Death and Subordination under Article 9 of the Uniform Commercial Code: Senior Buyers and Senior Lien Creditors

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DEATH AND SUBORDINATION UNDER ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE: SENIOR BUYERS AND SENIOR LIEN CREDITORS

David Gray Carlson*

INTRODUCTION

The ancient Greeks imagined Hypnos, the God of sleep, to be the brother of Thanatos, the God of death. Superficial similarities between death and sleep may have led to the Greek myth, but we can be confident that the Greeks ultimately understood the difference and therefore generally prevented the myth from intruding upon reality. The drafters of Article 9 of the Uniform Commercial Code (UCC),¹ in contrast, did not. They confounded provisions that kill security interests with provisions that merely put such interests to sleep, i.e., subordinate them pending some future awakening. Although courts generally have not been misled by this confusion, the rationale behind disregarding the plain language of the UCC should be set forth. In addition, the drafters failed to specify whether the enforcement of liens outside of Article 9 should kill off Article 9 security interests—a serious failure that has misled several courts. The purpose of this Article is to identify those situations in which security interests should be considered subordinated to the interests of lien creditors and buyers, and those in which security interests should be considered eliminated altogether.

I. SENIOR BUYERS

A comparison between section 9-301 and section 9-307(1) will make the point with regard to buyers. Section 9-307(1) is that all-important provision governing sales in the ordinary course of business. Such a sale (by anyone but a farmer selling farm products) kills any security interest created by the seller. This can be seen from the drafters’ use of the term “takes free”: “A buyer in ordinary course of business . . . takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer

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¹ Unless otherwise indicated, citations are to the 1978 version of the Uniform Commercial Code (UCC).
knows of its existence." The basic idea is expressed clearly enough. After a sale to a buyer in the ordinary course of business, any security interest in the goods sold ceases to exist. The death penalty is imposed upon security interests that are, for whatever reason, junior to the rights of these buyers. They are dead, and appropriately so.

Section 9-301(1)(c) expresses the subordination idea. This section provides:

\[\text{[A]n unperfected security interest is subordinate to the rights of}\]

\[(c) \text{ in the case of goods, instruments, documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business or is a buyer of farm products in ordinary course of business, to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected.}\]

This provision deals predominantly with buyers who are not protected by the death-dealing section 9-307(1). As against unperfected security interests, the language of section 9-301(1)(c) indicates that the buyer's rights (whatever they may be) are merely senior to the secured party's rights, provided both payment and receipt of possession by the buyer occur at a time when the buyer has the requisite ignorance. Subordination is not death, or at least not obviously so. Most people would assume that a junior security interest is distinguishable from no security interest. Perhaps the security interest lives on. Thus, whereas section 9-307(1) kills perfected security interests, section 9-301(1)(c) may allow unperfected security interests to survive.

The consequences of maintaining that subordination is not death are far from trivial. Take, for example, the case of a buyer out of the ordinary course of business who buys personal property without

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2 U.C.C. § 9-307(1).

3 The reference to "goods, instruments, documents, and chattel paper," id. § 9-307(1)(c), is designed to exclude intangible property, which is covered under section 9-301(1)(d). The separate treatment of intangibles is related to the ignorance requirements imposed upon the buyer. In the case of tangibles, the buyer needs to be ignorant of the unperfected security interest both at the time he gives value and at the time he takes delivery. In the case of intangibles, there is nothing to deliver; thus the buyer need only be ignorant at the time he gives value.

Section 9-301(1)(c) also excludes secured parties, for whom separate priority rules are set forth in section 9-312. Without this exclusion, it might be thought that secured parties are purchasers and therefore governed by section 9-301(1)(c). See id. § 1-201(32), (33).

Buyers in the ordinary course of business who take farm goods are included because they are not eligible for the more sweeping treatment of section 9-307(1). Section 9-301(1)(c) gives at least partial protection (against unperfected security interests only) to such buyers in the ordinary course.
knowledge of an unperfected security interest. Such a buyer is senior under section 9-301(1)(c), but what does this seniority mean? In recognition of a buyer's right to use and enjoyment of what he buys, courts permit the senior buyer to fend off any attempt by the secured party to repossess after the seller-debtor has defaulted. The right to use and enjoyment implies the right to depreciate the property, or to destroy it altogether. Presumably, the secured party, since he is junior to the buyer's rights, has no standing to object. Finally, the buyer has the right to encumber his property or sell it to another purchaser. It is here that the sleeping security interest might come to life. Suppose the second buyer has acquired knowledge of the unperfected security interest, or suppose that after the sale the secured party perfected his interest with a filing. If the security interest is not dead after the first sale, the second buyer would be ineligible for the protection of section 9-301(1)(c) and accordingly would be junior to the security interest. If this were the rule, the first buyer would find that he holds encumbered property worth a good deal less in the marketplace than comparable unencumbered property.

The possibility that the secured interest might survive against a senior buyer's subsequent transferees is a serious matter for merchants who deal with trade-ins. Section 9-307(1) clearly kills security interests created by the selling merchant himself. It does not, however, kill security interests created by customers who trade in encumbered goods to the selling merchant. The buying merchant therefore must rely upon some other provision to establish his immunity from the unperfected secured party. Thus, in Victory National Bank v. Stewart, the buying used car dealer successfully established his seniority over the unperfected secured party by means of section 9-301(1)(c).
What remains unsettled after Victory National Bank is the title that the used car dealer will be able to convey to a later customer.®

Cases proving or disproving the car dealer’s ability to convey good title simply do not exist.® The cases establishing that the junior secured party may not replevy goods or recover in conversion from the senior buyer prove only that the buyer’s “senior rights” include the right to use and enjoyment of the collateral free of the secured party’s rights under part 5 of Article 9. This principle is not the same as the death of the security interest altogether. Although courts occasionally consider the rights of buyers several times removed from the first buyer, they fail to distinguish between remote buyers who independently qualify for protection from unperfected security interests under section 9-301(1)(c) and remote buyers who do not qualify under that section but nevertheless prevail because the security interest died.

Supp. 1983), have provisions that govern the effect of unperfected security interests. Thus, in New York, “a security interest in a vehicle of a type for which a certificate of title is required is not valid against creditors of the owner or subsequent transferees or lienholders of the vehicle without knowledge of the security interest unless perfected as provided in this section.” Id. § 2118(a). This sounds like language of death (“not valid”) and therefore seems more conducive than section 9-301(1)(c) to an easy holding that the unperfected security interest was killed when a used car dealer purchased without knowledge. Nevertheless, the question remains as to what happens when the dealer sells to a customer with knowledge, or when the junior secured party attempts to force the issuance of a new certificate that reflects his lien. As to such parties, the uniform legislation merely hints at death, failing to state succinctly that the security interest is nonexistent when the used car dealer sells to a second buyer with knowledge of the car’s history.

In other states, legislation pertaining to certificates of title does not attempt to govern the effectiveness of unperfected security interests. See 1 G. Gilmore, Security Interests in Personal Property § 20.6, at 568 (1965). Presumably, such states would rely upon section 9-301(1)(c) to supply the rule, again raising the distinction between death and subordination.

Still other states have no specific certificate of title acts, at least as pertains to highway vehicles. This is the case in Kansas, the state where Victory Natl Bank was decided. See Kan. Stat. Ann. § 8-135 (1982). Thus, the UCC controls, and the death versus subordination issue must be confronted.

The seller’s power to convey title is addressed in section 2-403(1), which states: “A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased.” Any attempt to create a shelter rule out of this section would be misguided since the determination of whether the seller can convey good title directly depends upon the meaning of section 9-301.

More important, section 2-402(3)(a) provides: “Nothing in this Article shall be deemed to impair the rights of creditors of the seller . . . under . . . Article 9.” Hence, if section 9-301 preserves some rights in a junior secured party, nothing in Article 2 can be deemed to destroy those rights.

Some courts have stated casually that senior buyers “take free” of unperfected security interests under section 9-301(1)(c). E.g., In re Miguel, 30 Bankr. 896, 898 (Bankr. E.D. Cal. 1983). However, these courts have not put this proposition to the test of multiple buyers. E.g., id.

Part 5 of Article 9, U.C.C. §§ 9-501 to -507, deals with the secured party’s right of repossession.
when the first buyer was protected by section 9-301(1)(c). It is therefore impossible to ascertain the true meaning of these decisions. Commentators likewise fail to note the distinction between subordination and death, and even the authors of the official comments of the UCC assume that death and subordination are indistinguishable.


For a case full of ambiguities on the meaning of section 9-301(1)(c), see Fas-Pac, Inc. v. Fillingame, 123 Ga. App. 203, 180 S.E.2d 243 (1971). There, a judicial lien creditor (Inman) was also the buyer at the sheriff's sale. In both capacities, Inman was without knowledge of an unperfected security interest in the collateral. Later, Inman sold the collateral to a third party whose extent of knowledge was not disclosed by the court. The unperfected secured party then sought to enforce her security interest against the third party. Enforcement was denied for reasons that are unclear. The opinion indicates that the secured party was unsuccessful because Inman had no knowledge of the security interest at the time he became a lien creditor (which established seniority under the 1962 version of section 9-301(1)(b)). Id. at 203, 180 S.E.2d at 244. However, the court explicitly stated: “The rights of the claimant are derived from Inman, as the lien creditor and purchaser at the judicial sale, and are therefore superior . . . .” Id.

The opinion can be read in three distinct ways. First, the security interest may have been foreclosed by the sheriff's sale, pursuant to nonuniform lien law. But see U.C.C. § 9-201 (a security interest survives unless a UCC provision says otherwise); infra text accompanying notes 111-35 (discussing whether nonuniform lien law forecloses security interests). Second, the buyer at the sheriff's sale may have “taken free” of the security interest, so that by the time the third party bought the property, the security interest had already been extinguished. Third, it is possible that the third party was also a buyer without knowledge of the unperfected security interest. As such, the third party would be entitled to the protection of section 9-301(1)(c), even under the narrow view of that provision described in the text. One might argue that this last interpretation is untenable because the court indicates that the third party's rights were “derived” from Inman as a buyer. However, the opinion fails to address Inman’s knowledge at the time of the initial purchase as well as the third party's knowledge at the time of the later purchase. Thus, without more information, it is difficult to determine what the court meant by invoking the concept of derivation.

13 Among the works that do not distinguish between death and subordination in Article 9 are R. Henson, Handbook on Secured Transactions Under the Uniform Commercial Code § 8-3, at 302 (2d ed. 1979); J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code § 25-2, at 902 (1972) (section 9-301(1) subordinates, rather than extinguishes, a security interest); Coogan, The New UCC Article 9, 86 Harv. L. Rev. 477, 512 (1973); Kripke, Fixtures Under the Uniform Commercial Code, 64 Colum. L. Rev. 44, 57 (1964) (“the consequences of failure to perfect under Section 9-301 are . . . invalidity against a purchaser from . . . the debtor”); Nickles, supra note 5, at 521.

Professor Kripke criticizes section 9-301(1)(c), N.Y. U.C.C. § 9-301 practice commentary at 428 (McKinney 1964) (“it is hard to conceive of more confusing draftsmanship”), but fails to note that the section does not terminate the security interest. In the end he concludes that “[i]t all adds up to the right answer.” Id.

14 Section 9-301 states when transferees take free of unperfected security interests.

Sections 9-307 on goods, 9-308 on chattel paper and instruments and 9-309 on negotiable instruments, negotiable documents and securities state when purchasers of such collateral take free of a security interest even though perfected and even though the disposition was not authorized.
Only one court has come even close to holding that an unperfected security interest survives a sale to a senior buyer. In *United Rental Equipment Co. v. Potts & Callahan Contracting Co.*, an unperfected secured party tried to assert its security interest against a senior buyer. As a result of its assertion, a second buyer was scared away. The first buyer then sued the unperfected secured party for malicious interference with contractual relations. The court, noting that the allegation required proof of bad faith, refused to find any grounds for the suit. The court's refusal comports with the notion that subordination, rather than death, is a reasonable reading of the plain language of section 9-301. The court, unlike the first buyer, obviously thought that the security interest was not so clearly dead and buried.

