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Battle for the Bulge: The Reclaiming Seller vs. the Floating Lien Creditor

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BATTLE FOR THE BULGE: THE RECLAIMING SELLER VS. THE FLOATING LIEN CREDITOR

William Louis Tabac*

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Trade credit is a very big business¹ and an important source of financing.² Its low costs make it attractive to small businesses with limited resources.³ Unlike secured creditors, who insist on cushions to support their longer-

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¹ Live Capital, one trade creditor, reportedly offers such credit to Staples and Microsoft amounting to approximately \$4 billion. *Staples.com Expands Services Offering to Empower Small Business*, BUS. WIRE, INC., Nov. 6, 2000.

² Professor Garvin estimates that \$6 trillion in trade credit is extended each year and that \$30 billion in goods is subject to reclamation. Larry T. Garvin, *Credit, Information, and Trust in the Law of Sales: The Credit Seller's Right of Reclamation*, 44 UCLA L. REV. 247, 251 (1996).

³ See Emma Tucker, *Small Business Finance is 'Shaky'*, FIN. TIMES (London), Nov. 1, 1993, at 8.

term debts,⁴ trade creditors who sell goods, like the small businesses they support, are risk-takers. They deliver their goods on cheap, short-term, unsecured credit, trusting their debtors to pay up.⁵

A trade creditor is more likely to lend, and to lend more than a secured creditor.⁶ The service they perform for the economy is so valuable that these entrepreneurs are subsidized under federal and state law.⁷ Bankruptcy-bound debtors can prefer them⁸ and the Uniform Commercial Code⁹ gives them a lien even when they have not asked for one.

The lien arises under Article 2. Trade creditors may reclaim the sold goods if they learn that their buyer has received them while insolvent.¹⁰ This is the only security that the Code gives them, and it is lost if the goods are resold to

⁴ *Id.* (small companies are shunned by banks because of low ratio of fixed assets.)

⁵ "Small creditors, such as trade creditors . . . are not normally in a position to do a full investigation or to negotiate guarantees. Rather, they tend to rely on the business's appearance of substance..." *Consumer's Co-op of Walworth Co. v. Olsen*, 419 N.W.2d 211, 217 n.3 (Wis. Ct. App. 1988).

⁶ Where a secured lender will advance against a certain percentage of the value of the collateral, a reclaiming seller will advance the entire value. *See* Graeme S. Cooper, *The Reclamation Rights of Unpaid and Unsecured Sellers in International Trade*, 1987 COLUM. BUS. L. REV. 17, 26 (1987).

⁷ *See* U.C.C. § 2-702 (1989). Moreover, the lien is recognized in bankruptcy. *See* 11 U.S.C. § 546 (1994). "The purpose of [Section 546] is to recognize, in part, the validity of Section 2-702 of the Uniform Commercial Code, which has generated much litigation, confusion, and divergent decisions in different circuits." S. REP. NO. 95-989, at 86-87 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5872-73.

⁸ 11 U.S.C. § 547(c)(2)(1994). The provision is "a means of encouraging normal credit transactions and the continuation of short-term credit dealings with troubled debtors so as to stall rather than hasten bankruptcy." *In re Fred Hawes Org., Inc.*, 957 F.2d 239, 243 (6th Cir. 1992).

⁹ Hereinafter referred to as the "Code." Specific sections are referred to as "section X-XXX." All citations are to the Official Text unless otherwise indicated.

¹⁰ § 2-702(2).

unknowing buyers.¹¹ But the protection extends beyond their immediate buyer to other kinds of purchasers who claim through that buyer. The defaulting buyer might, for example, serve merely as a middleman by channeling the goods to a lessee under a prearranged lease contract.¹² If so, the lessee's position is no stronger than his defaulting lessor's. Only "subsequent" lessees, those who commit themselves after the goods have been sold to their lessor, will prevail. The Uniform Commercial Code so provides.¹³

Secured creditors also feed off of a buyer's ownership. The priority contest with the secured creditor, however, may have a different ending than it does with the lessee. The floating lien creditor, for example, prevails even though his debtor would be forced to yield to the seller.¹⁴ This, even though no advances were made against the sold good and no foreclosure occurred.¹⁵ Because of a failure to file, the seller may have been unaware that the floating lienor existed,¹⁶ and the floating lien creditor may have been equally ignorant about the existence of the sold goods.¹⁷

Under the prevailing view, the secured creditor's lack of reliance on the sold goods is of no consequence: the unpaid seller still loses. However, the Code does not provide for

¹¹ See U.C.C. § 2-403(1) (1989).

¹² The so-called "finance lease." U.C.C. § 2A-103(1)(g) (1999). A finance lease is the "functional equivalent of an extension of credit" where "[t]he lessor is the financial middleman between the supplier and the lessee." *Mojica v. Citibank N.A.*, 853 F. Supp. 51, 54 (D. Puerto Rico 1994) (quoting *Meyers Bros. v. Gelco*, 114 D.P.R. 116, 154-55 (1983)).

¹³ U.C.C. § 2A-304 (2000).

¹⁴ *Matter of Samuels & Co., Inc.*, 526 F.2d 1238, 1246 (5th Cir. 1976) (*en banc*) is the leading case.

¹⁵ *E.g., Lavonia Mfg. Co. v. Emery*, 52 B.R. 944, 947 (E.D. PA. 1985).

¹⁶ *First Nat'l Bank of Ariz. v. Carbajal*, 645 P.2d 830 (Ariz. Ct. App. 1981), 645 P.2d 778 (*en banc*) (*vacated on other grounds*); *Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank*, 519 P.2d 354, 356 (Colo. 1974).

¹⁷ An "unconscious purchaser." S. Richard Arnold, Note, *The Cash Seller's Right of Reclamation Versus The Secured Party's Floating Lien: Who is Entitled to Priority?* 35 WASH. & LEE L. REV. 277, 287 n.72 (1978). The term was coined by Professor Robert Braucher. See Vern Countryman, *Buyers and Sellers of Goods in Bankruptcy*, 1 N.M. L. REV. 435, 458 n.119 (1971).

this outcome. It exists because of a misreading of the Code's text. This view is also at odds with the other Code articles that regulate goods. It clashes, for example, with the rule that explicitly provides that only subsequent lessees can defeat the reclaiming seller.¹⁸ Finally, it contradicts what the Code drafters foresaw for reclamation; namely, that it "constitutes preferential treatment as against the buyer's other creditors."¹⁹

How did this happen? This construction was lobbied for by some venerable commercial law scholars who concluded that certain market principles were more powerful than the language penned by the Code's drafters. Respectfully, I submit that this view repudiates Code language and policy, commercial history, and basic restitution principles, not to mention good sense.

I am not alone in taking this position. Under pressure from secured creditor interests,²⁰ the Article 2 Drafting Committee,²¹ which is struggling to win approval of a revised Article 2, has gone back and forth, unable to settle on whether or not the floating lien creditor should triumph over the reclaiming seller.²² The equivocation by the Com-

¹⁸ U.C.C. § 2A-503 (1990).

¹⁹ U.C.C. § 2-702, cmt. 3 (emphasis added). "Creditor" includes "secured creditors." U.C.C. § 1-201(12) (1999).

²⁰ "The revisers of Article 9 have consistently sought to advance the rights of secured parties over those of unsecured parties, including the trade creditors for whom reclamation is potentially a significant remedy," Larry T. Garvin, *supra* note 2, at 251; see generally Kenneth N. Klee, *Barbarians at The Trough: Riposte in Defense of The Warren Carve-Out Proposal*, 82 CORNELL L. REV. 1466 (1997); Julian B. McDonnell, *Is Revised Article 9 a Little Greedy?*, 104 COM. L.J. 241, 264 (1999); Jean Braucher, *The UCC Gets Another Rewrite*, 82 A.B.A. 66, 67 (1996); Elizabeth Warren, *Symposium: Making Policy on Imperfect Information: The Article 9 Full Priority Debates*, 82 CORNELL L. REV. 1373 (1997).

²¹ The first major revision to Article 2 has been in progress for over a decade. At its May 1999 annual meeting, the American Law Institute approved a draft, but surprisingly, the National Conference of Commissioners on Uniform State Laws did not follow suit. Bjerre et al., *The Uniform Commercial Code Survey: Introduction*, 55 BUS. LAW. 1947 (2000).

²² In early 1996, the drafting committee voted to subordinate the floating lienor who relies on his past advance to the article 2 reclaiming

mittee is hardly surprising given the Balkanized way in which Code revision occurs.²³ Because separate drafting groups are hired to redo each of the Code articles the big picture that the Code has in place tends to be lost. It is for precisely that reason that the Code has been misread.

