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**Setting Farmers Free: Righting the Unintended
Anomaly of UCC Section 9-312(2)**

by

Steve H. Nickles

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Steve H. Nickles*

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INTRODUCTION

A lender secured by crops enjoys by law a kind of control over the farmer that is not possible in any other type of financing except by agreement between the creditor and debtor. The crop lender enjoys a practical monopoly in the extension of production credit to the farmer. Production credit enables the farmer to buy the goods and services needed to grow crops during the production season. Having a monopoly over production credit thus empowers the lender to make unilateral and arbitrary decisions regarding the debtor's farming operations. Even in the absence of default, the lender can dictate the terms by which the farmer produces crops or decide that the farmer will no longer produce at all, thereby putting the farmer out of business.

The lender expresses its decision by refusing to make a production loan or by conditioning the loan on its terms, and the priority rules of Uniform Commercial Code Article 9¹ enforce the lender's decision. This statute governs consensually created security interests in personal property or fixtures, that is, any agreement between a creditor and debtor to use the debtor's personal property or fixtures as security or collateral for a debt owed the creditor. Article 9 governs, therefore, when a lender's collateral is crops,² and its priority rules effectively prevent the farmer from obtaining production credit for new crops from any source other than the initial secured lender. Significantly, Article 9 facilitates alternative financing to enable debtors to produce and otherwise acquire every kind of collateral except crops.

As currently applied to crops, Article 9's priority rules give the lender first claim to any crops the farmer grows even when the lender contributed nothing to the production of the crops. Other financiers who enabled the farmer to produce new crops cannot share in the bounty until the farmer fully satisfies all debts to the lender that are secured by crops. These debts could easily absorb so much of the crops' value that the balance, if any, would not fully satisfy the crop financiers' claims.

1. Unless otherwise indicated, all citations and references to the Uniform Commercial Code (UCC) are to the 1978 Official Text and Comments.

2. U.C.C. § 9-102(1)(a).

This risk discourages other financiers from underwriting the production of crops.³ As a result, the usual lender is effectively the farmer's only source of production financing; the lender thereby enjoys monopolistic control over the farmer's enterprise.

As Part I of this Article explains, the law of creditor's rights in general, and Article 9, in particular, ordinarily inhibit this kind of control through a policy of priority for enabling interests in property. The interest of a creditor who enabled the debtor to acquire property is preferred to conflicting claims of other creditors who contributed nothing to the debtor's acquisition of the property. One justification for preferring enabling creditors is to free the debtor from total reliance on an earlier creditor as a source of borrowed capital. An older, more basic justification is to prevent unjust enrichment of the earlier creditor. As between the earlier creditor and a financier who enabled the debtor to acquire new property, plain and simple fairness dictates applying the property first against the enabling debt owed the financier.

Part II of this Article explains, however, that crop production financing is an exception to the pervasive policy of priority for enabling interests because of the conventional interpretation of UCC section 9-312(2), a key section among Article 9's priority rules. The black-letter, general principle of UCC section 9-312(2) is that a "security interest in crops for new value given to enable the debtor to produce the crops . . . takes priority over an earlier perfected security interest."⁴ Additional language in the section qualifies this priority "to the extent that

3. Indeed, the Farmers Home Administration (FmHA), which is often the financier of last resort for financially troubled farmers, will not make a production or other farm operating loan unless the loan is secured by a first lien on all property to be produced using the loan proceeds. 7 C.F.R. § 1941.19 (1986). FmHA guarantees to other people making production loans to farmers are effectively conditioned on a similar first-lien priority. *Id.* § 1980.60(a)(11) & app. G (Request for Guarantee Form, in which applicant must state that borrower's title to collateral will be subject only to the instruments securing the loan to be guaranteed). If a farmer's usual lender will not agree to subordinate its claim to the farmer's future crops, the FmHA usually cannot make a production loan or guarantee such a loan made by someone else. The farmer is thus at the mercy of her usual lender.

4. The entire section provides:

A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six months before the crops become growing

such earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise."⁵ The authorities have interpreted this qualification so as to transform the section's general principle of priority into a narrow rule that gives priority only rarely and fortuitously to enabling interests in crops. The anomalous effect of the conventional interpretation is that an enabling security interest in crops is ordinarily subordinate to a prior secured party's claim to the collateral.

Part III reveals that the drafters of Article 9 did not intend this anomalous effect. They designed Article 9's provisions on crop financing, including section 9-312(2), in full compliance with the statute's pervasive policy of priority for enabling interests in property of all kinds. Their design, however, was artless. As a result, a literal construction of section 9-312(2), which is the *sine qua non* of its conventional interpretation, defeats the original design and real purpose of the provision. Interpreted less rigidly and more purposively, in light of the original drafters' intentions, UCC section 9-312(2) insures that, upon compliance with certain procedural requirements, an enabling security interest in crops will always, rather than rarely and fortuitously, take priority over the claim of a prior secured party who contributed nothing to the production of the collateral.

This Article argues for righting the anomaly by any means because there is no principled basis for perpetuating it. No good reason exists for restricting farmers' access to enabling credit more than any other class of businesspeople. Farmers should be set free to shop for enabling credit on the same basis as everyone else by eliminating the disincentive to crop production credit that is the unintended, unfair result of Article 9's priority rules, primarily UCC section 9-312(2), as conventionally interpreted.

To right the unintended anomaly created by the conventional interpretation of UCC section 9-312(2), two possibilities exist. The courts can reinterpret the section in its present form in a manner consistent with the original drafters' intentions. A faster, more certain means of righting the anomaly is to enact a substitute for the present section 9-312(2) that more clearly ex-

crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.

U.C.C. § 9-312(2).

5. *Id.*

presses the real purpose and true meaning of the provision. This Article thus proposes, in Part IV, a new UCC section 9-312(2), with commentary, that accomplishes this goal in sufficient detail to make the scope and operation of the law both certain and fair.

I. PERVASIVE POLICY OF PRIORITY FOR ENABLING INTERESTS: THE LAW'S BRIDLE ON FLOATING LIENS

A. SECURED CREDITORS' FLOATING LIENS

1. The Concept of a Floating Lien

A secured creditor has an interest in property of the debtor that is security for the debtor's obligation to the creditor. The property is security in the sense that it can be seized and sold, and the proceeds applied to satisfy the obligation, if the debtor does not willingly pay. A creditor is secured either through agreement with the debtor⁶ or by operation of law,⁷ and the

6. Any debt, including any loan of money or other extension of credit, can be secured by contractual agreement between creditor and debtor. The debtor voluntarily gives the creditor an interest in real or personal property, or both, as collateral for the debt. Providing collateral induces the creditor to extend the credit because having the property as security reduces the creditor's risk of losing her investment. See generally Kripke, *Law and Economics: Measuring the Economic Efficiency of Commercial Law in a Vacuum of Fact*, 133 U. PA. L. REV. 929, 946 (1985) (arguing that "[t]he lender's risk is reduced by the taking of security"); White, *Efficiency Justifications for Personal Property Security*, 37 VAND. L. REV. 473, 508 (1984) (granting security expands credit to risky debtors); see also Jackson & Schwartz, *Vacuum of Fact or Vacuum Theory: A Reply to Professor Kripke*, 133 U. PA. L. REV. 987, 993 (1985) (no one "denies that security reduces the risks that secured creditors face"). But see generally Schwartz, *The Continuing Puzzle of Secured Debt*, 37 VAND. L. REV. 1051, 1068 (1984) (arguing that simple notions that 'security interests reduce risk' do not explain the secured debt puzzle). Having property as security also reduces the creditor's costs in forcibly recouping the investment from the debtor's estate, Kripke, *supra*, at 948 ("Security is desirable because it makes available summary legal procedures that bypass the slowness with which the mills of justice grind."), lowers the creditor's costs in monitoring the debtor for misbehavior, see Jackson & Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143, 1152-53 (1979) (arguing that collateral is likely to reduce the cost of monitoring the debtor), and gives the creditor significant control over the debtor's business decisions. See Scott, *A Relational Theory of Secured Financing*, 86 COLUM. L. REV. 901, 904 (1986) (suggesting that "leverage obtained by holding the debtor's assets hostage empowers the secured creditor to influence the debtor's business decisions").

7. There are three principal situations in which the law creates security for creditors. First, reducing the investment and collection risks to some classes of creditors is so economically or politically important that the law gives them security in property of the debtor for the credit they extend as

property used as security can be real, personal, or both. This Article refers to the security as *collateral* however the interest is created and without regard to the nature of the property. The term *lien* is used generically to refer to a secured creditor's interest in collateral.

A creditor's collateral is not necessarily limited to property the debtor owns when the obligation is originally secured. The collateral often includes property of the same type as the original collateral that the debtor later acquires, whether or not the creditor somehow funded the acquisition. Such collateral is known as *after-acquired property*,⁸ and the term *after-acquired interest* describes a secured creditor's claim to after-acquired property.

The creation of an after-acquired interest does not usually depend on formally recognizing it when the debtor actually acquires the property. Rather, the interest attaches automatically at the instant the debtor acquires rights in the property. In figurative terms, a creditor's claim to after-acquired property "floats" over the debtor's estate,⁹ attaching immediately when the debtor buys or otherwise obtains property subject to the after-acquired interest. This figuration of an after-acquired interest explains why it is often called a *floating lien*. Although the term floating lien is commonly reserved for describing after-ac-

soon as they extend it. The collateral is usually property that absorbed the value given by the creditor. Good examples are liens the law gives to artisans who repair or otherwise improve goods and to laborers and suppliers of materials who improve real estate. See *infra* text accompanying notes 39-42 & 85-97. Second, when a debt owed any creditor is reduced to judgment, the debt is thereafter secured by all of the debtor's nonexempt real estate, see *infra* text accompanying notes 11-13, and also by any of her nonexempt personal property that the sheriff seizes in enforcing the judgment through execution process, see *infra* note 56. Finally, whenever a debtor threatens unfair, contrived action to put her assets beyond the easy reach of a creditor, the law will act as preemptor by attaching sufficient property to satisfy an anticipated judgment against the debtor. Good examples are the prejudgment, provisional remedies of attachment and garnishment. Whenever security is created by law in these and other situations, the debtor's consent is not required, and her objection is meaningless.

8. After-acquired property, broadly defined, includes increases in the value of original collateral caused by additions or improvements to the property or caused solely by market forces and also includes proceeds resulting from the disposition of original collateral. For most purposes, however, this Article uses the term after-acquired property in a narrower sense to mean property of the same type as the original collateral but wholly distinct from it.

9. The term "debtor's estate" simply means the collection of property interests the debtor owns, including all legal and equitable interests in real and personal property.

quired interests resulting from consensual security arrangements, liens also float when the security is created by law.¹⁰

For example, a judgment creates by law a lien on the debtor's interests in real estate located within the territorial ju-

10. Security created by law, through a judgment lien or the like, *see infra* text accompanying notes 11-15, includes after-acquired property because, having determined that the debtor's estate in real or personal property is liable for the debts, there is no logic in limiting liability to property owned when the lien arises. In *Harrison v. Roberts*, 6 Fla. 711 (1856), the argument was made that a judgment lien reaches only the debtor's interests in real property she owned on the day of judgment and not property she thereafter acquired. The court rejected the argument, reasoning:

When it is enacted that judgments "shall create a lien and be binding upon the real estate of the defendant," it is not for this court to say that any portion of that estate shall be exempt from such lien. This would be to create a distinction and make a restriction . . . in itself unnatural and unreasonable. Why should property, acquired perhaps by the very means of a loan, be relieved from liability to a judgment rendered for the identical fund with which it was purchased? Such a rule would confound all our ideas of right and justice.

Id. at 713. The Tennessee Supreme Court, in an even older case, justified judgment liens reaching after acquired property on the basis of "symmetry of the law." *Chapron & Nidelete v. Cassaday*, 22 Tenn. (3 Hum.) 661, 663 (1842).

Consensually created security includes after-acquired property only when, and to the extent, the parties have agreed to the arrangement, *see infra* text accompanying notes 16-23. The law enforces their agreement for the same reasons it enforces any other kind of contract, primarily because of the principle of private autonomy. On the meaning of this principle as applied to contracts generally, see Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 806-08 & nn.9-11 (1941) (private autonomy as substantive basis of contract liability).

The law allows after-acquired interests to float, in the sense of attaching automatically to after-acquired property, mainly for reasons of convenience and efficiency. A judgment lien or the like would be largely useless as an aid in collection if the creditor got an interest in after-acquired property only by taking some new action every time the debtor added property to her estate. This requirement would force the creditor to monitor closely the debtor's transactions and to act quickly to catch property passing through the estate. The costs of the process would be so high, and its reliability so low, that the lien would benefit very few creditors insofar as it provided security in after-acquired property. Moreover, allowing a judgment lien to float does not seriously prejudice purchasers from the debtor who will be affected by the lien. *See, e.g., Barron v. Thompson*, 54 Tex. 235, 238 (1881) (the record of an unsatisfied judgment puts purchasers on notice).

Convenience and efficiency also explain the automatic attachment of consensually created after-acquired interests. A debtor and secured creditor often have an on-going relationship in which credit is periodically extended to the debtor on the basis of fresh collateral. The transaction costs for each of these extensions of credit is reduced by allowing the creditor's collateral to expand automatically to include after-acquired property. Jackson & Kronman, *supra* note 6, at 1166-67. Besides, the validity of any security created by agreement is based essentially on the debtor's consent. By agreeing to an after-acquired property clause, a debtor thereby consents to binding her future property and nothing else is necessary as far as validation is concerned.

isdiction of the court that rendered the judgment.¹¹ This lien reaches real estate that the debtor owns when the judgment is rendered or docketed, without further ado.¹² The lien also reaches automatically any interests in real estate that the debtor later acquires during the life of the judgment.¹³ Similarly, the federal tax lien¹⁴ "embraces not only property owned by the taxpayer when the lien arises but all that he may ac-

11. 2 A. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 928 (E. Tuttle 5th ed. 1925) [hereinafter FREEMAN ON JUDGMENTS] ("Ordinarily the lien is not effective outside of the territorial jurisdiction of the court [in which the judgment was rendered].").

12. *Id.* § 918 ("Judgment liens being entirely statutory, the time when they take effect depends largely upon the provisions of the statutes creating them."). State statutes that create the lien on the rendition of judgment include ARK. STAT. ANN. § 29-130 (1979) and MO. ANN. STAT. § 511.350 (Vernon Supp. 1987). Statutes that create the lien on the docketing, filing, or recording of the judgment include FLA. STAT. ANN. § 55.10 (West Supp. 1986) (recording), MINN. STAT. § 548.09 (1986) (docketing), and OKLA. STAT. ANN. tit. 12, § 706 (West Supp. 1987) (filing).

13. See, e.g., *Trustees of R.E. Bank v. Watson & Hubbard*, 13 Ark. 74, 82-85 (1852) (holding that judgment of the circuit court attaches upon land "subsequently acquired by the judgment debtor, as well as upon [land] which was seized on the day of its rendition"); *Harrison v. Roberts*, 6 Fla. 711, 712-14 (1856) (holding that property acquired after a judgment lien is subject to the lien); *Wales v. Bogue*, 31 Ill. 464, 467 (1863) (holding that subsequently acquired property is subject to a lien); *Campbell v. Martin*, 87 Ind. 577, 580 (1882) (holding that an existing judgment against a devisee attaches to devised land upon the testator's death); *Colt v. DuBois*, 7 Neb. 391, 396 (1878) (holding that land acquired subsequent to the rendition of a judgment is subject to its payment); *Greenway & Marshall v. Cannon*, 22 Tenn. (3 Hum.) 177, 179 (1842) (holding that a statutory lien extends to after-acquired property as well as to property owned at the time of the judgment); *Thulemeyer v. Jones*, 37 Tex. 560, 571 (1872) (holding that judgment liens attach to after-acquired property); *Coad v. Cowick*, 9 Wyo. 316, 325, 63 P. 584, 586 (1901) (holding that judgment liens attach to the after-acquired lands of the debtor); T. CRANDALL, R. HAGEDORN & F. SMITH, DEBTOR-CREDITOR LAW MANUAL ¶ 6.05[2][e] (1985) (stating that "[a]fter judgment, the judgment debtor may acquire property of a type that is potentially subject to judgment liens"); 2 FREEMAN ON JUDGMENTS, *supra* note 11, § 955 (noting that a "lien of prior judgment on after-acquired property attaches . . . to the interest actually acquired by the debtor"); W. HAWKLAND & P. LOISEAUX, DEBTOR-CREDITOR RELATIONS 17 (1979) (noting that some state statutes expressly state that after-acquired property is covered by the lien); E. SUGDEN, THE LAW OF VENDORS AND PURCHASERS OF ESTATES 520 (14th ed. 1862) (noting that "[j]udgments bound after-purchased lands").

14. "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C. § 6321 (1982). The lien arises automatically "at the time the assessment is made and shall continue until the liability for the amount so assessed . . . is satisfied or becomes unenforceable by reason of lapse of time." *Id.* § 6322.

quire during the life span of the lien."¹⁵

Consensual security arrangements create floating liens only if the debtor agrees that the creditor's collateral will include after-acquired property.¹⁶ A debtor who gives a creditor personal property collateral commonly agrees to include after-acquired property as a matter of course. Article 9 usually governs creation of a lien in personal property,¹⁷ which the UCC labels a *security interest*.¹⁸ Ordinarily, the debtor creates a security interest under Article 9 by signing a written security agreement that describes the collateral.¹⁹ Common standard-form security agreements provide a space for describing the property that is collateral or, more conveniently, provide a list of various kinds of property with a box to check by each kind that is collateral. Close by, in the fine print, is language providing that the collateral includes not only property of the kind described "now owned" by the debtor but also any such property "hereafter acquired." This language is commonly referred to as an *after-acquired property clause*, which Article 9 ex-

15. W. PLUMB, *FEDERAL TAX LIENS* 26 (3d ed. 1972).

16. The debtor's consent is not always necessary, however, for a consensually created lien to extend to after-acquired property as broadly defined *supra* note 8. For example, an Article 9 security interest in goods automatically attaches, by force of law alone, to proceeds of the collateral, U.C.C. §§ 9-203(3), -306(2), and also to accessions to the collateral, Nickles, *Accessions and Accessories Under Pre-Code Law and U.C.C. Article 9*, 35 ARK. L. REV. 111, 115-17 (1981). A mortgage on real estate similarly embraces fixtures. *Quicquid plantatur solo, solo cedit* (whatever is annexed to land, becomes part of the land). 5 AMERICAN LAW OF PROPERTY § 19.7 (A. Casner ed. 1952) (stating that mortgages presumably intend all additions to become permanent part of the land: "Where the fixture is installed after the execution of the mortgage, the courts generally hold . . . that the intent of the annexor at the time of the annexation is the determining factor." *Id.* § 19.7, at 29-30.); G. NELSON & D. WHITMAN, *REAL ESTATE FINANCE LAW* § 9.5, at 693 (2d ed. 1985) ("Suppose that a real estate mortgage is executed and recorded, and the mortgagor purchases . . . some . . . item that becomes a 'fixture.' If it becomes a fixture, under the normal rules of real property it becomes part of the real estate and therefore covered by the real estate mortgage."); G. OSBORNE, *HANDBOOK ON THE LAW OF MORTGAGES* § 38, at 67-68 (2d ed. 1970) (stating that "[i]nsofar as property subsequently acquired by the mortgagor becomes an accession to the mortgaged property it feeds the mortgage unaided by any after-acquired property clause"); 5 R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 651[3] (1986) (noting that "[t]he courts have established clear rules giving rights to a real estate mortgagee in articles affixed to the land either prior to the execution of the mortgage or afterwards").

17. See U.C.C. §§ 9-102(1)(a), -203(1).

18. "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation." U.C.C. § 1-201(37).

19. See U.C.C. § 9-203(1)(a).

pressly sanctions.²⁰

An after-acquired property clause in an Article 9 security agreement creates a floating lien that survives as long as any debts covered by the security agreement are unpaid. If the debtor later acquires any property of a kind described as collateral in the security agreement, the creditor automatically obtains an interest in the after-acquired property whether or not she advanced credit that enabled the debtor to acquire the property. The property becomes collateral for all debts covered by the security agreement.²¹

Mortgages of real estate can similarly create floating liens by providing that the mortgage debt is secured not only by the tract specifically described in the mortgage but also by all land the debtor later acquires.²² After-acquired property clauses are

20. Except in the case of consumer goods given as additional security, "a security agreement may provide that any or all obligations covered by the security agreement are to be secured by after-acquired collateral." U.C.C. § 9-204(1). For the exception regarding consumer goods, see U.C.C. § 9-204(2).

The most exhaustive technical analysis of floating liens under Article 9 is Skilton, *Security Interests in After-Acquired Property Under the Uniform Commercial Code*, 1974 WIS. L. REV. 925. For a thorough historical and policy analysis of Article 9 floating liens, see Coogan, *Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien,"* 72 HARV. L. REV. 838 (1959).

21. A security agreement typically defines the debts to be secured by the collateral to include every obligation owed the secured creditor presently and in the future, without regard to when, why, or how the obligation was incurred. This kind of language covering obligations that the debtor may later incur to the secured party is commonly referred to as a future advance clause, which Article 9 expressly allows. U.C.C. § 9-204(3). Consequently, if the debtor repays everything she owes the creditor and, a week or months later, incurs a fresh debt of any kind from the same creditor, the creditor is automatically secured by the collateral described in the security agreement, whenever and however the collateral was acquired. A new agreement is unnecessary. The life of a security agreement is not limited by law. It thus never dies unless the parties include an expiration date, which they rarely do.

The typical security agreement used in farm financing describes the collateral as all the debtor's inventory, equipment, farm products, accounts, other rights to payment, and general intangibles. This list encompasses all of the farmer's personal property except consumer goods. The agreement also contains an after-acquired property clause and an all-inclusive definition of debts the agreement secures. Consequently, the creditor's collateral includes all the goods and intangibles the farmer has or will acquire in connection with her farming enterprise; and every item of this property secures every debt owed the secured creditor, without regard to when or why the collateral was acquired or the debt was incurred.

22. See, e.g., *Franklin v. Community Fed. Sav. & Loan Ass'n*, 629 F.2d 514, 516 (8th Cir. 1980) (validity of after-acquired interest under Missouri law); *Pearl v. Williams*, 146 Ariz. 203, 206, 704 P.2d 1348, 1351 (Ct. App. 1985) (after-acquired interest valid under Arizona statute); *Wright v. Baumann*, 239 Or.

not as common in mortgages of land as they are in security agreements covering personal property. Nonetheless, they are effective to give a mortgagee an interest in real estate subsequently acquired by the debtor without the debtor's further agreement.²³

2. Usual Priority of Floating Liens

Floating liens in after-acquired property often conflict with other interests in the collateral. These other interests may have existed in the property before the debtor acquired it, or they may have arisen at the time of or after the debtor's acquisition. The interests can represent claims of ownership or claims of security. For example, the debtor may have sold the after-acquired property to a buyer who asserts an exclusive right to it. Alternatively, a competing interest may belong to another secured creditor, and the value of the after-acquired property may be insufficient to satisfy both claims completely. In either case, the question of *priority* arises. That is, which claim is superior? When the competing claimants are a floating lienor and another secured creditor, the answer determines whose claim will be paid first from the proceeds of a sale of the collateral.

Priority is never decided by agreement between creditor and debtor. Rather, priority is always decided by rules of law that balance the policy effects of preferring one kind of claim over the other.²⁴ Even when secured by agreement, the creditor and the debtor cannot bilaterally determine the rights of third parties to the collateral. Their agreement is limited in effect to giving the creditor an interest in the property that is collateral and to defining their own respective rights and duties with respect to the collateral. They cannot immunize the col-

410, 416-17, 398 P.2d 119, 122 (1965) (transfer of after-acquired interest in real estate does not create legal interest, only equitable mortgage) (citing *Straus v. Wilsonian Inv. Co.*, 177 Wash. 167, 171, 31 P.2d 516, 518 (1934)); see generally G. NELSON & D. WHITMAN, *supra* note 16, § 9.3 (discussion of after-acquired property clauses and the variations existing in different jurisdictions).

23. The interest is ordinarily equitable and unrecordable; hence, it is typically enforceable only against third persons who know of it, which accounts for its infrequent use. See G. NELSON & D. WHITMAN, *supra* note 16, § 9.3, at 686-87.

24. Creditors with conflicting liens on collateral can, however, contractually modify the law's priority rules as applied to them. The creditor entitled to priority may agree to subordinate her claim to that of the other creditor whose claim, by law, is junior. Article 9 expressly provides that its priority rules can be varied by subordination agreements. U.C.C. § 9-316.

lateral from other claims,²⁵ and they cannot effectively agree that the creditor's interest in the collateral will be superior to any other claim to the property. These matters are regulated exclusively by law.²⁶ Indeed, the principal concern of Article 9, which governs most consensually-created liens on personal property, is the limits of such an interest in relation to other claims to the collateral.²⁷

The fundamental rule of priority, applied generally throughout the law to order conflicting liens, claims, and interests of every kind in property, is that interests rank in the order in which they were created or perfected, that is, *first in time is first in right*.²⁸ Creation refers to the requirements for

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

26. The only kind of agreement that can alter the law's priority rules is a subordination agreement among the creditors themselves. See *supra* note 24.

27. U.C.C. § 9-101 comment.

28. For example: (1) Nonpurchase-money Article 9 security interests rank in the order of perfection, U.C.C. § 9-312(5)(a) (technically, filing or perfection), or, if neither interest is perfected, in the order in which the interests were created. U.C.C. § 9-312(5)(b). See also Jackson & Kronman, *supra* note 6, at 1162 (first-in-time rule prevails under Article 9 and was established in the chattel security field long before enactment of the UCC). (2) Apart from recording statutes, real estate mortgages rank in the order of creation. G. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES § 181 (1951). Because of recording statutes, the ranking of real estate mortgages is commonly determined by the order in which the mortgages were perfected by public recording, although in many states the second mortgagee wins priority by recording first only if she lacks actual notice of the earlier encumbrance. See *id.* § 196; 6A R. POWELL, *supra* note 16, ¶ 905; see also R. CUNNINGHAM, W. STOEUBUCK & D. WHITMAN, THE LAW OF PROPERTY § 11.9, at 775 (1984) (when debtor gives two competing mortgages, the first mortgage in time will have priority). (3) Priority between a federal tax lien and a real estate mortgage or Article 9 security interest generally depends on which of the claims was first perfected. 26 U.S.C. § 6323(a), (h)(1) (1982). (4) Judgment liens generally rank in the order in which the liens attached to the property. T. CRANDALL, R. HAGEDORN & F. SMITH, *supra* note 13, ¶ 6.05[2][f], at 6-81 to 6-82 (stating that "the relative priority among competing judgment liens depends upon the time at which the judgment lien attaches, with the first to attach being granted priority"); 2 FREEMAN ON JUDGMENTS, *supra* note 11, § 975, at 2053-54 ("The priority of judgment liens with respect to one another is normally governed by the time at which they become effective on the property in question, so that the one which first takes effect thereby takes precedence over those subsequently becoming operative." (footnote omitted)). (5) Moreover, with respect to the priority between judgment liens and other kinds of liens and interests, "[i]n the absence of statute otherwise providing, there is nothing about a judgment lien which would take it out of the general rule which ranks liens and other interests in real property in the order in which they were created." *Id.*

making the transfer of the lien or other interest enforceable against the transferor. *Perfection* refers to the steps necessary to make a lien or other interest in property enforceable, as far as is legally possible, against third parties' claims. The perfection requirement often involves public filing or some other kind of notorious conduct, such as taking possession of personal property, to alert the world at large to the interest. Interests subject to a perfection requirement are usually ranked, for purposes of the first-in-time rule, as of the time the requirement was satisfied.

