Purchase Money Under The Uniform Commercial Code

David Gray Carlson
Benjamin N. Cardozo School of Law, dcarlson@yu.edu

Follow this and additional works at: https://larc.cardozo.yu.edu/faculty-articles

Part of the Law Commons

Recommended Citation
Available at: https://larc.cardozo.yu.edu/faculty-articles/323
PURCHASE MONEY UNDER THE UNIFORM COMMERCIAL CODE

DAVID GRAY CARLSON*

TABLE OF CONTENTS

I. INTRODUCTION .......................................................... 793
II. THE TEMPORALITY OF THE PURCHASE MONEY SECURITY INTEREST .......................................................... 798
   A. The Conditional Sale .................................................. 800
   B. The Enabling Loan ................................................... 801
   C. The Exception That Proves the Rule ................................ 801
   D. Purchase Money Security Interests That Are First In Time .......................................................... 803
   E. Filing ........................................................................... 804
III. DEFINITION OF PURCHASE MONEY .................................... 808
   A. The Definition of Price .................................................. 809
      1. Collection Costs ..................................................... 810
      2. Future Advances ..................................................... 812
      3. Advances in General .................................................. 813
   B. Enabling Lenders ........................................................ 815
IV. DUAL STATUS OR TRANSFORMATION? ................................... 820
   A. The Transformation Rule and Inventory ................................ 830
   B. State or Federal Law? ................................................... 834
   C. Nonuniform Legislation ................................................ 843
V. REFINANCING AND THE DESTRUCTION OF PURCHASE MONEY STATUS .......................................................... 844
VI. CONCLUSION ..................................................................... 852

I. INTRODUCTION

Purchase money, as that odd phrase is used in Article 9 of the Uniform Commercial Code (UCC), does not refer to "money" at all but to a type of loan—a loan that finances the purchase of the collateral

* Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. Thanks go to Robert Lloyd, Jeanne L. Schroeder, and Paul Shupack for the comments on earlier drafts.
that secures the loan. Article 9 treats purchase money security inter­
ests rather differently from other types—particularly with regard to
their priority.

Perhaps most significantly, the purchase money priority1 breaks
the monopoly power an after-acquired property lender might have over
the debtor. If a security interest automatically attaches to everything a
debtor has, a supplier extending credit to the debtor without the bene­
fit of a purchase money status thereby makes a contribution to the
welfare of this creditor. This is to say that the loan will not be forth­
coming, as charity is not a hallmark of trade credit—not intentionally
so, anyway. If the debtor has no cash and nevertheless is in need of
supplies, the purchase money priority makes provisioning the debtor
possible over the opposition or indifference of the after-acquired prop­
erty lender, because the purchase money security interest has priority
over the after-acquired property security interest.2 Often this is justi­
fied by the claim that the purchase money lender is the “founder of the
feast” and simply deserves a higher priority than the after-acquired
property lender for this broader reason.3 Or the after-acquired prop-

1. A purchase money security interest is described in § 9-107, which provides:

A security interest is a “purchase money security interest” to the extent
that it is

(a) taken or retained by the seller of the collateral to secure all or part
of its price; or

(b) taken by a person who by making advances or incurring an obliga-
tion gives value to enable the debtor to acquire rights in or the use of
collateral if such value is in fact so used.

U.C.C. § 9-107 (1990) (hereinafter all references to the UCC are to the 1990 Official Text
unless otherwise stated). For an account of the drafting history of § 9-107, see D. Benja-
min Beard, The Purchase Money Security Interest in Inventory: If It Does Not Float,

2. Mark B. Wessman, Purchase Money Inventory Financing: The Case for Lim-
ited Cross-Collateralization, 51 OHIO ST. L.J. 1283 (1990). In the jargon of law-and-econ­
omics, it is sometimes said that the after-acquired property lenders have the ability to
extract economic rents from the debtor for new credit. The purchase money priority
renders purchase money lenders competitive, thereby lowering interest rates for the
debtor. Thomas H. Jackson & Anthony T. Kronman, Secured Financing and Priorities

Rev. 1, 11 (1985) (“During the nineteenth century the purchase money superpriority was
transformed from a formalistic concept . . . to an equitable concept in recognition of the
inherent fairness of giving first claim to the assets to those who parted with their money
to make possible the assets’ acquisition.”) Professor Lloyd thinks that purchase money
priority is a fairness concept that should be developed accordingly and that it is a mis­
take when judges revert back to the formal properties of purchase money priority to
settle legal disputes. Id.
ruptcy lender has a "stranglehold" over the debtor that ought to be broken.¹

Because purchase money priority has its relevance principally against after-acquired property liens, it appears quite late in the history of commercial liens on personal property, simply because the after-acquired property clause was vindicated only late in our history.⁵ Grant Gilmore traces it back to the revolution in financing created by the railroad boom of the Reconstruction era. Prior to that time, it had a venerable history in real property, largely because of two phenomena—the judgment lien, which encumbered real estate as soon as the judgment was docketed, and dower, which immediately attached to land as soon as it was acquired by the husband.⁶ As a result, the metaphysics of purchase money priority was already well known by the time security interests on personal property came into vogue.

If the principal purpose of purchase money priority is to establish the primacy of the purchase money security interest over the security interest in after-acquired property, a second major purpose in state law is to relieve consumer lenders from filing a financing statement with regard to purchase money security interests in consumer goods.⁷ The reason usually given for this is quite practical—if every purchase money security interest in consumer goods were subject to a filing rule, the files would be clogged with unedifying financing statements to the point where the system might break down—and the very lives of the clerks might be at risk—under the crush of a paper avalanche.

The automatic perfection of the purchase money security interest in consumer goods obviates the need to file as to either competing after-acquired property security interests or subsequently created property interests. Similarly, loss of purchase money status implies that the security interest becomes unperfected, in the absence of a filing. Later we will see a great many cases in which exactly this catastrophe occurred to secured parties for some real or imagined technical error.

Besides the above two purposes in state law—priority against after-acquired property security interests and automatic perfection in

⁴. _In re Daniels_, 35 B.R. 247, 249 (Bankr. W.D. Okla. 1983) (Bohanon, J.) (hereinafter the reader should note the author's inclusion of the judge who authored each court decision); _Beard_, supra note 1, at 440; _Lloyd_, supra note 3, at 5, 74.

⁵. U.C.C. § 9-204 cmt. 2.


⁷. U.C.C. § 9-302(1)(d). Prior to the 1972 amendments, a purchase money security interest in farm equipment having a purchase price of less than $2,500 also self-perfected. _See_ U.C.C. § 9-302(1)(c) (1962). The 1972 Review Committee believed that "the effect of the rule was to make farmers' equipment unavailable to them as collateral for loans from some lenders." U.C.C. § 9-302 Reasons for 1972 Change.
consumer cases—federal law makes purchase money priority important. One of these federal rules is a regulation of the Federal Trade Commission (FTC) under its powers under section 5 of the FTC Act. According to this rule, lenders who take nonpurchase money security interests in certain household goods have committed an unfair trade practice within the meaning of section 5(a)(1). For this, the remedy is a cease-and-desist order issued by the FTC against the offending lender.

Two federal bankruptcy provisions make purchase money status important. First, nonpurchase money security interests on certain kinds of exempt property are avoidable under section 522(f)(2) to the extent they impair exemptions. Purchase money secured parties are immune from this danger.

Second, section 1110(a) provides that the automatic stay in chapter 11 lapses after sixty days if a secured party claims a purchase money security interest in an airplane owned by a carrier with a certificate of convenience issued by the Civil Aeronautics Board.

8. Professor Robert Lloyd emphasizes a third: purchase money lenders were usually not subject to exemption laws. Lloyd, supra note 3, at 17-19; see Dominion Nat'l. Bank v. Nuckolls, 780 F.2d 408 (4th Cir. 1984) (Sprouse, J.) (discussing Virginia exemption statute). This purchase money privilege, however, in no way depends on the purchase money lender having a security interest. Rather, it is an immunity against exemptions that either general or secured creditors might enjoy.


10. Works of art, electronic equipment (except one television and one radio), jewelry (except wedding rings), and items acquired as antiques are excepted from this regulation. Id. § 444.1(i).


12. According to § 522(f):
Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(2) a nonpossessory, nonpurchase-money security interest in any—
(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
(B) implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor; or
(C) professionally prescribed health aids for the debtor or a dependent of the debtor.

Board. The only way a debtor can extend the automatic stay is to cure all past defaults and stay current on the relevant loan obligation. Non-purchase money lenders have no comparable privilege. Therefore, if a purchase money security interest on a qualified\textsuperscript{13} airplane is transformed in chapter 11, the automatic stay restrains the secured party even after sixty days.

All of these purposes make the definition of purchase money important. Yet the definition supplied by Article 9 of the UCC is fraught with problems. And, if you haven't already guessed it, that is precisely the topic I wish to take up in this essay.

I will limit my attention to the following four problems with the definition of purchase money. First, precisely what temporal attributes does a purchase money priority entail? Often it is said that purchase money priority is an exception to the rule of "first in time is first in right." I will show that the opposite is usually true. More fundamentally, the purchase money security interest is coeval with or perhaps older than its competitor, the security interest in after-acquired property. This fact has important implications for the filing rules that Article 9 imposes on purchase money lenders. In fact, there is a good argument that the purchase money lender should not have to file at all to beat out the morally questionable, barely legitimate security interest in after-acquired property.\textsuperscript{14}

Second, following the lead of Dean Gerald McLaughlin, who wrote the leading statement on the question, I will examine whether the purchase money priority extends beyond the pure advance of purchase money into such items as debt service, collection expenses, and the like. In the course of doing so, I will point out some flaws in the literal language of the UCC. Ordinarily we can ignore such trivia, as the aversion of judges to absurd results usually suffices to protect us from the chaos inflicted by the literal meaning of statutes. But in this era when plain meaning dictators threaten to seize control of the Supreme Court, the drafters of the new Article 9 had better pay attention to their grammar, if they wish to save us from the bother of irrational

\textsuperscript{13} Not all airborne collateral is covered by § 1110(a). Rather, the airplane must be owned by "an air carrier operating under a certificate of convenience and necessity issued by the Civil Aeronautics Board, or a water carrier that holds a certificate of public convenience and necessity or permit issued by the Interstate Commerce Commission . . . . " At least one court has held that licenses from the Department of Commerce are good enough to trigger section 1110(a) rights. \textit{In re Express Air, Inc.}, 136 B.R. 328, 330-31 (Bankr. D. Mass. 1992) (Hillman, J.).

\textsuperscript{14} The after-acquired property has been called "a somewhat refined sort of peonage." Beard, \textit{supra} note 1, at 465, citing Neil Cohen & Michael Gerber, \textit{The After-Acquired Property Clause}, 87 U. PA. L. REV. 635, 647 (1939).
commercial law decisions. They must speak by the card, or equivocation will undo them. 15

Third, I will examine the question of purity and pollution in purchase money priority—whether extra nonpurchase money collateral or nonpurchase money advances should destroy purchase money priority altogether, as a kind of anti-miscegenation penalty, or whether a “dual status” marriage will be tolerated, so that a secured party can hold purchase money and purchase money security interests simultaneously. As this is the topic of a truly masterful article by Professor Robert M. Lloyd, neither I nor anyone else could hope to improve on his study very much. Nevertheless, I will humbly summarize his findings and refine his conclusions wherever I can. As the question of transformation or dual status is vital for consumer and airline bankruptcies, I wish to pay special attention to whether Article 9 is competent to preempt the definition of purchase money priority, or whether federal bankruptcy courts are obliged to develop, at least in part, a federal definition that outranks whatever the UCC might presume to contribute.

Finally, I will conclude with comments on refinanced purchase money security interests—also a topic that Professor Lloyd takes up. Refinancings are conceptually different from transformation rule cases, as they turn on whether the parties intend to terminate a preexisting purchase money priority. The transformation rule, on the other hand, applies regardless of the intent the secured party may have entertained toward her own purchase money priority.

We turn first, then, to the temporality of purchase money security interests and what lessons can be derived from temporality for the governance of the superpriority.

II. THE TEMPORALITY OF THE PURCHASE MONEY SECURITY INTEREST

O tempore! O mores!
—Tully

It is usually said—erroneously—that purchase money priority violates the rule of “first in right is first in time.” 16 But this is not neces-

15. “How absolute the knave is! We must speak by the card, or equivocation will undo us.”—Hamlet to Horatio on the Grave Diggers. William Shakespeare, Hamlet.

16. Jackson & Kronman, supra note 2, at 1144 (“The overriding priority afforded purchase money lenders occupies an especially important place in the Article 9 scheme because it constitutes an exception to the general rule that competing security interests are to be ranked temporally, with earlier interests prevailing over later ones.”); Gerald T. McLaughlin, “Add On” Clauses in Equipment Purchase Money Financing: Too Much
sarily true. Typically, purchase money priority is entirely consistent with this rule. To explore the temporality of the purchase money security interest, it will be useful to divide them into two types: the conditional sale and the enabling loan. The conditional sale refers to purchase money security interests in which the seller or the item supplies the credit, retaining or receiving a security interest for the price of the item sold. The term "conditional sale" recalls the ancestor of this kind of purchase money security interest. This type of security interest is the one described in section 9-107(a).

The "enabling loan" is the purchase money security interest described in section 9-107(b). In the enabling loan, the lender provides credit so that the borrower can buy the item from the seller for cash.

of a Good Thing, 49 FORDHAM L. REV. 661, 661-62 (1981) ("If one of the secured creditors claims a purchase money security interest, however, the 'first-in-time' rule of priority is reversed; a 'second-in-time' purchase money security interest will normally outrank a competing 'first-in-time' security interest.") (footnotes omitted); Bernard A. Burk, Note, Preserving the Purchase Money Status of Refinanced or Commingled Purchase Money Debt, 35 STAN. L. REV. 1133, 1154 (1983) ("The PMSI, however, abruptly departs from the first-in-time rule."); Lynda Kay Chandler, Note, Preserving Purchase Money Security Interests and Allocating Payments, 20 U. MICH. J. L. REV. 849, 851 (1987) ("In general, the first security interest perfected has priority under the first-in-time, first-in-right rule. The U.C.C. makes an exception to this rule for a PMSI.") (footnotes omitted) [hereafter cited as Michigan Note].

17. McLaughlin, supra note 16, at 671. In the conditional sale, the buyer supposedly did not get title to the item bought until the last dollar of the price had been paid. Until then the seller was the owner. The Uniform Conditional Sales Act legislated the rule that if the seller ever repossessed the item because of a default in payment, the seller had to resell the item and return the surplus to the debtor. UNIF. CONDITIONAL SALES ACT § 18 (1918). After that, the concept of title became irrelevant, and was displaced with the generic security interest of Article 9. Lloyd, supra note 3, at 25-26.

18. According to § 9-107(a):

A security interest is a "purchase money security interest" to the extent that it is

(a) taken or retained by the seller of the collateral to secure all or part of its price . . . .

U.C.C. § 9-107(a).

19. According to § 9-107(b):

A security interest is a "purchase money security interest" to the extent that it is

(b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

U.C.C. § 9-107(b).
A. The Conditional Sale

It is very easy to conceive of the conditional sale as an example of "first in time is first in right," rather than as an exception to it. One may conceive of the conditional sale security interest as a retained property interest. So conceived, its age antecedes attachment of the security interest itself. That is, the seller conveys only the equity to the debtor, and retains the rest. On this view, the competing after-acquired property is actually second in time, because the retained purchase money security interest is older.