Is it unfair to allow the floating lienor, who gave up nothing in reliance on the sold goods, to trump the unpaid

seller. The change first appeared in the Mar. 1996 draft, which gave priority over reclaiming sellers to "good faith purchasers for *new* value that arise before the Seller takes possession under a timely demand for reclamation." May 1996 Draft 2-716 (emphasis added). In November 1996, Commissioner Ed Smith "questioned the requirement of 'new value' [in Section 2-716(b)] and suggested that this limitation upon the priority of after acquired security should be coordinated with the asset based lenders in the Article 9 process." Nov. 1, 1996, Status of Article 2 Revision. Still, the "new value" requirement reappeared in several successive drafts until March of 1997 when the drafting committee "voted to delete the word 'new' in front of value." Drafter's Comment, § 816, May 16, 1997 Draft. Nothing appears, however, to indicate what specific arguments the Article 9 Drafting committee made if they made any at all. Thereafter, the floating lienor was still subordinated to the reclaiming seller, but not by the "new value" requirement. In the March 1998 draft, it seemed clear that the reclaiming seller could lose out only to buyers, not secured parties. The protected purchasers were, as always, the buyer in the ordinary course and the good faith purchaser for value to whom the goods *have been delivered*, which likely did not contemplate the floating lienor relying on his past value. Mar. 1998 Draft § 2-504(b). By the December 1998 Draft, however, the reclaiming seller lost out to the good faith purchaser whose rights vested before the reclaiming seller took possession, which would of course protect the past, value-giving, floating lien creditor. Dec. 1998 Draft §816(c). The "vesting before" language remained until the November 2000 draft. That language was dropped, but the reclaiming seller was subjected to a "good faith purchaser," whether "under this Article" or not. Nov. 2000 Draft § 2-702(3). The most recent Article 2 draft, proposed by the National Conference of Commissioners on Uniform State Laws at its August 2001 annual meeting, makes explicit the rights of both cash and credit sellers to "reclaim" goods against everyone except a "buyer in the ordinary course of business or other good faith purchaser *under this Article*." Aug. 2001 Draft §§ 2-507(3) and 2-702(3) [emphasis added]. This draft, however, was also rejected.

²³ After rejecting the Nov. 2000 Article 2 draft, the Article 2 and Article 2A drafting committees were combined under a single reporter.

seller? I believe that it is.²⁴ I hope to illustrate that, as the Code stands, only buyers, lessees and secured creditors who rely to their detriment on the sold goods should win this priority contest.

Part I of this article will discuss "title" holders under the Uniform Commercial Code and the powers and rights that they have to defeat reclaiming sellers. Part II will describe the Code "lessees" and "secured creditors" as well as the powers and rights that they have to defeat reclaiming sellers. Part III will explain how a misreading of the Code has subordinated the reclaiming seller of goods to the Article 9 floating lien creditor. Finally, Part IV will argue that, as the Code drafters intended, the reclaiming seller of goods should prevail over the floating lien creditor.

I. CODE BUYERS: PURCHASERS OF TITLE

Reclamation is an old remedy.²⁵ The dispute erupts over "title"²⁶ to sold property, the "just cause or ground of that

²⁴ Congress rejected the *Samuels* result. See 7 U.S.C. § 196 (2001) (The Packers and Stockyards Act as amended). Increasing federal oversight over Article 9 has been noted. See Barkley Clark, *Forward: Growing Federal Presence in the Law of Secured Transactions*, 42 BUS. LAW. 1333 (1987). Colorado also amended its version of § 2-403 to protect livestock sellers. C.R.S. § 4-2-403 (Supp. 1976).

²⁵ The common law, as does the Code today, provided such remedies for both cash and credit sellers. See generally, Note, *The Rights of Reclaiming Cash Sellers When Contested By Secured Creditors of The Buyer*, 77 COLUM. L. REV. 934, 934-43 (1977). At common law and under Section 73 of the Uniform Sales Act, if the cash payment failed, title to the goods did not pass to the buyer: the seller still owned the goods. Consequently, the buyer had no title to transfer to anyone, good faith buyer or, a fortiori, anyone else. In a credit sale, however, title did pass, albeit a voidable one, which could be perfected in a good faith purchaser for value. Under the Code, the cash seller's right is derived, by implication, from sections 2-507 and 2-511. Section 2-702 explicitly provides for reclamation in credit sales. See generally, Arnold, *supra* note 17. Although the Code treats the two reclamation theories differently in some respects, it applies its voidable title theory to both

²⁶ "A unity combining all the requisites to complete legal ownership." THE AMERICAN COLLEGE DICTIONARY (1967); "such a claim to the exclusive control and enjoyment of a thing as the law will recognize

which is ours."²⁷ The unpaid seller seeks to recover ownership along with the goods. If the seller perfects²⁸ his right to reclaim, the buyer cannot stand in his way. The seller's fight is with a resale buyer, a lessee or a secured party who claims through his buyer.

Section 2-702(2) of the Uniform Commercial Code grants the authority to a credit seller to reclaim his title to the goods. His opponents are asserting various property claims that are also regulated by the Code. At the top stands ownership.²⁹ Under the Code, "title" is equivalent to "ownership."³⁰ If one has "title" to goods, one does not hold a "leasehold"³¹ or a "security" interest³² in them. "Leasehold" and "security" interests are other kinds of Code property and it is up to the title holder to create them. This is what the Code language says in distinguishing among the various kinds of Code property claims.³³ Contrary to the prevailing view, which obliterates the distinction between the discrete Code property interests, this is what the Code means.

Title to property forms the bedrock of our economic system. It is so durable that, when the Code drafters rejected

and enforce." ABBOTT'S LAW DICTIONARY (1879); *See also* the collected definitions in *Pratt v. Fountain*, 73 Ga. 261, 262 (1884).

²⁷ As translated from the Latin by the Court in *Pratt*, 73 Ga. at 262.

²⁸ In credit sales, "upon demand made within ten days after receipt" of the goods. U.C.C. § 2-702. There is no time limit if a "misrepresentation of solvency has been made to the particular seller in writing within three months before delivery." *Id.* In cash reclamation, no time limit applies to the demand. U.C.C. § 2-507 cmt. 3 (1989).

²⁹ "Ownership of property consists of a bundle of separate rights, powers and privileges." *Cool Homes v. Fairbanks N. Star Borough*, 860 P.2d 1248, 1254 (A.K. 1993), *citing* W. BURBY, *HANDBOOK OF THE LAW OF REAL PROPERTY* 9, at 13-14 (3d ed. 1965).

³⁰ U.C.C. § 2-106 (1989). "A sale transfers ownership and possession of the article for a price." *Cintrone v. Hertz Truck Leasing & Rental Service*, 212 A.2d 769, 776 (N.J. 1965).

³¹ U.C.C. § 2A-103(1)(m) (1999).

³² U.C.C. § 1-201(37) (1999).

³³ U.C.C. § 2-722 (1989), for example, explicitly distinguishes between holders of "title" and "security interests" in determining who has standing to sue for injury to goods.

title analysis as a working tool,³⁴ they neglected to excise it from the Code framework.³⁵ Thus, "where the [Code] provision refers to . . . title,"³⁶ title analysis still governs how the Code assigns consequences to the personal property it regulates.³⁷ What the drafters said about title principles, and what they did with them, have created the double bind that has confounded the foes of the reclaiming seller.

As the Code views it, a person owns property when he has most of the rights and privileges to it.³⁸ That much seems settled. As legions of commentators have observed, however, "ownership" is far easier to define than to describe.³⁹

Under the Code, a "buyer"⁴⁰ takes "title." A buyer is a Code "purchaser."⁴¹ So are "lessees,"⁴² "secured parties"⁴³

³⁴ U.C.C. § 2-401 (1989) (preamble). "This Article deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not 'title' to the goods has passed." *Id.*, cmt. 1.

³⁵ See *Evergreen Marine, Corp. v. Six Consignments of Frozen Scallops*, 4 F.3d 90, 96 (1st Cir. 1993); Michael G. Bridge et al., *Formalism, Functionalism, and Understanding The Law of Secured Transactions*, 44 MCGILL L. J. 567, 574-75 (1999); Margit Livingston, *Certainty, Efficiency, and Realism: Rights in Collateral Under Article 9 of The Uniform Commercial Code*, 73 N.C. L. REV. 115 (1994); William L. Tabac, *The Unbearable Lightness of Title Under The Uniform Commercial Code*, 50 MD. L. REV. 408, 408-09 (1991). Commenting on good faith purchase analysis under the Code, one writer has said, "[I]t is indicative of how difficult it is to eliminate the title concept from lawyers' thinking." Graeme S. Cooper, *The Reclamation Rights of Unpaid and Unsecured Sellers in International Trade* 1987 COLUM. BUS. L. REV. 17, 72 (1987).