The first-in-time rule is essentially an expression of the

§ 969, at 2034. (6) In states where execution creates a lien on the judgment debtor's property upon actual levy by the sheriff, priority among competing executions is determined according to the order in which the executions were levied. *See, e.g.,* Partch v. Adams, 55 Cal. App. 2d 1, 10, 130 P.2d 244, 250 (1942) (priority of successive executions depends upon the priority of the levies); Jackson-Hinds Bank v. Davis, 244 So. 2d 633, 637-38 (La. Ct. App. 1971) (liens of ordinary creditors seizing same property are ranked inter se in the order of their seizures), *writ ref.*, 258 La. 359, 246 So. 2d 681 (1971); Albrecht v. Long, 25 Minn. 163, 172 (1878) (without regard to when the writs of execution were delivered to the sheriff); Johnson v. Graham Lighter Corp., 83 Ohio App. 489, 494, 80 N.E.2d 690, 693 (1948) ("[I]n either an attachment or execution, priority must be accorded the writ in the execution of which the property is first seized by the officer."). In states where a lien of execution arises as soon as the writ of execution is delivered to the sheriff, execution liens are ranked according to when the sheriff got the writs. *See, e.g.,* Trapnall v. Jordan, 7 Ark. 430, 434 (1847); Flagship State Bank v. Carantzas, 352 So. 2d 1259, 1261-62 (Fla. Dist. Ct. App. 1977); Walton v. Hillier, 128 N.J.L. 119, 122, 24 A.2d 219, 220-21 (1942). (7) Liens of attachment are similarly ranked in the order in which the liens arose. *See, e.g.,* City Nat'l Bank v. Traffic Eng'g Assocs., Inc., 166 Conn. 195, 348 A.2d 637 (1974) (real property); Petri v. Sheriff of Washoe County, 87 Nev. 549, 491 P.2d 43 (1971) (personal property). (8) Moreover, in deciding a contest between an execution lien and a lien of attachment, the "liens are of equal dignity, both being statutory creatures," and, therefore, the principle of first in time, first in right applies. Commercial Transp. Corp. v. Robinson Grain Co., 345 F. Supp. 342, 344 (W.D. Ky. 1972). (9) Service of a writ of garnishment creates a lien on property of the debtor held by the garnishee, and the long-established general rule as to priority between several garnishments against the same property by different creditors is that the garnishment liens rank in the order of time of service of the garnishment summons on the garnishee. *See, e.g.,* Grand v. Kado, 279 So. 2d 811, 814 (La. Ct. App. 1973); Fico, Inc. v. Ghinger, 287 Md. 150, 162, 411 A.2d 430, 437-38 (1980); J. ROOD, A TREATISE ON THE LAW OF GARNISHMENT § 188 (1896). (10) The first-in-time principle is not limited to priority disputes involving legal liens such as those noted here. As a general rule, equitable liens, estates, and other equitable interests rank inter se according to the same principle. 2 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 678, 682, 683, 718 (S. Symons 5th ed. 1941); 2 E. SUGDEN, THE LAW OF VENDORS AND PURCHASERS OF ESTATES 396 (8th Am. ed. 1873). (11) Some states declare by statute that the first-in-time principle is the general rule of priority for all liens. *See, e.g.,* CAL. CIV. CODE § 2897 (West 1974); N.D. CENT. CODE § 35-01-14 (1980).

principle of derivative title, which basically holds that a transferee of property acquires the title of the transferor.²⁹ Such a rule is essential to a system like ours that is largely dedicated

29. The UCC codifies this proposition in several places: U.C.C. § 2-403(1) ("A purchaser of goods acquires all title which his transferor had or had power to transfer . . ."); § 3-201(1) ("Transfer of an instrument vests in the transferee such rights as the transferor has therein . . ."); § 7-504(1) (transferee of document "acquires the title and rights which his transferor had or had actual authority to convey"); § 8-301(1) (purchaser of security "acquires the rights in the security which his transferor had or had actual authority to convey").

The principle of derivative title is repeatedly expressed in Article 9. First, Article 9 makes clear that a debtor cannot create a security interest in property in which she has no rights. U.C.C. § 9-203(1)(c). Concomitantly, as a general rule a security interest only attaches to collateral to the extent that the debtor has rights therein. See R. HILLMAN, J. McDONNELL & S. NICKLES, COMMON LAW AND EQUITY UNDER THE UNIFORM COMMERCIAL CODE ¶ 18.01[2] (1985). A specific expression of the corollary that a security interest attaches only to the extent of the debtor's rights in the collateral is the rule of § 9-318(1), which applies when the collateral is accounts. This section restates the common-law maxim that an assignee stands in the shoes of her assignor. In technical terms, "the rights of an assignee are subject to . . . all terms of the contract between the account debtor [i.e., the obligor] and assignor and any defense or claim arising therefrom," and are also subject to "any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment." U.C.C. § 9-318(1).

Also, again because of the principle of derivative title, an Article 9 security interest is generally unaffected by the debtor's transfer of the collateral, whether by sale or creation of another encumbrance. The security agreement between the secured party and the debtor, and thus the interest created by the agreement, is generally enforceable against the debtor's subsequent transferees. U.C.C. § 9-201 (security agreement is effective against third parties as well as against the debtor herself); § 9-306(2) (security interest continues in collateral notwithstanding debtor's disposition of the property).

Of course, there are exceptions to each of these expressions of the principle of derivative title. See, e.g., U.C.C. § 2-403(1) (good faith purchaser from seller having only voidable title acquires good title); § 2-403(2) (buyer in ordinary course from merchant to whom goods entrusted acquires all rights of the entruster); § 3-305 (holder in due course of instrument takes free of all claims to instrument and most defenses to it); § 7-502 (holder of negotiable document who acquires it by due negotiation acquires all title to the document and to the goods); § 8-302(3) (bona fide purchaser of security acquires her interest in the security free of any adverse claim).

A large part of Article 9 is devoted to creating exceptions to the principle of derivative title. Indeed, the drafters commented that "[t]he rules set out in this Article are *principally concerned* with the limits of the secured party's protection against purchasers from and creditors of the debtor." U.C.C. § 9-101 comment (emphasis added). The principle generally fails to protect a secured party who has not perfected her interest, i.e., given public notice of it, by filing or otherwise. Although "[a] perfected security interest may still be or become subordinate to other interests . . . in general after perfection the secured party is protected against creditors and transferees of the debtor and in particular against any representative of creditors in insolvency proceedings instituted by or against the debtor." U.C.C. § 9-303 comment 1. The text following this note

to protecting private ownership of property because it prevents a party from transferring away interests that belong to another.³⁰ The transferee of property, including a transferee of a limited interest therein, therefore takes subject to all claims and interests existing at the time of the transfer.

A perfection requirement is a modification of the derivative title principle, designed to protect creditors and transferees against dishonest debtors and transferors who would repeatedly encumber and convey property without being truthful about the state of the title. Perfection allows potential creditors and transferees to know in advance of a transaction the state of title of property to be used as collateral or transferred. An effect of a perfection requirement, if not also a purpose, is to establish a clear, certain, and uniform signal as to when a lien or other interest has been created for purposes of applying the first-in-time rule. The efficiency of the rule is thereby enhanced.³¹

Under the rule of first-in-time, a floating lien would enjoy priority over any competing claim to the collateral that arises after the lien was originally created or perfected. Suppose, for example, that Debtor agrees that Bank shall have an Article 9 security interest in all of Debtor's goods, including goods later acquired,³² to secure a loan. This agreement will give Bank an after-acquired interest in any goods Debtor acquires in the fu-

explains the relationship between perfection and the principle of derivative title.

30. An economic justification of the first-in-time rule, at least as applied in consensual security transactions, is that it achieves "what the parties would do for themselves in its absence, and thereby achieves a savings in transaction costs." Jackson & Kronman, *supra* note 6, at 1164.

31. Under Article 9, it is possible for a secured creditor to take the usual step for perfecting a security interest, that is, filing a financing statement, even before the interest is created. U.C.C. § 9-402(1). The interest will not be perfected, in the fullest sense of the term, until the steps for creating the interest have been taken. U.C.C. § 9-303(1). Yet, under Article 9's first-in-time rule that governs conflicts between competing Article 9 security interests, priority is based on time of perfection *or* filing, so that the secured party who first filed wins even though her interest was not the first security interest created in the collateral. U.C.C. § 9-312(5)(a). In this type of system, there are other purposes and effects of perfection, defined narrowly to mean simply giving notice of a potential interest. See Jackson & Kronman, *supra* note 6, at 1178-82 (cost-benefit analysis of Article 9's notice filing system); Scott, *supra* note 6, at 952-59 (Article 9's extraordinary protection of floating liens is justified by establishing an "exclusive financing relationship" that allows the lender "to manage the [debtor's] growth prospect properly and to insure the optimal timing of inputs necessary to achieve maximum return to the joint enterprise." *Id.* at 956.).

32. This clause is authorized by U.C.C. § 9-204(1). See *supra* text accompanying notes 16-21.

ture. The Bank perfects by public filing.³³ Debtor thereafter buys new goods from Seller on credit. Seller secures payment of the purchase price by reserving and perfecting an Article 9 security interest in the new goods. These goods are also subject to Bank's after-acquired interest. Under UCC section 9-312(5), the first-in-time rule that governs conflicts between Article 9 security interests, Bank's after-acquired interest would be entitled to priority over Seller's interest.³⁴ In this kind of case, however, the first-in-time rule of section 9-312(5) is subject to exceptions that will give Seller priority, if she complies with certain procedural requirements, because Seller's interest is an enabling interest.

B. FLOATING LIENS VERSUS ENABLING INTERESTS

1. The Concept of an Enabling Interest

A common competitor of a secured creditor's floating lien in after-acquired property, and also her claim in original collateral, is the interest of a person who, by making a loan or otherwise extending value, directly enabled the debtor to buy, otherwise acquire, or improve the property.³⁵ Such an *enabling interest* is occasionally created by law and can always be created by agreement with the debtor. There are a great many examples of enabling interests, which can be grouped into three major types: *purchase money*, *production money*, and *improvement money interests*.

33. Perfection of an Article 9 security interest ordinarily requires filing a "financing statement," U.C.C. § 9-302(1), which is described in § 9-402, with the Secretary of State or a local county official, or with both of them, U.C.C. § 9-401.

34. U.C.C. § 9-312(5)(a).

35. A general operating loan to a debtor that allows her to stay in business certainly enables her subsequent acquisition or improvement of property. The lender's interest in the debtor's inventory to secure the loan is not an enabling interest, however, because this kind of value only indirectly makes possible increasing the debtor's estate. For the proposition that Article 9 security interests for general operating loans and the like do not qualify as purchase money interests entitled to special priority, see 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 28.2, at 750 (1965) (a claim must be "directly" related to the acquisition of property in order to rank as purchase money); Jackson & Kronman, *supra* note 6, at 1164-66, 1175-78 (unrestricted, general purpose loans have never received, and should not gain, purchase money status, even if the loan may have increased the value of the collateral); McLaughlin, *Qualifying as a Third-Party Purchase-Money Financier: The Hurdles to Be Cleared, the Advantages to Be Gained*, 13 U.C.C. L.J. 225, 232-33 (1981) (purchase-money debts are limited to money that actually purchases identifiable collateral).

By far the most common type of enabling interest is a *purchase money interest*, which describes a creditor's interest in property that secures credit extended to enable the debtor to purchase the property. The creditor may be a lender or a seller, and the property may be real estate or personal property. In some cases, purchase money interests are created by force of law alone,³⁶ but most commonly such interests are created by agreement between creditor and debtor. A lender who loans a debtor the price of a house and secures the loan with a mortgage on the property has a purchase money interest. If the seller finances the purchase through a sale contract and retains an interest in the property until the price is paid, the retained interest is a purchase money interest. If the subject of either transaction were personalty governed by Article 9, the lender's or seller's interest would be classified, in the statute's own terms, as a purchase money security interest.³⁷ A purchase money interest attaches to the collateral whether or not the property is also subject to another secured creditor's floating lien.

Buying is not the only means of acquiring personal property. For instance, a debtor can acquire goods by manufacturing or otherwise producing them from component parts, raw materials, or the like. In this case, too, an Article 9 security interest in the product that secures the creditor who financed acquisition of the constituent elements is an enabling interest. It is not, however, a purchase money security interest because the

36. See *infra* note 49 (authorities cited on vendor's implied equitable lien on real estate). Some states have codified the vendor's lien on real estate. See, e.g., IDAHO CODE § 45-801 (1977); KY. REV. STAT. ANN. § 382.070 (Michie/Bobbs-Merrill 1970); LA. CIV. CODE ANN. art. 3249 (West 1952). Under UCC Article 2, a seller of goods may reclaim the property delivered to an insolvent buyer, U.C.C. § 2-702(2), or may stop delivery of goods in the possession of a bailee. U.C.C. § 2-705. While these rights are available only in limited circumstances, they do confer a form of purchase money interest arising by operation of law. See also LA. CIV. CODE ANN. art. 3227 (West 1952), construed in *Wallace Lincoln-Mercury Co. v. Gentry*, 469 F.2d 396, 402 (5th Cir. 1972) ("By operation of [art. 3227] title [to goods sold] passes to the purchaser but the vendor retains the vendor's privilege . . ." *Id.* A lien is sometimes called a "privilege" under Louisiana law. *Id.* at 400.).

37. Article 9 defines a *purchase money security interest* as a security interest that 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 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.

creditor did not enable the debtor to acquire the product through purchase. Rather, the debtor acquired the product through production. The creditor's enabling interest is thus a *production money interest*, which is a term coined for purposes of this Article.

For example, when a manufacturer buys flour and sugar on credit to make cake mix and gives the seller a security interest in the mix, the seller's interest is a production money security interest.³⁸ So, too, when a supplier sells seed, fertilizer, and petroleum on credit to a farmer, who then grows wheat, the supplier's Article 9 security interest in the crop, or a lien on the crop given by law, is a production money interest. A production money interest can attach even if another secured creditor has a floating lien on all of the debtor's products.

Property is also acquired, in the broad sense of increasing the worth of a person's estate, when the value of property within the estate increases. A debtor can acquire property in this way by improving real or personal property presently owned. A secured creditor's claim to property repaired, transformed, or otherwise improved with materials or services supplied on credit is thus a form of enabling interest which can be labeled an *improvement money interest*. For instance, an artisan who supplies parts or services to repair goods, or a person who supplies materials or labor to improve real estate, acquires by law a lien on the goods³⁹ or land⁴⁰ for the value of the re-

38. The seller's security interest in the raw materials—the flour and sugar—would be a purchase money security interest. U.C.C. § 9-107(a).

39. "By the common law, a workman who by his skill and labor has enhanced the value of a chattel has a lien on it for his reasonable charges, provided the employment be with the consent, either express or implied, of the owner." 1 L. JONES, A TREATISE ON THE LAW OF LIENS § 731, at 480 (2d ed. 1894). Generally, under the common-law, the artisan loses her lien when she surrenders possession of the goods. R. BROWN, THE LAW OF PERSONAL PROPERTY § 13.2, at 396 (W. Raushenbush 3d ed. 1975); 1 L. JONES, *supra*, § 745, at 492. Her only remedy is to hold the goods hostage for payment. In most states, however, the common-law lien has been codified and enhanced so that many states now allow the artisan to enforce the lien by selling the property herself or by forcing a judicial sale of it. *See, e.g.*, IDAHO CODE § 45-806 (1977); MD. COM. LAW CODE ANN. § 16-302 (1983); MINN. STAT. § 514.20 (1986); MISS. CODE ANN. § 85-7-101 (1972); NEB. REV. STAT. § 52-203 (1984); OKLA. STAT. ANN. tit. 42, § 91 (West 1979); S.C. CODE ANN. § 29-15-10 (Law. Co-op. Supp. 1986). Another common enhancement is continuing the lien when the artisan parts with possession, the continuation occurring either automatically or by the artisan recording a lien notice. *See, e.g.*, ARK. STAT. ANN. § 51-415 (1971); KAN. STAT. ANN. § 58-201 (1983); MINN. STAT. § 514.18 (1986); NEB. REV. STAT. § 52-202 (1984); N.D. CENT. CODE § 35-13-02 (1980); S.D. CODIFIED LAWS ANN. § 44-11-3 (1983).

sources supplied. In each instance, the lien is an improvement money interest.

Any increase in the value of property that is improved will inure to the benefit of a creditor having a preexisting lien on the collateral.⁴¹ In this sense, the added value is a form of after-acquired property, broadly defined.⁴² The preexisting lien floats, in the sense of automatically embracing the value added to the collateral, just as a floating lien attaches without formalities when the debtor acquires property subject to the lien through purchase or production. The existence of a preexisting lien on the property, however, does not prevent attachment of an improvement money interest.

Properly labeling an enabling interest according to this three-prong classification scheme—purchase, production, and improvement money interests—is not terribly important. The scheme is primarily designed for convenience in organizing the following discussion, which makes the essentially important point that enabling interests of all classes generally enjoy priority over floating liens.

2. Exceptional Priority for Enabling Interests

The first-in-time rule, which is the law's general rule of priority, could always subordinate an enabling interest in collateral to any floating lien created or perfected before the property was acquired or improved.⁴³ The first-in-time rule, however, is frequently subject to an exception whereby an enabling interest is superior to the conflicting interest of another secured creditor who claims the collateral through a floating lien as security for *unrelated debt*, which means liability for

40. See *infra* text accompanying notes 91-97; see, e.g., FLA. STAT. ANN. § 713.05 (West Supp. 1986); IDAHO CODE § 45-501 (1977); ILL. ANN. STAT. ch. 82, para. 1 (Smith-Hurd Supp. 1987); KY. REV. STAT. ANN. § 376.010 (Michie/Bobbs-Merrill Supp. 1986); MINN. STAT. § 514.01 (1986); see generally G. NELSON & D. WHITMAN, *supra* note 16, § 12.4, at 860.

41. As obviously true as this statement is, a few authorities have been compelled to declare it true. See, e.g., 2 G. GLENN, MORTGAGES § 350, at 1450 (1943) ("[I]f the mortgagor brings upon the premises a thing which by its own nature becomes a part of the land . . . the mortgagee may enjoy the resulting benefit . . ."); cf. *Kinney v. Vallentyne*, 15 Cal. 3d 475, 478-79, 541 P.2d 537, 539, 124 Cal. Rptr. 897, 899 (1975) (judgment lien reaches subsequent increases in the value of the debtor's equity in the property); *Bank of Santa Fe v. Garcia*, 102 N.M. 588, 698 P.2d 458, 461 (Ct. App. 1985) (same); *Smith v. Popham*, 266 Or. 625, 640, 513 P.2d 1172, 1179 (1973) (same).

42. See *supra* note 8.

43. See *supra* text accompanying notes 28-34.

credit that did not directly enable the debtor to acquire or improve the property.

When applicable, this exception prefers an enabling interest to a floating lien without regard to how, or the order in which, the conflicting interests were created or perfected, as long as any applicable procedural requirements have been satisfied.⁴⁴ This is not to say that an enabling interest of any kind, however created, is always entitled to priority over a floating lien. Yet, some kind of enabling interest that is entitled to priority usually is available to a creditor who makes possible the debtor's acquisition of property.⁴⁵

44. Typically, such procedural requirements include perfecting the enabling interest within a short time after it is created, seasonably taking action to enforce the interest, personally notifying other creditors of the interest, or complying with a combination of these kinds of requirements.

If applicable procedural requirements of this kind are not satisfied, the usual priority principle of first in time ordinarily applies and the enabling interest is thus subordinated to the floating lien. See, e.g., *IIT Indus. Credit Co. v. Regan*, 487 So. 2d 1047, 1049 (Fla. 1986) (Article 9 purchase money security interest in equipment, if not filed within the statutory period prescribed by § 9-312(4), completely subordinate to an earlier perfected security interest in after-acquired property), *overruling* *International Harvester Credit Corp. v. American Nat'l Bank*, 296 So. 2d 32 (Fla. 1974); *Circle 76 Fertilizer, Inc. v. Nelsen*, 219 Neb. 661, 668-69, 365 N.W.2d 460, 466-67 (1985) (petroleum products lien, a kind of enabling interest created by law, was subordinate to a prior security interest in crops because the petroleum lienor did not comply with the law providing for the lien that required foreclosure of the lien within a certain time period); *Edmiston v. Kiersted*, 140 Or. 299, 304-05, 12 P.2d 299, 300-01 (1932) (construction lienor who supplied materials for improvement of real estate subordinate to the holder of a preexisting claim of the property to whom the construction lienor had not given statutorily prescribed notice).

45. For example, a seller's Article 2 right of reclamation, U.C.C. §§ 2-507, 2-511, 2-702, is subordinate to the floating lien, that is, after-acquired Article 9 security interest, of the buyer's secured party that attaches to the goods. *Los Angeles Paper Bag Co. v. James Talcott, Inc.*, 604 F.2d 38, 39-40 (9th Cir. 1979); *In re Samuels & Co.*, 526 F.2d 1238 (5th Cir.), *cert. denied*, 429 U.S. 834 (1976); *Lavonia Mfg. Co. v. Emery Corp.*, 52 Bankr. 944, 946-47 (E.D. Pa. 1985) (seller's right of reclamation was subordinate to interest of debtor's secured creditors, but court noted that any seeming unfairness was mooted because seller could have protected itself by complying with purchase money provisions of UCC); *R. HILLMAN, J. MCDONNELL & S. NICKLES*, *supra* note 29, ¶ 18.02[4]. Yet, if the seller retains an Article 9 purchase money security interest in the goods, this interest will prevail over the floating lien of another secured party of the buyer. U.C.C. § 9-312(3), (4). See, e.g., *Ever Ready Machinists, Inc. v. Relpak Corp. (In re Relpak Corp.)*, 25 Bankr. 148, 153 (Bankr. E.D.N.Y. 1982) (seller's purchase money security interest in equipment had priority under § 9-312(4) over after-acquired equipment clause of conflicting security interest). See *infra* notes 67-75 and accompanying text. Also, an artisan's Article 9 security interest in goods she repaired loses to a prior perfected security interest in the property. U.C.C. § 9-312(5)(a). This is simply an application of the first-in-time principle of priority. See *supra* text accompanying notes 28-34. On the other

The exceptional priority for enabling interests over floating liens applies to cases involving real and personal property collateral and to cases in which the floating lien, the enabling interest, or both, were created by law or by agreement. Yet, the priority is most clearly stated and most consistently applied in Article 9, which governs consensually created security interests in personal property.⁴⁶ For this reason, and also because this Article will soon focus on Article 9's treatment of production money interests in crops,⁴⁷ the priority rules of Article 9 are emphasized in the following discussion illustrating the priority of enabling interests over floating liens.⁴⁸

hand, an artisan's lien that arises by law often enjoys priority over any other claim to the collateral, including prior, perfected security interests. See *infra* notes 85-86 and accompanying text.

46. There is a reason why Article 9 so firmly provides priority for enabling interests. The "primary controversy" surrounding Article 9 in its development and infancy was the statute's endorsement of floating security interests. Coogan, *supra* note 20, at 839. Critics worried that the floating liens would result in a debtor "tying up all of his assets with one creditor and hampering his ability to get credit from anyone else." *Id.* The principal answer to this concern was the special priority for purchase money financiers. *Id.* at 861 ("especially important means by which security transactions can at least partially escape from the blanket-like coverage"); see also Gilmore, *The Purchase Money Priority*, 76 HARV. L. REV. 1333, 1336-37 (1963) (the priority of purchase money interests is the most important limitation designed to avoid unjust results of the floating lien). Indeed, according to Professor Gilmore: "No previous security statute has so warmly embraced the . . . after-acquired property interest. It is also true that no previous statute has so sternly insisted on the priority for purchase money interests." *Id.* at 1334. This insistence on balancing the effects of floating security interests is also seen in provisions giving special priority to other kinds of enabling liens, as discussed *infra* text accompanying notes 76-97.

47. For the discussion of production money interests in crops, see *infra* text accompanying notes 111-17.

48. The priority of enabling interests among themselves is not resolved according to a single principle of priority. Rather, every jurisdiction provides a largely nonuniform assortment of different rules for ranking enabling liens *inter se*. The appropriate rule in a particular case usually depends on law that is peculiar to the kinds of enabling interests in conflict. The range of these priority rules is very wide.

At one extreme is the familiar first-in-time principle applied to conflicting enabling interests. For example, this principle is said to govern conflicts among Article 9, purchase money security interests in the same collateral. 2 G. GILMORE, *supra* note 35, § 29.2, at 784 (1965) (purchase money security interests in the same collateral that are perfected at different times are regulated by § 9-312(5), which is an expression of the first-in-time principle); J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 25-5, at 1051-52 (2d ed. 1980) (same); Hogan, *Financing the Acquisition of New Goods Under the Uniform Commercial Code*, 3 B.C. INDUS. & COM. L. REV. 115, 130-33 (1962) (same); Special Project, *The Priority Rules of Article Nine*, 62 CORNELL L. REV. 834, 882-84 (1977) (although policy favors

a. *As applied to purchase money interests*

Whether created by law or agreement, a floating lien that

pro rata distribution among conflicting purchase money security interests, the language of the Code dictates that they rank according to § 9-312(5)); cf. U.C.C. §§ 9-313(4)(a), 9-312(6) (construction mortgage and purchase money interest in fixtures rank according to rule of first to file or record); *but see* B. CLARK, *THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* ¶ 3.9[5], at 3-68 to 3-69 (1980) (better reading of § 9-312 is to award a pro rata recovery when the dispute is between two competing purchase money interests); cf. Baker, *Priority Conflicts Involving Purchase-Money Security Interests*, *PRAC. LAW.*, Oct. 15, 1983, at 67, 78 (conflicting purchase money interests can rank according to the first-in-time rule of § 9-312(5) or the secured parties can share ratably according to their contributions). Even Professor Gilmore suggests that purchase money security interests should rank equally if they attach or are perfected simultaneously. 2 G. GILMORE, *supra* note 35, § 29.2, at 784; *accord* Note, *Competing Purchase Money Security Interests*, 22 *BAYLOR L. REV.* 456, 461-62 (1970); cf. 2 J. POMEROY, *supra* note 28, § 719, at 1041 ("Ordinarily, where two [real estate] mortgages . . . are simultaneously executed on the same property by the same mortgagee, and are recorded, or delivered for record at the same time, their liens are concurrent . . .").

Scattered throughout the law are other instances of enabling liens ranking inter se in the order in which the liens attached or were perfected, that is, according to the first-in-time principle. *See, e.g.*, GA. CODE ANN. §§ 44-14-340, -342 (1982) (landlords' liens on crops for goods and money furnished tenants in producing crops generally rank, as between themselves, according to date); IOWA CODE ANN. § 572.17 (West 1970) (construction liens on real property rank in order of filing); S.D. CODIFIED LAWS ANN. § 38-17-8 (1977) (liens on crops for seed furnished farmer shall have preference in order of filing).

At the other extreme is a rule that ranks later enabling liens ahead of earlier ones so that last in time is first in right. For example, this rule generally applies to conflicting enabling liens on vessels, that is, maritime liens:

[T]he general principle has always been that liens . . . take precedence in the inverse order of their time of accrual, the later liens prevailing over the earlier . . . [because] the earlier lienors, having a proprietary interest in the ship, have been benefitted by the services rendered to all interests in her by the later lienors.

2 BENEDICT ON ADMIRALTY § 51, at 4-4 (7th ed. 1986); *see also* *The St. Jago de Cuba*, 22 U.S. (9 Wheat) 409, 416 (1824) ("[T]he last lien given will supersede the preceding . . . [because] [t]he vessel must get on."); *see generally* G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 743 (2d ed. 1975).