Alternatively, it is possible to conceive of the conditional sale differently; the sale wipes out the seller's property interest entirely, and the debtor conveys back a newly created purchase money security interest. So conceived, the purchase money security interest attaches simultaneously with the after-acquired property interest. Neither exists until the debtor has rights in the collateral. Neither is prior in time compared to the other. Both security interests came into existence at precisely the same moment.

In either case, the conditional sale is either an example of the rule of "first in time is first in right," or it is a case of simultaneously attached liens. Subject to the exception developed below, it is incorrect to characterize the conditional sale as violative of the rule of "first in time is first in right."

A purchase money security interest is not generally later in time than the after-acquired property security interest, in terms of attachment. Usually, commentators who say that the purchase money priority is an exception to the rule of "first in time" are thinking of filing a financing statement. It is normal for an after-acquired property lender to file first before a purchase money lender. Yet the purchase money secured party still wins priority. Filing, though, is not creation (i.e., attachment) of a lien, or even perfection. Rather, perfection is carefully defined as a combination of filing and attachment. If one attends to this technical definition, one can see that, at least when filing occurs in advance of attachment, an after-acquired property security interest and a purchase money security interest are perfected at

20. Section 9-107(a) hedges its bets and refers to a conditional sale as being either "taken or retained."
23. U.C.C. § 9-303(1).
precisely the same time—when the debtor first gets rights to the collateral.

B. The Enabling Loan

Similarly, the enabling loan is also at least consistent with "first in time is first in right." When the purchase money security interest is an enabling loan, the purchase money lender obtains a security interest precisely at the same time as the after-acquired property lender—when the debtor first obtains rights in the collateral. In such a case, Article 9 breaks a tie when it awards priority to the purchase money lender, but it does not violate the rule of first in time is first in right.24

C. The Exception That Proves the Rule

Purchase money loans are usually simultaneous with after-acquired property liens (or older, in the case of a retained conditional sale interest). Nevertheless, it is not impossible that a purchase money security interest might be younger than an after-acquired property security interest. Such a purchase money security interest still beats out to the after-acquired property security interest. When this occurs, the purchase money priority does indeed violate the rule of "first in time is first in right."

Whatever else section 9-107 may require, it does not require that the security agreement be signed before the debtor obtains the collateral.25 A signed security agreement is one of the elements of attach-

24. In the case of a tie, the common law tried mightily to reconcile purchase money priority with the rule of "first in time is first in right." Historians often cite Nash v. Preston, 79 Eng. Rep. 767 (K.B. 1631), as the original purchase money priority case. Lloyd, supra note 3, at 11. In this case, a husband bought land subject to a purchase money mortgage. He died, and the widow claimed dower over the land, free and clear of the mortgage. In this case, the wife's dower claim is the equivalent of an after-acquired property security interest. The court held that the dower right could not attach because the husband's title "is in and out of him quasi uno fiatu [like a breath], and by one and the same act." This so-called doctrine of instantaneous seisin would appear by its origin to be a principle of flatulence. For a more modern formulation, see Chase Nat. Bank v. Sweezy, 281 N.Y.S. 487, 492 (1931) (Callahan, J.), aff'd, 236 A.D. 835 (N.Y. App. Div. 1932), aff'd, 185 N.E. 803 (N.Y. 1933) ("The theory is that title does not rest in the vendee for a single moment, but merely passes through the latter to vest in the mortgagor, without stopping beneficially in the purchaser, and that during such instantaneous passage the prior lien cannot attach to the title.")

25. In contrast, the Bankruptcy Code would punish a purchase money lender who obtains a signed security agreement after the debtor has received collateral. Section 547(c)(3) is designed to preserve the enabling loan from avoidance as a voidable preference. According to § 547(c)(3), the trustee cannot avoid a security interest:

(3) that creates a security interest in property acquired by the debtor—
ment. Therefore, the debtor could obtain the collateral before the purchase money lender's security interest attaches. By this time, the after-acquired property lender will already have an attached security interest. Later, when the purchase money agreement is formalized in writing, the purchase money lender's security interest will attach—second in time. Yet the second security interest still has the purchase money priority and therefore beats out the after-acquired property security interest, if the lender perfects in time.

This exception refutes Official Comment 2 to section 9-107, a comment that has influenced law making with regard to purchase money priority. According to Comment 2:

When a purchase money interest is claimed by a secured party who is not a seller, he must of course have given present consideration. This section therefore provides that the purchase money party must be one who gives value "by making advances or incurring an obligation": the quoted language excludes from the purchase money category any security interest taken as security for or in satisfaction of a preexisting claim or antecedent debt.

In the counter-example just given, purchase money was advanced and used to obtain collateral, but the execution of the security agreement was delayed. Hence, the purchase money security interest became "se-

(A) to the extent such security interest secures new value that was—
(i) given at or after the signing of a security agreement that contains a description of such property as collateral;
(ii) given by or on behalf of the secured party under such agreement;
(iii) given to enable the debtor to acquire such property; and
(iv) in fact used by the debtor to acquire such property; and
(B) that is perfected on or before 10 days after the debtor receives possession of such property . . . .

11 U.S.C. § 547(c)(3) (1988). If the debtor has obtained the collateral before a security agreement was signed, then the secured party gave value before the signing of the security agreement, so that she cannot comply with § 547(c)(A)(i).


27. That is, within ten days of the debtor receiving possession of the collateral, in noninventory cases, U.C.C. § 9-312(4), or before the debtor receives possession of inventory (together with a letter to the after-acquired property inventory lender). Id. § 9-312(3). In real estate cases, where the collateral becomes a fixture, the grace period starts to run against the mortgagee or other "encumbrancer" when the collateral is affixed to the real estate. U.C.C. § 9-313(4)(a). Of course, purchase money security interests in consumer goods are deemed automatically perfected. Id.

28. See infra text accompanying notes 92-102.
curity for or in satisfaction of a preexisting claim or antecedent debt." Therefore, the comment is wrong and ought to be ignored.

The exception just described—grant of a purchase money security interest after the debtor already has rights in the collateral—is certainly avoidable, because the UCC facilitates pre-loan closings by allowing secured parties to file their financing statements in advance of the loan. In real estate cases, many courts required that a mortgage deed is effective only if the debtor already owned the premises at the time of the deed. For the purchase money mortgagee, this meant that first the seller deeded the land to the buyer and then the buyer deeded the mortgage to the lender. This requirement virtually required the temporal subordination of the purchase money mortgage to whatever after-acquired property interest the mortgagee had to compete with.

This embarrassment, however, was simply ignored, as courts declared purchase money mortgages to be senior, regardless of this temporal detail. Therefore, what is an exotic variation in UCC transactions was routine in real estate deals, yet courts did not hesitate to favor the purchase money priority.29

D. Purchase Money Security Interests That Are First In Time

Purchase money security interests take priority over after-acquired property security interests, and this usually implies simultaneous creation of the two competing liens—though not always. We have seen that conditional sales can be conceived as being older than competing after-acquired property liens. In addition, because section 9-107(a) does not require a security agreement before the purchase money advance, a purchase money security interest can indeed be second in time and still prevail over the after-acquired property security interest.

Of course, they also compete with security interests and liens that are subsequently created. For example, the debtor may give A a purchase money security interest in a piece of equipment and, subsequently may give B a security interest in the same equipment. Usually, this contest is decided in the ordinary way—the first to perfect or file wins under section 9-312(5)(a). Ordinarily, the purchase money priority is entirely irrelevant to this contest. But there is one circumstance in which the purchase money priority might still be relevant to such a contest. If a second security interest or judicial lien attaches to the collateral within ten days of the debtor receiving collateral, and if the purchase money security interest is unperfected, the purchase money

security interest might still have priority if the secured party perfects within the ten day grace period provided in section 9-312(4) or section 9-301(2). Nothing in this grace period limits its effect to after-acquired property security interests. Therefore, the purchase money priority is useful to defeat not only after-acquired property security interests but also some subsequently created security interests as well.

E. Filing

It is a cliche that purchase money security interests are favored in Article 9, but this is not entirely true. Putting aside consumer goods for the moment, purchase money security interests are given priority over competing security interests in after-acquired property, but only if the purchase money lender files a financing statement by some deadline. With regard to purchase money security interests in inventory, the secured party must file before the debtor receives the goods and, in addition to filing a financing statement, the secured party must send a billet doux to the after-acquired property lender informing her of the impending influx of purchase money collateral.

30. Purchase money security interests in consumer goods are deemed automatically perfected, against most lien creditors and buyers. U.C.C. § 9-302(1)(d); but see § 9-307(2) (consumer buyers take free of these purchase money security interests unless the lender has filed a financing statement).

31. U.C.C. § 9-312(3). This section provides:

A perfected security interest in inventory has priority over a conflicting security interest in the same inventory and also has priority in identifiable cash proceeds received on or before the delivery of the inventory to a buyer if

(a) the purchase money security interest is perfected at the time the debtor receives possession of the inventory; and

(b) the purchase money secured party gives notification in writing to the holder of the conflicting security interest if the holder had filed a financing statement covering the same types of inventory (i) before the date of the filing made by the purchase money secured party, or (ii) before the beginning of the 21 day period where the purchase money security interest is temporarily perfected without filing or possession (subsection (5) of Section 9-304); and

(c) the holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory; and

(d) the notification states that the person giving the notice has or expects to acquire a purchase money security interest in inventory of the debtor, describing such inventory by item or type.

U.C.C. § 9-312(3). For a case interpreting the adequacy of the notice sent to the after-acquired property lender, see In re Daniels, 35 B.R. 247 (Bankr. W.D. Okla. 1983) (Bohanon, J.) (letter failing to mention purchase money status of new security interests still good enough to put sophisticated after-acquired property lender on notice).
With regard to goods other than inventory or consumer goods, the secured party must file within ten days of the debtor's receiving possession of the goods. Meanwhile, in order to beat a lien creditor as to any kind of nonconsumer property—inventory or otherwise—the purchase money lender must file within ten days of receiving possession of the collateral.

These rules actually prejudice a secured party, compared to precod law. Prior to the UCC, a conditional seller had to perfect in order to beat a subsequent secured party, but no filing was required for the purchase money priority to have its primary effect—the priming of the simultaneously created after-acquired property lien. According to the Supreme Court:

A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires; and if he purchase property and give a mortgage for the purchase-money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage, or judgment, or recognizance, can displace such mortgage for purchase-money. And in such cases a failure to register the mortgage for purchase-money makes no difference. It does not come within the reason of the registry laws. These laws are intended for the protection of subsequent, not prior, purchasers and creditors.

The idea—at least with regard to conditional sales—is that the secured party retains a security interest in the collateral and transfers only the equity to the debtor. To this equity attaches the after-acquired property lien; the earlier unperfected security interest is simply never touched by the after-acquired property lien.

32. Professor Lloyd states “[p]re-UCC law generally subjected purchase money mortgages to the operation of the recording laws,” Lloyd, supra note 3, at 39, but for this proposition he cites only cases in which subsequent judicial lien creditors or bankruptcy trustees took priority over an unperfected purchase money security interest. But see UNIF. CONDITIONAL SALES ACT § 5. See also Lewis v. Manufacturers Nat'l Bank, 364 U.S. 603 (1961) (describing Michigan's precod grace period of fourteen days).

A case illustrating this is *Robinson v. Wright,* where a judgment creditor served an execution on Sheriff Robinson on February 2, 1928. The execution created a judicial lien on all property that the debtor then owned or thereafter acquired. On March 22, Wright sold the debtor a car and (as a back-up) a team of mules. The sale was on credit, with Wright reserving for himself a purchase money chattel mortgage. On April 10, Wright perfected his chattel mortgage by filing the requisite financing statement, and on April 14, Sheriff Robinson levied the car and the mules. Wright sued Robinson to recover possession of the collateral. In such a case, the court had no trouble ruling that Wright's security interest prevailed over the after-acquired property lien, even though Wright delayed perfection by almost a month.35

These rationales happened to deal with conditional sales, where it is possible to say that the purchase money security interest is older than the competing after-acquired property lien. Such cases appear to be nothing but the rule of "first in time is first in right." But, of course, purchase money security interests also include enabling loans, where the enabling lender's security interest is created at precisely the same time as the after-acquired property security interest. In such a case, the rationale for protecting the purchase money security interest must be different from the intuitions of "first in time is first in right."

There is a good argument that a purchase money lender should not have to file a financing statement at all, with regard to an after-acquired property lender, as precode authorities intuited. There is no compelling reliance argument that the after-acquired property lender can make—at least when goods other than inventory is involved. In fact, this instinct was followed in *International Harvester Credit Corp. v. American National Bank of Jacksonville.*36 In this case, a purchase money secured party who did not file nevertheless prevailed over an after-acquired property security interest, to the general dismay of the commentators.37 According to Justice Dekle, "it would be an invidious preference to the earlier creditor-bank without so much as a showing

---

34. 9 P.2d 618 (Colo. 1932) (Butler, J.).
35. "Even if the property comes into the hands of the mortgagor subject to a lien which is good against him, though for want of formalities it is not good against his subsequently attaching creditors and third persons, it is nevertheless prior to the lien of a mortgage under an after-acquired property clause." Id. at 620.
36. 296 So. 2d 32 (Fla. 1974), noted in 3 FLA. ST. U. L. REV. 150 (1975).
that there was a compelling public interest or purpose served by such arbitrary requirement of outright priority to the earlier creditor in the total after-acquired property. 38 Any other result, he thought, "would be abhorrent to equity and justice," a case of "unjust enrichment." 39

Overlooking the merits of these observations, the Florida legislature amended Florida's version of UCC section 9-312(3) (pertaining to inventory) by adding this sentence: "If any of the foregoing . . . requirements are not met, the priority of the purchase money security interest shall be determined under subsection (5)." 40 A similar sentence was added to section 9-312(4) as well. 41 These sentences were designed to force the courts to move onto the "first to file or perfect" rule, if the purchase money secured party had not perfected in time against the after-acquired property lender. Under this latter rule, the purchase money secured party was probably doomed to lose.

Subsequent to this legislation, a purchase money secured party who failed to file still demanded priority over an after-acquired property lender. Though clearly sympathetic, the Florida Supreme Court had to eat crow: "Accordingly, we now recede from International Harvester. Pursuant to the Code, when the buyer takes possession of property under a credit sales contract, he acquires the property, not merely an equity interest in the property. The seller retains only a security interest in the property." 42

Even if it is true that a purchase money secured party should not have to file against an after-acquired property security interest, there are two other important points to be made. First, it should still be the case that the purchase money secured party should have to perfect against any subsequently created security interest, judicial lien or purchase. Whatever rationales for the perfection requirement that exist will exist with regard to purchase money collateral when a subsequent purchaser or lien creditor contests priority.

