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THE IMPACT OF THE FEDERAL AVIATION ACT
OF 1958 ON BUYERS IN THE ORDINARY
COURSE OF BUSINESS

DAVID W. EVANS

THE FEDERAL AVIATION ACT OF 1958 (1958 Act) requires aircraft owners and other interested parties to record their interests with the Federal Aviation Administration (FAA). Section 503 of the 1958 Act provides that “[n]o conveyance or instrument the recording of which [is required by the 1958 Act] . . . shall be valid . . . against any person . . . until such conveyance or other instrument is filed for recordation with [the FAA].” Article 9 of the Uniform Commercial Code (UCC), as adopted by most state legislatures, provides a priority system for parties claiming interests in chattels. The UCC usually protects a buyer in the ordinary course of business from his seller’s lender’s interest (“inventory lender”).

Courts confuse the relation of section 503 of the 1958 Act to article 9 of the UCC. Some courts hold that, in addition to the filing requirement, the 1958 Act provides a priority system for

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2 See infra notes 44-75 and accompanying text.
4 1 P. COOGAN, W. HOGAN AND D. VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE vii (1967) [hereinafter cited as P. COOGAN].
5 See infra notes 76-100 and accompanying text.
6 U.C.C. § 1-201(9) (1977) defines a buyer in the ordinary course of business as “a person who . . . buys in ordinary course from a person in the business of selling goods of that kind . . . .” See infra note 80 and accompanying text.
7 U.C.C. § 9-307(1) (1977) provides that “[a] buyer in ordinary course of business . . . takes free of a security interest created by his seller . . . .” See infra note 81 and accompanying text.

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lien claimants that preempts state law. Many courts hold that only the filing provisions of the 1958 Act preempt state law, so state law governs disputes between lien claimants.

A typical fact pattern involves an aircraft dealer who arranges inventory financing with an inventory lender. When the dealer subsequently purchases a new plane from the manufacturer, the inventory lender files with the FAA both the dealer’s bill of sale and the inventory lender’s lien on the new plane. The inventory lien prohibits the dealer from selling the plane without the inventory lender’s consent. A consumer buyer later arranges a purchase money mortgage with a bank to buy the new plane. Neither the buyer nor the bank searches the FAA records, but the bank files with the FAA the buyer’s title and the bank’s lien on the new plane. When the dealer defaults on its note to the inventory lender, the lender seeks to repossess the new plane, arguing that its lien is superior to the buyer’s title and the bank’s lien.

Some courts would hold that the 1958 Act totally preempts UCC priorities, thus favoring the prior perfecting secured party over all subsequent lienholders. These courts hold for the inventory lender over the buyer and the bank. Other courts hold that the 1958 Act does not preempt UCC priorities, thus favoring the buyer as a buyer in the ordinary course of business.

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* See, e.g., Gary Aircraft Corp. v. General Dynamics Corp. (In re Gary Aircraft Corp.), 681 F.2d 365 (5th Cir. 1982), cert. denied, 103 S. Ct. 3110 (1983), discussed infra notes 242-70 and accompanying text.


* Inventory financing is called floor planning.

* See, e.g., Dowell v. Beech Acceptance Corp., 3 Cal. 3d 544, 476 P.2d 401, 91 Cal. Rptr. 1 (1970), cert. denied, 404 U.S. 823 (1971), discussed infra notes 134-52 and accompanying text (holding that because the 1958 Act totally preempted state law priorities, the secured party that first perfected its lien with the FAA had priority over secured parties that filed later).

* Id.

* See Gary Aircraft Corp. v. General Dynamics Corp. (In re Gary Aircraft Corp.), 681 F.2d 365 (5th Cir. 1982), cert. denied, 103 S. Ct. 3110 (1983), discussed infra
A conflict exists, therefore, between the UCC, which grants priority to the buyer in the ordinary course of business, and the 1958 Act, which some courts interpret as denying such priority. To resolve this conflict, courts first must determine to what extent the 1958 Act preempts state laws governing lien priorities under the UCC.¹⁸ Courts that reconcile the conflict in favor of the UCC still must determine the 1958 Act's effect on the Uniform Commercial Code.

This paper will examine the conflict between the Federal Aviation Act of 1958 and the UCC and propose a solution. The first two sections of this paper will examine the 1958 Act's language and history and explain briefly the operation of UCC article 9. The third and fourth sections of this paper will explore arguments for and against the 1958 Act's preemption of the UCC and other possible effects the Act has on the UCC doctrine favoring the buyer in the ordinary course of business.

I. THE HISTORY OF FEDERAL RECORDATION OF AIRCRAFT INTERESTS

The first aviation act, the Air Commerce Act of 1926,¹⁶ did not require lienholders to record their interests in aircraft.¹⁷ However, two subsequent pieces of legislation, the Civil Aeronautics Act of 1938¹⁸ (1938 Act) and the Federal Aviation Act of 1958,¹⁹ both required lienholders to record their title and notes 242-70 and accompanying text.

¹⁸ Recently the United States Supreme Court considered Philco Aviation Inc. v. Shackett, 103 S. Ct. 2476 (1983), discussed infra, notes 37 and 269. The Court granted certiorari only on the question of preemption: “By enacting 49 U.S.C. § 1403 requiring recording of conveyances affecting aircraft, did Congress preempt state law insofar as state law would permit conveyance of title to aircraft by transfer of possession alone, without FAA recording?” 51 U.S.L.W. 3306 (Oct. 19, 1982). The Court did not resolve the apparent priority conflict granted secured parties under the 1958 Act and the UCC. 103 S. Ct. at 2480.

security documents affecting aircraft with the designated federal agency. Although the 1938 Act eventually was repealed, it paved the way for many advancements in the field of security interest recordation.

A. Recordation Under the Civil Aeronautics Act of 1938

Congress enacted the Civil Aeronautics Act of 1938 to achieve greater safety and progress in air transportation by regulating the industry and strengthening the economics of air commerce. One problem that Congress sought to remedy in particular was the economic difficulty of financing aircraft purchases, caused by the mobility of aircraft through many state jurisdictions. Before Congress enacted the 1938 Act, buyers and lenders had to search and file lien instruments with every conceivable recording authority in every jurisdiction to adequately protect their interests. The differing filing requirements, the number of jurisdictions in which the lender had to file, and the uncertainty about whether such attempts to perfect a lien were adequate complicated and hindered aircraft financing. By enacting the 1938 Act, Congress sought to “protect” lenders by providing a centralized place for filing and eliminating the duplicitous number of filings required.

Title V of the 1938 Act required owners of aircraft to regis-

(1976)). This act repealed the 1926 legislation.

80 49 U.S.C. § 1403 (1976). The 1938 Act established the Civil Aeronautics Authority; the 1958 Act established the Federal Aviation Administration.


82 1938 Senate Report, supra note 21, at 1. The report stated “without economic stability there can be no safety.” Id. The Senate supported the 1938 Act, in part, because investors were dissatisfied with air commerce under the laws existing in 1938. Id. at 2.


84 Id.

85 Id.

86 Id.

87 Id.
ter their aircrafts' nationality, certain aircraft components, and to record the ownership of their aircraft. The 1938 Act further required the Civil Aeronautics Authority to systematically record "conveyances." It defined "conveyance" to include a "bill of sale, contract of conditional sale, mortgage, assignment of mortgage, or other instrument affecting title to, or interest in, property." The statutory language implies that the parties should file original copies of documents resulting from two-party, consensual transactions. Once a person recorded an instrument with the Civil Aeronautics Authority, the instrument was "valid as to all persons" without any fur-

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Conveyance to be Recorded
(b) No conveyance . . . which affects the title to, or interest in, any civil aircraft of the United States, or any portion thereof, shall be valid in respect of such aircraft or portion thereof against any person other than the person by whom the conveyance is made or given, his heir or devisee, and any person having actual notice thereof, until such conveyance is recorded in the office of the secretary of the Authority. Every such conveyance so recorded in the office of the secretary of the Authority shall be valid as to all persons without further recordation. Any instrument, recordation of which is required by the provisions of this section, shall take effect from the date of its recordation, and not from the date of its execution.

Id.