³⁶ § 2-401 (preamble).

³⁷ *Id.*

³⁸ *E.g.*, *Nationwide Mut. Ins. Co. v. Hayes*, 174 S.E.2d 511, 519 (N.C. 1970); see *United States v. Lutz*, 295 F.2d 736, 741 (5th Cir. 1961) (entire bundle of rights passes with title).

³⁹ "The attempt to establish . . . who ha[s] the title . . . often can involve intricate, obscure and frustratingly puzzling title questions." LAWRENCE VOLD, *LAW OF SALES* 7 (2d ed. 1959).

⁴⁰ See § 2-103(1)(a) (1999); § 2-106 (1989).

⁴¹ U.C.C. § 1-201(33) (1977). A "purchaser" takes by "any voluntary transaction creating an interest in property." § 1-201(32).

⁴² § 2A-103(1)(n).

and anyone else to whom a Code property interest is transferred voluntarily by the property's owner.⁴⁴ The definition of "purchase" is therefore broad. At the apex is the buyer who purchases all or most of the bundle of rights that constitute ownership. A "leasee" purchases possession and use.⁴⁵ The Article 9 "secured party"⁴⁶ purchases a lien on property to enforce an obligation.⁴⁷

The Code is organized into eight substantive articles. Article 2 covers transfers of title to goods.⁴⁸ Article 2A governs leasehold interests in goods.⁴⁹ One article regulates goods indirectly. Article 7, which governs documents of title,⁵⁰ establishes rules for negotiable paper⁵¹ that control ownership of goods. Articles 3 and 8 govern other Code property. These articles deal generally with quasi-intangible property, including "instruments"⁵² and "securities."⁵³ Article 9 regulates "security interests"⁵⁴ in all Code property, tangible and intangible.⁵⁵

⁴³ U.C.C. § 9-102(a)(72) (2000).

⁴⁴ U.C.C. § 1-201(32) (1977).

⁴⁵ § 2A-103(1)(n).

⁴⁶ § 9-102(72) (2000). Holders of security interests that arise by operation of law are not Code "purchasers." *See, e.g.*, U.C.C. § 2-711(3) (1989).

⁴⁷ So says the general definition of security interest in § 1-201(37). For policy reasons, to force recording of claims, the term will also include consignors and certain buyers of intangible property. *Id.* at (c) and (d).

⁴⁸ Technically, the article applies to "transactions in goods." § 2-102. But the article's key provisions deal with "sales," *e.g.*, §§ 2-313, 2-314, 2-315, which is the transfer of title for a price. § 2-106. The broader scope presumably refers to transactional issues that arise before and after title is transferred. *Technicon Instruments Corp. v. Pease* 829 S.W.2d 489, 490 (Mo. Ct. App. 1992) (Article 2 deals only with sales).

⁴⁹ Before Article 2A was created, some courts extended Article 2 to leases by analogy, particularly its warranty provisions. *See, e.g.*, *Industrialease Automated & Scientific Equip. Corp. v. R.M.E. Enter. Inc.*, 396 N.Y.S.2d 427, 429 (N.Y. App. Div. 1977).

⁵⁰ § 1-201(15).

⁵¹ U.C.C. § 7-501 (1991) et seq.

⁵² U.C.C. § 3-104 (1991).

⁵³ U.C.C. § 8-102(15) (1991).

⁵⁴ § 1-201(37).

⁵⁵ U.C.C. § 9-110 (2000) provides that security interests arising under other Code articles are "subject to" Article 9.

All of these articles recognize title as the ultimate property claim and provide rules to govern its transfer. Each of these articles provides rules to resolve competing title claims. Because of the different natures of Code property, title rights to it differ, as does the way that title can be taken away.

It has long been a maxim of American law that a thief cannot create ownership rights in goods.⁵⁶ The owner of goods must voluntarily part with his control over goods before he can lose title to them.⁵⁷ The owner must "introduce [them]... into the stream of commerce."⁵⁸ The rule is part of the framework of Article 2.⁵⁹ It is also a part of Articles 2A⁶⁰ and 7,⁶¹ which also cover goods, but not of Articles 3, 8 and 9. The maxim has been put to its test by the Revisionist reading of the Code.

Before title to goods can be transferred under Article 2, the owner must deliver⁶² the goods to another person.⁶³

⁵⁶ *Nixon v. Brown*, 57 N.H. 34, 37 (1876). "The possessor of stolen goods does not have voidable title and therefore cannot convey good title under Section 2-403 regardless of how innocently the goods have been acquired by him." *Suburban Motors, Inc. v. State Farm Mutual Auto. Ins. Co.*, 218 Cal. App.3d 1354, 1361 (Ct. App. 1990), *citing*, ANDERSON, UNIFORM COMMERCIAL CODE § 2-403:26, 584 (3d ed. 1983). The rule is different in civil law countries where a thief can create new ownership. See Ian M. Goldrich, Comment, *Balancing The Need*, 23 FORD. INT'L L. J. 118, 141 (1998). The UNIDROIT Convention attempts to strike a balance between common law jurisdictions. *Id.*

⁵⁷ *E.g.*, *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F. Supp. 829, 840 (E.D.N.Y. 1981).

⁵⁸ LAWRENCE VOLD, HANDBOOK OF THE LAW OF SALES 184 (2nd ed. 1959).

⁵⁹ *E.g.*, *Morgold, Inc. v. Keeler*, 891 F. Supp. 1361, 1366 (N.D. Cal. 1995) (art is subject to the "usual rule").

⁶⁰ *Cucchi v. Rollins Protective Services Co.*, 574 A.2d 565, 570 (Pa. 1990) (recognizes derivative nature of Article 2A).

⁶¹ See § 7-503 (1999) (owner must either deliver or entrust goods to lose ownership). This was also the common law rule. *E.g.*, *Soltau v. Gerdau*, 23 N.E. 864, 866 (N.Y. 1890).

⁶² Unless otherwise agreed. § 2-308 (1989). The transfer must be voluntary. *Hawkland*, UCC SERIES, 2-403:04.

⁶³ LAWRENCE VOLD, HANDBOOK OF THE LAW OF SALES, *supra* note 58, at 184.

Delivery is the first step in creating either a right⁶⁴ or a power⁶⁵ to transfer title to goods to someone else. Under Articles 3⁶⁶ and 8,⁶⁷ with their sweeping negotiability policies, ownership of intangible property can be transferred even though the owner never delivered it. A finder or even a thief may create ownership of notes, drafts or investment securities.⁶⁸

A. Rights and Powers to Transfer Title Under Articles 2 and 2A

Under the Code, a person who has unavoidable⁶⁹ title to goods exercises the right to create good title in someone else by delivering the goods to that person with the intention of transferring title to him.⁷⁰ But if the owner delivers goods without such an intention, the recipient may nevertheless acquire a power to transfer title to them,⁷¹ but only to Article 2 "buyers"⁷² who purchase for "value"⁷³ and in "good faith."⁷⁴ In these cases, the title-taking buyer will be permitted to rely on an "apparent title"⁷⁵ that the Code con-

⁶⁴ A legally enforceable claim of one person against another that the other shall do a given act or shall not do a given act. RESTATEMENT OF PROPERTY § 1 (1936).

⁶⁵ The "ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act." *Id.*; see Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied to Judicial Reasoning*, 23 YALE L. J. 16, 30 (1913-14).

⁶⁶ See §§ 3-301 and 3-302 (1991).

⁶⁷ See §§ 8-302 and 8-303 (1994).

⁶⁸ *E.g.*, *Fidelity Trust v. Mays*, 83 S.E. 961 (Ga. 1914).

⁶⁹ *Oliver v. Platt*, 44 U.S. 333, 405 (1845) (beyond all legal exception).

⁷⁰ *A Van Drimmelin v. Converse*, 181 N.W. 699, 700 (Iowa 1921).

⁷¹ § 2-403. Even if the goods are acquired under false pretenses. *Perimeter Ford, Inc. v. Edwards*, 399 S.E.2d 520, 523 (Ga. Ct. App. 1990).

⁷² § 1-201(9).

⁷³ § 1-201(44).

⁷⁴ §§ 1-201(19), 2-103(1)(B).

