at 371-72 (the conversion occurs when the sheriff seizes the collateral) with *Smith*, 16 U.C.C. Rep. Serv. 852 (N.Y. Sup. Ct. 1975), and *Murdock*, 26 Utah 2d at 30, 484 P.2d at 169-70, 8 U.C.C. Rep. Serv. at 961 (the conversion occurs when the collateral is sold). See also *supra* note 48. One possible explanation for the courts' relative inattentiveness to this issue is that the market value of the collateral was likely to have remained fairly constant from the date of levy to the date of sale.

age rule be applied literally in all cases. Suppose, for example, that the value of the collateral on the date of conversion exceeds the amount of the secured debt. This possibility was recognized by only one court; surprisingly, this court sanctioned the recovery by the secured party with the extraordinary proviso that the debtor was entitled to any amount recovered by the secured party in excess of the debt.⁵⁶ When determining value, courts agree that although evidence of what the collateral brought at the execution sale is admissible, it is not binding on the question.⁵⁷

II. A SUGGESTED ORDERING OF INTERESTS

Any suggestion of how to order the respective interests of the secured party and lien creditor must account for the rejection of two quite simple but polar solutions.⁵⁸ One possible solution is to give the secured party the right to have any levy set aside without an attendant obligation either to dispose of the collateral or account to the lien creditor for any surplus beyond the amount of the secured debt. This approach would, in most cases, preclude creditor access to debtor's equity. The other extreme would permit the execution sale to take place with the purchaser taking free of the security interest. The secured party would, however, have a priority position in the proceeds. Though an argument can be made in favor of either solution, it can be shown that neither is tenable.

Although the notion that the debtor's equity should be available to his or her creditors has a certain intuitive appeal, that alone does not justify rejection of the first mentioned solution. It is reasonable to assume that most creditors would be aware of a rule which insulates debtors' equity and would recognize that it has the effect of increasing the risk of their claims.⁵⁹ In response to this

56. *Cooper*, 129 Ga. App. at 263, 199 S.E.2d at 372. It has been suggested that courts apply the usual measure of damages without much thought because the market value of the collateral is usually less than the amount of secured debt. See Nickles, *supra* note 10, at 537. Such was clearly the case in *Murdock*, 26 Utah 2d at 30, 484 P.2d at 169-70, 8 U.C.C. Rep. Serv. at 961.

57. *Murdock*, 26 Utah 2d at 30, 484 P.2d at 170, 8 U.C.C. Rep. Serv. at 961. See also *American Fin. Co. v. First Nat'l Bank*, 134 Ga. App. at 25-26, 217 S.E.2d at 366.

58. See generally Henderson, *supra* note 11, and Justice, *supra* note 35, both of whom recognize, but reject, both extremes.

59. See Jackson & Kronman, *supra* note 3, at 1147-48 n.22: "For any given loan, a creditor will face a number of possible outcomes ranging from prompt repayment of all

increased risk, a creditor will either demand increased compensation in the form of a higher rate of interest or take some action to reduce the risk.⁶⁰ This suggests that if "creditors remain free to select their own debtors and to set the terms on which they will lend, there is no compelling argument based on considerations of fairness for adopting one legal rule . . . rather than another"⁶¹

This argument, however, ignores the advantages which result from a legal rule, the effect of which is to lower the debtor's overall cost of credit.⁶² Although at the outset it matters little to creditors, secured or otherwise, which legal rule is adopted (each receives a return concomitant with risk), debtors are quite interested in which legal rule is selected. If the potential benefit from a particular allocation of risk were great enough, a debtor would likely agree to share a portion of this benefit with his or her creditors if their cooperation were needed. Creditor cooperation becomes necessary when adherence to existing legal rules would produce a less favorable result for the debtor. Since a cooperation premium would make creditors better off, it is expected that they would agree to act in a manner consistent with the best interests of the debtor. Consequently, if permitting access to the debtor's equity would lower the debtor's overall costs, all creditors would agree to this regardless of the applicable legal rules.⁶³

The efficient legal rule is one which mirrors this imagined

principal and interest to failure by the debtor to pay any part of either." In the event debtor fails to voluntarily satisfy his or her obligation it is apparent that any obstacle placed in the path of creditor's collection efforts must have the effect of decreasing the likelihood of success. As this possibility increases, so will the perceived riskiness of the original extension of credit.

60. Restrictive covenants in the loan agreement or otherwise which attempt to control debtor behavior may often serve as risk reducers. It is also possible that potential creditors will demand that their extensions of credit be secured. *Id.* at 1148 n.23.

61. *Id.* at 1148.

62. The benefits which result from a decrease in debtor's cost of credit have already been developed at great length and need not be fully reviewed here. See, e.g., Jackson and Kronman, *supra* note 3, *passim*.

63. The "creditor's bargain model" is useful for analyzing the allocative efficiency and fairness of legal rules. As applied here, it serves to compare the rule in question with that to which the parties would have agreed had they been able to negotiate beforehand. For the application of this model in other contexts, see *id.* (justifying the allowance of secured credit) and Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditor's Bargain*, 91 *YALE L.J.* 857 (1982) (testing the efficiency of recognizing certain non-bankruptcy entitlements in a bankruptcy proceeding).

consensual agreement.⁶⁴ Whether access to debtor's equity will reduce his or her credit cost depends upon how it affects the perceived risk of creditor claims. If access is permitted, the risk to the secured party will increase, and with it the rate of return demanded. If this increase is more than offset by the resultant decrease in debtor's total cost of unsecured credit, the debtor will experience a net cost saving. It is reasonable to assume that such will be the case if the interests of competing creditors are ordered in such a fashion as to make debtor's equity available to his or her creditors, while at the same time preserving the basic expectations of the secured party.

There exists an even more compelling reason for adoption of an "access to equity" rule. A creditor who is unable to satisfy a claim because of the existence of one or more secured parties has an incentive to push for some type of collective insolvency proceeding in which the debtor's equity is available to unsecured creditors. At the time of the creditor's push, however, it may not be in the best interests of the debtor's other creditors for the debtor to be involved in such a proceeding.⁶⁵ Because of the number of creditors and free-rider⁶⁶ problems, it usually would be difficult for the pushing creditor to negotiate with other creditors so as to receive its insolvency entitlement and hence to refrain from the push.⁶⁷ Refusing to accord creditors access to a debtor's equity

64. It has been suggested that

[f]acing positive transaction costs, . . . the legal system provides ready-made rules based on common assumptions about typical contracting behavior. These "off the rack" contract rules reduce the costs of exchange by specifying the legal consequences of typical bargains where the expected cost of explicit negotiation exceeds the utility derived from individualized exchange.

Jackson and Kronman, *supra* note 3, at 1157 n.53 (citing Goetz & Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 588 n.87 (1977)).

65. Professor Jackson points out that, because of the potential disharmony of creditors' claims, bankruptcy often involves "complex, costly, and potentially intractable negotiations . . ." Jackson, *supra* note 63, at 876. "[A] private arrangement is faster, cheaper, and more satisfactory all around—that is, if all the creditors join in." LAW & CONTEMP. PROBS., Aug. 1977, at 123, 171 (transcript of seminar discussion of legal and economic considerations in bankruptcy reform conducted by the Law and Economics Center of the University of Miami School of Law; statement by Peter F. Coogan).

66. The term "freerider" is often used to refer to someone who relies on and hopes to capitalize on the efforts of others. See generally Levmore, *Monitors and Freeriders in Commercial and Corporate Settings*, 92 YALE L.J. 49 (1982).

67. See generally Jackson, *supra* note 63, at 904.

outside of the insolvency process may therefore result in an inefficient use of that process. This "insolvency incentive" problem will arise whenever a creditor enjoys an entitlement in an insolvency proceeding not enjoyed outside of that proceeding.⁶⁸

The other extreme solution, permitting the execution sale to occur with the purchaser taking free of the security interest, would also have disadvantageous consequences. It is plausible to view the right of the secured party to take possession of the collateral and control its disposition upon the debtor's default as the sine qua non of a security interest.⁶⁹ If a subsequent levy can deprive a secured party of Article 9 remedies, the secured party will most certainly view his or her claim as riskier. This increased risk will affect the debtor directly in the form of higher credit charges. Though a debtor's total cost of credit might possibly be reduced because of the improved position of unsecured creditors, the reduction will not be maximized given the drastic consequences to the secured party. To achieve the efficiencies concomitant with secured credit,⁷⁰ its benefits should not be reduced beyond that which is necessary. It is possible and hence more efficient to allow access to debtors' equity without, at the same time, upsetting the expectations of the secured party.

Moreover, while a disposition by the secured party would maximize proceeds, an execution sale would decrease the value of the collateral and increase the likelihood of a deficiency or a larger deficiency,⁷¹ much to the debtor's disadvantage. In light of the foregoing it is surprising that the Delaware Supreme Court explicitly approved of this latter position.⁷² In this court's opinion,

[c]hattels sold at an execution sale should be sold free and clear of all encumbrances in order to ensure the highest price and to stimulate bidding. The creditor with the highest priority is not prejudiced in his reliance on the value of the chattel to secure the debt since he is satisfied first from the

68. *Id.* at 887-92, 901-06 (discussing ipso facto clauses, state-created priorities, and bankruptcy statutory liens).

69. See Henderson, *supra* note 11, at 195; and Justice, *supra* note 35, at 434. Both authors assert that the price received as the result of a disposition by the secured party will usually exceed that which would be obtained as the result of a sheriff's sale.

70. See generally Jackson & Kronman, *supra* note 3, at 1149-58 (discussing the benefits of secured credit).

71. See Henderson, *supra* note 11, at 195.

72. See discussion of Maryland Nat'l Bank v. Porter-Way Harvester Mfg. Co., 300 A.2d 8 (Del. 1972), *supra* notes 36-40 and accompanying text.

proceeds.⁷³

This view is flawed in that it fails to recognize that the disposition objective should be to maximize the value of the collateral. This is not accomplished, regardless of whether the highest execution sale price is ensured, if disposition by the secured party would result in an even higher price. In addition, the secured party would not likely be amenable to this arrangement.⁷⁴

Having rejected these two extreme positions, this Article suggests an alternative solution which allows creditor access to a debtor's equity, and, at the same time, recognizes and gives effect to the superior interest of the secured party.⁷⁵

A. *U.C.C. section 9-311 and the Lien Creditor's Right of Levy*

Arguments which justify the right of a creditor to levy on collateral are one thing, but finding authorization for a levy under the law of a particular jurisdiction is another. In the absence of express statutory authorization,⁷⁶ determining the impact of section 9-311⁷⁷ is critical. It is the only Code section which speaks directly to the issue of whether a debtor's interest in collateral can be reached by his or her creditors.

