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PROPERTY CONCEPTS IN THE REVISED U.C.C. ARTICLES 2 AND 9 ARE ALIVE AND WELL

Linda J. Rusch*

To paraphrase a famous quote, the death of property concepts in the UCC has been greatly exaggerated.1 While it is true that the lump concept of title plays a diminished role in the UCC scheme,2 the concepts inherent in the idea of private property are ever present.3

2. The comment to Section 2-101 provides:
   The arrangement of the present Article is in terms of contract for sale and the various steps of its performance. The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.
   Thus Section 2-401 provides:
   Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except when the provision refers to such title.
Several examples come to mind. Under Article 2, a sale is defined as the passing of title for a price. The thrust of Article 2 provisions is to pass ownership rights in the goods to the buyer through agreement. Under Article 2A, a lease distinguishes between a transfer of merely the property right of possession or use and the property rights that are transferred in a sale. Under Article 9, a security interest can attach only to the rights the debtor has in the collateral or the rights the debtor has power to transfer. Each of these examples illustrates the use of the concept of private property.

What is meant by the concept of private property? A system of private property generally provides that whoever is designated the owner has rights of possession, use, and disposition to something that is deemed to be property. Part and parcel of having a right to possess, use, or dispose of property is the right to exclude others from doing the same to that piece of property. In Article 2, several sections allow the buyer to obtain the goods from the seller. Other sections allow the seller to prevent the buyer from obtaining the goods or allow the seller to retrieve the goods from the buyer. These provisions are about asserting an enforceable right against specific property and implicate the attributes of property ownership; the right to possess, use or dispose of property. Further, based upon these codified rights, persons who are not parties to the contract between the buyer and the seller are able to assert enforceable rights against that specific property. Asserting rights against specific property is all about property rights.

The purpose of this article is to provide a road map of the intersection of Article 2 and Article 9 concerning the rights of buyers and sellers to obtain the goods as against each other and as against third party claimants. The following discussion will work through these rights under current Article 2 and the proposed revision of Article 2 and under current Article 9 and the Revised Article 9. To do so, this article will first consider the rights of the buyer to obtain the goods from the seller. Then the

7. LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 18-21 (1980); Frisch, supra note 3, at 1696-1717. The theorists debate whether those rights should be absolute or subject to interference. Linda J. Rusch, Bankruptcy as a Revolutionary Concept: Good Faith Filing and a Theory of Obligation, 57 MONT. L. REV. 49, 73-76 (1996).
8. See infra Part I.
9. See infra Part II.
10. See infra Parts I.B and II.B.
seller's right to keep the goods from the buyer or to retrieve the goods from the buyer will be discussed. In both situations, the rights of third parties to the goods will be considered.

I. BUYER'S RIGHTS TO THE GOODS

A. As Against the Seller

When a buyer contracts to buy goods from a seller, the process of transferring the ownership of the goods to the buyer begins. At the point of contract formation, however, the buyer does not have an enforceable property right to the goods. If the seller repudiates the contract, the buyer will have an action against the seller for breach of contract, but not a property interest in the goods.\(^{11}\) It is only upon identification of the goods to the contract that the buyer first obtains a property interest in the goods.\(^{12}\) Identification to the contract occurs when the goods are designated as pertaining to the particular contract.\(^{13}\) Identification is not the same as passage of title but rather generally occurs at an earlier point in time than title passage in the usual sales transaction.\(^{14}\) It is upon identification that the buyer can begin to assert its property rights to obtain the goods from the seller. Identification, in and of itself, however, is not sufficient for the buyer to actually obtain the goods.\(^{15}\) Article 2 provides two rights to the buyer that hinge upon identification of the goods to the contract and that allow the buyer to assert superior property rights in the goods as against the seller. These rights for the buyer to obtain the goods from the seller are not self-help remedies. In each situation, the buyer will effectively assert its rights against the seller through litigation.

1. Section 2-502: Pre-Paying Buyer

Current Section 2-502 provides a very limited right to a buyer who pre-pays in whole or part for goods that are identified to the contract. The pre-paying buyer may recover the identified goods if the seller becomes insolvent within 10 days after receipt of the first installment payment.\(^{16}\) If the seller is insolvent when the seller receives payment or becomes insolvent outside the limited time period of 10 days after receipt of the

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first installment, the section does not apply.\(^1\) Some courts have held that this buyer's "lien" under this section is not enforceable under the bankruptcy code provision voiding statutory liens that arise only on insolvency.\(^2\)

Revised Article 2 retains that right as described above for all buyers. In addition, it provides an expanded right for consumer buyers. A person buying for personal, family, or household purposes may recover the identified goods if the buyer has paid in whole or part prior to shipment even if the seller is not insolvent.\(^3\) This revision will take effect in states that have enacted Revised Article 9, even if Revised Article 2 is not enacted, as this change was part of the conforming amendments to Article 2 that accompanied Revised Article 9.\(^4\)

2. **Section 2-716: Replevin and Specific Performance**

The second right that hinges on the identification of the goods to the contract is contained in Section 2-716(3). Under current Article 2, if the goods are identified to the contract and the buyer is unable to effect cover, the buyer has a right to replevin the goods from the seller.\(^5\) Revised Article 2 makes no changes to this right.\(^6\)

Current Article 2 contains one additional right for the buyer to obtain the goods from the seller that does not hinge on identification of the goods to the contract. Section 2-716(1) allows the buyer to obtain specific performance of the contract if the goods are unique or in other proper circumstances.\(^7\) This ability to obtain specific performance is not generally considered to create a property interest for the buyer.\(^8\) Rather if


\(^{19}\) U.C.C. § 2-502(a) (Annual Meeting Draft July 2000) provides:

- Subject to subsections (b) and (c) and even though the goods have not been shipped a buyer that has paid a part or all of the price of goods in which the buyer has a special property under section 2-501 may on making and keeping good a tender of any unpaid portion of their price recover from the seller if:
  - (1) in the case of goods bought for personal, family, or household purposes, the seller repudiates or fails to deliver as required by the contract; or
  - (2) in all cases, the seller becomes insolvent within 10 days after receipt of the first installment on their price.

\(^{20}\) U.C.C. rev'd art. 9, app. 1, § 2-502 (2000).


\(^{22}\) U.C.C. § 2-716(c) (Annual Meeting Draft July 2000) provides:

The buyer has a right of replevin or the like for goods identified to the contract if after reasonable effort the buyer is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.


specific performance is ordered the seller will perform the contract, which will eventually result in ownership of the goods being transferred to the buyer.