⁷⁵ "Has the mere holder of . . . property such ostensible ownership that third persons may deal safely with him on the strength of his apparent title?" *Shephard v. VanDoren*, 60 P.2d 635, 645 (N.M. 1931). Apparent title is similar to "color of title." *Brooks v. Bruyn*, 35 Ill. 392,

structs to protect him when he innocently parts with the price. Apparent ownership begins under Article 2 with delivery by the seller to a buyer or by merely "entrusting"⁷⁶ the goods to a merchant⁷⁷ who deals in goods of that kind.⁷⁸ Apparent title to goods is an appearance of ownership that the Code holds to be sufficient to create binding ownership expectations in an Article 2 buyer.⁷⁹ It must begin, however, with some form of consent by the true owner. Possession of goods alone is not enough to create ownership expectations.⁸⁰

Whatever limitations exist on Article 2 reclamation are imposed by Article 2, specifically, subsection (3) of Section 2-702. Only two kinds of "purchasers" can defeat the reclaiming seller under Article 2 as it is written. One is the buyer in the ordinary course of business.⁸¹ The other is a good faith purchaser who takes title for value.⁸² Both are Article 2 "buyers" who must rely on their seller's apparent ownership by giving fresh value and taking delivery.⁸³

This is the Article 2 negotiability policy. It protects buyers who rely on the apparent ownership of goods that Article 2 constructs. The Article 2A policy, which protects lessees who rely on the apparent ownership of their lessors, is identical.⁸⁴

394 (1864). By his conduct, the true owner "authorizes or ratifies the sale, or is precluded . . . from denying the third party's authority to make it." *Wilson v. Commercial Fin. Co.*, 79 S.E.2d 908, 913 (N.C. 1954).

⁷⁶ § 2-403(3).

⁷⁷ U.C.C. § 2-104 (1978).

⁷⁸ § 2-403(2).

⁷⁹ *Ogunsanya Duros INMI-ETTI v. Aluisi*, 492 A.2d 917 (Md. Ct. Spec. App. 1985).

⁸⁰ *Soltau*, 23 N.E. at 864.

⁸¹ § 1-201(9).

⁸² *E.g.*, *Eaton & Co. v. Davidson*, 21 N.E. 442, 443 (Ohio 1889). The Uniform Sales Act sections upon which 2-403 is in part based referred more explicitly to such purchasers as "buyers" taking "title" to goods. *See* UNIFORM SALES ACT §§23 and 24.

⁸³ *See Pacific Wool Growers v. Draper & Co., Inc.*, 73 P.2d 1391, 1394 (Or. 1937). § 2-403 is based, in part, on Section 25 of the Uniform Sales Act which protects subsequent purchasers that "receiv[e] and pay... value" for goods previously sold but still in the seller's possession.

⁸⁴ *See* § 2A-304.

B. Power to Sell Under Articles 3 and 8

To serve far greater negotiability policies, Articles 3 and 8 lay out much broader apparent ownership principles. Under these articles, apparent ownership of property, which carries with it the power to create good title to property, can arise in a finder⁸⁵ or even a thief.⁸⁶ If a person takes lost or stolen Article 3⁸⁷ or 8⁸⁸ paper, he may be able to cut off prior ownership claims to this kind of Code property in the same way that a person who acquires money can cut off such claims.⁸⁹ Whether or not the owner consents or participates in the transfer of title is irrelevant.

The protected purchaser must first take "hold"⁹⁰ or control⁹¹ of such paper. A "holder"⁹² is someone who is in possession of Code paper that carries enforceable "rights."⁹³ Someone "controls" Code paper when he has the exclusive right to enforce it.⁹⁴ What distinguishes these purchasers of Code paper from a person who takes possession of goods is the expectation created by the nature of the property. If genuine, Code paper, like currency, carries enforceable rights within its four corners.⁹⁵ Goods may or may not carry such rights.⁹⁶ That will depend upon whether they were lost, stolen or otherwise purloined from their rightful owner because rights to goods require that their owner at least

⁸⁵ Shaw v. R.R. Co., 101 U.S. 557, 565 (1879).

⁸⁶ *Id.*

⁸⁷ See § 3-104.

⁸⁸ See § 8-102(4); Alexander v. Horner, 1 F. Cas. 366 (E.D. Ark. 1879).

⁸⁹ Stone Webster Eng'g Corp. v. Hamilton Nat'l Bank, 199 F.2d 127, 131 (6th Cir. 1952).

⁹⁰ § 3-301

⁹¹ § 8-303

⁹² § 3-301

⁹³ § 3-301

⁹⁴ See U.C.C. § 8-106 (1994).

⁹⁵ Mutual Life Ins. Co. v. Weir, 247 S.W.2d 284 (Tex. Civ. App. 1952), *modified in* 251 S.W.2d 525 (Tex. 1952).

⁹⁶ The same for documents of title regulated by Article 7. Although documents may be negotiable like their Article 3 and 8 counterparts, they cannot create ownership in goods that were stolen. See U.C.C. § 7-503 (1999); Velsian v. Lewis, 16 P. 631, 633 (Or. 1888).

deliver them into the stream of commerce.⁹⁷ By contrast, rights to Code paper arise when the creator of the paper, by authenticating it,⁹⁸ grants such rights to whomever holds⁹⁹ or controls the paper.¹⁰⁰ Unlike goods, the fact that Code paper (or money) was lost or stolen has no bearing on the validity of those rights. Even a thief or a finder of Code paper can enforce it. By creating the rights that Code paper contains, the obligor has in fact consented to bind himself to whomever comes into possession of the paper, including the finder or thief.¹⁰¹ Mere possession of goods does not necessarily carry such consent. This is what makes Code paper so much more negotiable than goods.

But the thief or finder cannot enforce Code paper against its rightful owner.¹⁰² Only an innocent purchaser of the paper can cut off ownership claims. If the holder or one who controls Code paper takes it in "good faith,"¹⁰³ he will not know that the paper was lost or stolen. If, in addition, he paid for the paper, his expectation will be comparable to that possessed by the good faith purchaser of money. This kind of taker of Code paper reasonably believes that the enforceable rights that are contained in the instrument are his to enforce. This is the apparent ownership policy of the Code articles that regulate commercial paper.

Apparent ownership, and with it, the power to cut off ownership claims, therefore arises more easily with Code intangibles than it does with goods.

Why should different market forces rule goods and Code paper? It has to do both with the kind of property they are and the kind of expectations they create in people who

⁹⁷ *Pacific Acceptance Corp. v. Bank of Italy*, 209 P. 1024, 1027 (Cal Ct. App. 1922) (owner can only be divested of title by his own act).

⁹⁸ § 1-201(39) (signature); § 3-401 (no liability on instrument unless signed).

⁹⁹ § 3-104 (payable to "order" or "bearer").

¹⁰⁰ See §§ 8-202 and 8-204 (1994) (restrictions on transfer generally ineffective).

¹⁰¹ Shaw, *supra* note 85, at 564.

¹⁰² *E.g.*, *Queenan v. Mays*, 90 F.2d 525, 531 (10th Cir. 1937).

¹⁰³ § 3-302 (holder in due course); § 8-303 (without notice of adverse claim).

would purchase them. Goods have a limited negotiability compared with Code paper because of what still survives of the doctrine of caveat emptor.¹⁰⁴ The rule that a finder or a thief cannot create ownership of goods is so fundamental, and understood, that a buyer of goods or of the title document that serves as their proxy, knows that he will have to give the goods up if they are stolen.¹⁰⁵ Secured lenders who advance funds against goods know that too, which is why they routinely check the debtor's source of title.¹⁰⁶ But the purchaser of Code paper validly held¹⁰⁷ or controlled by him expects to be able to enforce the rights that appear in it unless he knows that someone else is asserting an ownership claim to it.¹⁰⁸

II. MUCH LESS THAN TITLE: CODE LESSEES AND SECURED PARTIES

Along with "buyers," the Code recognizes other kinds of "purchasers." "Lessees" and "secured creditors" also purchase property rights.

A "lessee" purchases possession and use of goods.¹⁰⁹ Article 2A, which governs leases, recognizes two kinds of leases. One, the "finance" lease,¹¹⁰ is negotiated before the lessor

¹⁰⁴ "It is the buyer's own fault if he is so negligent as not to ascertain the right of the vendor to sell, and he cannot successfully invoke his bona fides to protect himself from liability to the true owner" *Velsian v. Lewis*, 16 P. 631, 633 (Or. 1888).

¹⁰⁵ "This is a moral issue." Lord Jannor of the Holocaust Educational Trust, as reported by Godfrey Barker, *Don't Let Us Act Like Nazis Over This*, *TIMES* (London), Mar. 2, 2000, at 23.

¹⁰⁶ See *Maryland Nat'l Bank v. Vessel Maden Chapel*, 821 F. Supp. 1361, 1365 (S.D. Cal. 1993); Craig R. Thorstenson, *Mortgage Lender Liability To The Purchaser of New or Existing Homes*, 1988 U. ILL. L. REV. 191 (1988).

¹⁰⁷ Defined in § 1-201(20).