The middle position is a relatively common rule that ranks enabling liens equally inter se, in which case the lien holders share ratably in the proceeds of the collateral. In many states this rule applies to multiple construction, that is, improvement, liens on the same parcel of real property. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 33-992, -1000 (1974); ARK. STAT. ANN. § 51-611 (1971); CONN. GEN. STAT. ANN. § 49-36 (West Supp. 1986) (excluding lien of principal contractor); HAW. REV. STAT. § 507-46 (1985); MICH. COMP. LAWS ANN. § 570.1119 (West Supp. 1986); MISS. CODE ANN. § 85-7-263 (1972); MONT. CODE ANN. § 71-3-502 (1985); OR. REV. STAT. ANN. § 87.060 (Butterworth 1981); R.I. GEN. LAWS § 34-28-25 (1984); S.D. CODIFIED LAWS ANN. § 44-9-44 (1983); TEX. PROP. CODE ANN. § 53.122 (Vernon 1984); UTAH CODE ANN. § 38-1-10 (1974); VT. STAT. ANN. tit. 9, § 1923 (1984); W. VA. CODE §§ 38-2-17, -18 (1985); WIS. STAT. ANN. § 779.11 (West 1981); WYO. STAT. ANN. § 29-1-305 (Michie 1977). It

attaches to after-acquired property to secure unrelated debt generally ranks behind a purchase money interest in the same collateral. Suppose, for instance, that *A* acquired and docketed a judgment against *D*. *D* later buys a nonexempt parcel of real estate in the county where the judgment is outstanding. *D*'s purchase was made possible by a loan from *B*, who has a con-

also applies to conflicting production money security interests in goods. U.C.C. § 9-315. Pro rata sharing is common, too, when the conflict involves production and improvement money liens arising by operation of law. See, e.g., FLA. STAT. ANN. § 83.10 (West Supp. 1986) (landlords' liens on crops for rent and supplies furnished tenant rank equally); LA. CIV. CODE ANN. art. 3217 (West 1952) (various privileges securing property and services are concurrent interest); MONT. CODE ANN. § 71-3-401 (1985) (farm laborers' liens rank equally and are paid pro rata from proceeds of foreclosure sale of collateral); N.D. CENT. CODE § 35-07-03 (Supp. 1985) (grain threshing and drying liens have equal priority); OR. REV. STAT. ANN. §§ 87.146(b), .216, .222, .226 (Butterworth 1981 & Supp. 1986) (certain laborers' liens on chattels have equal priority); S.C. CODE ANN. § 29-13-30 (Law. Co-op. 1976) (laborers' liens on crops rank equally); TENN. CODE ANN. § 66-12-104 (1982) (landlords' liens rank equally).

Finally, and least commonly, the order among conflicting enabling liens is occasionally determined with reference to the nature of the underlying claims, without regard to the order in which the liens arose. The best examples are the construction lien laws of several states that rank conflicting construction liens in the following, or a similar, order: (1) laborers; (2) suppliers of materials; (3) subcontractors; (4) original or general contractors. See, e.g., COLO. REV. STAT. § 38-22-108 (1982); FLA. STAT. ANN. § 713.06 (West 1969); IDAHO CODE § 45-512 (1977); NEV. REV. STAT. § 108.236 (1986); N.M. STAT. ANN. 48-2-13 (1978); N.D. CENT. CODE § 35-27-22 (Supp. 1985); VA. CODE ANN. § 43-23 (1981); WASH. REV. CODE ANN. § 60.04.130 (Supp. 1987). Another, related example of deciding priority among enabling liens by reference to the nature of the underlying claims is the widely accepted rule that ranks purchase money mortgages ahead of construction liens regardless of the order in which the different encumbrances attached or were recorded. See, e.g., ARK. STAT. ANN. §§ 51-605, -607 (1971) (materialmen's lien generally superior to prior liens on improvement except purchase money liens); D.C. CODE ANN. § 38-109 (1986) (construction liens prior to subsequent claims except purchase money mortgages); HAW. REV. STAT. § 507-46 (1985) (in certain cases construction liens are subordinate to subsequent purchase money mortgages); 4 AMERICAN LAW OF PROPERTY, *supra* note 16, § 16.106H, at 239 ("As a general rule purchase money mortgages, whether in favor of the grantor or a third party, prevail over mechanics' liens even though these arose under contracts that antedated the mortgages."); cf. VT. STAT. ANN. tit. 9, § 1921 (Supp. 1986) (construction lien shall not take precedence over a mortgage given upon the project or upon the land as security for the payment of money loaned and to be used in payment of expenses of same); *but see* OR. REV. STAT. ANN. § 87.025(6) (Butterworth Supp. 1986) (construction lien has priority over earlier recorded mortgage given to secure a loan made to finance the improvement). Also, for one reason or another, vendors' liens on real estate are similarly superior to purchase money mortgages on the property. See, e.g., *Schoch v. Birdsall*, 48 Minn. 441, 51 N.W. 382 (1892) (encumbrance in favor of vendor preferred to earlier recorded purchase money mortgage on the realty); *Rader v. Dawes*, 651 S.W.2d 629, 631 (Mo. Ct. App. 1983) (same); G. NELSON & D. WHITMAN, *supra* note 16, § 9.2, at 681-82.

suasually created purchase money mortgage on the land, or by an extension of credit from *B* as the seller, who retained a vendor's lien created by law on the land.⁴⁹ *A*'s judgment lien automatically attached to the land.⁵⁰ This lien originated with the docketing of *A*'s judgment,⁵¹ which occurred before the creation of *B*'s mortgage or lien. In a sense, therefore, *A*'s judgment lien is first in time. Nevertheless, *B*'s mortgage or vendor's lien has priority because a purchase money interest in real estate, however created, always prevails over the lien of an antecedent judgment.⁵² Similarly, if *A* claimed the land

49. R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 28, § 10.6 ("Courts of equity generally recognize an implied lien, much like a mortgage on the land, in the favor of the vendor for the amount of the unpaid purchase price." *Id.* at 657-58.); 2 L. JONES, *supra* note 39, § 1061, at 1 (vendor of real estate has implied lien for purchase money); 4 J. POMEROY, *supra* note 28, § 1261, at 770 (A vendor's lien "is only another mode of expressing his equitable interest . . . arising from the doctrine of conversion . . . and so far as it has any distinctive signification, it simply means his right of enforcing his claim for the purchase money out of the vendee's equitable estate by means of a suit in equity."); see authorities cited *supra* note 36; see also *Quintana v. Anthony*, 109 Idaho 977, 980, 712 P.2d 678, 681 (Ct. App. 1985) (IDAHO CODE § 45-801 codifies vendor's equitable lien to secure amount of unpaid purchase price); *Grace Dev. Co. v. Houston*, 306 Minn. 334, 335, 237 N.W.2d 73, 75 (1975) ("A vendor's lien is an implied equitable lien upon real property for the amount of the unpaid purchase price."); *Rader v. Dawes*, 651 S.W.2d 629, 631 (Mo. Ct. App. 1983) (priority of vendor's lien over recorded down-payment mortgage); *Bean v. Walker*, 95 A.D.2d 70, 74, 464 N.Y.S.2d 895, 898 (1983) (vendor "holds the legal title in trust for the vendee, subject to the vendor's equitable lien for the payment of the purchase price in accordance with the terms of the contract"); *Russo v. Cedrone*, 118 R.I. 549, 556, 375 A.2d 906, 909 (1977) (vendor's equitable lien is recognized, but not favored, under Rhode Island law).

50. See *supra* text accompanying notes 11-15.

51. See authorities cited in *supra* note 12.

52. See *Federal Land Bank v. Bank of Lenox*, 192 Ga. 543, 16 S.E.2d 9 (1941), in which the court opined:

[A]nother principle, long settled in this State and recognized with little dissent in other jurisdictions, [is] that a mortgage or deed to land, securing its purchase-money, and executed as a part of the same transaction in which the purchaser acquires title, will exclude or take precedence over any prior lien against the property arising through or against the purchaser.

Id. at 556, 16 S.E.2d at 17; *Nelson v. Stoker*, 669 P.2d 390, 396 (Utah 1983) ("[T]he State's judgment lien, like other judgment liens, takes priority as of the time it is duly docketed or recorded. Like other judgment liens, however, it must also yield to the special priority accorded a vendor's purchase money mortgage."); accord, *Associates Discount Corp. v. Gomes*, 338 So. 2d 552 (Fla. Dist. Ct. App. 1976); *Bank of Homewood v. Gembella*, 48 Ill. App. 2d 316, 199 N.E.2d 293 (1964); *Liberty Parts Warehouse, Inc. v. Marshall County Bank & Trust*, 459 N.E.2d 738 (Ind. Ct. App. 1984); see also T. CRANDALL, R. HAGEDORN & F. SMITH, *supra* note 28, ¶ 6.05[2][f], at 6-83 ("There is general agreement that a purchase-money mortgage on after-acquired property has

through an after-acquired property clause in an earlier mortgage agreement with *D*,⁵³ real estate finance law would favor *B*'s interest over that of *A*.⁵⁴

The same result would ensue if *B*'s consensually created purchase money interest was in goods. Article 9 would then govern the creation, perfection, and priority of *B*'s interest, which is a *purchase money security interest* under the Code.⁵⁵

priority over a judgment lien based on a judgment docketed before the acquisition of title."); H. HERMAN, TREATISE ON THE LAW OF EXECUTIONS 195, 364-65 (1875) (a judgment lien on the interest of a vendee of land is subject to the lien of the vendor); G. NELSON & D. WHITMAN, *supra* note 16, § 9.1, at 676-77 (purchase money mortgage enjoys "superiority . . . over liens arising under judgments against the grantee-mortgagor under a judgment obtained and docketed or recorded before the purchase money mortgage is executed"); 2 J. POMEROY, *supra* note 28, § 725, at 1072-79 (same); 2 E. SUGDEN, *supra* note 28, at 395 (persons claiming by operation of law through vendee of real estate take subject to vendor's lien, noting specifically that vendor's lien prevails against judgment creditor of the vendee).

53. Regarding floating liens created by agreement, see *supra* text accompanying notes 16-23.

54. G. NELSON & D. WHITMAN, *supra* note 16, § 9.1, at 677 (purchase money mortgage "often wins over after-acquired property clauses in previously executed mortgages that would cover the subject matter of the purchase money mortgage"). On the basis of very traditional reasoning, a vendor's lien should also prevail over the interest of a prior mortgagee claiming under an after-acquired property clause in an earlier mortgage between her and the vendee. The mortgagee should lose because the newly acquired property would secure a preexisting debt. A vendor's lien is defeated only by a purchaser for new value, not by a purchaser who takes her interest for preexisting debt. 2 L. JONES, *supra* note 39, § 1079, at 20-22 (1888). Because a vendor's lien and an after-acquired interest in real property are both equitable claims, there is another traditional reason for the result: In equity, a general lien, such as that on all after-acquired property of the debtor, is generally subordinate to a specific lien on particular property the debtor acquires later. See 2 J. POMEROY, *supra* note 28, § 720, at 1053-54. Finally, a vendor's lien accompanies the transfer of the estate to the vendee and therefore is intrinsically superior to a lien created by the latter in favor of a third person, since such lien can have no being before the title to the estate has vested in the vendee and the title comes to him burdened with the vendor's equity.

Eubank v. Finnell, 118 Mo. App. 535, 544, 94 S.W. 591, 593 (1906) (purchase money mortgage in favor of third person to secure downpayment on land subordinate to vendor's lien for balance of the purchase price). This rule was recently followed in Rader v. Dawes, 651 S.W.2d 629, 631-32 (Mo. Ct. App. 1983) (vendor's lien has priority over a downpayment mortgage even though the mortgage was recorded first and the vendor has actual knowledge of it); *cf.* Schoch v. Birdsall, 48 Minn. 441, 443-44, 51 N.W. 382, 382 (1892) (purchase money mortgage in favor of third person to secure part of price of land subordinate to mortgage given vendor to secure balance of price even though third person's mortgage was recorded earlier); Protection Bldg. & Loan Ass'n v. Knowles, 54 N.J. Eq. 519, 34 A. 1083 (N.J. Ch. 1896) (same).

55. U.C.C. § 9-107. For technical analyses of the Article 9 purchase money

Article 9 would subordinate *A*'s floating lien claim to *B*'s purchase money security interest whether *A*'s claim was based on a lien of execution⁵⁶ arising by law or on an after-acquired property clause in an earlier security agreement with *D*. In either event, Article 9 would condition *B*'s priority only on *B* fulfilling certain procedural requirements.

Assume, for instance, that *A*'s floating lien was based on a lien of execution. *A* is a *lien creditor* for purposes of Article 9.⁵⁷ *B* is a *secured party*, which is Article 9's name for a person in whose favor a security interest exists.⁵⁸ Generally, UCC section 9-301(1)(b), which is a form of the first-in-time rule, determines priority between a lien creditor and a secured party. Under section 9-301(1)(b), the lien creditor prevails if the lien attached *before* the secured party perfected.⁵⁹ In contrast, the

security interest, and the special priority Article 9 accords it, see Baker, *supra* note 48; Hogan, *supra* note 48, at 118-37; McLaughlin, *supra* note 35, at 225-26; Special Project, *supra* note 48, at 869-92. For the most authoritative historical and policy analysis of purchase money priority, see 2 G. GILMORE, *supra* note 35, § 29.

56. Execution is the process through which a judgment is coercively collected by state action. See 1 A. FREEMAN, A TREATISE ON THE LAW OF EXECUTIONS § 1 (3d ed. 1900); see, e.g., N.D. CENT. CODE § 28-21-06 (1985) ("The writ of execution must be issued in the name of the state of North Dakota . . ."). Execution is initiated through pro forma issuance of an appropriate writ to the sheriff who is thereby instructed to seize and sell so much of the debtor's non-exempt property as is necessary to satisfy the judgment. Execution creates by law a lien on personal property of the debtor. 1 A. FREEMAN, *supra*, §§ 38, 40; 2 *id.*, § 202. In some states, the lien arises upon delivery of the writ to the sheriff and attaches to all of the debtor's nonexempt personal property within the sheriff's jurisdiction. See, e.g., ARK. STAT. ANN. § 30-116 (1979); DEL. CODE ANN. tit. 10, § 9553(b) (1975) ("[F]rom the time an execution is delivered to a constable or sheriff, it shall bind all the goods and chattels of the defendant within the bailiwick of such constable or sheriff which are actually levied upon within 30 days thereafter."). In other states, creation of the lien of execution awaits levy by the sheriff and attaches only to property she actually or constructively seizes. See, e.g., ALA. CODE § 6-9-60 (1975) (lien is created at time of levy and notice of levy); CAL. CIV. PROC. CODE § 697.710 (West Supp. 1987) (lien is created upon levy on judgment debtor's property); MINN. STAT. § 550.10 (1986) ("Until a levy, property not subject to the lien of the judgment is not affected by the execution."). Everywhere the lien reaches after-acquired property. 2 A. FREEMAN, *supra*, § 197, at 1011 ("An officer having an execution in his hands is entitled to levy it upon any property which he may find belonging to the debtor, although acquired subsequently to delivery of the writ.").

57. For Article 9 purposes, the term "lien creditor" includes a creditor who acquires a lien on property through attachment, levy or the like. U.C.C. § 9-301(3).

58. U.C.C. § 9-105(1)(m).

59. The actual language is as follows: "[A]n unperfected security interest is subordinate to the rights of . . . a person who becomes a lien creditor before the security interest is perfected." U.C.C. § 9-301(1)(b).

secured party prevails if perfection of the security interest occurred before or at the same time as the lien attached.

B can thus insure priority of the purchase money security interest by filing before *D* acquires rights in goods. Not until *D* acquires rights will *A*'s floating lien of execution attach to the property.⁶⁰ *B*'s interest will attach at the same point⁶¹ and also will be perfected then because of the earlier filing.⁶² Because *A*'s interest did not attach *before* perfection of *B*'s interest, *B*'s purchase money security interest prevails under section 9-301(1)(b).⁶³

Moreover, Article 9 provides additional protection for a purchase money security interest as against a lien of execution or the like that attaches after the security interest is created

60. An execution lien only attaches to property in which the judgment debtor has an interest. See, e.g., *Eastern Shore Bldg. & Loan Corp. v. Bank of Somerset*, 253 Md. 525, 530, 253 A.2d 367, 370 (1969); *In re Estate of Robbins*, 74 Misc. 2d 793, 795, 346 N.Y.S.2d 86, 89-90 (Sur. Ct. 1973); *Belnap v. Blain*, 575 P.2d 696, 698 (Utah 1978); see also H. HERMAN, *supra* note 52, § 113, at 140-41 ("Generally, the right to seize and sell property on execution is confined to the seizure and sale of such property as an owner himself can sell, or that can be sold, if there be no law to the contrary.").

61. U.C.C. § 9-203(2) provides that a security interest attaches as soon as all the requirements of § 9-203(1) are met, and § 9-203(1) requires that the debtor have rights in the collateral. See, e.g., *Babson Credit Plan, Inc. v. Cordele Prod. Credit Ass'n*, 146 Ga. App. 266, 271, 246 S.E.2d 354, 358 (1978) (both purchase money interest and competing security interest attached at moment of delivery which was when buyer obtained rights in the collateral).

62. "A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. . . . If such steps are taken *before* the security interest attaches, it is perfected at the time when it attaches." U.C.C. § 9-303(1) (emphasis added).

63. Cf. *Sperry Corp. v. Farm Implement, Inc.*, 760 F.2d 196, 198 (8th Cir. 1985) (even if security interest and lien attached simultaneously, lien creditor would lose under § 9-301(1)(b)); *Texas Oil & Gas Corp. v. United States*, 466 F.2d 1040, 1048 (5th Cir. 1972) (noting that even if judgment lien and security interest were perfected simultaneously, under Article 9 security interest would still have priority), *cert. denied*, 410 U.S. 929 (1973); accord *Carlson & Shupack, Judicial Lien Priorities Under Article 9 of the Uniform Commercial Code: Part 1*, 5 CARDOZO L. REV. 287, 345-46 (1985) (noting that in case of "tie," secured party wins). The same analysis would give priority to a nonpurchase money, after-acquired security interest attaching to the property so long as the secured party had filed before lien of execution attached and, when the lien attached, the debtor was obligated to the secured party.

A purchase money security interest in personal property also prevails over other kinds of floating liens created by law, including the most important federal tax lien. Fetzer, *The Purchase Money Security Interest and the Federal Tax Lien: A Proposal for Legislative Change*, 36 HASTINGS L.J. 873, 892-95 (1985). Also, a purchase money interest in real property generally enjoys priority over floating liens whether created by law or by agreement. See *supra* text accompanying notes 49-54.

but before the interest is perfected. Under these circumstances, section 9-301(1)(b) gives the lien creditor priority.⁶⁴ The secured party, however, can rely on a special, exceptional rule, section 9-301(2), which gives a ten-day grace period for perfection of purchase money security interests.⁶⁵ This rule gives the purchase money secured party priority over the intervening lien creditor "[i]f the secured party files . . . before or within ten days after the debtor receives possession of the collateral."⁶⁶

If competing claimants are both secured parties, Article 9 again provides protection for the party who claims a purchase money interest as against the party with a floating lien in after-acquired property. For example, now assume that *A*'s floating lien on *D*'s goods, newly purchased from *B*, is based on an after-acquired clause in a security agreement between *A* and *D*. In this case, *A* and *B* are both Article 9 secured parties. Each of them has an Article 9 security interest in the same goods, but only *B*'s interest is a purchase money security interest. Conflicts between perfected security interests are generally governed by the first-in-time rule embodied in section 9-312(5)(a). This rule ranks interests in the order of filing or perfection and thus prefers *A*'s interest because it was filed long before *B* entered the scene. Many exceptions to section 9-312(5)(a) exist, however.

Significantly, two special rules together protect purchase money security interests in every kind of collateral against earlier perfected floating security interests. The broader of these

64. See *supra* note 59.

65. Many states have enlarged this grace period. Florida and Georgia have increased the ten-day period to fifteen days. FLA. STAT. ANN. § 679.301(2) (West Supp. 1986); GA. CODE ANN. § 11-9-301(2) (1982). Of the states increasing the period, the majority have enlarged it to twenty days. See, e.g., ARIZ. REV. STAT. ANN. § 47-9301(B) (1986); ILL. ANN. STAT. ch. 26, para. 9-301(2) (Smith-Hurd Supp. 1986); KY. REV. STAT. ANN. § 355.9-301(2) (Michie/Bobbs-Merrill Supp. 1986); ME. REV. STAT. ANN. tit. 11, § 9-301(2) (Supp. 1986); MICH. COMP. LAWS ANN. § 440.9301(2) (West Supp. 1986).

66. U.C.C. § 9-301(2). See *Marine Midland Bank v. Smith Boys, Inc.*, 129 Misc.2d 37, 40, 492 N.Y.S.2d 355, 358 (Sup. Ct. 1985) (noting that purchase money secured party's failure to file within ten days of debtor receiving possession of the collateral would defeat its security interest under § 9-301(2) only with respect to a lien creditor or trustee in bankruptcy whose lien arose prior to filing, but did not apply to priority with respect to purchasers); 2 G. GILMORE, *supra* note 35, § 29.5, at 800; *id.* § 45.3.2, at 1297; J. WHITE & R. SUMMERS, *supra* note 48, § 24-3, at 998; *id.* § 25-2, at 1032.

For an excellent discussion of the issues raised by § 9-301(2), see Carlson & Shupack, *supra* note 63, at 326-40.

two purchase money rules is section 9-312(4). It gives priority to a "purchase money security interest in collateral other than inventory . . . over a conflicting security interest in the same collateral . . . if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within ten days thereafter."⁶⁷ If, for example, the collateral claimed by *A* and *B* is cattle added to *D*'s dairy herd, *B*'s purchase money interest in the additions as farm products will have priority over *A*'s after-acquired interest in them, if *B* perfected within ten days of *D* receiving the animals.⁶⁸ The

67. U.C.C. § 9-312(4). The ten-day grace period for filing has been increased in many states. Florida, Georgia, and Indiana have increased it to fifteen days. FLA. STAT. ANN. § 679.312(4) (West Supp. 1986); GA. CODE ANN. § 11-9-312(4) (1982); IND. CODE ANN. § 26-1-9-312(4) (Burns Supp. 1986). An even larger group of states has increased the ten-day period to twenty days. See, e.g., ARIZ. REV. STAT. ANN. § 47-9312(C) (1986); DEL. CODE ANN. tit. 6, § 9-312(4) (Supp. 1986); IOWA CODE ANN. § 554.9312(4) (West Supp. 1986); KAN. STAT. ANN. § 84-9-312.4 (Supp. 1985); MONT. CODE ANN. § 30-9-312(4) (1985).

68. *United States v. Mid-States Sales Co.*, 336 F. Supp. 1099, 1102 (D. Neb. 1971) (recognizing that under § 9-312(4) purchase money security interest in cattle that were not inventory had priority over conflicting security interest in debtor's after-acquired livestock that could be identified under the security agreement). *United States v. Hooks (In re Hooks)*, 40 Bankr. 715, 722 (Bankr. M.D. Ga. 1984) (under § 9-312(4), purchase money security interest in cows which were farm products had priority over a conflicting security interest in the cows); The purchase money secured party's failure to file within the time specified in § 9-312(4) renders the section inapplicable so that priority is determined according to the usual first-in-time rule of § 9-312(5)(a), which ordinarily means that the purchase money interest in the collateral is subordinate to a floating lien on the collateral. See, e.g., *Bank of Madison v. Tri-County Livestock Auction Co.*, 123 Ga. App. 768, 769-70, 182 S.E.2d 687, 689 (purchase money security interest in cattle not timely filed); *North Platte State Bank v. Production Credit Ass'n*, 189 Neb. 44, 52-53, 200 N.W.2d 1, 6 (1972) (same); *Burlington Nat'l Bank v. Strauss*, 50 Wis. 2d 270, 277, 184 N.W.2d 122, 125-26 (1971) (same).

U.C.C. § 9-312(4) will not give priority to a security interest taken directly in the cattle for feed and other goods and services used in maintaining or improving the herd. The reason is that such an interest in the cattle is not a purchase money security interest in them because the credit extended to the debtor was given to enable her to purchase the supplies, not to acquire rights in the cattle themselves. U.C.C. § 9-107. On the same reasoning, a security interest in crops for the goods and services necessary to produce them is not a purchase money security interest in the crops. See *infra* notes 134-36 and accompanying text.

The supplier's security interest given directly in the livestock is nevertheless a kind of enabling interest, an improvement money interest. See *supra* text accompanying notes 39-42; *infra* notes 85-97. The inferiority of this interest to a floating lien on the livestock does not undermine the proposition that the claims of creditors who provide enabling credit with respect to collateral generally outrank after-acquired interests in the property.

First, in some states suppliers of certain goods and services for livestock

same result follows if the collateral is consumer goods or equipment, such as a tractor, used in connection with *D*'s business.⁶⁹

enjoy liens created by law that prevail over after-acquired interests in the collateral (but such liens, so potent in priority, are not very common). See, e.g., IOWA CODE ANN. §§ 570A.3, .5 (West Supp. 1986) (lien of agricultural supply dealer furnishing feed to farmer given limited priority over earlier perfected security interest in the livestock); KAN. STAT. ANN. § 58-220 (1983) (agister's lien on livestock preferred to any prior security interest or other encumbrance); MINN. STAT. § 514.92(4) (1986) (veterinarian's lien entitled to priority over all other liens and security interests on the animals to the extent services performed primarily for protecting human health, preventing spread of diseases, or preserving the health of the animal or animals treated); N.C. GEN. STAT. § 44A-2(c) (1984) (lien of person for boarding animals has priority over perfected security interests); see also *Defiance Prod. Credit Ass'n v. Hake*, 70 Ohio App. 2d 185, 187-88, 435 N.E.2d 692, 695 (1980) (liens of farmers who boarded hogs were entitled to priority over earlier perfected security interests in the animals). But see *Washington County Bank v. Red Socks Stables, Inc.*, 221 Neb. 300, 302-03, 376 N.W.2d 782, 784 (1985) (agister's lien held subordinate to previously perfected security interest because statute creating lien provided that the agister shall have a "first, paramount and prior lien" only if "holders of any prior liens on that livestock 'shall have agreed in writing to the contract for the feed and care of the livestock involved'" (quoting NEB. REV. STAT. § 54-201 (1984))).

Also, in cases where feed or other goods consumed by the livestock are supplied, an Article 9 security interest retained in the goods should continue in the livestock and either outrank or rank equally with an after-acquired security interest in the animals. See U.C.C. § 9-315 (a perfected security interest in goods that become part of a product or mass continues in the product or mass); R. HILLMAN, J. MCDONNELL & S. NICKLES, *supra* note 29, ¶ 22.05[1][a][iii]; Clark, *Some Problems in Agricultural Lending Under the UCC*, 39 U. COLO. L. REV. 352, 362-63 (1967); see also *infra* text accompanying notes 76-84 (regarding application of § 9-315 to production money security interests in manufactured goods); but see *Meadville Prod. Credit Ass'n v. McDougal* (*In re McDougal*), 60 Bankr. 635, 636 (Bankr. W.D. Pa. 1986) (cattle not a product or mass within meaning of § 9-315, and security interest in feed does not continue into cattle that consume the feed); *First Nat'l Bank v. Bostron*, 39 Colo. App. 107, 109, 564 P.2d 964, 966 (1977) (same). In any event, if the earlier interest belongs to a person who financed the purchase of the livestock, this person's interest is also an enabling interest. Giving her claim priority is in accord with the common practice of ranking conflicting enabling interests according to the first-in-time principle. See *supra* note 48.