Revised Article 2 broadens the right to specific performance by allowing the parties in non-consumer contracts 25 to agree to specific performance. That contract clause agreeing to specific performance may be enforced by a court order as long as the obligation is not the payment of money. 26 Revised Article 2 also allows either the buyer or the seller to obtain specific performance of the contract. 27

3. Article 9: Financing Buyer

Article 9 provides the buyer yet one more option for obtaining a property interest in the goods in order to force the seller to deliver the goods to the buyer. A buyer who has prepaid in whole or in part may obtain a security interest in the goods under Article 9. This situation often occurs when the buyer advances funds to the seller to enable the seller to produce the goods. 28 The seller should execute a security agreement granting to the buyer a security interest in the described collateral. The buyer should file its financing statement in the proper place to perfect its security interest. 29 If the seller defaults in its obligation to deliver the goods, the buyer may exercise its rights under Article 9 to obtain possession of the goods. 30

4. Section 2-711: Buyer's Security Interest

Except as outlined in Part II infra, the buyer in possession of goods generally has the ability to keep the goods after delivery. If the goods do not conform to the contract, however, the buyer may want to reject the goods or revoke its acceptance of the goods. If the buyer has rightfully

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25. A consumer contract is defined as a contract between a merchant seller and a consumer. U.C.C. § 2-102(a)(12) (Annual Meeting Draft July 2000). A consumer is defined in Proposed Revised Article 2, U.C.C. § 2-102(a)(11) (Annual Meeting Draft July 2000) as follows: "an individual that buys or contracts to buy goods that, at the time of contracting, are intended by the individual to be used primarily for personal, family, or household purposes."

26. U.C.C. § 2-716(a) (Annual Meeting Draft July 2000) provides:
   Specific performance may be decreed where the goods are unique or in other proper circumstances. In a contract other than a consumer contract, specific performance may be decreed if the parties have agreed to that remedy. However, even if the parties agree to specific performance, specific performance may not be decreed if the breaching party's sole remaining contractual obligation is the payment of money.


rejected the goods or justifiably revoked acceptance of the goods, both Article 2 and its proposed revision give the buyer a security interest in the goods to secure payments made on the price and any incidental damages. The buyer has the right to sell the goods pursuant to the resale provision in Article 2 and must account to the seller for any surplus over the amounts owed the buyer.

B. As Against Third Parties

Under the property-based concept of derivative rights, a person can transfer only those rights that person has or has power to transfer and the transferee of rights obtains only those rights that its transferor had or had power to transfer. A corollary to the derivative rights concept is the property-based priority rule of "first-in-time." That is, the order in which property rights arise determine the relative priority of rights as against each other. Logically, using these property-based concepts, if the buyer has a property interest in the goods that is superior to the rights of the seller, then the buyer's right should be superior to the rights of the seller's creditors or other transferees that arise after the buyer's property right arises.

1. Buyer's Rights Under Sections 2-502 and 2-716

Does Article 2 follow those concepts in regard to the remedies found in Sections 2-502 and 2-716? The place to start is Section 2-402 which provides that the seller's unsecured creditors are subject to the buyer's rights under Sections 2-502 and 2-716. If the term "unsecured creditors" means creditors without any property interests in the goods, i.e. no lien interest, that is an unremarkable statement of the derivative rights and first-in-time rules. The buyer with a property interest in the goods under Article 2 should have priority over creditors without property interests in the goods. This unremarkable statement, however, is subject to three exceptions.

a. Seller's Fraudulent Retention of Possession

First, a seller's creditor can treat a sale to a buyer or an identification to the contract as fraudulent if the creditor retains possession of the goods and such retention is fraudulent under other state law. If the seller retains possession in good faith in the course of the trade and for a com-

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33. See Mautner, supra note 3, at 97-99.
36. "Creditor" is defined as including a "general creditor, a secured creditor, a lien creditor and any representative of creditors . . . " U.C.C. § 1-201(a)(12) (2000).
37. Creditors without property interests in the goods include the entity that sold the goods to the seller on unsecured credit. See infra Part II.A.
mmercially reasonable time, the retention is deemed to be not fraudulent.\textsuperscript{38} Assuming the seller retains possession of the goods and the sale or identification is fraudulent, the effect of that retention is that a seller's levying creditor can get an interest in the goods that would be superior to the buyer's rights under sections 2-502 and 2-716 if the creditor's lien attaches before delivery of the goods to the buyer.\textsuperscript{39}

Revised Article 2 continues that rule\textsuperscript{40} without change and provides in addition that the buyer's rights under sections 2-502 and 2-716(c) will vest upon identification of the goods to the contract.\textsuperscript{41} If a creditor's lien attaches to the goods subsequent to the buyer's rights vesting under a first-in-time rule stated in the proposed comment,\textsuperscript{42} the buyer should prevail as against that levying creditor unless the seller's retention is fraudulent under section 2-402(2).

b. Seller's Article 9 Creditors

The second exception to the rule that the unsecured creditor is subordinate to the buyer's rights under sections 2-502 and 2-716 is found in current Section 2-402(3)(a). That section provides that nothing in Arti-

\textsuperscript{38} U.C.C. § 2-402(2) (2000); U.C.C. § 2-402(b) (Annual Meeting Draft July 2000).
\textsuperscript{40} U.C.C. § 2-402 (Annual Meeting Draft July 2000) provides:
(a) Except as provided in subsections (b) and (c), rights of unsecured creditors of the seller with respect to the goods that have been identified to a contract for sale are subject to the buyer's rights to recover the goods under sections 2-502 and 2-716.
(b) A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against the creditor a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.
(c) Except as provided in section 2-403(b), nothing in this Article shall be deemed to impair the rights of creditors of the seller:
(1) under Article 9; or
(2) where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a pre-existing claim for money, security or the like and is made under circumstances that under any rule of law of the state where the goods are situated would apart from this article constitute the transaction a fraudulent transfer or voidable preference.
\textsuperscript{41} U.C.C. § 2-502(b) (Annual Meeting Draft July 2000) provides: "The buyer's right to recover the goods under subsection (a) vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver."
U.C.C. § 2-716(d) (Annual Meeting Draft July 2000) provides: "The buyer's right under subsection (c) vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver."
\textsuperscript{42} Both the official comments to Sections 2-502 and 2-716 in the conforming amendments to Revised Article 9 and the proposed comments to those sections in the Article 2 revision draft state that first-in-time rule. U.C.C. rev'd art. 9, app. I, § 2-502 cmt. 3, § 2-716 cmt. 3 (2000); U.C.C. § 2-502 Reporter's Note & § 2-716 cmt. 4 (Annual Meeting Draft July 2000).
Article 2 affects the rights of seller's creditors under Article 9. An Article 2 rule which could affect the seller's secured party is the derivative title rule in Article 2, Section 2-403(1), which provides that a "purchaser of goods acquires all title which his transferor had or had power to transfer." A purchaser is defined as anyone who acquires an interest in property by voluntary transfer and includes a secured party. Under this Article 2 rule, if the seller's secured party obtained its interest in the goods subsequent to the rights of the buyer arising under Sections 2-502 or 2-716, the secured party should be subordinate to the buyer's rights as the seller can only convey to its purchaser (the secured party) the rights the seller has. The comments to the revised sections in the Revised Article 9 conforming amendments in fact so state. Section 2-402(3), however, prohibits using the Article 2 derivative rights rule to subordinate the seller's secured party to the buyer's rights under Sections 2-502 or 2-716.