The particular purpose and effect of this section has never

73. 300 A.2d at 12.

74. For one thing a deficiency may result, which is less likely to occur when the secured party controls the collateral's disposition. Also, such an approach deprives the secured party of his or her right to propose to retain the collateral in satisfaction of the secured debt. *See* U.C.C. § 9-505.

75. This Article assumes that the approach suggested is not precluded in whole or in part by a contrary legislative response. Though most jurisdictions have not enacted special legislation to deal with the secured party/lien creditor conflict, some have. Some of these statutes provide for satisfaction of the secured debt before sale. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 223, §§ 74-75 (West 1958 & Supp. 1983); MONT. REV. CODES ANN. § 25-13-505 (1983). Others provide for satisfaction after sale, from the proceeds. *See, e.g.*, N.H. REV. STAT. ANN. §§ 528:8, 511:26 (1974 & Supp. 1983); KAN. CIV. PROC. CODE ANN. § 60-2406 (Vernon 1967); R.I. GEN. LAWS § 9-26-9 (1956). This type of legislation has the same effect and negative consequences as would recognition of the continuation of the secured party's interest in the proceeds. *See infra* notes 136-45 and accompanying text.

Implicit in the following discussion is also the assumption that the collateral is not third-party-obligation collateral such as an account or promissory note. Because of the necessary introduction of a third-party obligor into the scenario and the dissipative nature of the collateral, permitting creditor access would raise a number of unique issues. This is not to suggest, however, that creditor access should be denied.

76. *See supra* note 75.

77. For the full text of § 9-311, see *supra* note 24.

been clear. When the Code was first offered to the states for adoption, some commentators thought that section 9-311 declared void any provision in the security agreement prohibiting the transfer of collateral or making such transfer constitute a default.⁷⁸ It has been suggested that this conclusion finds support in the evolution of the section.⁷⁹

In the 1949 Draft, the predecessor to section 9-311 read, in part: "Notwithstanding any forfeiture or title retention terms in a lien agreement, the borrower's interest in the collateral may be reached by attachment, levy or other appropriate judicial process"⁸⁰ Later, in the 1952 Official Draft, the section read: "The debtor's rights in collateral (a) are alienable, although the security agreement may make disposition without the secured party's consent a default; and (b) may be reached by attachment, levy, garnishment or other appropriate judicial process."⁸¹ The section was again officially amended in 1958 to read as it does today.⁸²

In light of the drafting history, it is arguable that a clause in the security agreement making an involuntary transfer an event of default is invalid because (1) the successive amendments reflect a growing concern with such a default clause and its adverse impact upon the debtor and third parties; (2) the default provision now applies to both voluntary and involuntary transfers; and (3) if a clause prohibiting the transfer of collateral is rendered void by this section, an accompanying reference to a default clause means that it, too, is void.⁸³

Concerned that such an interpretation of section 9-311 would unjustifiably impair the interests of secured parties, some states amended the official version of the section to make it clear that it does not prohibit a clause in a security agreement declaring a transfer of collateral, whether voluntary or involuntary, to be an event of default.⁸⁴ The commentators who have considered this

78. See DEL. CODE ANN. tit. 6, § 9-311 study comment (1967); IND. CODE ANN. § 26-1-311 comment (Burns 1974); N.J. STAT. ANN. § 12A: 9-311 study comment note 1 (West 1962). See also Henderson, *supra* note 11, at 198-99; Special Project, *California Chattel Security and Article 9 of the U.C.C.*, 8 UCLA L. REV. 806, 975-76 (1961).

79. Note, *supra* note 11, at 528-29.

80. U.C.C. § 7-113 (1949).

81. U.C.C. § 9-311 (1952).

82. U.C.C. § 9-311 (1957).

83. See Note, *supra* note 11, at 528-29; Special Project, *supra* note 78, at 976.

84. See ARIZ. REV. STAT. ANN. § 44-3132 (1980); CAL. U. COMM. CODE § 9311 (West

issue agree that such clauses are valid. These commentators uniformly recognize that because of the vicissitudes of personal property, the secured party has a legitimate interest in the identity of the person who holds the collateral.⁸⁵ That the intent of this section was never to void such default clauses is evidenced by the following retort of the permanent editorial board of the U.C.C. to the California amendment to section 9-311: "This variation merely makes explicit what must fairly be implied from the language omitted."⁸⁶

If the purpose of section 9-311 is not to invalidate a "transfer equals default clause," then what is its purpose? On this point the official comments are particularly helpful. Comment 1 states that the purpose of the section is "[t]o make clear that in all security transactions under this Article, the debtor has an interest (whether legal title or an equity) which he can dispose of and which his creditors can reach." It has been suggested that this section is simply another example of the Code's general rejection of title as a test for determining the rights of the parties.⁸⁷ Support for this is found in Official Comment 2, which states:

Supp. 1983), which expressly validates such clauses. For instance, Arizona amended § 9-311 to read:

The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer except where a security interest is indicated on a certificate of title to such collateral as required by the laws of this state in which case such collateral may not be transferred without the written consent of the secured party. *A provision in the security agreement making the transfer constitute a default is valid.*

(Emphasis added).

85. See Henderson, *supra* note 11, at 199; Special Project, *supra* note 78, at 976.

86. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT No. 2, at 218 (1965).

87. Professor Gilmore writes that "[t]he § 9-311 provision followed logically from § 9-202 which, with respect to 'rights, obligations and remedies,' makes it irrelevant whether title to collateral is in the secured party or in the debtor." He goes on, however, to note that "by accident if not by design, § 9-311 takes care of the negative covenant very nicely" in that § 9-311

evidently contemplates that the negative covenant is effective between the parties: the debtor's violation of the covenant, either by making a voluntary transfer or by suffering an involuntary one, may 'constitute a default.' The covenant is clearly enough looked on as what the pre-Code case law calls a 'personal' one: it will have no effect against third parties but will give the covenantee a right of action against the covenantor for its breach.

2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 38.5, at 1017-18 (1965).

Some jurisdictions have held that when a mortgagee or conditional seller has "title" to the collateral, creditors may not proceed against the mortgagor's or vendee's interest by levy, attachment or other judicial process. This section changes those rules by providing that in all security interests the debtor's interest in the collateral remains subject to claims of creditors who take appropriate action. It is left to the law of each state to determine the form of "appropriate process".

Prior to the Code and its adoption of a unitary personal-property security device,⁸⁸ there was a divergence of views regarding whether the interest of a mortgagor of personal property could be reached by his or her creditors. This lack of uniformity was caused, in part, by the inability of courts to agree on the nature of the property rights possessed by the mortgagor. Such was the inevitable consequence of the pre-Code obsession with the metaphysical concept of title⁸⁹ which influenced the historical development of post-judgment enforcement procedures.⁹⁰ As a prac-

88. Under Article 9,

the traditional distinctions among security devices, based largely on form, are not retained; the Article applies to all transactions intended to create security interests in personal property and fixtures, and the single term "security interest" substitutes for the variety of descriptive terms which had grown up at common law and under a hundred-year accretion of statutes.

U.C.C. § 9-101 comment.

89. Prior to the U.C.C., many commercial problems were resolved by "resorting to the idea of when property or title passed or was to pass . . ." U.C.C. § 2-101 comment. The potential difficulties in locating title at a given point in the life of a commercial transaction have long been recognized. *See, e.g., 1 Hearings Before the New York Law Revision Commission on the Uniform Commercial Code 96 (1954) (statement of Karl Llewelyn); J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 5-1 (2d ed. 1980) ("[w]ho had title and what caused title to pass from the seller to the buyer were often mysteries to both lawyers and the courts," id. at 176).* The drafters of the U.C.C. sought "to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character." U.C.C. § 2-101 comment. Thus the solution of many commercial problems formerly dependent upon the location of title, such as risk of loss, are now resolved on a more practical basis. *See, e.g., U.C.C. §§ 2-509 and 2-510.* It should be noted, however, that the U.C.C. does contain a title section; U.C.C. § 2-401, to "be followed in cases where the applicability of 'public' regulation depends upon . . . location of 'title' . . ." U.C.C. § 2-401 comment 1.

90. The most common procedures were execution and levy, garnishment, and the creditor's bill. Writs of execution and the process of garnishment were developed by the common law courts, and being legal devices could not be used to reach equitable interests. 1 A. FREEMAN, EXECUTIONS § 116 (3d ed. 1900). *See Young v. Schofield*, 132 Mo. 650, 653, 34 S.W. 497, 501 (1896) ("at common law the equitable interest of a debtor in chattels was not the subject of sale under execution"). *See also State v. Nolte*, 203 S.W. 956, 959 (Mo. 1918); *Ottumwa Nat'l Bank v. Totten*, 94 Mo. App. 596, 597, 68 S.W. 386, 388 (1902). The mortgagor's interest, if characterized as equitable, could be reached, if at all, by resort

tical matter, the ability of a judgment creditor to reach the interest of the mortgagor was dependent on the availability of the legal device of execution and levy.⁹¹

The characterization of the mortgagor's interest as either equitable or legal was often a result of the type of personal-property security device used.⁹² If, for example, the operative device was either the pledge⁹³ or the chattel mortgage⁹⁴ most courts were of the opinion that the pledgor or mortgagor retained only an equitable interest, hence the collateral was not subject to execution and levy.⁹⁵ On the other hand, in the case of the conditional

to a creditor's bill. See Note, *supra* note 11, at 520-21. The categories of "legal" and "equitable" interest were, therefore, the traditional touchstones by which courts determined the relative provinces of their post-judgment procedures.