69. *Bank One v. Farmers Prod. Credit* (*In re Miller*), 44 Bankr. 716, 720 (Bankr. N.D. Ohio 1984) (purchase money security interest in equipment given priority under § 9-312(4)); *Tuftco Sales Corp. v. Garrison Carpet Mills, Inc.*, 158 Ga. App. 674, 675-76, 282 S.E.2d 159, 161 (1981) (purchase money security interest in equipment, perfected by filing within 10 days after debtor obtained possession, had priority over previously perfected security interest in debtor's after-acquired property even though purchase money secured party subsequently forfeited its priority by terminating its financing statement); *Mikulicka v. Baer*, 184 N.J. Super. 457, 460-61, 446 A.2d 555, 556 (1982) (purchase money security interest in fixtures had priority over competing security interest in same fixtures); *John Deere Co. v. Prod. Credit Ass'n*, 39 U.C.C. Rep. Serv. (Callaghan) 1882, 1884 (N.Y. Sup. Ct. 1984) (purchase money security in-

If the newly purchased collateral is inventory, another purchase money rule, UCC section 9-312(3), similarly gives priority to *B*'s enabling interest over *A*'s after-acquired interest in the property.⁷⁰ The major differences between sections 9-312(3) and 9-312(4) are procedural, not substantive. For example, section 9-312(3) has no ten-day grace period within which *B* can file the purchase money security interest in the inventory. *B* must perfect before *D* receives the inventory.⁷¹ Also, before *D* receives the inventory, *B* must give *A* written notice of *B*'s interest.⁷² Despite these procedural differences,⁷³ the ultimate theme of sections 9-312(3) and (4) is the same. A purchase money security interest in personal property collateral of any kind is entitled to priority over an after-acquired security interest in the property, notwithstanding the order of filing,⁷⁴ to the

terest in farm equipment had priority over competing security interest in same equipment under § 9-312(4)).

70. This section provides:

A perfected purchase money 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).

71. *Id.* § 9-312(3)(a).

72. *Id.* § 9-312(3)(b).

73. For detailed comparison and explanation of the procedural differences between § 9-312(3) and (4), see Coogan, *supra* note 20, at 861-64; Special Project, *supra* note 48, at 873-80.

74. This theme is repeated in UCC § 9-313, which governs priority disputes concerning fixtures. The principle of first-in-time is the general rule of priority between a real estate encumbrancer and an Article 9 secured party whose collateral is fixtures that have become part of the real estate. U.C.C. § 9-313(4)(b), (7). Thus, the secured party loses if her security interest was perfected after the real estate mortgage was recorded. The result is different, however, if the secured party's interest in the fixtures is a purchase money security interest. In this event, the security interest is entitled to priority if the secured party perfects "before the goods become fixtures or within ten days

extent the after-acquired interest secures unrelated debt.⁷⁵

b. *As applied to production money interests*

Under Article 9, consensually created production money interests in manufactured goods also have priority over, or rank equally with, after-acquired interests for unrelated debts. Suppose *A* has a perfected Article 9 security interest in all of *D*'s inventory, present and after-acquired. *D* manufactures widgets that are produced by combining several components which lose their identity in the product. *D* buys components on credit from *B* who reserves an Article 9 security interest in them. *D* produces a batch of widgets with the components purchased from *B*. By operation of law, specifically UCC section 9-315(1), *B*'s interest in the components continues in the new widgets as products of the collateral.⁷⁶ *A*'s floating lien attaches to the components, as well as the widgets produced therefrom, because the security agreement with *D* covers after-acquired inventory.

The relative priority of *A* and *B* in the batch of newly produced widgets is an open question under Article 9, which has been variously interpreted by the authorities, but in no event does *A*'s earlier perfection give her complete priority. Relying on UCC section 9-315(2),⁷⁷ some authority holds that the conflicting interests of *A* and *B* rank equally and, therefore, *A* and *B* share ratably in the product.⁷⁸ Arguably, however, even

thereafter," notwithstanding that the mortgage is already recorded. U.C.C. § 9-313(4)(a). The usual first-in-time rule returns to govern if the real estate encumbrance is a construction money mortgage, U.C.C. § 9-313(7), which is appropriate because in this event the conflict is between two enabling interests. See *supra* note 48 and authorities cited therein.

75. If the after-acquired interest is also a purchase money security interest, the standard rule of first in time applies, as expressed in UCC § 9-312(5)(a). See *supra* authorities cited in note 48.

76. According to UCC § 9-315(1)(a):

(1) If a security interest in goods was perfected and subsequently the goods or a part thereof have become part of a product or mass, the security interest continues in the product or mass if

(a) the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass

77. "When under subsection (1) more than one security interest attaches to the product or mass, they rank equally according to the ratio that the cost of the goods to which each interest originally attached bears to the cost of the total product or mass." U.C.C. § 9-315(2).

78. *In re San Juan Packers, Inc.*, 696 F.2d 707, 711 (9th Cir. 1983); 2 G. GILMORE, *supra* note 35, § 31.5, at 854-56; Hogan, *supra* note 48, at 153-54. *B* need not comply with the procedural requirements of U.C.C. § 9-312(2) to enjoy this equal priority status because § 9-315 overrides § 9-312. U.C.C. § 9-312(1); 1A P.

under section 9-315(2), *B* wins completely if she fully financed the cost of the component goods.⁷⁹ Other authority holds that section 9-315(2) is inapplicable to the dispute between *A* and *B* because the provision applies only when each competing interest has attached to the product or mass solely through section 9-315(1).⁸⁰ In the hypothetical case, *A*'s interest in the widgets is not dependent on section 9-315(1). Although *A*'s interest attached to the component parts as inventory⁸¹ and continued in the parts as they were transformed into widgets, *A*'s interest also attached directly to the widgets themselves as inventory. Accordingly, if section 9-315(2) is inapplicable, section 9-312 governs the dispute.⁸² Because *B*'s interest in the components was a purchase money security interest, her interest in the products is also such an interest.⁸³ *B*'s purchase money interest in the widgets is thus eligible for complete priority over *A*'s interest in them under UCC section 9-312(3),⁸⁴ assuming *B* complies with the section's procedural requirements for priority.

c. *As applied to improvement money interests*

To illustrate the priority generally given an improvement money interest, suppose that *A* has a perfected Article 9 security interest in certain goods belonging to *D*. The collateral secures an unrelated debt *D* owes *A*. *B* furnishes materials or services to repair or otherwise improve the goods. By operation of law, *B* acquires an artisan's lien on the goods to secure the value of materials and services supplied. Because of UCC section 9-310,⁸⁵ *B*'s artisan's lien outranks *A*'s interest in the col-

COOGAN, W. HOGAN, D. VAGTS, J. McDONNELL, BENDER'S SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 7.11A[2][y] (1986).

79. 2 G. GILMORE, *supra* note 35, § 31.5, at 854-56.

80. Frisch, *UCC Section 9-315: A Historical and Modern Perspective*, 70 MINN. L. REV. 1, 48-52 (1985) (emphasizing that by its own terms, the rule of § 9-315(2) applies only when the competing security interests in a product or mass attached "under subsection (1)").

81. As Article 9 defines "inventory", the term includes raw materials and materials used or consumed in a business. U.C.C. § 9-109(4). Security agreements covering inventory typically define the term just as broadly.

82. Frisch, *supra* note 80, at 52.

83. Jackson & Kronman, *A Plea for the Financing Buyer*, 85 YALE L.J. 1, 29 (1975); McLaughlin, *supra* note 35, at 237-38, 250-51.

84. McLaughlin, *supra* note 35, at 252-55. U.C.C. § 9-312(3) is quoted *supra* note 70 and explained *supra* text accompanying notes 70-75.

85. This section 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 per-

lateral, unless extra-Code law specifically provides otherwise.⁸⁶

fectured security interest unless the lien is statutory and the statute expressly provides otherwise.

U.C.C. § 9-310.

86. See, e.g., *Peavy's Serv. Center, Inc. v. Associates Fin. Servs. Co.*, 335 So. 2d 169 (Ala. Civ. App. 1976) (common-law, possessory mechanic's lien for repairs to diesel truck takes priority over a perfected security interest), *cert. denied*, 335 So. 2d 172 (Ala. 1976); *Carolina Aircraft Corp. v. Commerce Trust Co.*, 289 So. 2d 37 (Fla. Dist. Ct. App. 1974) (repairer's lien on airplane had priority over properly perfected security interest in the goods); *National Bank v. Bergeron Cadillac, Inc.*, 38 Ill. App. 3d 598, 347 N.E.2d 874 (1976) (common-law, possessory mechanic's lien for services and materials used in repairing motor vehicle had priority over perfected security interest in same), *aff'd*, 66 Ill. 2d 140, 361 N.E.2d 1116 (1977); *Corbin Deposit Bank v. King*, 384 S.W.2d 302 (Ky. 1964) (statutory repairman's lien on automobile was entitled to priority over a prior perfected security interest of bank); *General Motors Acceptance Corp. v. Colwell Diesel Serv. & Garage, Inc.*, 302 A.2d 595 (Me. 1973) (common-law mechanic's lien, where the repairman retains possession of the repaired goods, has priority over a perfected security interest in the goods); *Thorp Commercial Corp. v. Mississippi Road Supply Co.*, 348 So. 2d 1016 (Miss. 1977) (repairman's lien was entitled to priority over perfected security interest in equipment); *United States Nat'l Bank v. Atlas Auto Body, Inc.*, 214 Neb. 597, 335 N.W.2d 288 (1983) (auto body shop's artisan's lien outranks bank's security interest to extent of repairs made to collateral); *Ferrante Equip. Co. v. Foley Mach. Co.*, 49 N.J. 432, 231 A.2d 208 (1967) (conditional seller's security interest in bulldozer was inferior to common-law artisan's lien of machine company for repairs which had enhanced the value of the vehicle); *Gulf Coast State Bank v. Nelms*, 525 S.W.2d 866 (Tex. 1975) (mechanic's lien for repairs made to an automobile entitled to priority over a previously perfected security interest in the vehicle); *cf. Bond v. Dudley & Moore*, 244 Ark. 568, 426 S.W.2d 780 (1968) (artisan's lien statute expressly subordinated lien to prior interest of seller of goods to secure price); *General Motors Acceptance Corp. v. Madden*, 331 So. 2d 882 (La. Ct. App. 1976) (repairman's lien statute expressly subordinated lien to vendors' privilege or chattel mortgage); *Hackensack Trust Co. v. Alvarez*, 66 N.J. 275, 330 A.2d 359 (1974) (purchase money security interest in motor vehicle prevails over repair shop's claim of a lien for subsequent repairs inasmuch as lien statute subordinates the lien to the interest of a prior conditional vendor or chattel mortgagee). Giving priority to an earlier perfected purchase money security interest, as in the last three cases cited here, is consistent with the common practice of resolving conflicts between conflicting enabling interests according to the general rule of first in time. See *supra* note 48 and authorities cited therein.

UCC § 9-310 does not apply when the artisan is asserting a lien against property she no longer possesses. Recent, well-reasoned authority, however, holds that the policy behind § 9-310 to protect enabling claims should be applied in a dispute between a lienor for services or materials, who is out of possession, and a secured party. *First Maryland Lease Corp. v. M/V Golden Egret*, 764 F.2d 749 (11th Cir. 1985) (even though § 9-310 did not apply to non-possessory state watercraft lien, the policy behind § 9-310 entitled properly perfected watercraft lien to priority over all other liens including security interests); but see *Balzer Mach. Co. v. Kline Sand & Gravel Co.*, 271 Or. 596, 533 P.2d 321 (1975) (negative implication of § 9-310 is that all statutory non-possessory liens are subordinate to perfected security interests). See also Recent Decisions, *Liens—Priority Under U.C.C. Section 9-310—Artisan's Lien Takes*

Moreover, if *B*'s improvement of the collateral involves affixing or otherwise adding goods thereto that constitute accessions,⁸⁷ *B* could have additional protection under the Code. *B* could retain an Article 9 security interest in the accessions, which would outrank *A*'s floating lien⁸⁸ that automatically extends to the added goods.⁸⁹ Under UCC section 9-314(4), *B* could then remove the accessions from the collateral without having to account to *A* "for any diminution in value of the whole caused by the absence of the goods removed."⁹⁰

If the collateral was realty to which *B* contributed services or materials for improvements, *B* would acquire by law a construction lien on the property.⁹¹ In many states, a construction

Priority Over Prior Perfected Security Interest Notwithstanding Lack of Continuous Possession of Repaired Property, 48 MISS. L.J. 1113 (1977).

87. "An accession is literally something added." R. BROWN, *supra* note 39, § 6.1, at 49. Under the law of property, however, goods that are added to other goods are accessions "only in those cases in which the additions have become so permanently united with the original materials as to form together but one article." *The Law of Accession Viewed in Its Relations to Personal Property*, 2 COLUM. JURIST 374, 375 (1886). According to the majority of courts, a sufficient integration occurs

where the articles later attached to . . . [the] principal article of personal property become so closely incorporated with the principal article that they cannot be identified and detached therefrom without injury to the . . . principal article . . . [and when they are so attached,] such articles become a part of the machine or principal article to which they are so attached and will pass by accession [that is, by operation of law] to the one having a chattel mortgage or other lien upon the principal article, if the lien is enforced.

Goodrich Silvertown Stores v. Pratt Motor Co., 198 Minn. 259, 261-62, 269 N.W. 464, 465 (1936). See generally R. BROWN, *supra* note 39, §§ 6.1-6.7 (discussing the law of accession).

88. U.C.C. § 9-314(1) (if *B*'s interest in the accessions attached before the goods were installed or affixed to the collateral).

89. See, e.g., *Bancorp Leasing & Fin. Corp. v. Stadel Pump & Constr., Inc.*, 81 Or. App. 371, 724 P.2d 948 (1986) (engine installed in motor vehicle); *Mack's Used Cars & Parts, Inc. v. Tennessee Truck & Equip. Co.*, 694 S.W.2d 323 (Tenn. Ct. App. 1985) (wrecker assembly bolted to the frame of a truck); *Nickles*, *supra* note 16, at 111-35.

90. U.C.C. § 9-314(4).

91. A construction lien, also known as a mechanic's or materialman's lien, is a lien given by statute to secure the claims of persons who supply goods or services for the improvement of real estate. See G. NELSON & D. WHITMAN, *supra* note 16, § 12.4; S. PHILLIPS, *A TREATISE ON THE LAW OF MECHANICS' LIENS ON REAL AND PERSONAL PROPERTY* 15 (3d ed. 1893) ("The lien of the mechanic . . . is a remedy in the nature of a charge on land . . . to secure a priority or preference payment of money for the performance of labor or supply of materials to buildings or other improvements . . ."). The states agree about the need for such a lien, but they disagree on many of the incidents and aspects of the lien. This disagreement includes not only the procedural details with respect to recognizing and enforcing the lien, but also, although to a

lien enjoys priority over an earlier recorded mortgage or other encumbrance on the land, at least with respect to the improvement that the lienor helped to make.⁹² In any event, if *B*'s im-

much lesser extent, the classes of persons entitled to the lien. *See, e.g.*, KAN. STAT. ANN. § 60-1101 (1983) ("[a]ny person furnishing labor, equipment, material, or supplies used or consumed for the improvement of real property"); MISS. CODE ANN. § 85-7-131 (Supp. 1986) ("architects, engineers, surveyors, laborers, and materialmen and/or contractors who rendered services and constructed improvements"); N.C. GEN. STAT. § 44A-8 (1984) ("[a]ny person who performs or furnishes labor or professional design or surveying services or furnishes materials"); OR. REV. STAT. ANN. § 87.010 (Butterworth 1981) (laborers, materials suppliers, lessors of equipment, trustees of the employee benefit plans of the workers involved in a project, architects, and surveyors).

Despite a wide range of disagreements among the states regarding the particulars of construction liens, there is general agreement that the lien attaches not only to the improvement itself that is repaired, altered, or constructed, but also to the land, or some part of it, on which the improvement sits. *See, e.g.*, ALA. CODE §§ 35-11-210, -217 (1975), *interpreted in* O'Grady v. Bird, 411 So. 2d 97, 105 (Ala. 1981) (lienor may claim up to one acre surrounding the structure or improvement); MINN. STAT. § 514.01 (1986) (grants lien on improvement and land); MO. ANN. STAT. § 429.010 (Vernon Supp. 1987) (same).

92. ALA. CODE § 35-11-211 (1975) (priority over prior liens with respect to the building or other improvement); ALASKA STAT. § 34.35.060(c) (1985) (a lien for work actually performed, or for an employee benefit trust for such efforts, is preferred to prior encumbrances); ARK. STAT. ANN. §§ 51-605, -607 (1971) (liens attach to the building or improvements in preference to any prior lien or encumbrance or mortgage existing upon the land before the building or improvements were erected thereon, except prior liens given for the purpose of raising money to make such building or improvement); COLO. REV. STAT. § 38-22-103(2) (1973) (when the lien is for work done or materials furnished for any entire structure, erection or improvement, the lien attaches to the structure, erection or improvement in preference to any prior lien or encumbrance); ILL. ANN. STAT. ch. 82, para. 16 (Smith-Hurd 1987) (construction lienor preferred to the value of improvements over prior encumbrances); IOWA CODE ANN. § 572.20 (1950) (mechanics liens attach to the building or improvement upon which the work was done in preference to any prior encumbrance or mortgage upon the land where the building or improvement was erected or situated); LA. CIV. CODE ANN. art. 3268 (West 1952) ("When the vendor of lands finds himself opposed by workmen seeking payment for a house or other work . . . a separate appraisalment is made of the ground and of the house, [and] the vendor is paid to the amount of the appraisalment on the land, and the other to the amount of the appraisalment of the building."); LA. REV. STAT. ANN. § 9:4821 (West 1983) (construction liens of laborers are prior to previous mortgages); MO. ANN. STAT. § 429.050 (Vernon 1979) (the liens are preferred to any prior lien or encumbrance or mortgage upon the land upon which the buildings, erections, or improvements or machinery have been erected or placed); MONT. CODE ANN. § 71-3-502(2) (1985) (liens attach to the building, structure, or improvement in preference to any prior lien, encumbrance, or mortgage upon the land); N.Y. LIEN LAW § 13(1) (McKinney 1966) (liens have priority over earlier attachment or money judgment upon a claim which was not for materials furnished, labor performed or moneys advanced for the improvement of the property); N.C. GEN. STAT. § 44A-22 (1984) (lien has priority over all other interests previously created); N.D. CENT. CODE § 35-27-21 (1980) (a

provement of real estate collateral consists of adding fixtures⁹³ in which *B* retains a perfected Article 9 security interest, *B*'s interest in the fixtures themselves would outrank *A*'s mortgage interest,⁹⁴ which would automatically embrace the fixtures.⁹⁵ The mortgagee, *A*, would prevail as to the fixtures only if she held an earlier recorded construction mortgage—that is, a mortgage securing an obligation incurred to acquire the land or to build an improvement thereto.⁹⁶ In such a case, *A*'s interest also would be an enabling interest, and priority would be decided according to the usual rule of first-in-time.⁹⁷

3. Justifications for the Priority of Enabling Interests (Especially Purchase Money Interests)

Modern justifications for the law's pervasive policy of priority for enabling interests generally rely on principles of fairness and of economics. Although the arguments usually focus on reasons for preferring purchase money interests in the context of consensual secured transactions, some or all of these

lien attaching to an original, complete, and independent building, whether it is placed upon a foundation or not, has preference to any prior title, claim, lien, encumbrance, or mortgage upon the land); OR. REV. STAT. ANN. § 87.025(1) (Butterworth 1984) (lien upon any improvement has priority over all prior liens, mortgages or other encumbrances upon the land); TEX. PROP. CODE ANN. § 53.123 (Vernon 1984) (lien upon the improvement shall be preferred to any prior lien or encumbrance upon the land, but liens upon the structure and land existing at the time of the inception of the lien are not affected); VA. CODE ANN. § 43-21 (1981) (lien for erection of building or structure is superior to prior liens); P.R. LAWS ANN. tit. 29, § 186 (1985) (lien has priority over all other debts of the property owner). Cf. OKLA. STAT. ANN. tit. 42, §§ 92, 96 (West 1979) (laborer's lien given priority over recorded mortgage), *discussed in Republic Bank & Trust Co. v. Bohmar Minerals, Inc.*, 661 P.2d 521, 523-24 (Okla. 1983) (reasons for giving laborer's lien, as distinguished from construction lien, priority over prior interests).

On the reasons for giving a construction lien priority as to the building or improvement made by the lienor (generally to avoid unjustifiable enrichment of the prior encumbrancer of the land) and also on enforcing the lien's priority over an earlier encumbrance on the land (which usually involves severing the improvement or selling the entire property and apportioning the fund), see 4 AMERICAN LAW OF PROPERTY, *supra* note 16, § 16.106G, at 234-38.

93. Fixtures are goods, U.C.C. § 9-105(1)(h), that "become so related to particular real estate that an interest in them arises under real estate law." U.C.C. § 9-313(1).

94. U.C.C. § 9-313(4)(a).

95. See 5 AMERICAN LAW OF PROPERTY, *supra* note 16, §§ 19.7, 19.12; see also authorities cited *supra* note 41.

96. U.C.C. § 9-313(1)(c).

97. U.C.C. § 9-313(7). Regarding the first-in-time principle as governing disputes between conflicting enabling interests in the same collateral, see *supra* note 48.

reasons apply equally well to justify priority for any kind of enabling interest.⁹⁸

The authorities sometimes cite fairness as a reason for preferring purchase money interests.⁹⁹ The argument for fairness is that "[s]ince the credit supplied by the purchase money lender is what makes the debtor's acquisition of the collateral possible, it is just, as well as financially necessary, that the purchase money lender should prevail over other secured parties in any priority dispute regarding the collateral itself."¹⁰⁰ Moreover, any consensually secured lender who must look to after-acquired collateral that she did not finance is almost always partly to blame for her predicament. She either miscalculated the present or future value of collateral that existed when advances were made, misjudged the debtor's ability or honesty, or deliberately decided to take an unsecured risk. Allowing this lender to grab after-acquired collateral that she did not finance allows her to shift the costs of her mistakes, and the risks she assumed, to the innocent purchase money financier. The effect would be to give the lender a windfall, and because the lender is culpable, the result would be unjust enrichment.

A complementary view posits that the lender who claims an interest in after-acquired property, without having financed it, could not have justifiably relied on the collateral during dealings with the debtor. Moreover, because the purchase money financier gets priority only in goods she financed or their proceeds, the lender's position is no worse than if the debtor had not acquired the goods.¹⁰¹ Giving priority to the purchase money financier, therefore, essentially takes nothing away from the floating lien lender.¹⁰²

Economics is more often cited as the reason for preferring

98. Cf. Jackson & Kronman, *supra* note 83, at 8-9 ("[T]he rationale underlying the purchase money priority [has] never been limited to any specific type of collateral.").

99. *E.g.*, Nelson v. Stoker, 669 P.2d 390, 394 (Utah 1983); Fetzer, *supra* note 63, at 885 (intrinsic fairness, justice, and equity); Skilton, *supra* note 20, at 948 (fireside equities); Note, *Defeating the Priority of an After-Acquired Property Clause*, 48 HARV. L. REV. 474, 476 (1935) (fairness and financial expediency).

100. Jackson & Kronman, *supra* note 83, at 6-7.

101. Slodov v. United States, 436 U.S. 238, 258 n.23 (1978); Recent Cases, *Secured Transactions—Purchase Money and After-Acquired Property Interests—Priority of Security Interests Under UCC 9-312*, 26 CASE W. RES. L. REV. 708, 711 (1976); Comment, *The Value of "Value" in a Purchase Money Security Interest*, 28 BAYLOR L. REV. 667, 673 (1976).

102. Kripke, *supra* note 6, at 936 (In purchase money situations the secured party adds to the assets of the debtor and takes nothing from other creditors.).

purchase money interests over floating liens in the context of consensual secured transactions. In general terms, this preference is necessary "to encourage future lenders to extend credit when the first secured party would or could not,"¹⁰³ for otherwise an "unyielding creditor may be able to frustrate future outside borrowing."¹⁰⁴ One explanation for facilitating new sources of credit when a debtor's usual lender is unwilling to supply it deems borrowing and spending purchase money to be desirable ends in themselves.¹⁰⁵ A more common explanation is that the purchase money priority averts a monopoly¹⁰⁶ in the supply of credit to a debtor.¹⁰⁷

This sort of monopoly is economically harmful because, at the very least, it gives the lender who enjoys it a competitive advantage, and thus breeds inefficiency in the credit marketplace.¹⁰⁸ A related harm is that when a debtor is totally depen-

103. Comment, *supra* note 101, at 672.

104. Jackson & Kronman, *supra* note 83, at 1; see also Coogan, *supra* note 20, at 839, 861 (discussing the "primary controversy surrounding Article 9" which was allowing a debtor to create a floating lien "tying up all of his assets with one creditor and hampering his ability to get credit from anyone else," and focusing in part on purchase money priority as an "especially important means by which security transactions can . . . escape" floating liens).

105. Baker, *supra* note 48, at 68-69 (encourages new money and attracts new credit); Fetzer, *supra* note 63, at 885 (encourages the acquisition of new assets).

106. R. BRAUCHER & R. RIEGERT, INTRODUCTION TO COMMERCIAL TRANSACTIONS 464 (1977) (purchase money priority prevents a creditor from taking advantage of the debtor); Fetzer, *supra* note 63, at 885 (encourages the acquisition of new assets and averts a monopoly of the debtor's resources); Jackson & Kronman, *supra* note 6, at 1167 (purchase money priority is best thought of as a device for preventing a situational monopoly); Special Project, *supra* note 48, at 870-71 (purchase money priority provides an alternative source of funds when a floating lienor refuses to extend credit and thereby facilitates commerce and reduces the potential unfairness created by the monopolization of credit).

107. In broader, simpler terms, which were used in the New York Law Revision Commission analysis of the purchase money priority rules of Article 9, this sort of preference is necessary to prevent monopolizing activity. Letter from Harold F. Birnbaum to Milton P. Kupfer (April 8, 1954), reprinted in 2 STATE OF NEW YORK, LAW REVISION COMMISSION, REPORT AND RECORD OF HEARINGS ON THE UNIFORM COMMERCIAL CODE 1056-57 (1954), and thereby reduce a lender's control over a debtor, 3 STATE OF NEW YORK, LAW REVISION COMMISSION, REPORT—STUDY OF THE UNIFORM COMMERCIAL CODE 2025 (1955).

108. Jackson & Kronman, *supra* note 6, at 1167 (1979). There are, of course, arguments in favor of tying a debtor to a single creditor in a monopolistic relationship. As Professor Coogan observed:

There undoubtedly are situations in which a lender is fully justified in refusing to do any financing unless he is the only secured lender or possibly even the only long-term lender. Entirely apart from the dan-

dent for credit on a single lender, the lender has a veto over many of the debtor's most important business decisions. Consequently, the debtor cannot freely respond to market forces and opportunities if the lender interprets the market differently. Entrepreneurial enterprise is therefore stifled and credit may be inefficiently applied. Additionally, as Professor Robert Scott has recently theorized, because the lender's

rate of return is fixed in advance, [the lender] has less incentive than the debtor to pursue high-risk, high-return opportunities that arise after the initial venture is planned. The [result of the] creditor's conservatism in adhering to the initial development plan may be inconsistent with maximizing the value of the [debtor's] firm.¹⁰⁹

Wider impacts of wedding a debtor to a single lender are an artificially low limit on available credit and an artificially high price on the cost thereof, which unnecessarily inhibit economic growth.¹¹⁰

ger of fraud, the lender might reasonably be concerned with the possibility of double financing which results from poor record keeping. . . . [Moreover,] [i]n the absence of any power of a major financier to control the creation of other debts and liens, it is possible that a smaller creditor would enter a situation that he would otherwise stay away from, knowing that the large creditor has too much at stake to permit the enterprise to fail. . . .

Nor is a rule which encourages one secured creditor to exercise a considerable amount of control necessarily bad for the debtor. The intelligent debtor often willingly ties himself to one major financier so that the financier will find it difficult as a matter of business morality to desert the debtor when he is in trouble. To spread that responsibility among several financiers is to dispel it completely. And this responsibility is not limited to supplying money. Since the typical users of credit secured by personal property are the smaller companies, often those still in the learning stage, the financier's greatest contribution may be advice.

Coogan, *supra* note 20, at 876-77 (citation omitted). See also Scott, *supra* note 6, at 956 ("[E]xclusive financing relationship encourages the creditor to manage the growth prospect properly and to insure the optimal timing of inputs necessary to achieve maximum return to the joint enterprise."). The law has decided, however, that on balance, the advantages of complete monopoly control by a floating lienor are outweighed by the benefits of limiting the control to the extent accomplished by purchase money priority.