¹⁰⁸ "In the hands of the holder, it is evidence of ownership. Its transfer...precludes all inquiry into the transaction in which it originated, because it has come into the hands of persons who have innocently paid value for it." *Pollard v. Vinton*, 105 U.S. 7, 8 (1881).

¹⁰⁹ § 2A-103(1)(b).

¹¹⁰ § 2A-103(1)(g).

acquires title to the good to be leased. The other, called a "subsequent" lease,¹¹¹ is formed after the lessor has acquired ownership of the leased good. Under the finance lease, the buyer of the good takes title to it "in connection with" a prearranged lease with his lessee.¹¹² The buyer-lessor's role is to put up the purchase money that will enable the lessee to acquire his rights of possession and use.¹¹³ The buyer-lessor therefore acts as a conduit. Whatever vulnerabilities of ownership he has pass through him to the lessee from the instant that title is transferred to him.¹¹⁴

Constructed from Article 2, Article 2A recognizes that a lessor with voidable title ¹¹⁵to the good can create a good lease in only one class of lessee, namely, the "subsequent" lessee.¹¹⁶ This lessee, as opposed to the "finance" lessee, parts with monies worth in reliance on the lessor's apparent ownership of the leased good. The finance lessee therefore stands in the shoes of his lessor, who must yield his defective ownership to the reclaiming seller. The subsequent lessee, like Article 2 buyers who part with value in reliance on the apparent ownership of his transferor, prevails over the reclaiming seller.¹¹⁷

A "security interest" is much less than "ownership" or even "possession" and "use" for that matter. A security interest can be created either by agreement¹¹⁸ or can arise by operation of law.¹¹⁹ It is a lien that attaches to property

¹¹¹ See § 2A-304.

¹¹² § 2A-103(1)(g).

¹¹³ The finance lease may be "created to facilitate acquisition of expensive equipment and to protect lenders against risks associated with such acquisitions . . ." *Telecom Int'l Am. Ltd. v. AT&T Corp.*, 187 F.R.D. 492, 497 (S.D.N.Y. 1999).

¹¹⁴ See § 2A-304.

¹¹⁵ *Id.*

¹¹⁶ "[A] lessor with voidable title has power to transfer a good leasehold interest to a good faith subsequent lessee for value." [emphasis added]. § 2A-304 cmt. 5 (pointing out that it is meant to state a "unified policy on good faith purchase of goods.").

¹¹⁷ § 2A-304.

¹¹⁸ § 9-102(73).

¹¹⁹ *E.g.*, § 2-711(3).

rights.¹²⁰ It may therefore attach to "title," "possession," "use" or all of these rights at once. The secured party does not acquire *title* to the goods or their use as the case may be.¹²¹ Rather, he thrives off of his debtor's title to or lesser rights to exploit the collateral.¹²²

The lien of a secured creditor is therefore wholly derivative; it depends upon whether and to what extent his debtor can assert "rights" to Code property.¹²³ If a secured creditor attempts to attach his claim to property in which his debtor cannot assert rights, he, like his debtor, is subject to being ousted by someone who can.

Thus, in a reclamation contest between a secured creditor and a seller of goods, the questions will be, does the buyer-debtor have "rights" to the property to which a security interest can attach, and, if he does, may those rights be asserted against a reclaiming seller?

The Code clearly recognizes that, like a buyer with voidable title, a debtor without rights to Code property may have a power to create rights to which a security interest may attach. That power is authorized by Article 9, not Article 2. It arises in two cases. First, a consignee with mere possessory rights to goods may have the power to attach a security interest to the consignor's ownership rights.¹²⁴ Second, a seller who has sold certain intangibles may have the power to sell them again.¹²⁵

¹²⁰ *Williams v. Westinghouse*, 468 S.W.2d 761, 763 (Ark. 1971).

¹²¹ *E.g.*, *Frierson v. United Farm Agency, Inc.*, 672 F. Supp. 1272, 1275 (W.D. Mo. 1987) (absent default).

¹²² *Estate of Harris v. Harris*, 218 F.3d 1140, 1149 (10th Cir. 2000) (no ownership of cattle, no security interest in them); *Northwestern Bank v. First Virginia Bank of Damascus*, 585 F. Supp. 425, 429 (W.D. Va. 1984) (some ownership interest). At the least, something beyond "naked possession" is required. *Morton Booth Co. v. Tiara Furniture, Inc.*, 564 P.2d 210, 214 (Or. 1977).

¹²³ *In re Emergency Beacon Corp.*, 665 F.2d 36, 40 (2d Cir. 1981) (no rights, no security interest).

¹²⁴ U.C.C. § 9-319(a) (2000).

¹²⁵ U.C.C. § 9-318(b) (2000) (accounts, chattel paper, payment intangibles and promissory notes). The transfer of title of such property is covered by Article 9. *See* §9-109.

The debtor's power to create these rights springs from his apparent ownership. As elsewhere in the Code, this apparent ownership and with it, the power to encumber or sell property that one does not own is destroyed once third parties have reason to know that it does not exist. It is, therefore, destroyed when perfection occurs for once the consignor or intangibles buyer publishes his claim, third parties cannot be misled.¹²⁶

The Uniform Commercial Code, as written and enacted, allows relying "buyers" of goods and "lessees" to be protected from reclaiming sellers. It may even allow, although it does not expressly provide, relying secured creditors to prevail over reclaiming sellers. But what it does not do is permit secured creditors who do not rely on the sold goods to triumph over reclaiming sellers.

III. HOW THE CODE HAS BEEN MISREAD

Given the plain meaning of the Code language, how did the floating lien creditor come to occupy his favored position? It had nothing to do with any superior equity he might have against the reclaiming seller. An existing creditor's claim to sold goods for which his debtor has not paid is not, in itself, a superior equity. It was through the advocacy of a few prominent commentators who believed that market principles were much more important than property rights.

These commentators pressed for a negotiability of goods that rivaled that of commercial paper. Among them were Samuel Williston, who drafted the Uniform Sales Act,¹²⁷ and Lawrence Vold, who published a respected treatise on sales.¹²⁸ The policy to be served was security in commercial transactions. If unrelying secured creditors are permitted

¹²⁶ § 9-318(b) (accounts, chattel paper, payment intangibles and promissory notes), and § 9-319(b) (consignments).

¹²⁷ See SAMUEL WILLISTON, *THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT* (1909).

¹²⁸ LAWRENCE VOLD, *HANDBOOK OF THE LAW OF SALES* §79 (2d ed. 1959).

to triumph over reclaiming sellers, they contended, commerce will be conducted more efficiently and more expectations will be fulfilled, which will serve the greater good.¹²⁹

To make their case for the floating lien creditor, they stopped just short of theft, and began with the settled one: the innocent buyer from a seller with voidable title. If left undisturbed, they pointed out that the defective exchange generates further commitments from still more buyers and other kinds of purchasers. Multiplied expectations are, after all, no more than the desired consequences of classical consideration, which justifies enforcement of bargained-for exchanges.¹³⁰ One of these enhanced expectations, they contended, may be held by the floating lien creditor. Unlike the resale buyer, he does not give new value in reliance on the sold good, but he may contribute something just as valuable to the market. By learning that the debtor has acquired the goods, but not knowing of their seller's right to reclaim them, the floating lien creditor might forego foreclosing on his debtor and thus keep him in business.¹³¹ For

¹²⁹ "Suppose goods are taken by a creditor merely as security for a preexisting debt without giving any binding extension of time. Here the weight of common-law authority in this country regarded the transfer as not a transfer for value [But this] does not produce socially advantageous results. Though forbearance is not expressly bargained for, the effect of conveying goods as security is almost inevitably that 'it stays the handoff the creditor' [citing *Leask v. Scott*, 2 Q.B.D. 376 (1877)]. It causes the creditor to forbear or to relax his efforts to make present collection. Thereby in fact this line of credit is maintained a while longer on the strength of the new security. Without the new security it would have been closed out That position is to be preferred which both makes possible the extended continuance of productive credit and promotes security of transactions." *Id.* at 404.

¹³⁰ See Steve Thel & Edward Yorio, *The Promissory Basis of Past Consideration*, 78 VA. L. REV. 1045 (1985); Robert Cooter & Melvin Aron Eisenberg, *Damages for Breach of Contract*, 73 CAL. L. REV. 1432, 1434 (1985).