38. International Harvester, 296 So. 2d at 34.
39. Id.
40. FLA. STAT. ANN. § 679.312(3) (West 1990).
41. Id. ch. 679.312(4) ("Failure to so perfect shall cause the priority of the purchase money security interest to be determined under subsection (5)").
42. ITT Indus. Credit Co. v. Regan, 487 So. 2d 1047 (Fla. 1986) (Overton, J.) (citations omitted). Chief Justice Boyd dissented, however. A sentence in the after-acquired property lender's security agreement stated that the lender only claimed "all of the right, title and interest of the mortgagor in any such personal property or fixtures subject to a conditional sale contract, chattel mortgage or similar lien or claim." Id. at 1050. This sentence, Boyd thought, meant that the after-acquired property claimed only the debtor equity and nothing more, which should have preserved the priority of the unperfected purchase money secured party. Id. at 1050-51.
Second, with regard to inventory, the current rules are justified by the supposition that the after-acquired property lender decides whether to foreclose on existing collateral or whether to advance new funds depending on whether an adequate equity cushion exists on inventory currently in the possession of the debtor.\(^\text{43}\) This justification amounts to a reliance argument in favor of the after-acquired property lender, thereby making inventory cases different from other kinds of after-acquired property cases, where reliance probably plays no role. Therefore, even if filing ought not to be necessary as against other kinds of after-acquired property security interests, it should continue to be the case that a purchase money lender supplying or enabling the acquisition of inventory should have to send the letter currently required by section 9-312(3) to the after-acquired property lender.

III. DEFINITION OF PURCHASE MONEY

Case law has revealed that the current definition of "purchase money" is fraught with problems. According to UCC section 9-107:

A security interest is a "purchase money security interest" to the extent that it is

\(\begin{align*}
(a) \text{ taken or retained by the seller of the collateral to secure all or part of its price; or} \\
(b) \text{ taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.}
\end{align*}\)

The first problem with this definition is that the conditional sale is defined with respect to "price," but the enabling loan is not. This has given rise to questions regarding items that are not advances, strictly speaking. For example, a purchase money secured party may incur collection costs and attorneys' fees. Security agreements usually permit the secured party to add to the secured claim against the debtor. Will such costs be considered the "price" of the item?

The second problem is that the enabling loan does not refer to price but to the status of a person who makes a purchase money advanced. This reference to the status of the person suggests that security interests taken by such a person for other things could obtain a purchase money priority. For example, the enabling lender should have no trouble bringing in her attorneys' fees, even as the conditional seller must struggle with the definition of "price." But it also suggests that

\(^{43}\) U.C.C. § 9-312 cmt. 3; see also Beard, supra note 1, at 461-62, 486.
any security interest taken by such a person might have purchase money priority, because the definition, on this reading, is no longer tied to the purchase money advance itself.

A. The Definition of Price

According to section 9-107(a), a conditional sale is a security interest "taken or retained by the seller of the collateral to secure all or part of its price." The meaning of these words is apparently that only "the price" is eligible for the purchase money priority.

What constitutes "the price" of an item is not specifically defined by Article 9.44 Besides the "list price," two items have been endorsed as properly part of "price." One is any sales tax connected with the purchased item. The second is the finance charge. The finance charge—interest—is the difference between the cash price of the item and the price over time.45 Dean Gerald McLaughlin points out that, at two places, Article 9 refers to "cash price" to refer to price minus interest.46 This in turn implies that the unadorned "price" of section 9-107(a) must include debt service.47 Hence, there seems little disagreement that "its price" includes the concept of interest compensation.48

44. On the broad definition of "price" in precode law, see McLaughlin, supra note 16, at 672-73. Dean McLaughlin points out that, in precode law, the priority against after-acquired property secured creditors was rare, because the after-acquired property clause was not widely recognized. Instead, the typical dispute on the scope of the conditional sale security interest prior to the UCC involved the bankruptcy trustee against the conditional seller. If the conditional seller's security interest was not part of the conditional sales interest, then it was not a perfected security interest at all, because no chattel mortgage filing had occurred. Therefore, the courts were liberal in defending the secured creditor against the bankruptcy trustee. These precedents, McLaughlin warns, are not trustworthy in the context of Article 9, where a security interest that is not purchase money might still be perfected, even as it loses priority to the after-acquired property secured party.


46. The first of these provisions is § 9-505(1). According to this section, if a consumer debtor has paid sixty percent of the "cash price" of purchase money collateral, she may sue the repossessing secured party for conversion if the secured party has not sold the collateral within ninety days.

Section 9-507(1) also uses the term "cash price." According to this provision, a secured party who has misbehaved after repossessing consumer goods must return all debt service to the consumer debtor, plus ten percent of the "cash price."


48. See Stanford Note, supra note 16, at 1178 (interest compensation necessary and, "[a]ccordingly, finance charges are always considered part of an original purchase money debt . . . .").
Harder to bring into the concept of price is collection expenses and the attorneys’ fees connected with enforcing the purchase money security interest. Indeed, let’s face it. The task is impossible.

When Article 9 foreclosure proceedings are at stake, this omission is substantially mitigated by section 9-504(1)(a). This provision gives the purchase money lender priority for “the reasonable expenses of re-taking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys’ fees and legal expenses incurred by the secured party.” This priority is structured so that, if a foreclosure actually occurs, the purchase money lender would have priority for these expenses over her own purchase money claim, which is recompensed only under section 9-504(1)(b). But, more important, she has priority over the security interests of competing after-acquired property lenders as well, whose priority is described in section 9-504(1)(c). Thus, when a foreclosure sale is conducted by the purchase money secured party, the relevant expenses will be compensated as if the expenses had a priority that is even better than the purchase money priority.

But suppose, as is very likely, that there is no foreclosure sale, because the debtor has filed a bankruptcy petition in federal court. If this occurs, section 9-504(1) has no application. The question then arises whether these enforcement expenses are part of the purchase money priority.

To some extent, this question is mitigated by the presence of section 506(b) of the Bankruptcy Code, which provides:

To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.49

Under this provision, an oversecured purchase money lender can recover collection costs or postpetition interest, to the extent of the equity cushion she enjoys in the collateral. Undersecured parties are out of luck, but this simply replicates her predicament under state law, where, if the collateral runs out, section 9-504(1)(a) or a purchase

money priority will no more produce a recovery of collection expenses than would section 506(b).

Now suppose a modest surplus exists. Section 506(b) gives priority to the purchase money lender for collection expenses to the extent of the collateral, even if there exists a junior after-acquired property security interest. If the junior secured party is harmed, the junior secured party is entitled to adequate protection for the loss. That is, the bankruptcy trustee must transfer unencumbered assets to the junior secured party to make up the loss (or pay off the senior secured party so that the junior secured party is unharmed). 50

Suppose, however, that the junior secured party is an after-acquired property secured party, claiming that the collateral costs are not part of the "price" as that word is used in section 9-107(a). This argument, if accepted, implies that the purchase money lender has a first security interest for the purchase money advance and a third security interest for the collection expenses. Should section 506(b) override this state-law priority and associate the collection expenses with the purchase money priority? This seems to be the literal meaning of section 506(b). If so, then perhaps federal law effectively expands the definition of "price" to include collection expenses and postpetition interest.

There is one circumstance under state law in which we still want to know whether collection expenses are part of the purchase money priority. Suppose that the junior after-acquired property lender holds a junior foreclosure sale and finds a buyer. Under section 9-504(4): "When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto." Under this rule, the buyer at the junior foreclosure sale takes subject to senior purchase money security interest, but she takes free of any junior security interest. Now it becomes necessary to know whether the purchase money lender's claim for attorneys' fees and collection costs are part of the senior purchase money priority that survives the sale or part of a junior security interest that gets wiped out. If the latter is true, then the junior secured party holding the sale is entitled to take cash proceeds ahead of the junior security interest for the purchase money lender's collection costs. 51

51. This example disproves Dean McLaughlin's maxim that "the expenses of repossession and attorney's fees, although technically not included in purchase money
2. Future Advances

Dean Gerald McLaughlin aggressively argues that any future advance used to repair or maintain the purchase money collateral should be added to the purchase money collateral, even though such future advances are clearly not "the price" of the purchase money collateral. His argument is that under section 9-207(2) a pledgee in possession of collateral may spend to preserve the collateral and may add the amount spent to the amount of the secured loan. This can be done even in the absence of the debtor's consent. Now if a pledgee were to be a purchase money lender—not an impossibility—nothing in section 9-207(2) specifies that the expense would be entitled to a purchase money priority. This question could only be settled by an interpretation of section 9-107(a)—the very question Dean McLaughlin is trying to answer.

This circularity aside, Dean McLaughlin thinks that section 9-207(2) means that nonpledgees who make similar expenditures can also add these expenses to the secured debt in the absence of agreement—a questionable premise—but he goes on to suggest that these added expenses would be entitled to purchase money priority. According to McLaughlin: "[B]ecause the Code automatically includes these payments in secured debt, these payments should automatically assume the character of the secured debt. If the secured debt is purchase money debt, these payments should become part of that purchase money debt." Unhappily, these remarks are a non sequitur mounted precariously on another non sequitur. A future advance to the debtor is a secured advance only if the security agreement says so. According to section 9-204(3), "[o]bligations covered by a security agreement may include future advances or other value . . . ." Yet McLaughlin suggests that advances used to spruce up collateral are always to be added to the secured claim, whether an agreement provides for this or not. The reason: pledgees may add their own collateral preservation expenses to the secured debt. But there is a difference between pledgees and nonpossessory secured parties. The former are in control of the collateral and spend their own money in aid of the collateral directly. Secured parties out of possession are not in control of the collateral and need the debtor's consent to maintain or repair the collateral. In the absence

---

52. Provided, of course, that the security agreement does not expressly bar this behavior.
54. Id. at 674-75.
of an agreement it is hard to see why the secured party is entitled to assume that the future advance is part of the secured claim over the opposition of the debtor. And even if future advances could be jammed into the secured claim over the opposition of the debtor, it does not follow that these nonconsensual secured advances should have a purchase money priority.

Now it might be said that any lender whose loan increases the value of the debtor's estate should be entitled to priority over the earlier secured parties. The increased value is otherwise a windfall to the earlier secured parties, who contributed nothing to it. Indeed, statutory liens usually add this value and are accorded a supervenient priority over old security interests. In admiralty, the rule of "last in time is first in right" is entirely based on this insight. Although this insight is a good idea, it is not the idea Article 9 follows. Therefore, even if any ordinary advance increases the value of collateral, it by no means follows that the advance, for that reason, is entitled to purchase money priority.

3. Advances in General

As the above discussion indicates, a great many round pegs must be forced into square holes in order to bring incidentals like debt service and collection costs into the concept of purchase money. In fact, the problem stems from a broader conceptual failing of the drafters of the UCC—an assumption that "advances" do not encompass all forms

55. That is, the advance is voluntarily accepted, but their secured status is opposed by the debtor.

56. UCC § 9-310 provides:
When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise. U.C.C. § 9-310. See also id. cmt. 1 (purpose is to "provide that liens securing claims arising from work intended to enhance or preserve the value of the collateral take priority over an earlier security interest even though perfected").

57. The usual justification for maritime liens is that these liens add value to the vessel, which needs to be a floating source of credit as it moves from port to port. This priority scheme always guarantees that the captain may offer the boat as collateral for any new services done. Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty 742-44 (2d ed. 1975).

58. It is invoked by Dean McLaughlin in defense of his extravagant reading of § 9-207. McLaughlin, supra note 16, at 675 (unless a purchase money secured party knows in advance she can advance new funds for repair of collateral, she is less likely to extend purchase money priority in the first place).
of "value." Because the drafters conflated "advances" and "value," several priority rules in the UCC are ambiguous.

This is not the case with the most salient priority rule in the UCC—that between competing nonpurchase money secured parties. Secured parties are governed by the "first to perfect or file" rule. Here priority can be secured without any reference to "attachment" at all. It is sufficient for a secured party to be the first to file, even though filing is not perfecting because some elements of attachment are missing. If the secured party is the first to file, all subsequent advances and other incidentals become part of the senior secured claim.

On the other hand, when a priority rule turns on when an advance is given, an ambiguity arises with respect to elements of value that are not advances. For example, secured parties have priority over lien creditors only for their future advances. According to UCC section 9-301(4):

A person who becomes a lien creditor while a security interest is perfected takes subject to the security interest only to the extent that it secures advances made before he becomes a lien creditor or within 45 days thereafter or made without knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien.59

Suppose, for example, that SP who has advanced $50 claims a senior perfected security interest on collateral worth $80. Thereafter, LC becomes a lien creditor and encumbers the debtor equity.60 Once the judicial lien attaches, SP can make some senior future advances, but it is far from clear that senior collection expenses or debt service are senior, as these are not "advances."

Judge Henry Friendly faced this embarrassment in Dick Warner Cargo Handling Corp. v. Aetna Business Credit, Inc.61 In this case, a judicial lien creditor garnished a surplus general intangible against which a secured party once had a perfected security interest. The debtor's balance owed to this secured party, however, had fallen to zero, so that the general intangible was available to satisfy the claim of the judicial lien creditor. Thereafter, the secured party expended funds resisting the loss of this collateral. It therefore claimed that its collection expenses—incurred after the lien attached—were senior to the judicial lien creditor's claim. The judicial lien creditor responded that

59. U.C.C. § 9-301(4) (emphasis added).
60. See U.C.C. § 9-311.
the collection expenses were not "advances," and section 9-301(4) guaranteed priority only to future advances.

Judge Friendly indicated that any collection expenses related back to the original advance to which they were related. Here he forgot that no outstanding advances existed to which the expenses in question could relate; the secured party simply wanted to keep the lien creditor away from an unencumbered intangible. In any case, Friendly's idea was that a genuinely senior advance sucked in all the incidentals related to it.

Although a strong argument exists that Dick Warner was wrongly decided—that secured parties should not be able to squeeze out judicial lien creditors by running up collection expenses—the Permanent Editorial Board has attempted to intervene on behalf of secured creditors against the general creditors by specifically endorsing the result in Dick Warner. Therefore, if this intervention is to be given effect, purchase money secured parties could be the unintended beneficiaries. If the purchase money advance has a high priority over an after-acquired property security interest, then any interest or related collection expense is simply senior as well, on Judge Friendly's reasoning.

B. Enabling Lenders

The definition of an enabling lender has a flaw in it that no one has yet exploited, but, given the textual fetishism with which section 9-107 is approached, it is only a matter of time before courts consider the meaning of this omission that I am about to present.

According to section 9-107:

A security interest is a "purchase money security interest" to the extent that it is

   . . .

(b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

62. Id. at 135.


64. See PEB COMMENTARY No. 2 SECTION 9-301(4). The Permanent Editorial Board has described § 9-301(4)'s protection of future advances but not other incidentals as "just an accident of draftsmanship . . . ." Id.
Notice that a security interest taken by a certain person is automatically a purchase money security interest just because this person took it. Who is this person? A person who made advances or incurred obligations to enable the debtor to buy or lease the collateral, if "such value" was so used.65

Under this definition, the problem of collection costs is easily solved. Any collection cost incurred by a person who extended purchase money credit is a purchase money security interest, even though the collection cost is not part of the "price" of the item. In this respect, the definition of "enabling lender" is superior to the definition applicable to conditional sellers.