Although language of subordination may be ambiguous in the context of senior buyers, it is well suited and thoroughly appropriate for priorities between lienors. A lien is merely the right to apply the property toward the payment of a money debt. The usual method of enforcement is sale of the collateral. The lien creditor gets first priority to the cash proceeds of the sale (after the selling expenses of the enforcing agent, of course) and the debtor gets the surplus. Subordinated lienors, if they exist, come before the debtor in their right to receive cash proceeds. Thus, junior liens clearly are not eliminated altogether by the senior lien. For this reason, language of subordination, as opposed to language of death, is important to lien systems. Unfortunately, Article 9 contains many provisions where such language goes beyond lien priorities and describes the rights of buyers as well.

Section 9-301 is the most significant section in which this overreaching occurs. Section 9-301 started its life as a catalogue of all the

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U.C.C. § 9-306 comment 3. This remark provides good evidence that the drafters of Article 9 did not contemplate any difference between death and subordination, at least with regard to senior buyers.


16 At one point the court does refer to the senior buyer's "good title." Id. at 559, 191 A.2d at 574. However, the court emphasizes the junior secured party's lack of malice and right to pursue its interest as the reasons for the tort suit's failure.

17 See U.C.C. § 9-504(1). Occasionally, lien statutes contemplate strict foreclosure, whereby the lienor simply retains the collateral in satisfaction of the underlying debt. E.g., id. § 9-505(2).

18 See id. § 9-504(1)(a)-(b).

19 See id. § 9-504(1)(c).

20 For the purposes of this Article, the term "lienor" will be used to describe generally any party with a right to have the property sold in enforcing a debt. The term "lien creditor" will follow the Article 9 definition of judicial lien creditor only. See id. § 9-301(3). The term "secured party" will refer, of course, to a lienor with a consensual Article 9 interest. See id. § 9-105(m).
property interests that could be senior to unperfected security interests. Because the drafters saw no difference between death and subordination, they found it grammatically convenient to include judicial lien creditors, secured parties and buyers as among those to whom an unperfected secured party might be "subordinate." A better approach would have been to separate buyers and lienors, affording each distinct treatment.

The same drafting problem can be found elsewhere in the UCC; section 9-308, pertaining to chattel paper, and section 9-312, as it pertains to the sale of accounts, are noteworthy examples. Largely to reflect the realities of nonrecourse financing of receivables, the drafters chose to treat buyers of accounts and chattel paper as secured parties under Article 9, rather than buyers under Article 2 or the common law of assignments. Nevertheless, the distinction between a straight sale and a secured transaction should have been upheld here as well. A buyer of chattel paper or accounts essentially is speculating on collecting more than he pays for the account. Since he expects to collect each and every penny the account debtor owes to the debtor, there is nothing left for any other secured party who claims to be junior to the buyer of the chattel paper. Therefore, language of death would have been appropriate. Language of subordination would make sense only if there were a chance of a surplus, in which case the respective rights of debtors and junior lienors would be of importance.

A variation of this drafting problem exists in section 9-313, which pertains to fixtures. This section indiscriminately mixes the language of death and subordination. Section 9-313(2) provides that "no security interest exists" in "ordinary building materials incorporated into an improvement on land." This language clearly kills security interests on

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21 See id. § 9-301 comment 1 ("This section lists the classes of persons who take priority over an unperfected security interest."). The initial purpose of section 9-301 has been abrogated to some degree by the 1972 addition of section 9-301(4) (future advances), which deals only with the rights of lien creditors against perfected security interests. See Carlson & Shupack, Judicial Lien Priorities Under Article 9 of the Uniform Commercial Code (pt. 1), 5 Cardozo L. Rev. 287, 317-19 (1984).


23 Despite this drafting ambiguity, it does not appear as though any great harm is done in this case. Since buyers of accounts and chattel paper are Article 9 secured parties, remote buyers are effectively sheltered from a reversal of priorities by section 9-302(2)—an advantage not supplied explicitly to other buyers.

Buyers of accounts and chattel paper, because they are considered secured parties, are treated differently from buyers of general intangibles, who are not secured parties. Thus, buyers of intangibles can establish their senior status as soon as they give value. Id. § 9-301(1)(d). Buyers of accounts, however, cannot become senior until they file. Id. § 9-312(5).
behalf of real estate buyers. But in using the language of death, the drafters went too far. It does not follow that death is appropriate as against senior lienors, such as mortgagees. In a mortgage foreclosure sale, a secured party holding an interest in lumber should have a better claim to a surplus than the debtor. There can be little doubt that section 9-313(2) was drafted with section 9-313(8) in mind. Section 9-313(8) gives a secured party the power to remove fixtures (if he compensates the landowner) whenever the security interest is senior. The drafters did not want secured parties to recover the bricks and beams out of buildings. A middle course could have been adopted, however. Secured parties claiming bricks and beams could have been given seniority in a mortgage foreclosure sale but no power to remove.

The remaining fixture provisions also do not draw the proper distinction between death and subordination. In section 9-313(4), purchasers are lumped with mortgagees and other lienors. As against these purchasers, security interests are "subordinated," rather than killed. Section 9-314, pertaining to accession of collateral into unencumbered goods, makes the same error.

Alongside sections that treat purchasers and lien creditors as if there were no differences between them, there are other sections that successfully segregate lien creditors and purchasers, without making the basic error of subordinating on behalf of the former or killing on behalf of the latter. In section 9-307, for example, only the rights of buyers are considered. Here, death is everywhere. Each subsection specifies that the buyers "take free" of the security interests, whether perfected or not. 24 Death also looms in section 9-504(4), which governs enforcement sales by secured parties. Here, use of the language "take free" was most judicious. Without it, a foreclosure sale would attract no buyers, and the security interest would be of little value indeed. 25 Language of subordination also is used aptly in sections 9-310, -312 and -315, each dealing with priorities among lienors of various sorts. Finally, subordination is the terminology of section 9-309, which preserves the rights of holders in due course and bona fide purchasers of instruments under Articles 3, 7 and 8. These parties are

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24 Professor Gilmore criticized section 9-313(2) roughly along the same lines. He thought that a requirement of compensation for harm done to the land is enough to dissuade secured parties from disassembling buildings. 2 G. Gilmore, supra note 8, § 30.3, at 811-14. Implicit in this view is the notion that the secured party would be accorded some sort of priority in the mortgage foreclosure sale.

25 See infra text accompanying notes 65-88.
frequently buyers of instruments (although sometimes they are pledgees), but the language of subordination is not inappropriate.

Even though the drafters used the language of death and subordination indiscriminately, the question may be posed whether junior liens should survive the appearance of a senior buyer. One possible justification is the distinction between sales in and out of the ordinary course of business. Section 9-307(1) deals with merchants and their customers, but section 9-301(1)(c) and some of the other provisions where buyers do not necessarily take free of security interests deal predominantly with sales outside of the ordinary course of business. It is conceivable that death should be the rule for ordinary course transactions, to facilitate business, and subordination should be the rule for other circumstances where the free flow of buying and selling is

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26 Section 9-309 is not a paradigm of draftsmanship, although its defects are unrelated to the distinction between death and subordination. See Clark, Abstract Rights versus Paper Rights under Article 9 of the Uniform Commercial Code, 84 Yale L.J. 445, 453 (1975).

In traversing the complicated terrain of section 9-309, it is important to distinguish between a security interest claimed in the instrument itself and a security interest in connected goods, e.g., where a warehouse receipt covers encumbered goods. In the first case, section 9-309 asserts that the rules pertaining to holders in due course prevail over the rules pertaining to the pledgee's rights. U.C.C. § 9-309 ("[n]othing in this Article limits the rights of a holder in due course"). If the transferee is a holder in due course, he "takes free" of the pledgee's claims. See id. §§ 3-305(1), 8-301(1). Although seemingly the language of death, sections 3-305(1) and 8-301(1) actually represent a type of subordination since the rights of the pledgee can still come alive against at least some future holders. See id. § 3-201(1) ("a transferee who has himself been a party to any fraud or illegality affecting the instrument or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course"); id. § 8-302(4) (same). This hybrid death-subordination concept, however, appears to serve the needs of commerce adequately. Section 7-502(1), on the other hand, simply grants title to a holder who takes a document by due negotiation, thereby leaving no surviving rights. As a result, the language of subordination in section 9-309 is not inappropriate because the language of death (or its close equivalent) in Articles 3, 7 and 8 will govern according to the particular context involved.

Where the security interest is not in the instrument but in the goods covered by the instrument, the language of subordination is also not inappropriate. In chattel paper cases, for example, the holder in due course of a negotiable instrument may have bought the instrument outright, but is nevertheless a mere secured party with regard to the collateral backing up the instrument. Since he is never a buyer of the collateral per se, the language of subordination is deftly used. In Article 7 cases, however, section 9-309 seems subject to some ambiguity. This is because buyers of warehouse receipts are said to have their rights under Article 7, but are also said in section 9-309 to "take priority over . . . earlier security interest[s]." This apparent ambiguity and the unhelpful language of subordination are rectified by section 7-503(1), which adequately kills security interests. See Clark, supra, at 458–61. Other details of the interplay between Article 7 and Article 9 are expertly developed in Dolan, Good Faith Purchase and Warehouse Receipts: Thoughts on the Interplay of Articles 2, 7 and 9 of the UCC, 30 Hastings L.J. 1 (1978).
unimportant. Such a distinction is preserved elsewhere in the UCC. For example, entrustment of goods to merchants empowers them to kill the property rights of the entruster, and full bona fide purchaser protection under Article 7 is contemplated only within the ordinary course of business. Under this view, the language of subordination with regard to senior buyers out of the ordinary course of business can be viewed as a sort of compromise. The buyer retains the right to use the goods he has purchased for himself, but must give way to the junior secured party in case the buyer tries to sell them to a second buyer, provided the secured party has advertised or perfected his security interest by the time of the second sale.30

Such a distinction, however, ignores the role fraudulent conveyance law plays in striking down secret liens. Section 2-403(1), for instance, provides that any seller with voidable title has the power to convey good title to a bona fide purchaser. This provision applies to merchants and nonmerchants alike. To be sure, section 2-403 does not contemplate the destruction of unperfected security interests. In fact, section 2-402(3)(a) specifically prevents application of section 2-403(1) against secured parties. Nevertheless, it is not atypical to consider the debtor to be the trustee of the secured party, with power to convey good title to bona fide purchasers. The ancient hostility toward secret liens has always aided all types of buyers, not out of concern that the stream of commerce be preserved, but out of fairness to the buyer with no notice of the lien. This history was never based on any distinction between transactions in and out of the ordinary course of business. Even within Article 9, there is considerable evidence that the drafters never intended to distinguish between buyers who were in

27 See Gilmore, On Statutory Obsolescence, 39 U. Col. L. Rev. 461, 467 (1967) ("due course holding or good faith purchase becomes a matter of importance, with respect to any type of property, only when that property is regularly bought and sold in a market and may be expected to pass from hand to hand in a series of transfers").

28 See Skilton, Buyer in Ordinary Course of Business Under Article 9 of the Uniform Commercial Code (and Related Matters), 1974 Wis. L. Rev. 1, 22 (discussing the distinction in rights between those who buy "in normal trading channels" and those who buy from "one shot" sellers); Warren, Cutting Off Claims of Ownership Under the Uniform Commercial Code, 30 U. Chi. L. Rev. 469, 479 (1963) ("With regard to goods, the Code . . . restricts the protection of good faith purchasers to essentially commercial transactions.").

29 U.C.C. § 7-501(4) (the phrase used in this subsection is "regular course of business"); see Dolan, supra note 26, at 4.

30 See supra note 6.

31 See Unif. Trust Receipts Act § 9(1)(a) (act withdrawn 1951, superseded by UCC). Under section 9(1)(a), the "trustee" had the power to convey good title to the collateral to a bona fide purchaser for value.

32 See infra text accompanying notes 45-53.
or out of the ordinary course of business.\footnote{33} For example, when an unperfected security interest is created by someone other than the seller, buyers in the ordinary course are unable to use section 9-307(1) but presumably can resort to section 9-301(1)(c).\footnote{34} Thus, section 9-301(1)(c) is not exclusively the province of unimportant sales out of the ordinary course. Any appearance that these sections can be distinguished on the basis of ordinary and unusual transactions is highly deceptive.