34 See supra notes 30-32.
35 Prior to recording, a recordable instrument was "valid" only with respect to the parties to the transaction, their heirs or devisees, and persons with actual notice of the transaction. Civil Aeronautics Act of 1938, Pub. L. No. 75-706, tit. V, § 503(b), 52 Stat. 973, 1006 (1938). See supra note 30 for the text of section 503.
36 Id.
When enacting the 1938 Act, the 75th Congress did not thoroughly discuss the effect the federal recording should have on the priority of claimants to interests in aircraft. The only use of the word “priority” in the legislative history ap-

37 Id. In an early case, Anderson v. Triair Assoc., 1949 U.S. Av. Rptr. 440 (Wis. Cir. Ct. 1947) the court determined that it was possible for parties to perfect a security interest by filing under state laws as well as under the 1938 Act, and held that a subsequent repairman did not have a duty to check the CAA records. Id. at 445-48. Beginning with In re Veterans’ Air Express Co., 76 F. Supp. 684 (D.N.J. 1948), discussed infra note 149, every court has held that the 1938 Act’s and, later, the 1958 Act’s filing requirement was the exclusive method to perfect an interest in aircraft. See, e.g., McCormack v. Air Center, Inc., 571 P.2d 835 (Okla. 1977) (holding that a subsequent repairman of an aircraft properly perfected his mechanic’s and material-man’s lien by filing a lien notice with the FAA even though the relevant Oklahoma statute required filing with the local county recorder, because the Oklahoma filing requirement was procedural rather than substantive, and thus, the 1958 Act preempted state filing requirements for aircraft). But see State v. Green, 158 N.J. Super. 124, 385 A.2d 896 (N.J. Super. Ct. App. Div. 1978) (holding that the FAA did not preempt or impliedly repeal a State regulatory apparatus and that, therefore, a private aircraft owner was liable for a $50 fine for his failure to register his aircraft with the State).

Recently, the United States Supreme Court considered the exclusivity of the 1958 Act’s filing requirement in Philco Aviation, Inc. v. Shackett, 103 S. Ct. 2476 (1983). In Philco, buyer-1 sought a declaratory judgment that they had clear title to their new aircraft, which they purchased from a dealer. The buyer-1 relied on the dealer to record their title in the aircraft, but the dealer never recorded the title. The dealer also sold the same aircraft, subsequently, to a second buyer to satisfy an indebted obligation to buyer-2. Buyer-2 recorded his bill of sale with the FAA but buyer-1 had possession of the plane. The Seventh Circuit, 631 F.2d 506, held that buyer-2 could not qualify as a good faith purchaser because it never had possession. Further, the court stated that buyer-2 was not a buyer in the ordinary course of business because U.C.C. § 1-201(9) excludes from it definition of a buyer in the ordinary course of business a purchaser who gives satisfaction of a money debt as value for the transaction. The Seventh Circuit failed to explain why buyer-1’s failure to file with the FAA did not significantly affect its analysis.

The Supreme Court reversed the Seventh Circuit, holding that the recording provisions of the 1958 Act preempt the Illinois law that permits transfer by possession without recordation. 103 S. Ct. at 2480. The Court reasoned that the express language of the statute as construed by the context and legislative history required all transfers of aircraft to be recorded before such transfer could affect the rights of innocent third parties. Id. at 2479-80. The Court concluded “we hold that state laws allowing undocumented or unrecorded transfers of interests in aircraft to affect innocent third parties are preempted by the federal Act.” Id. at 2480.

pears in a Senate amendment that withdrew from the 1938 Act the sentence, “[e]very instrument so recorded shall have priority over all other claims arising after July 1, 1939, against the aircraft subject thereto.” The ambiguous language of section 503, as enacted, could be interpreted to equate “validity” with priority and to give priority status to the party that files a security instrument with the federal administration. The statute, however, does not make priority depend upon the chronological order in which the parties filed. Under the literal wording of the statute, when several lien claimants each file lien instruments, each document is “valid” against each other filed document. The patent absurdity of this result emphasizes the inherent problems stemming from the omission of a priority scheme in section 503.

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83 CONG. REC. 6,757 (1938). No legislative history explains the withdrawal of this complete priority scheme. The sentence had followed the last part of section 503(c) of the Civil Aeronautics Act of 1938, 52 Stat. 973, 1006 (1938). See supra note 30. Congress intended the 1938 Act to create “protection” for lenders with interests in aircraft. See 1938 HEARINGS, supra note 23, at 406-07 (statement by Fred D. Fagg, Jr., Director of Air Commerce, Department of Commerce). The “protection” merely referred to the difficulty of multiple recordings of lenders' interests due to the high mobility of the aircraft through many states.


See supra note 30.

In 1948, Congress was concerned about the difficulty the airline industry had in obtaining secured financing for engines and propellers used to upgrade aircraft. Recordation of Liens on Engines and Parts; Liability for Injuries or Damages: Hearing on S. 2454 and S. 2455 Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce, 80th Cong., 2d Sess. 6, 7, 19 (1948) (statement by G. Nathan Calkins, Jr., General Counsel's Office, Civil Aeronautics Board and statement by Henry G. Hotchkiss, Counsel for Aircraft Industries Assoc. of America). Section 503 of the 1938 Act did not permit recordation of interests in engines and propellers, which resulted in creditor hesitance to loan money for such items. Congress amended section 503 to provide for recordation of interests in specific engines and for a general
B. Recordation Under the Federal Aviation Act of 1958


Section 1403 provides in relevant part:

(a) Establishment of recording system

The Secretary of Transportation shall establish and maintain a system for the recording of each and all of the following:

1. Any conveyance which affects the title to, or any interest in, any civil aircraft of the United States;
2. Any lease, and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which lease or other instrument affects the title to, or any interest in, any specifically identified aircraft engine or engines of seven hundred and fifty or more rated takeoff horsepower . . . or any specifically identified aircraft propeller capable of absorbing seven hundred and fifty or more rated takeoff shaft horsepower, and also any assignment or amendment thereof or supplement thereto;
3. Any lease, and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which lease or other instrument affects the title to, or any interest in, any aircraft engines, propellers, or appliances maintained by or on behalf of an air carrier certificated under section 1424(b) of this title for installation or use in aircraft, aircraft engines, or propellers, or any spare parts maintained by or on behalf of such an air carrier, which instrument need only describe generally by types the engines, propellers, appliances, and spare parts covered thereby and designate the location or locations thereof; and also any assignment or amendment thereof or supplement thereto.

(b) Recording or releases, cancellations, discharges or satisfactions

The Secretary of Transportation shall also record under the system provided for in subsection (a) of this section any release, cancellation, discharge or satisfaction relating to any conveyance or other instrument recorded under said system.
1958 Act contains recordation provisions substantially identical to those in the 1938 Act. Like the 1938 Act, the 1958 Act requires parties to record "conveyances" which are, upon filing, "valid as to all persons without further recordation." Congress did not change the definition of "conveyance" or provide a definition of "valid" or "validity." By leaving the recording provisions of the 1938 Act substantially unchanged, Congress perpetuated the ambiguity which confused courts regarding the Act's effect on priority among claimants to aircraft interests.

(c) Validity of conveyances or other instruments; filing

No conveyance or instrument the recording of which is provided for by subsection (a) of this section shall be valid in respect of such aircraft, aircraft engine or engines, propellers, appliances, or spare parts against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation.

(d) Effect of recording

Each conveyance or other instrument recorded by means of or under the system provided for in subsection (a) or (b) of this section shall from the time of its filing for recordation be valid as to all persons without further or other recordation, except that an instrument recorded pursuant to subsection (a)(3) of this section shall be effective only with respect to those of such items which may from time to time be situated at the designated location or locations and only while so situated: Provided, That an instrument recorded under subsection (a)(2) of this section shall not be affected as to the engine or engines, or propeller or propellers, specifically identified therein, by any instrument theretofore or thereafter recorded pursuant to subsection (a)(3) of this section.

Id.

1958 REPORT, supra note 44, at 3755. The provisions are not identical, but all the significant language is the same. Compare note 30, supra, with note 45, supra.


48 49 U.S.C. § 1403(d) (1976). This section changed the time of effectiveness provided by the 1938 Act. See Civil Aeronautics Act of 1938, Pub. L. No. 75-706, § 503(b), 52 Stat. 973, 1006 (repealed and reenacted at 49 U.S.C. § 1403(b) (1976)) (providing that "[a]ny instrument ... shall take effect from the date of its recordation").


51 Id.

52 See supra notes 39-42 and accompanying text. Filing with the FAA is accomplished by mailing a completed bill of sale on a form provided by the FAA along with the requisite fee to the FAA recording office in Oklahoma City, Oklahoma. See
In 1964, Congress amended the 1958 Act to clarify administrative and judicial interpretation of section 503. The legislature recognized that borrowers, lenders and courts were confused about what law applied to determine whether a recorded instrument was "valid." Accordingly, Congress added section 506 to the 1958 Act to designate the law of the place where the security agreement was delivered as controlling. The Senate stated:

When the instrument has been filed for recordation under the law, all persons are deemed to have notice of its existence and its effect on title to the property covered thereby. Consequently, to determine whether there are any encumbrances on the aircraft, it is only necessary to consult the central file.

Without question the amendment federally preempted local filing requirements and procedures. The legislative history indicates that Congress, as a whole, likewise intended a buyer to have constructive notice of the contents of filed instruments.

Section 506, by its terms, does not designate the controlling

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90 49 U.S.C. § 1406 (1976). Section 1406 provides:

The validity of any instrument the recording of which is provided for by section 1403 of this title shall be governed by the laws of the State, District of Columbia, or territory of possession of the United States in which such instrument is delivered, irrespective of the location or the place of delivery of the property which is the subject of such instrument. Where the place of intended delivery of such instrument is specified therein, it shall constitute presumptive evidence that such instrument was delivered at the place so specified.

Id.