109. Scott, *supra* note 6, at 962. Professor Scott also justifies the purchase money priority on the basis that purchase money financiers may more efficiently monitor against debtor misbehavior (asset conversions and substitutions) than the lender, and may provide other specialized skills that benefit the debtor's business. As a result of these efficiencies, the lender benefits derivatively. *Id.* at 963.

110. "[T]he purchase money provisions give the debtor somewhat greater bargaining power and at least theoretically enlarge his ability to get credit." J. WHITE & R. SUMMERS, *supra* note 48, § 25-5, at 1043.

4. Justifications Extend to Production Money Interests in Crops

The reasons for subordinating an after-acquired interest in collateral to a purchase money interest in the property argue just as strongly for similarly preferring production money interests in crops. Farm lenders are not so much wiser than other secured parties, and farmers no more childlike than other debtors, as to justify a higher degree of paternalism in financing crop production. Also, now more than ever, no business exceeds farming in the need for laws that work to stimulate and efficiently distribute credit and to insure fairness and prevent windfalls; and farming has no less right to such laws.

Appropriately, production money interests in crops that are created by law frequently enjoy priority over after-acquired interests in the collateral. For example, threshers' liens, and liens for other services that contribute to crop production, typically rank ahead of any mortgages, encumbrances, or other liens on the crops.¹¹¹ Statutorily created liens for certain goods

111. *E.g.*, ARK. STAT. ANN. § 51-901 (1971) (owner of cotton gin has a lien on the cottonseed and the baled cotton to secure payment of the ginning, which lien is superior to all other liens); *id.* § 51-909 (1971) (rice processor's lien shall be superior to all other prior liens); CAL. CIV. CODE § 3061.5 (West Supp. 1987) (laborers who harvest or transport crops or farm products have a lien on the goods that is "prior in dignity to all other liens, claims, or encumbrances"); DEL. CODE ANN. tit. 25, § 4101 (1974) (owner of threshing machine, cornpicker or hay baler has a prior lien upon crops threshed, picked or baled); IDAHO CODE § 45-301 (1977) ("Any person who does any labor on a farm or land in tilling the same, or in cultivating, harvesting, threshing, or housing any crop or crops raised thereon, has a lien upon such crop or crops for such labor. Such lien shall be a preferred and prior lien thereon to any security interest . . ."); IOWA CODE ANN. § 571.1, .2 (West 1950 & Supp. 1986) (thresherman or cornsheller has a first lien on grain and seed threshed, on any farm product baled, or on corn shelled or husked that has priority over a security interest in the grain, seed or crop); KAN. STAT. ANN. § 58-218 (1983) (liens for threshing and husking have priority over any prior security interest or encumbrance); LA. CIV. CODE ANN. arts. 3186, 3217 (West 1952) (Privilege on crops for laborers' wages shall not be divested by any prior mortgage.); ME. REV. STAT. ANN. tit. 10, §§ 3401, 3402 (1980) (Laborer who cuts or harvests hay has a lien on the hay for services performed that has precedence over all other claims except state liens.); MINN. STAT. § 514.65 (1986) (person owning or operating a threshing machine, combined thresher and harvester, clover huller, cornpicking machine, corn sheller, corn shredder, grain dryer, ensilage cutter, or hay baler has a lien upon the product for the price or value of his service that is preferred to all other liens or encumbrances except seed liens); MISS. CODE ANN. § 85-7-1 (Supp. 1986) (every person who may aid by his labor to make, gather, or prepare for sale or market any crop have a lien for his wages that is paramount to all liens and encumbrances or rights of any kind except a landlord's lien); MONT. CODE ANN. § 71-3-401 (1985) (farm laborer's lien has priority over all other liens, chattel mortgages, or encumbrances); *id.* §§ 71-3-801, -804 (1985)

used in producing crops, such as seed liens, often have a similar preference,¹¹² as do landlord liens on tenants' crops.¹¹³

(all threshermen or swathers owning or operating threshing or swathing machines and all owners of combine harvesters and threshers have a lien upon the grain and other crops swathed or threshed that shall be prior to and have precedence over any mortgage, encumbrance or other lien upon grain or other crops, except liens for the seed furnished for the purpose of growing the particular crop); N.M. STAT. ANN. §§ 48-5-1, -3 (1978) (owner or lessee of threshing machine who threshes grain for another has a lien on the grain for the value of his services, and the lien has priority over all other liens); N.D. CENT. CODE §§ 35-07-01, -03 (Supp. 1985) (owner or lessee of a threshing machine or combine or a grain drying machine who threshes or dries grain has a lien upon the grain that has priority over all other liens and encumbrances upon the grain, including mortgages upon the crop or grain given by the person claiming the lien); *id.* § 35-10-01 (1980) (any person furnishing labor or services necessary in the production, harvesting and hauling of sugar beet crops shall be entitled to a lien upon the crops so raised that has priority over all other liens and encumbrances except government seed liens); S.D. CODIFIED LAWS ANN. §§ 38-17-14, -16 (1977) (thresher's and processor's lien on grain processed shall have priority over all other liens and encumbrances upon the grain if timely filed); TENN. CODE ANN. § 66-15-101 (1982) (the charges of ginners for ginning and baling cotton are secured by a lien on the cotton that has priority over all other liens except landlords' liens for rent and furnishings); *id.* §§ 66-12-113 to -115 (1982) (any person who performs any labor or renders services to another in cultivating the soil and in producing a crop has a lien upon the crop for the payment of the compensation or wages agreed on, and the lien is superior to all liens except landlords' liens for rent or supplies); VT. STAT. ANN. tit. 9, § 1991 (1984) (person cutting or drawing logs has a lien thereon for his wages that has precedence over all other claims except taxes); WASH. REV. CODE ANN. §§ 60.11.020, .050 (Supp. 1987) (supplier of work or labor shall have lien upon the crops that is preferred and prior to any other lien or security interest upon the crops); WIS. STAT. ANN. § 779.50 (West 1981) (lien for threshing, husking or baling shall be preferred to all other liens and encumbrances); WYO. STAT. ANN. §§ 29-5-102, -104 (Michie 1981) (all persons owning or operating harvesting machines are entitled to a lien on the crops harvested by them for their work performed, which lien has priority over any mortgage or incumbrance).

112. *E.g.*, IDAHO CODE § 45-1604 (1977) (seed lien has priority as to crops covered thereby over all other liens and encumbrances except farm laborers' liens); KAN. STAT. ANN. § 58-218 (1983) (seeding and baling liens preferred to any prior security interest or encumbrance); LA. CIV. CODE ANN. arts. 3186, 3217 (West 1952) (privilege given for debts due for necessary supplies furnished to any farm or plantation, and debts due for money actually advanced and used for the purchase of necessary supplies and the payment of necessary expenses for any farm or plantation, which privilege shall not be displaced by any prior mortgage); MONT. CODE ANN. §§ 71-3-701, -702 (1985) (lien for seed or grain has, as to the crop covered thereby, priority over all other liens and encumbrances thereon); N.D. CENT. CODE § 35-09-01 (1980) (person who furnishes or applies fertilizer, farm chemicals, or seed shall have a lien upon crop produced therefrom that is generally prior to all other liens and encumbrances); *id.* § 35-10-01 (1980) (any person who furnishes seed, insecticide, fertilizer, or material, or cash advances, necessary in the production, harvesting, and hauling of sugar beet crops shall be entitled to a lien upon the crop so

A preference for consensually created production money

raised that shall have priority over all other liens and encumbrances except government seed liens); S.C. CODE ANN. § 29-13-50 (Law. Co-op. 1976) (any person furnishing provisions, supplies, and other articles for agricultural purposes shall have a lien in preference to all other liens, existing or otherwise, upon such provisions, supplies and other articles, until they shall be consumed in the use); S.D. CODIFIED LAWS ANN. §§ 38-17-3, -8 (1977) (except inter se and as against thresher's liens, seed liens shall have priority over all other liens and encumbrances); WASH. REV. CODE ANN. §§ 60.11.020, .050 (Supp. 1987) (supplier who furnishes seed, fertilizer, pesticide, fungicide, weed killer or herbicide shall have a lien on the crops that is entitled to priority over earlier filed liens and security interests, except lien of supplier of work or labor); cf. IOWA CODE ANN. §§ 570A.3, .5 (West Supp. 1986) (agricultural supply dealer furnishing chemical, seed, or petroleum product to a farmer has a lien on crops that, in certain circumstances, is equal to prior perfected liens).

113. ALA. CODE § 35-9-30 (1975) (landlord has a lien on crops grown on rented lands for the rent for the current year and for advances for the sustenance of the tenant or his family or for cultivating, gathering, saving, handling or preparing the crop for market, and the lien is paramount to and has preference over all other liens); FLA. STAT. ANN. §§ 83.08, .10 (West 1964 & Supp. 1986) (landlord's lien for rent on agricultural products raised on the land leased or rented shall be superior to all other liens, although of older date, and landlord's lien on crops for advances made in money and other things for sustaining tenant and tenant's family or in producing crops shall be paramount to all other liens except landlord's lien for rent); GA. CODE ANN. § 44-14-341 (1982) (landlord's lien for rent on crops grown on land rented from landlord is superior to all other liens except tax liens); KY. REV. STAT. ANN. § 383.070 (Michie/Bobbs-Merrill 1970) (landlord renting premises for farming shall have a lien on the produce of the premises rented and on the other personal property of the tenant which, to the extent of four months rent, is superior to all other liens); MINN. STAT. § 514.960 (1986) (person leasing property for agricultural production has lien for unpaid rent on the crops produced on the property, which lien has priority over all other liens or security interests in the crops); MISS. CODE ANN. § 89-7-51 (1972 & Supp. 1972-1986) (landlord's lien on agricultural products of leased premises to secure the payment of rent and of money advanced to the tenant is paramount to all other liens, claims or demands upon such products); N.M. STAT. ANN. § 48-6-1 (1978) (all persons leasing or renting agricultural lands shall have a preference lien for rent that may become due and for all money and the value of all equipment and supplies furnished by the landlord to the tenant, which lien shall attach to the crop raised and the property furnished); N.C. GEN. STAT. § 42-15 (1984 & Supp. 1985) (landlord's lien on crops for rent accrued and advances made to aid in the cultivation of crops is preferred to all other liens); S.C. CODE ANN. §§ 29-13-10, -30 (Law. Co-op. 1976) (every landlord leasing land for agricultural purposes shall have a prior and preferred lien for his rent to the extent of all crops raised on the lands leased by him, which lien is preferred to all other liens); TENN. CODE ANN. §§ 66-12-101 to -104 (1982) (landlord shall have a lien upon crops for rent; for the payment of necessary food, household fuel, money, and clothing supplied to the tenant or the tenant's dependents; and for payment of necessary fertilizer, implements, work stock, feed for stock, seed, labor, and insecticide furnished to and used by the tenant in the production of crops, and the lien shall be superior to any other encumbrance, lien, levy, or contract on the crops regardless of the date of the other encumbrance, lien, levy, or contract); VA. CODE ANN. § 43-29 (1981) (landlord who advances tenant money, supplies, or

security interests in crops is also important. Production money interests in crops that are created by law, and that have priority over after-acquired interests in the property, do not cover completely the full range of services and goods that a farmer needs to produce crops.¹¹⁴ Suppliers of goods and services that are

other things has a lien to the extent of the advances on all the crops or livestock that are made or seeded or raised, or grown or fed on the land during the year in which the advances are made which is prior to all other liens); WASH. REV. CODE ANN. §§ 60.11.020, .050 (Supp. 1987) (landlord's lien on crops grown on demised premises is superior to prior liens and security interests, except for liens for work or labor); see also *Schneider v. Ray (In re Roberts)*, 38 Bankr. 128, 134 (Bankr. D. Kan. 1984) (landlord's lien preserved and asserted by bankruptcy trustee entitled to priority over perfected security interest in the crops to the extent rent was due); *Dwyer v. Cooksville Grain Co.*, 117 Ill. App. 3d 1001, 1003, 454 N.E.2d 357, 359 (1983) (noting that the long-established rule in Illinois is that the landlord's crop lien is paramount to all other liens); B. CLARK, *supra* note 48, ¶ 8.5[2][d], at 8-56 (in priority contests between security interests and landlords' liens on crops the decisions have frequently favored the landlord); Meek, *Secured Transactions Under the Uniform Commercial Code*, 18 ARK. L. REV. 30, 54-55 (1964) (local landlord's crop lien "will take priority over the tenant's security agreement"); see also Meyer, *Potential Problems Connected with the Use of "Crops" as Collateral for an Article 9 Security Interest*, 3 AGRIC. L.J. 115, 143 (1981-1982) (landlord crop-share lease has priority over a perfected security interest in the crops because farmer cannot encumber landlord's share); WASH. REV. CODE ANN. § 60.11.020 (Supp. 1987) ("A landlord with a crop share agreement has an interest in the growing crop which shall not be encumbered by crop liens," except liens for suppliers of goods and services used in producing the crop.); cf. Hunt & Coates, *The Impact of the Secured Transactions Article on Commercial Practices with Respect to Agricultural Financing*, 16 LAW & CONTEMP. PROBS. 165, 178 (1951) (Article 9 covers crop-share lease).

114. The collection of statutes cited *supra* notes 111-13 is a largely complete survey of statutory liens on crops for the value of land, goods and services used in producing the crops that by the terms of the statutes are expressly preferred to all other claims on the crops. Scattered throughout the states are several more statutory liens on crops that do not by their terms assure priority by law for the lienholder either because (1) the statutes are silent on the issue of priority, see, e.g., ARIZ. REV. STAT. ANN. § 33-901 (1974) (lien for person who labors or furnishes labor or machinery or equipment in improving and preparing agricultural lands for planting crops); ARK. STAT. ANN. §§ 51-201, -203 (1971) (landlord's lien for rent and for advances of supplies to enable tenant to make and gather the crop); DEL. CODE ANN. tit. 25, § 6715 (Supp. 1986) (same); IND. CODE ANN. § 32-8-33-1 (Burns 1980) (lien for owner or operator of any machine or tools used in crop production); MO. ANN. STAT. §§ 441.280, .290 (Vernon 1986) (landlord's lien for rent or money or supplies furnished tenant); NEB. REV. STAT. § 52-501 (1984) (thresher's lien); OR. REV. STAT. ANN. § 87.226 (Butterworth 1984) (lien for person who performs labor, supplies materials or provides services on farmland to aid the growing or harvesting of crops); or, less commonly, or (2) the statutes effectively condition priority on the consent of the floating lienor or otherwise give the floating lienor a veto on priority for the statutory enabling lien, see, e.g., KAN. STAT. ANN. §§ 58-241 to -246 (Supp. 1985) (agricultural input lien for labor and certain goods furnished in producing crops is not given priority over previously perfected security interest in

not covered would be discouraged from extending production credit to farmers for new crops if the law also failed to prefer the suppliers' consensual interests in the crops. To this extent, farmers would be subjected to the potentially monopolizing control of their usual lenders.

It is no surprise, therefore, that the drafters of Article 9 included section 9-312(2) which, by part of its terms, prefers a consensual production money security interest in crops over an earlier perfected, after-acquired security interest for unrelated debt.¹¹⁵ The intended symmetry between this provision and the purchase money priority rules of Article 9¹¹⁶ is explicit. The original commentary to section 9-312(2) described the provision as directly analagous to the purchase money priority rules, that is, simply "another instance of the preference which [Article 9] gives a secured party who makes a present advance over one who takes security for an old debt."¹¹⁷

As conventionally interpreted, however, section 9-312(2) does not generally prefer enabling security interests in crops to an earlier perfected security interest that attaches to the crops as after-acquired collateral. The after-acquired, floating security interest ordinarily ranks ahead of the interest of a secured party who extended credit to enable the debtor to produce the crops, even though the holder of the after-acquired interest contributed nothing to the production of the collateral. The

crops of farmer's lender if lender refuses upon notice to guarantee payment for the labor or goods); MINN. STAT. §§ 514.950 -959 (1986) (same); NEB. REV. STAT. §§ 52-1101 to -1103 (1984) (priority of statutory enabling interest for goods and labor used in producing crops conditioned on prior lienholder agreeing in writing); OKLA. STAT. ANN. tit. 42, § 113 (1979) (threshers' and combiners' liens are subject to prior mortgage liens unless the mortgagee has consented in writing to the threshing or combining). Statutes creating enabling liens on crops very rarely, by their terms, subordinate the liens to prior encumbrances. *But cf.* TENN. CODE ANN. §§ 43-31-101 to -106 (Supp. 1986) (priority of agricultural production input lien for certain goods and services used in production crops determined by UCC Article 9). Likewise, the courts rarely interpret such statutes to subordinate the enabling liens.

A fair summary of the situation throughout the country is that the majority of states provide no statutorily created enabling liens on crops, save possibly a thresher's lien. Moreover, in most states that provide for such liens, only a limited range of the supplies and services necessary for producing crops is covered, and the limited coverage is usually accomplished through a patchwork of very narrowly drawn statutes that ordinarily, but not always, guarantee priority for the holders of the enabling liens.

115. The full text of UCC § 9-312(2) appears *infra* text accompanying note 136.

116. See *supra* notes 67-75 and accompanying text.

117. U.C.C. § 9-312 comment 7 (Official Draft Text and Comments 1952).

next part of this Article explains how section 9-312(2) has been construed so as to create this anomalous situation in crop financing and thereby subject farmers and their suppliers of production credit to the ills of unbridled, floating security interests.

II. THE ANOMALY IN CROP FINANCING: UCC SECTION 9-312(2) AS CONVENTIONALLY INTERPRETED

A. SETTING THE CONTEXT

In the typical case, a farmer's lender finances virtually every aspect of the farmer's enterprise. *Lender* hereafter means the collection of institutions that are the farmer's usual sources of credit: principally, commercial "country" banks; agencies of the Farm Credit System such as the Federal Land Bank and the Production Credit Association; and federal agencies such as the Farmers Home Administration. The lender's collateral usually includes practically everything the debtor presently owns and anything later acquired, including land, equipment, crops, livestock, other farm products, and receivables from sales of these products.

An alternative source of production credit for new crops is the suppliers of the seed, petroleum, fertilizer, and other goods and services necessary to produce the crops. One who sells these goods and services on credit provides the farmer with production financing, enabling the farmer to produce crops. Similarly, one who loans money to the farmer to buy the goods and services consumed in producing crops also provides production financing. These two types of crop production financiers differ in that the former provides goods and services directly while the latter provides money to purchase the goods and services. Nevertheless, both directly enable the farmer to produce the crops, and the term *supplier*, as used hereinafter in this Article, will refer to either financier.

Suppliers take a very large risk when they extend credit to farmers who cannot get production credit from lenders or who, for other reasons, are shopping for alternative financing. Because typically everything the farmer owns is heavily or completely mortgaged to the lender, the farmer's equity in existing property will not fully secure the suppliers. Moreover, what equity the farmer may have is illusory because it will shrink if the value of the property declines or the secured debt grows.

The suppliers also can take as collateral the crops the

farmer will grow using the goods and services that they have financed. This security arrangement is governed by Article 9.¹¹⁸ Each supplier and the farmer execute a simple agreement through which the farmer grants to the supplier a security interest in the future crops.¹¹⁹ The supplier's interest attaches automatically as soon as the crops begin to grow. For convenience, the supplier's interest in the crops is referred to as a *crop production security interest*, which is simply a variation of the earlier-defined and broader term "production money interest."¹²⁰ The term crop production security interest thus means an Article 9 security interest securing credit that directly enabled the debtor to produce the crops that serve as collateral.

Taking a crop production security interest in the farmer's future crops does not substantially reduce the suppliers' risk, however. The collateral is worthless until the crops are harvested, and until then the suppliers, like the farmer, are at Nature's mercy. Additionally, even if Nature smiles on them, the market may frown and pay a price for the harvest that is less than production costs. Finally, the farmer's lender undoubtedly will acquire a security interest in the crops as after-acquired collateral, which will likely have priority over the supplier's interest.

In earlier dealings with the lender, the farmer probably agreed as a matter of course that all kinds of debts owed the lender, including the loan that the farmer used to buy the farm, would be secured by crops whenever grown by the farmer.¹²¹ So, the lender automatically gets a security interest in the crops that the suppliers financed even though the lender advanced none of the direct production credit.¹²² Contrary to the preferred treatment usually accorded enabling interests,¹²³ the suppliers' crop production security interests will likely be subordinate to the lender's after-acquired interest in the collateral. This anomalous situation results from the conventional interpretation of UCC section 9-312(2), which is explained

118. U.C.C. § 9-102(1)(a).

119. U.C.C. § 9-203(1).

120. See *supra* text between notes 37 and 38.

121. See *supra* text accompanying notes 16-21 (regarding after-acquired property clauses); *supra* note 21 (regarding future advance clauses). The effect of both kinds of clauses in combination is referred to as "cross-security," that is, "collateral acquired at any time may secure advances whenever made." U.C.C. § 9-204 comment 3.

122. See *infra* text following note 129.

123. See *supra* text accompanying notes 43-97.

shortly.¹²⁴ When suppliers extend production credit on the strength of the crops as collateral, therefore, they must gamble on a continuing equilibrium between the value of the lender's existing collateral and the size of the farmer's debt.

Even if the supplier wins this gamble, however, the risk remains that the lender will have reason to seize security and decide to claim the crops or their proceeds instead of other collateral. Courts do not often require a secured party to exhaust the collateral in which others do not claim an interest before seizing shared collateral.¹²⁵ As a result, junior creditors

124. See *infra* text accompanying notes 128-49.

125. According to the doctrine of marshaling of assets, "where a creditor has a lien on two funds in the hands of the same debtor and another creditor has a lien on only one of them, . . . equity . . . will compel the former to make his debt out of that fund to which the latter cannot resort." *First Am. Nat'l Bank v. Alcorn, Inc.*, 361 So. 2d 481, 492 (Miss. 1978). See also R. MEGARRY & P. BAKER, *SNELL'S PRINCIPLES OF EQUITY* 404 (27th ed. 1973). The doctrine "is designed, not to protect the debtor's interests, but rather those of the junior lienor, by requiring the senior lienor to exhaust other securities readily available to him before resorting to a fund which is the junior lienor's only security." *Associates Realty Credit v. Brune*, 89 Wash. 2d 6, 14, 568 P.2d 787, 792 (1977). A junior lienor cannot depend on the doctrine of marshaling, however, because the doctrine is equitable and is applied "by the benevolence of the court in its sound discretion" and "only where its application will do justice." *Enloe v. Franklin Bank & Trust Co.*, 445 N.E.2d 1005, 1007-08 (Ind. Ct. App. 1983). For more on the doctrine, see generally Karasik & Kolodney, *The Doctrine of Marshaling Under the Bankruptcy Code*, 89 COM. L.J. 102 (1984) (arguing for the invocation of the doctrine on equitable grounds); Labovitz, *Marshaling Under the UCC: The State of the Doctrine*, 99 BANKING L.J. 440 (1982) (arguing that an Eighth Circuit decision to make an equitable adjustment between properly protected secured creditors and unsecured creditors was an anomaly that should be ignored by other circuit courts and trustees in bankruptcy); Lachman, *Marshaling Assets in Bankruptcy: Recent Innovations in the Doctrine*, 6 CARDOZO L. REV. 671 (1986) (arguing that in the interests of equity and economic efficiency courts should not invoke the doctrine of marshaling against corporate guarantors or sureties in favor of unsecured creditors); Note, *Marshaling: Equitable Rights of Holders of Junior Interests*, 38 RUTGERS L. REV. 287 (1986) (examining the availability, application, and advantages of the equitable doctrine of marshaling, and advocating statutory recognition of the doctrine).

For recent cases in which the courts have refused to apply the doctrine, see, e.g., *Owens-Corning Fiberglass Corp. v. Center Wholesale, Inc.* (*In re Center Wholesale, Inc.*), 759 F.2d 1440 (9th Cir. 1985); *Telefest, Inc. v. VU-TV, Inc.*, 591 F. Supp. 1368 (D.N.J. 1984); *Loeb v. Franchise Distributors, Inc.* (*In re Franchise Systems, Inc.*), 46 Bankr. 158 (Bankr. N.D. Ga. 1985); *Bank Leumi Trust Co. v. Diamond Sales Co.* (*In re Diamond Sales Co.*), 32 Bankr. 21 (Bankr. S.D. Fla. 1983); *Whitlock v. Max Goodman & Sons Realty* (*In re Goodman Industries*), 21 Bankr. 512 (Bankr. D. Mass. 1982); *United States v. Friend* (*In re A.E.I. Corp.*), 11 Bankr. 97 (Bankr. E.D. Pa. 1981); *S. Lotman & Son v. Southeastern Fin. Corp.*, 288 Ala. 547, 263 So. 2d 499 (1972); *Enloe v. Franklin Bank & Trust Co.*, 445 N.E.2d 1005 (Ind. Ct. App. 1983); *Grise v. White*, 355

in shared collateral frequently receive little protection.

Suppliers who extend production credit secured by crops are naturally expected to chance the weather and the market. It is unnatural, however, in the sense of being anomalous, to expect them to chance having their collateral—the crops they enabled the farmer to acquire—siphoned off by a lender who, with respect to the particular harvest, did not take the risks they accepted.¹²⁶ If the law's policy of priority for enabling interests actually does insure fairness and efficiency in financing arrangements,¹²⁷ the absence of this priority for crop production credit means that crop financing is fertile ground for unfairness, inefficiency, and the other ills that accompany lenders' unbridled floating liens. Yet, giving lenders' floating liens on crops free rein is exactly the result of the conventional interpretation of UCC section 9-312(2).

B. HOW ARTICLE 9'S PRIORITY RULES PREFER LENDERS: THE CRITICAL ROLE OF UCC SECTION 9-312(2) AS CONVENTIONALLY INTERPRETED

The superiority of a lender's claim to crops as after-acquired collateral is based on UCC section 9-312(5)(a), which states the usual rule for determining priority between conflict-

Mass. 698, 247 N.E.2d 385 (1969); *Lieberman Music Co. v. Hagen*, 394 N.W.2d 837 (Minn. Ct. App. 1986); *Platte Valley Bank v. Kracl*, 185 Neb. 168, 174 N.W.2d 724 (1970); *Production Credit Ass'n v. Jacobson*, 131 Wis. 2d 550, 388 N.W.2d 655 (Ct. App. 1986); cf. *Jefferson Nat'l Bank v. I.A. Durbin, Inc.* (*In re I.A. Durbin*), 65 Bankr. 4 (Bankr. S.D. Fla. 1985) (creditor not compelled to look to collateral of principal debtor before resorting to property of surety); *In re Hostetler*, 49 Bankr. 737 (Bankr. W.D. Pa. 1985) (marshaling doctrine not applicable in favor of Chapter 11 debtors); *Moody Day Co. v. Westview Nat'l Bank*, 452 S.W.2d 572 (Tex. Civ. App. 1970) (transferee of collateral not entitled to marshaling). *But see, e.g., Berman v. Green* (*In re Jack Green's Fashions for Men—Big and Tall*), 597 F.2d 130 (8th Cir. 1979); *Consumers Time Credit, Inc. v. Remark Corp.*, 248 F. Supp. 158 (E.D. Pa. 1965); *In re Kids Stop of Am., Inc.*, 64 Bankr. 397 (Bankr. M.D. Fla. 1986); *Fundex Capital Corp. v. Balaber-Strauss* (*In re Tampa Chain Co.*), 53 Bankr. 772 (Bankr. S.D.N.Y. 1985); *In re Emerald Hills Country Club, Inc.*, 32 Bankr. 408 (Bankr. S.D. Fla. 1983); *Peoples Bank v. Computer Room, Inc.* (*In re Computer Room, Inc.*), 24 Bankr. 732 (Bankr. N.D. Ala. 1982); *Merrigan v. Small Business Admin.* (*In re Clary House, Inc.*), 11 Bankr. 462 (Bankr. W.D. Mo. 1981); *Shedoudy v. Beverly Surgical Supply Co.*, 100 Cal. App. 3d 730, 161 Cal. Rptr. 164 (1980); *Charles Constr. Co. v. Leisure Resources, Inc.*, 1 Mass. App. Ct. 755, 307 N.E.2d 336 (1974); *Bloom v. Hilty*, 427 Pa. 463, 469 n.3, 234 A.2d 860, 863 n.3 (1967) (dictum); *Associates Realty Credit Ltd. v. Brune*, 89 Wash. 2d 6, 568 P.2d 787 (1977); cf. *Community Bank v. Jones*, 278 Or. 647, 566 P.2d 470 (1977) (doctrine applied in favor of transferees of collateral).