What, then, should courts do about this drafting ambiguity when a junior secured party tries to assert that his security interest, though subordinate to a senior buyer, still lives? The best rule is that senior purchases should extinguish security interests, while senior liens should merely subordinate security interests in the usual sense. One difficulty with such a declaration, however, is that the word "subordination" will have drastically different meanings from sentence to sentence. In rational legislation, words should have only one meaning, to the extent possible.\footnote{35}

A second possibility is for courts to hold that transferees of the first buyer are "sheltered" when they buy from him, even though the second transferee would not otherwise qualify for protection from the security interest under section 9-301(1)(c). Shelter is distinguishable from death to the extent that any requirements at all, such as taking for value, are imposed upon the transferee.\footnote{36} Thus, a shelter concept would preserve the senior buyer's right to alienate for value, while preserving the possibility that the junior security interest might live again.

There might, however, be an objection to introducing the less protective shelter concept to buyers out of the ordinary course of

\footnote{33} The true demarcation between these sections, however, is that section 9-301 lists interests that defeat unperfected security interests, while section 9-307 lists those interests that defeat perfected interests.

\footnote{34} To be precise about the statutory language, section 9-301(1)(c) does not extend to buyers in the ordinary course of business, except for buyers of farm products. Meanwhile, section 9-307(1) covers security interests created by the seller. Therefore, no section in the UCC governs a buyer in the ordinary course of business who buys goods encumbered by unperfected security interests created by someone other than the seller. Nevertheless, one can safely assume that courts would extend section 9-301(1)(c) to cover this important group of buyers in the ordinary course of business.

\footnote{35} On the general failure of the UCC to achieve definitional consistency, see Mellinkoff, The Language of the Uniform Commercial Code, 77 Yale L.J. 185 (1967).

\footnote{36} Thus, section 3-201(1) is a true shelter provision, since it is possible for third party claims to come back to life against at least some transferees. Section 7-504(1), on the other hand, does not seem to allow for this possibility, making it closer to a death provision than a shelter provision. See supra note 26.
business. The objection is that the drafters have provided shelter elsewhere,\textsuperscript{37} so that their failure to do so in section 9-301(1)(c) should be taken as significant. Thus, senior secured parties are specifically given shelter; senior buyers are not. That the omission is significant is bolstered by the history of the fixtures priority provision—section 9-313. In the 1962 version, it was feared that senior mortgagees could not convey their priority to assignees who had actual or constructive knowledge of the junior secured interests. A specific shelter provision in section 9-313(4) was therefore added in the 1972 amendments.\textsuperscript{38} That the drafters added a shelter provision specifically to quell discontent may suggest that their failure to do so with regard to buyers out of the ordinary course of business is all the more significant. These arguments, of course, are merely attempts to find the legislative intent and could be countered by contrary evidence, such as a showing that denial of shelter to buyers under section 9-301(1)(c) violates the fundamental philosophy of the UCC priority system.\textsuperscript{39}

In this author's opinion, there is considerable theoretical justification for the view that subordination in sections 9-301(1)(c) and (d) does imply death even if subordination in section 9-301(1)(b) does not. Justification also exists for the proposition that shelter provisions should be read generously into the UCC whenever necessary to protect the marketability of a senior party's priority. Stated briefly, the justification is that the word "subordination" has always meant invalidation. But invalidation against lienors is only partial (to the extent necessary to satisfy the senior indebtedness) whereas against buyers it must be total.

This can be better seen by briefly examining the origins of lien priorities, which stem from two principles: (1) the logical concept that an owner can transfer to another only the rights he has in property and (2) fraudulent conveyance law.\textsuperscript{40}

\textsuperscript{37} See U.C.C. § 9-302(2).
\textsuperscript{38} The words that achieve shelter protection for senior buyers of real estate are as follows: "[T]he security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner . . . ." Id. § 9-313(4)(b); see Carlson, Fixture Priorities, 4 Cardozo L. Rev. 381, 403-04 (1983).
\textsuperscript{39} Comment 1 to section 1-102 admonishes:

\begin{quote}
The Act should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, [and] also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.\end{quote}
\textsuperscript{40} On the relationship between fraudulent conveyance law and priorities of chattel security interests, see Baird & Jackson, Possession and Ownership: An Examination of the Scope of Article 9, 35 Stan. L. Rev. 175, 180-81 (1983).
The first principle is what Professors Baird and Jackson have called the "derivation principle"—the familiar concept that the debtor can only convey what he has. In a case where the debtor conveys a first lien on property (assuming the lien was made public and hence is not fraudulent), the second buyer or lienor is subject to the first lienor's rights in all respects. Only after the first lienor satisfies his claim from the cash proceeds of a foreclosure sale can the second lienor expect to satisfy his claim. In essence, the debtor transfers no more than his hypothetical right to a surplus (if any) to the second party. For our purposes, this branch of priority law is not so much based on the concept that the second lien or other interest is terminated, but upon the idea that, as to the part of the property already transferred to the first lienor, the second interest never came into being.

The second principle, fraudulent conveyance law, contributes the notion that hypothecations, in the absence of public notice or recordation, are frauds upon subsequent creditors and are "void" against them. Early fraudulent conveyance statutes are phrased in terms of death, not subordination. From the earliest times, hypothecations (absent a recording system or some form of notoriety) have been considered fraudulent against creditors, and these creditors could establish their liens against the property conveyed to the secured lenders as if the conveyance was "void." Classical fraudulent conveyance law dealt almost entirely with the rights of creditors, but in related areas the rights of buyers were dealt with as well. For example, sales law has always covered the double sale of goods where the

42 See U.C.C. § 2-403(1).
43 Of course, where the second party is a buyer, the debtor also transfers his right of possession pending default.
44 See Carlson & Shupack, supra note 21, at 291-92.
45 The early English statute was most effusive on this score. Fraudulent conveyances were to be "clearly and utterly void, frustrate and of none Effect; any Pretence, Colour, feigned Consideration, expressing of Use, or any other Matter or Thing to the contrary notwithstanding." Statute of Elizabeth, 13 Eliz., ch. 5, § 11 (1570).
46 The modern successor to this statute is to the same effect. Under section 9 of the Uniform Fraudulent Conveyance Act (UFCA), creditors can have fraudulent conveyances "annulled to the extent necessary," or may "disregard the conveyance" and cause the sheriff to levy the conveyed property. 7A U.L.A. 304 (1978).
47 This was the fraud involved in Twyne's Case, 3 Co. Rep. 80b, 76 Eng. Rep. 809 (Star Chamber 1601). Rules punishing secret hypothecations have been a part of bankruptcy legislation since 1623. See 1 G. Glenn, Fraudulent Conveyances and Preferences § 342 (rev. ed. 1940) (citing the version of this rule found in the English Bankruptcy Act, 1623, 6 Jac. 1, ch. 19); see also Hanna, The Extension of Public Recordation, 31 Colum. L. Rev. 617, 619-23 (1931) (discussing the history and purpose of recording systems in England and the United States).
first buyer leaves his purchase in the possession of the seller. When the seller sold again, the second buyer took rights to the goods as if the first buyer had authorized the second sale. Under this rule, the second sale was allowed to take effect as if the first sale never existed. The first buyer was relegated to a personal claim against the double-dealing seller. Thus, the system contemplated the death of the first buyer's right to the property per se.

Some time after this law developed, legislatures began creating recording systems for chattel mortgages, conditional sales and other security devices. Once recorded, the hypothecation lost its fraudulent flavor. A typical formulation of the effect of filing (and failing to file) was as follows:

Every mortgage or conveyance intended to operate as a mortgage of goods and chattels, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith and for a fair consideration, unless the mortgage . . . is filed . . . within ten days after the making thereof.

Although this statute has complexities not relevant here, its intimations of death are unmistakable. The security interest under this statute is simply void.
Voidness under these antihypothecation statutes had different implications for subsequent buyers and subsequent lienors. A lienor only looked to the hypothecated property to satisfy a fixed debt. A surplus was always possible, and the secured party’s right to the surplus was obviously superior to that of the debtor. The fraudulent conveyance to the secured party was void, but only to the extent that the fraudulent conveyance interfered with the senior rights of the subsequent lienor. The punishment of voidness was made to fit the crime. This idea was later summarized by the terms “priority,” “seniority” and “subordination.” Hence, the word “subordination” is merely shorthand for death in the context of liens.

Under these chattel mortgage statutes, buyers’ rights required total voidness. Although a search of the cases turns up nothing to prove this, it is safe to assume that the use of the word “void” would undoubtedly have been taken literally. It is inconceivable that the courts of an earlier era, so hostile to secret liens, would have contrived a means to preserve the unperfected security interest against the buyer’s rights when the statute proclaimed the secret lien to be void.

It was only in the UCC that legislators changed from the language of death to the language of subordination. Whereas the early lien statutes usually dealt with subsequent buyers and lienors together (referring to them both as “purchasers,” or purchasers and creditors, against whom the unrecorded lien was “void”), the drafters of the UCC instead drafted separate priority rules, some applying only to buyers and some applying only to lienors. Instead of using the old language of invalidity, however, the drafters used a shorthand term—“subordination”—which seemed to describe the concept of partial invalidity of an unrecorded lien to a subsequent recorded lien. But the term, as applied to buyer priorities, is especially ambiguous, implying that somehow the security interest lives on, even after a buyer has purchased the collateral. This ambiguity is not present, of course, where the drafters used the words “takes free,” as in section 9-307.

Thus, it can be seen that the language of subordination historically stems from the language of death. Priority rules were based, in
fact, on the complete and total invalidity of secret transfers, but an invalidity that extended only so far as was necessary to cure the fraud. In the case of buyers, the proper remedy was loss of the transfer altogether. Hence, when modern courts interpret such terms as "subordinate" or "takes priority over" in relation to the rights of senior buyers, they cannot merely follow the plain meaning of the words, but they can, without truly doing violence to those words, terminate the junior security interest altogether.

The idea that subordination implies death also means that senior parties should be able to convey their rights without the assignee being demoted in priority for failure to qualify as a bona fide purchaser. This might be useful for senior lienors who cannot claim to have killed off the junior security interest altogether. If it is true that the junior security interest is void as to that part of the collateral transferred to the senior lienor, the senior lienor can convey clean title to his assignee. As to that senior lien amount, there is no danger that the security interest could attach in any way. Thus, the senior lienor may assign his interest either gratuitously or to a bad faith purchaser for value, with the interest retaining its senior status.

The converse proposition, however, does not necessarily follow. It should be possible for a junior party to convey to an assignee, who might then be senior to the formerly superior security interest. This is because the security interest of necessity must be unperfected or, as in the case of fixtures or chattel paper, insufficiently perfected. As such, the security interest is fraudulent against the unwary assignee and should be subordinated or killed, as the case may be. For example, a buyer or lienor who otherwise qualifies for seniority is junior if he has knowledge of the contents of a misfiled financing statement of the unperfected secured party. When a junior buyer or lienor who is subordinated because of knowledge assigns to a third party, the uninformed third party is entitled to the same protection from secret liens to which the assignor was entitled (but for his knowledge). Stated differently, the assignor himself stands in the debtor's shoes, conveying all that the debtor had. Since the debtor had the power to convey free of prior unrecorded security interests, the assignor should have a similar power.

54 Courts occasionally have ruled that a second transferee steps into the shoes of the first transferee for all purposes, so that the knowledge of the first is imputed to the second. See, e.g., Henry Elias Brewing Co. v. Boeger, 74 Misc. 547, 132 N.Y.S. 286 (Sup. Ct. 1911).
55 U.C.C. § 9-401(2).
57 This issue can also be analyzed by determining who should suffer the loss when a junior lienor (subordinated by knowledge to an unperfected security interest) conveys to an ignorant
Thus, an assignment should be able to change a junior interest into a senior interest, but, as noted above, it should not be able to change a senior interest into a junior one. Assignments of rights should work only in favor of the assignee’s priority against unperfected security interests.

II. SENIOR LIEN CREDITORS

Section 9-201 is a bold piece of work. That section provides:

Except as otherwise provided by this Act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors.