92 The statutory language appears to refer to the enforceability of the security agreement among parties to the agreement. The Senate Commerce Committee reported that the amendment was designed to clarify which jurisdiction's laws must be followed to create an enforceable contract. 1964 Report, supra note 54, at 2320.

93 Id. at 2323.

94 See supra note 37.

95 See supra text at note 57.
law in many situations. The statute requires courts to resolve choice-of-law questions in situations such as conflicts between two parties with interests in the same aircraft, whose contracts were delivered in different states, and who seek judicial relief in a third state. The statutory language and legislative history make no mention of the law which should control subsequent lawsuits involving litigants who were not original parties to the filed agreement.

In addition to adding section 506, Congress amended section 503(e) to permit the FAA to exempt certain lien instruments from the notarization requirement. At the same time, the Senate stated in its report that it intended to permit interested parties to file non-consensual lien instruments such as judicial decrees. This amendment, in effect, broadened the language of section 503, which was limited to two-party consensual transactions.

Today, section 503 of the 1958 Act provides for the filing and recordation of interests in aircraft and interests in specific aircraft parts. The statute permits parties to file liens on spare parts in inventory without designating those parts specifically, and clearly covers consensual transactions.

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*See infra notes 278-84 and accompanying text.
* See supra note 55.
* Id.
* 1964 REPORT, supra note 54, at 2321.
* See supra notes 34 and 47 and accompanying text. The accompanying regulation, 14 C.F.R. § 49.31 (1982), incorporated the expanded view by permitting non-consensual liens to be filed. The regulation provides:

  This subpart applies to the recording of the following kinds of conveyances:
  
  (a) A bill of sale, contract of conditional sale, assignment of an interest under a contract of conditional sale, mortgage, assignment of mortgage, lease, equipment trust, notice of tax lien or of other lien, or other instrument affecting title to, or any interest in, aircraft.

  14 C.F.R. § 49.31 (1982).
* 49 U.S.C. § 1403(a)(3) (1976). This is called a basket-lien. See supra note 42.
* See supra notes 33-34 and 46-50 and accompanying text.
Moreover, the 1964 amendment\textsuperscript{71} expands the recording provisions to include non-consensual liens.\textsuperscript{72} Parties who file their lien instruments with the FAA actually or constructively notify the world of the lien's existence and its effect on the title to an aircraft or parts.\textsuperscript{73} The law of the state where the security agreement was delivered controls the determination of the agreement's "validity;"\textsuperscript{74} however, Congress has not clarified the issue of priority among claimants to interests in aircraft.\textsuperscript{75}

II. THE OPERATION OF UNIFORM COMMERCIAL CODE, ARTICLE 9

A general overview of a few UCC provisions regarding secured transactions is necessary because the UCC provides a uniform basis for state laws governing commercial transactions.\textsuperscript{76} Article 9 of the UCC establishes a system of priorities among lien claimants, applicable to most personal property transactions.\textsuperscript{77} Except for those instances where the 1958 Act totally preempts UCC provisions, the UCC will control the priorities among lien claimants in aircraft.\textsuperscript{78}

A typical conflict occurs between a consumer buyer, who pays full purchase price, and the seller's inventory lender, who retains a secured interest in the goods sold.\textsuperscript{79} Under the UCC, priority conflicts between a buyer in the ordinary course of business\textsuperscript{80} and a dealer are resolved in favor of the

\textsuperscript{72} See supra notes 62-66 and accompanying text.
\textsuperscript{73} 1964 REPORT, supra note 54, at 2320.
\textsuperscript{74} 49 U.S.C. § 1406 (1976). See supra notes 55-56 and accompanying text. Congress omitted a provision to determine complex conflicts of laws questions.
\textsuperscript{75} See supra notes 37-43, 50-52 and accompanying text.
\textsuperscript{76} See supra note 4.
\textsuperscript{77} See infra notes 80-84 and accompanying text.
\textsuperscript{78} See infra notes 96-100 and accompanying text.
\textsuperscript{79} See supra notes 10-11 and accompanying text.
\textsuperscript{80} U.C.C. § 1-201(9) (1977). The UCC definition is in part: "Buyer in ordinary course of business" means 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 . . . . "Buying" may be for cash or by exchange of other property or on secured or unsecured
A buyer in the ordinary course of business may know that a security interest in the purchased goods exists and still take good title free of the security interest. If the buyer knows, however, that the sale to him violates the seller's security interest, the buyer is not in the "ordinary course of business," and does not take the goods free of the security interest. A sale to a buyer in the ordinary course of business effectively terminates a lien on goods held by a lender who finances a dealer's inventory.

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credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer ... as security for or in total or partial satisfaction of a money debt.

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U.C.C. § 9-307(1) (1977). This subsection provides that "[a] buyer in ordinary course of business (subsection (9) of Section 1-201) ... takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence." Id.

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Comment 2 states:

Reading the two provisions together, it results that the buyer takes free if he merely knows that there is a security interest which covers the goods but takes subject if he knows in addition, that the sale is in violation of some term in the security agreement not waived by the words or conduct of the secured party.

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U.C.C. § 9-306(2) (1977) provides:

Except where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

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U.C.C. § 9-307(1) "otherwise provides" that a buyer in the ordinary course takes free of a security interest created by his seller. See supra note 81 and accompanying text. Some courts rely on a consent theory pursuant to U.C.C. § 9-306(2), deeming the lender to actually or impliedly consent to the dealer's sale to a buyer in the ordinary course of business. See infra notes 292-300 and accompanying text. White and Summers stated that U.C.C. § 9-306(2) covers the usual case of inventory floor plans when the agreement contains a consent clause. WHITE & SUMMERS, supra note 83, at 1066. The UCC may similarly protect a buyer other than a buyer in the ordinary course of business from a third-party security interest. U.C.C. § 9-307(2) (1977) provides:

In the case of consumer goods, a buyer takes free of a security interest
Since its development in England, the law governing perfection of secured transactions has required a party to file its security instrument or notice of its interest with a designated government office. Prior to the UCC's enactment, most legislation required "transaction filing" whereby the secured party filed a security instrument containing an exact description of the secured property. The UCC drafters later provided for "notice filing" whereby the secured party would file a financing statement that described the types of collateral, but not specific items.

"Notice filing" eases the oppressive burden that was placed on inventory financers by "transaction filing" statutes which required the filing of separate security instruments for each newly acquired piece of inventory and which hampered in-

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even though perfected if he buys without knowledge of the security interest, for value, and for his own personal, family or household purposes, unless prior to the purchase the secured party has filed a financing statement covering such goods.

Id. Such a buyer typically is a consumer purchasing a good from another consumer. The UCC, however, protects a third-party's security interest given by a non-dealer if the buyer knew of its existence or the secured party filed its interest properly. Therefore, a buyer from a non-dealer seller will take the good subject to the security interest whether or not the buyer knows of its existence if it is recorded.

1 Gilmore, Security Interests in Personal Property § 15.1, at 462-63 (1965) [hereinafter cited as Gilmore].

See U.C.C. § 9-302(1) (providing that "[a] financing statement must be filed to perfect all security interests"); id. § 9-401 (specifying the place for filing); id. § 9-402(1) (stating the requirements of a valid financing statement). Section 9-402(1) provides as follows:

A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral.

Id. § 15.2, at 467-68. The author states:

Such constant filing would have been both onerous and expensive, to say nothing of the disastrous effect it would have had on the files themselves: if a searcher had to hunt through hundreds, if not thousands, of contracts in order to determine which items of existing inventory were subject to a security interest, the files might just as well not exist at all.

Id.
inventory financing. A UCC financing statement need only give notice that a prior, perfected interest exists. It does not provide information regarding the specifics of the prior interest. Because the financing statement contains the creditor's address, interested persons can question the creditor or debtor regarding the creditor's interest in the collateral. “Notice filing” under the UCC, therefore, provides only general, public notice that an interest in unspecified goods belonging to the debtor possibly exists.

The UCC provides limited uniformity to the law governing liens which result from services rendered by repairmen subsequent to the perfection of the secured party's interest. The UCC protects the subsequent repairman's interest by granting his lien priority over a prior security interest. Individual states may override the UCC's provision, however, by enacting mechanics's and materialman's lien statutes which deny servicemen priority.

The UCC defers to federal law when the latter regulates se-
secured transactions in aircraft. The UCC also recognizes that federal acts containing filing provisions preempt the UCC's filing provisions. When such a federal statute applies, complying with that statute is the only method of perfecting a security interest.

Although the drafters of the UCC recognized that the 1958 Act's filing provisions, section 503, 49 U.S.C. § 1403 (1976), preempted the UCC filing provisions, they stated that the 1958 Act did not contain a complete priority scheme which would preempt the UCC. Therefore, to the extent that the

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94 U.C.C. § 9-104 (1977). The section provides in relevant part: "This Article does not apply (a) to a security interest subject to any statute of the United States, to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property ...." Id.