But this one advantage is outweighed by the fantastic breadth of the definition to cover other kinds of security interests. Suppose an ordinary after-acquired property lender competes with other after-acquired property lenders, but has filed later and so is junior. Suppose that this junior secured party then makes a purchase money advance, which allows the debtor to obtain only one item of collateral. All of the security interests on after-acquired property are now "purchase money security interests" under this definition, because they were "taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral . . . ." 88

There can be no question that such a reading exploits a mistake by the drafters. One piece of proof is the deletion from the Official Draft in 1956 of UCC section 9-107(c), which additionally defined a purchase money security interest as one:

taken by a person who for the purpose of enabling the debtor to pay for or acquire rights in or the use of collateral makes advances or incurs an obligation in or the use of collateral even though the value given is not in fact used to pay the price.

This provision was deleted from the 1957 Official Draft because it "extends the purchase money security interest concept too far." 87 Notice that it dispenses with the tracing requirement, if collateral is indeed obtained within days of the advance, or if the advance is given within

65. Cf. Beard, supra note 1, at 454 (arguing that § 9-107(b) permits pooling of different purchase money security interests held by the same lender). What I argue in the text is that nothing in § 9-107(b) prevents the extension of pooling to nonpurchase money collateral as well.
66. U.C.C. § 9-107(b).
ten days after the debtor obtains the collateral. It therefore loosens the connection between the advance and the purchase money collateral and was for this reason repealed. Now if relaxation of the tracing rule was rejected, it is fair to assume that there must be a nexus between the advance, the collateral and the lender making the advance, contrary to the theory just presented, based as it is on the literal words of section 9-107(b).

Few commentators have noticed that section 9-107(b) can be read this abusive way. Gerald McLaughlin writes: "The equipment actually purchased with the advance constitutes the purchase money collateral, and the amount advanced that was 'in fact . . . used' to acquire rights in the equipment is the purchase money debt." In fact, neither of these propositions is consistent with the exact words of section 9-107(b). Read literally, section 9-107(a) states that, so long as a person gives some genuine purchase money, all security interests of that person are purchase money security interests, and all secured claims are purchase money claims. McLaughlin, who does not see that any security interest might be purchase money if taken by a person who made purchase money advances, feels compelled to argue that debt service falls within the concept of "advance," as that word is used in section 9-107(b). He shows considerable discomfort in making this notion work:

Although the word "advance" in section 9-107(b) appears to connote an advance of money, it need not be interpreted so narrowly. The financier could be viewed as having "advanced" the finance charge to the buyer, not in the form of money, but rather in the form of a credit. Even if the "advance" hurdle is surmounted, can this "credit advance" be viewed as having in fact been used to acquire rights in collateral? It is hard to fit the "credit advance" covering the finance charge within this language because the "advance" covering the finance charge is not directly involved in the buyer's acquisition of rights in equipment from the seller."

In the end Dean McLaughlin is reduced to arguing that "[t]he drafters of the Code . . . must have understood that the financier's advance 'so used' would be repaid with a finance charge added to it." As for inci-

69. Id. at 701 (emphasis in original).
70. McLaughlin has two back-up arguments, but neither works very well. First, he notes that § 9-107 refers to purchase money security interests. Under the UCC, "purchase" includes "taking by sale." Id. at 702. According to Dean McLaughlin, "[i]n the context of Article 9, a sale will always be a credit sale, and credit sale necessarily involves a finance charge." Id. Yet Article 9 sometimes does use the word "purchase" to
dental charges such as insurance,\textsuperscript{71} McLaughlin wisely does not even try to argue that section 9-107(b) can be read to cover these items. Instead, he suggests that "the financier should rely on the Code's general principles and policies embodied in section 1-102"—thin gruel indeed for secured creditors starved for arguments. McLaughlin continues:

There is no rational basis for treating these incidental costs of credit differently from the finance charge. They generally become part of the secured debt when the debtor does not pay them directly. Common sense and general business understanding argue for their inclusion in section 9-107(b) purchase money debt. Thus, section 9-107(b) can be interpreted to include the finance charge and insurance and filing costs in purchase money debt.\textsuperscript{72}

These matters are somewhat overstated by Dean McLaughlin. Suppose a bankruptcy judge is deeply committed to a debtor's fresh start in bankruptcy and therefore wants to read Bankruptcy Code section 522(f)(2) as broadly as possible. It then becomes "rational"—contrary to what Dean McLaughlin asserts—to treat the security interest for the purchase money advance and the security interest for the incidentals differently. The argument is better, however, when the contest is between two competing secured parties. In such a case, it ill behooves an after-acquired property lender to claim that the incidentals should not bear the superpriority when the after-acquired property lender is just as interested in establishing her own security interest for the same incidentals as superior.

Also, the self-evidence of including the incidentals into purchase money priority breaks down with regard to attorneys' fees. Suppose a 

---

\textsuperscript{71}. Id. at 701-02. McLaughlin also sees great difficulties with renegotiated higher interest rates as a result of a loan workout, but concludes on the familiar basis of nontextual "logic" that these renegotiated interest charges should be added to purchase money priority, the same as the original interest charge. \textit{Id.} at 705.

\textsuperscript{72}. \textit{Id.} at 703.
purchase money lender spends lavishly to defend purchase money priority, hoping to add this expense into the purchase money debt, which would then have priority over the competing after-acquired property lender. Or suppose the secured party wishes to add these expenses in defending against the debtor’s section 522(f)(2) avoidance actions. These luxuries come entirely at the expense of the competing litigants. Here it is not so clear that these parties must indulge the purchase money lender in state-of-the-art legal work with regard to the self-interest of the lender.73

Thus, to summarize, if courts insist that section 9-107(b) must be read literally—that any security interest taken by someone who advances some purchase money is a purchase money security interest—then it is easy to see how debt service, incidentals and collection expenses can be brought under purchase money priority. On the other hand, if the court has decided not to read the statute literally, the court is methodologically free to add whatever else it thinks common sense dictates. Therefore, it should be open for a court to adopt Dean McLaughlin’s admittedly sensible conclusions, since plain meaning of the statute cannot govern in purchase money cases.

Professor Mark Wessman in part sees that section 9-107(b) does not tie purchase money priority to the actual purchase money advance, but he uses this insight to make a much narrower argument than what is presented here. Noticing that “its price” appears in section 9-107(a) but not in section 9-107(b), Wessman suggests that enabling lender might have a better claim for cross-collateralization clauses than do conditional sellers. Nevertheless he would still require that the priority be related to actual purchase money advances,74 even though the language of section 9-107(b) does not quite require this. Indeed, section 9-107(b) only requires that a person who has given a purchase money advance has taken a security interest; any security interest taken by such a person would be a purchase money security interest, if the statute is read stringently. The failure to realize this has led Wessman to worry that debt service might be included in the “price” of a condi-

73. Dean McLaughlin, a faithful friend of the purchase money lender, thinks that collection expenses should be freely added to the purchase money priority because otherwise purchase money lenders will be less likely to extend purchase money credit in the first place. Id. at 677. This can never constitute a sufficient argument, without some temperance, because any advantage you can think of will likewise encourage purchase money lending. For instance, the rule that purchase money lenders should be able to rob a bank in case of default would encourage purchase money lending, too, but it is rejected because the costs of this rule outweigh its admitted benefits. To assert the benefits of a rule without fathoming its costs is always incomplete.

74. Wessman, supra note 2, at 1317.
tional seller, but not the purchase money advance of an enabling lender.75

These thoughts commit the sin of taking seriously the exact words of Article 9. Undoubtedly the drafters of Article 9 had no idea that future readers of section 9-107 would discern differences in the definitions of purchase money priority between conditional sellers and enabling lenders.76 But, as Professor Wessman points out, if the definitions are deemed to be the same, the enabling lender becomes vulnerable to losses because of cross-collateralization, whereas a literal reading of section 9-107(b) would allow the enabling lender to escape this.77

If non-advance value is integrated with difficulty into section 9-107(b)—unless the statute is read literally to vindicate any security interest owned by someone who made a purchase money advance—advances used for incidental purposes related to the equipment might have an easier time qualifying as purchase money advances, because any advance that “enables” the debtor to obtain equipment qualifies as a purchase money advance. Through the miracle of remote or distant cause, a great many advances might qualify. Dean McLaughlin, for example, fears that advances to cover general overhead expenses might be purchase money, because they “enabled” the debtor to be in the position of utilizing the equipment actually bought with a purchase money advance. Or—a little less ambitiously—he fears that an advance used to prepare a factory for receipt of equipment might be an enabling advance. “The scope of section 9-107(b) is not so sweeping,” he assures us,78 but nothing in the text of section 9-107(b) authorizes McLaughlin’s confidence that scope’s broom is so ineffectual.

IV. DUAL STATUS OR TRANSFORMATION?

The single biggest issue in the definition of purchase money is whether the purchase money secured party is permitted to have several security interests on the purchase money collateral, some of which are not purchase money security interests. Some courts would say that the presence of a nonpurchase money security interest transforms all the

75. Id. at 1318.
76. Id. at 1322.
77. Id. at 1318. Wessman also adds that obliterating the difference between enabling loans and conditional sale also eases the ability of the enabling lender to claim that debt service is part of the purchase money priority, but as we have argued above, the enabling lender can already argue that debt service has a purchase money priority, because any security interest taken by an enabling lender is a purchase money security interest.
78. McLaughlin, supra note 16, at 705.
security interests of the lender into nonpurchase money security interests, even though, through sound allocation methods, a purely purchase money security interest could be identified.

There are two kinds of mistakes that might transform a purchase money security interest into an ordinary one: (1) If the security agreement provides that future purchases secure the earlier purchase money loan, so that any given purchase money claim can be enforced against nonpurchase money collateral, then all of the sequential purchase money security interests are deemed nonpurchase money. These are called "collateral add-on clauses." (2) If the security agreement provides that purchase money collateral secures future advances as well as the original purchase money advance, the security interest has been proclaimed not purchase money. These are called "debt add-on clauses." The most aggressive view of the transformation rule is that it applies whenever a mere contractual future advance clause exists, even if no future advance has been made. 79

These two clauses are said to "transform" the purchase money security interest into the nonpurchase money variety, and so courts refer to the loss of purchase money status as the "transformation rule." 80

The transformation rule, as applied in bankruptcy cases, does further the cause of the debtor's fresh start, both under section 522(f)(2) and section 1110(a), but, according to Professor Robert Lloyd:

the transformation rule is at best a meat-axe approach to furthering these purposes . . . . If we apply the transformation rule, the clever secured creditor may well be able to document around it, even while engaging in the most abusive enterprises. On the other hand, the unwary seller who through generosity or self-interest adds some delinquent interest to principal loses his purchase money security interest. The debtor who dealt with him gets the collateral without paying for it, thus thwarting section 522(f)'s apparent purpose of protecting the purchase money lender. 81

On the other hand, the transformation rule does discourage cross-collateralization clauses, which prevent the debtor from ever owning any-


81. Lloyd, supra note 3, at 84-85.
thing free and clear of the claims of the secured creditors. As a major purpose of section 522(f)(2) is based on the idea that security interests in household goods are in terrorem instruments, rather than, genuine security, the transformation rule would at least further this important purpose. For this reason, some have suggested that the transformation rule might persist in consumer cases, but should definitely be rejected in purely commercial cases, such as those involving priority to inventory.

Another virtue cited for the transformation rule is that it does not implicate a bankruptcy court in the tedious task of allocating payments between the purchase money and nonpurchase money parts of the security interest. Also, some courts think that, because purchase money status gives special privileges to the secured party, it is fair that

82. Such a cross-collateralization clause was the source of a classic statement of the doctrine of unconscionability in contract. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (Wright, J.). Many state statutes actually endorse such a pro-creditor system of allocating payments in legislation, with the effect that the creditor's security interests are prolonged in life until the total debt is paid; at no time does any single item become disencumbered until everything is disencumbered. Michigan Note, supra note 16, at 865-68, 870-71.

83. According to the legislative history:

Frequently, creditors lending money to a consumer debtor take a security interest in all of the debtor's belongings, and obtain a waiver by the debtor of his exemptions. In most of these cases, the debtor is unaware of the consequences of the forms he signs. The creditor's experience provides him with a substantial advantage. If the debtor encounters financial difficulty, creditors often use threats of repossession of all of the debtor's household goods as a means of obtaining payment.

In fact, were the creditor to carry through on his threat and foreclose on the property, he would receive little, for household goods have little resale value. They are far more valuable to the creditor in the debtor's hands, for they provide a credible basis for the threat, because the replacement costs of the goods are generally high. Thus, creditors rarely repossess, and debtors, ignorant of the creditors' true intentions, are coerced into payments they simply cannot afford to make.

The exemption provision allows the debtor, after bankruptcy has been filed, and creditor collection techniques have been stayed, to undo the consequences of a contract of adhesion, signed in ignorance, by permitting the invalidation of nonpurchase money security interests in household goods. Such security interests have too often been used by over-reaching creditors. The bill eliminates any unfair advantage creditors have.


the burden on the secured party is extremely high in showing that the security interest is purely purchase money.86

In contrast, some courts are willing to save purchase money status by invoking the "dual status" rule. Under this rule, a court allocates between nonpurchase money and purchase money status. On this view, the secured party owns two different claims, one of which is purchase money and the other not. In support of the "dual status" rule, its advocates are able to point to the phrase "to the extent" in section 9-107. This language is said to indicate a legislative intent that a single loan might have two natures—one a purchase money nature and the other not.87

If a dual status rule is followed, then it is necessary to allocate past repayments to either the purchase money or the nonpurchase money side of the obligation.88 When a security agreement provides an allocation formula, courts are willing to abide by it, and indeed have even been persuaded to institute the dual status rule rather than the transformation rule when such allocations are contractually provided for.88 Or, some courts have found in state retail legislation formulas for allocating payments upon which they base a dual-status rule,89 though other courts have refused to use such legislation to help purchase money secured parties.90 On the other hand, when no such allocation is described in the security agreement, courts have chosen the transformation rule and proclaimed the purchase money status to have ended.91 Yet even here, some courts have supplied a tracing rule in aid of

87. Pristas v. Landaus of Plymouth, Inc. (In re Pristas), 742 F.2d 797, 801 (3d Cir. 1984) (Weis, J.) ("a purchase-money security interest in a quantity of goods can remain such 'to the extent' it secures the price of that item, even though it may also secure the payment of other articles.") (citations omitted); McLaughlin, supra note 16, at 679.
88. See McLaughlin, supra note 16, at 681.
the purchase money secured party, when the contract or legislation is unavailable.93

According to Professor Robert Lloyd's powerful and persuasive history of the transformation rule, it simply did not exist prior to the enactment of the UCC. Rather, precode law uniformly instituted the dual status rule with regard to both debt add-on and collateral add-on.94 The birth of the transformation rule is traced not so very far back to In re Simpson.95 This bankruptcy referee's decision was later relied upon by the Fifth Circuit in Roberts Furniture Co v. Pierce (In re Manuel).96 After Manuel, the transformation rule became relatively well established, though often rejected in favor of the dual status rule.

In Simpson, referee David E. Nims thought the UCC dictated the transformation rule.97 According to section 9-107 Comment 2:

(Kelley, J.); Mulcahy v. Indianapolis Morris Plan Corp. (In re Mulcahy), 3 B.R. 454, 457 (Bankr. S.D. Ind. 1980) (Bayt, J.) (where secured party did not put security agreement into evidence, court presumed no allocation formula existed).