The thrust of this provision is that a security interest lives on perpetually unless a UCC provision says otherwise. The provision shows that the drafters confidently thought they could list within Article 9 every reason why a security interest should die. That they failed to anticipate each and every circumstance is patent. For example, where in the UCC does it state that security interests are void if they are fraudulent conveyances? Article 2 incorporates fraudulent convey-
ance law by reference, but Article 9 does not. One might argue that section 1-103 fills this omission. That section provides:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including . . . fraud . . . or other validating or invalidating cause shall supplement [the UCC's] provisions.

The trouble with section 1-103 is that if rules outside the UCC are available by this means to destroy security interests, section 9-201 has no meaning at all. To the contrary, it seems as if section 9-201 "displaces" such non-UCC rules, within the meaning of section 1-103, making section 1-103 useless to solve the fraudulent conveyance problem.

Nevertheless, few would assert that section 9-201 displaces fraudulent conveyance law. Instead, it is obvious that section 9-201 is generally forgotten whenever justice requires. Yet, courts and com-

vindicated without annulment of the security interest, under section 9(1)(a) of the UFCA, annulment (or more precisely subordination) is in fact "necessary to satisfy [the lien creditor's] claim." See supra note 45.

60 U.C.C. § 2-402(3) provides:

Nothing in this Article shall be deemed to impair the rights of creditors of the seller . . .

(b) where . . . delivery is made . . . under circumstances which under any rule of law of the state where the goods are situated would apart from this Article constitute the transaction a fraudulent transfer or voidable preference.

Section 2-402(3)(a) makes clear that this section is not to be bootstrapped into Article 9. See also id. § 2-403(4) ("rights of other purchasers of goods and of lien creditors are governed" by Articles 9, 6 and 7).

61 For an excellent essay on the meaning of section 1-103, see Hillman, Construction of the Uniform Commercial Code: UCC Section 1-103 and "Code" Methodology, 18 B.C. Indus. & Com. L. Rev. 655 (1976). Professor Hillman's basic theme is that section 1-103 should not be an excuse to use the old common law to override inconsistent UCC policies explicitly or implicitly set forth in statutory language. Unfortunately, he does not address the extent to which section 9-201 eliminates the utility of section 1-103. Nevertheless, he recognizes that statutory language in the UCC may imperfectly express the true intent of the drafters and that it may be necessary for courts to assert old common law rules over express UCC language. This should occur, writes Professor Hillman, "if, but only if, the logic of the common law is clearly consistent with purposes and policies of the Code, while the technical language of an express section is clearly inconsistent." Id. at 686. What will be said about lien creditors falls within Professor Hillman's methodology.

62 For example, Professor Kripke notes: "It must not be forgotten that . . . principles of state law may in some situations be involved, such as . . . the law of fraudulent conveyance . . . and . . . general equitable principles . . . ." N.Y. U.C.C. § 9-301 practice commentary at 429-30 (McKinney 1964). Professors Baird and Jackson agree, stating that "despite 9-201's bold assertion that only other provisions of the [UCC] override it, obviously other statutory law . . . must be considered." D. Baird & T. Jackson, supra note 41, at 367-68. Instead, according to these authors, section 9-201 merely establishes a presumption that may be rebutted by common law rules. Id. at 368. Finally, Professor Gilmore comments: "If the Code had described itself as
mentators alike have made a fair amount of fuss over section 9-201. For instance, the Court of Appeals for the Second Circuit, quoting White and Summers, has said: "This section has been called the 'golden rule of Article Nine' . . . and is fundamental to the treatment of security interests under the Code." Because section 9-201 is taken seriously from time to time, it is necessary to discuss a difficulty that threatens the priorities accorded by section 9-301 to senior lien creditors.

Priorities between judicial liens and security interests mean precious little if they do not culminate in money proceeds from a sale that can be distributed to the claimants according to their priority. Of course, in order to have proceeds to distribute, something of value must be offered to attract a buyer. If the selling agent who enforces a lien cannot offer good title to the personal property involved, he can hardly expect a buyer to supply the proceeds necessary to effectuate a lien priority system.

Foreclosure is the method by which the sheriff, receiver or reposessing secured party offers good title to the property that is for sale. Surprisingly, even though foreclosure is at the absolute center of any lien enforcement procedure, the subject has suffered from legislative carelessness and scholarly neglect.

Because there is a dearth of literature on the subject, some basic principles of lien foreclosure will be deduced. These principles will then be compared to the UCC provisions that apply when a security interest is being enforced. As will be shown, because these two foreclosure systems fail to mesh, the lien priorities of section 9-301 could be effectively reversed. As a result, administrative control of the sale is a vital issue between a lien creditor and a secured party.

A. Foreclosure of Judicial Liens

State lien law is often silent on the extent of the interests foreclosed. As a matter of logic, however, the minimal title the sheriff
must offer for the sheriff's sale to work is title good against both the creditor whose lien is being enforced and the judgment debtor. If a lien creditor were able to reley goods from the buyer at a sheriff's sale to satisfy the remainder of the judgment, no buyer would bid and liens would never be satisfied by sheriff's sale proceeds. Similarly, if the debtor could simply take back the property after the sale, the buyer's title would be worthless. At least these two interests must be "foreclosed" by the sheriff's sale.

In exchange for the foreclosure of their property interests, the judgment creditor and the judgment debtor are given rights to receive proceeds from the sale, according to their "priority." In a well-designed lien system, foreclosure of an interest and the right to share in sale proceeds should be coterminous principles. As shall be seen, however, the UCC itself does not conform to this minimal standard. This failure to coordinate foreclosure with the right to receive proceeds is one source of the difficulties to which we shall soon turn.

Foreclosure of outstanding property rights is what the purchaser at a sheriff's sale pays for. It follows that when state law increases the number of property interests that are foreclosed, the price the buyer is willing to pay will rise. For this reason, state legislatures, when they have thought about it, have provided for the foreclosure of many more interests than merely those of the enforcing judgment creditor and the judgment debtor. The typical foreclosure statute provides that when the sheriff issues a deed to the purchaser of personal property at a judicial sale, he conveys whatever rights the judgment debtor had at the time the judicial lien first arose. Such a statute should successfully foreclose all interests created by the debtor.

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65 Cf. In re Riverside Inv. Partnership, 674 F.2d 634, 640 (7th Cir. 1982) ("Generally, in a 'free and clear' sale, the liens are impressed on the proceeds of the sale and discharged at the time of sale; in a 'subject to' sale, on the other hand, the lien survives the sale in some form for some period of time, however slight."); 26 U.S.C. § 7425(a) (1982) (if a United States tax lien is foreclosed, the government gets a share of the proceeds according to its priority); 4B Collier On Bankruptcy ¶ 70.99[3] (L. King 14th ed. 1978) (in a judicial sale, the property can be transferred free of liens, so long as the lienholder has the opportunity to satisfy his right to the proceeds).
66 See infra text accompanying notes 126-44.
68 See Maryland Nat'l Bank v. Porter-Way Harvester Mfg. Co., 300 A.2d 8, 12 (Del. 1972) ("Chattels sold at an execution sale should be sold free and clear of all encumbrances in order to ensure the highest price and to stimulate bidding.").
69 E.g., Ariz. Rev. Stat. Ann. § 12-1625 (1982) (certificate of sale conveys "all the right which the debtor had in the property on the day the levy was made"); Ark. Stat. Ann. § 30-435 (1979) (buyer at sheriff's sale gets "all the right, title and interest which the debtor had in and to the property sold, on the day the execution was delivered"); Md. Cts. & Jud. Proc. Code Ann. §
after the attachment of the lien being enforced. Admittedly, these statutes do not explicitly provide for the foreclosure of subsequently created property interests, but as a matter of logic and policy such foreclosures must occur. If the debtor attempts to transfer the encumbered property to a third party who is not entitled to protection of the type these statutes sometimes give to good faith purchasers, the transferee can be in no better position than the debtor himself. Since all the transferee can obtain is the debtor's interest in the property, and since the debtor's interest must be foreclosed for the sale to be successful, the transferee's interest must be foreclosed as well. A similar argument can be made for the foreclosure of involuntary transfers (i.e., junior judicial liens) that are created after the lien being enforced first arises.

Some states have developed a more complex concept of foreclosure, providing that senior judicial liens, as well as subsequently

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11-501 (Supp. 1983) (sheriff seizes all the defendant's rights when he levies); Nev. Rev. Stat. §§ 21.170, .180 (1981) (sheriff conveys what debtor had on the day of levy); N.J. Stat. Ann. § 2A:26-15 (West 1952) (when sheriff sells property pursuant to an attachment lien, the deed conveys "all the title to such property had by a defendant ... at the time that the writ of attachment became a lien thereon"). Curiously, New Jersey's foreclosure statute is not applicable when the sheriff enforces an execution lien. See id.

70 In many states, a bona fide purchaser can take property free of a judicial lien that was prior to the actual levy by the sheriff. In New York, for instance, a lien arises when the execution is delivered to the sheriff. N.Y. Civ. Prac. Law § 5202(a) (McKinney 1978). However, until the sheriff levies the encumbered property, any transferee for value takes the property as if it were unencumbered. Id. § 5208(a)(1). Bona fide purchaser protection in lien statutes is discussed in Carlson & Shupack, supra note 21, at 299–315.

71 If this were not true, then debtors could defeat sheriff's sales (and the entire debt enforcement mechanism) by eleventh hour conveyances to third parties. See infra text accompanying notes 112–22.

A few states provide that the sheriff's deed conveys what the debtor could have conveyed, but they neglect to state the time at which the conveyance is deemed made. E.g., S.C. Code Ann. § 15-39-830 (Law. Co-op. 1976). Because of the danger that eleventh hour conveyances pose to sheriff's sales, the proper construction of such statutes is that the sheriff conveys the debtor's interest at the time the lien first arose. See Kollock v. Jackson, 5 Ga. 153 (1848).

The nation's least fortunate statute is in Hawaii and states that "[n]o sale by execution shall operate to convey a greater estate or interest in the property sold [than] the defendant in execution had at the time of sale." Hawaii Rev. Stat. § 651-49 (1976). Such a statute implies that the debtor has the power to convey property at any time after the execution lien arises but before the sale. In one case, the Hawaii Supreme Court was able to protect the integrity of a sheriff's sale of real estate from an eleventh hour mortgage, by virtue of a statute, id. § 634-29 ("All after-leases, mortgages, sales, devises, assignments, trusts, or other conveyances of the property, until the dissolution of the process, shall be void in law as against the plaintiff in such cases."). In re Trustees of Robinson, 51 Hawaii 164, 454 P.2d 116 (1969). But this statute applies only to prejudgment attachments, not postjudgment executions, and only to real estate, not personal property. Fortunately for the buyer at the execution sale in Robinson, the lien being enforced was a prejudgment attachment lien on real estate. In other cases, however, no readily apparent solution exists to prevent destruction of the sheriff's sale by creation of eleventh hour conveyances to good faith purchasers.
created interests, are foreclosed by a sheriff's sale. Obviously, such a provision increases the efficiency of debt enforcement procedures by increasing the price that each sale of personal property will produce. These states, by foreclosing senior judicial liens, reward the diligence of the junior lien creditor in having been the first to enforce a lien.

A large number of state legislatures, however, have never considered the question of foreclosure of competing property interests. Some states simply direct the sheriff to sell the encumbered property, without indicating the scope of the property interest to be conveyed to the purchaser. In such states, courts are left to their own devices in determining the extent to which interests are foreclosed by a sheriff's sale. Fortunately, because the foreclosure question appears more important with regard to real estate, detailed foreclosure provisions pertaining only to real estate often do exist. Taking advantage of this, one court used an analogy to real estate foreclosure provisions pertaining to a state tax lien where the legislature had failed to speak on foreclosure by sale of personal property. Analogies to real estate foreclosure provisions can provide adequate guidance to the courts of

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72 Florida has accomplished this by case law. See Love v. Williams, 4 Fla. 126 (1851). A more recent case has apparently modified Love by holding that only purchasers with no knowledge of senior liens can take free of such liens. Flagship State Bank v. Carantzas, 352 So. 2d 1259, 1262 (Fla. Dist. Ct. App. 1977). Other language in Flagship suggests that when the bad faith purchaser later sold the still encumbered property to a second transferee who was a good faith purchaser, that second purchaser took the property free of the judicial lien. See id. at 1263.