Under both current and revised Article 9, a security interest is effective against purchasers of goods from the debtor (the seller) unless the UCC provides otherwise. That rule makes no reference to a first-in-time or derivative rights approach. Conceivably, then even though the buyer has an enforceable right under Sections 2-502 or 2-716 that arose before the secured creditor's security interest is effective in the goods, the secured creditor's security interest would be superior to the buyer's interest in the goods unless there was a provision in the UCC, other than Article 2 per the prohibition in Section 2-402(3)(a), that said otherwise. One provision that provides otherwise in Article 9 is the derivative rights rule in Section 9-203. That section provides that the security interest only attaches to the debtor's rights in the collateral or the rights the debtor has power to transfer. If the seller who is subject to the rights of a buyer under Section 2-502 or 2-716 has a "voidable" title, the rule in Section 2-403 provides that the seller can transfer good title to a good faith purchaser for value. Under that rule the seller (debtor) has power to create a security interest in the goods, even if the goods are already subject to the buyer's rights under Sections 2-502 or 2-716. This then creates a priority contest that is not resolved in the text of either revised Article 9 or the proposed revision of Article 2. The revised comments to Sections 2-502 and 2-716 that accompany Revised Article 9 implicitly assume that the "voidable" title

45. U.C.C. § 1-201(32), (33) (2000).
47. One could argue perhaps that the seller subject to the buyer's rights under sections 2-502 and 2-716 has voidable title and could convey good title to the secured party who qualifies as a good faith purchaser for value. Whether the seller had voidable title in this situation is not resolved by Article 2. If that argument holds, the Article 2 derivative rights rule would not affect the Article 9 secured party.
49. U.C.C. § 2-402(3)(a); U.C.C. § 2-402(c) (1999); U.C.C. § 2-402(c) (Annual Meeting Draft July 2000).
title rule of Section 2-403 is inapplicable to this situation.\textsuperscript{53} Under those comments and the derivative rights rule of section 9-203, the secured party whose security interest attaches subsequent to the buyer's rights vesting under Sections 2-502 or 2-716 should lose to the buyer.

Article 9 has three additional provisions for a buyer of goods that allow the buyer to have superior rights in the goods as against the seller's secured creditors. One rule applies only to consumer to consumer sales. The other two rules revolve around the concept of buyer in ordinary course of business. A buyer of the seller's consumer goods who buys for personal, family, or household purposes takes free of a perfected security interest if the buyer gives value and buys without knowledge of the security interest and before the secured party files a financing statement.\textsuperscript{54} A buyer in ordinary course of business takes free of a security interest created by its seller even if the security interest is perfected.\textsuperscript{55} A buyer not in ordinary course of business will take free of the seller's secured party's security interest if the buyer gives value and receives delivery of the goods without knowledge of the security interest and before the security interest is perfected.\textsuperscript{56} Which rule applies depends upon whether the buyer is a buyer in ordinary course.

A buyer in ordinary course of business before the revision of Article 9 was defined as follows:

a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. All persons who sell minerals or the like (including oil and gas) at wellhead or minehead shall be deemed to be persons in the business of selling goods of that kind. “Buying” may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.\textsuperscript{57}

Under that definition, one question often litigated was when does someone become a buyer in ordinary course.\textsuperscript{58} Some of the possible choices are when the contract is formed, when the goods are identified to the contract, when title passes to the buyer, or when the buyer obtains

\textsuperscript{55} U.C.C. § 9-307(1) (1995); U.C.C. § 9-320(a) (2000). In both the current and the revised Article 9, a buyer of farm products cannot use this rule. However, the Food Security Act of 1985, 7 U.S.C. § 1631 (1994), provides the same rule for buyers of farm products unless the notice system established by that Act operates to make the buyer take subject to the security interest.
\textsuperscript{56} U.C.C. § 9-301(1)(c) (1995); U.C.C. § 9-317(b) (2000).
\textsuperscript{57} U.C.C. § 1-201(9) (2000).
\textsuperscript{58} David Frisch, Buyer Status Under the U.C.C.: A Suggested Temporal Definition, 72 Iowa L. Rev. 531 (1987).
possession of the goods.59 Under the revised definition of buyer in ordinary course accompanying Revised Article 9,60 this issue is resolved by providing that a buyer becomes a buyer in the ordinary course of business when the buyer has possession or the right to possession of the goods.61

The buyer's right to possession is determined by Sections 2-502 and 2-716. Thus if the buyer is able to assert rights under Sections 2-502 or 2-716 and otherwise meets the requirements of a buyer in ordinary course of business, the buyer will take free of the security interest created by its seller.62 The buyer's right to obtain the goods from the seller will not prevail, however, if the secured party has possession of the goods.63

C. ANTECEDENT DEBT SATISFACTION

The third exception that would prevent the buyer asserting rights under Sections 2-502 and 2-716 from prevailing over the seller's creditors is found in Section 2-402(3)(b). If the identification or delivery of the goods to the buyer is in satisfaction of a preexisting debt and such identification or delay is fraudulent as to creditors or a preference under other law, the buyer's rights under Section 2-502 or 2-716 are subordinate to the seller's creditor's rights in the goods.64

Revised Article 2 would make one additional change to the above-described scheme. The revision makes clear that the entrustment rule found in Section 2-403(2) trumps the rights of the seller's secured creditor under Article 9 and the seller's creditor asserting fraudulent transfer or preference law.65 The entrustment rule provides that if a person entrusts the goods to a merchant who deals in goods of the kind, the merchant can transfer the entrustor's rights to a buyer in ordinary course of business.66

