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Fixture Priorities

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Section 9-313 of the Uniform Commercial Code (UCC) has had a tumultuous history. Originally, the drafters of the Code intended to do no more than repeat the fixture rules as they had existed under the Uniform Conditional Sales Act (UCSA). The real estate industry had
lived with those provisions without apparent hardship. Consequently, there was no reason to expect any objections to the perpetuation of those principles in the UCC. Unfortunately, the discussion of the fixture priorities under the UCC galvanized the real estate bar into a storm of protest which broke only after the 1962 version of section 9-313 was adopted into the law of most states.\(^3\) As a result of this controversy, scholars generated a great deal of literature on the “fixture problem,” and the Permanent Editorial Board, spurred on largely by fixtures, decided to revise all of Article 9 with a large set of amendments. A Review Committee was appointed for this purpose,\(^4\) and their work culminated in the 1972 amendments. Section 9-313 was perhaps more radically changed than any other section of Article 9.

The purpose of this Article is to examine the complexities introduced by the 1972 amendments into the system of fixture priorities, a subject which has not yet been fully explored.\(^5\) Although there has been extensive scholarly discussion of the 1962 version of section 9-313, a brief review of those rules is nevertheless required in order to understand fully the changes wrought by the 1972 amendments.

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4. The Review Committee was composed of: Joe C. Barrett; Carl W. Funk; John S. Hastings, Senior Circuit Judge, U.S. Court of Appeals, Seventh Circuit; Robert Haydock, Jr.; Ray David Henson; Harold Marsh, Jr.; William Curtis Pierce; Millard H. Rudd; Sterry R. Waterman, Senior Circuit Judge, U.S. Court of Appeals, Second Circuit; Herbert Wechsler (Chairman). Funk, The Proposed Revision of Article 9 of the Uniform Commercial Code, 26 Bus. Law. 1465, 1466 n.7 (1971).

5. The best article so far on the 1972 version of section 9-313 is Adams, supra note 1. It is hoped that this article will push the analysis of section 9-313 at least a little further than that impressive work.
I. The 1962 Version of Section 9-313

Prior to 1962, the UCSA was the only uniform legislation governing fixture priorities. This reflected the fact that purchase money security interests were the principal type of fixture interest for which personal property lenders needed secured status. The 1962 version of section 9-313 was simply an attempt to incorporate the provisions of

6 The full text of the 1962 version of section 9-313 is as follows:

(1) The rules of this section do not apply to goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work and the like and no security interest in them exists under this Article unless the structure remains personal property under applicable law. The law of this state other than this Act determines whether and when other goods become fixtures. This Act does not prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate.

(2) A security interest which attaches to goods before they become fixtures takes priority as to the goods over the claims of all persons who have an interest in the real estate except as stated in subsection (4).

(3) A security interest which attaches to goods after they become fixtures is valid against all persons subsequently acquiring interests in the real estate except as stated in subsection (4) but is invalid against any person with an interest in the real estate at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as fixtures.

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

(a) a subsequent purchaser for value of any interest in the real estate; or
(b) a creditor with a lien on the real estate subsequently obtained by judicial proceedings; or
(c) a creditor with a prior encumbrance of record on the real estate to the extent that he makes subsequent advances if the subsequent purchase is made, the lien by judicial proceedings is obtained, or the subsequent advance under the prior encumbrance is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the real estate at a foreclosure sale other than an encumbrancer purchasing at his own foreclosure sale is a subsequent purchaser within this section.

(5) When under subsections (2), (3) or (4) a secured party has priority over the claims of all persons who have interests in the real estate, he may, on default, subject to the provisions of Part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.


7 See Coogan, Fixtures—Uniformity in Words or in Fact?, 113 U. Pa. L. Rev. 1186, 1187-88 (1965); 2 G. Gilmore, supra note 1, § 30.6, at 821 ("Almost without exception, pre-Code fixture financing was carried out under conditional sale: the nature of the conditional sale automatically restricted the priority to what, in Code terminology, would be called purchase money security interests.").
section 7 of the UCSA into the UCC. The result, however, was less than perfect. The principal failure was that it introduced mutually exclusive filing requirements. Both the UCSA and the UCC required a filing in the local real estate records in order for the secured party to prevail over subsequent purchasers of the real estate. The UCSA, however, allowed an ordinary filing to perfect a conditional sale against subsequent lien creditors. This allowed the conditional sale to survive in bankruptcy, as long as some sort of perfection occurred. Under the 1962 version of the UCC, a fixture filing was ineffective to perfect an interest in nonfixtures, and an ordinary UCC filing was ineffective to perfect a fixture interest. As a result, the secured party

Purchase money security interests collateralize loans enabling the borrower to buy goods. The collateral must be the very goods that were bought, and the loan must actually have been used for the purchase. U.C.C. § 9-107 (1972). A “conditional sale” is a purchase money security interest where the seller of goods is also the lender. That is, the sale is made on credit. See id. §§ 9-102(1), 9-107(1). Purchase money security interests are further described in notes 22–23 and accompanying text.

The term “fixture filing” was used for the first time in the 1972 amendments. U.C.C. § 9-313(1)(b) (1972). Under the 1972 amendments, a “fixture filing” is a filing in the local real estate records in a form which comports with the 1972 version of section 9-402(5). Section 9-402(5) requires that, in addition to the minimal requirements of section 9-402(1), the financing statement recite that the collateral is in fact a fixture, and that the statement is to be filed in the real estate records. If the debtor does not have an interest in the real estate, the financing statement must also state the name of “a record owner.”

The term “fixture filing” will also be used to refer to the special filing that had to be made for fixtures under the 1962 UCC. Under those rules, the only formality required beyond those necessary for an ordinary UCC filing was that the financing statement describe the real estate affected. Then, as now, the financing statement had to be filed in the “office where a mortgage on the real estate would be filed.” Id. § 9-401(1).

Under all three options for section 9-401 of the 1962 version, a fixture filing had to be made in the “office where a mortgage on the real estate concerned would be filed or recorded.” Such a filing would not have satisfied the filing requirements for nonfixture collateral under the first of the options, which contemplates filing only with the secretary of state. Under the other two options, it was not impossible for a 1962 fixture filing in the local real estate records to have sufficed in perfecting unaffixed collateral. The second and third alternatives allowed filing for farm equipment or consumer goods in the county of the debtor’s residence or (if the debtor did not reside in the state) in the county where the goods were kept. If this office happened to be the same office that received mortgage filings, perhaps a fixture filing would have sufficed to perfect an interest in unaffixed collateral. See id. § 9-403(1) (1962) (mere presentation of the statement and paying the fee constitutes filing); Adams, supra note 1, at 859 n.93. But see In re Leckie Freeburn Coal Co., 405 F.2d 1043, 1046 (6th Cir. 1969), cert. denied, 395 U.S. 960 (1969) (“It is true that the proper Clerk did receive the instrument for filing. . . . However, this was not sufficient to comply with the [UCC]. . . . [M]ore is required of the filing party than to just hand the instrument to the Clerk. . . . When dealing with a multipurpose document, it is incumbent upon the filing party to disclose to the Clerk the purpose for recording.”).
faced a hazardous election; if he chose incorrectly, he could find his security interest voided in bankruptcy. Of course, a cautious secured party could always have made both a fixture filing and a nonfixture filing. This, however, was not always a viable option. For example, where a purchase money lender took a security interest in potential fixtures sold to a corporation that owned real property in various locations,12 it would have been difficult to make a fixture filing in exactly the right office.13 Elimination of mutual exclusivity of filings was a major motivation for amending the 1962 fixture provisions. This goal, as will be shown,14 has not yet been fully realized.

The major function of the fixture rules was the resolution of priority conflicts between the fixture lenders and real estate claimants. The priorities under the 1962 version of section 9-313 are perhaps best illustrated by considering the six logical temporal possibilities that exist between the three important events that are relevant to establishing priorities. The three events are: (a) accrual of the competing real estate interest, whether a judicial lien, a mortgage, or a purchase; (b) affixation of the personal property to the real estate; and (c) attachment of the Article 9 security interest to the collateral. Using a mortgagee, for the moment, as a stand-in for all real estate claimants, the six possible temporal patterns are as follows:

1. Mortgage–Attachment–Affixation;
2. Mortgage–Affixation–Attachment;
3. Attachment–Mortgage–Affixation;
4. Affixation–Mortgage–Attachment;
5. Attachment–Affixation–Mortgage;
A. Case One: Mortgage–Attachment–Affixation and Section 9-313(2)

According to the drafters, where the mortgage was already in place before attachment or affixation of the collateral, the mortgagee was no longer a "reliance creditor" who depended on the state of the real estate records in deciding whether or not to lend. Thus, under section 9-313(2), which covered all "attachment-then-affixation" cases, the secured party won over the prior mortgagee whether or not his interest was perfected.

In addition to the "absence of reliance" theory, two other theories supported the priority rules of section 9-313(2). The premise of the first was that the secured party added to the value of the real estate in an "attachment-then-affixation" case, and therefore should be the first to recover that value in case of default. The thinking was that giving priority to the earlier mortgage would provide the mortgagee with a windfall at the expense of the subsequent fixture lender.

The emphasis on "reliance" conformed to section 7 of the UCRA, which only required filing for protection against "subsequent purchasers" of real estate. According to Professor Gilmore, the protection of unperfected purchase money security interests from subordination to earlier "after-acquired property" interests dated back to the 19th century railroad cases. 2 G. Gilmore, supra note 1, § 28.1, at 743-48.

This view was criticized by Peter Coogan on the theory that mortgagees might rely on the absence of subsequent encumbrances in deciding whether or not to foreclose on the mortgage. Coogan, The New UGC Article 9, 86 Harv. L. Rev. 477, 493 (1973). Since Mr. Coogan was a consultant to the Review Committee which drafted the 1972 amendments, he was in an excellent position to weave this view into the fabric of the new section 9-313. See General Comment on the Approach of the Review Committee for Article 9, 3 U.L.A. 7 (1981) [hereinafter cited as Review Committee]. Today, perfection is required if the secured party is to have priority over earlier real estate interests. See U.C.C. § 9-313(4)(a), (c) (1972).

"A purchase money security interest in . . . 'fixtures' must meet the filing requirements . . . in . . . 9-401(1)(b) to take priority over prior encumbrances of the real estate."

Shanker, supra note 1, at 791. Of course, the value of the land might be reduced by the damage done when the secured party repossesses and the fixture is removed. Section 9-313(5) (1962), renumbered 9-313(8) in 1972, requires the fixture lender to hold the prior real estate owner or encumbrancer harmless by reimbursing him "for the cost of repair of any physical injury." Even so, real estate owners and encumbrancers might still complain that reimbursement under section 9-313(8) denies them the "going concern" value of the real estate. Adams, supra note 1, at 855 n.74.

This ignores the fact that many fixtures are replacements for those already in place at the time the mortgage interest arose. Since the value of the mortgagee's interest encompassed the value of the original fixtures, it could be argued that giving him priority in the new fixtures would in no way provide him a windfall. See Keil Motor Co. v. Home Owners Loan Corp., 43 Del. 322, 47 A.2d 164 (Super. Ct. 1941). In Keil, a furnace which had been in place at the time...
From the standpoint of the earlier mortgagee, the priorities under section 9-313(2) were not believed to be prejudicial since the value of the real estate would be enhanced by at least the value of the fixture. In fact, priority for fixture financing was thought to be a positive benefit to the real estate mortgagee, since the premises could thereby be kept in good repair.

The second theory underlying section 9-313(2) related to the simple order of property transfer. By the time the personal property was affixed, it had already been encumbered by the secured party's interest. The mortgage lien could, therefore, attach only to the debtor's equity, if any, and not to that part of the fixture collateral already subject to a security interest.

These three theories are also the general justifications for purchase money priority. The 1962 version of section 9-313(2) did not require purchase money status, yet these purchase money justifications applied equally well to nonpurchase money security interests in fixtures where there had been "attachment-then-affixation." In fact, the "property transfer" theory had greater validity in fixture cases than in other purchase money cases. In a straight purchase money case, involving personal property, where a prior secured party or lien creditor had a right to after-acquired property, the interests of the two secured parties and the debtor all arose simultaneously. Nevertheless, the "already encumbered" reasoning of the "property transfer" theory was thought to be applicable. In a fixture case, it is inevitable that the prior mortgagee cannot obtain an interest in the collateral until it has been affixed and has become real estate. Where attach-
ment preceded affixation, the secured party’s interest in the collateral was clearly prior in time, not merely simultaneous. Section 9-313(2), therefore, could be viewed as a “first in time is first in right” rule, whereas standard purchase money priority cannot be so easily viewed.23

B. Case Two: Mortgage–Affixation–Attachment and Section 9-313(3)

In those cases where the collateral was affixed to the real estate before the security interest attached,24 the priorities were the reverse of those under 9-313(2). Under 9-313(3), the prior mortgagee always won, and the secured party could do nothing (absent a subordination agreement) to achieve priority.