In Norrell v. W.S. Badcock Corp. (In re Norrell), 426 F. Supp. 435 (M.D. Ga. 1977) (Owen, J.), state retail sales legislation existed to require that payments from the debtor be first used to disencumber the first item bought on credit. But the contract had no apportionment formula, and so the court proclaimed the purchase money security interest unperfected, because the secured party had never filed a financing statement. See also Slay v. Pioneer Credit Co. (In re Slay), 8 B.R. 355 (Bankr. E.D. Tenn. 1980) (Kelley, J.) (because no repayment had occurred at all, it was possible to allocate between purchase money and nonpurchase money advances for purposes of dual status rule).


94. Lloyd, supra note 3, at 25-38. Lloyd also shows that the influential New York State Law Revision Commission, which almost ignored the UCC's definition of purchase money priority, nevertheless took time to cite a case that held for the dual status rule. N.Y. STATE LAW REVISION COMM'N 1955 REPORT 2062 (1955), citing Chase Nat. Bank v. Sweezy, 281 N.Y.S. 487 (1931) (Callahan, J.), aff'd, 236 A.D. 835 (N.Y. App. Div. 1932), aff'd, 185 N.E. 803 (N.Y. 1933). According to Lloyd, this implies that this commission assumed the dual status rule would continue under the UCC.


96. 507 F.2d 990 (5th Cir. 1975).

97. The Simpson court went so far as to suggest that the mere presence of a future advance clause transformed the purchase money security interest into something else, though, in the case, advances were in fact made. 4 U.C.C. Rep. Serv. at 247; compare Kawasho Int'l (U.S.A.) Inc. v. Alper (In re Mid-Atlantic Flange Co.), 26 U.C.C. Rep. Serv. (Callaghan) 203 (E.D. Pa. 1979) (mere presence of such a clause does not destroy purchase money status if no advances were given). It might be noted, however, that the secured party survived unscathed, because it had repossessed the collateral prior to bankruptcy. This repossession constituted perfection. And, as perfection occurred at a time when the secured party had no reason to believe the transfer was preferential, see Bankruptcy Act § 60(b), the security interest could not be avoided. 4 U.C.C. Rep. Serv.
When a purchase money interest is claimed by a secured party who is not a seller, he must of course have given present consideration. This section therefore provides that the purchase money party must be one who gives value "by making advances or incurring an obligation": the quoted language excludes from the purchase money category any security interest taken as security for or in satisfaction of a preexisting claim or antecedent debt.

Now Comment 2 discourages antecedent debt from qualifying for purchase money priority; as Nims could see no difference between debt add-on and antecedent debt, he proclaimed that the entire security interest transformed into a nonpurchase money variety.

Acknowledging "to the extent" in the preamble to section 9-107 pointed to the dual status rule, Nims seemed to think that Comment 2 also proved that section 9-107 could not be read literally. Some have taken this remark to be a non sequitur. But it must be admitted by now that section 9-107 simply cannot be read literally. A literal reading would mean that any security interest taken by an enabling lender—even on nonpurchase money collateral—is a purchase money security interest. Or that purchase money priority cannot include debt service or collection costs. Therefore, even if Comment 2 does not prove that section 9-107 cannot be read literally, the point is nevertheless one that even opponents of the transformation rule must concede.

Professor Lloyd scores some other effective points against Simpson. Lloyd notes that the drafters of the UCC would not have instituted a change so important as the repeal of the dual status rule.
without disclosing it specifically.\textsuperscript{103} Yet even here it must be conceded that incidents do exist where changes were allegedly instituted without specific acknowledgement. The adoption of a race priority instead of a race-notice priority would be one example.\textsuperscript{104} In Simpson, Referee Nims also cited a treatise for the proposition that a dual status purchase money security interest was impossible, though elsewhere in the treatise, precisely this proposition is defended.\textsuperscript{105} And finally, Nims took precode law to be in accord with the transformation rule, citing as the sole authority for this erroneous proposition an unpublished opinion from 1961 from a Michigan federal judge.\textsuperscript{106}

Nevertheless, in spite of these analytical weaknesses, Judge Phillip Nichols, in \textit{Roberts Furniture Co. v. Pierce (In re Manuel)},\textsuperscript{107} praised Simpson as "well thought out, and documented with references to the Official Code Comment \#2, and to secondary authority." He therefore happily invested the prestige of the Fifth Circuit in this rule.\textsuperscript{108}

Another early treatment of the transformation rule is \textit{Goodyear Tire & Rubber Co. v. Staley (In re Staley)}.\textsuperscript{109} In this case, a conditional seller sold a stereo and then a freezer on credit subject to a cross-collateralization clause: This clause specifically allocated payments to the first item bought. The bankruptcy court ruled that the security interest on the freezer was perfected, but the security interest on the stereo was not. Not satisfied with the freezer, the secured party (Goodyear) appealed with regard to the stereo. On appeal, Judge Wilbur Owen ruled that the security interest in the stereo was immune from the transformation rule:

\begin{quote}
Goodyear's security interest in the stereo by the explicit terms of the agreement was to terminate as soon as the purchase price of the stereo was paid. Because the collateral thus secured only debt representing its price, the security agreement
\end{quote}

\begin{enumerate}
\item \textsuperscript{103} Lloyd, supra note 3, at 50.
\item \textsuperscript{104} See David Gray Carlson, \textit{Rationality, Accident and Priority Under Article 9 of the Uniform Commercial Code}, 70 Minn. L. Rev. 207 (1986) (arguing that the race priority generates from confusion about how to deal with future advances, not from a desire to benefit bad faith secured parties, and that the latter conclusion is a later gloss by law professors).
\item \textsuperscript{106} See Lloyd, supra note 3, at 51.
\item \textsuperscript{107} 507 F.2d 990 (5th Cir. 1975).
\item \textsuperscript{108} "With the weight of the Fifth Circuit behind it," Professor Lloyd writes, the transformation rule gained momentum, and other courts relied on it uncritically." Lloyd, supra note 3, at 52.
\item \textsuperscript{109} 426 F. Supp. 437 (M.D. Ga. 1977).
\end{enumerate}
did create a purchase money security interest which, being in a consumer good, did not need to be filed in order to be perfected.\footnote{110 \textit{Id.} at 438.}

Now this doesn't follow in the slightest. Suppose the stereo and the freezer each cost $1,000 and Staley defaulted straight out. Suppose that the freezer brought only $800 in a foreclosure sale. The lender could look to the stereo for the $200 deficit from the freezer. Because this is so, the stereo did secure both a purchase money advance and a nonpurchase money advance; the same was true for the freezer. That payments were allocated first to the stereo is consistent with the nonexistence of cross-collateralization, but, as the contract specifically provided for it,\footnote{111 The security agreement read: "I hereby grant to Goodyear a security interest in each item of merchandise purchased or hereafter purchased under this Agreement, and Goodyear shall retain such security interest in each item of merchandise until it is paid for in full." \textit{Id.} at 437.} allocation could not cancel out the cross-collateralization that might be fatal to purchase money status.\footnote{112 Professor Lloyd thinks that \textit{Staley} is consistent with \textit{Simpson} and \textit{Manuel}: Even though the security agreement stated that the first item purchased secured the purchase price of the items purchased later, the fact that the purchaser could obtain the release of the first item by paying its purchase price meant that as a practical matter the first item secured only its purchase price. Lloyd, \textit{supra} note 3, at 53.}

To this should be compared \textit{Norrell v. W.S. Badcock Corp. (In re Norrell)},\footnote{113 426 F. Supp. 435 (M.D. Ga. 1977).} also decided by Judge Owen. In \textit{Norrell}, no contractual allocation existed, but a statute required that payments first be allocated to the first item purchased. Owen thought that a \textit{contractual} allocation cancels an otherwise fatal cross-collateralization clause but a statutory allocation could have no such effect. Hence, he applied the transformation rule and destroyed the purchase money priority.

Since these early cases, the trend seems to be against the transformation rule and in favor of the dual status rule.\footnote{114 An important case at the appellate level is \textit{Pristas v. Landaus of Plymouth, Inc. (In re Pristas)}, 742 F.2d 797 (3d Cir. 1984) (Weis, J.), favoring dual status.} This trend has most recently been represented in the monumental Eastern Airlines bankruptcy. In \textit{First National Bank v. Shugrue (In re Ionosphere Clubs, Inc.)},\footnote{115 123 B.R. 166 (S.D.N.Y. 1991) (Sweet, J.), rev'd 112 B.R. 78 (Bankr. S.D.N.Y. 1990) (Lifland, J.).} Eastern Airlines had signed a comprehensive indenture in 1963, to govern various borrowings that Eastern undertook. Under this indenture, lenders pooled their collateral with other lenders. Some of the loans pooled under the indenture enabled Eastern to acquire new
equipment. Others were nonpurchase money loans. The right to enforce any given security interest was vested in an indenture trustee. Thus, the indenture trustee lender had the equivalent of a collateral add-on clause.\textsuperscript{116} And, since new lenders could join the pool, the indenture trustee also had a debt add-on right with respect to any given plane (though loans were supplied by individual beneficiaries of the trust). In case of a foreclosure, the beneficiaries would divide up the cash equally.\textsuperscript{117}

In Eastern's bankruptcy, Eastern moved for a declaration that neither the indenture trustee nor any given lender had a right to seize planes under authority of section 1110(a). Judge Lifland ruled in Eastern's favor for three reasons. First, the purchase money lenders had agreed to be pari passu with other nonpurchase money lenders under the indenture.\textsuperscript{118} He concluded that this meant that the security interest was on the collateral pool as a whole and hence not a purchase money security interest at all.\textsuperscript{119}

On the basis of finding but one claim and one creditor, Judge Lifland rejected the lenders' theory that the purchase money lenders had partially assigned their priority to the nonpurchase money lenders (presumably in exchange for partial assignments of nonpurchase money claims back to the purchase money lenders). A purchase money loan does not ordinarily lose its purchase money status merely because it is sold by the original lender to a third party. If not, then the partial assignee of the purchase money loan might still enjoy purchase money status, even while it held a nonpurchase money status at the same time. The assignment theory would have allowed the purchase money lenders to claim that they, together with the nonpurchase money lenders, could join to assert the pre-assignment purchase money status. But, according to Lifland, none of the lenders had direct security interests in planes at all. Only the trustee did, for the benefit of all lenders

\textsuperscript{116} 123 B.R. at 169 ("All of the loans issued pursuant to the Indenture are secured by all of the property in the Collateral Pool, so that if Eastern defaults on any one of the loans . . . [the trustee] may take possession of any or all of the property in the Collateral Pool . . . .").

\textsuperscript{117} Id.

\textsuperscript{118} In re Ionosphere Clubs, 112 B.R. at 83.

\textsuperscript{119} Id.
together.\textsuperscript{120} Therefore, Lifland thought that nothing was assigned between the beneficiary lenders.\textsuperscript{121}

Although Lifland thought that the lenders had no purchase money security interest because of collateral add-ons, he also ruled in the alternative that the purchase money status was forfeit because of the lenders' debt add-on clauses.

In so far as this theory rested on a debt add-on clause, Judge Lifland once again asserted that there was only one lender—the indenture trustee—not several lenders. That several lenders claim the same purchase money collateral could not deprive them of superpriority status if some separate lender advances a nonpurchase money loan. The whole point of this status is to provide seniority over competing lenders. Hence, the "single lender" metaphysics was necessary to invoke the transformation rule from the debt side. But if one recognizes that the trustee represents diverse lenders, and if one focuses on this diversity, the consumer cases would be inapplicable.

The problem with Judge Lifland's assertory metaphysics (that the whole is essential and its constituent units meaningless) is that one could, with equal dignity, assert that the whole is meaningless—it is rather an aggregate of units.\textsuperscript{122} Since the purchase money lenders contributed units of purchase money collateral, they are purchase money lenders for those units.

And so, whereas Judge Lifland saw a single pool of collateral and a single lender, Judge Sweet, on appeal, saw an aggregate of individual planes and a group of individual lenders.\textsuperscript{123} Thus, purchase money security interests did exist on certain of the planes, even if the security interest on other planes were nonpurchase money security interests. And to account for the fact that these lenders had to share their superpriority with nonpurchase money lenders, Judge Sweet compared this

\textsuperscript{120.} Id. at 86-87. See U.C.C. § 9-105(m) ("When the holders of obligations issued under an indenture of trust . . . are represented by a trustee or other person, the representative is the secured party.").

\textsuperscript{121.} 112 B.R. at 87. The lenders had tried to argue that the indenture trustee was like a "hypothetical assignee," who would inherit the purchase money status of the assignor. Judge Lifland rejected this analogy for two reasons. First, the trustee was not an assignee. Second, "it is undisputed that [the indenture trustee] is not entitled to § 1110 treatment." Id. Both of these dismissals are too quick. If the trustee took over responsibility for the lender's funds, the trustee might be a purchase money lender directly on behalf of all the pari passu lenders. And if it is "undisputed" that the trustee has no rights under Bankruptcy Code § 1110(a), it is only true if the trustee is not a purchase money lender. The hypothetical assignment argument, no matter how clumsily phrased, might have worked to give the trustee those rights.

\textsuperscript{122.} R. UNGER, KNOWLEDGE AND POLITICS 46-48 (1975).

sharing of priority with the partial assignment of the purchase money secured claim to the nonpurchase money lenders. Since an assignee of a purchase money claim inherited the purchase money priority the assignor had, the status could still be asserted by all the lenders together.

With regard to the collateral add-on clause, Judge Sweet also thought that UCC section 9-107 precluded the transformation rule in favor of the dual status rule. For this, Sweet relied on the by-now-familiar “to the extent” language in section 9-107. But, warned Judge Sweet, there must be some rational means of identifying payments to the two different loans. Since, in the Eastern case, the loans came from separate lenders, allocation of payments was easy. Hence, Sweet, in reversing Judge Lifland, brought the case in line with the apparent trend in favor of the dual status rule.

A. The Transformation Rule and Inventory

The transformation rule, if applied to inventory, would virtually end purchase money priority for inventory lenders. That is because, whenever more than one item of inventory is bought, each item secures the price of every other item. Unless the parties separately match purchase price to each individual item of inventory, inventory lending is inherently “debt add-on.” Absent a hurculean accounting system that matches every unit of price with every item of collateral, the transformation rule destroys the purchase money priority for inventory lenders unless two things are true: (a) the UCC demands the dual status rule, and (b) the UCC demands tracing rules that match up portions of the debt with units of inventory and, later, payment to the secured party with the payment of the price of specific items of inventory.

124. Sweet cited Billings v. Avco Colo. Indus. Bank (In re Billings), 838 F.2d 405 (10th Cir. 1988) (Logan, J.), a case holding that a refinanced purchase money security interest still had purchase money status, for purposes of § 522(f)(2). But the case also involved an assignment of a purchase money security interest before it was refinanced, so that the case was indeed good authority for the proposition that purchase money status survives assignment.


126. In re Ionosphere Clubs, 123 B.R. at 172-73.

127. But see Paul M. Shupack, Defining the Collateral 29 IDAHO L. REV. 785-791 (1993) (arguing that § 9-107 establishes an “entity” theory that allows all purchase money collateral to be pooled together).
Professor Wessman agrees with this observation in a series of interesting hypotheticals. But the problem is much more thoroughgoing than he realizes. No security interest in inventory can be a purchase money security interest if inventory has the barest plurality, unless the UCC embodies a dual status rule with liberal tracing rules.