126. See *supra* notes 118-24 and accompanying text.

127. See *supra* notes 98-110 and accompanying text.

ing security interests in the same collateral.¹²⁸ The rule ranks the interests "according to priority in time of filing or perfection."¹²⁹

The lender's assertion of a security interest in the new crops is typically based on an old security agreement in which the debtor agreed that the collateral for debts owed the lender would consist of currently owned and after-acquired property of the kind described in the agreement, including crops and other farm products. As soon as the future crops come into existence, therefore, the lender's floating security interest automatically attaches. No new agreement between the lender and farmer is necessary, and no new advance by the lender is required. The crops become fresh collateral for all outstanding debts the farmer owes the lender, for any subsequent increases in these debts, and for new advances.

The lender's after-acquired interest in the new crops is perfected by the financing statement filed when the security agreement was executed. A new filing with respect to after-acquired collateral is not necessary if the financing statement already on record covers the property. The financing statement covers the new crops if they fit within the statement's general description of collateral, regardless of whether it warns that the collateral includes after-acquired property.¹³⁰ Because the lender filed long before the suppliers acquired and perfected their security interests, the lender's interest in the new crops is entitled to priority under section 9-312(5)(a) even though the purchase of goods and services necessary to produce the collateral was financed entirely by the suppliers. Ordinarily, this priority automatically attaches to proceeds of the collateral even if the lender authorized the disposition.¹³¹

The section 9-312(5)(a) first-to-file-or-perfect rule, like the broader first-in-time principle of which it is a variant,¹³² is not absolute. Notwithstanding section 9-312(5)(a), a purchase money security interest in goods of any kind takes priority over a conflicting interest that attaches under an after-acquired property clause in an earlier security agreement between the debtor and a prior secured party. As already discussed, the special rules of sections 9-312(4) and 9-312(3) override the usual

128. See *supra* text accompanying note 34.

129. U.C.C. § 9-312(5)(a).

130. *Id.* § 9-204 comment 5.

131. *Id.* §§ 9-306(2),(3), 9-312(5)(a), 9-312(6).

132. See *supra* text accompanying notes 28-34.

first-to-file-or-perfect rule of section 9-312(5)(a) for purchase money security interests in all types of goods.¹³³

A supplier's crop production security interest could conceivably fit within the definition of purchase money security interest. Article 9 describes a purchase money security interest as "[a] security interest . . . taken by a person who by making advances . . . gives value to enable the debtor to acquire rights in . . . collateral."¹³⁴ Broadly defined, the term "advances" could include extensions of credit in which a supplier permits a farmer to defer payment of the purchase price for property and services needed for crop production. This extension of credit, which is value, enables the farmer to acquire rights in the crops in the sense that without the credit there would be no production and thus no crops.

Most authorities assume, however, that a purchase money security interest arises only when the debtor buys or rents collateral with the secured enabling advance, not when the debtor uses the advance to create the collateral. For this reason, a crop production security interest is not a purchase money security interest and thus is not entitled to the priority of UCC section 9-312(4).¹³⁵

The strongest argument for this conclusion is that Article 9 elsewhere and otherwise deals specifically with crop production security interests. That is, UCC section 9-312(2) carves an exception to the usual first-to-file-or-perfect rule of priority and gives a crop production security interest super priority over the

133. U.C.C. § 9-312(3) (inventory), § 9-312(4) (collateral other than inventory), § 9-313(4)(a) (fixtures). See *supra* text accompanying notes 67-75.

134. U.C.C. § 9-107(b).

135. 2 G. GILMORE, *supra* note 35, § 32.5, at 869 n.4 (crop interests are not purchase money interests because the drafters did not affirmatively so indicate and because § 9-312(2) specifically deals with them); Clontz, *Financing the Farmer Under the Uniform Commercial Code*, 2 U.C.C. L.J. 119, 138 (1969) (believes drafters had no intention of applying purchase money security interest concept to crops, but sees possibility of stretching concept to cover them); Miller, *Farm Collateral Under the UCC: "Those Are Some Mighty Tall Silos, Ain't They Fella?"*, 20 S.D.L. REV. 514, 534 (1975) (crop production lender gains rights only in the seed, not in the crop, and therefore has no purchase money interest in the crop); Note, *Secured Interests in Growing and Future-Growing Crops Under the Uniform Commercial Code*, 49 IOWA L. REV. 1269, 1285 n.102 (1964) (provision in § 9-312(2) for crop loans leads to conclusion that crop interests do not come within purview of purchase money priority); but see Phillips, *Agricultural Financing Under the U.C.C.*, 12 ARIZ. L. REV. 391, 408 (1970) (arguing that a crop production loan creates a purchase money interest because it enables the debtor to acquire rights in the collateral).

after-acquired interest of a prior lender, even though the lender filed first. The section provides:

A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.¹³⁶

As conventionally interpreted, however, section 9-312(2) is only a tiny exception to the first-to-file-or-perfect rule. The section gives priority to crop production security interests only if, and to the extent that, the earlier filed, after-acquired interest secures stale obligations, that is, obligations more than six months *overdue* when the crops began to grow.¹³⁷

Suppose, for example, that in 1984, farmer owes lender \$250,000, to be satisfied by installment payments spread over the next ten years. Also in 1984, as partial security for the debt, farmer gives lender an Article 9 security interest in the farmer's present and after-acquired crops. Lender properly files a financing statement covering all the farmer's crops. In 1986, the farmer plants a corn crop using \$80,000 worth of seed and other goods and services acquired on credit from supplier, to whom the farmer gives a security interest in the corn. Sup-

136. U.C.C. § 9-312(2).

137. See, e.g., *Dennis v. Connor (In re Connor)*, 733 F.2d 523, 525-26 (8th Cir. 1984); *United States v. Minster Farmers Coop. Exch., Inc.*, 430 F. Supp. 566, 570 (N.D. Ohio 1977); *Decatur Prod. Credit Ass'n v. Murphy*, 119 Ill. App. 3d 277, 289-90, 456 N.E.2d 267, 275 (1983); *Production Credit Ass'n v. Jacobson*, 131 Wis. 2d 550, 554 n.1, 388 N.W.2d 655, 657 n.1 (Ct. App. 1986); T. CRANDALL, R. HAGEDORN & F. SMITH, *supra* note 28, ¶ 7.07[4][d], at 7-121; 2 G. GILMORE, *supra* note 35, § 32.5, at 868; J. WHITE & R. SUMMERS, *supra* note 48, § 25-6, at 1052-53; Coogan & Mays, *Crop Financing and Article 9: A Dialogue with Particular Emphasis on the Problems of Florida Citrus Crop Financing*, 22 U. MIAMI L. REV. 13, 49 (1967); Meyer, "Crops" as Collateral for an Article 9 Security Interest and Related Problems, 15 U.C.C. L.J. 3, 47-48 (1982); Meyer, *Potential Problems Connected with the Use of "Crops" as Collateral for an Article 9 Security Interest*, 3 AGRIC. L.J. 115, 147 (1981); Miller, *supra* note 135, at 535; Phillips, *supra* note 135, at 406.

Recently, however, a court refused to read § 9-312(2) to mean that a crop production security interest wins priority only over obligations that were in default for more than six months before the crops became growing crops. In *First Nat'l Bank v. Hollingsworth*, No. 86-218-II (Tenn. Ct. App. Dec. 3, 1986) (WESTLAW, TN-CS data base), the court interpreted the section to give crop production security interests priority over any earlier perfected interest securing obligations that were *originally due* more than six months before the crops began to grow.

plier properly files. Within three months after the supplier first extends credit, the crops begin to grow, and several months later the farmer reaps a bountiful harvest worth \$125,000. At about this point the lender accelerates the balance of the farmer's \$250,000 debt and claims the crops as after-acquired collateral.

The lender wins the priority dispute with the supplier under the first-to-file-or-perfect rule of section 9-312(5)(a). Under this rule the nature of the debt to the lender is irrelevant, and the extent of the lender's priority is measured by the total amount of the unpaid obligation secured by the crops. Section 9-312(2) does not aid the supplier because, as conventionally interpreted, it is completely useless against an earlier perfected interest securing a debt of any kind¹³⁸ to the extent the debt is freshly due within or after the six-month period before the crops started to grow.¹³⁹ If none of the debt underlying the earlier interest was overdue when the six-month period commenced, section 9-312(2), as currently construed, is altogether inapplicable. The supplier's enabling security interest is thus wholly subordinate, notwithstanding that the earlier secured party contributed nothing to the production of the current crop. If part of the debt securing the earlier interest was overdue at the beginning of the six-month period, the crop production secured party gets a limited priority. That is, the supplier receives priority with respect to the then overdue portion of the debt securing the earlier interest.¹⁴⁰ The crop production secured party wins total priority only if all of the debt securing the earlier interest was overdue at the beginning of the six-

138. 2 G. GILMORE, *supra* note 35, § 32.5, at 868-69.

139. *Dennis v. Connor (In re Connor)*, 733 F.2d 523 (8th Cir. 1984); *United States v. Minster Farmers Coop. Exch., Inc.*, 430 F. Supp. 566 (N.D. Ohio 1977); B. CLARK, *supra* note 48, ¶ 8.5[2][c], at 8-54 (production lender is left with goose egg if mortgage debt secured by the crops is accelerated within six-month period); Clontz, *supra* note 135, at 143-44 (same); Coates, *Financing the Farmer*, PRAC. LAW., Nov. 1974, at 45, 55 (§ 9-312(2) gives no priority over debts freshly due after the six-month period); Miller, *supra* note 135, at 531-35 (production lender does not take priority over obligations due after the six-month period cut-off date). Only recently, however, a lone voice opined that § 9-312(2) should be read purposively, and should be applied to give priority to a crop production secured party over a lender with an earlier perfected security interest who refuses to provide production credit even though the debt due the lender was not technically due prior to the beginning of the six-month period. *In re Piwowar Farms*, 66 Bankr. 23, 25-26 (Bankr. W.D. Pa. 1986) (dictum).

140. *Decatur Prod. Credit Ass'n v. Murphy*, 119 Ill. App. 3d 277, 289-90, 456 N.E.2d 267, 275 (1983).

month period before the crops started to grow,¹⁴¹ and only if no new debt was created during the period.

Obviously, section 9-312(2) so interpreted is at most a small and fortuitous threat to the superiority of a lender's after-acquired security interest in a farmer's crops. Conversely, a supplier can never "make a crop loan on the strength of § 9-312(2) with any certainty that he [will] end up with a clear priority" over the lender's earlier perfected interest.¹⁴² No wonder section 9-312(2) has been described as "hardly . . . worth having,"¹⁴³ "one of the Code's dead-letter provisions,"¹⁴⁴ "almost a joke,"¹⁴⁵ an "Alice In Wonderland type rule,"¹⁴⁶ and, in sum, "substantially meaningless."¹⁴⁷ The aptness of these descriptions is borne out in practice: there are only three reported cases in which crop production security interests have earned any protection from UCC section 9-312(2).¹⁴⁸

141. See *Bossingham v. Bloomington Prod. Credit Ass'n*, 49 Bankr. 345, 352 (S.D. Iowa 1985), *aff'd*, 794 F.2d 681 (8th Cir. 1986).

142. 2 G. GILMORE, *supra* note 35, § 32.5, at 870.

143. *Id.*

144. *Id.*

145. B. CLARK, *supra* note 48, ¶ 8.5[2][c], at 8-54.

146. Hawkland, *The Proposed Amendment to Article 9 of the U.C.C. — Part I: Financing The Farmer*, 76 COM. L.J. 416, 421 (1971). Accord Miller, *supra* note 135, at 534 ("Alice-in-Wonderland priority rule").

147. R. HENSON, HANDBOOK ON SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 5-5, at 140 (1979). For similar descriptions, see R. BRAUCHER & R. RIEGERT, *supra* note 106, at 462 ("The purpose of [§ 9-312(2)] is to aid farmers in obtaining loans necessary to produce crops. The Subsection does not . . . help a subsequent lender much and has proved to be of little importance."); J. WHITE & R. SUMMERS, *supra* note 48, § 25-6, at 1052 ("scope of [§ 9-312(2)] is carved down almost to insignificance"); Clark, *supra* note 68, at 366 (referring to priority under § 9-312(2) as seriously limited and "so restricted"); Coates, *supra* note 139, at 55 (§ 9-312(2) has "very limited application"); Coogan & Clovis, *The Uniform Commercial Code and Real Estate Law: Problems for Both the Real Estate Lawyer and the Chattel Security Lawyer*, 38 IND. L.J. 535, 544 (1963) (§ 9-312(2) is "so limited as to be of questionable practical value to anyone"); Coogan & Mays, *supra* note 137, at 48-49 (§ 9-312(2) is unimportant because its scope is "so limited" and the section "does not go far enough to accomplish its purpose"); Meyer, "Crops" As Collateral for an Article 9 Security Interest and Related Problems, 15 U.C.C. L.J. 3, 47 (1982) (§ 9-312(2) is "probably the strangest priority rule in the Code"); Meyer, *Potential Problems Connected with the Use of "Crops" as Collateral for an Article 9 Security Interest*, 3 AGRIC. L.J. 115, 147 (1981) (§ 9-312(2) has "very little meaning").

148. See *Bossingham v. Bloomington Prod. Credit Ass'n*, 49 Bankr. 345, 351-52 (S.D. Iowa 1985), *aff'd*, 794 F.2d 681 (8th Cir. 1986); *Decatur Prod. Credit Ass'n v. Murphy*, 119 Ill. App. 3d 277, 289-90, 456 N.E.2d 267, 275-76 (1983); *First Nat'l Bank v. Hollingsworth*, No. 86-218-II (Tenn. Ct. App. Dec. 3, 1986) (WESTLAW, TN-CS data base). In two other cases, however, crop production secured parties were denied priority under UCC § 9-312(2) only because they

The conventional interpretation of section 9-312(2) is not, however, the only possible reading of the provision and is almost surely not the reading its authors intended. The next part of this Article reinterprets section 9-312(2) in light of the original drafters' intentions and the purposes and policies behind the section. These underpinnings have never before been considered or even mentioned by authorities construing the section. This oversight may explain why the conventional interpretation renders the provision meaningless. Read in light of its drafting history, section 9-312(2) is a vital rule. By giving priority to enabling interests, it is fully consistent with the pervasive policy, expressed in the law generally and in Article 9 particularly, of preventing the unfair and monopolizing effects of floating liens. Reinterpretation is justified and important because the law, as it currently stands, chains farmers to their lenders by arbitrarily denying suppliers any reliable means of insuring that investments in crop production credit will not be gobbled up by a lender's sprawling, voracious after-acquired interest in the collateral.¹⁴⁹

failed to comply with the section's procedural requirements, that is, they failed to perfect their new-value security interests. *Walker v. Planter's Bank & Trust Co. (In re Rogers)*, 39 Bankr. 295, 298 (Bankr. W.D. Ky. 1984); *United Tobacco Warehouse Co. v. Wells*, 490 S.W.2d 152-54 (Ky. 1973). In another case a bank was denied priority under § 9-312(2) because the money loaned the debtor did not enable production of the crops. *Production Credit Ass'n v. Jacobson*, 131 Wis. 2d 550, 388 N.W.2d 655 (Ct. App. 1986) (loan proceeds used to satisfy enabling credit supplied by a third party).

149. Only through rare fortuity does Article 9, as currently applied and apart from § 9-312(2), permit a supplier's production money security interest in crops to achieve priority over a lender's after-acquired interest in the collateral. The supplier will win if the lender and debtor failed to satisfy Article 9's requisites for creating a security interest. In this event, the lender stands as an unsecured creditor as to the crops with no claim whatsoever to the property. The supplier also wins if the lender's financing statement is somehow defective as to substance or place of filing. The first-to-file-or-perfect rule, § 9-312(5)(a), works only for secured parties who properly file.

The supplier can achieve priority beyond Article 9 through a subordination agreement with the lender. Subordination agreements are contracts governed largely by the common law. Although not within Article 9's scope, these agreements can override the statute's priority rules. U.C.C. § 9-316. By subordinating her security interest a secured party "waives her priority" in favor of some other claimant of the collateral such as another secured party with a junior claim under § 9-312. *A-W-D, Inc. v. Salkeld*, 175 Ind. App. 443, 446, 372 N.E.2d 486, 488 (1978). The rank of the two security interests is thereby reversed altogether or in part, depending on the terms of the subordination agreement. See R. HILLMAN, J. McDONNELL & S. NICKLES, *supra* note 29, ¶ 24.03. Because contractual subordination requires the lender's consent, it is a

III. A DIFFERENT READING OF UCC SECTION 9-312(2)

The history of Article 9's crop financing provisions and early commentary that fully reveals the purposes of section 9-312(2) and explains its structure make clear that the conventional interpretation of section 9-312(2) defies the original drafters' intention. Rather than giving crop production security interests a narrow, fortuitous priority over after-acquired interests in the collateral, section 9-312(2) was designed to achieve the opposite result. Read purposively, in line with Article 9's overarching policy of priority for enabling interests, section 9-312(2) dictates that a crop production security interest always outranks an earlier perfected, after-acquired interest except to a small, always limited extent when the earlier interest secures a purchase-money debt for, or rent owed on, the farmland. If the earlier interest secures anything other than new value given to produce the crops, the crop production security interest enjoys complete priority.

To fully understand UCC section 9-312(2), its three essential parts should be considered separately. The first part provides:

*A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest . . .*¹⁵⁰

To this point, section 9-312(2) closely resembles sections 9-312(3) and 9-312(4), which give priority to purchase money security interests over conflicting interests in the same collateral

very narrow and shallow harbor for suppliers seeking to protect crop production security interests against lenders' after-acquired interests.

By happenstance, perhaps in the language that a lender uses in refusing to subordinate, a supplier might conceivably collect facts sufficient to support a claim of priority based on the common-law doctrine of equitable estoppel. Cases exist in which a secured party has been estopped to assert priority earned under Article 9 because of culpable conduct that misleads a junior secured party or other subordinate claimant of the collateral. *See id.* ¶ 24.04[2]. These cases are rare, however, and typically involve clearly egregious conduct such as deliberately lying about the very existence of any claim to the property.

Existing law offers nothing else to protect crop production security interests against after-acquired interests in the collateral. Suppliers are thus relegated to relying on production money interests in crops that the law creates and protects against after-acquired interests. Typically, however, this protection does not extend to the full range of services and goods that a farmer needs to produce crops. *See supra* note 114.

150. U.C.C. § 9-312(2) (emphasis added).

if certain procedural requirements are satisfied.¹⁵¹ This resemblance is not accidental.

From its earliest days, Article 9 has equated crop production and purchase money security interests. The true precursor of the present section 9-312 appeared in the Spring 1950 draft of the Code. The section number was the same, and the substance of the early provision was little different from its modern counterpart. The 1950 version established the principle of first-to-file as the basic and residual rule of priority among conflicting security interests.¹⁵² The precursors to the present sections 9-312(3) and 9-312(4) were combined in a single section which provided that notwithstanding the rule of first-to-file, "a purchase money security interest is prior to a conflicting interest in the same collateral under an after-acquired property clause."¹⁵³

The precursor of the present section 9-312(2) appeared in 1950 as section 9-312(4).¹⁵⁴ The two versions of the provision are materially identical so that the 1950 commentary to section 9-312(4) applies equally well to its successor section 9-312(2). This commentary describes the section as simply another "instance of the preference which this Code gives a new value lender."¹⁵⁵ Commentary from the 1952 Official Draft Text of the Code describes the section, which then appeared as section 9-312(6), as "another instance of the preference which this Article gives a secured party who makes a present advance over one who takes security for an old debt."¹⁵⁶ The other instances of preference which these descriptions refer to are the rules giving priority to purchase money security interests. The commentary to the present section 9-312(2) similarly describes the

151. See *supra* notes 67-75 and accompanying text.

152. U.C.C. § 9-312(1) (Proposed Final Draft Spring 1950).

153. *Id.* § 9-312(2).

154. See *id.* § 9-312(4). The section provided:

Notwithstanding the provisions of subsection (1) in case the collateral is growing crops the interest of a lender who makes an advance, incurs a new obligation or releases a perfected security interest during the production season or not more than three months before the crops are planted or otherwise become growing crops, in order to enable the debtor to produce them, takes priority over the interest of an earlier secured lender to the extent that the earlier lender's interest secures obligations (such as rent, interest or mortgage principal amortization) due more than six months before the crops are planted or otherwise become growing crops even though the earlier lender's interest was perfected prior to the interest of the later enabling lender.

Id.

155. *Id.* § 9-312 comment 6.

156. U.C.C. § 9-312 comment 8 (Official Draft Text and Comments 1952).

provision as giving "priority to a *new value* security interest."¹⁵⁷

These comments equate, in principle, crop production and purchase money security interests, and put section 9-312(2) on a par structurally with the provisions in section 9-312 that give priority to purchase money security interests. The first part of section 9-312(2) is consistent with this equation and thus is the general rule of the provision. Stated simply, a crop production security interest takes priority over an earlier perfected security interest if certain procedural requirements are satisfied. The third and last part of the section simply makes clear that this general rule of priority is unaffected if the holder of the crop production security interest knows of the earlier interest.

The middle or second part of section 9-312(2) is key. In some sense, it limits the general rule of the section by adding that priority is taken "to the extent that such earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise."¹⁵⁸ The conventional interpretation of section 9-312(2) reads this part as qualifying the general rule of the section in every case without regard to the nature of the debt underlying the earlier interest.¹⁵⁹ As a result, the priority of a crop production security interest over an earlier perfected security interest is always limited to the extent that the earlier interest secures debts of any kind that are more than six months overdue when the crops begin to grow. Moreover, this limitation is construed literally and broadly so that section 9-312(2) does not apply, and the earlier perfected interest takes priority under section 9-312(5)(a), to the extent that any of the debts underlying the earlier interest are due within or after the six-month period.¹⁶⁰ This broadly construed qualification, of course, swallows the general rule established in the first part of the section and leaves a crop production security interest with a tiny, fortuitous priority only over stale debts.¹⁶¹

157. U.C.C. § 9-312 comment 2 (emphasis added).

158. *Id.* § 9-312(2).

159. See 2 G. GILMORE, *supra* note 35, § 32.5, at 868-69.

160. See authorities cited in *supra* note 139.

161. Reason in itself for doubting the soundness of the conventional interpretation is the lack of any believable justification why a crop production security interest should prevail over an earlier interest simply because the debt securing the earlier interest was six months overdue when the crops began growing. A possible rationale is to encourage secured parties to keep collections current. Yet, there is no obvious reason for encouraging such a practice only among secured parties with after-acquired interests in crops; and there is no apparent explanation why failing to adhere to the practice should be pun-

The second part of section 9-312(2) was designed, however, as an occasional, narrow exception to the general rule of the provision, not as a wide and blanket limitation on the rule. Proving this conclusion requires a short lesson in the history of crop financing under Article 9.

Until 1972, the statute prohibited after-acquired security interests in crops planted more than one year after execution of the security agreement.¹⁶² The intended effect was to limit the use of crops as collateral to current production or enabling loans and credit.¹⁶³ This prohibition, however, did not com-

ished by loss of priority only when the later, conflicting interest is a crop production security interest.

162. This prohibition appeared in the earliest complete draft of the Code when the article on secured transactions was Article 7. Section 7-510(3) provided in pertinent part that "[a] lien on crops 'to be grown' or the like includes only crops produced or to be planted during [the planting season of the year of execution of the agreement] [the year following the execution of the agreement]" (bracketed language in original). U.C.C. § 7-510(3) (Draft May 1949).

The prohibition reappeared in slightly different form in subsequent drafts and as UCC § 9-204(4)(a) in the 1952, 1957, 1958, and 1962 Official Texts. Originally, the provision left open the period of effectiveness of an after-acquired property clause on crops. Each state was free to decide for itself how far into the future an after-acquired interest in crops could reach. In the words of the drafters, the provision "leaves the determination of the time limit to local policy." U.C.C. § 9-204 comment 6 (Official Draft Text and Comments 1952). Eventually, however, the drafters decided on a uniform one-year limit. The apparent reasoning was that, although "[u]nder existing [pre-Code] statutes varying time limits are stated, the most frequent . . . [is] one year." U.C.C. § 9-204 comment 6 (Official Text 1957). Significantly, and surely not by accident, the limitation of one-year conformed "neatly to the schedule of annual crop production loans, where the time-limit will always be met." Clark, *supra* note 68, at 364.

A few states still retain the one-year limitation on after-acquired interests in crops, *see, e.g.*, KY. REV. STAT. ANN. § 355.9-204(4)(a) (Michie/Bobbs-Merrill 1970) & § 335.9-204(2)(a) (Michie/Bobbs-Merrill Supp. 1986) (effective July 1, 1987); VT. STAT. ANN. tit. 9A, § 9-204(4)(a) (1966), or impose a similar limitation. The North Dakota codification of § 9-204, N.D. CENT. CODE § 41-09-17(1) (Supp. 1985), provides an explicit exemption for crops. *See* N.D. CENT. CODE § 35-05-01.1 (Supp. 1985) ("A security interest upon crops shall attach only to the crop next maturing after the delivery of the security agreement. The provisions of this section shall not apply to liens by contract given to secure the purchase price or the rental of land upon which the crops covered by the lien are to be grown.")

163. Professor Barkley Clark has speculated that "the eastern draftsmen felt paternalistic toward the solitary yeoman and sought to protect him in this way from overreaching creditors." Clark, *supra* note 68, at 364. The drafters themselves explained the limit on after-acquired interests in crops as simply a codification of pre-Code law in many farm states. They commented that the limit "follows many state statutes which invalidate long-term mortgages of future crops." U.C.C. § 9-204 comment 6 (Official Draft Text and Comments 1952). In any event, most commentators were critical of the limit or ques-

pletely outlaw after-acquired interests in crops; rather, it banned long-range interests spanning more than a year.¹⁶⁴

Significantly, the drafters recognized a logical exception to this limited ban. Contract vendors, purchase money mortgages, and lessors of farmland sometimes take a consensual chattel interest in the debtor's present and future crops to secure the land debts owned them.¹⁶⁵ As to these creditors, to whom this Article refers as *land financiers*, the ban on long-range after-acquired security interests in crops was lifted. The Spring 1950 draft of Article 9 provided in pertinent part:

No security interest attaches under an after-acquired property clause . . . to crops planted or otherwise becoming growing crops more than one year after the agreement for the security interest is made *except that a security interest in crops to be planted which is given in conjunction with a lease, land purchase mortgage or contract may if so agreed attach to crops to be grown on the land subject to such lease, mortgage or contract during the period of such real estate transaction*

. . . .¹⁶⁶

tioned its soundness. See, e.g., Clark, *supra* note 68, at 364 (reflects "naiveté toward modern large-scale commercial agriculture"); Coates, *Farm Secured Transactions Under the UCC*, 23 BUS. LAW. 195, 199 (1967) ("This one-year limitation is no more than a carryover from the past. It is a limitation on the freedom of contract between farm lender and farm borrower. It has only its age to support its existence."); Coogan & Clovis, *supra* note 147, at 546 (laws that are paternalistic toward farmers are "hard to understand").

164. Some might argue that the very existence of this ban argues for the conventional interpretation and against the different reading suggested here, the assumption being that the ban was the device for bridling floating liens on crops. The answer is two-fold: First, the ban was not complete. After-acquired interests that attached within one year of executing the security agreement were effective. The need remained to bridle floating liens, even though short-lived, that just as easily as an ancient after-acquired interest could be unrelated to crop production. Second, if the ban by itself accomplished the goal of harnessing floating liens so as to insure completely that crops were available on a first-priority basis for crop production credit, there was no reason to include anything like § 9-312(2).