In an “affixation-then-attachment” case, the purchase money theories supporting the priority rule of 9-313(2) were inapposite. Here the secured party took an interest in collateral that was already subject to the mortgage lien. In this circumstance, the rule of “first in time is first in right” demanded that the mortgagee win. Furthermore, the secured party, rather than adding value to the real estate, was doing quite the opposite. He was clearly depriving it of value. The secured party would, therefore, lose his claim to priority over the previous mortgagee.

Subordination to earlier mortgagees did not render financing impossible where affixation preceded attachment. The fixture lender could still have priority over subsequent purchasers or subsequent lien

23 Professors Jackson and Kronman add yet another justification for purchase money priority. They point out that without purchase money priority, a lender with an after-acquired property interest can prevent other lenders from being senior, has already sunk policing costs, and therefore has monopoly power over the debtor who needs another loan. The purchase money priority, however, allows another lender to bid against the after-acquired property lender for the debtor’s business, thereby eliminating the monopoly power held by the after-acquired property lender. Jackson & Kronman, Secured Financing and Priorities Among Creditors, 88 Yale L.J. 1143, 1167-75 (1979).

This same rationale works for nonpurchase money security interests in fixtures. An earlier real estate mortgagee also has a competitive advantage for making future fixture loans unless priority can be given to some other lender. Section 9-312(2) (1962) therefore allows for competition in making loans to the debtor on property which is to become fixtures.

24 E.g., State Bank v. Kahn, 58 Misc. 2d 655, 296 N.Y.S.2d 391 (Sup. Ct. 1969) (lender did not advance funds for swimming pool until construction was complete).

The opposite result is illustrated by Sunshine v. Sanray Floor Covering Corp., 64 Misc. 2d 780, 315 N.Y.S.2d 937 (Sup. Ct. 1970). There, the failure to execute a written security agreement prior to the affixation of the collateral defeated the interest of the conditional seller.

The result in Sunshine was approved by the 1972 amendments, which require a writing as a precondition to attachment. U.C.C. § 9-203 (Reasons for 1972 Change). See infra note 123.
creditors if he perfected his interest or if the holder of the subsequent interest had knowledge of the intervening fixture interest. He could also have priority over the subsequent advances made by the earlier mortgagee, if the mortgagee had knowledge of the unperfected security interest, or if the security interest had been perfected by the time of the advance.

The use of goods already affixed to real estate as collateral was an innovation over the UCSA. The post-affixation security interest was not, however, the only "real estate" in which a chattel security interest could be created. It may seem anomalous that "real estate" could be encumbered by chattel security interests. Yet many states have always allowed for the creation of chattel mortgages on crops. Today, the UCC allows security interests in three different types of real estate—crops, timber, and, of course, fixtures.

C. Cases Three and Four: Where the Mortgage Arose Between Attachment and Affixation

In his article on the 1962 fixture rules, Mr. Coogan wondered whether a real estate interest which accrued between attachment and affixation or between affixation and attachment was subsequent or prior to the security interest. While there was legitimate confusion where future advances under a mortgage were involved, the result in other cases was quite clear. When the mortgage arose between the two Article 9 events it was clearly a prior mortgage explicitly governed by section 9-313(2) (if attachment preceded affixation) and by section 9-313(3) (if the temporal order was reversed). "Subsequent," therefore, as used in section 9-313(4) could only have meant "subsequent to both attachment and affixation." Only where the mortgagee's interest arose after the two events could section 9-313(4) govern the priorities. Thus, the priority of the secured fixture lender vis-a-
vis the mortgagee in these types of "sandwich" cases depended solely upon the order in which attachment and affixation had occurred.

D. Cases Five and Six: Subsequent Mortgages and Section 9-313(4)

Under the 1962 Code, perfection of security interests in fixtures was necessary or helpful only where a real estate interest arose subsequent to both attachment and affixation. The unperfected secured party could still gain priority if the mortgagee had "knowledge" of the unperfected secured interest. The effect of "knowledge" on the ordering of priorities was consistent with the prevailing theory of the 1962 Code—that it was to be, in large part, a "race-notice" statute, not a "race" statute.

Under section 9-313(4) of the 1962 Code, particular complexity occurred in the context of future advances made under a real estate mortgage after the security interest attached to affixed collateral but before it was perfected. Section 9-313(4)(c) expressly stated that all future advances made under prior mortgages were to be considered subsequent to the extent of the advance. No distinction was made between discretionary and obligatory future advances. Ironically, the 1962 Code provided that a security interest for an obligatory future advance attached at the time the commitment was made. This rule,
however, did not govern mortgages, although real estate law had analogous rules which allowed relation back to the priority of the original mortgage in the case of obligatory advances. 36 It was, therefore, unclear whether all future advances were to be considered "subsequent" under section 9-313(4) and hence not subject to the benefits and burdens of sections 9-313(2) or (3), or whether only discretionary future advances were covered by section 9-313(4)(c).

In one leading case, *House v. Long*, 37 the court read 9-313(4)(c) to mean that future advances, whether obligatory or discretionary, never related back to the priority of preaffixation advances under the mortgage. In that case, a mortgagee had been subordinated under section 9-313(2) but was given a new lease on life as to his obligatory future advances under section 9-313(4)(c), which were held not to relate back to the low priority of the initial mortgage. The court's treatment of obligatory future advances was notable on two counts. First, it proved that relation back was not always helpful to mortgagees. It was helpful only when the mortgagee was senior as to the initial part of the mortgage debt. Where the initial part of the mortgage debt was junior, as it was in *House v. Long*, relation back was undesirable. Second, in holding that obligatory future advances under

new and separate security interest when the advance was actually made. Compare R. Henson, *Handbook of Security Interests Under Article 9 of the Uniform Commercial Code* § 5-14, at 101-02 (1973) ("the distinction in this context between voluntary and obligatory advances [is] meaningless") with Kripke, *Fixtures*, supra note 1, at 71 (only future advances that were contracted for are protected). The 1972 amendments have adopted the view that discretionary advances give rise to separate security interests. See U.C.C. §§ 9-301(4), -307(3) (1972).

The priority of future advances is important whenever the status of the secured party depends on perfection. Between secured parties, priority goes to the party who is the first to perfect or file. U.C.C. § 9-312(5)(a) (1972).

36 G. Osborne, *Handbook on the Law of Mortgages* § 120 (2d ed. 1970). The rule in a majority of jurisdictions is that if a future advance made under a mortgage is "obligatory," it has the priority of (i.e. relates back in time to) the original mortgage in which the obligation to lend was made. Treatment of "discretionary" future advances varies from jurisdiction to jurisdiction. In most states, the discretionary advance relates back to the priority of the original mortgage unless the mortgagee had actual knowledge of the intervening lien claiming priority over the future advance; recordation or "perfection" is not strictly relevant in such states. A minority of jurisdictions subordinate the discretionary future advance if the intervening lien is recorded, even if the mortgagee had no knowledge of the lien at the time of the advance. The theory here is that the mortgagee has "constructive" knowledge of the intervening lien. These jurisdictions, of course, make it necessary for mortgagees to check the records before making every new discretionary advance. In a few states, discretionary advances relate back in all circumstances and are therefore indistinguishable from obligatory advances. See id. §§ 120-21; Comment, *Mortgages to Secure Future Advances: Problems of Priority and the Doctrine of Economic Necessity*, 46 Miss. L.J. 433, 434-41 (1975).

37 244 Ark. 718, 426 S.W.2d 814 (1968).
the mortgage had no relation back feature, the court was ignoring the
UCC rule that would have applied to personal property security
interests and the real property rule that would have applied to
mortgages. Only where the two bodies of law—each agreeing upon
the proper position to take—collided and overlapped was a different
rule created. Arkansas has now passed the 1972 amendments and has
therefore ended this curious anomaly.

Another problem facing the mortgagee under section 9-313(4) of
the 1962 Code was his status at a foreclosure sale as a purchaser of the
property on which he had an encumbrance.

Neither mortgagees nor lien creditors are allowed to keep the
land in which they have an interest. Mortgage liens and judgment
liens are real estate interests which secure the payment of debt. The
cumbered real estate must therefore be sold in order to reduce it to
money, the language in which the mortgage debt and judgment are
expressed. When a foreclosure sale occurs, an issue arises as to
whether the purchaser at the sale should be considered a “subsequent”
purchaser with priority over unperfected security interests in fixtures
which attached prior to the sale. Section 9-313(4) expressly addressed
this issue, giving the subsequent purchaser priority, but it had a
curious exclusion. Whereas purchasers at foreclosure sales generally
received protected status afforded subsequent purchasers in other situ­
ations, purchasers who were also the mortgagees of the property
instigating the sale were denied protection.

38 U.C.C. § 1-201(44) (1972).
39 See, e.g., United States v. Westmoreland Manganese Corp., 134 F. Supp 898, 932 (E.D.
Ark. 1955) (obligatory future advances made pursuant to a construction mortgage have priority
over intervening mechanic liens), rev’d on other grounds sub nom. United States v. Latrobe
Conway Sheet Metal Co., 244 Ark. 963, 428 S.W.2d 293 (1968) (obligatory future advance has
priority over intervening materialman’s lien). See also Lyman Lamb Co. v. Union Bank, 237
Ark. 629, 374 S.W.2d 820 (1964) (where advances found to be optional and not obligatory,
mortgagee’s notice of intervening lien caused future advance to be subordinated to that lien).
(Supp. 1981)). The 1972 amendments no longer legislate the priority of future advances under
mortgages. See infra text accompanying notes 72-74.
judgment lien does not create any right of property or interest in the lands upon which it is a lien.
It gives the right to foreclosure, either by execution or independent suit, which, when done, will
relate back so as to exclude adverse interests subsequent to the fixing of the lien.”).
42 Cf. U.C.C. § 9-505(2) (1972) (secured party may keep the collateral on default if the
debtor or junior secured parties do not object).
1966); 2 G. Gilmore, supra note 1, § 28.7, at 773 n.6.
This exclusion was borrowed, apparently without much thought, from the case law under the UCSA. In choosing such a rule, the drafters of the original section 9-313 ignored the debate as to whether such purchasers deserved the protection of the recording statutes. A respectable vein of opinion thought they did deserve it, since protection of ignorant mortgagees who purchased at their own foreclosure sales would help make those sales more efficient and thus help make real estate financing a more desirable lending device. The contrary view was that recording statutes were designed solely to keep the ordinary course of business running smoothly. Foreclosure sales were not in the ordinary course of business and, therefore, recording statutes should never protect purchasers at such sales, especially not the very mortgagee or lien creditor who sponsored the foreclosure sale. Such a creditor-purchaser, after all, did not part with money but merely offset the debt owed to him.

The importance of preventing mortgagees at their own sales from being protected against subsequent purchasers under section 9-313(4) should not be overestimated. It was a very narrowly drawn provision that adversely affected only junior encumbrances. Senior mortgagees presumably have the power under nonuniform real estate law to foreclose competing junior liens and security interests by their foreclosure sale. If such a power exists, the purchaser at the foreclosure sale took the land free of any foreclosed lien, regardless of his knowledge of these liens. Purchaser protection under section 9-313(4) was therefore irrelevant when a senior encumbrance was foreclosed; denial of it to senior mortgagees who purchased at their own foreclosure sale was, therefore, also quite beside the point. Even among junior mortgagees, the exclusion had less than universal application. If the mortgagee was junior under section 9-313(2)—because the collateral was already encumbered with a security interest at the time of affixation—the narrow exclusion did apply, so that the junior mortgagee was not permitted to bootstrap himself up to senior "purchaser" status by

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45 For an excellent discussion of these issues, see Pugh v. Highley, 152 Ind. 252, 53 N.E. 171 (1899).
46 E.g., N.Y. Real Prop. Acts. Law § 1352 (McKinney 1979). One unanswered question is the extent to which nonuniform law can destroy Article 9 security interests in light of section 9-201, which states, "Except as otherwise provided by this Act a security agreement is effective . . . against purchasers of the collateral." U.C.C. § 9-201 (1972) (emphasis added). The author intends to explore this conundrum in a separate article on lien foreclosure in general.
purchasing at his own foreclosure sale. Even if he had the requisite ignorance at the time of the purchase, the mortgagee was to remain junior. But as to mortgagees who were junior by virtue of section 9-313(4)—because they obtained their mortgage with knowledge after affixation and attachment of a still unperfected security interest—the exclusion was irrelevant. Their knowledge would have kept them from being senior purchasers, even without the exclusion in question.47

One complexity that existed before the 1972 amendments related to mortgagees who took by assignment from a previous mortgagee. A technical reading of section 9-313(4)(a) indicates that the assignment of the mortgage made the successor mortgagee a "subsequent purchaser."48 A mortgage that had been senior in the hands of the assignor became junior in the hands of the assignee if, between the creation of the mortgage and its assignment, the assignee obtained knowledge of the unperfected security interest in fixtures or if the secured party properly perfected his interest. Conversely, a junior mortgage (under section 9-313(2)) became senior in the hands of an assignee without knowledge of an unperfected security interest. Again, once the mortgagee established senior status, he could buy freely at his own foreclosure sale, since nonuniform foreclosure law destroys all junior liens, regardless of the purchaser's knowledge. Ordinarily, one would have expected that the assignee took the exact status of his assignor, an expectation that the 1972 amendments have effectuated.49

II. The 1972 Amendments

In response to the avalanche of criticism of and commentary on the 1962 version of section 9-313, the 1972 amendments to section 9-

47 The narrow exclusion under discussion also did not apply where the mortgagee was junior under section 9-313(2), where the fixture interest was later perfected, and where the junior mortgagee purchased at his own sale. In such a case, no purchaser at the sale would have been protected, so that the exclusion of the mortgagee-purchaser was irrelevant.