95 U.C.C. § 9-302(3)(a) (1977). This section provides:
(3) The filing of a financing statement otherwise required by this Article is not necessary or effective to perfect a security interest in property subject to
(a) a statute or treaty of the United States which provides for a national or international registration or a national or international certificate of title or which specifies a place of filing different from that specified in this Article for filing of the security interest; ....

Id.

96 U.C.C. § 9-302(4) (1977) This section provides:
(4) Compliance with a statute or treaty described in subsection (3) [supra note 97] is equivalent to the filing of a financing statement under this Article, and a security interest in property subject to the statute or treaty can be perfected only by compliance therewith except as provided in Section 9-103 on multiple state transactions.

Id.

97 U.C.C. § 9-302 comment 8 (1977). The drafters stated, in relevant part: 8. Subsection (3) [supra note 97] exempts from the filing provisions of this Article transactions as to which an adequate system of filing, state or federal, has been set up outside this Article and subsection (4) makes clear that when such a system exists perfection of a relevant security interest can be had only through compliance with that system (i.e., filing under this Article is not a permissible alternative).


Id.

98 U.C.C. § 9-104 comment 1 (1977). The U.C.C. drafters commented:
1. Where a federal statute regulates the incidents of security interests in particular types of property, those security interests are of course governed by the federal statute and excluded from this Article. The Ship Mortgage Act, 1920, is an example of such a federal act. The present provisions of the Federal Aviation Act of 1958 (49 U.S.C. 1403 et
1958 Act provides a filing scheme, the UCC defers to the federal statute. The UCC drafters intended, however, for the UCC provisions, rather than the 1958 Act, to govern priority disputes among claimants to interests in aircraft.

III. THE EFFECT OF THE 1958 ACT'S FILING PROVISIONS ON THE UCC PRIORITY SYSTEM

Every court in which claimants with conflicting liens in aircraft seek relief must determine the 1958 Act's impact on the UCC's priority system. The UCC drafters recognized

seq.) call for registration of title to and liens upon aircraft with the Civil Aeronautics Administrator [sic] and such registration is recognized as equivalent to filing under this Article (Section 9-302(3)); but to the extent that the Federal Aviation Act does not regulate the rights of parties to and third parties affected by such transactions, security interests in aircraft remain subject to this Article. Although the Federal Copyright Act contains provisions permitting the mortgage of a copyright and for the recording of an assignment of a copyright (17 U.S.C. §§ 28, 30) such a statute would not seem to contain sufficient provisions regulating the rights of the parties and third parties to exclude security interests in copyrights from the provisions of this Article. . . . Compare also with respect to patents, 35 U.S.C. § 47. The filing provisions under these Acts, like the filing provisions of the Federal Aviation Act, are recognized as the equivalent to filing under this Article. Section 9-302(3) and (4).

. . . The exclusionary language in paragraph (a) [supra note 96] is that this Article does not apply to such security interest "to the extent" that the federal statute governs the rights of the parties. Thus if the federal statute contained no relevant provision, this Article could be looked to for an answer.

Id. See infra notes 260-67 and accompanying text (comparing the provisions of the FAA, Ship Mortgage Act and Federal Copyright Act).


102 See, e.g., Gary Aircraft Corp. v. Gen. Dynamics Corp. (In re Gary Aircraft Corp.), 681 F.2d 365 (5th Cir. 1982), cert. denied 103 S. Ct. 3110 (1983), discussed infra notes 242-70 and accompanying text; Note, Sales-Federal Registration of Air-
that the 1958 Act requires lienholders to file with the FAA to perfect their liens. Courts must now determine whether the 1958 Act also preempts the UCC's priority system or impacts the UCC in other ways.

A. The Extent to which the 1958 Act Preempts the UCC

1. The Argument for Total Preemption.


Several recent cases have held that the 1958 Act preempts the entire area of recording and governs priorities among lien claimants in aircraft. In 1981, the bankruptcy court in Sun Bank, N.A. v. Snell (In re Cone) broadly stated that Congress preempted the field of filing and recording title instruments and state priority laws. In Snell, the lender had loaned the bankrupt money and received a lien on his aircraft which the lender timely filed with the FAA. A creditor obtained a judgement against the bankrupt in another state and docketed its writ of execution in the bankrupt's state with the federal marshal, who levied upon and seized the aircraft.

The creditor argued that its lien was perfected when the it docketed its writ of execution with the U.S. Marshal and that it was superior to the lender's lien. The court determined...
that under Florida law, a writ of execution on personal property is effective when it is docketed with the U.S. Marshal.\textsuperscript{110}

The court held, however, that the 1958 Act preempted state-prescribed methods of perfecting liens in aircraft\textsuperscript{111} and required actual seizure of the aircraft combined with either docketing one's writ of execution or filing the writ of execution with the FAA pursuant to section 503 of the 1958 Act.\textsuperscript{112} It concluded that the lender had perfected its lien by the proper method prior to the creditor,\textsuperscript{113} and that the lender held an interest superior to the creditor.\textsuperscript{114}

The \textit{Snell} opinion has been interpreted as supporting total preemption of state law by the 1958 Act.\textsuperscript{115} The court's initial statement in \textit{Snell}, however, that the 1958 Act preempted state priority systems does not appear necessary to the court's reasoning or its holding. First, to support its statement that the 1958 Act preempts state priorities, the court in \textit{Snell} cited \textit{Danning v. Pacific Propeller, Inc. (In re Holiday Airlines Corp.).}\textsuperscript{116} The court in \textit{Pacific Propeller} thoughtfully analyzed controlling state law\textsuperscript{117} and refused to hold that the 1958 Act determines priority questions.\textsuperscript{118} Second, both the lender and

\textsuperscript{110} Id. at 928.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} The court carefully noted the chronology of events. The three crucial dates are:

(1) On August 12, 1980 a writ of execution in favor of the judgment creditor was issued from the United States District Court for the Middle District of Florida and was docketed with the United States Marshal for the district; (2) on September 24, 1980 the purchase money lender recorded with the FAA its security interest in the aircraft, purchased by the bankrupt on September 17, 1980; (3) on November 26, 1980 the United States Marshal levied upon and seized the aircraft pursuant to the writ of execution. \textit{Id.} at 926.
\textsuperscript{115} Id. at 930.
\textsuperscript{116} See, e.g., \textit{Gary Aircraft Corp. v. Gen. Dynamics Corp. (In re Gary Aircraft Corp.), 681 F.2d 365 (5th Cir. 1982), cert. denied, 103 S.Ct. 3110 (1983), discussed infra notes 242-70 and accompanying text.}
\textsuperscript{117} 620 F.2d 731 (9th Cir. 1980).
\textsuperscript{118} Id. at 733-35. See infra notes 278-84 and accompanying text.
\textsuperscript{119} The Court in \textit{Pacific Propeller} initially made the broad statement that "[t]he provisions of the Federal Aviation Act preempt state law insofar as they relate to the priority of liens." 620 F.2d at 733. It may be that the court in \textit{Sun Bank} merely began its opinion in a similar fashion meaning to say no more than \textit{Pacific Propeller}. The interpretation of \textit{Sun Bank} by the Fifth Circuit in \textit{Gary Aircraft Corp.}, 681 F.2d 365 (5th Cir. 1982), as holding that the 1958 Act totally preempts state priority law, does
creditor in *Snell* argued that local law, rather than the 1958 Act, controlled the priority issue. Finally, the court in *Snell* merely held that the 1958 Act determined the appropriate method to perfect a security interest which determined which party first perfected its interest. The court looked to the 1958 Act's filing provisions, rather than its preemption of state priority law, in protecting the lender's lien. The court in *Snell*, therefore, specifically held that the 1958 Act preempts the UCC's filing provisions which necessarily include the proper method for perfecting liens on aircraft.

A Florida appellate court considered the extent to which the 1958 Act preempted Florida's version of the UCC in *O'Neill v. Barnett Bank of Jacksonville, N.A.* The buyer in *O'Neill* purchased an aircraft from a fixed base operator (FBO) knowing that it had been used for rental purposes and was not part of the FBO's sales inventory. The FBO's lender did not finance the aircraft as part of the inventory financing arrangement. The lender successfully argued that the buyer knew that the aircraft sold to him was not part of the ordinary course of the seller's business and, further, that this knowledge deprived the buyer of the protection afforded a buyer in the ordinary course of business. Nevertheless,
the court held that the 1958 Act preempted the section of Florida's commercial code equivalent to UCC section 9-307(1) making the buyer in the ordinary course of business doctrine inapplicable to aircraft purchasers.

Despite the court's broad statement that the 1958 Act governs priority conflicts among lien claimants, the court did not explain how the 1958 Act protects a prior secured party against a subsequent purchaser who does not buy in the ordinary course of business. Instead the court stated that it adopted the reasoning of Dowell v. Beech Acceptance Corp., a case which held that the 1958 Act totally preempted state priority laws established by the UCC. The O'Neill court summarily held for the lender, although it is not clear how the court's adoption of Dowell led to that result. Dowell involved a buyer in the ordinary course of business, whereas the court in O'Neill specifically held the buyer was not a buyer in the ordinary course of business. Since the court noted that UCC section 9-307(2) would favor the lender just as would the 1958 Act, the 1958 Act's preemption of state commercial law does not change the result. The court in O'Neill must have interpreted Dowell to hold that any lien recorded with the FAA defeats subsequent lien claimants of all types.