73 The federal tax lien statute authorizing the sale of the debtor's property is silent on the extent of foreclosure. See 26 U.S.C. § 7403 (1982). The Supreme Court, however, has recently ruled that where the debtor's property is held in cotenancy, the interests of all cotenants should be foreclosed, with the foreclosed parties taking a share of the proceeds. See United States v. Rodgers, 103 S. Ct. 2132, 2141-46 (1983). Rodgers amounts to a rule foreclosing senior property interests.

74 E.g., Code of Civil Procedure, Ill. Ann. Stat. ch. 110, § 12-158 (Smith-Hurd 1983) ("All goods and chattels, real and personal, may be taken and sold to satisfy a judgment, except as otherwise provided by law.").


most states when questions arise concerning the nature of a pur­
chasers's title to personality bought at a sheriff's sale.

The basic foreclosure statute described above also implies that if
transfers subsequent to the judicial lien being enforced are foreclosed
because the debtor can only transfer rights that, logically speaking,
are subject to foreclosure, then, conversely, transfers prior in time to
the judicial lien are never foreclosed. Even the states that foreclose
senior judicial liens do not foreclose other senior interests. Therefore,
under the typical foreclosure provision, voluntary transfers made
prior to attachment of the judicial lien cannot be foreclosed by a deed
to the purchaser at a sheriff's sale. Such a deed conveys only the
interest that the debtor had at the time the judicial lien first arose, and
by that time, antecedent transfers had already reduced the debtor's
equity in the encumbered property. This does not mean, however,
that the sheriff will be uninterested in property conveyed away prior
to attachment of the judicial lien. Where the debtor has retained some
equity in the property, it could be levied upon by the sheriff. For

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78 See Justice, Secured Parties and Judgment Creditors—The Courts and Section 9-311 of
The Uniform Commercial Code, 30 Bus. Law. 433, 434 (1975). The federal government cannot
be foreclosed when it is a senior tax lien creditor. See 28 U.S.C. § 2410(c) (1982) ("A sale to
satisfy a lien inferior to one of the United States shall be made subject to and without disturbing
the lien of the United States, unless the United States consents that the property may be sold free
of its lien and the proceeds divided as the parties may be entitled."). Section 2410 apparently
applies only to sales ordered by a judge. Execution sales are not considered "judicial sales," A.H.
& R.S. Coal Corp. v. United States, 461 F. Supp. 752, 755 (W.D. Pa. 1978), and so are governed
by section 7425, 26 U.S.C. § 7425(b) (1982). Even with regard to "nonjudicial sales," the
government may not be foreclosed when it has a senior lien (although this conclusion requires a
boost from 26 C.F.R. § 301.7425-2(3) (1983)). The government's ability to keep its senior liens
out of the fray of an execution sale was upheld in Berlin v. United States, 535 F. Supp. 298
(E.D.N.Y. 1982).
79 See U.C.C. § 9-311. Section 9-311, permitting such levies, repeals prior state laws that
frequently prohibited the sheriff from levying the debtor's interest in property encumbered by
(1972). California and Massachusetts, however, have overridden section 9-311 with nonuniform
(West 1958); id. § 75 (West Supp. 1983-1984); id. ch. 246, §§ 60-61 (West 1959); see Coogan,
The Effect of the Federal Tax Lien Act of 1966 Upon Security Interests Created Under the
Uniform Commercial Code, 81 Harv. L. Rev. 1369, 1390 n.101 (1968). Idaho has similar
legislation, but only with regard to prejudgment attachment. Idaho Code § 8-506A (1979); see
Henderson, The Judicial Creditor Versus the Article Nine Secured Party, 17 Idaho L. Rev. 183,
210-13 (1981). These statutes are occasionally supplemented by provisions allowing the judg­
mint creditor the option of paying money to the senior secured party and proceeding with the
levy from which both the judicial lien and the subrogated senior security interest will be
§ 4251-4256 (1980). These vestiges of pre-UCC law may reflect common law concepts of real
estate mortgages wherein the secured lender appeared as holder of title to the land. Apparently,
example, if a piece of equipment worth $10,000 is subject to a per­
fected security interest of $5,000, or if an undivided half interest in the 
equipment has been sold to a buyer, the sheriff will still levy upon the 
machine on behalf of an execution creditor and will then sell the 
judgment debtor's $5,000 interest in the equipment. Of course, the 
earlier transferee's interest is not foreclosed, and whoever buys the 
equipment takes subject to the unforeclosed interest.80

The question of foreclosure is greatly complicated by the presence 
of a recording statute that subordinates an earlier unrecorded transfer 
to a later one. Real estate recording statutes, for example, protect 
subsequent bona fide purchasers from such prior secret conveyances. 
A "purchase," however, connotes a voluntary transfer from the 
debtor.81 A judicial lien, on the other hand, is an involuntary transfer 
from the debtor and is not within the bounds of a bona fide pur­
chase.82 Therefore, when a recording statute protects only bona fide 
purchasers, judicial lien creditors continue to have status that is "jun­
ior" to prior unrecorded conveyances. Nevertheless, judicial lien cred­
itors enjoy important indirect benefits from bona fide purchaser pro­
tection. Protected bona fide purchasers who take free of prior secret 
conveyances of real estate will pay more at the sheriff's sale than will 
unprotected purchasers who must take subject to such conveyances.83

The excess proceeds generated by the protection of bona fide pur­
chasers go directly to the judicial lien creditor for whom the sale is 
held.

Some states extend protection of the recording statutes to credi­
tors, usually by stating that bona fide purchasers and creditors take 
free from secret conveyances.84 The scope and nature of this extended 
protection are rarely spelled out, but when the words "and creditors" 
are added to the recording statute, a court can feel free to change the 
rules of the sheriff's sale in such a way that creditors are indeed

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81 See U.C.C. § 1-201(32).
82 See 4 American Law of Property § 17.10, at 562-63 (A. Casner ed. 1952) (the term purchaser does not include judgment creditors).
83 See Justice, supra note 78, at 434.
84 See 4 American Law of Property, supra note 82, § 17.29, at 609 & n.1.
protected. The patterns of creditor protection vary greatly. Some rules protect only lien creditors where the lien arose before the secret conveyance was recorded. Others protect nonlien creditors who had no knowledge of the secret conveyance when credit was first extended. Among the rules that protect only lien creditors, some require that the lien creditor be without knowledge at the time the lien arose, while others make no bona fide requirements upon the lien creditor. The choice of protection is often mandated by a linguistic quirk of the recording statute, although occasionally the statute is vague enough to allow the courts to choose the best rule as a matter of policy.

In all cases, once the creditor qualifies for protection, the state of knowledge of the buyer at a sheriff's sale is irrelevant. Under recording statutes that grant status to creditors against prior secret conveyances, even bad faith purchasers take the real estate free of secret encumbrances.

Article 9, of course, is the recording statute that applies to transfers of security interests in personal property. What Article 9 means for the sheriff's sale is a matter to be explained after a brief discussion concerning the enforcement of UCC security interests.

B. The Secured Party's Right to Enforce His Interest After Default

Enforcement of a security interest differs greatly from enforcement of a judicial lien. First, enforcement of a judicial lien is an immediate right, limited only by the minimum time during which a sheriff's sale must be advertised. A secured party, on the other hand, must wait until default has occurred to exercise his rights, which are carefully circumscribed in part 5 of Article 9.

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85 See id. at 609–10, 610 n.2; Note, Rights of Creditors of the Mortgagor Against the Holder of an Unrecorded Mortgage, 3 Colum. L. Rev. 539 (1913); Note, Execution Sales—Rights of Bona Fide Purchasers, 24 Minn. L. Rev. 505, 506–07, 513 (1940).
87 Cf. id. (1972) (protecting lien creditors in spite of knowledge).
88 4 American Law of Property, supra note 82, § 17.30, at 612 ("if the judgment creditor himself was protected by the statute against unrecorded transactions, the purchaser at the sale obtains a good title irrespective of notice" (footnotes omitted)).
89 Of course, the rules pertaining to prejudgment liens are different. Pending judgment, the sheriff usually holds the encumbered property or, if the goods are perishable and must be sold immediately, holds the cash proceeds from the sale. E.g., N.Y. Civ. Prac. Law § 6218(a) (McKinney 1980).
90 U.C.C. § 9-501(1).
1. Sale by the Secured Party

Enforcement of the security interest is not necessarily limited to sale, although sale is certainly the centerpiece of the UCC's enforcement procedure. Under certain circumstances, the secured party may simply retain the collateral in satisfaction of the debt, but only if the debtor and junior secured parties do not object. In either case, the secured party must gain control of the collateral. The UCC permits simple self-help, provided there is no breach of the peace. Alternatively, the secured party may replevy the collateral through the usual judicial means.

Unlike the sheriff, the secured party choosing to conduct the sale himself need not auction the property if he can substitute some other commercially reasonable method of sale. In this regard the secured party resembles a receiver appointed in a supplemental proceeding. The right to conduct the sale is of immense importance to the secured party, in large part because the sheriff is viewed as a rather ham-handed and unproductive selling agent. Thus, in the extensive litigation between secured parties and judicial lien creditors, secured parties have strongly asserted their right to control the sale in order to maximize the sales price and, hence, their return on the defaulted loan.

The secured party also resembles a receiver and a sheriff in that he may award himself the administrative expenses connected with the sale before applying the balance of the proceeds to reduce his debt. If the debt is not fully satisfied by the proceeds of the sale, the deficit remains as an unsecured claim against the debtor.

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See id. § 9-505(2).

Id. § 9-503.

Id.

Id. § 9-504(3).


See Guardian Loan Co. v. Early, 47 N.Y.2d 515, 518, 392 N.E.2d 1240, 1242, 419 N.Y.S.2d 56, 59 (1979) ("Any judicial sale . . . is a tragic event."). Professor Gilmore wonders whether a sale by the secured party is any better. See 2 G. Gilmore, supra note 8, § 43.2, at 1188 ("The surplus to be returned to the debtor after the sale is a glittering mirage; the deficiency judgment is the grim reality.").

See Henderson, supra note 79, at 207-08. See generally Justice, supra note 78, at 438-41 (discussing various cases involving the secured party's right to possession).

U.C.C. § 9-504(1)(a).

Id. § 9-504(2); cf. 11 U.S.C. § 506(a) (1982) ("An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.").
Like the sheriff and receiver, the secured party conducting the sale must distribute the proceeds of the sale according to priorities. The UCC provides for junior secured parties to make a demand for a share of the proceeds. In exchange, their junior security interests in the property are foreclosed by the sale. Secured parties who are senior to the seller, however, are not entitled to share in the proceeds at all, because their security interests are not foreclosed. Accordingly, the buyer of the collateral at a UCC sale takes the property subject to any senior security interests. Naturally, the price that a buyer is willing to pay largely depends on the number of liens and interests still outstanding and the risk that unknown surviving encumbrances will come to light in the future.

Relevant here is the fact that not only are junior security interests foreclosed by the UCC sale, but junior judicial liens are foreclosed as well. Senior judicial liens, however, are not foreclosed. A discussion of the significance of the foreclosure of junior judicial liens will be deferred momentarily in order to describe how a secured party can enforce his interest by use of judicial process.

2. Use of Judicial Process

The self-help method of enforcing a security interest after default is permitted only where the debtor acquiesces. If self-help is not available without a breach of the peace, the secured party must resort to judicial process. Judicial process requires that the secured party reduce his claim to judgment. The judgment may be for replevin, if the secured party wishes to conduct the sale, or it may simply be a money judgment, in which case the secured party, as a judgment creditor, enforces the judgment by obtaining an execution or following an alternative enforcement procedure.