48 "The security interests described in subsections (2) and (3) do not take priority over (a) a subsequent purchaser for value of any interest in the real estate . . . ." U.C.C. § 9-313(4)(a) (1962) (emphasis added).

49 See infra text accompanying notes 91-96.
The official text of the 1972 amendments to Section 9-313 is as follows:

(1) In this section and in the provisions of Part 4 of this Article referring to fixture filing, unless the context otherwise requires
   (a) goods are "fixtures" when they become so related to particular real estate that an interest in them arises under real estate law —
   (b) a "fixture filing" is the filing in the office where a mortgage on the real estate would be filed or recorded of a financing statement covering goods which are or are to become fixtures and conforming to the requirements of subsection (5) of Section 9-402 —
   (c) a mortgage is a "construction mortgage" to the extent that it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates.

(2) A security interest under this Article may be created in goods which are fixtures or may continue in goods which become fixtures, but no security interest exists under this Article in ordinary building materials incorporated into an improvement on land.

(3) This Article does not prevent creation of an encumbrance upon fixtures pursuant to real estate law.

(4) A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where
   (a) the security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within ten days thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate; or —
   (b) the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate; or —
   (c) the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any method permitted by this Article; or —
   (d) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this Article.

(5) A security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where
   (a) the encumbrancer or owner has consented in writing to the security interest or has disclaimed an interest in the goods as fixtures; or —
   (b) the debtor has a right to remove the goods as against the encumbrancer or owner. If the debtor's right terminates, the priority of the security interest continues for a reasonable time.

(6) Notwithstanding paragraph (a) of subsection (4) but otherwise subject to subsections (4) and (5), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.
The first and most imperative of the initiatives may also be (so far) the least successful. The initiative was designed to eliminate the need to elect between a fixture filing (not effective to perfect a nonfixture interest) and an ordinary UCC filing (not effective to perfect fixture interests) which existed under the 1962 Code. This system posed a bankruptcy risk, since the trustee could avoid the security interest in fixtures when the secured party relied upon the wrong kind of filing.\footnote{52}

Professor Kripke, a principal drafter of the amendments to section 9-313,\footnote{53} introduced the notion that “perfection” need not imply the establishment of priority over every possible claimant. He thought that an ordinary UCC filing should be sufficient to “perfect” against lien creditors and hence against bankruptcy trustees (claimants who would not be expected to search real estate records). If priority over real estate purchasers and mortgagees were desired, a more complicated fixture filing, designed to give notice to real estate title searchers, should be made.\footnote{54} As a result of this thinking, the 1972 amendment to section 9-313 requires only “perfection by any method” to gain priority over subsequent lien creditors.\footnote{55} Since bankruptcy trustees were deemed “subsequent lien creditors,”\footnote{56} it was hoped\footnote{57} that

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


\footnote{51} See infra text accompanying notes 97–101.

\footnote{52} See supra text accompanying notes 9–14.

\footnote{53} Henson, Fixtures: A Commentary on the Officially Proposed Changes in Article 9, 52 Marq. L. Rev. 179, 181 n.11 (1968).

\footnote{54} Kripke, Fixtures, supra note 1, at 59–60.

\footnote{55} U.C.C. § 9-313(4)(d) (1972).

\footnote{56} Bankruptcy Act of 1898 (1898 Act), § 70(c) (1976) (repealed by Bankruptcy Reform Act of 1978, 11 U.S.C. § 544(a) (Supp. V 1981)). The BRA provision stipulates that the trustee is a hypothetical lien creditor on the day of the bankruptcy petition. Section 70(c) was more vague as to the time limitations on the trustee’s hypothetical lien creditor power, but the Supreme Court construed the statute to limit lien creditor status as of the day of bankruptcy. Lewis v. Manufacturers Nat’l Bank, 364 U.S. 603 (1961).

\footnote{57} See Review Committee, supra note 16, para. A–8. (“It is hoped that since the fixture security interest arises against the goods in their capacity as chattels, the bankruptcy courts will apply the judgment creditor test.”).
this requirement would preserve the secured fixture interest against invalidation in bankruptcy.

The effect of the 1972 amendments under the Bankruptcy Act of 1898 (1898 Act) had been extremely doubtful. Under section 70(c)—the so-called strong arm statute—the bankruptcy trustee might have been a mere hypothetical lien creditor on the day of bankruptcy (and hence could be defeated by an ordinary UCC filing), but he also had a different and more potent power under section 60, the preference statute. One of the aims of preference law—aside from guaranteeing that creditors cannot raid the debtor's estate on the eve of bankruptcy—was the persecution of the secret lien.®® This, of course, is really a fraudulent conveyance idea; but from earliest times, section 60 tried to obliterate the secret lien by deeming that a transfer of the debtor's personal property occurred only when it was so far perfected as to have priority over a subsequent lien creditor. Such a rule tended to transform contemporaneous transfers of property (which are not preferences) into transfers in satisfaction of antecedent debt.®® Notwithstanding Professor Kripke's suggested reform of section 9-313, a fixture interest perfected only by a UCC filing was a voidable preference in bankruptcy because a transfer of "real estate" had to be perfected against a bona fide purchaser of real estate. A fixture interest protected against a subsequent lien creditor, therefore, was still a "secret lien" as far as section 60 was concerned, because fixtures are real estate,®® and only a fixture filing could perfect the interest against a hypothetical subsequent bona fide purchaser of real estate.®®

The drafters of the Bankruptcy Reform Act (BRA) recognized this problem and attempted to supplement the 1972 amendments to section 9-313 with language that would preserve fixture interests perfected by an ordinary UCC filing. They did so by specifying that fixtures should be considered personal property, rather than real estate, and that only the lien creditor test could be used to challenge an Article 9 security interest in fixtures.®® Unfortunately, Congress lost sight of the fixture problem when it redrafted the trustee's strong-arm power. Under section 70(c), the trustee had always been a hypothetical lien creditor on the day of bankruptcy; under section 544(a), he

®® See J. White & R. Summers, supra note 13, § 24-4, at 999.
®® See Breitowitz, Article 9 Security Interests as Voidable Preferences, 3 Cardozo L. Rev. 357, 372-78 (1982).
®® Breitowitz, supra note 59, at 384-87.
also became a hypothetical purchaser of real estate on the day of bankruptcy. In drafting section 544(a), Congress forgot that fixtures are real estate and that an ordinary UCC filing by a secured party would not perfect a fixture interest against a hypothetical purchaser of real estate. The characterization of fixtures as personal property in section 547 was for purposes of preference law only, and not for purposes of section 544.

This drafting error was spotted soon after the BRA became law, and Congress is already pondering a technical amendment to section 544(a) to make clear that fixtures are to be considered personal property. The amendment, however, has not passed Congress as of the date of this Article's publication. Thus, despite twenty years of regret that a secured party must, at his peril, “elect” to make a fixture filing or a regular UCC filing, that election must still be made.

There is a further bankruptcy risk aside from the failure of Congress to coordinate section 544(a) with the 1972 amendments. Whereas affixed collateral is saved from lien creditors by an ordinary UCC filing, unaffixed collateral is not necessarily saved by a fixture filing. A fixture lender who chooses to make only a fixture filing may

63 Id. § 544(a)(3).
64 See, e.g., In re Boots Builders Inc., 11 Bankr. 635, 639 (N.D. Tex. 1981). In Boots, the defendant installed air conditioners on the bankrupt’s real estate. After the plaintiff filed for bankruptcy, the defendant quickly filed notice of a materialman’s lien on the air conditioners. Under Texas lien law, the filing established the lien’s priority over any judicial lien intervening between installation of the air conditioners and the filing. Thus, the hypothetical lien creditor in bankruptcy was beaten. See 11 U.S.C. § 546(b)(Supp. V 1981). The filing, however, had only a prospective effect with regard to bona fide purchasers of real estate. Therefore, the bankruptcy court ruled that, as of the day of bankruptcy, the fixture interest was unperfected against a hypothetical bona fide purchaser of real estate under section 544(a)(3), and was therefore void.
65 The Bankruptcy Technical Amendments Act, first introduced in 1979, proposes to amend section 544(a)(3) of the BRA by excepting fixtures from the real estate category therein. S. 658, 96th Cong., 1st Sess., 125 Cong. Rec. 23,513-320 (1979). The same act was proposed by the 97th Congress, H.R. 3705, 97th Cong., 1st Sess., 127 Cong. Rec. H2437 (1981), and will presumably be reintroduced during the 98th Congress.
66 Of course, no such bankruptcy risk exists if the collateral falls within the narrow category of readily removable machines and replacements of consumer appliances. U.C.C. § 9-313(4)(c) (1972); see infra text accompanying notes 112–18.

Even with regard to ordinary fixture collateral, the secured party has moved forward from his position under the 1898 Act. Under section 60, the deadline for making a fixture filing was the latest of either the debtor’s insolvency, the secured party’s knowledge or reason to know of the debtor’s insolvency, or the start of the four month preference period. If the fixture filing was made thereafter, the fixture interest became a voidable preference. Under the BRA, the absence of a fixture filing is irrelevant to preference liability. The deadline for the fixture filing has therefore been moved back by section 544(a)(3) to the date of the bankruptcy petition.
67 Of course, the “right place” for unaffixed collateral under section 9-401(1) might coincidentally be the “right place” for affixed collateral as well. In that case there would be no risk from the debtor’s failure to affix prior to bankruptcy. See supra note 11.
have an unperfected security interest until the collateral is affixed to the land described in the financing statement. The secured party, therefore, takes a risk that bankruptcy may occur before affixation.68

The second and "weightiest"69 initiative of the 1972 amendments gives superpriority to construction mortgagees. In this type of transaction, the mortgagee lends the money actually used to buy the personal property that later becomes fixtures. Under the 1962 Code, a construction mortgage was treated in the same manner as any other prior mortgage.70 Any security interest, perfected or not, had priority over the construction mortgage, provided that attachment preceded affixation. Thus, a construction mortgagee could supply the purchase money for personal property intended for affixation to the real estate, only to have that personal property become the collateral for a non-purchase money lender who gave a second loan.71 Today, the construction mortgagee cannot be subordinated to a second lender while construction of the building is ongoing.72

With the superpriority given to construction mortgagees, the Review Committee supposed it solved a second problem under the 1962 Code—the priority accorded to future advances under the real estate mortgage. Whereas the 1962 version of section 9-313(4)(c) specifically stated that future advances under a prior mortgage were to be treated as "subsequent" mortgage debt, the current version of section 9-313 is silent on this point. But construction mortgagees are not the only mortgagees who give future advances. Ordinary mortgagees might also do so.73 Thus, priority conflicts involving future ad-

68 See Adams, supra note 1, at 914.
70 E.g., House v. Long, 244 Ark. 718, 426 S.W.2d 814 (1968).
72 U.C.C. § 9-313(6) (1972). The superpriority is limited to fixtures that are installed after the construction mortgage is recorded and that are not readily removable—i.e., collateral covered by section 9-313(4)(a). Section 9-313(6) specifically contemplates that fixture security interests perfected by a fixture filing before the construction mortgage is recorded, U.C.C. § 9-313(4)(b), and readily removable collateral of the sort covered by section 9-313(4)(e) not be subject to the construction mortgagee's superpriority. The rationale behind section 9-313(4)(e) is that readily removable office machines and consumer goods are not related to construction of the building. See Review Committee, supra note 16, para. A-9; Coogan, supra note 16, at 498-99.
73 See Adams, supra note 1, at 925. Professor Adams has discovered an inconsistency with regard to future advances given by a mortgagee who is junior under section 9-313(4)(a). Logically, such a mortgagee can never be a construction mortgagee; otherwise, he would be senior under section 9-313(4). If the advance under the mortgage is discretionary, it would not relate back to the junior status of the underlying mortgage under the law of most states. Therefore, the advance would be considered a "new" subsequent mortgage, which is governed
vances under a nonconstruction mortgage remains unresolved. The better view is probably to treat future advances as they would be treated under real estate law. Thus, obligatory advances would relate back to the time when the commitment was actually given, whereas discretionary advances might or might not.74

In a third initiative, knowledge of the real estate claimant has been made irrelevant to priorities under section 9-313. The 1962 Code had been in part a “race-notice” statute. While a secured party’s knowledge was rarely material to his priority,75 the knowledge of lien creditors and those buyers not protected by section 9-307(1) could subordinate them to unperfected security interests.76 The 1972 amendments generally eliminated knowledge as a disability for lien creditors in section 9-301(1)(b)77 (though not for buyers)78 as well as for priorities governed by section 9-313. Today, section 9-313 is entirely a “race” statute and has no “notice” features.79

The fourth initiative instituted by the Review Committee has removed the possibility of a secured party having priority over an earlier real estate interest unless the security interest has been perfected. Today, in order for a secured party to prevail over a mortgagee whose interest arose earlier in time, he must file a fixture filing under section 9-313(4)(a) within ten days of affixation of the collateral to the real estate. Furthermore, if the collateral is “readily removable” within the meaning of section 9-313(4)(c), the secured party can prevail only if he perfects (by any means permitted by the Article) under section 9-313(4)(b). There, we learn that the mortgage is senior to the perfected fixture interest, because the mortgage was “of record” before the fixture filing was made. See Adams, supra note 1, at 924–25. It is patently unjust that a mortgagee should be able to give a discretionary advance with priority over a previously perfected fixture interest. In such a case, the priority of the advance should be equated with the junior status of the underlying mortgage. Section 9-313(4)(b) has been justly criticized by Professor Adams on this point.