¹³¹ "[The secured creditor's] subsequent conduct is almost sure to be affected by possession of the security. Even though forbearance is not bargained for, the effect almost inevitably is to cause the creditor to forbear or to diminish his efforts to obtain satisfaction from other sources." SAMUEL WILLISTON, *SALES OF GOODS AT COMMON LAW* 1038 (1909)

that reason, they asserted, the floating lienor should prevail over the reclaiming seller.¹³²

The courts, however, were less introspective. The Revisionist position was adopted by them through a misreading of the Code language rather than by sorting out the interdependent property interests within their Code barriers.¹³³ Leading the cases¹³⁴ that hold that the floating lien creditor

¹³² Referring to past value, Williston wrote, "[There] seems to be no reason to distinguish when negotiable paper is purchased and where property of other sorts is purchased. Chattels transferred by negotiable paper should [therefore] be treated the same." *Id.* The Code, however, does not go this far either. Under Article 7, no matter how negotiable the document, an owner who does not cause the goods to be bailed cannot lose his title to them. See § 7-503 ("Document of Title to Goods Defeated in Certain Cases").

¹³³ "The Code is an integrated statute whose Articles and Sections overlap and flow into one another." *In re Samuels & Co.*, 526 F.2d 1238, 1241 (5th Cir. 1976) (*en banc*), *cert. denied sub nom*; see generally *Stowers v. Mahon*, 429 U.S. 834 (1976).

¹³⁴ The 3rd, 5th, 8th, 9th and 10th circuit courts of appeal have concluded that a floating lienor takes priority over the reclaiming seller. *Toyota Indus. Trucks USA v. Citizens Nat'l Bank*, 611 F.2d 465, 473 (3rd Cir. 1979); *Samuels*, 526 F.2d at 1241; *In re Pester Refining Co.*, 964 F.2d 842, 846 (8th Cir. 1992); *Los Angeles Paper Bag Co. v. Talcott*, 604 F.2d 38 (9th Cir. 1979); *United States v. Wyo. Nat'l Bank*, 505 F.2d 1064, 1068 (10th Cir. 1974). Several state supreme courts have also favored the floating lien creditor. *Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank*, 519 P.2d 354, 359 (Colo. 1974); *Iola State Bank v. Bolan*, 679 P.2d 720 (Kan. 1984); *Maryott v. Oconto Cattle Co.*, 607 N.W.2d 820, 827 (Neb. 2000); *O'Brien v. Chandler*, 765 P.2d 1165, 1166 (N.M. 1988); *Evans Products Co. v. Jorgensen*, 421 P.2d 978, 981 (Or. 1966); *Cont. Grain Co. v. Heritage Bank*, 548 N.W.2d 507, 513 (S.D. 1996); *House of Stainless, Inc. v. Marshal and Ilsley Bank*, 249 N.W.2d 561, 564 (Wis. 1977) as have a few state Courts of Appeal. *E.g.*, *B&P Lumber Co. v. First Nat'l Bank*, 250 S.E.2d 505, 507 (Ga. App. 1978); *Peerless Equipment Co v. Azle State Bank*, 559 S.W.2d 114, 115 (Tex. App. 1977).

Some courts prefer the reclaiming seller. The Third Circuit has concluded that the secured creditor cannot rely on past value to win over the reclaiming seller. *In re Kravitz*, 278 F.2d 820 (1960). Although the Seventh Circuit has criticized *Samuels*, it is "a question we have avoided." *In Re Reliable Drug Stores*, 70 F.3d 948, 950 (1995). In *Citizens Bank of Roseville v. Taggart*, 143 Cal. App. 3d 318, 325 (1983), in holding for the reclaiming seller, a State Appeals Court concluded that, "Bank, unlike the typical good faith purchaser for value, did not

takes prior to the Article 2 reclaiming seller is *In re Samuels & Co.*¹³⁵ where the Fifth Circuit concluded that a floating lien creditor, who acts in good faith,¹³⁶ takes free of the seller's right to reclaim, even if the creditor did not rely on the sold goods.¹³⁷ The result is fair, the court reasoned, because the reclaiming seller can always protect itself by entering into a secured transaction with his buyer¹³⁸ and achieve the superpriority¹³⁹ that Article 9 gives to the purchase money lender.

The statutory path to the Fifth Circuit's holding proceeded as follows: a reclaiming seller, under Article 2, must rely on either cash¹⁴⁰ or credit¹⁴¹ theories of reclamation. These Article 2 theories provide that the buyer has title to the goods, but that it is voidable, and that the seller can rescind the transaction and recover it.¹⁴²

give value for the automobile, nor did Bank in making the loans, rely on the ostensible ownership or voidable title of [its seller]."

¹³⁵ *Samuels* was the subject of considerable litigation. See No. BK 3-1314 (N.D. Tex. 1972) (findings of fact of Bankruptcy Ref. Whitehurst), *rev'd* No. 73-1185 (N.D. Tex.), *rev'd and remanded*, 483 F.2d 557 (5th Cir. 1973), *rev'd and remanded sub nom*; Mahon v. Stowers, 416 U.S. 100 (1974) (per curiam), *rev'd sub nom. In re Samuels & Co.*, 510 F.2d 139 (5th Cir. 1975), *rev'd on reh'g*, 526 F.2d 1238 (5th Cir. 1976) (en banc), *cert den. sub nom*; Stowers v. Mahon, 429 U.S. 834 (1976).

¹³⁶ Good faith, the court reasoned, did not prevent C.I.T. from cutting off its debtor's funds--pulling the plug on a sinking ship--even though it might trigger reclamation remedies. *Samuels*, 526 F.2d at 1244.

¹³⁷ *Samuels*, 526 F.2d at 1238.

¹³⁸ *Id.* at 1248 (concurring opinion of Judge Gee); See U.C.C. § 9-107 (2000).

¹³⁹ U.C.C. § 9-324 (2000).

¹⁴⁰ This contention is derived from section 2-507 and section 2-511. Reclamation is "implicit in . . . § 2-507(2)." Szabo v. Vinton Motors, Inc., 630 F.2d 1 (1st. Cir. 1979).

¹⁴¹ U.C.C. § 2-702 (2000).

¹⁴² An issue that split the three-judge panel was whether the sales were cash or credit transactions. Under cash sale reclamation, the buyer has no "right" to the goods as against the seller. No such language is found in section 2-702. Thus, cash reclamation was the stronger case for the ranchers. The problem was that the ranchers could not be paid until their cattle was graded, and it took a short time to perform that function. The *en banc* court agreed with the three judge panel that these were cash

Both Article 2 sellers are therefore subject, the court recognized,¹⁴³ to the claims of certain good faith purchasers. But the protected purchasers must find their shelter under Article 2, specifically Section 2-403, not under Article 9. The Code so provides by explicit language,¹⁴⁴ and the court agreed.¹⁴⁵ Upon reaching Section 2-403, however, the court lost its way. The Fifth Circuit concluded that, as a good faith purchaser for value under the Code,¹⁴⁶ an Article 9 floating lien creditor can take priority over the reclaiming seller.

An examination of Section 2-403 shows, however, that it does not apply to secured creditors.¹⁴⁷ With "title" as its centerpiece, Section 2-403 controls Article 2 ownership rights, not "leasehold" or "security" interests.¹⁴⁸ Consequently, the Section applies only to "sales," the subject of the article in which it is found. What Section 2-403 does is empower a buyer with voidable title¹⁴⁹ to create good title¹⁵⁰ in an innocent, value-giving buyer. The protected Section 2-403 "purchaser" will therefore take "title" to the goods, not a "leasehold interest"¹⁵¹ or a "security interest"¹⁵² in

sales because payment, made as soon as practicable, was intended to be made contemporaneously with delivery. *Samuels*, 526 F.2d at 1238.

¹⁴³ *Id.* at 1242.

¹⁴⁴ "The seller's right to reclaim . . . is subject to the rights of a buyer in ordinary course or other good faith purchaser *under this Article* (Section 2-403)." § 2-702(3) (emphasis added).

¹⁴⁵ "C.I.T.'s status [was] as an Article 2 good faith purchaser..." *Samuels*, 526 F.2d at 1243.

¹⁴⁶ *Samuels*, 526 F.2d at 1254.

¹⁴⁷ "The rights of other purchasers of goods are . . . governed by the Articles on Secured Transactions (Article 9) . . . and Documents of Title (Article 7)." § 2-403(4).

¹⁴⁸ If a security interest arises under Article 2, the Code directs that Article 9 governs it, not Article 2. U.C.C. § 9-110 (2000).

¹⁴⁹ "A person with voidable title has power to transfer a good title." § 2-403(1).

¹⁵⁰ "The Uniform Commercial Code is written so that definitions appearing in any particular Article usually apply only to transactions governed by that Article." *Westinghouse Credit Corp. v. Shelton*, 645 F.2d 869, 873 (10th Cir. 1981).

¹⁵¹ U.C.C. § 2A-103(1)(m) (2000).