Although the sheriff’s sale on behalf of a judgment creditor holding a security interest must be conducted pursuant to the provisions of

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100 U.C.C. § 9-504(1)(c).
101 Id. § 9-504(4).
102 These senior interests are not listed in sections 9-504(1)(a) to (c) as among those entitled to share in the proceeds.
103 U.C.C. § 9-504(4); see also id. § 9-306(2) (“security interest continues in collateral notwithstanding sale”).
104 On the effect that risk of secret liens has on price, see Carlson & Shupack, supra note 21, at 306-09.
105 U.C.C. § 9-504(4).
106 See supra text accompanying notes 91-92.
107 See U.C.C. § 9-501(1).
state lien law, the UCC changes the significance of the sheriff's actions in two principal ways—the first involves the priorities by which the money proceeds are distributed, and the second involves the number of interests foreclosed by the sale.\footnote{108 See id. §§ 9-301(1)(b), (2), (4), -501(5).}

As to the effect of Article 9 on the priorities the sheriff must honor when enforcing a secured party's money judgment, section 9-501(5) provides:

When a secured party has reduced his claim to judgment the lien of any levy which may be made upon his collateral by virtue of any execution based upon the judgment shall relate back to the date of the perfection of the security interest in such collateral.

Thus, a secured party with a money judgment is entitled to Article 9 priorities when the sheriff levies collateral. If this were not the case, the secured party would be forced to rely on the priority of his judicial lien, which could be considerably lower.\footnote{109 See infra note 113. Section 9-501(5) is subject to a drafting peculiarity. It states that the priority of the secured party's judicial lien relates back only to perfection of the security interest, not to the time of filing. Therefore, in after-acquired property or future advance cases, intervening security interests might take priority under section 9-501(5), whereas they would be junior under section 9-312(5)(a), which gives priority to the first secured party to perfect or file. See D. Baird & T. Jackson, supra note 41, at 805 (further explicated in the accompanying Teacher's Manual at 145); see also Carlson & Shupack, supra note 21, at 343-46 (discussing the "first to perfect or file" rule in the context of judicial liens).}

As to the number of interests foreclosed, according to section 9-504(4), a sale of collateral by the sheriff on behalf of the secured party forecloses not only the security interest of the enforcing party and the property interest of the debtor—the logically minimum foreclosures—but also all security interests and judicial liens junior to the enforcing security interest. The foreclosure provisions of the UCC, however, must be added to the independent foreclosure provisions under state lien law. When, for example, a Florida sheriff is selling collateral on behalf of a UCC secured party, the number of interests foreclosed increases to the maximum extent available under the combined bodies of law. While junior interests are foreclosed under the UCC, senior judicial liens are foreclosed under Florida case law.\footnote{110 See supra note 72 and accompanying text.} In Florida, therefore, no execution or attachment lien can survive a UCC sheriff's sale. The only surviving encumbrances are security interests that are senior to all security interests participating in the distribution of proceeds from the sheriff's sale.
C. Two Problems in Administering the Sale of Encumbered Property

There are two problems that have not been adequately appreciated in the literature. The first concerns whether judicial lien creditors can foreclose the interests of secured parties. If not, a secured party may be able to skew the results of priorities under section 9-301 simply by ignoring the judicial sale instigated by a lien creditor. The second problem concerns the absence of rights of judicial lien creditors in UCC sales conducted by the secured parties, even though junior liens are foreclosed.

1. Can Nonuniform Lien Law Destroy Security Interests Without Authority from a UCC Provision?

Section 9-306(2) reinforces the presumption in section 9-201 that security interests are always good against creditors of the debtor unless a specific provision of the UCC says otherwise. According to section 9-306(2), "a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof." This, again, is subject to other contrary provisions of Article 9. If nothing in the UCC provides for the foreclosure of junior security interests when senior judicial liens are foreclosed, then sections 9-201 and 9-306(2) require that such security interests be unforclosable. But this reasoning leads to absurd results. For example, where a judicial lien has attached and a sheriff's sale of levied property is imminent, a debtor may create a security interest in the eleventh hour before the sale. Under state lien law, the subsequent transfer would be foreclosed upon sale, but UCC section 9-201 states that only a UCC provision can foreclose the junior interest. If no such UCC provision exists, the junior security interest will survive the sale and will be enforceable against the buyer. The Supreme Court of Pennsylvania and a court in

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111 See supra text accompanying notes 58-63.
112 Bloom v. Hilty, 427 Pa. 463, 234 A.2d 860 (1967), discussed in 67 Mich. L. Rev. 1421 (1969). The facts of this case are quite complicated. X had a senior perfected security interest in some pipe. Z had an unperfected and hence junior security interest in the same pipe. A judgment creditor (Y) caused the pipe to be levied upon, thereby creating a lien that was junior to X's security interest but senior to Z's security interest. At the sheriff's sale, X purchased the pipe. Z thereafter sought to replevy the pipe on the grounds that his security interest survived the sheriff's sale. The Pennsylvania Supreme Court denied replevin to Z, holding that X had a senior security interest in the pipe that Z could not disturb. Significantly, the court also found that Z's security interest survived the foreclosure sale because X was a buyer with knowledge and therefore unprotected by section 9-301(1)(c). The court simply assumed that Y's execution sale would not foreclose a junior security interest.

The case can also be criticized for allowing X, the senior secured party and owner of the equity (in between which fell the security interest of Z), to fend off Z when X was not presently
Kentucky have actually reached this conclusion, and no court has clearly articulated any reasons for a different rule.\textsuperscript{114}

intending to sell. Even a junior secured party has a right to enforce his interest by repossession and sale pursuant to part 5 of Article 9. Roemer & Zeller, Inc. v. Ace Transmission Center, Inc., 114 Misc. 2d 415, 416, 454 N.Y.S.2d 377, 378 (Sup. Ct. 1982), vacating 114 Misc. 2d 310, 451 N.Y.S.2d 601 (Sup. Ct. 1982); Nickles, Rights and Remedies Between U.C.C. Article 9 Secured Parties with Conflicting Security Interests in Goods, 68 Iowa L. Rev. 217, 218–31 (1983). Although X’s right to conduct the sale might be superior to Z’s right to do the same, X should not have been able to play “dog in the manger” at the expense of Z. For a discussion of competition for the right to administer the sale, see infra text accompanying notes 126–44.


This opinion is seriously flawed in numerous ways. In Tabers, a judgment creditor had initiated a sheriff’s sale. An unperfected secured party (whose financing statement had lapsed) appeared at the sale to announce his interest. The court held that the buyer at the sale took subject to the unperfected security interest.

One feature of this case is that the judgment creditor was also a secured party. The court should have found that section 9-504(4) foreclosed the junior security interest, but the court assumed that the senior secured party had elected to sue on the judicial lien only and therefore had no status under the UCC. Accord In re Wilson, 390 F. Supp. 1121 (D. Kan. 1975) (reliance on judicial lien precludes later reliance on security interest as a matter of res judicata). One would have thought that the “relation back” aspect of section 9-501(5) was automatic. See Bilar, Inc. v. Sherman, 40 Colo. App. 38, 41, 572 P.2d 489, 491–92 (1977) (“a secured creditor need not ‘elect’ his choice of remedies”). Nevertheless, the judgment creditor was treated as if it were a lien creditor without Article 9 rights.

If the court’s assumption that the judgment creditor had waived its Article 9 rights is accepted at face value, the lapsed security interest is indeed junior to the judicial lien held by the judgment creditor. Section 9-403(2) states: “If the security interest becomes unperfected upon lapse, it is deemed to have been unperfected as against a person who became a purchaser or lien creditor before lapse.” The meaning of the court’s opinion, then, must be that senior judicial liens may not foreclose junior security interests.

Another court was also persuaded that nothing in the UCC forecloses junior security interests, so that when a buyer at the enforcement sale has knowledge, he takes subject to the unperfected security interest. This court, however, was reversed. In re Dennis Mitchell Indus., Inc., 280 F. Supp. 433 (E.D. Pa. 1968), rev’d, 419 F.2d 349 (3d Cir. 1969). In this case, the issue was whether a bankruptcy trustee (who is given the status of lien creditor under UCC section 9-301(3)) could sell property free of an unperfected security interest. The lower court reasoned that since the buyer from the trustee had knowledge of the unperfected security interest, neither section 9-301(1)(c) nor any other UCC provision affected the security interest. In reversing this holding, the court of appeals claimed that it was not deciding the issue of whether security interests may be foreclosed by nonuniform lien law. Instead, the court ruled that the federal strong-arm provision, Bankruptcy Act of 1898, ch. 541, § 70(c), 30 Stat. 544, 566 (repealed 1978 for bankruptcies filed after October 1, 1979), allowed a trustee to sell property free of liens. 419 F.2d at 359.

In fact, section 70(c) merely grants lien creditor status to the trustee and depends entirely upon state law for its interpretation. The court erred in assuming that a junior security interest could ever be “invalid” as against the trustee under section 70(c) where state law did not similarly invalidate the unperfected security interest against judicial liens. Thus, when the court of appeals overruled the district court on whether the security interest survived the trustee’s sale, it did indeed reach the issue of whether Bloom v. Hilty, 427 Pa. 463, 234 A.2d 860 (1967), was good law. Cf. 11 U.S.C. § 363(f) (1982) (independent authority for the foreclosure of liens without the aid of state law).

\textsuperscript{114} Only four cases have been found in which junior security interests were foreclosed (or thought to be foreclosed) by nonuniform lien law. In none of these did the court attempt to
Survival of the junior security interest effectively reverses the priority that section 9-301(1)(b) gives to the lien creditor. A numerical confrontation section 9-201 of the UCC. In the case of In re Dean Monagin, Inc., 18 Mich. App. 171, 170 N.W.2d 924 (1969), the court assumed that an assignee for the benefit of creditors (a lien creditor under section 9-301(3)) could sell the debtor's property completely free of an unperfected security interest since the assignee had become a lien creditor within the meaning of section 9-301(1)(b) before the security interest was perfected. In Columbia Int'l Corp. v. Kempler, 46 Wis. 2d 550, 175 N.W.2d 485 (1970), a receiver sold property held on consignment to a buyer with knowledge of the consignee's rights. The lower court held that the consignor's interest survived the receiver's sale because of the buyer's knowledge. The Wisconsin Supreme Court disagreed, reasoning that a buyer's knowledge at a sheriff's sale is irrelevant if the judgment creditor's lien is senior to the consignor's Article 9 interest. Ultimately, this disposition seems correct, although the court did not bother to explain its result in light of section 9-201.

Furthermore, the court's statement is mere dictum. The buyer who had knowledge in that case was the senior secured party for whom the receiver was acting. Under section 9-501(5), the judicial procedure used by a foreclosing secured party is vested with the effect of any other UCC sale. Under section 9-504(4), a buyer at a UCC sale "takes free" of all security interests junior to the security interest being enforced. Therefore, the buyer's knowledge was irrelevant in the Kempler case, but because of section 9-504(4), not section 9-301(1)(b). Section 9-504(4) clearly forecloses junior security interests, whereas section 9-301(1)(b) does so only if one accepts the argument presented in this Article.

A third case actually ruled that senior security interests should be foreclosed when junior judicial liens are foreclosed. Maryland Nat'l Bank v. Porter-Way Harvester Mfg. Co., 300 A.2d 8 (Del. 1972). In that case, a senior secured party petitioned the court to have an execution sale set aside on the theory that senior security interests survive such sales. Indeed, they should survive, which is precisely why the sheriff's sale need not have been set aside. The judgment creditor (who seems also to have been the purchaser at the sale, as no other purchaser was made a party to the action) defended on the basis that the senior security interest was foreclosed by the sheriff's sale. Of course, if the sale were to be set aside, the question of foreclosure would become moot. Therefore, the defense was as nonsensical as the secured party's grounds for setting aside the sale. In any case, the sale was not set aside. The court held that under Delaware practice pertaining to sheriff's sales, all liens—even senior security interests—are foreclosed, in exchange for which the foreclosed interests take a share of the proceeds according to priority. Id. at 11-12; cf. United States v. Rodgers, 103 S. Ct. 2132 (1983) (similar holding under tax lien statute). The Porter-Way Harvester opinion is highly dubious law, but it proves that, at least in Delaware, nonuniform lien foreclosure law (here, judicially-created) can foreclose security interests in spite of section 9-201. Again, the court did not specifically consider the effect of section 9-201 on nonuniform law.