91. The creditor's bill was not always a satisfactory alternative because it could become an extremely cumbersome device. See Ward, *supra* note 8, at 255.

Creditor's bill consists of two distinct parts. The bill's discovery prayer is designed to compel defendants to disclose assets. Pursuant to such a prayer, a creditor requests that the court question the debtor and third parties in order to locate assets which can be applied to the judgment. By separate prayer the creditor asks the court to apply the debtor's property to the judgment. The court can enjoin the debtor from conveying or encumbering any property discovered, and can appoint a receiver to take over discovered property.

Id. at 256.

In addition to the two-part procedure under a creditor's bill, the creditor "was typically required to show that his writ of execution had been returned *nulla bona*." *Id.* at 255. See also Bouget v. Government Employees Ins. Co., 287 F. Supp. 108 (D. Conn. 1968); Goldman v. Meredith, 596 F.2d 1353 (8th Cir.), *cert. denied*, 444 U.S. 838 (1979).

92. Prior to the U.C.C., there were numerous personal-property security devices, each operating within its own province. The most typical were the "pledge," the "chattel mortgage" and the "conditional sale." For a detailed discussion of all the various pre-Code devices, see generally 1 G. GILMORE, *supra* note 87, at §§ 1.1-8.8.

93. The debtor or pledgor would deliver possession of the collateral to the creditor or pledgee. If the pledgee failed to satisfy his or her obligation when due, the pledgee was empowered to sell the collateral and retain those proceeds necessary to satisfy the obligation. *Id.* at §§ 1.1-1.6.

94. The debtor or mortgagor would give to the creditor or mortgagee a mortgage on the collateral. In the event that the mortgagor defaulted on his or her obligation, the mortgagee was permitted to take possession and dispose of the collateral. Prior to an event of default, possession of the collateral usually remained with the mortgagor. Unlike the conditional sale, the debtor usually had an interest in the collateral prior to incurring his or her obligation to the creditor. *Id.* at §§ 2.1-2.8.

95. In the case of the pledge, execution and levy was thought to interfere with the rights of the pledgee.

The only obstacle to the sale of pledged property is that, the pledgee being entitled to the possession, the officer has no right to seize upon the property in violation of the rights of the pledgee An officer acting under an execution cannot by his levy obtain or transfer any greater interest in the property than was possessed by the [pledgor] at the time of the levy.

sale,⁹⁶ courts were in disagreement over the correct labeling of the debtor's interest.⁹⁷

It appears reasonably certain from official Code comments and the pre-Code state of affairs⁹⁸ that one purpose of section 9-311 was to allow for the alienability of the debtor's equity in the collateral by way of an involuntary transfer, regardless of the fact that the transfer would constitute a default under the terms of the security agreement.⁹⁹

Although the purpose of the section is arguably clear, its effect on pre-existing law is not. One commentator posits that

Newman v. Mantle, 109 Ky. 292, 293, 58 S.W. 783, 784 (1900).

If a chattel mortgage was being used, most courts felt that title to the property was "conveyed by the mortgagor to the mortgagee subject to being divested upon timely payment of the debt which gave rise to the transaction." Note, *supra* note 11, at 516. As a result of this so-called title theory, it was often held that the mortgagor did not retain an interest which was subject to execution and levy. 1 A. FREEMAN, *supra* note 90, at § 117. See, e.g., Jennings v. McIlroy, 42 Ark. 236 (1883); Holbrook v. Baker, 5 Me. 309 (1828); Haven v. Low, 2 N.H. 13 (1819); Erdman v. Erdman, 109 Ark. 151, 159 S.W. 201 (1913). A few courts avoided such a harsh result by concluding that, even though title vested in the mortgagee, the mortgagor did retain a legal interest in the property (i.e., present possession and the possibility of reverter). Note, *supra* note 11, at 516. See, e.g., *Ex parte* Logan, 185 Ala. 525, 64 So. 570 (1914); Second Nat'l Bank v. Gilbert, 174 Ill. 485, 51 N.E. 584 (1898); Mueller v. Provo, 80 Mich. 475, 45 N.W. 498 (1890); Smith v. Beattie, 31 N.Y. 542 (1865); Stewart v. Wheeling & L.E.R. Co., 53 Ohio St. 151, 41 N.E. 247 (1895); Lane v. Baughman, 17 Ohio St. 642 (1867). This leviable interest was thought to vanish, however, when defaulting mortgagor's possession depended on the whims of the mortgagee. Note, *supra* note 11, at 517-18. See, e.g., Tannahill v. Tuttle, 3 Mich. 104 (1854); Manning v. Monaghan, 28 N.Y. 585 (1864); Green v. Powell, 46 S.W.2d 915 (Mo. App. 1932); Hauelsen v. Szalay, 33 Ohio App. 350, 169 N.E. 602 (1929).

96. The conditional sale was used primarily by sellers to secure all or a portion of the purchase price. Conceptually, it was said that the seller retained title to the collateral until the purchase price had been paid in full. 1 G. GILMORE, *supra* note 87, at §§ 3.1-3.8.

97. If the vendee, at the time of the levy, had the right to possession of the goods, it was often thought that this interest was leviable. See 13 N.Y.U. L. REV. 611, 625 nn.14-16 (1936); Note, *Conditional Sales—Interest of Conditional Buyer of Personal Property—Is it Attachable?*, 13 MINN. L. REV. 247, 248 n.4 (1929) [hereinafter cited as Note, *Conditional Sales*]. On the other hand, there were courts which denied the right to levy irrespective of the vendee's right to continued possession. See 13 N.Y.U. L. REV. at 624; Note, *Levy of Attachment and Execution on Buyer's Interest Under Conditional Sales Contract*, 42 W. VA. L.Q. 152 (1936). Once an event of default had occurred, the vendee's legal interest was thought to vanish and the goods became immune from execution and levy. See Note, *Conditional Sales, supra*, at 249 & n.11.

98. That pre-Code law should be considered when interpreting and applying provisions of the Code was recognized by Professor Gilmore, who stated: "The solid stuff of pre-Code law will furnish the rationale of decision quite as often as the Code's own gossamer substance." Gilmore, *Article 9: What it Does for the Past*, 26 LA. L. REV. 285, 286 (1966).

99. *Accord* Hogan, *Pitfalls in Default Procedure*, 2 U.C.C. L.J. 244, 246-47 (1970) (discussing voluntary transfers of collateral).

[s]ince the drafters wanted to change existing state law as little as possible, they listed the three principal methods of reaching this interest at law—attachment, execution, garnishment—and used the term “other judicial process” to cover such procedures as sequestration, trustee process and creditor’s bill. Hence, the provisions of this section are satisfied if the debtor’s interest can be reached in any one of these ways even though it can be reached in no other way.¹⁰⁰

Under this rationale, the section would effect no change in those jurisdictions which, though labeling the debtor’s interest as equitable, nevertheless permitted its alienability by creditor’s bill or otherwise.¹⁰¹

In light of the drafter’s approach to the idea that the location of title is determinative of legal rights,¹⁰² it is unlikely that no change in prior law was intended by the inclusion of section 9-311 in the Code. It is true that the section does not provide a means by which a creditor can reach the debtor’s interest. That it was not intended to be self-executing can be inferred from the statement in Official Comment 2 that “[i]t is left to the law of each state to determine the form of ‘appropriate process.’ ”¹⁰³ What it does, however, is give the debtor a legal interest in the collateral which would then be accessible to creditors by resort to the appropriate legal devices. This conclusion would change the law in those jurisdictions which would otherwise label the debtor’s interest as equitable and thus beyond the scope of legal process.¹⁰⁴

Section 9-311 may also have the effect of insulating the credi-

100. See Note, *supra* note 11, at 526.

101. *Id.*

102. See *supra* note 89.

103. See *Maryland Nat’l Bank*, 300 A.2d at 12. See also *supra* notes 35-40, 72-74 and accompanying text.

104. See OKLA. STAT. tit. 12A, § 9-311 comment (1963). See also *Citizens Bank*, 253 Ark. at 639, 488 S.W.2d at 14; *New Jersey Bank v. Community Association/Farms, Inc.*, 666 F.2d 813 (3d Cir.), 32 U.C.C. Rep. Serv. 963 (1981).

The right of levy should not be affected by the fact that the secured party is in possession of the collateral. An additional problem arises when the secured party is relying on his or her possession to perfect the security interest. How can a sheriff take possession without thereby relegating the secured party to the status of unperfected? One commentator suggests that “the sheriff should be viewed as a bailee with notice of the secured party’s interest within the meaning of the second sentence of section 9-305.” Ward, *supra* note 8, at 238. But after sale it would be difficult to view the purchaser as the type of bailee contemplated by § 9-305. Perhaps a better solution would be to allow the secured party to file a financing statement without the debtor’s signature pursuant to § 9-402(2), which should not be viewed as containing an exhaustive list of circumstances authorizing such a filing.

tor from conversion liability to the secured party.¹⁰⁵ Since an involuntary transfer is expressly sanctioned, it would seem that the taking of the collateral pursuant to the appropriate process, without more, is not wrongful and, hence, not a conversion. It would make no difference whether the creditor proceeds against the collateral before or after the debtor's default under the terms of the security agreement.¹⁰⁶ This interpretation would change the pre-Code law in some jurisdictions.¹⁰⁷

Assuming that the debtor's interest is subject to involuntary transfer, either because of or without regard to section 9-311, the Code is nevertheless silent on how the competing interests of the secured party and the creditor are to be reconciled. Both have interests which need protection, but which often conflict.

B. *The Secured Party's Right to Vacate the Levy and Recover Possession From the Sheriff*

Without the correlative right of the secured party to pursue remedies under Part Five of Article 9, the value of the security interest is substantially lessened.¹⁰⁸ Therefore, full recognition of the secured party's priority position requires courts to allow secured parties to vacate any levy and take possession of collateral. Most courts have recognized that a priority position under Article 9 carries with it a superior possessory right. Many have, in fact, allowed secured parties to vacate levies and take possession of collateral, but the doctrinal justification for this decision has not often been articulated.¹⁰⁹ These courts have concluded simply that the lien creditor's interest must yield to the secured party's right under section 9-503 to take possession of the collateral upon the debtor's default.¹¹⁰ But this argument is problematic.¹¹¹ The

105. See Note, *supra* note 11, at 527; Henderson, *supra* note 11, at 209; *Citizens Bank*, 253 Ark. at 639, 488 S.W.2d at 14. See also *infra* notes 154-57 and accompanying text.