60. Two other changes to the definition are in the revision. Ordinary course is defined according to the seller's business practices. Good faith is defined as honesty in fact and the "observance of reasonable commercial standards of fair dealing." U.C.C. § 9-102(a)(43) (2000).
61. U.C.C. rev'd 9, app I, § 1-201(9) (2000). This is the position that Professor Frisch advocated in his article. Frisch, supra note 58, at 572-74.
66. U.C.C. § 2-403(2) (2000); U.C.C. § 2-403(b) (Annual Meeting Draft July 2000). The revision adds that the merchant transfers the goods free of the entrustor's rights as well. This effect has been implied under the original language. Compare Sears Consumer Fin. Corp. v. Thunderbird Prods., 802 P.2d 1032 (Ariz. Ct. App. 1990) with Matteson v. Harper, 682 P.2d 766 (Or. 1984). Arguably this will change the analysis of cases such as Gordon v. Hamm, 74 Cal. Rptr. 2d 631 (Cal. Ct. App. 1998) where the court found that even though the owner's secured lender and the owner entrusted the good to the merchant, the buyer in the ordinary course did not take the goods free of the secured lender's claim.
By referencing the buyer in ordinary course, this returns full circle to the rights of a buyer under Sections 2-502 and 2-716. A buyer who otherwise qualifies as a buyer in ordinary course and who has a right to get the goods under Sections 2-502 or 2-716 will take the goods free of not only a secured creditor's claim but also the claims of creditors asserting rights under fraudulent transfer law or preference law if those creditors have entrusted goods to a merchant who deals in goods of the kind.

1. **Buyer's Security Interest Under Section 2-711**

   The buyer's security interest arising under Section 2-711(3) is a security interest arising under Article 2 that is subject to Section 9-113. As long as the seller does not lawfully obtain possession, the buyer need not have a security agreement or file a financing statement to be considered as having a perfected enforceable security interest. The buyer's enforcement rights are governed by Article 2. Because Section 9-113 provides that the security interest arising under Article 2 is otherwise subject to Article 9, the priority rules of Article 9 will apply to determine the priority between the buyer's security interest and the rights of seller's other secured parties who may have a security interest in these same goods.

   Assuming the buyer, when it received delivery of the goods, took the goods free of any existing security interest created by its seller, the seller's secured party's interest may arise through the operation of an after-acquired property clause in the security agreement between the seller and the secured party and the operation of Section 2-401, which revests title in the seller when the buyer rejects or revokes acceptance to the goods. That revesting of title in the seller should be sufficient to allow the seller's secured party's interest to attach to the goods under a properly constructed security agreement. Applying section 9-113 to this priority contest could result in the buyer's security interest under Article 2 being subordinate to the seller's other secured party's security interest through the application of the Article 9 priority rule of first-to-file-or-perfect of section 9-312(5). The seller's other secured party would generally have filed its financing statement before the buyer's security interest even arose.

   Revised Article 9 changes that result through Section 9-110. As under present law, the buyer asserting a Section 2-711(3) security interest need not have a security agreement or a financing statement and the buyer's rights will be enforced under Article 2 as long as the debtor (seller) does not obtain possession of the goods. Significantly, the revision of Article 9 provides that the buyer's rights under Section 2-711(3) will also have priority over other secured creditors of the seller as long as the seller does

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68. A noted commentator reports the struggles of courts attempting to decide whether Section 9-113 should be interpreted so as to apply the Article 9 priority rules to these disputes. Hawkland, supra note 15, at § 9-113:4.
not obtain possession of the goods.\(^7\) An interesting situation arises if the seller's secured party's security interest has continued in the goods and not been cut off through application of the buyer in ordinary course rules discussed previously. That is, the goods in the buyer's hands are subject to an enforceable security interest of the seller's secured party. In that situation, should the buyer's security interest created under Article 2 be subordinate to that already existing security interest in the goods under a derivative-rights approach? The example in comment 4 to Section 9-110 contemplates that the buyer will prevail over the seller's secured party, but it does not explicitly deal with the fact that the seller's secured party had a first-in-time lien that was not stripped off when the goods were initially sold to the buyer.\(^7\)

2. Non-Creditor Claimants

So far the discussion has focused on the rights of the seller's creditors. Other possible claimants to the goods are transferees from the seller who are not creditors. Such transferees could be buyers or donees from the seller.

Section 2-403(1) states that a seller can transfer all title it has or has power to transfer.\(^7\) At what point does the seller "transfer" title to the buyer? Although identification confers a property interest, it does not transfer title. Section 2-401 provides when title passes to the buyer. Unless the goods are to be delivered without being moved (such as when in the possession of the bailee) title will generally pass to the buyer when the seller completes its performance with respect to physical delivery of the goods.\(^7\)

Assume the seller sells goods to Buyer 1 who does not take possession of the goods. Seller then purports to sell the goods to Buyer 2 who takes possession of the goods. As between Buyer 1 and Buyer 2, who has the superior property interest in the goods? One could argue that Buyer 1 does not have title to the goods as physical delivery did not take place and so seller's sale to Buyer 2 was the transfer of title to the goods. However, does the analysis change if Buyer 1 has the right under either Section 2-502 or Section 2-716 to obtain possession of the goods from the seller which arose before the sale to Buyer 2? Does Buyer 1 having those rights under Section 2-502 or 2-716 defeat the seller's ability to transfer good title to Buyer 2?

If seller's title is "voidable," the seller can transfer good title to Buyer 2

\(^7\) U.C.C. § 9-110 (2000).
\(^7\) Revised Article 9, Section 9-325 does not address this situation as it is not a contest between security interests created by two different debtors. Some cases have held that as between the buyer's security interest under Section 2-711(3) in which the seller is the debtor and the purchase money security interest is asserted by a buyer's secured party, the purchase money security interest has priority. Ambre v. Joe Madden Ford, 881 F. Supp. 1182 (N.D. Ill. 1995).
\(^7\) U.C.C. § 2-403(1) (2000); U.C.C. § 2-403(a) (Annual Meeting Draft July 2000).
if Buyer 2 is a good faith purchaser for value.\textsuperscript{75} Even if seller's title is not voidable, Buyer 1 may lose to Buyer 2 under the entrustment rule in section 2-403(2)\textsuperscript{76} if the seller is a merchant with respect to goods of the kind and Buyer 2 qualifies as a buyer in ordinary course. Buyer 1, by not taking possession, has entrusted the goods to seller and thus a merchant seller can transfer the goods free of Buyer 1's rights. If seller's title is not "voidable,"\textsuperscript{77} seller is not a merchant with respect to goods of the kind, or Buyer 2 is not a buyer in ordinary course, then the issue becomes the rights of Buyer 1 asserting rights under Section 2-502 or 2-716 and the rights of Buyer 2 in physical possession of the goods. The derivative title rule does not provide a clear answer under current law. Under the revision of Article 9, however, the vesting rule in Sections 2-502 and 2-716 coupled with the first-in-time comment\textsuperscript{78} should lead to Buyer 1's victory.