74 See supra note 36.
75 But see U.C.C. § 9-401(2) (1972).
76 Id. §§ 9-301(1), -307(2) (1962). Section 9-307(1), of course, is the all-important rule that “buyer[s] in [the] ordinary course of business” of anything except farm products take free of even perfected security interests, “even though the buyer knows of its existence.” The statement about buyers in the text ignores certain complexities, e.g., U.C.C. § 9-308 (purchasers of chattel paper and instruments), beyond the scope of this article.
77 Id. § 9-301. See Review Committee, supra note 16, paras. E–46 to –47.
78 U.C.C. § 9-301(c)–(d) (1972).
79 Again, this may be subject to the rule protecting secured parties who filed in the wrong place from competitors with knowledge of the contents of the financing statement. Id. § 9-401(2). See infra text accompanying notes 150–60.
prior to affixation. No ten day grace period exists under section 9-313(4)(c).

With the fifth initiative, the drafters eliminated what they perceived to be a real estate owner’s vulnerability to unscrupulous general contractors. Revised subsections 9-313(4)(a) and (b) protect the secured party only where the debtor “has an interest of record” in the real estate or has possession of the real estate. Under the old version of the Code, commentators feared that a general contractor could buy inventory subject to a supplier’s security interest; it could even have been the case that the supplier’s security interest in the contractor’s inventory was unperfected. Since the security interest had attached prior to affixation of the inventory to the real estate, the security interest was senior to the interests of any prior real estate party. Thus a real estate owner wishing to install new plumbing could have found that the plumbing, once installed, was subject to a security interest for a debt the real estate owner did not even owe. This danger may have been somewhat exaggerated, since, under section 9-307(1), the real estate owner who bought the plumbing would take it free of any security interest created “by his seller” (i.e., the contractor), provided that the sale had been in the ordinary course of the seller’s business. It is difficult to imagine many circumstances in which section 9-307(1) would not have protected the real estate owner, but presumably, the outside chance that this scenario could occur was enough to prompt the drafting of some protection for the real estate owner in section 9-313. Under the 1972 version, at least with regard to fixtures that are not readily removable, office machines or consumer appliances, the debtor must have “an interest of record in the real estate or [be] in

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60 Of course, the grace period under section 9-313(4)(a) does apply to “readily removable” collateral covered by section 9-313(4)(c), if the secured party chooses to file a fixture filing. The interaction between these two sections will be developed in more detail below. See infra text accompanying notes 105–19.


62 U.C.C. § 9-307(1) (1972). Any supplies in the possession of a general contractor would seem to be covered by section 9-307(1), provided only that the contractor is a “person in the business of selling goods of that kind” within the meaning of section 1-201(9); see also U.C.C. § 9-109(4) (1972) (goods are inventory “if they are . . . to be furnished under contracts of service or if he has so furnished them”). If the contractor so qualifies, the owner of the real estate is a “buyer in [the] ordinary course of business” within the meaning of section 9-307(1).

63 Professor Kripke considered and—on inadequate grounds—rejected the use of section 9-307(1) to prevent contractor fraud. See Kripke, Fixtures, supra note 1, at 70 (“[T]his line of analysis probably will not work under the present Code, because a building contract is not a contract for the sale of goods and, therefore, the owner is not a buyer in the ordinary course under Section 1-201(9); thus, the protection afforded by Section 9-307(1) does not apply.”).
possession of the real estate” before the secured party can gain priority. Of course, the secured lender continues to have the option of obtaining the real estate owner's consent to priority; subordination agreements in such cases have always been expressly approved by the UCC.

Unfortunately, the drafting job, intended to thwart unscrupulous contractors, was less than complete. First, the debtor need not have an interest in real estate in the case of collateral covered by section 9-313(4)(c)—“readily removable” machines and appliances. Since these items will tend to be a large percentage of fixture transactions, a major loophole has been left. On the other hand, we may safely rely on section 9-307(1) to destroy the supplier’s security interest, so that contractor’s fraud is a most unlikely.

Second, the drafters overlooked the fact that the contractor will often have a statutory lien to cover the supply of fixtures to an owner of real estate. If so, the debtor (i.e., the contractor) will have an “interest of record in real estate” (the statutory lien). Section 9-313(4)(a) makes clear that the fixture interest of the supplier takes priority over the unwitting home owner whenever the contractor had a recorded statutory lien. Again, section 9-307(1) renders this loophole irrelevant or at least unimportant.

construction contract may well be outside the scope of Article 2, as Professor Kripke suggests, but section 9-307(1) does not require Article 2 coverage of the sale. It requires only that the buyer be in the ordinary course of business, which, through section 1-201(9), requires that the contractor be a seller of “goods of that kind” (emphasis added). See U.C.C. § 9-105(1)(b) (1972) (fixtures are goods). Even if the basic terms of the construction contract do not fall under Article 2, it does not follow that security interests on goods which become fixtures cannot be terminated under section 9-307(1). This is especially so since application of section 9-307(1) serves the policy of preventing contractor’s fraud.

Nevertheless, authors have never used section 9-307(1) as the answer to contractor’s fraud and have assumed that it remained an important problem under the 1962 Code. See, e.g., Adams, supra note 1, at 866; Gordon, Credit Sales of Installed Equipment Financing—The Uniform Commericial Code’s Uneasy Truce Between Realty and Chattel Financing Interests, 64 Nw. U.L. Rev. 651, 670 (1970).

84 U.C.C. § 9-313(4)(a)-(b) (1972).
85 Id. §§ 9-313(5)(a), -316.
86 For example, in Texas, a statutory lien arises whenever a contractor supplies fixtures. The lien arises at the time an agreement is recorded or work commences, whichever is earlier. Tex. Civ. Code Ann. § 5459(2) (Vernon Supp. 1982).
87 U.C.C. § 9-313(4)(a)-(b) (1972). The words “of record” will prevent the unfiled statutory lien from sufficing for this theoretical contractor’s fraud. Texas requires that a filing be made by a contractor not later than 120 days after the “indebtedness accrues.” The lienor must notify the debtor and must swear out an affidavit claiming the lien and the notice to the debtor. Id. § 5453. Tex. Civ. Code Ann. § 5453 (Vernon Supp. 1982).
The sixth initiative deals with automatic perfection without filing for purchase money security interests in consumer goods. Under the 1962 Code, the automatic perfection rule for purchase money security interests was unavailable for personal property which became fixtures. These interests had to be perfected by a fixture filing. A purchase money lender for consumer goods, therefore, faced the same election dilemma as did his nonpurchase money brethren. In 1972 the rule was changed. An automatically perfected interest in consumer goods will survive affixation. This form of perfection is not good as against all real estate parties, however, and there are circumstances in which fixture filings are still required for priority.

The seventh initiative centered around the fact that assignment of a mortgage could reverse the priority that the mortgage originally had; junior mortgages could become senior in the hands of an assignee who was ignorant of an intervening unperfected security interests, and senior mortgages could become junior in the hands of an assignee with knowledge of the intervening unperfected fixture interest (or an assignee without knowledge, if the secured party simply perfected his interest with a fixture filing). This reversal of priorities occurred because an assignee of a mortgage fit within the black letter of section 9-313(4)(a) of the 1962 Code as a “subsequent purchaser for value of any interest in the real estate.” This reversal is justifiable in the case of a junior mortgage that is assigned and becomes senior in the hands of the assignee. In such a case, the fixture lender will have failed to perfect and therefore deserves his fate. Likewise, the case of a senior mortgage, which becomes junior in the hands of an assignee is not unfair (from the perspective of the assignee) because the assignee could have protected himself by checking the records (where perfection has occurred) or because the assignee took the mortgage in spite of his knowledge of an unperfected fixture interest. The reversal was,

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89 Id. § 9-302(1)(d) (1972).
90 Automatic perfection will suffice only when the secured party is able to claim priority under section 9-313(4)(c) because his collateral is readily removable office machines or replacements for consumer appliances, or when the competing real estate claimant is a subsequent lien creditor under section 9-313(4)(d).
91 In such a case, the assignor’s encumbrance could be junior either under old section 9-313(2) (attachment-affixation cases) or under section 9-313(4)(a) or (c) (encumbrance taken or advances made with knowledge of an unperfected security interest in fixtures).
92 In this case, the assignor’s mortgage could be senior either under old section 9-313(3) (affixation-attachment cases) or under section 9-313(4) (encumbrance subsequently created without the encumbrancer’s knowledge of an unperfected security interest).
however, unfair to the senior mortgagee. Although the mortgage remained senior in the case where the mortgagee himself foreclosed, the mortgage was less valuable in the mortgage resale market in light of the reversal of priorities. The 1962 version of section 9-313 thus lacked a "shelter" concept, whereby a senior mortgagee could also convey senior status to a prospective assignee, regardless of intervening perfection of the security interest or the assignee's knowledge. In contrast, the 1962 Code did provide a shelter provision to protect assignees of fixture security interests.

The potential for senior mortgages to be subordinated to fixture interests upon assignment has been obviated by a change in the language of 9-313(4)(b) which gives the secured party priority over subsequent purchasers only when "the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner." This language incorporates the "shelter" concept that the 1962 version clearly lacked.

Marketability of mortgage debt takes on added significance in light of the active trading which has arisen in recent years in "Ginnie Maes" (mortgage-backed bonds guaranteed by the Government National Mortgage Association) and other securities. See, e.g., Note, Security Interests in Notes and Mortgages: Determining the Applicable Law, 79 Colum. L. Rev. 1414, 1415 (1979).

Cf. U.C.C. § 3-201(1) (1972) (shelter provision for holders of negotiable instruments).

The 1972 amendments prevent the deterioration of a mortgage's priority because of assignment, but they do not necessarily eliminate the possibility that a (potentially) junior mortgage could become senior as a result of an assignment. Under section 9-313(4)(a) of the 1972 Code, a mortgage is potentially junior for 10 days after affixation. If a fixture filing is made within these 10 days, the mortgage becomes permanently junior, and there is no way this status could be changed by assignment. But if the potentially junior mortgage is assigned before perfection during the 10 days following affixation, it becomes senior in the hands of the assignee, provided the assignee records his new interest before a fixture filing is made. If the assignee of the mortgage does file first, he is "of record" prior to perfection of the security interest within the meaning of section 9-313(4)(b). Roughly speaking, this establishes a grace period similar to that in section 9-301(2), where lien creditors and bulk purchasers are made subject to the grace period, but other kinds of buyers are not, U.C.C. § 9-301(1)(c)-(d) (1972).

The "no-shelter" idea when the mortgage is potentially junior under section 9-313(4)(a) is not analogous to section 9-301(2) in this regard: If a lien creditor were to assign his lien during the grace period, the assignee would also be subject to the grace period, because the assignee's rights would "arise between the time the security interest attaches and the time of filing." Id. § 9-301(2). But under section 9-313(4)(a), the encumbrancer's rights must arise "before" affixation of the collateral. Assignees who take their rights between affixation and the filing seem to be covered only by section 9-313(4)(b), where they have a chance to improve the position held by the assignor, who was potentially junior.

Another curiosity with regard to assigned real estate interests is the assigned judicial lien. These liens are covered by section 9-313(4)(a). If they arise before affixation of the collateral they can be defeated only by a fixture filing within 10 days of affixation. If such a lien were to be assigned during the grace period, the lien's priority would be governed not by section 9-
The eighth initiative in the 1972 amendments is not really a change in the law, but is more in the nature of a clarification which the drafters thought important enough to emphasize with some explicit statutory language. This final initiative relates to "trade fixtures," a term of art referring to fixtures installed by tenants, typically to equip their places of business. For example, stools in a diner might qualify as fixtures in some states because they are bolted or cemented to the floor. The law of most states, however, is that "trade fixtures" are presumptively removable by the tenant. At the end of the lease term, the tenant, not the landlord, keeps the stools.