106. See Henderson, *supra* note 11, at 210.

107. See Note, *supra* note 11, at 527.

108. See *supra* notes 69-70 and accompanying text.

109. See *supra* notes 14-40 and accompanying text.

110. See *supra* notes 14-29 and accompanying text.

111. A secured party attempting to recover possession of the collateral subsequent to levy on the strength of § 9-503 does not face the interpretative problem which exists when recovery is sought from a subordinate secured party. As Professor Nickles points out:

Section 9-503 gives 'a secured party' the right to possession of the collateral on the debtor's default; neither this right nor the section 9-504 right to dispose of

conclusory nature of it becomes apparent by its failure to respond to the contrary contention: that the secured party's right of possession given by section 9-503 should yield to the lien creditor's right of levy. What is needed is a more persuasive reason for awarding possession to the secured party.

Unless there exists an applicable exception, the general rule is that the sheriff, by the act of levy, cannot acquire greater rights in the property levied upon than the rights which the debtor had.¹¹² Article 9 does provide a limited exception by awarding a lien creditor priority over a pre-existing secured party in certain circumstances.¹¹³ If the levy occurs after the secured party's interest has attached but before it is perfected, the lien creditor's priority should enable the sheriff to deal with the collateral as if it were not subject to the security interest. Assuming that the interest of a secured party has priority, however, this limited exception becomes immaterial.

Prior to the occurrence of an event of default,¹¹⁴ the debtor will usually have the right to possess, use, and sometimes even to dispose of the collateral. Interference with these rights, even by the secured party, may result in liability for conversion.¹¹⁵ After

collateral after repossession is granted exclusively to *senior* secured parties. Thus, the junior creditor may contend that because he, too, has the statutory rights to repossess the collateral and foreclose, the senior secured party cannot retake the property from him.

Nickles, *supra* note 12, at 219 (citations omitted). Sections 9-503 and 9-504, however, make no mention of lien creditors.

112. See A. FREEMAN, *supra* note 90, § 195, at 1005. Professor Freeman stated that [i]n the absence of a statutory provision giving it some greater effect, an execution lien, like that of a judgment, attaches to the real rather than the apparent interest of the defendant. If the title held by him is subject to equities of third persons, the execution lien is also subordinate to such equities. "The fountain cannot rise higher than its source." In all attempts to acquire rights under the execution, the title of the defendant must be regarded as the source beyond which it will be impossible to proceed.

Id. See also *Ford Motor Credit Co.*, 26 U.C.C. Rep. Serv. at 1317; Nickles, *supra* note 12, at 223 n.25 (in support of a secured party's right to recover possession from a subordinate secured party, Professor Nickles relies on the similar rule that ordinarily one cannot convey greater title than one possesses).

113. See U.C.C. § 9-301 and *supra* note 9.

114. Though the secured party's rights often depend on the existence of an "event of default," nowhere in the Code is that term defined. Usually the security agreement will provide the necessary definition. For examples of some typical default provisions, see B. CLARK, *THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 4-4* through 4-5 (1980). Usually the parties will agree that a levy constitutes a default. *Id.*

115. See, e.g., *Warren v. Ford Motor Credit Co.*, 693 F.2d 1373 (11th Cir. 1982); *Clay-*

default, however, the situation changes. The secured party then becomes the one with the superior right of possession.¹¹⁶ The sheriff will then take subject to this superior possessory right and it should make no difference whether the default precedes or follows the levy.¹¹⁷

Section 9-201 also provides a basis for awarding possession to the secured party after default.¹¹⁸ It provides, in pertinent part: "Except as otherwise provided by this Act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against *creditors*."¹¹⁹ If the security agreement gives the secured party the right to possess the collateral upon default, this right is presumptively enforceable against the lien creditor. Of course, this presumption is rebuttable in the event Article 9 provides otherwise. It does provide otherwise when it "subordinates the security interest because it has not been perfected . . . or defeats the security interest where certain types

ton v. Crossroads Equip. Co., 655 P.2d 1125 (Utah 1982); Nevada Nat'l Bank v. Huff, 94 Nev. 506, 582 P.2d 364 (1978); Ford Motor Credit Co. v. Spicer, 144 Ga. App. 383, 241 S.E.2d 273 (1977); Klingbiel v. Commercial Credit Corp., 439 F.2d 1303 (10th Cir. 1971); Ford Motor Co. v. Hitchcock, 116 Ga. App. 563, 158 S.E.2d 468 (1967).

116. In addition to § 9-503, this right of possession will usually be granted in the security agreement.

117. The lien creditor may, nevertheless, seek to circumvent the secured party's superior right to possession by resort to the equitable doctrine of marshalling. Official Comment 3 to § 9-311 suggests that its application may be appropriate if, for example, "a debt of \$100,000 is secured by inventory worth twice that amount" but only "certain units of the inventory are seized . . ." Because the debtor has equity in the whole but not in any individual unit, the lien creditor may seek to require the secured party to first proceed against the items remaining with the debtor. To date, two reasons have been offered to justify the procedure's non-incorporation into the priority scheme of Article 9, both premised on the idea that it would defeat certain statutory rights of the secured party. First, its application would be violative of the secured party's right under U.C.C. § 9-501 to pursue remedies in any order. See B. CLARK, *supra* note 114, at 4-17 n.55; Labovitz, *Marshalling Under the U.C.C.: The State of the Doctrine*, 99 BANKING L.J. 440 (1982). Second, it would negate the right of possession granted by § 9-503. See *Platte Valley Bank v. Krace*, 185 Neb. 168, 174 N.W.2d 724 (1970). Notwithstanding these reservations, several courts have been receptive to the procedure and its effect on the ordering rules of Article 9. See, e.g., *Community Bank v. Jones*, 278 Or. 647, 566 P.2d 470 (1977); *Shedoudy v. Beverly Surgical Supply Co.*, 100 Cal. App. 3d 730, 161 Cal. Rptr. 164 (1980); and *In re Jack Green's Fashions*, 597 F.2d 130 (8th Cir. 1979). Because marshalling cannot be used when the result would be inequitable there does not appear to be any reason for its outright rejection. Its appropriateness will have to depend upon the facts of each case.

118. See Nickles, *supra* note 12, 228-30.

119. U.C.C. § 9-201 (emphasis added). The term creditor, as defined in U.C.C. § 1-201(12), includes a lien creditor.

of claimants are involved . . ."¹²⁰ To rebut this presumption of effectiveness the section clearly requires a showing that the secured party does not have priority. Since it is assumed that the secured party does have priority, and since section 9-201 "effectively equates priority of interest . . . with priority of possession,"¹²¹ the secured party is entitled to vacate the levy and recover possession from the sheriff.

Recognizing the superior possessory right of the secured party does not, however, mean that upon repossession the lien creditor loses all interest in the collateral and its eventual disposition. The lien creditor clearly is protected by Part Five of Article 9's protective provisions,¹²² even though this is not explicit in the language of the provisions.

C. *The Lien Creditor's Right to Retain "Proceeds" Resulting from the Execution Sale*

If the execution sale takes place, it is quite possible that the secured party will assert a claim to the resultant proceeds. The basis for the secured party's claim will be fairly straightforward; the security interest continues in the proceeds pursuant to section 9-306(2)¹²³ and the secured party's priority position with regard to the original collateral carries over to the proceeds.¹²⁴ This argument is quite convincing if, in fact, the secured party's interest continues in the proceeds. Whether it does will depend on which of two conflicting interpretations of section 9-306(2) one adopts. Professor Henson has remarked that

[t]his provision is capable of being read to say that proceeds, which include collections, must be received by the debtor, or that the proceeds need not be

120. U.C.C. § 9-201 official comment.

121. See Nickles, *supra* note 12, at 229.

122. See *infra* notes 171-94 and accompanying text.

123. U.C.C. § 9-306(2) reads as follows:

Except where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

124. That a secured party's priority with respect to the original collateral carries over to the proceeds of that collateral is, in the case of two competing secured parties, made explicit by U.C.C. § 9-312(6), which provides that "[f]or the purposes of subsection (5) a date of filing or perfection as to collateral is also a date of filing or perfection as to proceeds."

received by the debtor but the security interest will in any event continue in identifiable proceeds regardless of who receives them and it will also continue in collections received by the debtor.¹²⁵

The validity of the secured party's claim depends, therefore, upon what the phrase "received by the debtor" modifies in section 9-306(2). If it modifies both the words "proceeds" and "collections" then the secured party has no interest in these proceeds since they are received by the lien creditor, not the debtor.¹²⁶

Professor Nickles argues that the drafting history of section 9-306(2) makes it clear that the drafters' intent was to restrict the secured party's interest to only those proceeds received by the debtor.¹²⁷ He bases his conclusion on the fact that, prior to the 1957 Official Text, what was then section 9-306(1) provided that if "collateral is sold, exchanged, collected or otherwise disposed of by the debtor the security interest continues in any identifiable proceeds *received by the debtor.*"¹²⁸ In this version there can be no doubt as to what the phrase "received by the debtor" modifies, and Nickles points out that since the 1957 revision was simply "for clarity,"¹²⁹ it did not enlarge the secured party's entitlement to proceeds.¹³⁰

125. R. HENSON, HANDBOOK ON SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 6-1, at 197 (2d ed. 1979).

126. Though lien creditors should be able to take advantage of the protective provisions of Part Five of Article 9, *see infra* notes 171-94 and accompanying text, they are not "debtors." A debtor is defined as:

the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the Article dealing with the collateral, the obligor in any provision dealing with obligation and may include both where the context so requires.

U.C.C. § 9-105(1)(d).

The courts in both *Smith v. Guzman*, 16 U.C.C. Rep. Serv. 852 (N.Y. Sup. Ct. 1975), and *Murdock v. Blake*, 26 Utah 2d 22, 484 P.2d 164, 8 U.C.C. Rep. Serv. 956 (1971), thought that the security interest continued in the proceeds of the sheriff's sale. But neither court gave the issue much consideration; both ignored the patent ambiguity of § 9-306(2).