II. SELLER'S RIGHTS TO THE GOODS

A. AS AGAINST THE BUYER

As discussed above, when the goods are identified to the contract for sale, the buyer obtains a special property interest in the goods.\textsuperscript{79} Title may even have passed to the buyer before delivery if the parties have so agreed.\textsuperscript{80} In some circumstances, the seller may withhold or stop delivery even if the goods are identified or title has passed to the buyer or the seller may retrieve the goods from the buyer even if delivery has taken place. Those rights are the subject of this section.

I. Withholding or Stopping Delivery

The seller may withhold or stop delivery of the goods if the buyer has breached the contract by repudiating or failing to make a payment when due on or before delivery of the goods to the buyer.\textsuperscript{81} The seller may also stop or withhold delivery if the buyer is insolvent.\textsuperscript{82} If goods are in transit or in the hands of a bailee, the seller must notify the bailee to withhold delivery before the buyer receives the goods, the bailee must acknowledge that it holds the goods for the buyer, or the buyer obtain possession of a negotiable document of title.\textsuperscript{83}

Current Article 2 limits the seller's ability to stop delivery when the goods are in transit to a "carload, truckload, planeload, or larger ship-

\textsuperscript{75} U.C.C. § 2-403(1) (2000); U.C.C. § 2-403(a) (Annual Meeting Draft July 2000).
\textsuperscript{76} U.C.C. § 2-403(2) (2000); U.C.C. § 2-403(b) (Annual Meeting Draft July 2000).
\textsuperscript{77} See supra notes 47-53 and accompanying text.
\textsuperscript{81} U.C.C. § 2-703(a) (2000); U.C.C. § 2-703(b)(1) (Annual Meeting Draft July 2000).
\textsuperscript{82} U.C.C. §§ 2-702(1), 2-705(1) (2000); U.C.C. §§ 2-702(a), 2-705(a) (Annual Meeting Draft July 2000). The Section 2-702(1) right to withhold delivery when the buyer is insolvent is a codification of a common law right. HAWKLAND, supra note 15, at § 2-702:1.
ment of express or freight.” Presumably that limitation was to avoid sidelining entire conveyances to search out smaller packages. The proposed revision eliminates that limitation on stopping delivery only of larger shipments as “incompatible with current shipping capabilities.” The revision does not address whether the bailee could refuse to stop delivery of small shipments contained within larger conveyances due to the inconvenience of finding the small package. Under both the current law and proposed revision, the seller is liable to the bailee for damages incurred due to the bailee’s stopping shipment at the seller’s behest.

The seller may also withhold the goods from the buyer by shipping goods under reservation. Shipping under reservation results in the seller having a security interest in the goods. The seller ships under reservation when it procures a non-negotiable bill of lading to its own or a nominee’s order or procures a negotiable bill of lading. A non-negotiable bill of lading naming the buyer does not create a security interest in the seller. The effect of shipment under reservation is to allow the seller to withhold the goods from the buyer until the buyer pays the price. Shipment under reservation does not, however, affect the buyer’s right to inspect the goods before payment. When the buyer tenders satisfaction of the amount due for the goods, the buyer has a right to replevin the goods from the seller. The proposed revision does not make any changes to this right.

2. Recovering the Goods after Delivery

Once the goods are delivered to the buyer, the seller has very limited rights to recover the goods. The seller may take a security interest in the goods under Article 9 and assert the rights of a secured party to recover possession of the goods in the event the buyer defaults. If a seller retains title to the goods delivered, that retention of title is deemed to be merely a security interest in the goods and the seller must use the Article 9 rules to recover the goods. In the event the seller does not have a security interest in the goods, Article 2 contains two rights for the seller to reclaim the goods from the buyer.

When the seller sells on credit to the buyer, the seller has a right to reclaim the goods if the buyer is insolvent. This right to reclaim is based upon the idea that a buyer receiving goods on credit while insolvent is a fraudulent act. The reclamation remedy is derived from the remedy of

recission based on fraud. Successful reclamation bars the credit seller from other remedies. Under current Article 2, the seller exercises this right by making a reclamation demand within ten days after the buyer receives the goods. The ten day time period does not apply if the buyer has misrepresented its solvency to the seller in writing in the three months prior to delivery. The proposed revision of Article 2 would give the credit seller the right to reclaim the goods from an insolvent buyer by making the reclamation demand within a reasonable time after the buyer received the goods, thus eliminating the ten day and three month time periods.

The other reclamation right in Article 2 is the right of the cash seller to reclaim the goods when the payment mechanism fails. The usual example of the failure of the payment mechanism in a cash sale is the sale in exchange for a check which is dishonored. Current Article 2 contains a comment to Section 2-507 and PEB Commentary No. 1 that provides that a cash seller can reclaim the goods by making a demand within a reasonable time. The revision of Article 2 codifies the cash seller's right to reclaim in Section 2-507 by allowing the seller to demand the goods back within a reasonable time after learning that payment has failed. Unlike the credit seller's reclamation right premised on insolvency and fraud, the cash seller's reclamation right is based upon the buyer's breach of contract, or failure to pay. Thus the cash seller who successfully reclaims is not limited to reclamation and may pursue other remedies for breach.

In any event, a reclaiming seller attempting to reclaim under Article 2 against a buyer who has filed bankruptcy must also comply with 11 U.S.C. § 546(c) in order to assert its rights successfully. The reclamation right recognized in that section requires the seller to have a reclamation right under state law, the sale to the buyer/debtor to be in the ordinary course of the seller's business, and the buyer to be insolvent when receiving the goods. The seller must also give a written reclamation demand within ten

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97. U.C.C. § 2-702(b) (Annual Meeting Draft July 2000) provides:
   Where the seller discovers that the buyer has received goods on credit while insolvent the seller may reclaim the goods upon demand made within a reasonable time after the buyer's receipt of the goods. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.
98. U.C.C. § 2-507 & cmt. 3 (2000); PEB Commentary No. 1.
99. U.C.C. § 2-507(b) (Annual Meeting Draft July 2000) provides:
   Where payment is due and demanded on the delivery to the buyer of goods or documents of title, the seller may reclaim the goods delivered upon a demand made within a reasonable time after the seller discovers or should have discovered that payment was not made.
days after the debtor receives the goods. Practically, the seller should comply with the requirements of the bankruptcy code in addition to the requirements of Article 2 in each case to have the best chance of reclaiming the goods.