Under the 1962 Code the landlord never had an interest in this type of fixture. When the landlord sold his reversionary interest in the...
premises, or when they were seized by his creditor, the purchaser or lien creditor never obtained the trade fixtures. It was, therefore, impossible for such real estate parties to take priority over the tenant's creditor who had a security interest in the trade fixtures. The Review Committee apparently thought that the danger of some court missing this point was sufficiently great that it specifically added section 9-313(5)(b). Under this subsection, the secured party has priority over the landlord or the landlord's assignees, whether or not the security interest has been perfected. This provision is not an exception to the mandate of section 9-313(4)(a)—that prior real estate interests cannot be subordinated to unperfected security interests. Rather, it is simply a restatement of the obvious principle that the landlord has no interest whatsoever in trade fixtures and thus perfection, as to him, is irrelevant.

Another theme might be mentioned which cannot properly be termed an "initiative" since it is not clear whether the reform was intended or not. The 1972 amendments solve the riddle posed by an unperfected real estate mortgage. Under the 1962 Code, an earlier unrecorded mortgage might still have prevailed over a security interest in an "affixation-then-attachment" case. On the other hand, an

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100 "In considering fixture priority problems, there will always first be a preliminary question whether real estate interests per se have an interest in the goods as part of the real estate. If not, it is immaterial, so far as concerns the real estate parties, as such, whether a chattel security interest is perfected or unperfected." Review Committee, supra note 16, para. A-6.

101 It is not inevitable that the tenant may remove trade fixtures at the end of the term. In Federal Sign & Signal Corp. v. Berry, 601 S.W.2d 137 (Tex. Civ. App. 1980), the landlord leased land to a tenant on the condition that any fixtures added by the tenant became the landlord's property after the lease terminated. A signmaker "leased" some signs to the tenant who affixed them to the land. As so often happens, the signmaker found himself to be an unperfected secured party, not a lessor. See U.C.C. § 1-201(37) (1972). Since the secured party made no filing, let alone a fixture filing, the landlord's "after-acquired property" interest took priority over the security interest. Section 9-313(5)(b) was of no avail to the unperfected secured party here.

It should be noted that the stated rationale of the court in Berry is quite different from the above analysis. The court reasoned that the unperfected security interest had been foreclosed when the landlord sued to foreclose his statutory lien against the tenant's personal property. This analysis is demonstrably wrong. A Texas landlord does indeed have a lien on a tenant's personal property to secure payment of rent, but here the landlord's interest was a consensual grant by the tenant, not a statutory lien. The landlord was not seeking a "judgment for restitution of the premises" after termination of the lease. See Tex. Civ. Proc. Rules Ann. R. 748, 751-55 (Vernon 1979). The better analysis is that the landlord was a senior real estate claimant because the secured party failed to make a fixture filing within 10 days of affixation, as required by section 9-313(4)(a).

102 Adams, supra note 1, at 902. The only reference in the 1962 version of section 9-313(4) to recordation of the real estate interest was that a future advance was entitled to priority over an
Article 9 fixture lender seemed to qualify as a subsequent bona fide purchaser of real estate under most recording statutes. These were competing priority schemes, each awarding priority to different parties. A choice between the conflicting systems might therefore have been required under the 1962 version. The 1972 amendments solve the conundrum. Under section 9-313(4)(b), a secured party who perfects before a mortgage is “of record” always prevails. Today there is a pure race between mortgagees and secured parties to record or perfect their respective claims.

III. Priorities Under the 1972 Amendments

The structure of section 9-313 today is such that secured parties lose automatically unless they can find a rule that supports their priority under subsection (4). Even if they do find such a rule, secured parties may still lose if the real estate claimant against whom they are competing is a construction mortgagee (or his assignee) and construction is going on at the time of affixation.

For purposes of comparison with the 1962 Code, it will again be helpful to examine the priorities that arise from the six possible patterns of temporal order between attachment, affixation and accrual of the real estate interest (which, for convenience, will again be provisionally identified as a mortgage).

A. Case One: Mortgage–Attachment–Affixation Under Sections 9-313(4)(a)–(c)

This first case, so simple under the 1962 version of the Code, has now become monstrously complex. The basic structure of the relevant priority sections is such that section 9-313(4)(a) might be available,

intervening unperfected security interest only when the underlying mortgage was “of record.” The purpose of this reference was less than clear, and perhaps echoed some mortgage cases which denied priority to future advances if the mortgage was unrecorded. See G. Osborne, supra note 36, § 119, at 192-94. Ironically, those cases denied priority to the future advance because the original mortgage itself was denied priority. Under section 9-313(4)(c) of the 1962 Code, however, the future advance was denied priority for lack of recordation even though the original unrecorded mortgage had priority over the fixture interest under section 9–313(4)(3) (affixation-attachment cases) or under section 9-313(4)(a).

103 See U.C.C. § 9–313(7) (1972). Of course, under subsection (5)(b), the secured party wins if the fixtures are trade fixtures in which the competing landlord has no interest. U.C.C. § 9-313(5)(b) (1972). This is not, strictly speaking, a priority contest, but merely a restatement of the obvious principle that the secured party always wins where the landlord has no interest at all to claim. See supra text accompanying notes 97–101.

104 See supra notes 69–72 and accompanying text.
irrespective of the nature of the collateral, or, if the collateral is "readily removable" and is within a narrow category of "machines" and appliances, section 9-313(4)(c) may also be used.\textsuperscript{105} Section 9-313(4)(b) is also available when the mortgage is unrecorded.

Section 9-313(4)(a) is unique in that it requires the secured party to have purchase money status. The 1962 Code never required it, and neither does any other subsection of current section 9-313. In addition to having purchase money status, a secured party relying upon section 9-313(4)(a) must perfect against the prior mortgagee (a major change from the 1962 law),\textsuperscript{106} and perfection can only be achieved by a fixture filing.\textsuperscript{107}

\textsuperscript{105} If these sections are inapplicable, the secured party can also have priority under section 9-313(4)(b) if he perfects his security interest before the mortgage is recorded.

\textsuperscript{106} See supra note 23 and text accompanying notes 15–17. Professor Adams saw in the lack of a perfection requirement a threat to the validity of the earlier real estate mortgage. He reasoned that the unperfected security interest was voidable in the debtor's bankruptcy, where the trustee, was given the status of a hypothetical lien creditor on the day that the bankruptcy petition was filed. 1898 Act § 70(c). Once avoided, the trustee could save the lien for the benefit of the estate and capture from the real estate mortgagee the senior priority of the UCC secured party, to the extent of the secured party's lien. Id. § 60(b). This much of the analysis is undeniable. Professor Adams suggests, however, that the trustee could subrogate himself to the secured party's rights under section 70(e) as well. Under the holding of Moore v. Bay, 284 U.S. 4 (1931), the trustee could then have avoided the entire real estate mortgage, not merely the amount equivalent of the secured party's prior lien. Adams, supra note I, at 868-69.

This theory seems to have a sound basis in the case law. E.g., Electric Constructors, Inc., v. Azar, 405 F.2d 475, 476-77 (5th Cir. 1968) (trustee could subrogate himself to a statutory lien creditor's rights and defeat a junior security interest). See also 2 G. Gilmore, supra note 1, § 45.3, at 1293–94; Coogan, supra note 7, at 1338–39. But the idea that section 70(e) allowed subrogation to lien rights seems dubious, in that it swallows whole the concept that avoided liens are preserved for the benefit of the bankrupt estate. Preservation of liens for the benefit of a bankrupt's estate prevents a windfall to junior secured parties who otherwise would benefit from the avoidance of a senior lien by the trustee. See S. Rep. No. 989, 95th Cong., 2d Sess. 90, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5876. If junior liens were always void because the trustee could subrogate himself to senior liens and destroy the entire junior lien under Moore v. Bay, there would be no room for the lien preservation concept to work.

It should also be noted that Professor Adams' theory of Moore v. Bay, in no way depends upon the avoidance of a senior security interest. Presumably the trustee could subrogate himself to any senior interest and could thereby eliminate any junior lien or mortgage from the picture.

Fortunately, we will have no further opportunity to explore this thesis. The newly enacted BRA limits the trustee's subrogation power to the rights of unsecured creditors only. 11 U.S.C. § 544(b)(Supp. V 1981).

\textsuperscript{107} An ordinary UCC filing will not do, even if we substitute a prior lien creditor for a prior mortgagee. This is indeed a pretty piece of nonsense, since a subsequent lien creditor can be beaten by an ordinary UCC filing or (if the fixtures are consumer goods) by no filing at all. Why there are different perfection requirements for prior and subsequent lien creditors has no logical answer, but there may be a literary answer. The subsequent lien creditor was equated with the bankruptcy trustee. With that in mind, section 9-313(4)(d) was drafted with great care. But as for prior lien creditors, who have no bankruptcy significance, the drafters were indifferent and were content to lump them in with other prior encumbrancers.
While a secured party who relies upon section 9-313(4)(a) for priority must meet these rigorous perfection requirements, at least he receives the benefit of a ten-day grace period. The grace period commences when the collateral is affixed to the real estate. This is different from the usual purchase money grace period found elsewhere in the UCC, which begins to run when the debtor "receives possession" of the collateral. Since receipt of possession is a logical prerequisite for affixation of the collateral to the debtor's real estate, it is possible, and perhaps common, for the grace period under section 9-313(4)(a) to be longer than the other grace periods for purchase money interests.

More problematic for the fixture lender is the fact that the grace period granted by section 9-313(4)(a) is quite different from that given under federal bankruptcy law. Section 547(e) of the BRA presents considerable danger for the purchase money fixture lender who thinks he can rely on the grace period under section 9-313(4)(a).

In order to sabotage any "secret liens," the preference statute has always deemed a transfer to occur when it is perfected against lien creditors or purchasers of real property. But a grace period has always been granted to avoid changing contemporaneously exchanged security interests into transfers in satisfaction of antecedent debt where there are only small gaps between attachment and perfection of those interests. Section 547(e) was therefore designed to give the secured party ten days to perfect his interest after it has attached. If the grace period has been met, the transfer is deemed to have occurred at the time of attachment. This transfer, if before the start of the preference period or if given in exchange for new value, is saved from avoidance; the transaction is either too early to be a voidable preference or is a contemporaneous exchange. If the grace period is not met, the transfer is deemed to have occurred at the time of perfection, long after value has been given by the creditors. This transaction is considered to be in satisfaction of antecedent debt and is potentially voidable.

Since affixation often occurs at a time different from attachment, a creditor relying solely on section 9-313(4)(a) for guidance as to when to perfect may find his security interest void if his debtor is bankrupt within ninety days of affixation. He may also lose his opportunity to prevail under section 547(c)(3). This section states that even if a

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109 Section 60(a)(7) of the 1898 Act provided a 21-day grace period. Unlike section 547(e), section 60(a)(7) was available only in cases where new value was given. See generally Breitowitz, supra note 59, at 388–408.
purchase money security interest is otherwise deemed a transfer in satisfaction of antecedent debt under section 547(e), it is immune from avoidance if the security interest is perfected within the ten-day grace period of 547(c)(3). This ten-day grace period also commences at attachment. A financing statement filed within the grace period of section 9-313(4)(a), therefore, may not protect the purchase money fixture lender from the bankruptcy trustee.111

A secured party who has not made a fixture filing within the grace period of section 9-313(4)(a) may have another opportunity to prevail if his collateral is of the type covered by section 9-313(4)(c). In order to qualify for the liberal filing rules of this section (“the security interest is perfected by any method permitted by the Article”), the collateral must be “readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods.”112

It is not clear how rigorously the restrictions on the types of collateral covered by section 9-313(4)(c) are meant to apply. For example, consider again the case of the bar stools which are collateral for an Article 9 security interest. These stools may be “equipment” within the meaning of section 9-109 because they are used in business,113 but they do not seem to be “machines,” even though they are “readily removable.” Hence, nonmechanical equipment does not fall under section 9-313(4)(c).114

110 Section 547(c)(3) was written to save the enabling loan from destruction. When a bank lends purchase money, the security interest it will later receive will almost certainly be a transfer on account of antecedent debt. Section 547(c)(3) sets forth the elements of purchase money status, but requires that perfection of the security interest occur within 10 days of attachment. See id. at 425-29. The converse circumstance also poses a bankruptcy risk: where the fixture filing is made before affixation of the collateral. Such a fixture filing is ineffective with regard to unaffixed collateral and only becomes effective upon eventual affixation. See supra text accompanying note 68. If affixation is within 10 days of attachment, then the fixture filing becomes effective perfection, and section 547(e)(2)(A) deems the transfer to be made at the time of attachment. If affixation is beyond the 10-day grace period, the transfer is deemed to be the time of affixation. In the latter case, delayed affixation turns an otherwise contemporaneous transfer into a transfer on account of antecedent debt. This proves yet again that the Review Committee has failed to remedy completely the mutually exclusive filing hazard that existed under the 1962 version of section 9-313. See supra text accompanying note 68.