127. *See* Nickles, *supra* note 12, at 252.

128. *Id.* at 246 and U.C.C. § 9-306(1) (1952 Official Text). The present language of the second clause of § 9-306(2) did not become part of the Code until 1957. *See* U.C.C. § 9-306(2) (1957).

129. *See* Nickles, *supra* note 12, at 246 (citing the explanation of the 1956 editorial board of the Code for the 1957 revision).

130. *See id.*

Contrary to his assertion, however, the drafting history of section 9-306(2) does not dispel "any doubt that ['received by the debtor'] . . . modifies 'proceeds' and not just 'collections.'"¹³¹ The pre-1957 wording of the present second clause of section 9-306(2) was arguably a result of the pre-1972 wording of the present first clause of that section.¹³² If the focus, during this period, was on dispositions *by the debtor*, it follows that the drafters would focus only on proceeds received *by the debtor*. Why at first the drafters explicitly addressed only dispositions by the debtor is unknown. Perhaps it was mere oversight, or perhaps they thought that a third party disposition already was adequately handled by the Code.¹³³ In any event it is unclear what the 1957 revision of the present second clause was meant to clarify¹³⁴ in light of the fact that the meaning of the prior version was crystal clear. If the drafters believed that section 9-306 was applicable to third party dispositions, or that this problem was adequately handled elsewhere in the Code, it could possibly be that the revision was meant to make clear that a secured party has an interest in proceeds, other than collections, regardless of the identity of the recipient.

After considering the drafting history of section 9-306(2), the meaning of the second clause remains ambiguous. Although two disparate interpretations are possible, there are persuasive reasons for denying the secured party an interest in proceeds received by anyone other than the debtor, including the lien creditor.¹³⁵

131. *Id.* at 252.

132. Prior to 1957, the precursor to § 9-306(2) read, in part, as follows:

When collateral is sold, exchanged, collected or otherwise disposed of by the debtor the security interest continues on any identifiable proceeds received by the debtor . . . [T]he security interest also continues in the original collateral unless the debtor's action was authorized by the secured party in the security agreement or otherwise

U.C.C. § 9-306(2) (1957).

In 1957, the language of § 9-306(1), in modified form, first appeared in § 9-306(2). It then read: "Except where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise . . ."

U.C.C. § 9-306(2) (1957).

This clause was then amended in 1972 to read as it does today. *See supra* note 123.

133. *See infra* note 207.

134. *See supra* note 129 and accompanying text.

135. Professor Henson argues that to read § 9-306(2) so as to deny to the secured party an interest in proceeds received by third parties would be to deny protection to the

Theoretically, a knowledgeable purchaser at an execution sale will not bid an amount in excess of the debtor's equity in the collateral.¹³⁶ If the lien creditor were required to turn over to the secured party the sale proceeds up to the amount of the secured debt, the creditor would get nothing unless the property sold for an amount greater than the total of the secured debt plus the costs of the levy and sale. Since prior to the levy the lien creditor has no way of accurately gauging the amount of the secured debt,¹³⁷ the act of levy becomes a gamble which the creditor may be unwilling to take or incapable of taking. As a result, the debtor's equity remains shielded. Even if the creditor, prior to the levy, could obtain accurate information regarding the secured debt, the creditor's decision as to whether or not to levy should depend solely on the value of the debtor's ownership interest, as it does with regard to unencumbered property. It would seem anomalous if this decision were to hinge on a comparison of the value of the debtor's ownership interest with that of the interest of some third party.

Moreover, giving the secured party an interest in sale proceeds could also have the effect of reducing the value of the debtor's ownership interest in the collateral, a result to be avoided if possible.¹³⁸ Upon learning of the levy the secured party could choose to recover possession of the collateral and pursue options available under Part Five of Article 9.¹³⁹ This, however, entails

secured party when it is most needed. He worries that upon debtor's insolvency the secured party would have no claim to proceeds received by a receiver or trustee. See R. HENSON, *supra* note 125, at 197-98. His concern, however, is unfounded. Such a creditor representative becomes, in effect, the owner of the debtor's assets. See, e.g., 11 U.S.C. § 541 (1982). Thus, such a creditor representative easily fits within the definition of debtor for purposes of § 9-306(2). See *supra* note 126.

136. To bid more than the amount of the debtor's equity would expose the purchaser to the risk of having to pay more than the collateral is worth. This happens whenever the purchaser must pay off the secured debt in order to avoid losing the collateral. In fact, the purchaser should bid less than the debtor's equity to compensate for the riskiness of the purchase. It has been noted that "a title acquired at [a] sheriff's sale [is] of all titles perhaps one of the most doubtful." Lloyd, *Executions at Common Law*, 62 U. PA. L. REV. 354, 368 (1914).

137. Prior to the levy, the lien creditor, who is not entitled to a "Statement of Account" under U.C.C. § 9-208, must depend on the cooperation of the secured party, which may not be forthcoming.

138. Such a result is not only detrimental to the debtor, but will also work to the collective disadvantage of the other creditors. See generally Jackson, *supra* note 63.

139. See *supra* notes 108-21 and accompanying text.

certain risks which the secured party would undoubtedly like to avoid.¹⁴⁰ One way to do this would be to let the lien creditor do all the dirty work. If the secured party is entitled to the sale proceeds then the lien creditor is, for all practical purposes, effectuating a disposition on behalf of the secured party which is outside, and thus avoids the pitfalls, of Article 9. Thus, even though an Article 9 disposition may maximize the sale proceeds¹⁴¹ the secured party will often be content to allow the execution sale to go forward. On the other hand, if denied an interest in proceeds received by the lien creditor, the secured party would normally have no choice but to recover possession of the collateral and control its sale.¹⁴²

Giving a secured party an interest in proceeds received by one other than the debtor will also make U.C.C. filings less effective in putting third-party searchers on notice that certain property may be subject to a security interest. Whenever a secured party retains an interest in property not in the possession of the debtor named in the financing statement, the ability to discover that interest is substantially reduced.¹⁴³ Sometimes this is justified as a consequence of protecting the value of the original security interest;¹⁴⁴ when the interests of the secured party are balanced

140. A secured party will certainly be aware that misbehavior in . . . reselling collateral can bring upon him a variety of unpleasant consequences They may be classified as follows: (1) criminal liability under state and federal laws; (2) tort liability for improper collection behavior; (3) statutory liability under 9-507 for loss caused by deviation from the provisions of Part Five of Article Nine; (4) statutory liability under 9-507 as a penalty for the improper . . . resale of consumer goods; and (5) denial of a deficiency judgment.

J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 1123 (2d ed. 1980).

141. See *supra* note 71 and accompanying text.

142. To do otherwise may result in the loss of the collateral. There is the possibility that a court will find that the secured party has, by inaction, impliedly consented to the sale, with the result that the purchaser takes free of the security interest. See *infra* note 208. Even if the security interest continues, the collateral will be in the hands of a third party, whose intentions regarding it are unknown.

143. If, because of an interest in proceeds, the secured party is less likely to interfere with the sale, the instances of purchasers taking subject to a security interest would undoubtedly increase. Since the secured party is under no duty to file a new financing statement naming the purchaser as debtor, see U.C.C. § 9-402(7), a third-party searcher will only discover the security interest if the transferee truthfully represents the collateral's origin.

144. If the secured party were required to refile each time possession of the collateral

against those of third parties, the balance often tips in favor of the former. In this situation, however, the balance tips the other way. The secured party is already adequately protected without the additional right of having an interest in proceeds.¹⁴⁵

D. *The Lien Creditor's Liability for Conversion of the Collateral*

One possible post-levy option available to the secured party is to forego any attempt at repossession and in its stead to bring an action against the lien creditor for conversion of the collateral. Though the secured party does not own the collateral, after default he or she does have the superior right to possess the collateral and control its disposition.¹⁴⁶ This, the secured party will argue, entitles him or her to maintain an action for conversion against anyone who interferes with that right, including a creditor causing a levy.¹⁴⁷ Although the Code recognizes this right "in an appropriate case," it offers no guidance on when a case is appropriate.¹⁴⁸ Does a conversion occur by the *mere* act of levy or does the existence of the tort depend on post-levy events?

One cannot say with certainty that most courts, if presented with the issue, would hold that the act of levy itself, without more, constitutes a conversion.¹⁴⁹ That view is not only contrary to the

changed, burdensome monitoring costs would result in secured credit becoming another historical relic.

145. The secured party has the right to recover possession of the collateral from the sheriff, *see supra* notes 108-21 and accompanying text, from the purchaser, *see infra* notes 195-212 and accompanying text, and, in an appropriate case, from either the lien creditor or purchaser for conversion of the collateral, *see infra* notes 146-70 and accompanying text and notes 213-18 and accompanying text.

146. *See supra* notes 108-21 and accompanying text.

147. Though Professor Prosser was of the opinion that the term conversion "almost defies definition," W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 15, at 79 (4th ed. 1971), a definition is attempted in the *RESTATEMENT (SECOND) OF TORTS*. It defines the tort as "an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." *RESTATEMENT (SECOND) OF TORTS* § 222A(1) (1965). The gist of the action is defendant's interference with the plaintiff's "control" or "possessory," as opposed to "ownership," interest. *See also id.* at § 225; and W. PROSSER, *supra*, at 93-97.

148. *See* U.C.C. § 9-306 comment 3.

149. *See supra* notes 41-50 and accompanying text. Though some courts may be willing to adopt a "levy equals conversion" approach, the commentators are not. *See* Henderson, *supra* note 11, at 209-10; Justice, *supra* note 35, at 441-43. For the rejection of a per se approach to conversion in other contexts, see Nickles, *supra* note 10, at 520-36 (the mere act of purchasing collateral after the debtor's default is not a conversion); and Nickles, *supra* note 12, at 256-71 (the mere repossession by a junior secured party is not a

approach taken by the *Restatement (Second) of Torts* and the evident intent of the drafters of the Code, but should be rejected on policy grounds.