Wessman gives the following example that purports to raise allocation problems. He posits an enabling lender financing two separate purchases of widgets. According to the security agreement, the enabling lender has both collateral add-on and debt add-on rights. A widget costs $1 wholesale. The debtor buys 60,000 widgets per batch, so that the debtor has bought 120,000 of widgets on $120,000 worth of credit in total. The debtor then sells $20,000 of widgets and pays the enabling lender $20,000. The enabling lender would like to claim a purchase money priority as to the remaining $100,000 in widgets.128 If the transformation rule is in effect, the enabling lender has forfeited purchase money priority.

This would not occur, Wessman argues, if there had been only one advance of $120,000 and one purchase of 120,000 widgets.129 Because the transformation rule clearly does not apply here, “[i]t is unjust,” Wessman suggests, “that such a slight difference in the form of the transaction should make such a dramatic difference in the collectibility of its debt.”130 In fact, it is possible to claim that both transactions are subject to the transformation rule, if one assumes that each individual widget is separate from every other. If Wessman thinks the second one escapes, it is by virtue of insisting that each batch of widgets is the “thing.”

Suppose for example that the debtor loses a single widget but still owes $1 to the enabling lender for this item. Is it not the case that the other 119,999 widgets are security for the debt associated with the lost widget? If so, then the 119,999 widgets secure both “its price” and the price of every other widget. Because this is so, the enabling lender has both a debt add-on and a collateral add-on right, and the single batch is just as much subject to the transformation rule as was the example in which the widgets were purchased in two installments.

The only way Wessman can avoid this conclusion is by asserting that each batch of widgets is a separate thing. Widgets themselves are deprived of their individuality; their identity is communistically absorbed into that of the batch. This is very close to the discredited “entity” theory of inventory, where all inventory taken together is “the

128. Wessman, supra note 2, at 1319.
129. Id.
130. Id.
thing." On the entity theory, Wessman’s two batches are a single thing and therefore no transformation rule can be applied to this united thing either.

To conclude, then, the “two-batch” example succumbs to the transformation rule because each batch is a separate thing. The single batch survived because no two “things” cross-collateralized each other. Yet if each widget is accorded individuality, then both examples become fodder for the transformation rule.

Wessman tries a separate argument—“its price” is meaningless in inventory cases. The idea is to show that associating any “thing” with “its price” depends on nonfalsifiable leaps of faith. Under the tenets of logical positivism, this dependence on faith makes these allocations "meaningless." Since “its price” is meaningless, it can be ignored in interpreting section 9-107. This erasure of “its price” from section 9-107 is one that Wessman does not endorse, because logical positivism is an unfashionable philosophy we may safely ignore.

To prove this, Wessman asks us to assume that the enabling lender has made a single advance of $60,000, and the debtor has used this advance to buy $60,000 of widgets. The debtor sells $20,000 of widgets and later pays $20,000 to the enabling lender. According to Wessman, it would be “laughable” for a competing after-acquired property lender to argue that the $20,000 payment to the enabling lender went to pay the “price” of widgets not yet sold. If, in spite of its laughability, this proposition were true, these unsold widgets are disencumbered and are available to the after-acquired property lender. Meanwhile, the widgets actually sold were disencumbered by section 9-307(1), and the enabling lender simply lost this collateral.

Such an argument, Wessman writes, is completely untenable:

There is no rational basis for dividing the original 60,000 dollar debt into segments, sorting the widgets into sub-piles, assigning a debt segment to each sub-pile and forcing [the debtor] to guess which sub-pile will be sold first or to which debt segment to apply the initial payment. Clearly, as of February 15, [the enabling lender] has a purchase money security interest in all 40,000 widgets remaining in [the debtor’s] inventory.131

First, it might be pointed out that if the $20,000 paid to the enabling lender were the cash proceeds of the widgets actually sold, the allocation that Wessman pronounces to be “clear” would indeed be so. In the case of cash proceeds, no act of allocation takes place at all. Rather,

131. Id. at 1320.
the cash proceeds are directly connected with the sold inventory and cannot possibly be allocated to the unsold inventory. But Wessman seems to have in mind the payment of unencumbered dollars, not cash proceeds. In such a case, allocation is necessary. Yet any allocation—even the one Wessman praises as "clear"—is a metaphysical assumption that is by no means clear or self-evident.

Indeed, there are legal arguments against the allocation that Wessman says is clear. Under the law of payment, the debtor has a right to state what a payment means. For example, if the debtor owes a creditor on claim A and claim B, the debtor has power to allocate any given payment to one or the other claim. Therefore, in the absence of any contractual agreement or governing legislation, the debtor might have said, "This payment of $20,000 relates to inventory not yet sold." Under the law of payment, the creditor would be bound by this.

If the debtor is silent, then the law of payment says that the creditor may allocate the payments as she sees fit. Under this view, the creditor has an incentive to proclaim that the payment relates to the widgets already sold, thereby guaranteeing that the unsold widgets remain as security for the debtor's outstanding obligation to pay $40,000. If neither side had an intent as to the meaning of the payment, then we must look to the law for a "gap filler" to supply this missing intent. A popular gap-filler in a bankruptcy context does indeed support the result that Wessman has proclaimed as "clear."132

Yet, in this exercise, we still divided the thing into sub-things—the pile into sub-piles. This subdivision of the entity is inevitable and must be done. Hence, Wessman is wrong that there is no "rational basis" to subdivide the pile. Subdivision there must be, and the only question is: "Whose ox shall we gore as we subdivide the pile of widgets?" Therefore, subdividing the pile is rationally necessary, though the means by which the subdivision occurs is a political matter. As the law now stands, it is open for the parties to contract for any allocation they want. And if there is no contract, the debtor has the superior power—and the economic incentive—to do just the opposite of what Wessman thinks is the only answer. This is so at least when payment is by means of unencumbered dollars.

132. In Barash v. Public Fin. Corp., 658 F.2d 504 (7th Cir. 1982) (Jameson, J.), the court reasoned that payments to an undersecured creditor are to be applied first to the unsecured portion of the undersecured claim, thereby maximizing the amount of collateral for the secured party (but also making any such payment to the secured party preferential). See also Gray v. A.I. Credit Corp. (In re Paris Indus. Corp.), 130 B.R. 1, 3 (Bankr. D. Me. 1991) (Votolato, J.).
From this assumption that the payment of unencumbered dollars must necessarily be allocated to the widgets actually sold, Wessman then argues that these principles must hold even if the debtor bought the 60,000 widgets in several batches, not just one. Yet this does not follow, because the single-batch assumptions were never proven in the first place.

Wessman concludes by invoking the bad reputation of logical positivism to defeat his own argument:

In its present form, however, [the enabling lender’s] argument goes too far. In particular, it depends upon the premise that, if there is no empirical basis (e.g., accounting entries) for separating purported purchase money debt into segments corresponding to the “price” of each item of collateral, it is meaningless to speak of such segments or “prices.” This sounds a great deal like logical positivism, which, in its extreme form, identified the meaning of a sentence with the set of empirical propositions which would verify or refute it. Logical positivism is now decidedly out of favor . . . . It is therefore unlikely that [the enabling lender] may dismiss the question whether purchase money collateral secures more than “its price” as mere gibberish.\textsuperscript{133}

What Wessman seems to be saying here is that there is nothing “natural” or “clear” about any given allocation rule. Rather, the allocations upon which the purchase money priority depends are deeply political and moral judgments; this doesn’t make them meaningless. The winners and losers of litigation certainly don’t find them so. These leaps of faith are made by all parties in this dispute. In the end, the choice of a transformation rule or a dual status rule, or the allocations needed to make the latter work, are inevitably political decisions—“questions for the legislature,” in positivist prose.

B. State or Federal Law?

One thing that is rarely made apparent in the cases interpreting section 522(f)(2) is whether the courts are following the state law of purchase money status or whether they are following a federal rule.\textsuperscript{134}

\textsuperscript{133} Wessman, \textit{supra} note 2, at 1320-21 (footnotes omitted).

\textsuperscript{134} See Billings v. Avco Colo. Indus. Bank (\textit{In re Billings}), 838 F.2d 405, 406 (10th Cir. 1988) (Logan, J.) (transformation rule said to be matter for state law in a refinancing case); Fickey v. Bank of Lafayette (\textit{In re Fickey}), 23 B.R. 586, 588 (Bankr. E.D. Tenn. 1982) (Kelley, J.) (Georgia law governs transformation rule, “[t]o the extent state law is relevant.”).
If the former is true, it is open for local legislators to change the content of bankruptcy law by openly adopting either the transformation rule or the dual status rule.

Some cases are surely pure state law questions. For instance, in the notorious Southeast Bank v. Borg-Warner Acceptance Corp, the court used the transformation rule to deny a purchase money secured party its priority over an after-acquired property secured party. This decision, a "diversity" case, must be a matter for state law.

Similarly, if the transformation rule is applied to a security interest in consumer goods, where the secured party relies upon automatic perfection, the transformation renders the purchase money security interest unperfected and hence vulnerable to the bankruptcy trustee's strong arm power or voidable preference power. Each of these powers depends upon the state-law priority between a judicial lien and an unperfected security interest. Therefore, the transformation rule is a state law question; no special federal policy is implicated. The classic statement of the transformation rule occurred in a voidable preference context in Roberts Furniture Co. v. Pierce (In re Manuel). In this case, the secured party had not filed a financing statement, which was fine, if the secured party were advancing purchase money to a con-

135. 760 F.2d 1240 (11th Cir. 1985) (per curiam).
136. This case is usually excoriated in strong terms. See Beard, supra note 1, passim.
138. Voidable preference theory depends on the priority of judicial liens through § 547(e). This is purely a timing rule to determine when a security interest is deemed transferred from the debtor to the secured party. According to § 547(e)(1)(B): "a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee." Meanwhile, according to § 547(e)(2), a transfer is deemed made:

(A) at the time such transfer takes effect between the transferor and the transferee [i.e., when it attaches], if such transfer is perfected at, or within 10 days after, such time;

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of—

(i) the commencement of the case; or

(ii) 10 days after such transfer takes effect between the transferor and the transferee.

11 U.S.C. § 547(e)(2) (1988). Putting these rules together, a security interest that is never perfected under Article 9 will be deemed transferred just before the bankruptcy petition, pursuant to § 547(e)(2)(C)(i).
139. 507 F.2d 990 (5th Cir. 1975) (Nichols, J.).
But the lender had both a debt add-on and a collateral add-on right. It made subsequent purchase money loans to the debtor, and each item was collateral for any given loan. The court declared that purchase money status was forfeit. This made the security interest unperfected and hence prey to the trustee’s strong arm power.

But two other issues are not so clearly state-law questions. First, nonpurchase money security interests in certain exempt property are void under section 522(f)(2). The transformation rule is most frequently used in consumer bankruptcy cases. For example, if a secured party advances nonpurchase money and allows the original purchase money collateral to secure the new as well as the old loan (debt add-on), purchase money status has been deemed forfeit. Consolidation of two loans into one also destroys purchase money status, at least if

140. U.C.C. § 9-302(1)(d).
141. When an automatically perfected security interest in consumer goods undergoes a lapse in perfection, it becomes necessary for a judge to choose between two different lapse rules, which are supplied for more different contexts. Under § 9-403(2), when a financing statement lapses because five years have passed and no continuation statement has been filed, judicial lien creditors enjoy a promotion over the de-perfected security interest. Under this rule, the trustee has an avoidance action under both the strong arm power of § 544(a)(1) of the Bankruptcy Code and a voidable preference theory under § 547(b). But § 9-103(3) has a different rule—if perfection lapses because the collateral has been moved to a different state, only buyers obtain a promotion. Lien creditors do not. Under this rule, the trustee has no avoidance theory. Again, the UCC provides no clear sign as to which lapsarian rule the bankruptcy court should adopt.

Nevertheless, it must be recognized that, when a court declares a de-perfected purchase money security interest to be void, it implicitly chooses the lapse rule in which judicial lien creditors obtain a promotion.

If an after-acquired property security interest exists to encumber the de-perfected security interest in consumer goods, the trustee might have an avoidance theory that does not require a choice between the lapse rules. This after-acquired property security interest clearly gets a promotion over the de-perfected purchase money security interest, no matter which rule is chosen, but this promoted security interest is likely to be a voidable preference. This avoided security interest is preserved for the benefit of the bankrupt estate. 11 U.S.C. § 551 (1988). The trustee can therefore assert this priority against the purchase money security interest. But after-acquired property security interests are subject to the rule of § 9-204(2), which provides: “No security interest attaches under an after-acquired property clause to consumer goods . . . when given as additional security unless the debtor acquires rights in them within ten days after the secured party gives value.” Therefore, this theory is most unlikely to occur, so that a choice of a lapse rule will usually be necessary.

one of the loans is nonpurchase money.\textsuperscript{143} Consolidation seems to be merely a combination of collateral add-on and debt add-on clauses.\textsuperscript{144}

The second possible federal interest in the definition of purchase money is with regard to purchase money security interests in qualified airplanes, vessels and trains. The secured creditors claiming such security interests are entitled to the privilege of section 1110(a), whereby the automatic stay against repossession dissipates after sixty days unless the chapter 11 debtor cures all past defaults on the security agreement. But if no purchase money status exists—or if it is forfeit under a transformation rule—then the secured party is subject to the usual automatic stay that all secured parties must live with.\textsuperscript{145}

According to section 522(f)(2) "the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been enti-

\footnotesize{143. Id; contra, Pristas v. Landaus of Plymouth, Inc. (In re Pristas), 742 F.2d 797, 801 (3d Cir. 1984) (Weis, J.).}

\footnotesize{144. Professor Mark Wessman makes the useful point that the dual status rule is simply a qualification of the transformation rule, not its polar opposite: Both rules are based on the same fundamental assumption that purchase money debt and collateral can never really be consolidated and cross-collateralized. Even if the debt from two successive purchases is consolidated as a matter of accounting, it is assumed that the separate “prices” of each item survive and can be (indeed must be) correlated to separate items of collateral. This is true even if, as in the consumer add-on cases, each successive debt and each item of collateral would have purchase money status considered in isolation. The difference between the strict version of the transformation rule and the dual status rule is only in the harshness of the penalty imposed if the creditor tries to accomplish anything more complex than a series of discrete, unrelated, and successive purchase money transactions. Under the transformation rule, purchase money status is lost entirely. Under the dual status rule, the loss of purchase money status may be partial only if the creditor has a payment allocation method which enables him to isolate the remaining “price” of particular items of collateral. The dual status rule is thus merely a less punitive qualification of the transformation rule, not a rule built on a different foundation. Wessman, supra note 2, at 1313.}

\footnotesize{145. This state of affairs is not entirely rational. Lessees have rights under § 1110(a), whether they originally supplied the equipment in purchase money style or whether they are simply financiers who fancy leases more than security interests. In re Continental Airlines, Inc., 932 F.2d 282 (3d Cir. 1991) (Scirica, J.); General Elec. Credit Corp. v. Pan Am Corp. (In re Pan Am Corp.), 124 B.R. 960, 963 n.1 (Bankr. S.D.N.Y. 1991), aff’d, 125 B.R. 372 (S.D.N.Y.) (Musakey, J.), aff’d, 929 F.2d 109 (2d Cir.) (per curiam), cert. denied, 111 S. Ct. 2248 (1991); Braniff, Inc. v. Toren (In re Braniff, Inc.), 110 B.R. 980 (Bankr. M.D. Fla. 1990) (Corcoran, J.). Why lessees of all stripes should be privileged but nonpurchase money secured parties should be left out of § 1110(a) can only be explained by the unaccepting continuance of uncritical distinctions drawn by the Bankruptcy Act.
tled under subsection (b) of this section . . . ”146 If a state proclaims that exemptions extend only so far as the debtor equity in collateral, it arguably follows that the security interest is not subject to section 522(f)(2) avoidance, because the exemption stops just short of the security interest. And if the security interest does not encumber exempt property, then section 522(f)(2) cannot obliterate the security interest after all.147

Initially, some courts so ruled, and as a result, when a state exemption law was felicitously worded, secured parties preserved their nonpurchase money security interests.148 In support of this view is the fact that section 522(f)(2) allows lien avoidance “to the extent that such lien impairs an exemption.” Yet if the security interest by definition does not encroach on the exemption, then there can be no lien avoidance.