112 “Goods are . . . (2) ‘equipment’ if they are used or bought for use primarily in business . . . .” Id. § 9-109.

113 Coogan has criticized the choice of words in section 9-313(4)(c) and would have preferred that the term “equipment” had been used. Coogan, supra note 16, at 486-90. Professor Adams, who also finds section 9-313(4)(c) to be imprecise, raises a hypothetical question of a landlord who furnishes his apartment with encumbered air conditioners. Professor
The applicability of section 9-313(4)(c) to consumer goods is limited to those which are replacements. This rule was designed to give mortgagees (and all others except subsequent lien creditors) priority over secured parties with security interests in original appliances in new dwellings. Thereafter, replacements are eligible for Article 9 financing. The emphasis on replacements creates strange results in some circumstances—for example, where a homeowner buys a dishwasher on credit subject to a purchase money security interest and installs it in a way that it becomes a fixture under the common law of the state. The applicability of 9-313(4)(c) will depend on whether or not the dishwasher is the first one the homeowner has bought. Also, if the homeowner has bought an additional dishwasher, it is not a “replacement,” and section 9-313(4)(c) is not applicable.

If a secured party can succeed in convincing a court that his collateral is readily removable machinery or replacements of consumer goods, he will be excused from many of the rigors of section 9-313(4)(a). He need not have technical purchase money status, he need not perfect with a fixture filing, and he can take priority over construction mortgagees. On the down side, there is no grace period, perfection must be prior to affixation, and in the case of consumer goods, automatic perfection can be had only if the lender has purchase money status.

Why the grace period of section 9-313(4)(a) is denied to a secured party under section 9-313(4)(c) is not apparent. Nor is it clear why Adams argues that these air conditioners are consumer goods and are therefore covered only to the extent they are replacements of previous consumer goods. Adams, supra note 1, at 912. I would take issue with this analysis, since the landlord is not using the air conditioners for his own personal use. To the landlord, they are equipment. But, significantly, they are not office or factory equipment and hence not covered by section 9-313(4)(c) at all. Accord Review Committee, supra note 16, para. A-10. Only perfection under section 9-313(4)(a) (which requires a fixture filing) is possible, and the secured party must have purchase money status as well.

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According to Professor Kripke, early proposals for grace periods against subsequent real estate owners and encumbrancers were staunchly opposed by the real estate industry. Kripke, Review Committee, supra note 1, at 308. Since section 9-313(4)(c) applies equally to subsequent and prior real estate interests, the failure to provide a grace period against prior interests may
purchase money status is strictly required under section 9-313(4)(a), but not section 9-313(4)(c). It is this sort of asymmetry which makes section 9-313(4) perhaps the most baroque of the UCC provisions.

Finally, the secured party who has not perfected by the deadlines in sections 9-313(4)(a) or (c) can still win under section 9-313(4)(c) if the mortgage is unrecorded and the secured party is the first to perfect with a fixture filing. Even if the collateral is one of the “readily removable” items within the meaning of section 9-313(4)(c), a fixture filing will be required against an unrecorded mortgage whenever ordinary UCC perfection has not occurred before affixation. This seems less peculiar than some of the contrasts we have seen. It is only sporting that the mortgagee and the secured party race to the very same finishing line—the mortgage recording office. In addition, the secured party with section 9-313(4)(c) collateral who has missed his deadline for ordinary UCC perfection and who is without a fixture filing is vulnerable to subsequent mortgagees; it therefore seems just that he likewise be vulnerable to a mortgagee who recorded late.120

Treating these two types of mortgagees equally will prevent the secured party from trying to claim that a truly subsequent mortgage is really a subsequently recorded earlier mortgage subject to an opposite rule. Priority cases will therefore be easily decided by the order of recordation in the real estate records.

B. Case Two: Mortgage-Affixation-Attachment and Section 9-313(4)(a)

Under the 1962 Code, section 9-313(3) accorded priority to the prior mortgagee in the “affixation-then-attachment” case. The rule has not changed greatly under the 1972 amendments, although in one exceedingly narrow circumstance the secured party can prevail over a prior mortgagee.

Where a prior mortgagee has promptly recorded121 his mortgage, section 9-313(4)(a) provides the only method by which the secured

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120 I question whether secured parties who miss their deadline under section 9-313(4)(c) should still be required to make a fixture filing to beat subsequent mortgages. If that criticism is well taken, then the point in the text also should be reversed. See supra note 119.

121 If the mortgagee fails to record, the secured party can always prevail by perfecting first with a fixture filing pursuant to section 9-313(4)(b).
party in an "affixation-then-attachment" case can prevail, but only under the most unusual of circumstances. In order to have priority under section 9-313(4)(a) the secured party must have purchase money status and must make a fixture filing within ten days of affixation. This is theoretically possible. Suppose that a merchant sells a dishwasher to the debtor on credit subject to a purchase money security agreement. The parties orally agree to the security interest but neglect to place their signatures on a written agreement that comports with the requirements of section 9-203(1)(a). The debtor takes the dishwasher home and affixes it to his real estate, which is subject to a mortgage with an after-acquired property clause encompassing fixtures. On the day after affixation, the seller realizes his mistake and rushes to the debtor's home for his signature. When the debtor signs, the security interest has now attached one day after affixation. The secured party then files a fixture filing within ten days after affixation. This scenario is just about the only one in which a secured party will have the opportunity for priority in an "affixation-then-attachment" case under section 9-313(4)(a). If that section offers little hope, section 9-313(4)(c) provides none at all, even if the dishwasher is a replacement. Here, attachment must precede affixation because section 9-
313(4)(c) requires that perfection precede affixation; under section 9-303(1) there cannot be perfection until attachment has occurred.\(^{125}\)

Once again it appears that a relatively straightforward provision from the 1962 Code—section 9-313(2)—has been transformed into a curious puzzle in the “affixation-then-attachment” cases. The secured party can prevail over earlier real estate interests in only the most unusual of cases.

C. Cases Three and Four: Attachment–Mortgage–Affixation and Affixation–Mortgage–Attachment

Under the 1962 Code, the priorities in an “attachment-mortgage-affixation” case were the same as those where the sequence was “mortgage-attachment-affixation.”\(^{126}\) Section 9-313(2) clearly applied in both situations. Similarly, section 9-313(3) governed both “mortgage-affixation-attachment” and “affixation-mortgage-attachment.”\(^{127}\) This symmetry has been destroyed by the 1972 amendments.

The 1972 Code continues to treat the cases of “attachment-mortgage-affixation” and “mortgage-attachment-affixation” in the same manner. In either situation the secured party can prevail under section 9-313(4)(a) if he has purchase money status and has perfected by a fixture filing within ten days of affixation. If the competing real estate claimant has failed to record his interest, priority under section 9-313(4)(b) is also possible whenever the secured party is the first to file. Finally, a secured party may gain priority under section 9-313(4)(c) if his collateral qualifies and if he perfects (by any method) prior to affixation.

Since 1972, the “mortgage-affixation-attachment” case has been treated differently from the “affixation-mortgage-attachment” case. As was demonstrated in “case two,” where the mortgage preceded affixation and attachment, the secured party had a remote possibility for priority under section 9-313(4)(a). If, however, the sequence is “affixation-mortgage-attachment,” the secured party cannot avail himself of this section. This is because section 9-313(4)(a) requires that “the interest of the encumbrancer or owner arise before the goods

\(^{125}\) Note that section 9-313(4)(a) has no such requirement. Therefore, the security interest in the dishwasher referred to in the text can be senior only under section 9-313(4)(a), even if the dishwasher is a consumer replacement within the meaning of section 9-313(4)(c).

\(^{126}\) See supra notes 29–31 and accompanying text.

\(^{127}\) See id.
become fixtures.” Thus, when the mortgage follows affixation, all chances for financing preaffixed collateral with priority over the mortgagee disappear, except when a mortgage is unrecorded and where attachment of the security interest and its perfection by a fixture filing are achieved before mortgage recordation. In such a case, the secured party wins under section 9-313(4)(b).

D. Cases Five and Six: Subsequent Mortgages

Before the 1972 amendments, section 9-313(4) alone governed the subsequent mortgagee’s priority, and “subsequent” meant subsequent to both attachment and affixation. Today, three subsections can conceivably govern the priority of a subsequent real estate interest. Only subsection (a) of section 9-313(4) (1972) requires that “the interest of the encumbrancer or owner arise[] before the goods become fixtures.” Therefore, any of the other subsections can aid the secured party in gaining priority. Since section 9-313(4)(a) is inapplicable, the secured party does not need purchase money status in order to prevail unless he wishes to rely on automatic perfection of an interest in consumer goods.

Section 9-313(4)(c) is available to the secured party where there is a subsequent mortgage. Of course, the nature of the collateral is crucial. If it qualifies as readily removable office or factory machines or replacements of consumer goods, the secured party can prevail if he perfects, by any means, prior to affixation.

If the secured party’s collateral does not meet the requirements of section 9-313(4)(c) or if he does not meet section 9-313(4)(c)’s merciless deadline for an ordinary UCC filing, his only hope for priority over subsequent purchasers or mortgagees is to proceed under section 9-313(4)(b). Under this section, there must be perfection by a fixture filing before the interest of the mortgagee is recorded. This section reduces the contest between the mortgagee and the secured party to a pure race to file in the real estate records.

128 See id.

129 Purchase money status for this purpose is required under section 9-302(1)(d) of the 1972 Code. Ordinarily, one would expect purchase money status to be helpful only against after-acquired property interests that were filed earlier in time. See U.C.C. § 9-312(3),-(4) (1972). But here is one circumstance where purchase money status is necessary to beat subsequently created interests.

130 Even if the secured party wins the race, he may lose if his filing is not deemed to meet the requirements of 9-313(1)(b). E.g., Corning Bank v. Bank of Rector, 265 Ark. 68, 576 S.W.2d 949 (1979) (filing not sufficient because it contained no description of real property).
One may fairly question the deadline in section 9-313(4)(c) for ordinary UCC perfection as applied to truly subsequent mortgagees. The whole premise of section 9-313(4)(c) is that the collateral covered therein is not typically expected to be part of the real estate available to mortgagees or purchasers and that therefore a fixture filing need not be required. With regard to earlier mortgages, the rule of "first in time is first in right" dictates that the deadline be imposed (and even here the Review Committee should have made a purchase money exception). No such justification exists for subsequent mortgages, however. If they truly do not expect to find real estate recordations on readily removable office machines and consumer appliances, there seems little reason to require a fixture filing in cases where the secured party has not met his section 9-313(4)(c) deadline.

It is curious that the treatment of prior and subsequent mortgagees and purchasers under section 9-313(4) is so drastically different. As to mortgagees and purchasers earlier in time, a grace period is given to purchase money security interests. U.C.C. § 9-313(4)(a) (1972). No grace period exists when these same parties are subsequent. Thus, if collateral is affixed on Tuesday, a Monday purchaser of real estate is burdened by a grace period, while a Wednesday purchaser is not. The difference can be explained by the fact that the Wednesday purchaser relies on the state of the record and is entitled to protection. The Monday purchaser does not rely on the state of the record and does not purport to buy unaffixed personal property. As to him a grace period seems more acceptable.

Under section 9-301, a distinction is made between lien creditors (subject to a grace period in purchase money cases) and buyers (who are not burdened by a grace period). But this distinction is entirely different in kind from what I have said about prior and subsequent real estate claimants. Under section 9-301(2), neither the lien creditor nor purchaser can be prior in time to the purchase money security interest, which arises instantaneously upon the debtor obtaining rights in the collateral. Under section 9-313 this temporal factor is all-important. Encumbrancers, at least, can have an interest in the underlying real estate before collateral is affixed. And under the fixture statute, no distinction is made between buyers and encumbrancers (except subsequent lien creditors, who are treated differently) whereas the distinction between lien creditors and buyers under section 9-301 is fundamental.

The rule of "first in time is first in right" therefore supports priority for the mortgagee. A purchase money security interest could be given a grace period here without much harm to the mortgage industry, and such a rule would make section 9-313(4)(c) consistent with similar grace periods given against lien creditors and other secured parties. U.C.C. §§ 9-301(2), -312(4) (1972).

When the mortgage arises subsequent to affixation and perfection of the security interest, the mortgage attaches to the collateral at a time when the security interest is already perfected. The rule of "first in time is first in right" cannot therefore apply to truly subsequent mortgages. Nor can it apply to unrecorded mortgages which are recorded after collateral is affixed and the security interest is perfected. Under the current statute, earlier mortgages which are subsequently recorded can only be defeated by a fixture filing under section 9-313(4)(b).
The secured party has an additional opportunity to prevail when a lien creditor is substituted for a mortgagee: section 9-313(4)(d) gives the secured party priority when he has perfected by any manner before the creditor obtains the lien “by legal or equitable proceedings.”