Unlike its predecessor, the *Restatement (Second)* explicitly adopts the view of Professor Prosser that "the tort of conversion [should be] confined to those major interferences with the chattel, or with the plaintiff's rights in it, which are so serious, and so important, as to justify the forced judicial sale to the defendant which is the distinguishing feature of the action."¹⁵⁰ This was accomplished by including the phrase "seriously interferes" within the definition of conversion¹⁵¹ and by adding subsection two to section 222A, which contains a non-exhaustive list of those factors which should be considered when determining the seriousness of defendants' interference.¹⁵² The notion that defendants' act alone is determinative of liability is clearly rejected. What must be taken into account is "[n]ot only the conduct of the defendant but also its consequences."¹⁵³ Under this approach, a levy which does not seriously interfere with the secured party's right of possession would not constitute a conversion.

Another reason for rejecting the levy-equals-conversion approach is the existence of section 9-311. Since it is plausible to interpret that section as authorizing the levy,¹⁵⁴ how can that act be characterized as wrongful? It follows that if the instigation of

conversion).

150. W. PROSSER, *supra* note 147, at 80-81.

151. See RESTATEMENT (SECOND) OF TORTS § 222A(1) (1965).

152. Among the factors to be considered when gauging the seriousness of a defendant's interference are:

- (a) the extent and duration of the actor's exercise of dominion or control;
- (b) the actor's intent to assert a right in fact inconsistent with the other's right of control;
- (c) the actor's good faith;
- (d) the extent and duration of the resulting interference with the other's right of control;
- (e) the harm done to the chattel;
- (f) the inconvenience and expense caused to the other.

Id. § 222A(2) (1965).

153. *Id.* at comment d. Cases holding that there must be a serious interference before there can be a conversion include: *Mustola v. Toddy*, 253 Or. 658, 456 P.2d 1004 (1969); *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969); *Allred v. Hinkley*, 8 Utah 2d 73, 328 P.2d 726 (1958); *Polley v. Shoemaker*, 201 Neb. 91, 266 N.W.2d 222 (1978); *Muzzy v. Rockingham County Trust Co.*, 113 N.H. 520, 309 A.2d 893 (1973); and *Romano v. Dempsey-Tegeler & Co.*, 540 S.W.2d 538 (Tex. Civ. App. 1976).

154. See *supra* notes 76-107 and accompanying text.

the levy is not unlawful the tort's existence must result from subsequent events.¹⁵⁵ If the lien creditor refuses, after demand, to secure the collateral's release¹⁵⁶ or otherwise *seriously interferes* with the secured party's right of possession,¹⁵⁷ there is a conversion. In that case section 9-311 will not protect the lien creditor. That section does not, and certainly was never intended to, sanction behavior of a third party which is inconsistent with his or her subordinate position under the Code's priority rules. The levy alone is not inconsistent with that position, but further acts may be.

Finally, permitting the secured party to recover for conversion as a result of the levy alone is tantamount to recognizing that party's claim to the execution sale proceeds, only worse.¹⁵⁸ If the secured party is given a prior claim to the sale proceeds, then the decision to levy makes sense only if it is anticipated that those proceeds will exceed the sum of the outstanding secured debt and the costs of sale.¹⁵⁹ The same is true if liability for conversion results from the levy, except that in this situation the downside risk to the creditor as a result of a miscalculation is increased. In the former case the potential out-of-pocket loss to the creditor is limited to the costs of sale; in the latter case the costs include also the amount by which the secured debt or market value of the collateral, whichever is less, exceeds the amount of proceeds.¹⁶⁰ This increased risk can only have the effect of further separating a debtor's judgment creditors from access to his or her equity in the collateral. Perhaps most importantly, the lien creditor's liability

155. For similar conclusions, see Henderson, *supra* note 11, at 206; Citizens Bank v. Perrin & Sons, 253 Ark. 639, 488 S.W.2d 14 (1972).

156. See W. PROSSER, *supra* note 147, at 89; RESTATEMENT (SECOND) OF TORTS § 237 (1965). In such a case "[t]he conversion consists in the unlawful detention of the chattel, and not in the manner in which possession was originally acquired." *Id.* at comment e.

157. If the lien creditor delays in securing the release of the collateral, there should be no conversion unless the delay seriously impinges upon the secured party's rights. "There may be trivial and unimportant detentions of chattels which are not so serious as to amount to a conversion. Thus a delay of five minutes in surrendering goods, even though it may be unreasonable under the circumstances, is normally not enough for conversion." *Id.* at comment a.

158. For reasons which justify rejection of the secured party's claim to the sale proceeds, see *supra* notes 136-45 and accompanying text.

159. Only then will anything remain for distribution to the lien creditor.

160. For discussion of the appropriate measure of damages, see *infra* notes 168-70 and accompanying text. If recoverable damages exceed the amount of proceeds received, that difference must come out of the lien creditor's pocket.

will only deter the secured party from taking control of the collateral's disposition. The temptation towards inaction is not as great when the secured party is given a right to the proceeds, since in this situation the damage claim will often exceed the amount of proceeds and the secured party need not be concerned with the possibility of a minuscule sale price.¹⁶¹

Conditioning the lien creditor's liability upon the consequences of the levy and not the act itself should result in a pattern of post-levy behavior which adequately protects the interests of all concerned. One would expect, as a response to the avoidable risk of conversion, that the lien creditor will, prior to the execution sale, notify the secured party of the collateral's seizure.¹⁶² Whether the absence of notice justifies the imposition of liability will have to depend on the facts of each case, but there is no reason why a creditor should assume a risk which can be avoided.

With notice of the levy, the secured party will, as a practical matter, have no choice but to assert a superior right of possession. If the secured party permits the execution sale to take place, he or she should have neither a cause of action for conversion against the lien creditor¹⁶³ nor a claim to the sale proceeds.¹⁶⁴ The only rights the secured party should retain in this situation are those of tracking down and repossessing the collateral, and "in an appropriate case," maintaining a conversion action against the purchaser.¹⁶⁵

Assuming a demand for possession by the secured party, the lien creditor will be required, to avoid a conversion, to secure the collateral's release.¹⁶⁶ Once in possession, the secured party's con-

161. Also affecting the secured party's decision will be the likelihood of satisfying a judgment against the lien creditor and the length of time required to obtain that judgment.

162. Notice of the levy should also result in the cessation of further advances being made by the secured party. This will preclude advances made more than 45 days from the date the lien attached from being secured. See U.C.C. § 9-301(4). Thus, there should be no dissipation of debtor's equity after the levy.

163. If the secured party, with knowledge of the levy, permits the sale to occur, this inaction should be construed as consent since "[s]ilence and inaction may manifest consent where a reasonable person would speak if he objected." W. PROSSER, *supra* note 147, at 102.

164. See *supra* notes 123-45 and accompanying text.

165. Even these rights will be lost if a court later determines that the sale had been authorized by the secured party. See *infra* note 208.

166. See *supra* note 156 and accompanying text.

duct must comport with the requirements of Part Five of Article 9, which provide the debtor and lien creditor with an adequate measure of protection.¹⁶⁷

In the event that the interference with the secured party's interest is serious enough to constitute a conversion, the court must determine the appropriate measure of damages. Since the secured party's interest in the collateral is potentially less than its market value at the time of conversion, any recovery should be limited to the lesser value.¹⁶⁸ To allow recovery in excess of the secured party's interest simply makes no sense unless the defendant's conduct was egregious enough to justify what amounts to an award of punitive damages.¹⁶⁹ In no other circumstances should the secured party receive a windfall. If, as at least one court has suggested,¹⁷⁰ the excess recovery must be returned to the debtor, then he or she receives the windfall in the form of realization upon equity, because the equity rightfully belongs to the lien creditor or execution sale purchaser. Moreover, if the conversion action is against the purchaser, it makes no sense to require the purchaser to purchase the one thing for which he or she has already paid: the debtor's equity.

E. *The Lien Creditor's Rights Upon the Secured Party's Repossession of the Collateral*

Repossession by the secured party will effectively insulate the debtor's equity in the collateral unless: (1) the lien creditor continues to be a lien creditor, and (2) the lien creditor comes under the protective umbrella of Part Five of Article 9.¹⁷¹ If the existence and/or perfection of the lien creditor's lien depends upon the

167. For discussion regarding the lien creditor's rights after repossession by the secured party, see *infra* notes 171-94 and accompanying text.

168. The RESTATEMENT (SECOND) OF TORTS provides that a successful plaintiff is entitled to recover "the value of the subject matter or . . . his interest in it at the time and place of the conversion, destruction or impairment" RESTATEMENT (SECOND) OF TORTS § 927 (1979). See also Nickles, *supra* note 10, at 536-39.

169. An award of punitive damages may result from "conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." RESTATEMENT (SECOND) OF TORTS § 908 (1979).

170. See *Cooper v. Citizens Bank*, 129 Ga. App. 261, 199 S.E.2d 369 (1973).

171. The importance of these two issues was also recognized by Henderson, *supra* note 11, at 229-30.

sheriff's taking possession of the collateral¹⁷² it could be argued that the lien is lost when that possession is lost. If this were true, the lien creditor would become one of many general creditors, without an interest in specific property of the debtor and no longer entitled to special recognition or treatment. The conflict between the lien creditor and the secured party would vanish.

Although a lien is possessory in origin, it is not necessarily abandoned once the sheriff relinquishes possession. Nor does it follow that if the levy is abandoned as against one particular person it is abandoned against all persons. When possession is delivered to the secured party, it cannot be said that there has been an actual and intentional abandonment. Moreover, by that act alone, no culpability can be attributed to the creditor.¹⁷³ There is, therefore, no reason to question the lien's continued validity as against the debtor. It should be deemed vacated only as against innocent third parties who are somehow misled by what has become a secret levy.¹⁷⁴ There is also no difficulty in concluding that the lien continues intact as against the secured party who is clearly not a purchaser for value without notice of the lien. In an analogous context, courts have held that a sheriff may surrender property to a court-appointed receiver of the debtor without, thereby, abandoning the lien.¹⁷⁵ No purpose is served by concluding, at least as against the debtor and secured party, that the sheriff's loss of possession releases the lien.