The facts of Dowell are typical of the transactions underlying the sale of new aircraft. The manufacturer sold an aircraft to a regional distributor who sold it to a dealer via a con-
ditional sales contract. The regional distributor sold its security interest, which it held pursuant to the conditional sales contract, to the manufacturer's finance company. Although the conditional sales contract prohibited the dealer from selling the aircraft without the consent of the manufacturer's finance company, the dealer sold the plane to a consumer purchaser without consent. Two months after the sale, the dealer informed the regional distributor of the sale, after which the regional distributor removed the plane from the buyer's possession without the buyer's knowledge or consent. The court observed that the buyer knew he could check the FAA's registry in Oklahoma City, Oklahoma for a small fee of $3.50, and reasoned that had he done so he would have discovered the finance company's interest, filed eight months before the sale, and the prohibition against the sale to the buyer.

The buyer can discover this information from the FAA records, because section 503 of the 1958 Act is a "transaction filing" statute requiring that the title instrument be filed. The court reasoned that after a title search the buyer would not have been a buyer in the ordinary course of business under UCC section 9-307(1) because he would have known the sale to him was in violation of a third party's security interest. The buyer said he did not check the FAA registry because the plane was new, and he knew the seller was an authorized dealer. Furthermore, the buyer did not record his bill of sale with the FAA, but "apparently" relied on the dealer's promise to file it for him.

The court held that the 1958 Act preempts California's

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136 3 Cal. 3d at 546, 476 P.2d at 401, 91 Cal. Rptr. at 1-2.
137 Id. at 546, 476 P.2d at 401-02, 91 Cal. Rptr. at 2.
138 Id.
139 Id. at 547, 476 P.2d at 402, 91 Cal. Rptr. at 2.
140 Id.
141 Id. at 551, 476 P.2d at 405, 91 Cal. Rptr. at 5.
142 See supra notes 85-93 and accompanying text; infra notes 301-34 and accompanying text.
143 See supra notes 80-84 and accompanying text.
144 3 Cal. 3d at 546, 476 P.2d at 402, 91 Cal. Rptr. at 2.
145 Id.
commercial code and does not protect a buyer in the ordinary course of business. The court reasoned that the 1958 Act created a "federal policy" requiring recordation to protect previously acquired aircraft titles. The tribunal understood the Act to be a complete and comprehensive system for recording interests in aircraft, and further reasoned that purchasers had the duty to inquire at the FAA registry con-

146 Id. at 549, 550-51, 476 P.2d at 404, 405, 91 Cal. Rptr. at 4, 5.
147 Id. at 549, 476 P.2d at 404, 91 Cal. Rptr. at 4. The court used the word "protect," which it may have borrowed from the original legislative history to section 503 of the Civil Aeronautics Act of 1938. 1938 Hearing, supra note 23, at 406, discussed supra note 39. The court in Dowell, however, did not cite any legislative history that supported its statement. Indeed, the "protection" the Dowell court interpreted the 1958 Act to grant to recorded interests was complete priority over subsequent [or subsequently recorded] interests. The "protection" mentioned in the 1938 Hearing involved a centralized recording system that simplified the way lenders had to perfect their liens. See supra note 39; Comment, Taking the Lender for a Ride: Section 1403 of the Federal Aviation Act and the Buyer in Ordinary Course of Business, 36 Wash. & Lee L. Rev. 205, 221 n.144 (1979) [hereinafter cited as Comment].
148 3 Cal. 3d at 550, 476 P.2d at 404, 91 Cal. Rptr. at 4. For this proposition, the court relied on two previous California cases: Pope v. Nat'l Aero Fin. Co., 236 Cal. App. 2d 722, 46 Cal. Rptr. 233 (1965), and International Atlas Servs., Inc. v. Twentieth Century Aircraft Co., 251 Cal. App. 2d 434, 59 Cal. Rptr. 495 (1967). The court in Pope held that plaintiffs merely had acquired an interest in a flying club and did not have specific interest in the aircraft in issue. The court also stated that the 1958 Act preempted the field of recording conveyances of aircraft which made it incumbent on plaintiffs to record their alleged interest, otherwise, the court reasoned, the plaintiffs would not be entitled to any priority. 46 Cal. Rptr. at 241. In International Atlas, a subsequent repairman had repaired the disputed aircraft under an agreement whereby he leased three aircraft engines and a quick engine change unit (QEC) to the owner, but failed to record these lease agreements pursuant to 49 U.S.C. § 1403. The secured party had recorded its security interest before repairs commenced. The secured party foreclosed and repossessed the aircraft when the owner defaulted and the subsequent repairman sued for its installed equipment. The court acknowledged that under state law the subsequent repairman would prevail. The court held, however, that the 1958 Act preempted the field by virtue of its completeness. A lease was recordable under 49 U.S.C. § 1403 so the subsequent repairman's failure to record before repossession subjected its interest to that held by the secured party. Neither the Pope nor the International Atlas opinions refer to any legislative history of the 1938 Act or the 1958 Act. Both opinions read 49 U.S.C. § 1403 at face value as establishing priority in favor of interests first recorded in accordance with the section.
149 The court cited In re Veterans' Air Express Co., 76 F. Supp. 684 (D.N.J. 1948), for this proposition. In Veterans' Air Express a subsequent repairman sought compensation for performance of extensive repairs and refitting of an aircraft owned by a bankrupt but mortgaged to the United States Government. The subsequent repairman, pursuant to California statute, held a possessory lien for its repair bill while the United States sought priority of its prior recorded mortgage pursuant to section 503 of the 1938 Act. The court held that Congress preempted the entire field of activity
cerning title to their prospective purchases. Absent a duty to inquire, buyers would "cavalierly" ignore the FAA registry to retain their status as buyers in the ordinary course of business, thus taking their aircraft free of perfected security interests. Refusal by buyers to search the FAA registry, the court noted, would "eviscerate" the federal policy that requires a party to record its interest in an aircraft because federal filing would not afford a secured party protection from subsequent purchasers.

b. Comment.

The opinion in Dowell contains perceptive observations but does not have support for its conclusion. Legislative history provides little credence for the court's proposition that Congress intended to protect prior recorded instruments by grant-

by enacting the 1938 Act. Id. at 686. The court further stated that all persons have constructive notice of liens duly recorded and are charged with a duty to check the federal registry. The important language of the court is:

It is clear that the Congress has prescribed the only way in which aircraft may be transferred and in which liens upon aircraft may be duly recorded. In this manner, all persons dealing with aircraft are upon full legal notice concerning possible liens and are charged with the duty of inquiry at the central recording office of the Civil Aeronautic Administration with respect to any aircraft in which they might be concerned.

Id. at 688. The opinion, which was the first to hold the 1938 Act was constitutional in its application to intrastate aircraft, see supra note 101, was primarily decided on the sovereignty of the United States over any claim established under state law, and not decided on a priority system in 49 U.S.C. § 523 (codified as amended at 49 U.S.C. § 1403 (1976)). See Scott, supra note 102, at 203; Sigman, supra note 101, at 364-65; Note, Federal Recordation of Title to Intrastate Aircraft, 49 Colum. L. Rev. 1248 (1949). Cf. United States v. United Aircraft Corp., 80 F. Supp. 52 (D. Conn. 1948) (holding that the 1958 Act preempted the field of conveyancing interests in aircraft, but a mortgage on an aircraft that did not describe specifically the two engines was insufficient notice to third parties of the secured party's interest in the engines and, therefore, void against a subsequent repairman of the engines).

150 3 Cal. 3d at 551, 476 P.2d at 405, 91 Cal. Rptr. at 5.
151 Id. at 550-51, 476 P.2d at 405, 91 Cal. Rptr. at 5. The court stated:

If prior recorded interests are not protected against subsequent buyers who fail to search title, the federal policy in favor of the recordation of aircraft titles will be frustrated and subsequent purchasers in California will cavalierly decline to investigate title so as to avoid "actual notice" under Commercial Code Section 9307.

Id. Section 9307 is equivalent to U.C.C. 9-307. See supra note 81.
152 3 Cal. 3d at 552, 476 P.2d at 406, 91 Cal. Rptr. at 6.
ing them priority over subsequently acquired interests. The California Supreme Court accurately perceived, however, that U.C.C. section 9-307(1) would permit subsequent purchasers and lenders to "cavalierly" refuse to check the FAA registry and discover the status of title to aircraft sold by dealers. The court simply needed a stronger premise than the federal policy it attributed to the 1958 Act to support the result in Dowell.

The opinions in O'Neill and Dowell, which hold that the 1958 Act totally preempts state law priority schemes contained in the UCC, may contain fatally defective reasoning. The court in neither case examined the legislative history of the 1938 Act or the 1958 Act to determine whether Congress intended to preempt the field of priority among lien claimants. Because Congressional intent is necessary for a federal statute to preempt a conflicting state statute, the reasoning in O'Neill and Dowell may not be a sound basis from which to infer that the 1958 Act totally preempts the UCC priority scheme.