Under the 1962 Code, all lien creditors, whether “prior” or “subsequent” to the security interest, were treated similarly to prior or subsequent mortgages. Section 9-313(4)(d) was included in the 1972 amendments in an attempt to protect the fixture lender from the bankruptcy trustee, but the measure of protection is diminished by an ambiguity as to timing. The statute makes clear that the lien itself must be “obtained” after perfection has occurred. What is left unclear is whether the judicial or equitable proceedings giving rise to the lien must also be subsequent to perfection. It is contended that the timing of the judicial proceedings should be irrelevant.

By way of illustration, consider a situation where ordinary consumer goods are subjected to an automatically perfected purchase money security interest, but are not yet affixed to the debtor’s real estate. At the point they are affixed and thereby transformed into real estate, a lien creditor will have “obtained” a lien on the fixtures, but not before. The judgment lien on consumer goods, therefore, should be deemed “subsequent” within the meaning of section 9-313(4)(d), and no further action on the part of the secured party would be necessary to defeat the lien creditor. If, however, the lien were held not to be subsequent, because the judicial proceedings which gave rise to it antedated perfection, it would have to be treated as a prior lien under section 9-313(4)(a). Such a lien can be subordinated only by a fixture filing.

The proper reading of section 9-313(4)(d) is that a security interest that is perfected before affixation will take priority over a judicial lien which is in place on the underlying real estate at the time of affixation. A fixture filing under section 9-313(4)(a) should not be required in such a case.

A final observation is that subsequent lien creditors may theoretically be subordinated under sections 9-313(4)(b) and (c), but section 9-
313(4)(d) subsumes these sections with more liberal perfection requirements. Section 9-313(4)(b) requires a fixture filing before the lien is of record, whereas section 9-313(4)(c) requires perfection before affixation. Under section 9-313(4)(d), the secured party can perfect after affixation, so long as he perfects before the judgment lien on the fixtures is obtained.

IV. Priorities Between Two Security Interests in the Same Fixture

Section 9-313 presupposes a priority battle between a classic real estate claimant—such as an owner or mortgagee—and an Article 9 secured party. The section does not seem to govern priorities between competing secured parties who both claim a fixture. Not a first glance anyway.

White and Summers have thought about and disposed of the priorities between fixture lenders with admirable succinctness. They conclude, "presumably neither party holds an encumbrance as that term is defined in 9-105(1)(g). Their relative priority, if determined at all under Article 9[,] will be settled by 9-312." Their analysis depends first on the assumption that section 9-312 easily solves the priority problems, and second on the supposition that a fixture interest under Article 9 is not an "encumbrance."

In fact, section 9-312, as applied to fixture interests under the 1962 Code, was not so easy to apply. Let us compare the typical case of a purchase money secured party versus a lender with a security interest in after-acquired property, where both security interests have attached to the collateral before it is affixed to the real estate. Under section 9-312(4), the purchase money lender won if he perfected his interest before the end of his ten-day grace period, which started to run when the debtor received possession of the collateral. But once the collateral became a fixture, the UCC filings were no longer adequate to perfect the interests in fixtures. Both interests were therefore rendered unperfected. Section 9-312(4) provided no clue as to how to treat purchase money priority when all perfection had lapsed.

Lapsed perfection was a most painful subject under the 1962 Code. It was generally agreed that interests arising after the lapse...
were to be given priority as if the security interest were unperfected. But there were two schools of thought about interests that arose before the lapse.\textsuperscript{140} Some thought that the lapse was prospective only, and benefited only claimants with interests arising after the lapse. As to prelapse claimants, they were to be treated as if the lapse had never occurred. Their junior priority was frozen in place forever.\textsuperscript{141} The second school of thought was that when perfection lapsed, it was repealed \textit{nunc pro tunc}. This view is reflected in the 1962 comments to section 9-103.\textsuperscript{142} Under this view, the courts were supposed to treat priorities of prelapse interests under the assumption that the security interest's perfection had never existed.\textsuperscript{143}

With regard to fixture disputes under the 1962 Code, the "prospective" school would have said that the priorities before the lapse...
were frozen and that the purchase money lender won. The retroactive school would have treated this as a priority battle between two unperfected security interests. In a purchase money versus after-acquired property case, the priority was very tricky, since attachment of the two interests would have occurred simultaneously—when the debtor obtained rights in the collateral. Section 9-312(5)(b) instructed that, where no one has perfected, priority is to be given to the first security interest to attach. But it did not resolve cases of simultaneous attachment. Perhaps the secured parties should have split the collateral between them. In addition, a secured party relying on section 9-312(5)(b) was in a most precarious position. The first secured party to make a fixture filing would capture seniority, and since repossession was a form of perfection, the repossessing secured party would automatically establish seniority. In any case, if the retroactive school of thought held the correct view on lapsed perfection, section 9-312 became a treacherous means by which to determine priorities.

As authority for the concept that the secured parties should divide the collateral, see Hulbert v. Hulbert, 216 N.Y. 430, 111 N.E. 70 (1916). In this case, two creditors docketed judgments against the defendant at a time when he had no real estate. The docketing of the judgments would have created liens on his real estate, if he had any. Later, the judgment debtor inherited some real estate, to which the liens attached immediately and simultaneously. The New York Court of Appeals assumed that these parties should share the proceeds on a pro rata basis.


In Babson Credit Plan, Inc. v. Cordele Prods. Credit Ass'n, 146 Ga. App. 266, 246 S.E. 2d 354 (1978), the Georgia Court of Appeals considered priorities between an after-acquired property security interest and a purchase money security interest. Each had perfected by ordinary UCC means in a timely fashion, and neither had perfected with a fixture filing. Upon affixation, perfection of both security interests lapsed. The court awarded victory to the purchase money lender, but not under the prospective theory of lapsed perfection. Instead, the court focused on the fact that the after-acquired property party also had a real estate mortgage. Under the 1962 Code, which was then in effect in Georgia, the after-acquired party as mortgagee was clearly subordinate under section 9-313(2). The court, without much discussion, simply assumed that the after-acquired property interest should also be subordinated in the interest of preserving the full effect of section 9-313(2). Section 9-312(4) was never mentioned.

A similar case, where the after-acquired property party had both a mortgage and a security interest in after-acquired property, is Sunshine v. Sanray Floor Covering Corp., 64 Misc. 2d 780, 315 N.Y.S.2d 937 (Sup. Ct. 1970). In this case the purchase money lender lost. First of all, he did not file in time to take advantage of section 9-312(4). That made the after-acquired property interest senior to the purchase money security interest. Second, the court assumed that attachment of the security interest occurred after affixation of the collateral to the real estate. This made the purchase money security interest subordinate to the mortgage under section 9-313(3). As to the latter point, the court equated attachment with the debtor signing the security agreement which occurred after affixation. While this is possible, it is more likely that the parties had orally agreed to a security interest at the time of the sales contract. Under the 1962 Code, a
Under the 1972 Code, use of section 9-312 to solve such disputes seems less problematic. Perfection no longer lapses under the 1972 version of the Code. Therefore, since one need not face the lapse question, section 9-312 seems easier to use. But the 1972 amendments also introduced a very broad definition of "encumbrance." Section 9-312 is usable only if Professors White and Summers have presumed correctly that security interests are not real estate encumbrances within the meaning of section 9-105(g). I would suggest that the definition does indeed fit security interests on fixtures and that these priority problems are better decided under section 9-313 than under section 9-312.

According to section 9-105(g), "'encumbrance' includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests . . . ." Fixtures are real estate, and security interests are liens. Therefore, the definition seems to fit. If it does, then each fixture party is an "encumbrancer" with regard to the other.

The result is that, in most cases, the first secured party to make a fixture filing will win under section 9-313(4)(b). The only exception to this is in the case of collateral qualifying under section 9-313(4)(c)—readily removable office machines and consumer appliance replacements. In such a case, ordinary UCC filings are sufficient to beat prior and subsequent encumbrancers, and so section 9-312 could be applied safely here. But section 9-313(4)(c) does require perfection before affixation. In a case where one of the parties has not perfected by this deadline, the prior perfected secured party wins under either section 9-312 or 9-313(4)(c), except in one case. If the unperfected secured party is a purchase money secured party, section 9-312(4) would award him victory if he eventually perfects within the ten-day grace period. But under section 9-313(4)(c), the earlier perfected security interest beats the purchase money lender who files after affixation and within the 9-312(4) grace period, because the purchase money security

mere oral agreement to create a security interest established attachment. See supra note 124. One suspects that the court did not understand the significance of any oral agreement preceding the written agreement.

If, in Sunshine, there had been an oral agreement before affixation, the purchase money secured party would have been senior to the mortgage under section 9-313(2). However, he still would have been junior to the mortgagee's security interest under section 9-312.

147 "Goods are 'fixtures' when they become so related to particular real estate that an interest in them arises under real estate law." U.C.C. § 9-313(1)(a) (1972).

interest is an "encumbrancer," and the other secured party has com­
plied with section 9-313(4)(c). In this narrow circumstance, sections 9-
312 and 9-313 are in conflict.

In any case, section 9-313(4)(a) is totally irrelevant to disputes
between secured parties over fixtures. That section requires the "en­
cumbrance" to have existed on real estate before affixation. Since
affixation creates "encumbrancehood" for both parties, neither party
can ever satisfy this requirement as against the other.

That leaves us with section 9-313(4) (b), where the first party to
make a fixture filing wins. Use of this section instead of section 9-312
achieves an important objective. It eliminates the possibility of a
circular priority when a real estate mortgagee or some equivalent real
estate claimant is in the picture. As between the two security interests
and the mortgage, the first to make a real estate recording clearly
wins. But if section 9-312 applies between the secured parties inter se,
a secured party who is senior to the mortgagee may easily wind up
junior to a secured party who has never made a fixture filing but who
perfected by ordinary UCC means in time to assure priority under
section 9-312. Thus, the secured party with a fixture filing could beat
a mortgagee, who beats a secured party with no fixture filing, who in
turn beats the secured party with a fixture filing. If we assume that all
fixture interests are encumbrances, we avoid this circular priority,
and we award victory to the party who first recorded an interest in the
real estate records.

Superficially, it may seem that secured parties who may not
know whether the collateral will become fixtures should be able to
rely on the usual UCC rules and should not have the extra burden of
worrying about the real estate records. It is true that, in creating
priority rules, we should be wary of generating added expense for
assuring seniority. This additional burden undoubtedly raises the cost
of secured lending and is therefore undesirable. But we face no danger
of generating such costs here. The duty to police the collateral for
affixation already exists. Secured parties must already make fixture
filings after affixation in order to beat real estate claimants. It is
therefore not unfair to make secured parties undertake the same filing
to beat other secured parties as well. Furthermore, as between a
secured party who has policed the collateral in this regard and has
made the fixture filing, on the one hand, and the secured party who
has neglected this duty which is clearly imposed on him, it seems just
to reward the secured party who followed the course imposed by the
UCC over the party who did not.

To summarize, Professors White and Summers may have been a
little too brief in dealing with priorities between two secured parties
with fixture interests. Under the 1962 Code, we are forced to deal with the difficult riddle of lapsed perfection. It is, therefore, not so clear what those priorities are even if section 9-312 applies. Under the 1972 amendments, the definition of "encumbrance" is so broad that it is hard to see how a security interest in fixtures does not qualify. If it does, the problem is better resolved under section 9-313(4)(b) than section 9-312, since we can avoid a circular priority and thereby reward the secured party who best polices his collateral in exactly the way the UCC demands that it be policed. That is, we will be favoring the secured party who first makes a fixture filing.

V. Use of Sections 9-401(2) and (3) to Cure a Lack of a Fixture Filing

Sections 9-401(2) and (3) are rare instances where the harsh realities of Article 9 perfection are tempered. Ordinarily, a secured party who files in the wrong place is deemed unperfected and will probably lose a priority battle to his competitor even when the competitor was in no way misled. The UCC is largely a "race" statute, and knowledge of the competing claimant is usually irrelevant. In contrast, section 9-401(2) protects the secured party in cases where he filed in the wrong place, provided the competing claimant had knowledge of the contents of the financing statement. In addition, section 9-401(3) protects him in cases where he filed initially in the right place but where the collateral has undergone a "change of use." Both these sections relieve the secured party from problems with the location of filing.