165. The land financier's interest in the real estate does not necessarily encompass crops grown on the land, especially not as against a third person with a specific interest in the crops. R. BROWN, *supra* note 39, § 17.3, at 594 ("crops grown and harvested by the mortgagor while he is still in possession of the mortgaged premises and before his right to the property is foreclosed belong to him"); W. BURBY, *HANDBOOK OF THE LAW OF REAL PROPERTY* § 10, at 17-18 (1965) (mortgagor's right to crops harvested before foreclosure, and tenant's right as against landlord to crops planted during tenancy under doctrine of emblements); Annotation, *Priority as Between Mortgagee of Real Property, or Receiver Appointed at His Instance, and Chattel Mortgagee of Crops*, 47 A.L.R. 772, 772-74 (1927) (chattel mortgage on crops generally takes priority over earlier mortgage on the real estate).

166. U.C.C. § 9-203(3)(a) (Proposed Final Draft Spring 1950) (emphasis added). This exception appeared in every version of Article 9 that contained the ban on long-range after-acquired interests in crops.

There is a critical link between section 9-312(2) and this exception to the prohibition on long-range after-acquired security interests in crops.

The drafters created the exception because they reasoned that in financing the farmer's purchase or use of the farmland, the land financier gave value that enabled the farmer to produce crops throughout the term of the mortgage, lease, or land sale contract.¹⁶⁷ Allowing the land financier qua enabling lender to take an after-acquired interest in crops produced throughout the term of the land transaction, therefore, was consistent with limiting the use of crops as collateral to current production or enabling loans and credit.

The drafters of course recognized that the after-acquired interest of a land financier would conflict with a supplier's or another secured party's crop production security interest, to which section 9-312 generally gave priority over any earlier perfected security interest. This conflict is somewhat unique. The land financier's interest in crops is not just any kind of interest, but, to an extent, it too is a production money interest. As explained in the 1950 comments to section 9-312(4), which is the present section 9-312(2), both the land financier and the current crop lender or other supplier "are in a real sense enabling the farmer to produce a crop—one furnishing land, the other money."¹⁶⁸

The second part of section 9-312(2) was therefore added as a narrow exception to the first part of the section to protect the earlier perfected, after-acquired interest of a land financier in crops qua new-value secured party with an enabling crop production security interest. The effect, first priority to the land financier over a supplier of other production credit, was consistent with deciding a conflict between purchase money secured parties on the basis of which secured party first gave value, which was the rule under the 1950 draft of Article 9. This protection was justified because the land financier contributes to the production of every year's crop by enabling the debtor to

167. In commenting on the exception appearing in the Spring 1950 draft of the Code, the drafters wrote:

The "except" clause permits such a security interest in future crops where the interest is given as part of a transaction by which the farmer acquires the land on which the crop is to grow. Here the value given (transfer of land) pertains to many production seasons, unlike a loan to finance a particular crop.

U.C.C. § 9-203 comment 2 (Proposed Final Draft Spring 1950).

168. *Id.* § 9-312 comment 6.

own or rent the farmland on which the crops are grown. The drafters did not intend anybody else to benefit from the second part of section 9-312(2). Indeed, the 1950 version of section 9-312(2) explicitly provided in the provision itself that the priority of the earlier security interest relates to "obligations," defined parenthetically to mean "rent, interest or mortgage principal amortization."¹⁶⁹ Notably, this definition survives intact in the modern commentary to section 9-312(2).¹⁷⁰

Equally important, the second part of section 9-312(2) was designed to limit even the protection given the earlier interest of a land financier. In exempting land financiers from the ban on long-range after-acquired interest in crops, the drafters expressly stated in their 1950 commentary that the priority of a land financier's after-acquired interest was limited by section 9-312(4), now section 9-312(2). They described the provision as giving higher priority "to security interests attaching to secure current obligations than to a security interest attaching in a real estate arrangement . . . to secure last year's rent or payments due on a real estate mortgage."¹⁷¹

This priority result is confirmed by the 1950 commentary to section 9-312, which gives the following example:

A farmer farming under a lease but behind in his rent for an earlier year gives his landlord as security for the past due rent a crop security

169. *Id.* § 9-312(4). The very earliest antecedent of the modern § 9-312(2) suggests even more clearly that, from the beginning, the drafters intended to subordinate a production money security interest to an earlier security interest only when the earlier interest secures a debt owed for the price or use of the farmland. This earliest antecedent, which is a common ancestor of the present § 9-312(2) and the 1950 § 9-312(4), was § 7-508(1)(a), which appeared in March, 1949, when the secured transactions article was Article 7. The section provided:

A farm products lien given for new value ranks ahead of a farm products lien given pursuant to or as part of an earlier real estate transaction to the extent such liens secures [sic] indebtedness rent, purchase price or interest becoming due more than one year before the date that such new value is given.

U.C.C. § 7-508(1)(a) (Tent. Draft No. 3, March 1, 1949).

170. U.C.C. § 9-312 comment 2.

171. U.C.C. § 9-203 comment 2 (Proposed Final Draft Spring 1950). The complete text of this sentence in the comment is somewhat garbled: "Section 9-312(4) on priorities limits the use of such a clause to security interests attaching to secure current obligations than to a security interest attaching in a real estate arrangement by giving higher priority to secure last year's rent or payments due on a real estate mortgage." The confusion is attributable to the apparent misplacement of an interlineation in the original manuscript of the Spring 1950 draft. In the papers of Karl Llewellyn, who was the overall architect of the Uniform Commercial Code, is a typed version of that draft in which the full text of the second comment to § 9-203 appears exactly as follows:

interest on a crop to be produced. He then borrows from the bank the funds needed to produce this year's crop giving a security interest in the same crop as that given to the landlord.¹⁷²

The analysis of this example is:

If both [a real estate lessor and a bank] claim security in this year's crop to secure this year's rent and this year's seed purchase, normal rules of priority should govern (first to perfect). But a real estate lessor may . . . attempt to make a current crop security for current and past due rent. This subsection [meaning § 9-312(4), which is now § 9-312(2)] provides that security for current advances for crop production takes precedence over security for past due claims.¹⁷³

The rationale is that the land financier's security interest is entitled to priority only to the extent of new-value contributions enabling production of the current crop. The credit extended by the land financier for last year's rent, or last year's mortgage payments, however, does not amount to new value contributing to this year's crop. In the language of section 9-312(4) in 1950, and section 9-312(2) today, the land financier's contribution of new value to any particular crop, and the limit of his priority over a crop production secured party, is the farmer's obligation to pay the purchase price of the land or rent due within "six months before the crops are planted or otherwise become growing crops."

Especially important is the drafters' description of this obligation as "rent, interest or mortgage principal *amortization*."¹⁷⁴ This description was part of the section itself in 1950 and presently appears in the commentary to section 9-312(2).¹⁷⁵ The implication, then and now, is that the land financier's contribution of new value to any particular crop, and thus the priority his

2. Subsection (3) (a) follows a not uncommon statutory prohibition against a long term mortgage of crops by a farmer. Only crops to become growing crops within one year of the agreement may be the subject to a security interest. The date of planting rather than the date of harvesting is used so that a security interest in crops with a long production season (e.g. nursery stock) may continue until harvesting. The "except" clause permits such a security interest in future crops where the interest is given as part of a transaction by which the farmer acquires the land on which the crop is to grow. Here the value given (transfer of land) pertains to many production seasons, unlike a loan to finance a particular crop. Section 9-311 (4) on priorities limits the use of such a clause to a security interest attaching on a real estate arrangement by giving higher priority security interests attaching to secure current obligations than/one to secure last year's rent or payments due on a real estate mortgage.

Typewritten Version of UCC § 9-203 comment 2 (Proposed Final Draft Spring 1950) in Karl Llewellyn Papers (available in University of Chicago Library, microfilm roll XII, 8.b.

172. U.C.C. § 9-312 comment 1(h) (Proposed Final Draft Spring 1950).

173. *Id.* § 9-312 comment 6.

174. *Id.* § 9-312(4) (emphasis added).

175. U.C.C. § 9-312 comment 2.

interest enjoys over a crop production security interest in the collateral, is limited to rent, interest, and amortized purchase money payments due and unpaid during the six months before the crops start to grow. Any part of the land debt attributable to any period before the six months is not new value that contributes to the production of a particular year's crop. Logically then, a land financier's contribution of new value does not include, and thus his priority does not extend to, rent or purchase money land obligations attributable to any period after the six months because the credit these obligations represent did not enable production of the current crop.

In sum, the land financier's priority over a crop production secured party under section 9-312(2) amounts to six months' rent or six months' interest and mortgage principal amortization due at the time of planting the crops. This phrasing better expresses the real intentions behind the second part of section 9-312(2). Interestingly, it was the phrasing used in the antecedent of section 9-312(2) that appeared in the first draft of the complete Code in 1949.¹⁷⁶ There is no evidence that the differ-

176. In 1949, when Article 9 was Article 7, the critical language provided:

A perfected farm products lien on products grown from the soil attaching pursuant to new value given under an agreement made not more than [six months] before the crop was planted ranks ahead of a lien on the same products attaching pursuant to any agreement securing an earlier indebtedness, rent, purchase price, or interest to the extent such lien secures more than one year's rent due or one year's interest and amortization on principal due at the time the crop is marketed.

U.C.C. § 7-511(1)(b) (Draft May 1949) (emphasis added) (bracketed material in original).

In an even earlier draft of just the secured transactions article, this provision appeared as § 7-508, which is the earliest antecedent of the present § 9-312(2). Interestingly, this draft-grandparent version read in part much like its most modern counterpart:

A farm products lien given for new value ranks ahead of a farm products lien given pursuant to or as part of an earlier real estate transaction to the extent such liens secures [sic] indebtedness rent, purchase price or interest becoming due more than one year before the date that such new value is given.

U.C.C. § 7-508(1)(a) (Tent. Draft No. 3, March 1, 1949) (emphasis added).

This "due more than" language first reappeared when the May 1949 draft was revised in September, 1949. See ALI & NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, UNIFORM COMMERCIAL CODE: SEPTEMBER 1949 REVISIONS OF SECTION 1-105, SECTION 6-303 AND ARTICLE ON SECURED TRANSACTIONS 73 (September 1949) [hereinafter Revisions September 1949]. In these revisions, the article on secured transactions was Article 8, and the present UCC § 9-312(2) appeared as § 8-406(4) which provided:

In case the collateral is growing crops the interest of a lender who gives new value during the production season or not more than three

ent phraseology in the 1950 version of section 9-312(2), which persists today, was intended to effect a change in substance. Possibly, the drafters changed the phrasing simply because technical rules of writing style reserved possessives for ownership by a person.

Substance was changed in 1972 when the official text of Article 9 was amended to eliminate altogether the limited ban on long-range after-acquired interests in crops that applied to lenders who were not land financiers. This change, however, in no way affects section 9-312(2). The sole purpose of the change was to make Article 9 consistent with actual practice. Lenders who were not land financiers had routinely skirted the ban. They would file a financing statement covering crops that was effective for a full five years and then have the farmer annually execute a new security agreement covering the current year's crops. The 1972 amendments to Article 9 simply validated this practice by allowing any lender to acquire crops as collateral years into the future through the expedience of an after-acquired property clause in the parties' original security agreement.¹⁷⁷

This recent technical or housekeeping change regarding how a lender acquires an interest in future crops, however, in no way dilutes the interpretative force of intentions and reasoning originally behind section 9-312(2) regarding the priority of production money security interests in current crops. Indeed, the 1972 change actually increases the importance of giving wide priority to production money interests inasmuch as the change enables lenders who have contributed nothing to the production of current crops to more easily claim them as collateral. Further, the net effect of the 1972 change was simply to

months before the crops are planted or otherwise become growing crops takes precedence over the interest of a lender whose interest is first perfected to the extent the interest of such earlier lender secures obligations (such as rent, interest or mortgage principal amortization) due more than six months before the crops are planted or otherwise become growing crops.

U.C.C. § 8-406(4) (Revisions September 1949).

177. In the judgment of the Review Committee that recommended the 1972 Amendments to Article 9, the ban on long-range after-acquired security interests in crops only complicated the pattern of a farmer's usual lender financing successive crops by requiring a new security agreement each year. Therefore, the Review Committee recommended eliminating the ban because it "appears to be meaningless in operation except to cause unnecessary paperwork." PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, FINAL REPORT OF THE REVIEW COMMITTEE FOR ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE 207 (April 25, 1971).

give after-acquired property clauses affecting crops the same reach into the future that such clauses covering inventory and equipment have. The longevity of after-acquired interests in inventory and equipment has never been considered a reason to read narrowly the purchase money priority rules of sections 9-312(3) and 9-312(4) which counteract those interests.

Moreover, the committee responsible for the 1972 amendments to Article 9 "determined . . . to leave . . . [§ 9-312(2)] unchanged."¹⁷⁸ These people did share what has become the conventional interpretation of the section, which they accordingly described as having "little practical effect."¹⁷⁹ Yet, because they left section 9-312(2) untouched, their reading of it cannot in any sense override the original design and true interpretation of the section. The original drafters' intent, therefore, should continue to guide interpretation of section 9-312(2).

Read consistently with the original drafters' intentions, section 9-312(2) should be reinterpreted by reading the provision as follows: A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise (that is, a production money security interest) takes priority over an earlier perfected security interest even though the person giving new value had knowledge of the earlier interest, except that the earlier interest takes priority if, and to the extent that, it secures unpaid rent or purchase money obligations for the land on which the crops are grown that are attributable to the six-month period before the crops become growing crops by planting or otherwise.

Pursuant to this reinterpretation of section 9-312(2), when a crop production security interest conflicts with an after-acquired interest that secures any obligation other than rent or the purchase price of the farmland, the crop production interest completely prevails even though the other interest was filed first. The applicable rule is the first part of section 9-312(2). The except clause of the section, as reinterpreted, is completely inapplicable. This result is perfectly consistent with the way in which Article 9 decides priority between a purchase money secured party and an earlier secured party who perfected first but contributed no new value to make possible the debtor's acquisition of the collateral.

178. *Id.* at 208.

179. *Id.*

If the earlier interest secures rent or a purchase money obligation for the farmland, the except clause applies. Yet, the clause limits the land financier's priority to rent or obligations owed on the purchase price of the land that are attributable to the six-month period before the farmer planted the crops. Rent or purchase money payments due before or after the six-month period receive no priority. If all of the payments due during the period have been made, the production money security interest has complete priority.

Also, if a purchase money debt on the farm is accelerated during the six-month period, or sometime after the crops begin growing, the priority of the land financier's security interest in the current crop should extend only to the interest and mortgage principal amortization actually due and unpaid for the six-month period. Only to this extent did the land financier enable production of the current crop, not to the extent of the full principal balance becoming due fortuitously through acceleration during or after the six-month period. No matter how repayment of the purchase money obligation was structured, and even if the principal was payable in a lump sum rather than on an amortized basis, the land financier's priority should never exceed an amount of principal that is fairly attributable to the six-month period and that has not been paid. Only to this extent did the land financier contribute new value to the current crop.

The result under the reinterpretation is not only consistent with the reasoning originally behind section 9-312(2), but also with the modern method for resolving priority conflicts between two purchase money security interests, which is according to the usual rule of first-to-file-or-perfect.¹⁸⁰ Indeed, there is perfect consistency with this method inasmuch as the extent to which the land financier is considered to have given new value, and thus the extent to which she has priority because of her earlier filing, is measured by the same gauge used to decide the extent to which a security interest is a purchase money interest: the amount of secured value contributed toward the purchase price that was actually used in buying the property.¹⁸¹ By limiting the land financier's priority in crops under section 9-

180. See 2 G. GILMORE, *supra* note 35, § 29.2, at 784. Cf. U.C.C. § 9-313(7) (priority between a construction money mortgage on real property and a purchase money security interest in fixtures attached to the realty).

181. A security interest securing a loan of money is a purchase money security interest only to the extent that the loan was "in fact so used" to enable the debtor to acquire rights in the collateral. U.C.C. § 9-107(b).

312(2) to unpaid obligations attributable to the six months before the crops began growing, the statute estimates conclusively the total financed rent or purchase money actually used in producing the particular crop.¹⁸²

In determining priority between two or more crop production security interests, section 9-312(2) does not apply at all. The governing rule is section 9-312(5)(a), first-to-file-or-perfect,¹⁸³ which also applies in resolving conflicts between conflicting purchase money security interests in the same collateral.¹⁸⁴ The symmetry between crop production and purchase money interests is thereby fully maintained.

Overall, this reinterpretation of section 9-312(2) makes sense of the section by reading it in light of underlying intentions, in harmony with the structure of section 9-312 as a whole, and consistent with Article 9's normal preference for enabling interests. The great mystery, then, is the source of the conventional interpretation, which reads the section as a meaningless joke, giving only a narrow, fortuitous priority to crop production security interests. The case which serves as the lodestar with respect to the conventional interpretation is *United States v. Minster Farmers Cooperative Exchange, Inc.*¹⁸⁵ The court's construction of section 9-312(2) in *Minster* was based solely and completely on a secondary source, the first edition of a popular,

182. The most accurate measure of this value may be the depreciation in land value caused by growing the crops. This standard, however, involves burdensome problems of proof and too much speculation. The amount of rent or mortgage principal amortization (plus interest) that became due during the year that the crops were grown is a much more convenient and rational measure.

To measure the land financier's priority under § 9-312(2) by the total value she gave the farmer, or the balance of the total the farmer still owed, would mean that ordinarily a crop production security interest would be largely or completely squeezed out because mortgage balances often approach or exceed the worth of the entire crop. This result would discourage crop production security interests in contradiction to Article 9's scheme for increasing credit availability by giving overriding preference to enabling interests.

There is no similar danger in determining priority among purchase money security interests on the basis of first-to-file-or-perfect. When there are two purchase money security interests in goods, the secured parties' total contribution will not exceed the price of the goods; and each secured party's contribution will be fully or largely supported by the collateral's value because ordinarily the debtor will not have paid a price for the goods that greatly exceeded the property's worth.

183. 2 G. GILMORE, *supra* note 35, § 32.5, at 867-68; Phillips, *supra* note 135, at 407.

184. See authorities cited *supra* note 48.

185. 430 F. Supp. 566 (N.D. Ohio 1977).

generally reliable commercial law treatise.¹⁸⁶ The treatise has a very small section on section 9-312(2), where the authors opine that "subsection (2) entitles one to priority only over obligations more than six months overdue at the time the crops in question become growing crops."¹⁸⁷ The authors do not explain how they came to this interpretation, and they cite no authority for it.¹⁸⁸

Possibly, the authors were influenced by Professor Grant Gilmore's monumental treatise on secured transactions, in which he advances the same interpretation.¹⁸⁹ Gilmore's construction of any Article 9 provision is normally entitled to much weight inasmuch as he was a principal architect of the statute. In this instance, however, and these next words are written with great respect and unlimited deference, there is cause to doubt Gilmore because of his uncharacteristically shallow analysis of section 9-312(2), and because another Article 9 insider interpreted the provision very differently.

Gilmore's treatise recognizes that the priority of section 9-312(2) is "extremely limited" compared to the "absolute priority" accorded purchase money security interests.¹⁹⁰ Indeed, the treatise describes "the § 9-312(2) priority [as] hardly . . . worth having,"¹⁹¹ and the section itself "as one of the Code's dead letter provisions."¹⁹² Conspicuously absent is any explanation why an "extremely limited," "hardly worth having," "dead letter" provision was included in Article 9. It is almost as though Gilmore confronted section 9-312(2) for the first time when he wrote about it in his treatise and was surprised and perplexed by the meeting.

Significantly, Professor Gilmore, a Yale law professor, was not the sole author of Article 9. At least in the beginning, there were three other principal coauthors:¹⁹³ Allison Dunham, who was then teaching at Columbia Law School in New York City; Fairfax Leary, then on the law faculty of the Uni-

186. See *id.* at 570 (citing J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 25.6, at 923 (1972)).

187. J. WHITE & R. SUMMERS, *supra* note 186, § 25.6 at 923, quoted in *Minster*, 430 F. Supp. at 570.

188. In the second edition of their treatise, Professors Summers and White state the very same opinion, citing the *Minster* case as authority. J. WHITE & R. SUMMERS, *supra* note 48, § 26-6, at 1052-53 & n.59.

189. 2 G. GILMORE, *supra* note 35, § 32.5.

190. *Id.* at 869.

191. *Id.* at 870.

192. *Id.*

193. See U.C.C. § 7-101 comment (Draft May 1949).

versity of Pennsylvania in Philadelphia; and Charles Bunn, then a professor at the University of Wisconsin Law School, in the heart of the agrarian Midwest.

Professor Bunn's understanding of section 9-312(2) was very different from Gilmore's. A seldom-cited piece coauthored by Bunn at about the same time Gilmore's treatise was published offers the following explanation of section 9-312(2):

Quite frequently (or should we say "traditionally"?) a farm is mortgaged. Perhaps the mortgage also covers future crops. Yet the farmer needs a current loan to "enable" him to plant this year's crop. Or, perhaps earlier in the year a farmer has obtained a secured loan against his crop and now wants another loan from a different lender. The UCC deals with these problems, and incidentally affects priorities in land security transactions, as follows: [UCC § 9-312(2) is quoted.]

This is tricky; we'll leave it to you to apply it. Here's the main idea though: Do you recognize this as a variation on the "purchase-money" theme? The thought is that the "old credit" (any debt "due" more than six months before the crops become growing crops) hasn't helped *produce* the COLLATERAL, at least not as much as the "enabling advance." *Careful* though: It's "due" more than six months, etc., *not* "incurred" more than six months, etc. So? Well, those *currently due* installments on the realty mortgage could take priority over the enabling advance . . .¹⁹⁴

A fuller explanation would have been nice. Yet, enough is written to confirm that the reinterpretation of section 9-312(2) urged in this Article is true to the understanding of an original drafter who, although not as well known, was probably closer to agriculture and more attentive to section 9-312(2) than Gilmore. More important, the reinterpretation is true to Article 9's pervasive and sound policy of preferring enabling, new-value security interests, which policy was nothing less than the "main idea" behind section 9-312(2)¹⁹⁵ and thus should be given effect.

IV. RIGHTING THE ANOMALY: A LEGISLATIVE PROPOSAL IN AID OF CERTAINTY

The courts are free to reinterpret UCC section 9-312(2) in a manner consistent with the different reading this Article urges. The long-lived, wide-spread acceptance of the conventional in-

194. C. BUNN, H. SNEAD & R. SPEIDEL, AN INTRODUCTION TO THE UNIFORM COMMERCIAL CODE 419-20 (1964). A student author also understood U.C.C. § 9-312(2) as allowing the earlier secured party to win only as to real estate mortgage installments due within the six months before the crops began growing. Note, *Farm Financing Under the Uniform Commercial Code*, 44 N.D.L. REV. 553, 561 (1968).

195. C. BUNN, H. SNEAD & R. SPEIDEL, *supra* note 194, at 420.

tepretation does not compel its perpetuation.¹⁹⁶ Yet, farm lenders who wish to preserve the priority of aged floating liens for stale loans will undoubtedly cry that they relied on the conventional interpretation in making the loans. Reliance, however, in and of itself, is no reason for clinging to a particular construction of a statute.¹⁹⁷ Moreover, cries of reliance would be unbelievable because it is unlikely that farm lenders actually made loans years ago that they then expected to satisfy from crops grown years later. Also, cries of reliance on the conventional interpretation of section 9-312(2) would be unmoving. Relying on crops to be grown years in the future as collateral for present advances is, and always has been, unreasonable in light of the many economic and natural uncertainties of farming that make even current production financing a risky venture. Finally, real and justified reliance on the conventional interpretation of section 9-312(2) argues only against retroactively applying the proper construction of the provision, and not against prospectively reinterpreting it.¹⁹⁸

Judicial reinterpretation of section 9-312(2) is not, however, a quick and dependable solution to the problems that the conventional interpretation of the provision causes and that the de-

196. Legislative unresponsiveness to the courts' interpretation of a statute is not a definite signal that the courts have correctly determined legislative intent, or that the legislature adopts the interpretation. See Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities,"* 64 B.U.L. REV. 737 (1985). See also authorities cited *infra* note 201, regarding the absence of a constitutional bar to reinterpreting U.C.C. § 9-312(2).

197. Reliance alone is not a substantive limitation on the power of a court to reinterpret a statute or the power of a legislature to alter an existing law. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930) (overruling a law established by previous decisions "on which a party relied" does not give rise to a due process claim); *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450 (1924) (reversal of a decision to the prejudice of a party does not give rise to a due process claim); *New York Cent. R.R. v. White*, 243 U.S. 188, 198 (1917) ("No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit.").

Constitutional arguments that may be encountered in retroactively reordering priority, either through judicial decision or legislative action, are discussed *infra* note 201.

198. Courts can, and occasionally do, overrule themselves prospectively. See, e.g., *United States v. Estate of Donnelly*, 397 U.S. 286, 295 (1970) ("[D]ecisions construing federal statutes might be denied full retroactive effect, as for instance where this Court overrules its own construction of a statute . . ."); *Hare v. General Contract Purchase Corp.*, 220 Ark. 601, 609, 249 S.W.2d 973, 978 (1952) (prospectively reinterpreting state constitutional usury provision); see also Traynor, *Quo Vasis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533 (1977).

pressed farm economy currently exacerbates. Furthermore, rereading the present section 9-312(2) will create the kind of uncertainty about its scope and application that accompanies the enactment of a completely fresh statute. This uncertainty is no reason for courts to refuse to reinterpret the section. Reducing uncertainty, however, is good reason for legislating a reinterpretation that addresses up front the most important interpretative issues and also makes adjustments to accommodate the most serious, legitimate concerns of farm lenders.

Accordingly, here is a statutory substitute for the present section 9-312(2) that mainly codifies, in clearer and more definite form, the intent and purpose of the original section to give broad priority generally to crop production security interests.¹⁹⁹ Additionally, it aids certainty by defining in detail certain critical terms and promotes accommodation by conditioning the priority on satisfying procedural requirements designed to guard against misleading farm lenders and other third parties.²⁰⁰

199. This is not the first call for legislative change. See Clontz, *supra* note 135, at 144 (arguing for amending § 9-312(2) "to give the same type of priority to a lender enabling the debtor to grow 'current crops' that we find given a lender financing inventory for a businessman"); Hawkland, *The Proposed Amendment to Article 9 of the U.C.C. — Part 1: Financing the Farmer*, 76 COM. L.J. 416, 421-22 (1971). Professor Hawkland wrote in the following strong terms about changing § 9-312(2) to provide a broad enabling priority for crop production security interests:

This Alice-in-Wonderland type rule is uncommercial, out of keeping with parallel rules for businessmen and flies in the face of the doctrine of unjust enrichment by failing to recognize that the first lender would have no collateral upon which his security interest could attach but for the enabling loan made by the second lender. It also has the unfortunate effect of deterring seed loans and driving the farmer back to the first lender for all his credit needs. It is high time that the discrimination against the seed lender be ended.

Id. Professor Hawkland added that this "situation of unjust enrichment . . . would not be tolerated for a single moment in a parallel commercial context." *Id.* at 422.

200. The following is a statutory substitute for the present § 9-312(2) that changes the section only to the minimal extent necessary to accomplish the intentions and purposes of the different reading this Article urges:

A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest except to the extent such earlier interest secures an amount of any purchase money obligation or rent for the land where the crops are grown that is determined by law to be proportionately attributable to the six-month period before the crops became growing crops, even though the person giving new value had knowledge of the earlier security interest.

This statute would leave unanswered fundamental issues that have been dor-

Commentary accompanies the proposed substitute both to explain and amplify it. Notes adorn the statutory language and the comments to further justify certain language and also to suggest alternative wording that limits or broadens the effects of the whole provision or parts of it.