Another case stating that nonuniform law can foreclose a junior security interest is Federal Sign & Signal Corp. v. Berry, 601 S.W.2d 137, 139 (Tex. Civ. App. 1980) (dictum). While ultimately the dictum seems correct, it was thoroughly misapplied in the case. In Berry, a landlord leased land to a tenant on the condition that, upon termination of the lease, any fixtures added by the tenant would become the landlord's property. Subsequently, a signmaker "leased" some signs to the tenant who affixed them to the land. As is so often the case, the signmaker found himself to be an unperfected secured party, rather than a lessor. See U.C.C. § 1-201(37). As such, his interest was junior to the landlord's ownership interest. See id. § 9-313(4)(a), (7). The secured party therefore had no right to repossess the signs.

The Berry court, however, denied the right of the secured party to repossess the signs on the grounds that the junior security interest was destroyed when the landlord "sued to foreclose his landlord's lien." This analysis is demonstrably wrong. Under Texas law, a landlord does indeed have a lien on his tenant's personal property to secure payment of rent, but in Berry the landlord's interest was not a statutory lien. Rather, it was a reversionary interest in real estate,
example will illustrate why this is so. Suppose the sheriff levies equipment worth $10,000. Just prior to the sale the debtor creates a $4,000 security interest, which the secured party advertises at the sheriff’s sale. Buyers will pay no more than the encumbered value of the equipment; thus, the lien creditor will realize only $6,000 toward satisfaction of his judgment. If the junior secured party had been senior in the first place, the lien creditor would have realized the same $6,000 from the sheriff’s sale. Therefore, inability to foreclose the junior security interest reverses the priorities and puts the senior lien creditor in the same position as if he had been junior. Such a result would turn the UCC into a statute analogous to those real estate recording provisions that protect bona fide purchasers, but not creditors. As stated earlier, the mere mention of creditor protection in a real estate recording statute has caused some courts to declare that unrecorded conveyances be foreclosed by judicial sale, making the knowledge of the buyer at the sale irrelevant. Ironically, section 9-201 of the UCC poses at least the possibility that similar improvisation by the courts will not be possible with regard to personalty.

As suggested earlier, section 1-103 could be used to assert nonuniform foreclosure rules over section 9-201, but this would seriously impair the general utility of section 9-201 to secured lenders. In addition, fraudulent conveyance law (also dependent upon section 1-103 at the expense of section 9-201) could be used to destroy the junior security interest, but reliance on such law is an uncertain tool at best. Clearly, the existence of direct language in Article 9 would be

created by a consensual and unconditional grant by the tenant. 601 S.W.2d at 138 ("all alterations and improvements made by the lessee shall become the lessor's property"). The landlord was not enforcing a statutory lien but merely seeking a "judgment for ... restitution of the premises" after termination of a lease. Tex. Civ. P. 748; see id. 751-755. Since the landlord was merely ejecting the tenant, no foreclosure of any interest occurred at all. Foreclosure implies that the tenant's property was sold under court order, which did not occur here. New York has such a real estate recording statute. N.Y. Real Prop. Law § 291 (McKinney 1968). In New York, mortgages can be created in anticipation of a judgment lien on land, and, if the mortgage is recorded before the sale, the mortgage will survive foreclosure. See Suffolk County Fed. Sav. & Loan Ass'n v. Geiger, 57 Misc. 2d 184, 291 N.Y.S.2d 982 (Sup. Ct. 1968) (unperfected real estate mortgage has priority in foreclosure action where it was created before the judgment lien was docketed, although not recorded until after docketing). Lien creditors simply are not protected by such a recording statute. Id. at 186, 291 N.Y.S.2d. at 985 ("it is well settled that the protection of the recording act can be relied upon only by subsequent purchasers and mortgagees, not by judgment creditors" (emphasis in original)).

116 New York has such a real estate recording statute. N.Y. Real Prop. Law § 291 (McKinney 1968). In New York, mortgages can be created in anticipation of a judgment lien on land, and, if the mortgage is recorded before the sale, the mortgage will survive foreclosure. See Suffolk County Fed. Sav. & Loan Ass'n v. Geiger, 57 Misc. 2d 184, 291 N.Y.S.2d 982 (Sup. Ct. 1968) (unperfected real estate mortgage has priority in foreclosure action where it was created before the judgment lien was docketed, although not recorded until after docketing). Lien creditors simply are not protected by such a recording statute. Id. at 186, 291 N.Y.S.2d. at 985 ("it is well settled that the protection of the recording act can be relied upon only by subsequent purchasers and mortgagees, not by judgment creditors" (emphasis in original)).

117 Cf. In re Adlman, 541 F.2d 999, 1003-04 (2d Cir. 1976) (under the Bankruptcy Act's analogue to UFCA section 7, courts are reluctant to find actual fraud in cases where the
the best means for permitting the foreclosure of junior security interests. If such language can be found, the absurd reversal of priorities I have described can be avoided without eviscerating the favorable presumption for secured parties found in section 9-201.

The question, then, is to what extent the UCC permits foreclosure of a security interest. Three provisions that fit the "except" clauses in sections 9-201 and 9-306(2) are subsections (1)(b), (c) and (d) of section 9-301. According to these subsections, an unperfected security interest is subordinated to the rights of a "person who becomes a lien creditor" and to a buyer out of the ordinary course of business. Do these provisions allow for a conclusion that a lien foreclosure provision can destroy a security interest?²¹

The protection given to buyers without knowledge is only of marginal utility. First, the protection in sections 9-301(c) and (d) gives assistance where the buyer at the sheriff's sale has no knowledge of the unperfected security interest. But this "foreclosure" provision is easily evaded; the unperfected secured party can guarantee the survival of his security interest merely by advertising his interest at the sheriff's sale or by perfecting his interest prior to the sale. In either case, the buyer would have the fatal knowledge, whether actual or constructive.

The remaining possibility is section 9-301(1)(b), which provides that "an unperfected security interest is subordinate to the rights of . . . a person who becomes a lien creditor before the security interest is perfected." As was true with regard to buyers without notice, the

²¹ Other UCC provisions that might foreclose security interests in other situations are not even remotely helpful in this context. For example, a buyer in the ordinary course of business "takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence." U.C.C. § 9-307(1). A sheriff's sale, however, is clearly out of the ordinary course of business. See United States v. Newton Lake Estates, Inc., 489 F. Supp. 432, 434 (M.D. Pa. 1979). Similarly, section 9-307(2) is a much narrower provision, applying only to unfiled security interests, where the seller and buyer are both consumers, and the buyer is without knowledge of the security interest. This section, of limited utility on its face, has been held inapplicable to sheriff's sales. National Shawmut Bank v. Vera, 352 Mass. 11, 15, 223 N.E.2d 515, 518 (1967); see Carlson & Shupack, supra note 21, at 340-43. Section 9-313(4)(d) applies only to security interests in fixtures. There, judicial liens on real estate are said to be merely subordinated to perfected security interests (and by negative implication are senior to unperfected interests), raising ambiguities similar to those in section 9-301(1)(b). See infra text accompanying notes 121-22.
rights of an unperfected secured party are merely subordinated to the rights of a lien creditor. However, if it is true, as suggested, that subordination means death,\textsuperscript{119} then the rights of a buyer and a lien creditor are sufficiently similar to justify foreclosure upon enforcement of the judicial lien.

A buyer has the right to use and enjoyment of the property purchased—a right that is senior to the secured party's right to repossess the collateral. A lien creditor has an analogous right—the right to cause the seizure and sale of encumbered property in satisfaction of judgment. As noted earlier, at a minimum, the sheriff can pass title free of the interests of the debtor and the enforcing lien creditor. State law usually provides for the foreclosure of additional junior interests. Without the ability to foreclose such junior interests, especially unperfected security interests, the "rights" of a lien creditor would often be worthless. In other words, the senior "rights" of a lien creditor must include the right to collect cash proceeds from a sheriff's sale before the junior secured party collects. Without foreclosure of the junior security interest, this right usually will be economically meaningless—seniority of the judicial lien would otherwise be the cash equivalent of juniority of the lien.\textsuperscript{120} Therefore, the senior lien creditor should be able to achieve foreclosure of the secured party's junior interest if, under a state's nonuniform lien law, that interest would be otherwise foreclosed.

Establishing a justification in the language of the UCC for a renvoi to nonuniform lien law avoids conflict with sections 9-201 and 9-306(2), thereby preserving their efficacy for some worthier purpose. But it does not end the matter where the nonuniform law is insufficient to foreclose junior security interests. Some states merely provide that the sheriff conveys whatever property interest the debtor had at the time the execution lien arose.\textsuperscript{121} Such provisions foreclose junior security interests created after the judicial lien arises, but they also leave prior unperfected security interests unscathed. These prior-but-junior security interests can effectively work a reversal of UCC priorities unless they are foreclosed. Fortunately, most states have no foreclosure provision regarding personal property. Courts in these states

\textsuperscript{119} See supra text accompanying notes 34-53.

\textsuperscript{120} For numerical example of how seniority is the functional equivalent of juniority without foreclosure of junior interests, see text accompanying notes 114-16.

\textsuperscript{121} See statutes cited supra note 69.
are free to adopt sensible rules for foreclosure of junior security interests.¹²²

Even the states that have enacted specific foreclosure statutes for liens on personal property¹²³ need not be deterred from extending foreclosures to prior-but-junior security interests. States with real estate recording statutes in which creditors are merely mentioned find no trouble in foreclosing prior unrecorded conveyances upon enforcement of a subsequent judicial lien, even though such treatment is not provided for in the statutes.¹²⁴ Under the UCC, lien creditors are treated no less vaguely than they are under these real estate recording statutes. By analogy to real estate law, courts should simply rule that all junior security interests are foreclosed. The restrictive foreclosure statutes may affirmatively require that subsequent transfers be foreclosed, but they need not be read to imply that prior interests cannot be foreclosed. Significantly, when a UCC security interest is enforced, all junior security interests and liens are foreclosed without regard to whether they are prior or subsequent in time to the senior security interest being enforced. The drafters of the UCC recognized the need for complete foreclosure of junior security interests, and so should the courts when interpreting (or creating) state lien law.¹²⁵

2. Control of the Sale Procedure

A second administrative problem arises when the secured party conducts the sale of the encumbered property. In this situation, junior judicial liens are foreclosed,¹²⁶ but there is no requirement that the secured party notify the junior lien creditors of the foreclosure.¹²⁷

¹²² The Supreme Court has done this with regard to the tax lien enforcement statutes, deciding that all competing interests are potentially foreclosable. United States v. Rodgers, 103 S. Ct. 2132 (1983); see also supra notes 75–76 and accompanying text (discussing the availability and use of real estate foreclosure statutes where such statutes do not exist for personality).

¹²³ These are statutes that describe the sheriff’s deed as conveying exactly what the debtor had when the lien arose. See statutes cited supra note 69.

¹²⁴ See supra text accompanying notes 84–87.

¹²⁵ Any foreclosure of recorded junior security interests must be consistent with the junior secured party’s due process right to notification before his property interest is destroyed. See Mennonite Bd. of Missions v. Adams, 103 S. Ct. 2706 (1983); First Nat’l Commerce & Fin. Co. v. Indiana Nat’l Bank, 360 So.2d 791 (Fla. Dist. Ct. App. 1978). The exact meaning of Mennonite as applied to commercial statutes is a serious issue that unfortunately cannot be taken up here. For a study of the effect of Mennonite on UCC foreclosure procedures, see Note, The Constitutionality of Section 9-504(3) of the Uniform Commercial Code: A Question of State Action and Procedural Due Process, 5 Cardozo L. Rev. 497, 521-26 (1984).

¹²⁶ U.C.C. § 9-504(4).

¹²⁷ Under the 1972 UCC, notice of the sale of consumer goods only needs to be sent to the debtor (and even this is not necessary when the goods are “customarily sold in a recognized
Even where the junior lien creditor somehow is notified of the sale, there is no provision requiring the selling party to give the junior lien creditor a share in the proceeds. 128 Similarly, the senior secured party and the senior lien creditor have no right to notice of or participation in the distribution, but at least these senior interests are not foreclosed by the UCC sale. The junior judicial lien creditor, however, faces foreclosure of his interest without any concomitant right to share in the proceeds of the sale.