It is a mystery whether and how these sections of the UCC might apply to fixture cases. Section 9-401(2) is not particularly troublesome. It was utterly unhelpful in fixture cases under the 1962 Code,
and, if applied to fixture cases under the 1972 amendments, it raises few unsettling problems. Section 9-401(2) subordinates only those parties with actual knowledge.\textsuperscript{153} If real estate claimants are subordinated under this principle, it will not undermine the guiding principle of both the 1962 and 1972 versions of section 9-313 that real estate title searches should be limited to searches of the traditional real estate records and should not include searches of the UCC files.\textsuperscript{154}

Application of section 9-401(3) is another matter. This section relieves the secured party from having to refile every time the debtor changes the “use” of the collateral.\textsuperscript{155} Change of use may change the location of the proper place to file. Thus, when a consumer appliance is used in a business and therefore becomes equipment, the latter two alternative texts of section 9-401(1) tell us that the proper place to file is the office of the secretary of state, not merely the office in the county where the debtor resides.\textsuperscript{156} Section 9-401(3) is of great value to the secured party here.

An unanswered question is whether affixation of collateral to real estate is a “change of use.” Consumer goods remain consumer goods once they become fixtures, and therefore it is open to argument that affixation alone is not a change of use.\textsuperscript{157} But section 9-401(3) seems to contemplate protection whenever an event happens that changes the proper place to file. Very frequently affixation will change the location of the proper place to file. Linguistically, one cannot be certain

\textsuperscript{153} There is no “shelter” provision in this section. Therefore, a security interest junior in the hands of a party with knowledge becomes senior in the hands of a good faith assignee.

\textsuperscript{154} See Kripke, Fixtures, supra note 1, at 46.

\textsuperscript{155} It should be noted that there are two alternative versions of section 9-401(3). The first protects the secured party from having to refile whenever the debtor changes his residence, place of business, or the location of the collateral. The second protects the secured party from such changes only for four months. Each version, however, protects the secured party if the use to which the collateral is put undergoes change.

\textsuperscript{156} Under the first option of section 9-401(1), every security interest not connected with real estate must be filed with the secretary of state, so that the example in the text would not cause a change in the place to file. Under the second option, the proper place to file would change to the secretary of state’s office. Under the third option, the result is the same, except that if the debtor has but one place of business in the state, a second filing would have to be made in the local county.

\textsuperscript{157} Section 9-109 divides “goods” into “consumer goods,” “inventory,” “equipment” and “farm products.” It could be that change of use only refers to transfers between the categories within section 9-109. It might therefore not include changes between personal property status and real property status.
that affixation is not a change of use within the meaning of section 9-401(3).

Another problem with the application of both sections 9-401(2) and (3) to fixture cases is that each subsection refers to financing statements being "effective." Under section 9-401(2), the financing statement is effective against knowledgeable parties, while, under section 9-401(3), a financing statement remains effective in spite of subsequent changes in the proper place to file.

These sections are written as if the only obstacle to perfection is that a financing statement is filed in the wrong place. In fixture cases, it may well be that once the location error is corrected, a financing statement is still deficient under section 9-402(5) because there is no description of the real estate. Do sections 9-401(2) and (3) also correct formal insufficiencies as well as location errors?

Read literally, the proclamation that financing statements are or continue to be "effective" suggests that all errors are corrected. If so, failure to describe the real estate in the financing statement does not prevent the application of these sections in fixture disputes. But there are two monumental objections to this reading. First, if failure to meet the requirements of section 9-402(5) can be ignored in the interest of making financing statements fully effective, why cannot other omissions in the financing statement be cured as well? If the financing statement is filed in the wrong place, or if a change in use or the debtor's location occurs after filing in the right place, do sections 9-401(2) and (3) paper over the failure of the debtor to sign the financing statement? If it does, why should a secured party who makes an error under section 9-401(2) or who benefits from the fortuity of changed circumstances under section 9-401(3) benefit from forgiveness of section 9-402 errors when secured parties who do not make errors have no such advantage? One possible answer is that, at least under section 9-401(3), the financing statement is to continue effective. Thus, if the financing statement was not originally effective, section 9-401(3) cannot very well continue that which never existed. Thus, section 9-401(3) requires that the debtor sign the financing statement and do the other things necessary to make the financing statement good as to unaffixed collateral. In such a case, the real estate description might be left out and the financing statement could still continue to be effective. Not so when another more fundamental

158 All secured parties benefit from section 9-402(8), which excuses "minor errors which are not seriously misleading." I am assuming that the errors under consideration would be considered major omissions. See In re Keefer, 26 Bankr. 597 (Bankr. D. Idaho 1983) (omission of debtor's address was a major faux pas).
type of defect in the financing statement exists. In that case, an effective financing statement never existed.

This argument works less successfully with section 9-401(2), which speaks of the financing statement being totally effective if the requirements of section 9-401(2) are met. With this section, we cannot so easily rely upon the notion that the financing statement must have been adequate at some time in its life, as we could with section 9-401(3). Instead, we are faced with a choice: section 9-401(2) cures all formal defects in the financing statement, or it cures none. The latter view seems more rational, in which case the failure to describe real estate in the financing statement may render section 9-401(2) unusable in fixture cases.

Even this view raises troubling inconsistencies. For instance, a competing real estate claimant may have all the knowledge required by section 9-401(2), including knowledge of the real estate where affixation occurred. But because the financing statement did not describe what the competing claimant already knew, section 9-401(2) could not be used to subordinate that claimant. This reduces section 9-401(2) to a somewhat fatuous provision as applied in fixture cases.

Whereas the use of section 9-401(2) in fixture cases is obviously not a serious impediment to the legislative intent behind section 9-313, the use of section 9-401(3) would completely devastate the legislative scheme. Therefore, I would propose that section 9-401(3) be barred from use in fixture cases. A principal theme behind section 9-313 is that real estate title searchers should be entitled to rely on the state of the real estate record and should not have to start searching UCC files as well. An exception is made under section 9-313(4)(c), where the

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There is language in section 9-401(2) that superficially supports the view that formal errors are not corrected. That section states that wrongfully filed financing statements are “nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this Article [regardless of knowledge] and is also effective with regard to collateral covered by the financing statement against any person who has knowledge . . . .” U.C.C. § 9-401(2) (1972) (emphasis added). One could read the first clause to require that financing statements must always comply with all other requirements except the place of filing, including the requirements of section 9-402. But the intent of the first clause seems to be somewhat different. The clause in italics is designed to establish that a financing statement filed in the right place for a part of the collateral remains effective to perfect an interest in that part of the collateral. It does not follow inexorably that financing statements which are filed in the wrong place for all the collateral must conform in all ways to section 9-402, although for other reasons, I think that this is the view that should be taken.

Alternatively, it could be argued that “filing” or “financing statement” as used in sections 9-401(2) and (3) refer to a “sufficient financing statement” within the meaning of section 9-402. Because of the policy matters to be discussed in the text, this must be the proper reading of these sections.
ready removability of the collateral puts the title searcher on his

guard. But applicability of section 9-401(3) would make ordinary
UCC filings prior to affixation universally good against real estate title
searchers. Real estate claimants would therefore be forced to under­
take the search of the UCC files in derogation of the legislative intent,
because they could never be sure that a UCC filing would not “con­
tinue effective” against them under section 9-401(3). In essence, the
liberal rule of section 9-313(4)(c) would be made generally applicable
to all kinds of collateral and would swallow up section 9-313(4)(a), in
that preaffixation perfection of any kind would be universally effec­
tive against all prior or subsequent real estate claimants. This is
especially true because section 9-401(3) contains no “good faith” re­
quirement of any kind, as does section 9-401(2). Therefore, a secured
party could rely on a UCC filing before affixation and would never
have an incentive to make a fixture filing, as required by subsections
9-313(4)(a) and (b).180

For this reason, the only acceptable reading of the statutes is that
subsections 9-401(2) and (3) do not correct errors in complying with
section 9-402.161 Furthermore, even if the secured party has correctly
listed the real estate and the other required items, so that there are no
omissions, section 9-401(3) should never be used under any circum­
stances in a fixture case, since its use would obliterate a key objective
of section 9-313—limitation of the real estate title search. A secured
party who has made a UCC filing prior to affixation should be re­
quired to make a fixture filing to gain priority over purchasers, mort­
gages and prior lien creditors, unless the collateral falls within the
“readily removable” category of section 9-313(4)(c).

180 Professor Adams adds a sophisticated statutory argument to support this view. He believes
that section 9-401(3) was available under the 1962 Code to save fixture lenders, a view with
which I take issue, since it would have destroyed the reliability of the real estate records with
regard to fixtures. He goes on to note that the “proper place” to file a financing statement for
goods that, at the time of attachment, are not intended to be fixtures was wherever other
nonfixture filings had to be made. Professor Adams comes to this conclusion from the following
language which appeared in all three alternatives for section 9-401(1) of the 1962 Code: “when
the collateral is goods which at the time the security attaches are or are to become fixtures . . .
then [the filing must be] in the office where a mortgage on the real estate . . . would be filed or
recorded . . . .” In 1972, the italicized words were dropped. This is consistent with the view that
it is never appropriate to file a financing statement on future fixtures in the same place where a
financing statement on nonfixture collateral would be filed, which in turn supports the view that
section 9-401(3) does not relieve the secured party from having to refile a fixture filing after
affixation. See Adams, supra note 1, at 923.

161 Adams, supra note 1, at 917, specifically recognizes that section 9-401(3) does not cure
omissions of information required under section 9-402 of the 1962 Code. If it was true in 1972, it
must have been just as true in 1962.
Incidentally, a secured party whose collateral becomes affixed after the security interest attaches is in for a rude shock if he wishes to correct his filing so that it can become a fixture filing. Such an action will frequently be necessary whenever affixation was not initially contemplated. Section 9-402 generally requires the debtor to sign the financing statement, but numerous exceptions are made where various kinds of corrections are needed. For instance, when the collateral is moved or the debtor changes his location to a new state, when proceeds are generated, or when the financing statement is about to lapse under section 9-403(2) because five years have gone by since the initial filing, the secured party may file without the debtor’s signature. All other amendments to the financing statement must be signed by the debtor. Obviously missing from this list of exceptions to the rule that the debtor must sign is the case where the debtor affixes encumbered goods to his real estate. Here the debtor could refuse to sign any amended financing statement; nothing in the UCC permits the secured party to proceed unilaterally. Nothing short of equitable relief can enable the secured party to refile so that a proper fixture filing is in place.

Conclusion

Notwithstanding the Review Committee’s goal to rid section 9-313 of its confusing aspects, the 1972 amendments have resulted in a set of fixture rules that are quite complex. The question may fairly be asked, “What is wrong with complexity?” It just may be that on a functional level there is nothing wrong with the complexity of section 9-313, especially if one believes that fixture priorities are infrequently litigated and that this entire subject has marginal impact upon our economy. Furthermore, the 1972 version represents a political compromise; one can hardly expect anything but a hopeless jumble when compromise is required. Nevertheless, the law of fixtures deserves to be something more than an asymmetrical morass in an otherwise well integrated statute.

In the interest of classical symmetry and beauty of design, I would therefore propose that prior lien creditors be defeasible by

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183 See id. § 9-402(4).
184 According to Professor Henson, fixture priorities are litigated only in times of declining real estate values, where the sales price is not high enough to satisfy the claims of all the secured parties. See R. Henson, supra note 34, § 8-1, at 292. But see Coogan, supra note 7, at 1187 (fixture priorities are “important”).
ordinary UCC filings in purchase money cases, that any subsequent real estate claimant be defeasible by a prior UCC filing under section 9-313(4)(c) (even where the filing is after affixation), that purchase money status be eliminated from section 9-313(4)(a), and that a grace period against subsequent lien creditors be given to secured parties in purchase money cases. Furthermore, discretionary advances under a junior mortgage should not be permitted to become senior over a perfected security interest. No doubt these suggestions will have little impact on the current trajectory of the American economy, whatever that may be, but they would lend some symmetry to an otherwise inexplicably bizarre set of priorities for security interests in fixtures under the UCC.

165 The reason purchase money security interests are even mentioned in section 9-313(4)(a) is that the drafters apparently wanted to draw a parallel to section 9-312(4). U.C.C. § 9-313(4)(a) comment 4(a) (1972). That is, only purchase money security interests deserve grace periods. See id. § 9-313 (Reasons for 1972 Change). That may be true with regard to grace periods, but it does not follow that only purchase money security interests should defeat prior real estate claimants. Purchase money priority is based on a variation of “first in time is first in right” and on the basis that purchase money collateral increases the debtor’s estate, so that denial of the increase to prior parties is not prejudicial. See supra text accompanying notes 15–23. But these reasons apply to all fixture security interests, regardless of purchase money status. Thus, a fixture interest, where attachment precedes affixation, is first in time, and the addition of encumbered fixtures to the real estate is a windfall to the prior real estate claimants unless superpriority is given to the fixture lender. See supra text accompanying notes 18–20. Therefore, we should eliminate purchase money status from section 9-313(4)(a) in general, so that any security interest can take priority over earlier real estate claimants. If parallelism is valued, perhaps the grace period could be reserved for purchase money security interests, but it should apply as well to purchase money security interests in collateral that qualify under section 9-313(4)(c).

166 See supra note 73.