Despite the possible flaw in the Dowell reasoning, the court accurately appraised the impact of state law on the 1958 Act's filing requirement for buyers in the ordinary course of busi-

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165 See supra notes 39 and 147.
166 See supra note 84.
168 The court stated forcefully that "[t]he federal policy to foster recordation and to protect recorded interests is eviscerated by a rule which relies on state laws to protect the buyer in the ordinary course of business even though he fails to undertake a simple title search which would have readily revealed all encumbrances." 3 Cal. 3d at 552, 476 P.2d at 406, 91 Cal. Rptr. at 6.
169 For other possible bases to prevent the operation of U.C.C. § 9-307(2), see infra notes 292-334 and accompanying text.
170 See Gary Aircraft Corp. v. Gen. Dynamics Corp. (In re Gary Aircraft Corp.), 681 F.2d 365, 369-70 (5th Cir. 1982) (reasoning with cited authority that the intent of Congress is determinative in deciding whether a federal statute preempts a conflicting state statute under the supremacy clause, article V of the United States Constitution), cert. denied, 103 S. Ct. 3110 (1983).
Although the federal legislation may not support the court's interpretation of the 1958 Act with regard to preemption and priority, the policies behind the Act would not sanction the impunity with which buyers in the ordinary course of business ignore the FAA registry. By stating that "all persons are deemed to have notice of [a filed instrument's] existence and its effect on title to the property covered thereby," Congress made plain its intent that filing with the FAA gives constructive notice of the contents of the filed document to all persons.

2. The Arguments for Partial Federal Preemption.

The majority of state and federal courts now hold that the 1958 Act preempts only the filing and recording provisions of the UCC and that the UCC governs priorities among lien claimants. The courts employ several arguments to support the theory that the UCC governs the priority question. The differences in reasoning affect the further determination regarding which state's law should control.

1 See supra notes 151-52 and accompanying text.
2 In every case discussed in this comment, one of the parties had failed to check the federal register for title to new aircraft purchased from dealers even though often they both knew how and had done so previously (especially, lenders experienced in financing the purchase of used aircraft from non-dealers). See, e.g., Tex. Nat'l Bank of Houston v. Aufderheide, 235 F. Supp. 599, 601 (E.D. Ark. 1964) (neither the purchasers nor the purchase money lender checked the federal records); Haynes v. Gen. Elec. Credit Corp., 432 F. Supp. 763, 764 (W.D. Va. 1977), aff'd per curiam, 582 F.2d 869 (4th Cir. 1978) (buyer failed to search the federal registry); Cessna Fin. Corp. v. Skyways Enter., Inc., 580 S.W.2d 491, 493 (Ky. 1979) (lender who was experienced in title searches on aircraft did not perform one because buyer whom it financed was a buyer in the ordinary course of business).
3 See Sigman, supra note 101, at 338-76 (setting out the number of court decisions favoring preemption of state law by the 1958 Act versus the number of court decisions favoring only partial preemption as of 1973; the author has analyzed this using categories of plaintiffs and defendants based on type of alleged claim in the aircraft).
4 The Ninth Circuit recently avoided determining which of three state laws controlled the resolution of priority among lien claimants. In CIM Int'l v. United States, 641 F.2d 671 (9th Cir. 1980) the court held that the UCC governed the suit brought in federal court. The court did not specify which state's laws applied, because the UCC had been adopted by all three states whose law potentially governed the controversy. Id. at 675. This is unsatisfactory because case law could differ on such things as the interpretation of the UCC language or burden of proof. See, e.g., Bank of Lexing-
a. The Continuing Vitality of Common Law as a Reason for Partial Preemption.

One court has held that state law governs disputes among lien claimants in aircraft under the theory that the common law priority scheme has continuing validity. The federal district court in *Texas National Bank of Houston v. Aufderheide* held that section 503 of the 1958 Act did not repeal the general common law of chattel mortgages. In *Aufderheide*, a dealer financed its stock of new planes with an inventory lender who filed a lien on the aircraft with the FAA. A partnership subsequently purchased an aircraft from the dealer by financing the purchase price with a bank. The bank did not record its mortgage until the controversy arose. The court first determined that section 506 of the 1958 Act determined only which state's law governed the "initial" or "inherent" validity of security agreements, and then decided that section 503 does not govern the validity of instruments as to third parties or the priority of a recorded interest as to other lien claimants. By using unique reasoning, the court concluded that general common law of chattel
mortgages controlled because the 1958 Act had not repealed this law. The court cited general propositions of chattel mortgage law which are consistent with the buyer in the ordinary course doctrine, and held for the partnership as a buyer in the ordinary course of business.

b. The Use of the Erie Doctrine as a Reason for Partial Preemption.

Unlike the court in Aufderheide, the federal district court in United States Aviation Underwriters, Inc. v. WTAE Flying Club held that state law applied to determine priority among lien claimants. In WTAE, a dealer financed an aircraft with an inventory loan. The inventory lender filed its

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174 The court reasoned "'[i]t does not follow, however, that section 1403 has repealed or abolished the general rule of chattel mortgage law . . . .'" 235 F. Supp. at 603.


176 The court conceded that the general propositions were similar to U.C.C. § 9-307(1) but it stated that Texas had not yet adopted the U.C.C. 235 F. Supp. at 604. 235 F. Supp. at 605. The court explained that the public policy behind protection of the buyer in the ordinary course granted such buyers the valid assumption that the dealer is authorized to convey the goods purchased free and clear of third party interests. The court stated:

Ordinarily, when a person goes into a merchant's place of business to make a purchase, whether it be of an automobile, a television set, a washing machine, or a pound of nails, the purchaser ought to have the right to assume that the merchant has a right to sell the commodity in question and should not be required to make a record search before purchasing or to see to it that the merchant obtains a valid release of the item from a bank floor plan before delivering it to the purchaser and receiving his money or obligation. The Court sees no reason why that right should not extend to the purchaser of an airplane who buys if from a recognized dealer from a regular inventory or display and in the ordinary course of business.

Id. at 604.

178 See supra notes 164-77 and accompanying text.


180 Id. at 346 n.5.

181 Id. at 344.
lien with the FAA.\textsuperscript{182} A member of an unincorporated association purchased the aircraft from the dealer and made it available to the association,\textsuperscript{183} which in turn sought a loan from a bank to repay its member the cost of the plane.\textsuperscript{184} Instead of paying the proceeds of the loan to the designated member and without that member's knowledge, the bank paid the inventory lender to obtain release of its recorded lien.\textsuperscript{185} The association sought to obtain the proceeds of the loan.\textsuperscript{186}

The court in \textit{WTAE} first determined that questions regarding the validity of the bank's mortgage were resolved under state law,\textsuperscript{187} reasoning that under the doctrine of \textit{Erie Railroad Co. v. Tomkins},\textsuperscript{188} state law controlled the controversy.\textsuperscript{189} The court did not explain how the \textit{Erie} doctrine impacted the 1958 Act's recording provisions and cited case law which did not mention \textit{Erie}.\textsuperscript{190} The court then noted that the relevant state law, U.C.C. section 9-307(1),\textsuperscript{191} protected the buyer in the ordinary course of business and terminated the inventory lender's lien.\textsuperscript{192} Holding that the association's bank had negligently paid the prior but invalid lien, the court found the bank obligated to the association for the full amount.\textsuperscript{193}

The court's rationale for applying state law over the 1958 Act is suspect. The court in \textit{WTAE} failed to explain and supp-

\textsuperscript{182} Id.
\textsuperscript{183} Id. at 343.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{186} The amount of the loan was $6,000. The bank paid $5,000 to the prior lienor. Id. at 344.
\textsuperscript{187} Id. at 345.
\textsuperscript{188} Id. at 346 n.5.
\textsuperscript{189} 304 U.S. 64 (1938).
\textsuperscript{190} 300 F. Supp. at 346 n.5. The court stated "[a]ll questions respecting the validity of the Bank's aircraft chattel mortgage are addressed to state law under the doctrine of \textit{Erie R. Co. v. Tomkins} ... notwithstanding the federal aircraft recording statute, § 503(d) ... ." Id.
\textsuperscript{191} Id.
\textsuperscript{192} The court did not utilize 49 U.S.C. § 1406, \textit{supra} note 55, because it was enacted after the relevant part of the underlying transaction in \textit{WTAE} occurred. 300 F. Supp. at 348 n.7.
\textsuperscript{193} Id. at 346. One of \textit{WTAE}'s members had obtained $2,200 repayment from the dealer's lender. The member paid this to \textit{WTAE}'s bank less his expenses of $224.60 incurred in obtaining the repayment. The remaining amount at issue with accrued interest was $4,149.40. Id. at 345.
port adequately its use of the *Erie* doctrine,\(^\text{194}\) and did not explain why an act of Congress could not preempt a state law even if the state law would otherwise control under the *Erie* doctrine.