3. Consignments

Another person who has historically been treated as a seller but who is not a seller of goods is a person who delivers goods on consignment to someone who then sells the goods. In a true consignment, the consignor is the owner of the goods and bails the goods to the consignee for the purpose of resale. Sometimes arrangements labeled consignments are in fact secured transactions and not consignments at all. In the consignment which is really a disguised secured transaction, the seller’s (consignor’s) rights to the goods from the buyer (consignee) are governed by Article 9. In a true consignment, the rights of the consignor to return of the goods from the consignee is governed by the law of bailments, the consignment contract between the parties, and perhaps Article 2. It is extremely difficult in practice to determine the difference between a true consignment and a consignment that is a secured transaction.

B. As Against Third Parties

The seller’s rights as against the buyer to the goods are relatively straightforward. The more interesting question is the priority of those seller’s rights as against other parties who assert rights to the goods. Typical claimants competing against the seller are the buyer’s secured party, other creditors of the buyer and non-creditor transferees from the buyer. The analysis of each of those third party’s rights depends upon what rights the seller is asserting in the goods.

1. Seller’s Right to Withhold or Stop Delivery

Assume under the analysis discussed above that the seller has the right to withhold or stop delivery as against the buyer. The buyer’s secured party may still have a security interest in those goods. Under Article 9, the debtor must have rights in the collateral in order to have the security

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102. See Columbia Intern. Corp. v. Kempler, 175 N.W.2d 465 (Wisc. 1970); see also Armor All Prods. v. Amoco Oil Co., 533 N.W.2d 720 (Wisc. 1995) (holding that goods not held for resale were not consignment).


104. See U.C.C. § 2-102 (2000) (stating that a consignment may fall within the phrase “transactions in goods”). The proposed revision to Article 2 states in a comment to section 2-103 that Article 2 would not apply to consignments that are bailments. U.C.C. § 2-103 cmt. 1 (Annual Meeting Draft July 2000).

interest attach.\textsuperscript{106} The buyer/debtor could have rights in the collateral when the goods are identified to the contract and thus the security interest of the buyer's secured party could attach at that time.\textsuperscript{107} Using a derivative rights approach, one could argue that if the seller's rights to stop or withhold delivery are effective against the buyer, the security interest of buyer's secured party is subordinate to the seller's right to withhold or stop delivery as the buyer can only transfer rights the buyer has or has power to transfer.\textsuperscript{108} Under Section 2-403, the buyer has power to transfer good title to a good faith purchaser for value if the buyer has voidable title.\textsuperscript{109} Does a buyer subject to the seller's right to withhold or stop delivery have voidable title?

The mysteries of void and voidable title are not addressed in Article 2 except to provide that a person can have voidable title if the person has taken delivery in a purchase transaction in four situations specified in section 2-403.\textsuperscript{110} If the buyer has voidable title in this situation, the buyer's secured party could qualify as a good faith purchaser who would trump the seller's rights to stop or withhold delivery. Other voluntary transferees of the buyer could also qualify as good faith purchasers. The buyer's lien creditors who sought to levy on the goods would not qualify as a good faith purchaser who can take advantage of this rule as they do not obtain their lien through a consensual transfer.\textsuperscript{111} The key to the seller's priority in the goods under the derivative rights approach as against the buyer's secured party or other possible good faith purchasers is whether the buyer has voidable title even though the buyer is subject to the seller's right to withhold or stop delivery.\textsuperscript{112} One commentator argues that a buyer can only have voidable title if the buyer has taken delivery of the goods through a voluntary transfer of possession.\textsuperscript{113} This argument would mean that the buyer subject to the seller's right to stop delivery cannot give a better title to a good faith purchaser from the buyer. As against the buyer's potential lien creditors, the rule leads to the conclusion that the seller will prevail because the lien creditor does not qualify as a good faith purchaser who can have better rights than the buyer.

One could also argue that the general rule of Article 9 is that a security interest is effective against creditors of the buyer unless a provision in the

\textsuperscript{107} See U.C.C. § 2-501 (2000); see also U.C.C. § 2-501 (Annual Meeting Draft July 2000); see also supra notes 58-63 and accompanying text regarding when a buyer becomes a buyer.
\textsuperscript{111} U.C.C. § 1-201(33), (34) (2000).
\textsuperscript{112} Some courts have implicitly held that the buyer does not have voidable title by holding that the seller's rights to withhold or stop delivery are superior to the rights of the buyer's transferees. In re Murdoch Mach. & Eng'g Co., 620 F.2d 767 (10th Cir. 1980).
\textsuperscript{113} HAWKLAND, supra note 15, at § 2-403:5.
UCC provides otherwise.\textsuperscript{114} Under this approach, a seller of goods is merely a creditor of the buyer, even though the seller is exercising its rights to withhold or stop delivery, and no rule explicitly provides the seller will prevail. One provision that might address the situation is section 9-113 of current Article 9. Under that section, a security interest arising under Article 2 is subject to the Article 9 rules except that if the debtor does not lawfully obtain possession of the goods the secured party need not have a security agreement nor file a financing statement.\textsuperscript{115} The first issue is whether the seller's rights to stop or withhold delivery is a security interest arising under Article 2. The comments to Section 9-113 support treating these rights as a security interest.\textsuperscript{116} If so, the notable failure of Section 9-113 to provide a priority rule may lead to the application of the Article 9 priority rules.\textsuperscript{117} Presumably the seller would be treated as a purchase money secured party and subject to the priority rules of Section 9-312(3) (if inventory) or Section 9-312(4) (if not inventory) as against the buyer's other secured parties.\textsuperscript{118} Under these rules the seller might well prevail over the buyer's other secured parties. The difficulty for the seller under the purchase money rules occurs when the seller is selling goods that will be the buyer's inventory. In that case, the seller must give notice to the buyer's other secured parties before delivery of the goods to the buyer in order to prevail.\textsuperscript{119} If the seller is not treated as if it were a purchase money secured party, the buyer's secured party would likely prevail under the residual first-to-file-or-perfect rule of Section 9-312(5).\textsuperscript{120}

If the seller with a right to withhold or stop delivery is treated as having a security interest arising under Article 2, the priority rule found in section 9-301 would lead to priority for the seller over lien creditors who arise after the seller is deemed perfected under section 9-113.\textsuperscript{121} The seller's right when withholding or stopping delivery as against other transferees of the buyer would depend upon application of the buyer in ordinary course rules discussed above.\textsuperscript{122} That is, a buyer in ordinary course would take free of the seller's "security interest" and non-buyers in ordinary course would be subject to the seller's "security interest."\textsuperscript{123}