Any changes in section 9-312(2) could constitutionally be applied to security interests created before the changes were enacted if the legislature so intended.²⁰¹ Where this intention

ment under the conventional interpretation of the present § 9-312(2): When must the new-value interest be perfected? Under what circumstances does new value enable crop production? What is crop production? Crop production financiers would be reluctant to rely on the statute until the courts answered these questions, and even then the statute's essential purpose would be fulfilled only if the courts' answers liberally and reliably favored crop production security interests.

201. Certain provisions of the federal Constitution and some state constitutions might appear at first glance to prevent retroactively applying either a newly enacted priority statute or a fresh construction of a long-standing priority statute. On closer examination, however, nothing in any constitution stands in the way of legislatively or judicially modifying priority rules as applied to existing interests.

Reordering the priority of interests in collateral is not an unconstitutional taking of property. In *United States v. Security Indus. Bank*, 459 U.S. 70 (1982) the takings clause of the fifth amendment was raised as a bar to retroactive application of a provision of the Bankruptcy Reform Act of 1978. As applied in that case, the provision in question allowed the debtor to entirely avoid liens that had been created prior to passage of the Act. The lower court held the retroactive application of the law unconstitutional under the takings clause. *Rodrock v. Security Indus. Bank*, 642 F.2d 1193, 1197-98 (1981), *aff'd sub nom. United States v. Security Indus. Bank*, 459 U.S. 70 (1982). The Supreme Court avoided ruling on the constitutional question by construing the statute as applying only prospectively. In discussing the constitutional question, the Court stated:

Since the governmental action here would result in a complete destruction of the property right of the secured party, the case fits but awkwardly into the analytic framework employed in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978), and *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), where governmental action affected some but not all of the "bundle of rights" which constitute the "property" in question.

Security Indus. Bank, 459 U.S. at 75-76 (emphasis added). This concept of the "bundle of rights" has been relied upon in several cases to uphold governmental actions against challenges under the takings clause. Where something less than the entire "bundle" is adversely affected, the Court has not found a "taking." See *PruneYard*, 447 U.S. at 82 ("[I]t is well established that 'not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense.'" (quoting *Armstrong v. United States*, 364 U.S. 40, 48 (1960)); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) ("At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."); *Penn Cent.*, 438 U.S. at 130 ("Taking" jurisprudence

accompanies enactment of the statute proposed here, the enacting legislation should clearly state that it applies retroactively.

does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”).

Retroactive application of either proposal in this Article would be sustainable under this theory. The bundle of rights is not affected in its entirety. Neither the judicial reinterpretation nor the legislative enactment would avoid the secured party's interest; the secured party remains a secured party, not a general unsecured creditor. *Cf. Security Indus. Bank*, 459 U.S. at 75. Priority is the only strand of the bundle that is disturbed. Moreover, a portion of the mortgagee's interest would be ranked along with other production input interests.

The Court has also recognized that regulatory restrictions on property are to be distinguished from actual physical intrusions on property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (“[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause.”).

Another factor that the Court has frequently emphasized in takings cases is whether the restriction impairs the “investment-backed expectations” of the property holder. *See, e.g., Loretto*, 458 U.S. at 426; *Penn Cent.*, 438 U.S. at 124. This factor alone, however, should not raise a governmental restriction on property to the level of a taking. Virtually *any* restriction placed on the disposition of property will defeat an expectation of economic use, and, indeed, the Court has sustained fairly drastic restrictions on property uses. *See, e.g., Penn Cent.*, 438 U.S. at 138.

Retroactive application of the proposed § 9-312(2) may also result in a challenge under the contracts clause. *See* U.S. CONST. art. 1, § 10 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”). This clause has been held to apply only to legislative action, not judicial interpretation. *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451 (1923); *Moore-Mansfield Constr. Co. v. Electrical Installation Co.*, 234 U.S. 619, 624 (1914). In *Toledo, D. & B. R.R. v. Hamilton*, 134 U.S. 296 (1890), the Court held that when at the time the mortgage on the railroad's property was executed there was no mechanic's lien statute in force, the mortgagee took its vested priority and any subsequent lien was subordinate to the mortgage. *Id.* at 301. The Court concluded that the priority of the mortgage was “beyond the power of the . . . legislature thereafter to disturb.” *Id.* Since 1890, however, the contours of the contracts clause have become less certain and the Court has upheld the retroactive application of state legislation restricting the right of a mortgagee to foreclose on a mortgage, *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 444-45 (1934), the right of a certificate holder to withdraw from a building and loan association, *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38 (1940), and the adjustment of creditors' claims against insolvent municipalities, *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502, 513-14 (1942).

In 1978 the Court decided *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). *Spannaus* struck down the retroactive application of a state law regarding the vesting of employees' interests in benefit plans. The law required that certain categories of employers were subject to a “pension funding charge” if a plan were terminated or a state office or plant were closed. *Id.* at 238. The Court relied on the analysis in *Blaisdell* and focused on five significant factors. The Court looked to 1) a legislative declaration “in the Act itself” of an “emergency need”; 2) whether the state was acting “to protect a basic societal interest, not a favored group”; 3) whether the legislation was “appro-

*Proposed Statutory Language***(2)(a) A crop production security interest is a security**

priately tailored" to meet the emergency; 4) whether "the imposed conditions were reasonable"; and 5) whether the term of the legislation was "limited to the duration of the emergency." *Spannaus*, 438 U.S. at 242 (citing *Blaisdell*, 290 U.S. at 444-47). In addition, the Court made clear that the level of scrutiny given legislative action will vary in direct relation to the impairment of the contract. "Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." *Id.* at 245 (footnote omitted).

Arguably, the proposed substitute § 9-312(2) will pass constitutional muster under *Spannaus/Blaisdell*. Initially, there must be a legislative declaration in the act itself of an emergency need. The subject of the *Blaisdell* action was a moratorium on mortgage foreclosures responding to the conditions of the Depression of the 1930s. *Blaisdell*, 290 U.S. at 421 n.3. The *Spannaus* opinion notes, however, that the legislation need not be responding to an emergency of such "great magnitude." 438 U.S. at 249 & n.24. Moreover, the Court has indicated that the legislation "need not be addressed to an emergency or temporary situation." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983) (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 n.19 (1977)); see also *Veix*, 310 U.S. at 39-40. In any event, legislatures considering proposed § 9-312(2) should include in the bill itself explicit findings regarding the crisis in agriculture and in rural communities.

The legislation also must be aimed at protecting a basic societal interest. *Energy Reserve*, 459 U.S. at 412; *Spannaus*, 438 U.S. at 242. In *Spannaus* the Court found that protecting the benefits of employees whose benefit plans had terminated or whose employers had closed operations was protection of a "narrow class." *Spannaus*, 438 U.S. at 249. While it is true that proposed § 9-312(2) would most directly affect production input suppliers, the protection would also operate to open additional credit to farmers. In light of the impact the farm crisis has on rural communities, the effect of the proposed change would be beneficial to the rural sector of the economy as a whole.

Spannaus additionally focused on whether the legislation was narrowly tailored to meet the emergency and whether the conditions imposed were reasonable. *Id.* at 242. The *Spannaus* Court found that the legislation before it failed in both respects. Indeed, in some cases the legislation resulted in charges to covered employers of up to \$19 million. *Id.* at 248 n.20. The proposal in this Article, however, is narrowly tailored and reasonable. It would reorder the priority of mortgagees *only* as to after-acquired interests in crops. Even then it would allow a certain amount of the mortgage to be accorded first priority as a production input of land.

The fifth factor the *Spannaus* Court considered was whether the legislation was temporary. *Id.* at 242, 250. In *Spannaus* the legislation was not of limited duration. While this fact alone would not be fatal, the Court did find it significant. *Id.* Proposed § 9-312(2) would be permanent. In light of the minimal intrusion into the total ability of a mortgagee to recover and the minimal scrutiny to which this proposal should be subject, however, permanence alone should not be sufficient grounds for unconstitutionality. The Court has upheld permanent "emergency" state laws. See *Energy Reserves*, 459 U.S. at 412; *Veix*, 310 U.S. at 39.

The Court in *Spannaus* also noted that the state law in question was in an

area "never before subject to regulation by the state." *Spannaus*, 438 U.S. at 250. Priority, on the other hand, has long been the domain of state law.

This final point raises a question that may be dispositive of a contracts clause challenge. As discussed above, questions as to priority have been raised under the clause. The most fundamental question, however, is whether such a case rightly involves the contracts clause. As early as *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819), Chief Justice Marshall recognized a distinction between the obligation arising from a contract and the state-provided remedy to enforce that obligation. *Id.* at 200. Chief Justice Hughes noted this distinction with approval in *Blaisdell* and quoted *Sturges*: "Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct." *Blaisdell*, 290 U.S. at 430 (quoting *Sturges*, 17 U.S. (4 Wheat.) at 200). Except in cases involving subordination agreements, priority is not resolved by referring to a contract. The state acts as referee in these disputes and determines priority by reference to rules wholly apart from the agreement between the parties. While it may be true that parties enter into an agreement with reference to a particular priority regime, changing the regime does not alter the obligations arising from the contract.

Some state constitutions also contain provisions that prohibit retroactive laws that impair contracts or "vested rights." *E.g.*, ALA. CONST. art. I, § 22, construed in *State ex rel. Highsmith v. Brown Serv. Funeral Co.*, 236 Ala. 249, 253, 182 So. 18, 21 (1938) (legislative enactment cannot be amended or repealed if the effect is to destroy contract or property rights which have become vested under it); ILL. CONST. art. I, § 16, construed in *Josic v. Josic*, 78 Ill. App. 3d 347, 350, 397 N.E.2d 204, 207 (1979) (legislature may not give retrospective effect to act which will affect vested rights); N.H. CONST. pt. I, art. 23, construed in *Gould v. Concord Hospital*, 126 N.H. 405, 408, 493 A.2d 1193, 1195 (1985) ("A law is retrospective [and thus prohibited under this article] if it impairs a vested legal right."). Some jurisdictions have held that priority is a vested right. *E.g.*, *Bourgette v. Williams*, 73 Mich. 208, 215-16, 41 N.W. 229, 231-32 (1889) (lien could not be asserted on materials supplied under contract entered into prior to passage of the law creating the lien); *North Am. Mfg., Inc. v. Crown Int'l, Inc.*, 115 N.H. 114, 116, 335 A.2d 660, 662 (1975) (priority under mechanics' lien statute could not be asserted against mortgage taken prior to enactment of the mechanics' lien statute).

The concept of "vested rights" is found in many diverse areas of the law and is not subject to precise definition. There is no clear analytic framework for precisely defining a vested right. See *Smith, Retroactive Laws and Vested Rights*, 6 TEX. L. REV. 409, 409-10 (1928). Courts have used a variety of characterizations in attempting to define vested, as opposed to nonvested, rights. One characterization that is common to many jurisdictions is that a "vested" right cannot be dependent on a future event or on the action or inaction of a third party. See, *e.g.*, *Hatch v. Tipton*, 131 Ohio St. 364, 368, 2 N.E.2d 875, 877 (1936) ("A right which is not absolute but is dependent for its existence upon the action or inaction of another is not basic or vested . . ."). *Accord* *State v. Estes Corp.*, 27 Ariz. App. 686, 688, 558 P.2d 714, 716 (1976); *Vaughn v. Nadel*, 228 Kan. 469, 473-74, 618 P.2d 778, 783 (1980); *Rodriguez v. City Civil Serv. Comm'n*, 337 So. 2d 308, 310 (La. Ct. App. 1976).

In the context of after-acquired interests, the creation of the interest itself is dependent on the acquisition of property at some later time by the debtor. See, *e.g.*, *Dunham Lumber Co. v. Gresz*, 71 N.D. 491, 496, 2 N.W.2d 175, 178 (1942) ("Whether any building would be annexed to the land after the mortgage was executed was purely a matter of speculation."). In the terms of the UCC, the after-acquired interest of a creditor does not attach until the debtor

interest in crops for new value given²⁰² while the crops are being produced, or not more than one year before the crops become growing crops by planting or otherwise,²⁰³ to en-

acquires rights in the collateral. In other words, with respect to the after-acquired property, the creditor does not even become a "secured party" within the meaning of Article 9 until the debtor acquires rights. See U.C.C. §§ 9-203, 9-204. Absent such status as a secured party, the claim to a vested right in priority is reduced to a claim in the continuance of existing law. "[A] mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws, does not constitute a vested right." *Vaughn*, 228 Kan. at 473-74, 618 P.2d at 783. *Accord* *Talandis Constr. Corp. v. Illinois Bldg. Auth.*, 60 Ill. App. 2d 715, 720, 377 N.E.2d 237, 241 (1978). By this reasoning, therefore, the priority of a mortgagee in crops to be grown at some future date is not a vested right; changing the priority with respect to those future crops is within the power of the legislature notwithstanding the constitutional provisions discussed above.

202. The definition does not require proof that the new value given to enable crop production was in fact used to produce the collateral. In this regard, the proposed statute follows the present UCC § 9-312(2) which does not condition priority on the crop production secured party seeing to the application of funds by the debtor. See 2 G. GILMORE, *supra* note 35, § 32.4 at 866; Clontz, *supra* note 135, at 142. The lack of a tracing requirement thus makes the definition of crop production security interest different from the meaning of purchase money security interest, which qualifies purchase money status on a demonstrable link between the new value given by a secured party and actual purchase of the goods in which a purchase money interest is claimed. U.C.C. § 9-107. For a discussion and defense of this tracing requirement applicable to purchase money security interests, see Jackson & Kronman, *supra* note 83, at 31-36; Jackson & Kronman, *supra* note 6, at 1175-78.

203. The language of the present § 9-312(2) requires giving the production credit "not more than three months before the crops become crops by planting or otherwise." Presumably, this language does not mean that the credit must be given during the three-month period so as to exclude credit given after planting and during production. See *In re Piwower*, 66 Bankr. 23, 25-26 (Bankr. W.D. Pa. 1986) (any production credit qualifies that is given during the growing season or harvest period) (*dictum*); *Bossingham v. Bloomington Prod. Credit Ass'n*, 49 Bankr. 345 (Bankr. S.D. Iowa 1985) (by implication). The different language used here makes explicit this presumption and should be read in conjunction with the definition of "producing crops" which also appears in subsection (2)(a).

The three-month period is extended to one year to insure coverage of all kinds of production credit, whenever given. This extension is especially important if an interest securing operating loans is included in the definition of crop production security interest. See *infra* note 205.

The original provision requires that the value be given to enable the debtor to produce the crops *during the production season*. This language is eliminated for two reasons. First, it seems unlikely, perhaps naturally impossible, that crops will be produced at any time other than the regular production season. Second, there is no good reason for denying priority to production credit that enables the production of crops outside of the regular season.

The authors of an early commentary construed the language in the original provision, "during the production season," as modifying when the new value must be given. Hunt & Coates, *The Impact of the Secured Transactions*

able the debtor to produce the collateral by acquiring goods²⁰⁴ or services to be used in producing the crops.²⁰⁵

Article on Commercial Practices with Respect to Agricultural Financing, 16 LAW & CONTEMP. PROBS. 165, 179 (1951). If this construction is accurate, the language should nevertheless be eliminated for the same reasons that justify dropping it as a condition on when the debtor must be enabled to produce the crops.

204. The financier of farm machinery or certain other kinds of farm equipment perhaps enables the production of crops even under the "direct connection" test laid down in the commentary accompanying the proposed statute. See text following note 209 *infra*. Thus, a security interest that the financier takes in crops to secure the price of the equipment is arguably a crop production security interest. Cf. Miller, *supra* note 135, at 534 (suggesting that an equipment financier can qualify for priority under the present § 9-312(2)). Yet, this person has the security of a first claim to the equipment itself. Therefore, as to the crops, she arguably should perhaps rank below suppliers of goods, services, and money that is consumed in the production process. If this policy issue is decided against the equipment financier, the decision can be expressed in the statute either by adding, parenthetically, the words "(other than durable equipment)" after the word "goods" in the definition of crop production security interest, or by substituting for the last word "crops" in the definition the following:

crops, except that a security interest in crops taken or retained by the seller, lessor, or any other supplier or financier of durable equipment to secure a debt owed with respect to the equipment is not a crop production security interest.

205. The definition does not include a security interest in crops for advances to cover current operating expenses and to sustain the farmer and her family. This exclusion is consistent with the usual understanding that a lender who extends credit to a manufacturer or retailer to enable the debtor to pay overhead and the like does not thereby acquire a purchase money security interest in goods the debtor thereafter buys. Arguably, however, farm operating loans are more directly related to crop production than overhead loans are to the purchase of equipment or inventory. Also, very recently a court construing the present UCC § 9-312(2) interpreted the language "for new value given to the debtor to produce the crops" to include ordinary and reasonable living expenses of the farmer-debtor. *First Nat'l Bank v. Hollingsworth*, No. 86-218-II (Tenn. Ct. App. Dec. 3, 1986) (WESTLAW, TN-CS data base). Moreover, the proposed statute may not stand a chance of passing any legislature without greater accommodations for farm lenders. For these reasons, it may be desirable to broaden the definition of crop production security interest to include farm operating loans. In this event, the following language should be substituted for the last word "crops" in the first sentence of subsection (2)(a):

crops, or by paying necessary farm operating expenses, including the debtor's normal personal and family expenses, except that operating expenses do not include obligations of any kind owed with respect to land.

Also, a corresponding addition to the commentary should be made, to wit: Operating expenses are the costs of doing business, i.e., the usual and necessary costs of maintaining the farming operation that produces the collateral, excluding obligations owed with respect to the farmland such as rent, mortgage principal or interest. Land obligations are excluded because subsection (2)(c)(ii) deals explicitly with the only

Producing crops includes any activity that causally relates to the growing of crops or marketing of crops.

(b) Except as provided in subsection (c), a crop production security interest takes priority over an earlier perfected security interest, and also in the proceeds of the collateral,²⁰⁶ even though the person giving new value had knowledge of the earlier security interest.

(c) The priority provided for in subsection (b) is subject to these limitations:

(i) The crop production security interest has priority only to the extent that before the debtor receives value, or within ten days thereafter, a financing statement covering the collateral is filed.²⁰⁷

such debts that are entitled to the special priority this subsection creates.

206. Explicitly extending the priority to proceeds is consistent with UCC § 9-312(4) and, to a lesser extent, § 9-312(3) (purchase money priority as to inventory only carries over to certain proceeds).

More so with crops than with inventory, equipment, or other goods, products of the collateral are a concern. If the crops are confused with other goods to produce a product, any security interest in crops, whether or not a crop production security interest, would likely continue in the product under UCC § 9-315. In other cases, the survival of the security interest is unclear under the existing terms of Article 9. To clarify the law in these cases, and also to insure that the priority of a crop production security extends to situations within § 9-315, two additions in the proposed statute are necessary.

First, add to subsection (2)(b): "This priority extends to products of the collateral."

Second, to insure that all security interests in crops continue in products of the crops, and also to continue the perfected status of any such interest, add a subsection (2)(e), which provides:

(e) Unless otherwise agreed, a security interest in crops continues in products of the collateral; and the security interest in products is a continuously perfected security interest if the interest in the original collateral was perfected.

If conditions on the continuation of the perfected status are desirable, they can easily be tacked to the very end of the additional subsection. Cf. U.C.C. § 9-306(3).

207. As the commentary accompanying the proposed statute explains, the filing requirement corresponds to the perfection requirement of UCC § 9-312(4) for purchase money security interests in collateral other than inventory. The purpose is to protect subsequent creditors.

Because farm lenders who make operating loans to the farmer, or other crop production secured parties, are likely to extend value repeatedly on the security of current crops, they are arguably entitled to the additional protection of direct, personalized notice if their preexisting claims to the collateral have been publicized. Cf. U.C.C. § 9-312(3)(b) (purchase money secured party must personally notify earlier perfected secured parties to qualify for priority as to inventory).

If the policy decision is made similarly to condition the priority this sub-

(ii) An earlier perfected security interest that secures a purchase money obligation, or rent, for the land on which the crops were grown²⁰⁸ has priority to the extent of an amount of the obligation or rent that is determined by law to be proportionately and fairly attributable to the six-month period before the crops became growing crops by planting or otherwise.

(iii) Subsection (5) governs priority between conflicting crop production security interests.

(d) Creating or perfecting a crop production security interest shall not operate under any circumstances as a default on, an accelerating event under, or otherwise as a breach of, any note or other instrument or agreement of any kind or nature to pay debt; any loan or credit agreement; or any security arrangement of any kind or nature whether the collateral is real or personal property.²⁰⁹

Proposed Official Comment

Subsection (2) is an instance of the preference which this Code gives a new-value secured party. The principle of this provision is that a person who extends credit that enables a debtor to produce new crops, and secures this credit with a security interest in the crops she enabled the debtor to produce, gets first claim to the collateral, outranking the interest of another secured party who claims the collateral merely as after-acquired property to secure a debt not directly related to the production of the crops. So subsection (2) creates an exception to the first-to-file-or-

section gives a crop production secured party, this additional limitation should be added to subsection (2)(c):

The crop production security interest has priority over a conflicting security interest only if the crop production secured party sends a notification in writing to the holder of the conflicting security interest if, before the date of the filing made by the new-value secured party, the holder had filed a financing statement covering all or part of the same crops, and the notification states that the person giving the notice has or expects to acquire a security interest in crops of the debtor, identifies the debtor, and describes the year or years in which the crops will be grown and the land where the crops are growing or to be grown.

208. Changing the wording slightly from "on which the crops were grown" to "on which the crops, or part of the crops, were grown" would avoid difficult problems of proof for land financiers seeking to rely on this exception, and would also widen the scope of the exception.

209. Clauses in security agreements or other loan documents that define default to include further encumbering the collateral are generally regarded as valid. See U.C.C. § 9-311 (negative implication of last clause). Subsection (2)(d) of the proposed statute is thus extraordinary, but there is explicit precedent in the UCC itself for limiting the parties' freedom of contract in specific cases where sound policy so dictates. See U.C.C. § 1-102(3) & comment 2.

perfect rule of subsection (5), as do subsections (3) and (4). The purposes behind all these exceptions are the same: to enable free-market forces to operate with respect to the debtor's acquisition of new property and to prevent unjust enrichment. Subsection (2) has the effect of putting farming on a par with any other business with respect to secured financing.

Priority under this subsection is not conditioned on the crop production secured party being without notice or knowledge of the conflicting security interest: She takes priority although she actually or constructively knows of it. In this respect, subsection (2) is no different from subsections 9-312(3) and (4).

The filing requirement serves subsequent creditors by providing a means whereby they can learn of existing or expected interests in the collateral. *Cf.* Section 9-312(4). A crop production secured party may extend value more than once with respect to the same crops. She need not file each time value is extended. Rather, a single filing, properly accomplished, protects her as to all enabling value she contemporaneously and subsequently extends with respect to crops covered by the filing.

Priority among crop production security interests, like priority between conflicting purchase money security interests, is governed by subsection 9-312(5) because conflicts between enabling interests in the same collateral are ordinarily determined by the fundamental principle of first in time, first in right.

A secured party with an interest in the crops to secure the purchase price of the land where the crops were grown, or to secure rent for the land, is not a crop production secured party. So her earlier perfected security interest in the crops is not protected by section 9-312(5) as against a crop production security interest entitled to priority under this subsection. Yet, such a land financier directly enabled the production of the crops to the extent of the land obligations that are attributable to the particular crops. Consistent with the notion of ranking enabling interests according to the first-in-time principle, subsection (2)(c)(ii) gives priority to the earlier perfected security interest of a land financier to the extent of her contribution to the crops. This contribution is measured in every case as so much of the land obligation as is fairly attributable by law to the six-month period before the crops began to grow. In measuring the land financier's contribution, no agreement of any sort between the land financier and the debtor is controlling because the ultimate issue is the extent of the land financier's priority as against third parties. A secured party cannot be allowed by contract with her debtor to determine the extent to which her interest will outrank the claims of other creditors.

The value that will support a crop production security interest includes a loan of money by a lender or other financier or an extension of credit by a seller or other supplier of goods or services. *See* Section 1-201(44). A crop production security interest is created for new value given in the good faith belief that the value will be used to enable the debtor to produce or raise the collateral even though the value is not in fact so used by the debtor. Con-

ditioning the priority of a crop production security interest on proof that the value was actually used in producing or raising the collateral would impose on farm lenders and suppliers unreasonable burdens of accounting and tracing.

Producing crops entails a wide range of many activities, each of which is useful or necessary to the process. Security interests based on value extended for all of these activities must qualify for the priority of this subsection so that the debtor can freely shop for enabling credit at every step of production. Thus, the subsection deliberately defines "producing crops" broadly: any causally related activity, including activities associated with marketing the collateral.

Producing crops thus includes preparing the land for planting, planting, cultivating or otherwise tending crops, harvesting, preparing crops for sale or storage prior to sale, storing crops prior to sale, transporting to sale, selling, or engaging in any other activity that proximately relates to the growing and marketing of crops.

Security interests in crops to secure credit that would directly enable the debtor to engage in any of these activities with respect to the collateral can qualify as crop production security interests. Of course, deciding if the credit enables the activity is a distinct issue. The test is whether there exists a direct link between the goods and services that are, or would be, purchased with the credit, and the production of crops. This test excludes credit for general operating expenses and the like which are one step removed from crop production and only indirectly make it possible.

The purposes behind this subsection could be frustrated by typically unbargained-for, boilerplate language in loan agreements that could be construed to prohibit a debtor from creating production money security interests. So this sort of language is neutered. See Subsection (2)(d). A creditor should not be allowed through contract to accomplish a result that contravenes the policy of positive law.

CONCLUSION

Floating liens are common in the law of creditors' remedies. These liens, whether created by law or agreement, attach automatically to property the debtor acquires after the liens are created. Because the law generally ranks liens according to a first-in-time principle of priority, a floating lien that attaches to the debtor's property is preferred to other liens arising after the floating lien was created.

This principle, fully applied, would mean that a floating lien on after-acquired property of the debtor outranks even a lien securing credit given to enable the debtor to acquire the property. Creditors would therefore be discouraged from extending enabling credit to a debtor whose estate was shadowed

by a floating lien. The debtor would thus be dependent on, and financially bound to, the creditor with the floating lien. This kind of enslavement can have undesirable effects, including the promotion of economic inefficiency and the stifling of entrepreneurial enterprise.

To avoid these effects, and also to insure fairness, the law generally recognizes an exception to the first-in-time principle of priority that subordinates a floating lien on after-acquired property to a lien securing credit extended to enable the debtor to acquire the property. This exceptional priority for enabling interests is pervasive throughout the law of creditors' remedies, and is often applied without regard to how the liens were created or the nature of the collateral. It is in UCC Article 9, however, that this priority for enabling interests is most clearly stated and most consistently applied.

Anomalously, Article 9 does not presently give priority to enabling security interests in crops that secure credit given to enable the farmer to produce the collateral, that is, crop production security interests. Farmers are thereby bound, in potentially monopolistic financial relationships, to their creditors who have floating liens on all the farmers' future crops. The lack of priority under Article 9 for crop production security interests results from the wide-spread, conventional interpretation of UCC section 9-312(2) which construes the section narrowly and gives only a tiny, fortuitous priority to crop production security interests over floating liens attaching to the collateral.

The conventional interpretation construes section 9-312(2) apart from its drafting history and also apart from the intentions and purposes of the original drafters. These underpinnings support a different reading of the section that gives wide priority to crop production security interests and thereby treats them on par with other kinds of enabling interests, especially purchase money security interests. This intended symmetry can be achieved through purposive, judicial reinterpretation of section 9-312(2) or, more quickly and with greater certainty, by enacting a new, clearer section 9-312(2), such as the legislative substitute this Article suggests. The common objective is to right the unintended anomaly of section 9-312(2), as conventionally interpreted, and thereby set farmers free, in the marketplace for production credit, from the monopolistic, unfair effects of unbridled floating liens on their crops. This freedom is already enjoyed by all other businesspeople shopping for en-

abling credit, and no principled basis exists for continuing to deny it to farmers.