c. *The Use of Section 506 of the 1958 Act to Apply State Law to Controversies between Lien Claimants.*

Several state and federal courts have reasoned that section 506 of the 1958 Act\(^\text{195}\) federalized the choice of law for suits involving lien claimants in aircraft. In *Sanders v. M.D. Aircraft Sales, Inc.*,\(^\text{196}\) a dealer executed a floor plan mortgage on its inventory in favor of an inventory lender.\(^\text{197}\) The mortgage, which the lender filed with the FAA, permitted the dealer to sell the financed inventory without the lender's consent unless the dealer was in default on its payments.\(^\text{198}\) A purchaser bought an aircraft from the dealer,\(^\text{199}\) and the inventory lender subsequently asserted its lien in the aircraft to be superior to the buyer's title when the lender discovered that the dealer was in default.\(^\text{200}\) The trial court held that section 503 of the 1958 Act totally preempted state law, and therefore displaced U.C.C. section 9-307(1), which the court acknowledged would have protected the buyer.\(^\text{201}\)

The Third Circuit Court of Appeals reversed the trial court's holding concluding that only the 1958 Act's recording provisions preempt state law.\(^\text{202}\) The court reasoned that Congress intended section 506 to determine which state law controlled controversies between lien claimants.\(^\text{203}\) The court stated that "Congress has sensibly federalized choice of law, thereby freeing aircraft financing from the forum shopping which the rule of *Klaxon Co. v. Stentor Elec. Mfg. Co.* . . .

194 See * supra* notes 189-90 and accompanying text.
196 575 F.2d 1086 (3d Cir. 1978).
197 *Id.* at 1087.
198 *Id.* at 1087-88.
199 *Id.*
200 *Id.* at 1088.
201 *Id.*
202 *Id.*
203 *Id.*
might otherwise produce." The court quoted the legislative history of section 506 in support of this proposition but did not explain how it lent support.

The appellate court glossed over a serious difficulty in its rationale. It incorrectly stated that the legislative history of section 506 says that the "legal effect" of filing was left to state law. In reality, the text of section 506 and the Senate Report use the ambiguous term "validity" to describe vaguely the ramifications of filing pursuant to section 503. Section 506 appears only to determine the choice of law governing the legal enforceability of a security agreement as between the parties to the agreement, and not as among multiple lien claimants in a subsequent lawsuit. Although two recent cases relied on Sanders, the court's failure to accu-
rately read the legislative history debilitates the court's conclusion.

The Ninth Circuit Court of Appeals in *CIM International v. United States*[^214] addressed the scope of section 506 and held that it requires courts to resolve priority disputes under state law. In *CIM International*, the alleged owner of an aircraft sought to prevent its sale after the aircraft had been seized by the government to satisfy a tax lien against a third-party taxpayer[^215]. Because the United States had not filed its tax lien with the FAA[^216], the owner did not discover the lien although it had searched the FAA register prior to purchasing the aircraft[^217]. The third-party taxpayer never had made any payment on its note and did not have any equity interest in the aircraft[^218]. The owner bought the aircraft by purchasing the dealer's mortgage on the plane and obtaining a bill of sale from the delinquent taxpayer[^219]. Two months before the government repossessed the aircraft, the owner had filed its ownership registration certificate with the FAA[^220]. The owner sought an injunction preventing the tax sale and a decree requiring the government to return the aircraft it had allegedly wrongfully seized[^221].

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[^214]: 641 F.2d 671 (9th Cir. 1980).
[^215]: Id. at 673.
[^216]: Id.
[^217]: The dealer had assigned its security interest in the aircraft to the bank. The bank reassigned the security interest to the dealer for consideration and release of the dealer's recourse obligation. The release and reassignment were not filed with the FAA until one month after the Government seized the aircraft, although the owner had obtained it eight months prior to seizure. Id.
[^218]: Id.
[^219]: The owner had loaned the aircraft to the delinquent taxpayer who had a pilot fly the plane to Santa Anna, California to pick up the taxpayer's wife and personal
The court in CIM held that state law applied to the lawsuit pursuant to section 506. It reasoned that the language and history of section 506 indicated that section 503 was merely a recording statute. The opinion also criticized the government's argument that section 506 should be more narrowly interpreted to govern only the validity of interests on file. The court reasoned that if section 506 only governed filed instruments, no law would be applicable to unfiled documents. Accordingly the court held a conclusion of law which was favorable to the government to be erroneous. By assuming that no law would govern subsequent suits unless specified in section 506, the court ignored conflicts of laws resolutions.

d. The Use of Section 1106 to Apply State Law to Controversies Among Lien Claimants.

The Appellate Court of Indiana in Crescent City Aviation, Inc. v. Beverly Bank applied state law remedies as permitted in section 1106 to resolve a priority conflict between belongings. En route the plane developed an oil leak, landed for repair and was seized by the Government. Id.

The United States argued that the release and reassignment that the bank executed in favor of the dealer was void because the owner filed it after the government seized the aircraft. Apparently, to bolster this argument, the United States sought to persuade the court that § 1406 related only to instruments on file. Cf. Idabel Nat'l Bank v. Tucker, 544 F.2d 1287, 1289-90 (Okla. Ct. App. 1975) (relying on Annot., 22 A.L.R.3d 1270, 1275 (1968), after quoting § 1406 and its legislative history without any comment, to hold that the Oklahoma commercial code, a version of the UCC, controlled the controversy and protected a buyer in the ordinary course of business).

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This section provides that "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." Id.
claimants. In *Crescent City Aviation*, a dealer sold an aircraft to a buyer under a retail installment contract. The dealer sold the financing paper to a bank which promptly recorded it with the Federal Aviation Administration. The buyer brought the aircraft back to the dealer for repairs, including removal of two engines, installation of one new engine, and other services and material. The dealer/repairman sought to perfect its lien for repair charges by filing a notice of mechanic's lien with the local county recorder and retaining possession of the plane, and then sought to foreclose its mechanic's lien against the financing bank. The trial court granted the bank's replevin action and invalidated the dealer/repairman's lien.

The appellate court in *Crescent City* observed that section 1106 provides that the 1958 Act does not exclude other common law or statutory remedies. Reading section 1106 and section 506 together, the court determined that state law remedies were available to those that give notice by filing with the FAA. The court determined that an instrument is not "valid" against anyone until filed pursuant to the 1958 Act. Therefore, the court held that although state remedies were available under section 1106, a party that failed to file could not invoke them. The rationale of the court in *Crescent City* is persuasive because it is based on federal preemption of the filing provisions of the UCC and employs the statutory authority of section 1106 to utilize state law in adjudicating controversies among claimants to aircraft interests.

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231 Title remained in the dealer until the purchase price was paid. 219 N.E.2d at 447.
232 *Id.*
233 *Id.*
234 *Id.*
235 *Id.*
236 *Id.*
237 See supra note 229 for text of § 1506.
238 See supra note 55 for text of § 1406.
239 219 N.E.2d at 449.
240 *Id.* See supra notes 44-48 and accompanying text.
241 219 N.E.2d at 449.
e. The Incompleteness of Section 503.


A growing number of recent decisions have determined that state versions of the UCC govern controversies among claimants to aircraft interests because of the incompleteness of section 503. In *Gary Aircraft Corp. v. General Dynamics Corp.* (In re Gary Aircraft Corp.) the Fifth Circuit thoroughly examined the 1958 Act and the UCC and held that the latter applied to determine priorities. The president of the bankrupt corporation had purchased two aircraft in his individual capacity from a dealer in aircraft. An inventory lender financed the dealer’s aircraft under a security agreement that permitted the dealer to sell the collateral unless he was in default on his loan. The vice-president of the bankrupt requested a title search on the two aircraft the day that the president purchased the second plane. The president transferred the aircraft to the bankrupt corporation, which executed a mortgage in favor of a purchase money lender. Both lenders timely recorded their mortgages with the Federal Aviation Authority. After declaring bankruptcy, the bankrupt requested permission to sell the two aircraft free and clear of the inventory lender’s lien. The bankruptcy court, affirmed

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42 681 F.2d 365 (5th Cir. 1982), cert. denied, 103 S. Ct. 3110 (1983).
44 Four aircraft were purchased but only two were in controversy in *Gary*. Id. at 367.
45 Id.
46 The dealer executed the security agreement in favor of the inventory lender on February 20, 1969. The FAA recorded the security agreement on March 3, 1969. The president of the bankrupt purchased the first plane on December 22, 1971 and the second one on January 4, 1972. The vice-president of the bankrupt requested a title search on January 4, 1972. Id.
47 The court assumed that at the time of sale the dealer had defaulted on its loan from the inventory lender, and therefore was not authorized to transfer the collateral. Id. at 367 n.1.
48 Id. at 367. See supra note 246. For four years the vice-president of the bankrupt requested the dealer to secure the release of the inventory lender’s security interest without results. Id. at 367.
49 Id.
50 Id.
51 Id. at 367-68.
by the district court, held that the bankrupt was entitled to the aircraft and the proceeds of its sale.262