\textsuperscript{114} U.C.C. § 9-201 (1995); see also U.C.C. § 9-201 (2000).
\textsuperscript{115} U.C.C. § 9-113 (1995).
\textsuperscript{116} Comment 1 to U.C.C. § 9-113 (2000) provides:
Under the provisions of Article 2 on Sales, a seller of goods may reserve a security interest (see, e.g., sections 2-401 and 2-505); and in certain circumstances, whether or not a security interest is reserved, the seller has rights of resale and stoppage under sections 2-703, 2-705 and 2-706 which are similar to the rights of a secured party.
\textsuperscript{See HAWKLAND, supra note 15, at § 9-113:2.}
\textsuperscript{117} HAWKLAND, supra note 15, at § 9-113:4.
\textsuperscript{118} U.C.C. § 9-312(3), (4) (1995).
\textsuperscript{119} Id. § 9-312(3).
\textsuperscript{120} Id. § 9-312(5).
\textsuperscript{121} U.C.C. § 9-301(1)(b) (1994).
\textsuperscript{122} See supra notes 54-63 and accompanying text.
A buyer subject to the seller's rights to withhold or stop delivery would not qualify as a buyer in ordinary course under the Article 9 revision as the buyer would not have possession or right to possession as against the seller.\textsuperscript{124}

Revised Article 9 provides some clarity to this situation in Section 9-110.\textsuperscript{125} The comments to that section provide that the seller's rights to withhold or stop delivery are not security interests arising under Article 2, but rather priority disputes governed by the first sentence to Section 2-403(1).\textsuperscript{126} That is, the buyer can convey only those rights it has. The implicit conclusion is that the seller who is stopping or withholding delivery will prevail over the buyer's secured party, the buyer's other creditors and the buyer's transferees. That comment seems to also be based on the assumption that the buyer's ability to convey good title under Section 2-403 does not come into play as the buyer does not have voidable title. The comment does not say so explicitly, however.

2. \textit{Shipment Under Reservation or Retention of Title}

The seller's shipments under reservation\textsuperscript{127} or retention of title\textsuperscript{128} are security interests arising under Article 2.\textsuperscript{129} Current section 9-113 would apply to make those enforceable and perfected security interests as long as the debtor does not lawfully obtain possession. The seller's shipment under reservation or retention of title does not stop the buyer from transferring rights to its creditors or other transferees. The buyer has sufficient rights in the goods for those third party in rem claims to attach.\textsuperscript{130} Again, the priority rules of Article 9 would apply as to the rights of the buyer's other secured parties, lien creditors, or other transferees from the buyer. Assuming the seller who shipped under reservation or retained title was treated as a purchase money secured party, the seller could pre-

\begin{footnotesize}
\begin{itemize}
\item[124.] See supra note 61 and accompanying text.
\item[125.] Revised Article 9, § 9-110 (2000) provides:
\begin{enumerate}
\item A security interest arising under Section 2-401, 2-505, 2-711(3), or 2A-508(5) is subject to this article. However, until the debtor obtains possession of the goods:
\item the security interest is enforceable, even if Section 9-203(b)(3) has not been satisfied;
\item filing is not required to perfect the security interest;
\item the rights of the secured party after default are governed by Article 2 or 2A; and
\item the security interest has priority over a conflicting security interest created by the debtor.
\end{enumerate}
\item[126.] U.C.C. § 9-110 cmt. 5 (2000). The approach under Revised Article 9 also follows the approach of courts that have held the seller's right to stop or withhold delivery when the buyer files bankruptcy does not violate the automatic stay or create an unenforceable statutory lien based on insolvency. \textit{See In re Nat'l Sugar Ref. Co.}, 27 B.R. 565 (S.D.N.Y. 1983).
\item[129.] See HAWKLAND, supra note 15, at § 9-113:2.
\item[130.] See Morton Booth Co. v. Tiara Furniture, Inc., 564 P.2d 210 (Okla. 1977); \textit{see also} Livingston, supra note 6, at 118-77 (discussing various issues concerning when a person has sufficient rights in the collateral for third party interests to attach).
\end{itemize}
\end{footnotesize}
vail under Sections 9-312(3) and (4) as against the buyer's other secured party and under Section 9-301(1)(b) as against the buyer's lien creditor.131 The rights of the seller as against other transferees depends upon the buyer in ordinary course rules of Sections 9-307 and 9-301(1)(c) discussed previously.132 In this situation, the buyer may be able to qualify as a buyer in ordinary course as having a right to possession under Section 2-502 or 2-716 if it tenders satisfaction of the security interest to the seller.

Revised Article 9 provides for the same result in Section 9-110, with two changes. The revision explicitly provides that the seller will have priority over the conflicting security interest created by the buyer and it eliminates the word "lawful" in front of possession.133 Thus a buyer who obtained possession of the goods, even if not "lawful," would render Section 9-110 inapplicable. In that case, the seller with the title retained or the shipment under reservation in effect would not have an enforceable perfected security interest and would lose to the buyer's secured parties, lien creditors or other transferees unless the seller took the appropriate Article 9 steps to obtain priority over third parties. Thus, the seller, to be sure it has the best possible priority as against third parties when it is asserting these rights, should take the appropriate Article 9 steps so it does not need to rely on the rights under Article 2 and Section 9-110.

3. Reclamation

In contrast to the above treatment of the seller's right to withhold or stop delivery as against third parties, the treatment of the seller's right to reclaim as against third parties is straightforward. The credit seller's right to reclaim based upon insolvency is subject to the rights of good faith purchasers for value or buyers in ordinary course of business.134 The buyer's secured party may qualify as a good faith purchaser.135 Under current Article 2, the cash seller's reclamation right as against third parties is governed by Section 2-403.136 Under Section 2-403, a buyer with voidable title can transfer good title to a good faith purchaser for value.137 A buyer has voidable title when it has taken delivery of the goods in exchange for a check which is subsequently dishonored.138 The buyer's secured party and other voluntary transferees may qualify as good faith purchasers for value.139 In addition, under the entrustment

131. See supra notes 118-121 and accompanying text.
132. See supra notes 54-63 and accompanying text.
133. See HAWKLAND, supra note 15, at § 9-113:3 (discussing circumstances where buyer may not have "lawful" possession); see also In re Ault, 6 B.R. 58 (Bankr. E.D. Tenn. 1980) (discussing whether buyer had possession when seller shipped under reservation).
rule of Section 2-403(2), the seller who has entrusted goods to the possession of a merchant who sells goods of the kind will find its rights transferred to the buyer in ordinary course. The revision of Article 2 provides the same result by stating explicitly that the cash seller asserting reclamation rights is subject to the rights of a good faith purchaser for value or buyer in ordinary course.