Other courts thought that if any part of the item is exemptible—if the debtor equity may be reserved by the debtor—then any security interest on the item may be destroyed under section 522(f)(2).149

This matter has now been settled by the Supreme Court in favor of this latter view whereby security interests can be destroyed regardless of the content of state exemption law. The issue, however, was addressed in the guise of a judicial lien on exempt property, something covered by section 522(f)(1), not section 522(f)(2). Nevertheless, the reasoning is fully applicable for both parts of section 522(f)(2).150


148. Fox v. ITT Fin. Servs., 902 F.2d 411 (5th Cir. 1990) (Garwood, J.) (Mississippi law); In re Bessent, 831 F.2d 82, 83-84 (5th Cir. 1987) (Jones, J.) (Louisiana); In re Spears, 744 F.2d 1225 (6th Cir. 1984) (per curiam); In re Allen, 725 F.2d 290, 292-93 (5th Cir. 1984) (Politz, J.) (Texas); In re Pine, 717 F.2d 281 (6th Cir. 1983) (Merritt, J.), cert. denied, 466 U.S. 928 (1984) (Tennessee and Georgia). For a rare case of rebellion by a lower court against the governing authorities in the Fifth Circuit, see In re Thompson, 59 B.R. 690, 692 (Bankr. W.D. Tex. 1986). Here Judge Glen Ayers wrote, “[w]ere the Fifth Circuit confronted with Allen today, it would almost certainly not render the same decision.” Id. at 695. The prediction proved incorrect, as the Fifth Circuit has reiterated its position at least twice since Allen.

149. Aetna Fin. Co. v. Leonard (In re Leonard), 866 F.2d 335 (10th Cir. 1989) (Brorby, J.); In re Hall, 752 F.2d 582 (11th Cir. 1985) (Kravitch, J.); In re Thompson, 750 F.2d 628 (8th Cir. 1984) (Lay, J.); In re Maddox, 713 F.2d 1526 (11th Cir. 1983) (per curiam).

In Owen v. Owen, an ex-wife had a judgment against her ex-husband when the latter bought a condominium apartment. The judicial lien attached to the condo upon acquisition pursuant to standard after-acquired property assumptions. The next year, Florida allowed condos to be exempt property, but it preserved any pre-existing judicial lien.

According to section 522(f)(1):

Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(1) a judicial lien . . .

The debtor therefore reasoned that the judicial lien on the exempt property should be avoided. The ex-wife thought that the judicial lien did not impair the exemption, within the meaning of section 522(f), and so the lien should stand.

Justice Antonin Scalia saw some merit in the ex-wife's argument, but he worried about its consistency with what he termed a "uniform practice of bankruptcy courts" regarding the meaning of the federal exemptions that most states have opted out of. This federal rule allows exemption of "the debtor's interest" in the listed items. This implies that only debtor equity is exempt. If the ex-wife were right, section 522(f) could never invalidate an effective judicial lien (or perfected security interest) on a federally exempt item of property. Bankruptcy courts have routinely allowed section 522(f) to avoid otherwise valid liens on federally exempt items.

---

153. Owen, 111 S. Ct. at 1836.
Given this attitude toward federal exemptions, Scalia saw no valid reason to distinguish the state-law exemptions and so in the interest of uniformity, he ruled that otherwise valid liens could be destroyed under section 522(f).

Scalia also made a great deal out of the language italicized above ("would have been"). "To determine the application of § 522(f)," Scalia wrote, courts interpreting the federal exemption "ask not whether the lien impairs an exemption to which the debtor is in fact entitled, but whether it impairs an exemption to which he would have been entitled but for the lien interest itself." That is, the debtor gets, not the exemptions to which she is entitled, but to what she...
would have been entitled. This past subjunctive tense demands that there be a "but for" against which the debtor is protected. Now one "but for" might be found in the opening words of section 522(f)—"[n]otwithstanding any waiver of exemptions." This harmless "but for" would allow the ex-wife's judicial lien to survive.

Scalia rejected this argument, because the opening word "notwithstanding" had already dispensed with the waiver. Given that the waiver had been neutralized, the "but-for" of the "would have been" must be something other than the waiver. Furthermore, Scalia thought, the destruction of waivers in section 522(f) is merely an aside. The main point of section 522(f) is to destroy liens, suggesting that the "but for" must be aimed at the lien, not the waiver of exemption.

Thus, the Florida judicial lien was destroyed by section 522(f)(1), and, once again, an ex-husband was allowed to escape the obligations to his family that law and nature demand. Now this reasoning directly affects Article 9 security interests under section 522(f)(2). Hence, it must be viewed as settled that, whatever the content of local state exemption law, section 522(f)(2) is competent to destroy any otherwise valid security interest on the specific items listed under section 522(f)(2).

For present purposes, the moral of Owen v. Owen is that the states may not nullify section 522(f)(2) by specifying that only debtor equity

158. Owen, 111 S. Ct. at 1837.

159. "The only other conceivable possibility is but for a waiver—harking back to the beginning phrase of § 522(f) . . . . The use of contrary-to-fact construction after a 'notwithstanding' phrase is not, however, common usage, if even permissible." Id.

160. Waivers are targeted quite directly in § 522(e), so that the damage done to waivers in § 522(f) can fairly be called "an aside." Id.

161. One argument not available to Justice Scalia, who interpreted § 522(f)(1), applies to § 522(f)(2)—the creation of a security interest in exempt property can be viewed as a waiver of the exemption; hence, § 522(f)(2) should destroy security interests "notwithstanding waiver," to quote the opening words of § 522(f). See In re MacManus, 681 F.2d 353, 358 (5th Cir. 1982) (Dyer, J., dissenting).

162. One aspect of the case, emphasized in Justice Stevens' dissent, is that Mr. Owens' condo became exempt only after Mrs. Owens' judicial lien encumbered the asset. Therefore, it ought to be possible in general to disencumber collateral that was never exempt by rendering it exempt. For example, suppose a debtor brings home encumbered office furniture, thereby rendering the furniture exempt. The security interest on that office furniture should effectively disappear, so long as it was not of the purchase money variety. In re Hilary, 76 B.R. 683 (Bankr. D. Minn. 1987) (Kressel, J.) (violin used for business could be converted into home instrument, though exemption disallowed for other reasons); but see In re Goodwin, 133 B.R. 141, 144 (Bankr. S.D. Ind. 1990) (Vandivier, J.) (because secured party relied on representation that furniture was for office, debtor estopped later to claim it was household furnishings).
in collateral is exempt. Rather, the states may only identify whole things—not parts of things—that can be exempted. If a security interest encumbers the whole of the exempt thing, that security interest can be avoided, no matter what the states say.

Now if this limitation exists on the definition of what may be exempt property, it is also possible that restrictions might exist on how a state might define “purchase money.”

At some level these restrictions must exist. Suppose, for example, that the Uniform Commissioners, taking offense at section 522(f)(2) and its implicit criticism of their wares, amended Article 9 to read: “All security interests granted for any purpose will be deemed purchase money security interests for all purposes.” This provision would equally eliminate section 522(f)(2) from existence, something Owen v. Owen does not allow. Therefore, it follows that “purchase money,” to some extent, must have a purely federal element.

Nevertheless, short of deliberate attempts to subvert section 522(f)(2), a federal court might still give deference to state-created definitions of purchase money security interests. That is, federal law would define the core concept of purchase money, to borrow H.L.A. Hart’s metaphor, while the states could legislate in the unessential periphery. If so, it might be open for the revisers of Article 9 to consider whether the transformation or the dual status rule is more desirable in consumer cases. Surely this is a peripheral question that does not strike at the core of purchase moneyhood.

In deferring in part but not in whole, bankruptcy courts might remember that the two relevant Bankruptcy Code provisions—section 522(f)(2) and section 1110(a)—do not involve priorities between creditors but rather relations between the secured party and the debtor only. Other creditors are relatively indifferent to whether a purchase money lender prevails under section 522(f)(2) or section 1110(a). In contrast, the purchase money questions under Article 9 go to priority between creditors only. Thus, the definitions under the Bankruptcy Code might be heavily influenced by the federal policy of “fresh start”


164. On this question Professor Robert Lloyd suggests that the federal courts might defer to the UCC definitions but as a federal matter. Nonuniform state definitions would then be excluded. Lloyd, *supra* note 3, at 77-79. In any case, Lloyd recommends that “if the courts wish to continue to further the debtor protection policies of section 522(f) in cases involving the survival of purchase money status, they should stop muddying the waters by claiming to be interpreting the UCC. They should admit that they are developing a Bankruptcy Code definition . . . .” *Id.* at 81.

165. *Id.* at 79.
for the debtor, while Article 9 definitions would be entirely indifferent to this. Such an observation might prevent federal courts from relying too heavily on Article 9 to solve consumer bankruptcy cases.

C. Nonuniform Legislation

Two states have attempted to overturn the potentially federal transformation rule by adding nonuniform language to section 9-107. According to section 47-9-107(c) of the Tennessee Code, a security interest is purchase money to the extent it is

(c) under subsections (a) and (b), a purchase money security interest upon any unpaid balance in preexisting collateral arising pursuant to a series of purchases or extension of payment time and terms. Provided, however, that whenever the collateral is consumer goods, the creditor retains no purchase money security interest in any property as to which he has received payments aggregating the amount of the sale price including any finance charges attributable thereto. For the purposes of this section, in the case of items purchased on different dates, the first item purchased shall be deemed the first paid for, and in the case of items purchased on the same date, the lowest priced item shall be deemed first paid for.

The idea of this provision is that “any unpaid balance” from a series of purchases is secured by purchase money security interests. This seems to protect collateral add-on and debt add-on (when the debt is itself purchase money debt for new items in a series of purchases), but it does not seem to protect debt add-on when nonpurchase money is advanced. Also, a “first in first out” allocation system for items purchased at different times is imposed. For items purchased at the

166. Id. at 81. Professor Lloyd reminds us that Article 9 deliberately refuses to concern itself with consumer protection. Id. at 74.


168. As the “unpaid balance” will include debt service and other incidentals, it could be that Tennessee answers the question left ambiguous in the official version—whether “its price” enabling “advances” include such items. Mary Aronov, The Transformation Rule Applied to Purchase Money Security Interests in Commercial Lending Transactions, 16 Mem. St. L. Rev. 15, 53 (1985).

169. Lloyd, supra note 3, at 68.

170. See Michigan Note, supra note 16, at 870 (“The FIFO method, unlike the pro rata method, is not unconscionable . . . .”).
same time, wherein the cheapest item is first disencumbered by any payment, followed by the second cheapest, and so forth.\footnote{171}

Louisiana has a provision that mandates the dual status rule. According to section 10.9-107(b) of the Louisiana Revised Statutes: "The fact that the collateral additionally secures other or future indebtedness of the debtor as a result of cross collateralization shall not affect purchaser [sic] money security interest status." Under this provision, even if future nonpurchase money advances are given (debt add-on), the original purchase money status continues to have integrity.

V. REFINANCING AND THE DESTRUCTION OF PURCHASE MONEY STATUS

Debt add-on or collateral add-on was based on the idea that impurities in the relation between claim and collateral might lead to a forfeiture or at least a limitation on purchase money status. Quite a different idea is that refinancing leads to a novation of the old purchase money loan in favor of a new nonpurchase money loan.

Whether an old interest lives on or is destroyed and replaced by an entirely new interest is a metaphysical puzzle we have already visited. The conditional sale, for example, can be viewed either as an old ownership interest that continues on as a retained security interest, or as a sale that wipes out the former ownership interest, and is replaced by an entirely new purchase money security interest.

The metaphysics of extension versus renewal recently occupied the attention of the Supreme Court in \textit{Farrey v. Sanderfoot}.\footnote{172} In this case, a divorcing husband and wife had been cotenants of their house. According to the divorce decree, the husband kept the house but owed the wife cash to balance out the equal division of the marital estate. This amount was secured by the house itself, and the divorce decree purported to give the wife a judicial lien on the house. The husband then filed for bankruptcy and, claiming the house as exempt property, un gallantly sought to destroy his ex-wife's judicial lien under section 522(f)(1) of the Bankruptcy Code. According to section 522(f)(1):

\footnote{171. For a case interpreting Tennessee's nonuniform version of § 9-107, see \textit{In re Nolen}, 53 B.R. 235 (Bankr. M.D. Tenn. 1985) (Paine, J.) (purchase money security interest not subject to transformation rule, thanks to legislation). Professor Robert Lloyd complains that this statute does not affect the refinancing cases, where a refinanced loan is deemed to extinguish the purchase money loan and replace it with a nonpurchase money loan. Lloyd, \textit{supra} note 3, 68-69. It is still open in Tennessee for a court to find a novation and hence extinction of a refinanced purchase money claim.}

\footnote{172. 111 S. Ct. 1825 (1991) (White, J.).}
Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(1) a judicial lien ... 173

The Supreme Court refused to avoid the judicial lien. According to Justice Byron White, the purpose of section 522(f)(1) was to relieve debtors who were required to file homestead statements in the real estate records but who had not done so before judicial liens attached. Under section 522(f)(1), these judicial liens could be avoided, even if the property only became exempt later, thereby tempering the disappointment of a lost race to the courthouse. 174

Now, given that section 522(f)(1)'s purpose was to avoid a race to the courthouse, it followed, by White's logic, that section 522(f) does not apply in any circumstance in which the parties would not engage in a race to the courthouse. One such instance is when the debtor owns no property at all at the time a judgment is rendered against him. In such a case, the debtor would not have any reason to race to the courthouse. In such circumstances, Congress did not intend for section 522(f) to apply. This policy led to an unusual definition of what it means to "fix" a lien. According to White:

Section 522(f)(1) does not state that any fixing of a lien may be avoided; instead, it permits avoidance of the "fixing of a lien on

174. This at least appears to be the race that White deplores. See Farrey, 111 S. Ct. at 1830 (describing § 522(f)(1)'s "purpose of preventing a creditor from beating the debtor to the courthouse . . . "). Elsewhere, White also deplores a race between creditors to get judicial liens, a province of voidable preference law. Id. (describing § 522(f)(1)'s role in replacing § 67(a) of the Bankruptcy Act).