¹⁵² U.C.C. § 1-201(37) (2000).

them. These interests are created and governed, respectively, by Articles 2A and 9. In fact, Section 2-403 expressly diverts secured creditors to Article 9 to determine what rights they might have as purchasers from a buyer with voidable title.¹⁵³

As I have used "title" interchangeably with "ownership," the Revisionists have used "security interest" interchangeably with "title."¹⁵⁴ In so doing, they have destroyed the boundary between Articles 2 and 9. As seen through the kaleidoscope employed by the Fifth Circuit, "the Code is an integrated statute whose Articles and Sections overlap and flow into one another."¹⁵⁵ Under Section 2-403, as drafted, however, it is clear that the only good faith purchasers who can defeat the reclaiming seller are both buyers.¹⁵⁶ One is the buyer in the ordinary course of business,¹⁵⁷ the other is a buyer in a resale from a buyer with voidable title.¹⁵⁸ The concept, hence, the boundary between a "sale" and a "secured transaction" governed respectively by Articles 2 and 9 of the Code, is indisputable.

Following the Fifth Circuit lead, most courts have read "title" out of Section 2-403.¹⁵⁹ Given the Code drafters' determined efforts to shun "title" as a working concept, this is hardly surprising.

¹⁵³ U.C.C. § 2-403(4) (2000).

¹⁵⁴ See § 2-401 (preamble).

¹⁵⁵ *Samuels*, 526 F.2d at 1241.

¹⁵⁶ Referring to its subsection (1), U.C.C. 2-403, cmt. 1 says that "the provisions of the section are applicable to a person taking by any form of 'purchase' as defined by this Act." Relying on the "official" comments to interpret Code sections is generally not approved. *E.g.*, *Simmons v. Clemco Indus.*, 368 So. 2d 509, 514 (Ala. 1979). In any event, when the comment was appended to the section, the section required that its good faith purchasers take delivery of the goods, which, of course, would rule out the floating lien creditor but not all secured creditors. See Julian B. McDonnell, *The Floating Lienor as Good Faith Purchaser*, 50 S. CAL. LAW REV. 429, 450-51 (1977).

¹⁵⁷ § 1-201(9).

¹⁵⁸ McDonnell, *supra* note 156, at 451 (section 2-403's drafting history "shows little evidence of intent" to protect floating lienor).

¹⁵⁹ In holding for a floating lien creditor over a reclaiming seller, one court did not even bother to read Section 2-403. *Evans Products Co. v. Jorgensen*, 421 P.2d 978 (Or. 1966).

The Code, though, is open to supplementation by certain principles of "law and equity."¹⁶⁰ Like virtually every other Code rule, Section 2-403 is not an exclusive statement of the governing principles, but rather a window that will admit still other consistent principles of governing law. Consequently, if such external principles can be found, it really does not matter what the Code says, so long as what is in fact written is not contradicted by them.¹⁶¹ There are, however, no common law or equitable principles that favor the floating creditor over the reclaiming seller who has not relied on the sold goods.

Two possible sources of such a rule would be the common law and the law of restitution. In both cases, the creditor must commit by changing his position in reliance on the sold goods. Under the common law, the prevailing view¹⁶² was that the unreliant creditor was subordinated to the reclaiming seller. Only secured creditors who made advances against the sold goods without being aware of the seller's claim would not lose their liens if the goods were reclaimed. A reclaiming seller could reestablish his ownership claim, but it was encumbered by the lien that had attached to it.¹⁶³ Thus, the floating lien creditor can take no comfort in the common law.¹⁶⁴ Indeed, one modern court, citing Section 1-103, applied the common law rule to favor a reclaiming cash seller over a floating lien creditor.¹⁶⁵

Restitution principles, the second possible source to favor the floating lien creditor, are aimed at unjust enrich-

¹⁶⁰ U.C.C. § 1-103; *Citizens State Bank v. Peoples Bank*, 475 N.E.2d 324, 327 (Ind. Ct. App. 1985) (promissory estoppel "consistent" with good faith defined in 1-203).

¹⁶¹ *Bay Springs Forest Products, Inc. v. Wade*, 435 So. 2d 690, 694 n.1 (Miss. 1983) (§ 2-403 "displaces" common law but does not "change" it).

¹⁶² *E.g.*, *Citizens Bank of Roseville v. Taggart*, 143 Cal. App. 3d 318, 325 (1983); *Hawkins v. M & J Finance Corp.*, 77 S.E.2d 669 (N.C. 1953).

¹⁶³ *E.g.*, *Mann v. Salsberg*, 17 Pa. Super. 280 (1901).

¹⁶⁴ Summarizing the common law rule, Williston said, "One who takes chattels as collateral for an antecedent debt is not a purchaser for value." WILLISTON, *THE LAW GOVERNING SALES*, *supra* note 127, at 1038.

¹⁶⁵ *In re Emery Corp.*, 38 B.R. 489, 491 (1984).

ment.¹⁶⁶ They, too, protect persons who rely by lending against the sold goods. The enriched party must account to the relying party for any benefit the relying party conferred upon him.¹⁶⁷ The buyer from the reclaiming seller has not enriched anyone. If anything, the reclaiming seller has enriched him and, under the current view, his floating lien creditor.¹⁶⁸ The common law embraced these principles. The enactment of the Uniform Commercial Code left them intact.¹⁶⁹

There are many problems with the Revisionist view. To begin with, the Code simply does not support the position that goods are, or should be, as negotiable as its paper. It is beyond dispute that a finder or thief cannot effectively sell goods. To negotiate goods, a person must either own them by having at least a voidable title to them or their owner must entrust¹⁷⁰ the goods to a person dealing in goods of

¹⁶⁶ RESTATEMENT OF RESTITUTION § 1 (1937); "Unjust enrichment occurs when a person fails to make restitution of property or benefits when he or she has an obligation to do so." *Ivey v. Williams*, 328 S.E.2d 837, 839-40 (N.C. App. 1985).

¹⁶⁷ *Bright v. QSP, Inc.*, 20 F.3d 1300, 1306 (4th Cir. 1994) (not only money or property); *Prudential Ins. Co. v. Couch*, 376 S.E.2d 104, 109 (W. Va. 1988) (a benefit "saves an expense or loss").

¹⁶⁸ "The seller has certainly not extracted assets from the business to satisfy some antecedent debt. Instead, new and valuable assets are contributed and, unlike a lender, the unpaid seller contributes the full value of the contributed goods--a lender will typically advance only a portion of the value of the goods." Graeme S. Cooper, *The Reclamation Rights of Unpaid and Unsecured Sellers in International Trade*, 1987 COLUM. BUS. L. REV. 17, 26 (1987).

¹⁶⁹ One commentator has argued that Section 1-103 contains an equitable rule that favors the reclaiming seller. Under the "antiwindfall" principle, which is restitutionary in nature, the undeserving floating lien creditor's gain would be both unearned and at the seller's expense. Clyde Summers, *General Equitable Principles Under Section 1-103 of The Uniform Commercial Code*, 72 NW. U. L. REV. 906, 921 (1978). The argument has been used to justify the superpriority that Article 9 awards to purchase money secured parties. Robert M. Lloyd, *Refinancing Purchase Money Security Interests*, 53 TENN. L. REV. 1, 58 (1985).

¹⁷⁰ U.C.C. § 2-403(3); *Orlando Dodge v. First Union Nat'l Bank*, 661 So. 2d 322, 325 (Fla. Dist. Ct. App. 1995) (knowing acquiescence in placement of good with dealer).

that kind.¹⁷¹ Not so under Articles 3 and 8 where good faith purchasers can cut off ownership claims to lost or stolen paper merely by taking hold of it.

The functions of goods and negotiable paper, which the Revisionists would have goods mimic, also differentiate them. The efficacy of paper as an exchange medium would fail if purchasers were required to investigate sources before buying it. Because of its anti-theft policy, Article 2 is not designed to move the goods it covers with the speed of Code paper. When merchants buy, they must adhere to trade standards of fair dealing.¹⁷² Banks routinely investigate the chain of title of collateral that they seek to encumber.¹⁷³ The breach of the boundary between Articles 2 and 9 has turned Code notice policy upside down. Article 2, upon which the Revisionists must rely to give a defaulting buyer the power to create rights in secured creditors, contains no publication requirement. Nothing in Section 2-403 requires its "purchasers" to give record notice of their claim to the bought goods, for good reason. Buyers of goods do not give such notice; to require them to do so would undermine Article 2 negotiability. Under the prevailing view, the floating lienor need not even give notice to win.¹⁷⁴ Under the Revisionist rule, unperfected secured creditors prevail over reclaiming sellers who do not even know that they exist.