172. In "order of levy" states, the lien dates from, and depends upon, the sheriff's seizure of the property. In "order of delivery" states, though the lien arises upon delivery of the writ of execution to the sheriff, it remains inchoate pending an actual levy. Seizure is not necessary, however, and the lien creditor does not risk losing that status when the secured party repossesses in those states which have adopted a filing system as a means of creating or preserving the creditor's lien. See Ward, *supra* note 8, at 235-47.

173. Professor Freeman has concluded that

[a] levy is often spoken of as abandoned, when what is meant is that the facts intervening after it was made show that it was not made in good faith nor for the purpose of enforcing it, and must, therefore be disregarded. If the object of the plaintiff apparently was merely to obtain some security, or to prevent some other levy being made in advance of his, or to hinder or delay other creditors of the defendant, the levy must be adjudged fraudulent and void.

2 A. FREEMAN, *supra* note 90, § 271, at 1522.

174. If a third party is misled as a result of the sheriff's lack of possession "there can be no doubt that, as to such [third party], a levy may be deemed abandoned when, as against the defendant, it may be regarded as still in force." *Id.* at 1521.

175. See *In re Boswell*, 8 F. Supp. 231 (S.D.N.Y. 1934); *In re Endlar*, 192 F. 762 (1st Cir. 1911).

The continued existence of the lien is worth very little, however, if the creditor is not a beneficiary of Article 9's protective provisions. These include: the right to receive any surplus;¹⁷⁶ the right to receive notice of any intended disposition;¹⁷⁷ the right to object to the secured party's proposal to retain the collateral in satisfaction of the debt;¹⁷⁸ the right to redeem the collateral;¹⁷⁹ and the right to recover from the secured party for loss caused by the secured party's failure to comply with Part Five.¹⁸⁰ The problem for the lien creditor is that the only express beneficiaries of these provisions are the debtor and subordinate secured parties who have notified the secured party of their interest. Professor Gilmore, recognizing the lien creditor's need for protection, has suggested that the terms "secured parties" and "security interests," when used in these sections, "be read broadly to include the liens."¹⁸¹

There is a way to arrive at this result without, at the same time, unnecessarily expanding the scope of Code-defined terms. When the lien attaches, what it attaches to is the "real" interest of the debtor.¹⁸² That interest is not limited to the corporeal, but also includes the incorporeal; the scope of the lien encompasses the debtor's rights under Article 9.¹⁸³ The Code itself suggests just such a conclusion.

Both section 9-105(1)(d)¹⁸⁴ and section 9-112¹⁸⁵ recognize

176. U.C.C. § 9-504(2).

177. U.C.C. § 9-504(3).

178. U.C.C. § 9-505(2).

179. U.C.C. § 9-506.

180. U.C.C. § 9-507.

181. 2 G. GILMORE, *supra* note 87, § 44.8, at 1250.

182. *See supra* note 112.

183. *See supra* notes 176-80 and accompanying text. One commentator posits that the purpose of § 9-311 was "to permit an involuntary transfer of those rights." Justice, *supra* note 35, at 440.

184. The complete text of § 9-105(1)(d) is set out *supra* note 126.

185. Section 9-112 provides that

[u]nless otherwise agreed, when a secured party knows that collateral is owned by a person who is not the debtor, the owner of the collateral is entitled to receive from the secured party any surplus under Section 9-502(2) or under Section 9-504(1), and is not liable for the debt or for any deficiency after resale, and has the same right as the debtor

(a) to receive statements under Section 9-208;

(b) to receive notice of and to object to a secured party's proposal to retain the collateral in satisfaction of the indebtedness under Section 9-505;

that these rights are capable of alienation. They can be transferred independently of¹⁸⁶ or in conjunction with, a transfer of the collateral.¹⁸⁷ As a consequence of these two sections, most Article 9 rights "tag along" with ownership of the collateral. When the execution sale purchaser acquires the collateral, he or she, as owner,¹⁸⁸ though not liable for the secured debt or for any deficiency after resale, acquires these rights.¹⁸⁹ If the purchase includes these incorporeal interests, it follows that the levy is upon and the lien attaches to those interests.¹⁹⁰

As a result of a levy, though legal title remains with the debtor, the sheriff acquires a special property in that which is levied upon,¹⁹¹ which, in the case of collateral, must include the debtor's Article 9 rights. This special property justifies, under certain circumstances, treating the sheriff as if he or she were the "owner of an absolute title."¹⁹² Such treatment is appropriate when to do otherwise would impair the effectiveness of the levy.¹⁹³ This suggests that, after the secured party's repossession, the sheriff should be treated as owner of the collateral (so as to receive any surplus generated by the resale on behalf of the lien

- (c) to redeem the collateral under Section 9-506;
- (d) to obtain injunctive or other relief under Section 9-507(1); and
- (e) to recover losses caused to him under Section 9-208(2).

186. Because of the chameleonic nature of the term "debtor" under the Code, one acquires many of Article 9's entitlements simply by becoming obligated for the secured debt. See, e.g., *Commercial Credit Corp. v. Lane*, 466 F. Supp. 1326 (M.D. Fla. 1979); *Third Nat'l Bank & Trust Co. v. Stagnaro*, 4 U.C.C. Rep. Serv. 675 (Mass. 1962); *Hepworth v. Orlando Bank & Trust Co.*, 323 So. 2d 41 (Fla. App. 1975); *T & W Ice Cream v. Carrige Barn, Inc.*, 107 N.J. Super. 328, 258 A.2d 162 (1969).

187. See § 9-112, set out *supra* note 185.

188. The purchaser acquires the same title as if there had been a voluntary conveyance by the debtor. See 3 A. FREEMAN, *supra* note 90, at § 335.

189. The acquisition of these rights by the purchaser does not mean that the debtor loses these rights. The debtor continues to be an Article 9 "debtor" because his or her obligation for the secured debt continues.

190. Referring to the Uniform Conditional Sales Act, Professor Bogert similarly opined that "[u]nder the Act the buyer's right to redeem and interest in the proceeds of the resale should not be regarded as personal, but ought to be treated as property rights capable of alienation and liable for debts." 2A G. BOGERT, *UNIFORM LAWS ANNOTATED* § 26, at 36 (1924).

191. See 2 A. FREEMAN, *supra* note 90, at § 268.

192. *Id.* § 268, at 1500.

193. If, for example, after levy "the property is taken from him, or if, being left by him in the possession of another, it is taken from such possession by any one or is converted by the custodian, the officer may sustain an action of replevin, trespass or trover" *Id.*

creditor¹⁹⁴) and as co-owner, with the debtor, of the other rights given by Article 9. In this way, the creditor's access to the debtor's equity and the secured party's accountability for improper conduct are assured.

F. *The Secured Party's Rights Against the Execution Sale Purchaser*

If the execution sale does occur, the disposition of the collateral will not terminate the secured party's interest. On this point all commentators¹⁹⁵ and most courts¹⁹⁶ agree. What is not quite so clear is whether this conclusion results from application of the U.C.C. or from a separate body of law relating to execution sales or, perhaps, a combination of both.

One commentator, who has suggested that the title of the execution sale purchaser is governed by non-Code law, was apparently concerned that application of the Code could work to the detriment of the lien creditor.¹⁹⁷ In particular, his concern involved the title received by a purchaser who purchases property subject to an unperfected security interest.¹⁹⁸ If the Code applies, though the lien creditor has priority over the secured party,¹⁹⁹ the purchaser will nevertheless take subject to the security interest if he or she has knowledge of the interest prior to the purchase.²⁰⁰ This commentator feared that this result would subvert the Code's priority rules.²⁰¹ To avoid this subversion it is necessary to apply non-Code law to the effect "that a purchaser at a judicial sale takes free of outstanding interests not enforceable against the lien creditor at the time his lien attached . . ."²⁰²

194. See U.C.C. § 9-112, set forth *supra* note 185. Since repossession occurred from the sheriff the secured party may be unable to defend an improper payment of surplus to the debtor by arguing that he or she was unaware of the sheriff's interest.

195. See Henderson, *supra* note 11, at 208-09; Justice, *supra* note 35, at 441-43.

196. See *supra* notes 30-40 and accompanying text.

197. See Note, U.C.C.—*Secured Transactions—Judicial Sales*, 67 MICH. L. REV. 1421 (1969).

198. See *id.* at 1426.

199. See U.C.C. § 9-301(1)(b).

200. Since the purchaser will not qualify as a "[b]uyer in ordinary course of business," see U.C.C. § 1-201(9), his or her priority must depend upon § 9-301(1)(c). That section does not subordinate the security interest if, before the sale, the purchaser learns of the security interest or the secured party's interest is perfected.

201. See Note, *supra* note 197, at 1428.

202. *Id.* at 1428-29.

Although the commentator's attempt to effectuate the Code's priority rules cannot be faulted, his fears, in this instance, are unfounded. They result from a failure to recognize that the proper resolution of an issue can require the simultaneous application of Code and non-Code law.²⁰³ Section 9-301(1)(b) is clearly determinative of the relative priority of the lien creditor, whereas the purchaser need not rely upon section 9-301(1)(c) to achieve priority over the secured party. What protects the purchaser in this case is the so-called "shelter" principal, which is unaffected by Article 9.²⁰⁴ Its application allows the execution sale purchaser to succeed to the lien creditor's priority over the unperfected or subsequently perfected security interest.²⁰⁵ In this way the secured party is prevented from circumventing the lien creditor's priority under section 9-301(1)(b).

In the case of a lien creditor without priority there is no reason to look outside the Code to determine whether the purchaser will take free of the security interest. Section 9-306(2) sets forth the general rule that "[e]xcept where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof" It is important to note the absence of any requirement that the disposition be by the debtor. The section would therefore apply to an involuntary disposition of collateral at an execution sale.²⁰⁶ Also relevant is section 9-201 and its rebuttable presumption that a security inter-

203. This possibility is expressly recognized by § 1-103 which provides, in part, that "[u]nless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions." Professor Gilmore similarly stated that the Code "assumes the continuing existence of a large body of pre-Code and non-Code law on which it rests for support, which it displaces to the least possible extent, and without which it could not survive." Gilmore, *supra* note 98, at 286.