Neither the current or proposed revised Article 2 address the timing issue of reclamation rights arising versus the purchaser's rights arising. If the seller asserting reclamation rights has merely demanded return of the goods and then the rights of the good faith purchaser or buyer in ordinary course arise, should the reclamation rights win under a derivative rights and first-in-time approach? Alternatively, should the seller have to take possession under a reclamation demand prior to the rights of a good faith purchaser or buyer in ordinary course arising in order to have priority? Presumably, if the reclamation right is successful and the goods are returned to the seller, the buyer could not defeat the reclamation by subsequently creating a good faith purchaser for value or a buyer in ordinary course of business, but the statute is not clear.

The rights of a reclaiming seller as against the lien creditor of a buyer are not clear under either the current or the proposed revision of Article 2. Under pre-Code law, a reclaiming credit seller triumphed over a buyer's lien creditor who levied on the goods. The 1952 Code provided that the lien creditor had priority over the reclaiming credit seller. The 1966 version deleted that language. Thus, one could argue that the common law rule would prevail and the reclaiming credit seller should have priority over the buyer's lien creditor. The lien creditor rule arose out of cases on fraud that held a defrauded seller should not lose to a lien creditor. Whether the reclaiming cash seller would enjoy the same priority is doubtful given that the reclaiming cash seller's rights are based upon a breach of the sales contract as opposed to fraud.

(Fls. Ct. App. 1995) (stating that landlord's lien had priority over cash seller's reclamation rights, no discussion of Section 2-403).

142. See HAWKLAND, supra note 15, at § 2-702:8 (stating that buyers whose rights arise prior to seller retaking possession are superior to the reclamation right).
143. See id. § 2-702:10.
144. See id.
145. See id.
4. **Consignment**

In a consignment that is in reality a secured transaction, the rights of transferees and creditors of the consignee as against the rights of the consignor would be determined under Article 9. In that transaction, which is in fact a secured transaction, the consignor (the secured party) who does not attach and perfect its security interest under Article 9 will lose to the consignee's creditors and transferees from the consignee under the Article 9 priority rules.148

In a true consignment, non-creditor transferees from the consignee will have whatever rights in the goods that the consignee had power to transfer under the consignment agreement with the consignor. In addition, the entrustment rule of Section 2-403 provides that the rights of the consignor (entrustor) will be transferred to a buyer in ordinary course from a merchant dealing in goods of the kind (consignee).149 In the usual case, therefore, the consignor in a true consignment will not have superior rights in the goods as against a non-creditor transferee who is typically a buyer in ordinary course from a merchant consignee.

As against creditors of the consignee, current Article 2 provides that a true consignment sale is deemed to be a sale or return.150 In a sale or return transaction, goods in the buyer's possession are subject to the claims of the buyer's creditors.151 A consignor in a true consignment that wants to protect itself from the claims of the consignee's creditors has the following options: comply with a law that requires the consignor's interest to be posted, establish that the consignee is generally known by its creditors to be substantially engaged in selling the goods of others, or comply with the filing requirements of Article 9.152 In addition, in order to assert purchase money security interest like priority over other secured parties, the consignor must comply with the notice requirements of section 9-114,153 which function in a similar manner to the purchase money priority provision found in Section 9-312(3).154

Revised Article 9 changes this paradigm by bringing true consignments within the scope of Article 9 and subjecting consignors in most true consignments to the attachment, perfection, and priority provisions of Revised Article 9, but not to its enforcement provisions.155 The consignor is

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151. Id. § 2-326(2).
152. Id. § 2-326(3); see also, e.g., In re Creative Goldsmiths, 178 B.R. 87 (Bankr. D. Md. 1995); HAWKLAND, supra note 15, at § 2-326:4.
153. U.C.C. § 9-114 (1995); see also In re Mobile Traveler, Inc., 117 B.R. 651 (Bankr. D. Kan. 1990). The phrasing of section 9-114 has created doubts about its application to situations where the consignor establishes the consignee's creditors knew that the consignee is engaged in selling the goods of others. See HAWKLAND, supra note 15, at § 9-114:4.
treated as having a purchase money security interest in the goods.\textsuperscript{156} Not
all true consignments, however, are subject to Revised Article 9 given
that the definition of consignment excludes some true consignments.
Consignments in Revised Article 9 are defined as:

a transaction, regardless of its form, in which a person delivers goods
to a merchant for the purpose of sale and:

(A) the merchant:

(i) deals in goods of that kind under a name other than the
name of the person making delivery;

(ii) is not an auctioneer; and

(iii) is not generally known by its creditors to be substantially
engaged in selling the goods of others;

(B) with respect to each delivery, the aggregate value of the goods is
$1,000 or more at the time of delivery;

(C) the goods are not consumer goods immediately before delivery;

and

(D) the transaction does not create a security interest that secures
an obligation.\textsuperscript{157}

Revised Article 9 also repeals the provision in Article 2 deeming con-
signments to be sales or returns\textsuperscript{158} leaving true consignments that fall
outside the definition of consignment to the common law of bailments.\textsuperscript{159}
Under derivative rights principles, the bailee in a true consignment
outside the scope of Revised Article 9 could grant to the transferee no
greater rights than the bailee has in the goods.

III. CONCLUSION

As one can see from the above sketch of property-based rights, Re-
vised Article 9, not the proposed revision of Article 2, makes the most
changes in the analysis of a seller's and buyer's rights to the goods as
against each other and as against third parties. The only change stem-
ming solely from the revision of Article 2 is the expansion of the re-
claiming seller's rights as against the buyer. As against third parties,
however, the revision of Article 2 does not change the reclaiming seller's
rights. Given the lack of change stemming from the proposed revised
Article 2 in this area, the delay of the project\textsuperscript{160} is of little moment as to
these property-based rights. The more important revision of Article 9,
which has been enacted in twenty-eight states and the District of Colum-
bia as of this writing, makes the bulk of the changes to the property rights
discussed and should be thoroughly reviewed by those who represent

\textsuperscript{156} Id. § 9-103(d). To overcome the conceptual hurdle that a consignee cannot trans-
fer more rights than it has, Revised Article 9 provides that the consignee has the ability to
transfer rights in the goods if the consignor has not taken the appropriate steps under
Revised Article 9 to have priority over the transferee from the consignee. See U.C.C. § 9-
319 (2000).


\textsuperscript{158} U.C.C. rev’d art. 9, app. I, § 2-326 (2000).

\textsuperscript{159} U.C.C. § 9-102 cmt. 14, § 9-109 cmt. 6 (2000).

\textsuperscript{160} See 69 U.S. Law 2110 (2000).
buyers and sellers.¹⁶¹

¹⁶¹ For an up-to-date count as to the states enacting Revised Article 9, see http://www.nccusl.org.