The Revisionist view also encourages theft. Unlike England, where limited sales of stolen goods are protected under the market overt concept,¹⁷⁵ America has not adopted such a rule. Thievery is condemned by penal sanctions and sound public policy. In fact, the public policy against stealing is so strong that the criminal law was broadened to make defrauding buyers criminals and reclaiming sellers

¹⁷¹ U.C.C. § 1-201(9); *In Re Air Vermont, Inc.* 45 B.R. 931, 934 (Bankr. D. Vt. 1985) (sold primarily from inventory).

¹⁷² U.C.C. § 2-103(b).

¹⁷³ Generally, through an abstract company. *See Peoples Nat'l Bank v. Weiner*, 514 N.Y.S.2d 772, 773 (App. Div. 1987).

¹⁷⁴ *Guy Martin Buick*, 519 P.2d at 359 (Colo. 1974).

¹⁷⁵ *See generally* SAMUEL WILLISTON, *THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT* §347 (1909).

victims. Under the Model Penal Code,¹⁷⁶ a buyer who obtains goods with no intent to pay for them steals them.¹⁷⁷ If the Revisionists are right about how the floating lien creditor behaves, insolvent debtors will order goods with no intention of paying for them just to remain in business.¹⁷⁸ Further, if floating lien creditors need not "pay" for the goods by giving fresh value for them, they will not investigate their debtor's rights to them.

Article 2 regulates sellers and buyers. It was not intended and it was not drafted to resolve Code disputes between reclaiming sellers and secured creditors.

IV. RESOLVING THE CONFLICT

The trade creditor knows what his risks are. His security is limited. If he has misjudged his debtor, he must act promptly to avoid the transaction, before a resale buyer is misled by his buyer's apparent ownership of the goods. The Article 9 secured creditor's expectations are clear: he knows that he can only assert claims to collateral in which his debtor has "rights."

Through a misreading of the Code, however, the expectations of both kinds of Code creditors have been undermined. There is something inherently wrong with a rule that allows a lender, who never counted on exploiting cer-

¹⁷⁶ MODEL PENAL CODE § 223.2(1) (1980).

¹⁷⁷ *E.g.*, *State v. Tovar*, 580 N.W.2d 768, 770 (Iowa 1998). Something more than non-performance is needed, however, to establish the fraudulent intent. M.P.C. § 223.3 cmt.190 (1980). An insolvent buyer treads perilously close to the line. As one court has pointed out, the "making of a promise [to pay] will necessarily imply an intent to perform, the absence of which may itself make a promise false when stated." *United States v. Shah*, 44 F.3d 285, 291 (5th Cir. 1995).

¹⁷⁸ Commenting on the classical cash sale doctrine, Article 9 drafter Grant Gilmore observed that when a buyer bounces a check in a cash sale, something "more serious than 'mere' fraud is involved, something approaching theft--'larceny by trick or device.' [C]onsequently, the defaulting cash sale buyer gets no title and can transfer none to a good faith purchaser." Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057, 1060 (1954).

tain property as collateral, to take it from a person who was never paid for it.¹⁷⁹ Yet this is the effect of the Code's misreading. The stream of commerce becomes a torrent sweeping the unpaid seller away in it.

Unhappy with what Article 9 gave them, secured creditors lobbied for the greater status enjoyed by Article 2 buyers. Treating floating lien creditors like buyers of goods has undermined the Code's operation by distorting its property interests. The Article 2 negotiability principles in place produce a principled outcome for every interest. The reclaiming seller, his buyer, his buyer's transferees, along with the greater good are all treated fairly under the Code as it is presently drafted.

Consider, first, the competing equities just after the seller delivers the goods, before they are negotiated away under Article 2. Delivery was made on Seller's expectation that Buyer would pay for the goods, but Buyer cannot pay because Buyer is insolvent. Buyer has possession of goods that, in good conscience, he should not keep and no one has changed his position in reliance on these goods. If seller makes his timely reclamation demand¹⁸⁰ and recovers the goods, no one will have been prejudiced.¹⁸¹

Consider now what happens if Seller does not make a timely demand or if Buyer negotiates the goods to a buyer

¹⁷⁹ A "gross injustice," according to Justice Bradley in *United States v. New Orleans R.R.*, 79 U.S. 362, 365 (1870).

¹⁸⁰ Ten days under U.C.C. § 2-702 unless buyer has misrepresented his solvency in writing "within three months before delivery." If so, the 10-day limit does not apply. *Id.* at § 2-702(2). Ten day limit exists under the Bankruptcy Code as well. The demand in bankruptcy, moreover, must be in writing. 11 U.S.C. § 546(c)(1)(A). Since no time is specified in the Code, the reclaiming cash seller must make his demand within a reasonable time. *See* U.C.C. § 2-507 cmt. 3 (1989).

¹⁸¹ Allowing the seller to recover equipment from the floating lienor will produce only "marginal harm" because equipment is often leased and secured creditors do not rely on it. Larry T. Garvin, *Credit, Information, and Trust in the Law of Sales: The Credit Seller's Right of Reclamation*, 44 UCLA L. Rev. 247, 315 (1996). As for inventory flow, upon which the floating lien creditor does rely, the seller can deal with it more efficiently by reselling it—it has expertise here that a lender does not have—and thus avoid depreciation. *Id.* at 316.

in the ordinary course or other good faith buyer. The floating lienor is entitled, without worry from the reclaiming seller, to all proceeds¹⁸² of the sale. Unlike the floating lien creditor, who relies on proceeds even more than on the goods that will generate them,¹⁸³ seller did not bargain for proceeds.¹⁸⁴ Hence, seller is not entitled to proceeds, either by expectation or by Code rule. The Article 2 sales contract gives the trade creditor only a limited lien against the sold goods.¹⁸⁵ Beyond that, he stands no higher than the other general creditors of his buyer.¹⁸⁶

The Code affords the reclaiming seller a very narrow window within which to enforce his property claim. He must make a timely demand for the goods. Timely demand or not, if the goods are promptly resold to qualifying buyers, leased to a subsequent lessee or taken by a secured creditor for fresh value, the seller's reclamation right will be damaged or destroyed.

Does this outcome fairly balance the equities of the competing parties? Yes, I submit. Like Code paper acquired by an innocent purchaser, the goods will have been negotiated away under the more limited Article 2 negotiability policy that respects the historic nature of goods and the expectations that people have about exploiting them. The security

¹⁸² U.C.C. § 9-315(a)(2) (2000). *See* § 9-110, which gives priority to a buyer who becomes an Article 2 secured party over the floating lien creditor because "the payments giving rise to the debt secured by the Article 2 . . . security interest are likely to be included among the lender's proceeds." § 9-110 cmt. 4.

¹⁸³ "Creditors who lend to farmers against crops as security expect like other inventory lenders to be paid from the proceeds generated by...sale of the inventory." Paul B. Rasor and James B. Wadley, *Agricultural Law Symposium: The Secured Farm Creditor's Interest in Federal Price Supports: Policies and Priorities*, 73 KY. L. J. 595, 663 (1984).

¹⁸⁴ His bargain is for a solvent debtor. *See* *Henkels & McCoy, Inc. v. Adochio*, 138 F.3d 491, 507 (3d Cir. 1998).

¹⁸⁵ "Successful reclamation of goods excludes all other remedies with respect to them." U.C.C. § 2-702(3); *In re PFA Farmers Market Ass'n.*, 583 F.2d 992, 1003 (8th Cir. 1978) (no right to any "deficiency").

¹⁸⁶ Under § 2-702(3), successful reclamation "excludes all other remedies with respect to" the goods.

interest will then attach to their proceeds, property to which the debtor has "rights" and the reclaiming seller has none. The trade creditor's bargain was either for a solvent debtor or the limited reclamation rights that Article 2 gives him.¹⁸⁷

As the Code stands, the reasonable expectations of all parties involved are met.

V. CONCLUSION

The fate of the Reclaiming seller is in the hands of the Article 2 Drafting Committee. As things stand now, to compete, the seller of goods must become more conservative in his practices, perhaps by mimicking the secured lender and imposing the additional burdens and costs of that kind of transaction.

The effect will be to stifle trade credit, and with it, the small businesses that depend on their sellers to work with them in channeling goods to the widest possible markets.

¹⁸⁷ *E.g.*, *In re Landy Beef Co., Inc.*, 30 B.R. 19 (Bankr. D. Mass.1983); *but see* *United States v. Westside Bank*, 732 F.2d 1258 (5th Cir. 1984) (whatever proceeds remain after secured creditors are paid); *cf.* *Ranchers and Farmers Livestock Auction Co. v. Honey*, 552 P.2d 313 (Colo. 1976) (seller entitled to proceeds from auctioneer acting on buyer's behalf).