204. The "shelter" principle "enters the Code via 1-103 and 2-403 and provides that a buyer gets as good a title as his seller had." J. WHITE & R. SUMMERS, *supra* note 140, § 25-1 at 1031. Section 2-403(1) expands this notion by recognizing that a purchaser also "acquires all title which his transferor . . . had power to transfer . . ." To determine the scope of this power often requires resort to principles of law outside the Code. See § 2-403 comment 1.

205. For a collection of cases so holding, see Note, *supra* note 197, at 1427 n.35.

206. Prior to the 1972 revision to Article 9, the focus of § 9-306(2) was upon dispositions by the debtor. For a discussion of the drafting history of § 9-306(2), see *supra* notes 127-34 and accompanying text. Arguably the deletion of any reference to debtor dispositions was to make clear that § 9-306(2) was not so limited, but applied equally to execution sales. See Justice, *supra* note 35, at 441 n.49.

est is effective against all third parties.²⁰⁷ Thus, unless the priority rules of Article 9 provide otherwise, the purchaser takes subject to the security interest. Unfortunately for the purchaser there is no rule providing otherwise.²⁰⁸

Since the security interest will be effective against the purchaser, the secured party is entitled to possession of the collateral upon the debtor's default.²⁰⁹ This right of possession is enforcea-

207. Professor Ward argues that "[i]f the purchaser does not come within § 9-301(1)(c) or some other code provision protecting him against the security interest, he falls victim to the residual presumption in favor of the effectiveness of the security agreement in § 9-201." Ward, *supra* note 8, at 231-32 n.31. Under this view, the 1972 Amendment to § 9-306(2) was unnecessary.

208. A secured party's inaction after learning of a levy may result in the forfeiture of rights. Regardless of the Code's priority rules, a security interest will not survive a sale if "the disposition was authorized by the secured party in the security agreement or otherwise." U.C.C. § 9-306(2) (emphasis added). Does the secured party's acquiescence constitute an "otherwise" authorization? Although courts have been willing to equate inaction with consent, the typical case involves more than an isolated sale. Such a finding is usually the result of a prior course of dealing with the debtor. See, e.g., *Central Cal. Equip. Co. v. Dolk Tractor Co.*, 78 Cal. App. 3d 855, 144 Cal. Rptr. 367 (1978); *Lisbon Bank & Trust Co. v. Murray*, 206 N.W.2d 96 (Iowa 1973); *In re Cadwell Martin Meat Co.*, 10 U.C.C. Rep. Serv. 710 (Cal. 1970); *Central Wash. Prod. Credit Ass'n v. Baker*, 11 Wash. App. 17, 521 P.2d 226 (1974); *Planters Prod. Credit Ass'n v. Bowles*, 256 Ark. 1063, 511 S.W.2d 645 (1974); *United States v. Central Livestock Ass'n*, 349 F. Supp. 1033 (D.N.D. 1972); *Clovis Nat'l Bank v. Thomas*, 77 N.M. 554, 425 P.2d 726 (1967); *Milnes v. General Elec. Credit Corp.*, 377 So. 2d 725 (Fla. Dist. Ct. App. 1979). Such a finding might also result when the secured party's inaction has caused a third party to be misled. See *Locke v. Woods (In re Woods)*, 35 U.C.C. Rep. Serv. 256 (Bankr. E.D. Tenn. 1982). On the other hand, neither the interests of the lien creditor nor those of the purchaser justify a finding of consent when the execution is allowed to occur. See *North Cent. Kan. Prod. Credit Ass'n v. Washington Sales Co.*, 223 Kan. 689, 577 P.2d 35 (1978) (concept of waiver should not be utilized in favor of one who has constructive notice of a lien); *Memphis Bank & Trust Co. v. Pate*, 362 So. 2d 1245 (Miss. 1978) (secured party has no duty to act in connection with execution sale); and *Powell v. Whirlpool Employees Fed. Credit Union*, 42 Mich. App. 228, 201 N.W.2d 683 (1972) (secured party has no duty to act in connection with execution sale). This does not mean, however, that the secured party's inaction is devoid of prejudicial effect. After the purchase the secured party's lien becomes secret. As a result, some courts have voided the security interest. See *In re Kittyhawk Television Corp.*, 383 F. Supp. 691 (S.D. Ohio 1974), *rev'd*, 516 F.2d 24 (6th Cir. 1975) (reasoning that under the facts of the case there was little danger of a secret lien, as the transaction amounted to little more than a name change); *In re Vieths, Inc.*, 9 U.C.C. Rep. Serv. 943 (Wis. 1971). Regardless of its justification, the drafters of the Code made the conscious decision to allow just such a lien to exist. See *Citizens Sav. Bank v. Sac City State Bank*, 315 N.W.2d 20, 25-26 (Iowa 1982); See also U.C.C. § 9-402(7), which provides for the continued effectiveness of the financing statement after the collateral is transferred "even though the secured party knows of or consents to the transfer."

209. For a discussion of the secured party's possessory right upon debtor's default, see *supra* notes 108-21 and accompanying text.

ble by self help, if it can be accomplished without a "breach of the peace,"²¹⁰ or the secured party "may proceed by action."²¹¹ This is not to suggest, however, that upon repossession the purchaser no longer has an interest in the collateral. As owner, the purchaser is entitled to any surplus and is a beneficiary of the post-repossession provisions of Article 9.²¹²

Although the purchaser has no liability for the secured debt,²¹³ the secured party may, as an alternative to repossession, wish to assert a monetary claim against the purchaser in the form of an action for conversion. The issue then is whether "an appropriate case" exists for the imposition of such liability.²¹⁴ The act of purchase should not constitute an unlawful conversion unless the secured party can show that the purchase has somehow seriously interfered with its superior right of possession.²¹⁵ Whether there has been a serious interference will, of course, depend on the facts of each case, yet certain post-purchase actions will certainly suggest such an interference. Examples of such actions are the purchaser's refusal to surrender the collateral to the secured party upon the latter's demand;²¹⁶ the subsequent resale of the collateral to another;²¹⁷ or any other act which diminishes the value of the collateral to the secured party. In summary, conversion liability should not be based solely on the nature of the purchaser's act (i.e. the purchase), but its consequences "are to be taken into account."²¹⁸

It may be questioned whether the labeling of the purchaser's actions as a conversion has any practical ramifications. Presumably, the purchaser at the time of his purchase only intended to pay for and acquire the debtor's equity. If aware of the secured party's interest and right of possession upon the debtor's default, the purchaser must have contemplated working something out

210. U.C.C. § 9-503.

211. *Id.* Regardless of the name given to the "action" in a particular jurisdiction, it will result in the seizure of the collateral by the sheriff or other officer and its delivery to the secured party.

212. *See supra* notes 184-90 and accompanying text.

213. *See* § 9-112, set forth *supra* note 185.

214. For discussion of lien creditor's liability for conversion, *see supra* notes 146-70 and accompanying text.

215. *See generally id.*

216. *See supra* note 156 and accompanying text.

217. *See* RESTATEMENT (SECOND) OF TORTS § 235 (1965).

218. *Id.* § 222A comment d (1965).

with the secured party after the purchase. This contemplated action would probably require payment of the value of the collateral or the amount of the secured debt—whichever is less. Since this amount would equal the measure of damages for conversion,²¹⁹ any judgment entered against the purchaser would simply reflect his or her prior intentions.

This position ignores, among other things, that purchasers at an execution sale often lack firsthand access to information about the state of the debtor's financial affairs. Even when all relevant information is available, the possibility remains that the purchaser's interests will be adversely affected by post-sale events over which he or she has no control.²²⁰ If the secured party can always veto the purchaser's offer to return the collateral and recover for conversion, this necessarily increases the financial risk to the purchaser. The result is a lower purchase price, to the detriment of the lien creditor. On the other hand, limiting the secured party's recovery to possession of the collateral if the purchaser's interference was insubstantial accords with the original expectations of the secured party and appears to be the perfect compromise.

CONCLUSION

In its treatment of priorities, the Uniform Commercial Code often neglects to address the effects of its orderings. The objective of this Article has been to consider the ramifications of the Code's subordination of a judgment creditor's lien to that of a pre-existent security interest. After suggesting that subordination should not preclude access to debtor's equity,²²¹ an attempt was made to set forth an approach which would permit such access while at the same time protect the worth of the secured party's interest. In so doing it was necessary to address several issues since each is likely to reoccur, and each, depending upon its resolution, can completely frustrate the lien creditor's efforts.

219. See *supra* notes 168-70 and accompanying text.

220. One event would be the depreciation, either objective or subjective, of the collateral subsequent to the purchase so that its value to the purchaser is perceived to be less than the amount of damages recoverable by the secured party. In such a case, the lien creditor would certainly prefer to return the collateral rather than pay conversion damages.

221. See *supra* notes 58-75 and accompanying text.

It is essential that the judgment creditor be allowed to cause a levy upon the collateral. This necessitates rejection of two dissimilar notions. One is that the debtor has only an equitable interest which is immune from legal process. Section 9-311 should be interpreted so as to preclude this conclusion.²²² The other is that causing a levy, without more, is a conversion. When determining whether there has been a conversion, either by the lien creditor or execution sale purchaser, the focus should be on the consequence to the secured party, not on the nature of the act.²²³ Nor should the secured party have a claim to the proceeds of an execution sale.²²⁴ The secured party's interest is fully vindicated if he or she is given the right to recover possession either from the sheriff²²⁵ before sale or from the purchaser²²⁶ after sale, as well as the right to recover for conversion in an "appropriate case." This should encourage repossession and disposition by the secured party, which inures to the collective advantage of the debtor and his or her other creditors²²⁷ and does not have an adverse impact upon the lien creditor's collection efforts.²²⁸ Though subordinate under the Code, a lien creditor's interest nevertheless is worthy of protection.

222. See *supra* notes 87-104 and accompanying text.

223. See *supra* notes 146-70 and accompanying text and notes 213-20 and accompanying text.

224. See *supra* notes 123-45 and accompanying text.

225. See *supra* notes 108-21 and accompanying text.

226. See *supra* notes 195-212 and accompanying text.

227. See *supra* notes 138-42, 158-61 and accompanying text.

228. See *supra* notes 171-94 and accompanying text.