Fortunately, junior judicial lien creditors may have remedies available under nonuniform law that will preserve their property interests in the collateral. The senior secured party who has repossessed collateral for sale is considered to be a third party holding property encumbered by judicial liens. State lien law usually provides that where a debtor's property is in the hands of a third party, it may be levied by the sheriff. The lien creditor therefore is able to obtain any surplus that exists after the UCC sale is concluded. 129

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128 See id. § 9-504(3) (1972). In all other cases, the repossessing secured party is required to inform only junior secured parties who have given written notice of their interests before the secured party sends notice to the debtor. See id. Under the 1962 UCC, the repossessing secured party had an affirmative duty to notify all junior secured parties of record. Id. § 9-504(3) (1962). For a discussion of the constitutional implications of section 9-504(3), see Note, supra note 125.

129 See U.C.C. § 9-504(1)(c) (only junior secured parties are entitled to share in proceeds).
However, levying proceeds is not a perfect solution. First, if the secured party obtains permission for strict foreclosure from the debtor and junior secured parties, there will be no cash proceeds.\textsuperscript{130} Lien creditors have no standing to block strict foreclosures under section 9-505.\textsuperscript{131} Second, levying proceeds may be ineffective where the judicial lien creditor is "sandwiched" in priority between two secured parties. It is by no means clear that the lien creditor's second senior position as to the collateral would be preserved as to cash proceeds of the collateral. Indeed, where a levy is required to establish a judicial lien,\textsuperscript{132} there are very good reasons why cash should not be encumbered under a proceeds theory. A major impetus in establishing the levy as the moment when a lien arises is to prevent secret liens on property that the sheriff does not possess. A proceeds theory as to judicial liens would run afoul of such a policy. At the same time, renunciation of a proceeds theory for judicial liens inevitably promotes a junior secured party over the "sandwiched" lien creditor. This anomaly is created by the drafters' unfortunate exclusion of the lien creditor from distribution rights in section 9-504(4).

Although junior lien creditors may be interested in having a judicial officer take charge of the sale (so that they can participate in the distribution of the proceeds), they should not be able to transfer control of the sale from the secured party to a sheriff or receiver. In \textit{William Iselin & Co. v. Burgess & Leigh, Ltd.},\textsuperscript{133} the court made a compelling point on this question. According to the court, when the sheriff levied property that was already encumbered by a security interest, he took the property subject to whatever contractual or statutory obligations the debtor owed to the secured party. The levied property was subject, therefore, to the secured party's right of repossession upon default. When default occurred, the sheriff, in deference

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\textsuperscript{130} See text accompanying notes 91 and 93.
\textsuperscript{132} E.g., Mich. Comp. Laws Ann. § 600.6012 (West 1968); see Carlson & Shupack, supra note 21, at 293–94.
\textsuperscript{133} 52 Misc. 2d 821, 276 N.Y.S.2d 659 (Sup. Ct. 1967).
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to the secured party's right, had to surrender the property to the
secured party.\textsuperscript{134} Effectively, this decision grants to the senior secured
party the right to control the sale.\textsuperscript{135}

The \textit{sine qua non} of this right is default.\textsuperscript{136} So long as default does
not occur\textsuperscript{137} (or, if default has occurred, so long as the secured party

\textsuperscript{134} Id. at 824, 276 N.Y.S.2d at 662. The court relied upon a pre-UCC case, General Motors
Acceptance Corp. v. Maloney, 46 Misc. 2d 251, 259 N.Y.S.2d 211 (Sup. Ct. 1965), wherein it
was said:

[When] then the sheriff seizes property in the possession of a conditional vendee, he takes
it subject to the rights and obligations of the conditional vendee and cannot sell the
right to possession if, prior to the sale, there is a default in payment. . . .

To hold otherwise would allow a sheriff to acquire greater property rights
against the conditional vendor than the conditional vendee had.

Id. at 252, 259 N.Y.S.2d at 213 (citation omitted).

\textsuperscript{136} More than one commentator agrees with this rationale:

Upon default, the secured party's basic protection is his ability to dispose of the
collateral and satisfy the debt from the proceeds. Allowing the execution to proceed
increases the costs to the secured party who then must follow the collateral into the
hands of the new purchaser. If there is to be a liquidation, it makes sense to allow the
secured party to repossess and dispose of the collateral; vacating the levy accom­
plishes this result.

Henderson, supra note 79, at 207-08; see also J. White & R. Summers, supra note 13, § 26-7, at
977 (secured party should not be denied right to control sale "merely because 9-311 states that the
'debtor's rights' may be transferred"); Nickles, supra note 112, at 218-31 (using pre-UCC
common law, pre-UCC recording statutes, and 9-201 to justify the senior secured party's
control); Note, Securing the Antecedent Debt of the Failing Retail Merchant Under the Uniform
Commercial Code, 77 Yale L.J. 1546, 1557 (1968) (noting that such a theory would not disrupt
the junior secured party's rights under 9-311). But see Ward, supra note 79, at 230 ("On balance
it seems preferable to restrict the secured party's ability to upset a levy to those situations where
his possessory rights arise before levy.").

\textsuperscript{137} In \textit{William Iselin}, the default existed at the time of the levy, but in General Motors
Acceptance Corp. v. Maloney, 46 Misc. 2d 251, 259 N.Y.S.2d 211 (Sup. Ct. 1965), the default
did not occur until three weeks after the levy. In both cases, the right of the secured party
to repossess was upheld, proving that the sequence of levy and default is irrelevant to the secured
party's right to repossess. See \textit{William Iselin}, 52 Misc. 2d at 824, 276 N.Y.S.2d at 663; see also
1974) (default after levy did not defeat secured party's right to repossess). But see Ward, supra
note 79, at 230.

It is not impossible to derive a contrary rule from First Nat'l Bank v. Sheriff of Milwaukee
County, 34 Wis. 2d 535, 149 N.W.2d 548 (1967). The report in that case was unclear as to
whether default had occurred between the time of the levy and the replevin action brought by
the secured party. The court stated broadly, "where . . . a debtor has the right to possession of
the collateral and the sheriff seizes the collateral on execution against him, the secured creditor
may not intervene by replevin in an attempt to take possession of the property." Id. at 541, 149
does not step in to prevent the sale\textsuperscript{138}, the sheriff may sell the goods as encumbered by the senior security interest.\textsuperscript{139} Thereafter, any future right of the secured party to repossess after the debtor's default may be exercised against the purchaser of the encumbered property.

N.W.2d at 550-51. This result is defensible if the secured party had no right to repossess at the time of his replevin action, but the language barring replevin where there is postlevy default seems unjustifiable. The secured party's interest will survive the sheriff's sale, at which point the collateral is subject to reposition if the debtor defaults. See Platte Valley Bank v. Krael, 185 Neb. 168, 174 N.W.2d 724 (1970). If the secured party's repossession is inevitable after the sale, what is the sense of allowing the sale to go forward?

\textsuperscript{138} Humble Oil & Ref. Co. v. Pathological & Diagnostic Lab., Inc., 11 U.C.C. Rep. Serv. (Callaghan) 386 (N.Y. Civ. Ct. 1972). One commentator assumes that where the secured party has the right to repossess but declines to exercise it, the sheriff may not proceed with the sale. Accordingly, this commentator reads the decision in First Nat'l Bank v. Sheriff of Milwaukee County, 34 Wis. 2d 533, 149 N.W.2d 548 (1967), as allowing secured parties to block any execution process against their collateral. This effectively insulates the debtor's equity in the collateral from its creditors other than the secured party. As long as the secured party does not exercise its rights to take possession of the collateral and dispose of it, the debtor will be able to continue holding and using it. Meanwhile, the judgment creditor may be unable to collect its judgment.

Justice, supra note 78, at 439. Section 9-311 must mean, however, that unless the secured party actually asserts his rights after default, the sheriff is free to levy and sell, and the purchaser takes the property subject to the security interest. See Nickles, supra note 112, at 259-61. The levying sheriff has a right of possession that is superior to the debtor's right, even if inferior to the postdefault right of the secured party.

It may be noted that a senior secured party has no affirmative duty to enforce a security interest on behalf of a junior creditor. William Iselin, 52 Misc. 2d at 824, 276 N.Y.S.2d at 663. But see Maryland Nat'l Bank v. Porter-Way Harvester Mfg. Co., 300 A.2d 8 (Del. 1972) (senior secured creditor was foreclosed by sheriff's sale for the benefit of junior lien creditor, implying a duty of the senior secured party to take affirmative action).

\textsuperscript{139} The sheriff's ability to sell the collateral after default on a third party's senior security interest, see supra note 138, is denied in states that characterize the sheriff's sale as a conversion of the secured party's rights. For instance, in Murdock v. Blake, 26 Utah 2d 22, 484 P.2d 164 (1971), a sheriff levied property encumbered by a security interest that was in default. Upon hearing of the pending sale, the secured party protested to the judgment creditor, but was ignored. The sale produced the usual disappointing price. Because the sheriff's sale constituted a conversion, the judgment creditor was liable for the market value (not the sales price) of the collateral "wrongfully" levied. If the decision is comprehensible, it is only because the security agreement was in default, the fact of default was communicated to the judgment creditor as part of the protest, and the secured party manifested his intent to take immediate possession of the collateral for disposition under part 5 of Article 9. Had the secured party not so protested, the sheriff should have been free to conduct the sale. The senior security interest would have survived the sale, and the right of repossession would have been exercisable against the buyers.

Even though the court found that the sheriff wrongfully refused to halt the sale, no conversion action should have lain. The senior security interest could still be enforced against the property in the hands of the purchaser. No prejudice to the senior secured party's rights exists under this analysis, and such prejudice is at the heart of a conversion action. See Justice, supra note 78, at 441-43; Nickles, supra note 112, at 268; accord Hull v. Carney, 11 N.Y. 501 (1854). On the other hand, if the purchaser at the sheriff's sale disappears with the goods and cannot be found, an argument for conversion liability against the purchaser can be made. See Nickles, supra note 112, at 264-68.
These rules, sensible enough when the security interest is senior to the judicial lien under which the sheriff acts, should not apply where the security interest is junior. Suppose that a receiver is appointed while a security interest is unperfected. Before the receiver obtains the collateral, the secured party declares a default, repossesses the collateral (thereby perfecting his interest by possession), and commences the sale procedure. In the impending sale, the senior judicial lien creditor has no right to share in the distribution. Accordingly, he would much prefer that the receiver administer the sale. The state courts should be prepared to vindicate the receiver, in such a case, and order a turnover to the receiver. The *William Iselin* case should be limited to security interests with seniority over the competing judicial lien.

One commentator fears that *William Iselin* cannot be so limited, and thus that a junior secured party might divest the sheriff of the collateral, even when the sheriff acts for a judicial lien creditor who is senior. However, it might as well be argued that *William Iselin* gives a junior secured party sufficient power to take control of the sale from a senior secured party. Nothing in the UCC mediates between a senior and a junior secured party who each claim a superior right of possession. The best answer to such disputes is that seniority and juniority extend beyond the right to proceeds of sales; they cover the right of possession as well. Therefore, the senior interest, whether it be a security interest or a judicial lien, should have the prior right of possession and the accompanying power to control the sale.

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140 Appointment of a receiver renders the creditor for whom he acts senior to unperfected secured parties. U.C.C. § 9-301(1)(b), (3).


142 In support of the sheriff’s right to sell when the judicial lien is superior is Beef & Bison Breeders, Inc. v. Capitol Refrigeration Co., 105 Misc. 2d 275, 431 N.Y.S.2d 986 (Sup. Ct. 1980). There, the sheriff had levied, and the unperfected secured party sought to block the sale. Significantly, the court’s sanction of the sheriff’s sale was based entirely upon the execution lien’s seniority under section 9-301.

143 Ward, supra note 79, at 229. Professor Ward properly recognizes this possibility as a threat to the priorities set forth in section 9-301.

144 Professor Ward wonders whether UCC section 9-201 (“Except as otherwise provided by this Act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors.”) compels a court to award control of the sale to a secured party even when his interest is junior to a competing judicial lien. Id. at 231. Earlier, it was argued that section 9-301(1)(b), which makes the lien creditor’s “rights” senior to those of the unperfected security interest, incorporates by reference a lien creditor’s rights under nonuniform lien law. Among these rights is the right to have the sheriff seize property that could be used to satisfy a money judgment. This should take care of Professor Ward’s concern about the effect of section 9-201.