White, then, conceives of creditors rushing to the courthouse to get liens in anticipation of bankruptcy. Farrey, 111 S. Ct. at 1831. This might justify voidable preference law, but it cannot suffice to justify § 522(f). Morris, supra note 155, at 288-89 (criticizing Justice White's invocation of voidable preference concepts). As far as the debtor's exemptions are concerned, the race cannot be conceived as beginning with unsecured creditors wishing for the first time to obtain liens. Creditors cannot have judicial liens on demand. They must win judgments, which require notice to the debtor, not to mention trials, motions and the like. The debtor can easily beat creditors to the courthouse to preserve their homestead if what we have is creditors starting off from an unsecured position hoping to get quick judicial liens.

Rather, if Congress had in mind the abolition of a race, it must be a race in which the debtor has just lost a judgment and has not filed a homestead declaration. It is not the creditor who will be rushing to the courthouse but only the debtor.
an interest of the debtor.” If the fixing took place before the debtor acquired that interest, the “fixing” by definition was not on the debtor’s interest. Nor could the statute apply given its purpose of preventing a creditor from beating the debtor to the courthouse, since the debtor at no point possessed the interest without the judicial lien. There would be no fixing to avoid since the lien was already there. To permit lien avoidance in these circumstances, in fact, would be to allow judicial lienholders to be defrauded through the conveyance of an encumbered interest to a prospective debtor. For these reasons, it is settled that a debtor cannot use § 522(f)(1) to avoid a lien on an interest acquired after the lien attached.\footnote{175}

Thus, according to Justice White, section 522(f) can apply only when the debtor owns property first and then, subsequently, a lien fixes to this property. Where the lien fixes first and the debtor obtains a property interest later, section 522(f) cannot have any effect on the lien.\footnote{176}

\footnote{175. Farrey, 111 S. Ct. at 1830 (citations omitted).}

\footnote{176. If this principle is transported to questions of § 522(f)(2), it implies that any security interest that “fixes” itself to the debtor’s interest at the same time as the debtor obtains the property, § 522(f)(2) cannot avoid the lien. Such a principle thoroughly disrupts the jurisprudence of § 522(f)(2). For example, as we shall see, a great amount of effort has been spent on striking down purchase money loans that also have “collateral add-on clauses.” Courts often insist that only the purest purchase money security interests are immune from § 522(f)(2). This mighty effort is for naught if § 522(f)(2) never applies in cases of simultaneous attachment. See Morris, supra note 155, at 290-91 (predicting problems with regard to security interests in after-acquired property). Not only will § 522(f)(2) be affected, but also other sections that refer to the “fixing” of liens. For example, § 545 provides: “The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien . . . (2) is not perfected . . . .” The most impressive statutory lien is the tax lien of the Internal Revenue Service. Section 545(2) implies that this lien is void unless the IRS has perfected it prior to bankruptcy. Farrey v. Sanderfoot, on the other hand, implies that unperfected tax liens are no good against property the debtor owned at the time the tax lien arose, but the lien is completely valid against any property acquired afterwards. This is so because the unperfected IRS tax lien encumbers after-acquired property without being “fixed” thereto—surely an absurdity. Also, perfected statutory liens are saved from voidable preference liability by § 547(c)(6), which provides that the trustee may not avoid a transfer “that is the fixing of a statutory lien that is not avoidable under section 545 . . . .” Justice White’s interpretation of “fixing” thus implies that statutory liens on after-acquired property are likely to be voidable preferences, if the debtor has obtained property within ninety days of bankruptcy. Morris, supra note 155, at 292. On the other hand, the illegitimately saved tax liens are also voidable preferences; at least partially righting a wrong that Justice White had perpetrated with regard to § 545(1).}
This view is nothing but the classic commercial law error that supposes a lien can exist before the debtor has acquired property.\textsuperscript{177} Rather, it must be said that the lien on after-acquired property "fixes" to the debtor's property precisely the same time or infinitely close after the debtor obtains the property.\textsuperscript{178} Be that as it may, Justice White determined that a lien created precisely when the debtor obtains rights in the collateral does not "fix" itself to the collateral within the meaning of section 522(f)(1). Nevertheless, as the judicial lien exists, it somehow attaches to the house by means other than "fixation." Perhaps it curls once about the house and falls asleep.

Justice White's view, no matter how inadequate, does require the view that the husband did not "retain" his old cotenancy, to which was added the wife's cotenancy, as encumbered by mortgages and the ex-wife's judicial lien. If the husband "retained" the cotenancy and then received extra property, then the judicial lien "fixed" to this cotenancy, within White's peculiar definition, and the ex-wife would lose her lien.

According to White, the ex-husband retained nothing. His old cotenancy was extinguished, and he received a new property interest—fee simple absolute, as encumbered by mortgages and the ex-wife's judicial lien—for the first time out of the divorce decree. So conceived, the husband's equity in the property was created coevally with the judicial lien.

But White saw that it was also quite possible to view the husband's cotenancy as "retained." Justice White sought to defeat this reasoning by reading the divorce decree as encumbering—not the husband's preexisting cotenancy—but only the cotenancy conveyed to the husband in the divorce decree. Since the judicial lien did not antedate the husband's acquisition of this cotenancy, then the judicial lien did not "fix" itself to the husband's property and therefore could not be avoided.\textsuperscript{179} This reasoning is fine so long as the wife's claim against her former cotenancy is less than the value of the cotenancy. It is unfortunate for the ex-wife if she is undersecured on this reasoning, because White implies that the husband's original cotenancy is completely unencumbered by his wife's judicial lien—half the victory White strove to deny the husband.

\textsuperscript{177} This very error plagued voidable preference law prior to the Bankruptcy Code, and so Congress sought to warn against it by enacting § 547(e)(3): "For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred." For a history, see Irving A. Breitowitz, Article 9 Security Interests as Voidable Preferences: Part II The Floating Lien, 4 CARDOZO L. REV. 1 (1982).

\textsuperscript{178} See Morris, supra note 155, at 302-05.

\textsuperscript{179} Farrey, 111 S. Ct. at 1831.
Justice White felt that he had avoided the difficult metaphysical question whether the husband retained his cotenancy, or whether his cotenancy was extinguished and subsequently encumbered. If he had to choose, by what method should this choice be governed? Clearly, the intent of the divorcing judge who wrote the decree should govern.\textsuperscript{180}

This is precisely the same metaphysics to which a refinanced purchase money security interest is subject. A refinanced security interest could alternatively be viewed as an extension of the old security interest or as a newly created security interest, because the earlier property rights were entirely extinguished and newly replaced with an unrelated security interest in the purchase money collateral. These matters should be governed by the intent of the parties,\textsuperscript{181} just as the judicial decree in \textit{Farrey v. Sanderfoot}\textsuperscript{182} was governed by the judge's intent.

Finding the intent of the parties, of course, should not be the same as seizing upon flimsy evidence to prove the secured party wanted to surrender an important commercial advantage. Thus, in an early case finding that refinancing destroys purchase money status, Judge James Wolfe, in \textit{In re Jones},\textsuperscript{183} ruled that new promissory notes were a new loan that did not "enable" the debtor to obtain new collateral. The old purchase money security interest had therefore been extinguished and replaced with a new nonpurchase money security interest which was fully avoidable under section 522(f)(2).\textsuperscript{184} Other cases agree that refinancing conclusively proves that the purchase money lender intended

\textsuperscript{180} \textit{Id.} at 1832 (interpreting what the divorce decree purported to achieve).

\textsuperscript{181} In Georgia, some state cases have held the refinancing constitutes a new obligation regardless of the parties' intent. \textit{Knight v. First Fed. Savs. & Loan Ass'n}, 260 S.E.2d 511, 516 (Ga. Ct. App. 1979) (Carley, J.).

\textsuperscript{182} 111 S. Ct. 1825 (1991) (White, J.).

\textsuperscript{183} 5 B.R. 655 (Bankr. M.D.N.C. 1980).

\textsuperscript{184} \textit{Id.} at 656. Of this case, Professor Lloyd writes that Judge Wolfe "displays a misunderstanding of the fundamental relationship between the promissory note and the debt it secures. The promissory note is not the debt; it is merely evidence of the debt. If the promissory note is cancelled and replaced by a new note, the debt remains unchanged." Lloyd, \textit{supra} note 3, at 58. Professor Lloyd's criticism does not exactly follow. If indeed the promissory note is evidence of the debt, then the new note might be evidence of a new debt, in which case the old purchase money status has disappeared. Nevertheless, it might be weak or misleading evidence, and if that is what Professor Lloyd means, he is undoubtedly correct.

In support of his proposition (in so far as it applies to negotiable instruments), Lloyd cites \textbf{UCC} § 3-802(1) (1972), which provides that "unless otherwise agreed where an instrument is taken for any underlying obligation . . . (b) the obligation is suspended pro tanto until the instrument is due . . . . If the instrument is dishonored action may be maintained on either the instrument or the obligation . . . ." Hence Lloyd too thinks that whether purchase money priority disappears depends on the intent of the parties.
to surrender the earlier purchase money status.\textsuperscript{185} Still others have seized on casual evidence that supposedly proves the secured party intended to waive a valuable right.\textsuperscript{186} Different maturity dates\textsuperscript{187} or interest rates are sometimes said to prove novation.\textsuperscript{188} But, as Dean McLaughlin argues, it is possible to say that the interest rate is part of

\begin{itemize}

In the early days of the Bankruptcy Code, it was held that \$ 522(f)(2) applied only to security interests created after the enactment of the Bankruptcy Code. United States v. Security Indus. Bank, 103 S. Ct. 407 (1983) (Rehnquist, J.). Many cases therefore involved whether a refinancing precode security interest became a postcode security interest by virtue of the refinancing. This determination involved precisely the same issues of novation and intent. Stanford Note, \textit{supra} note 16, at 1147-48 & nn.56, 59.


Judge Arthur Votolato seems to specialize in discovering that secured parties have intended to waive their purchase money status, thereby facilitating debtor avoidance under \$ 522(f)(2). In \textit{In re Adoptante}, 140 B.R. 940 (Bankr. D.R.I. 1992), the lender extended purchase money credit and then extended an additional amount for nonpurchase money purposes. Declining to decide whether to follow the transformation or dual status rule, Judge Votolato declared the lender intended to forfeit its earlier purchase money status. As evidence of this self-destructive intent, Judge Votolato could cite the failure to append a list of collateral to the second security agreement (even though the security agreement tellingly referred to an appendix), the failure to check a box on the security agreement form indicating that a security interest was being granted (though the agreement elsewhere made it clear that security interests were intended), the failure to indicate in the agreement the replacement value of the purchase money collateral, and the filing of a UCC-1. Judge Votolato noted this last piece of evidence was especially revealing, as a purchase money secured party need not file at all with regard to consumer goods (though a filing is necessary to prevent free-and-clear sales to other consumer buyers). U.C.C. \textsection 9-307(2). Now all of this evidence was flimsy at best, to put it mildly. One wonders whether Votolato was truly interested in the actual intent of the secured party, or whether Judge Votolato simply wished to trip up secured parties by setting drafting burdens just beyond the reach of the purchase money lender at hand.

For a similar case, see \textit{In re Smiley}, 84 B.R. 6 (Bankr. D.R.I. 1988) (Votolato, J.) (secured party in second loan forgot to indicate that the security interest from the first loan continued and hence it was waived altogether).

187. Matthews v. Transamerica Fin. Servs. (\textit{In re Matthews}), 724 F.2d 798, 801 (9th Cir. 1984) (per curiam).

the original price of the item, and the new interest rate could represent a new price renegotiated after the fact. Nothing in the UCC prevents such _ex post_ adjustment of the original price.\(^ {189} \)

Some courts have thought that the presence of a UCC-1 shows an intent to waive purchase money priority, because purchase money security interests in consumer goods need not be filed.\(^ {190} \) That a UCC-1 should be used against the secured party in finding an intent to waive purchase money status is particularly galling. In other contexts, Article 9 manifests a policy that financing statements should not be considered admissions against interest.\(^ {191} \) In particular, when a consignor or lessor files a cautionary financing statement, courts are not permitted to draw the inference that the transaction is really a disguised security interest.\(^ {192} \) Though it is a small matter that will not deter anti-creditor judges long, it might nevertheless help secured parties if section 9-408 were expanded to protect purchase money lenders from the guilty implications of their financing statements.

Of the cases that found in refinancing an excuse to destroy purchase money priority, Professor Lloyd writes: "Most of the previous decisions considering the novation theory were written by bankruptcy judges working under the pressure of enormous case loads. These judges are not expected to be exerting in important influence on the development of the law."\(^ {193} \) Nevertheless, appellate judges, in the glorious summer of their leisure, have closely followed the lead of cases such as _In re Jones_.\(^ {194} \)

It is possible, as always, that a secured party genuinely intends to weaken her own position and strengthen that of the debtor by destroying or surrendering her purchase money status.\(^ {195} \) But this self-destructive intent should be viewed as very rare. Rather, if a court is

---


192. U.C.C. § 9-408 ("filing shall not of itself be a factor in determining whether or not the consignment or lease is intended as security").


194. _Id_. at 62.

genuinely interested in the secured party's intent on the matter, it should entertain a strong presumption that the secured party intended to retain its advantage.196

Nevertheless, even if refinancing of the original loan by the same lender is not a novation of the old purchase money priority, third party refinancing looks more like nonpurchase money debt.197 Comment 2 to section 9-107, you may recall, "excludes from the purchase money category any security interest taken as security for or in satisfaction of . . . [an] antecedent debt." Still, the refinancing third party could have taken an assignment from the original purchase money lender,198 preserving the priority and then refinancing as if the third party were the original lender. Nevertheless, even here an assignee who refinanced the original loan was held to have forfeited its purchase money priority.199

All of the refinancing cases appear to exalt form over substance. Any one of these deals could have been done in a way to preserve purchase money status. Indeed, any nonpurchase money security interest can be changed into a purchase money version. For example, the new lender could buy the collateral from the old secured party and the debtor. Then the new lender "sells" the collateral to the secured party. Or, if the refinancing secured party is the same person as the original financing party, the refinancing agreement could take the form of a foreclosure-sale-plus-repurchase by the debtor.200

---


Because this is so, courts that have before them a refinanced purchase money security interest should undertake a serious attempt to find the true intent of the parties, keeping in mind that it is an unusual secured party indeed who would be so generous as to give up a valuable advantage like purchase money status.

VI. CONCLUSION

Like many other concepts in Article 9, the concept of purchase money is developed well beyond what the words of section 9-107 say. Section 9-107 itself is imprecisely written. It is impossible to take that provision literally. As we apparently are about to rewrite Article 9 in toto, an opportunity exists to sharpen up the language of section 9-107. In particular, purchase money should be defined more carefully to include or exclude incidentals, such as debt service, insurance and the like. Some decision should be made about the purchase money secured party's collection expenses—whether they should be in or outside of purchase money priority. Furthermore, the drafters of the new Article 9 have an opportunity to influence bankruptcy courts on whether a transformation or a dual status rule should be followed with regard to purchase money security interests in consumer goods.

In addition, I have argued that the perfection rules for purchase money security interest should be re-examined. There is no particular reason why a purchase money secured party should have to file at all against after-acquired property lenders, with the possible exception of inventory lenders, who supposedly make future advances on the strength of inventory on hand. Rather, perfection should be required only as against subsequently created security interests—not those that were created at the same time as the purchase money security interest was created. To the extent Article 9 can make perfection and priority less tricky and eccentric, the more populist and accessible the UCC will become.