The Fifth Circuit held on appeal that the 1958 Act did not preempt state priorities, and that the inventory lender’s lien terminated when the president of the bankrupt bought in the ordinary course of business.263 Acknowledging that the 1958 Act provided the exclusive method of perfecting secured interests in aircraft by filing the title documents with the FAA,264 the Fifth Circuit noted, however, that courts disfavor federal preemption of state law.265 The court reasoned that, absent a compelling showing that Congress intended such preemption,266 state law would govern.267 After a thorough examination of the language of section 503, the court found the statute ambiguous268 because the word “validity” did not necessarily establish a priority system.269

The court in Gary compared270 the 1958 Act with the Ship

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262 Id. at 368.
263 Id. at 377.
264 Id. at 368. See supra note 36.
265 The court cited Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 315-16 (1981). In Kalo Brick & Tile an interstate common carrier by rail defended against a brick manufacturer’s allegations of state law violations by asserting that the Interstate Commerce Act wholly preempted state law. The trial court agreed and dismissed the suit. The state appellate court reversed and the state supreme court denied the railroad’s application for review. The Supreme Court granted certiorari and held that preemption of state law by federal statute is not favored unless persuasive reasons exist for preemption. The Supreme Court found that the Interstate Commerce Act preempted the state law because the pervasive and comprehensive federal legislation was inconsistent with the state law.
266 The court cited Malone v. White Motor Corp., 435 U.S. 497, 504 (1978). In Malone the Supreme Court had to decide whether a Minnesota state pension law had been preempted by the National Labor Relations Act (NLRA). The Court held that preemption under the Supremacy Clause depended on the intent of Congress. When Congress does not clearly state its intent to preempt state laws, the Court stated, courts normally sustain the local law. The Court held in Malone that the NLRA did not preempt the Minnesota statute.
267 681 F.2d at 369-70.
268 Id. at 370.
269 Id. at 371. See supra notes 38-43 and accompanying text.
270 U.C.C. § 9-104 comment 1 (1977), supra note 100, invites this comparison in explanation for the Code drafters’ position that the 1958 Act does not preempt the UCC priority system. See Sigman, supra note 101, at 327-36 (comparing the recording and priority provisions, if any, of the Ship Mortgage Act, the Interstate Commerce Act, the Patent and Copyright Statutes and the Assignment of Claims Act).
Mortgage Act to further examine Congress' intent in enacting section 503 of the 1958 Act. The court found that the recording provisions of both Acts were similarly worded and structured, but that two other sections of the Ship Mortgage Act established priorities among lien claimants. The court then reasoned that the Congressional enactment of these other sections in the Ship Mortgage Act implied that the recording provisions of the Ship Mortgage Act did not establish priorities. Further, the court inferred that the close similarity between the 1958 Act and the Ship Mortgage Act recording provisions defeated a compelling showing that Congress considered the 1958 Act filing provisions to establish priorities that the equivalent Ship Mortgage Act provision did not establish. The court in Gary, therefore, concluded that Congress did not intend the 1958 Act to preempt the priori-

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Note 362: 681 F.2d at 371-72. The recording provision of the Ship Mortgage Act, 46 U.S.C. § 921(a) (1976), provides:

(a) No sale, conveyance, or mortgage which, at the time such sale, conveyance, or mortgage is made, includes a vessel of the United States, or any promotion thereof, as the whole or any part of the property sold, conveyed or mortgaged shall be valid, in respect to such vessel, against any person other than the grantor or mortgagor, his heir or devisee, and a person having actual notice thereof, until such bill of sale, conveyance, or mortgage is recorded in the office of the collector of customs of the port of documentation of such vessel, as provided in subsection (b) of this section.

Id. The similarity with 49 U.S.C. § 1403(c) (1976) is as follows: "No... conveyance... shall be valid... against any person other than... person having actual notice thereof, until... ("filed for recordation" (1958 Act); "recorded" (SMA)) in the office of [the relevant government agency]...." Compare with the full text of 49 U.S.C. § 1403 (1976), supra note 45.

Note 363: 46 U.S.C. § 922 (defining preferred mortgage), § 953(b) (providing that the preferred mortgage has priority in the proceeds of judicial sale of a vessel over all claims except court costs and preferred maritime liens).

Note 364: 681 F.2d at 371-72.

Note 365: Id.

Note 366: Id. The court reasoned that if the supposed priorities established by the filing provision of the 1958 Act were similarly established by the equivalent SMA provision, the later provisions in the SMA would be both contradictory and repetitive of other provisions in the SMA. The Fifth Circuit reasoned that this clearly demonstrates that Congress did not consider the SMA filing provisions to establish priorities among lien claimants. Further, the court reasoned, this analogy to the 1958 Act seriously undermined the argument that Congress would consider the nearly identical 1958 Act's filing provision to establish a priority system. Id. at 372.
ties established by state law. The Fifth Circuit resolved the dispute in Gary by holding that the priority granted to a buyer in the ordinary course of business protected the president of the bankrupt, and that the bankrupt took clear title from the president pursuant to the UCC.

The Gary rationale, that the 1958 Act lacks the provisions necessary for a complete priority scheme which would preempt state law, has been articulated in other cases. In a brief opinion on a summary judgment motion in Aircraft Investment Corp. v. Pezzani & Reid Equipment Co., Chief Judge Levin of the U.S. District Court for the Eastern District of Michigan held that viewing the 1958 Act as totally preempting state law was "erroneous."

The court stated that the lack of priority provisions in the 1958 Act left the existence

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267 Id.
268 Id. at 80-84 and accompanying text.
269 This was pursuant to U.C.C. § 2-403(d) (1977) which provides that "[a] purchaser of goods acquires all title which his transferor had or had power to transfer..."
270 The inventory lender argued that the bankrupt was only a buyer not in the ordinary course of business, U.C.C. § 9-307(2), and, therefore, the inventory lender's lien deserved priority over the bankrupt's title. The court rebutted this, holding that the inventory lender's lien on the aircraft transferred to the proceeds of the sale but was extinguished in the aircraft when the president of the bankrupt, a buyer in the ordinary course, purchased the aircraft. The court held that the subsequent transaction between the president and the bankrupt could not resurrect the lien. 681 F.2d at 372.

Although the Supreme Court denied the writ of certiorari in Gary, the Court mentioned Gary in Philco Aviation, Inc. v. Shacket, 103 S. Ct. 2476, 2480 (1983), discussed supra note 37. The Court distinguished Gary as deciding whether the 1958 Act's priority scheme, if any, preempted state law (UCC) priorities for title and secured interests in aircraft. 103 S. Ct. at 2480. The Court did not pass on the issue of priorities which was not before it in Philco, but stated "[w]e are inclined to agree with this rationale [in Gary]." Id. The Court noted that the Fifth Circuit in Gary interpreted "validity" in section 503(d) of the 1958 Act, 49 U.S.C. § 1403(d)(1976), as not meaning "priority," but only such "validity" as state law granted. Id. at 2480 n.6. See supra notes 39-42 and 49-52 and accompanying texts. The Court then strongly indicated that state law governs priority disputes stating that "[a]lthough state law determines priorities, all interests must be federally recorded before they can obtain whatever priority to which they are entitled under state law." Id. at 2480. Thus the Supreme Court implicitly approved Gary in dicta.
271 681 F.2d at 372.
273 Id. at 82. A buyer purchased a new aircraft from a dealer. The dealer had financed his inventory with an inventory lender. The day after the completed sale, the inventory lender filed its chattel mortgage with the FAA. Subsequently the dealer became bankrupt and the inventory lender sought to enforce its lien against the aircraft held by the buyer.
The court concluded that "[i]f the purported chattel mortgage is void [against a competing secured party] under the appropriate state law, federal recording will not save it."274 In Feldman v. Philadelphia National Bank,275 the U.S. District Court for the Eastern District of Pennsylvania also summarily rejected the view that the 1958 Act totally preempted state law governing priorities among claimants to interests in aircraft.276 The court reasoned that the 1958 Act lacked certain remedies, which indicated Congress intended state law remedies to govern controversies concerning priorities among claimants to aircraft interests.277

Courts that hold state law governs must determine which state law applies.278 Some courts have recognized that section 506 of the 1958 Act279 determines the controlling law on questions regarding the enforceability of a security agreement between parties to the agreement.280 Under the rule of Klaxon, however, courts have held that the law governing the locale of the collateral governs the issues at bar pursuant to the UCC.281 Klaxon held that the law of the forum state in which the federal district court sits controls controversies brought

273 Id.
274 Id.
276 In Feldman the trustee in bankruptcy sought lease payments made to a bank by a third party pursuant to an unrecorded lease which had been assigned by the bankrupt to the bank. The trustee's theory was that the lease and its assignment must have been recorded with the FAA to be valid. The trustee further argued that the bankrupt's creditors were entitled to the lease payments since the assignment of lease had not been filed with the FAA. Id. at 26-27.
277 Id. at 32. This is the inverse of the statutory provision, 49 U.S.C. § 1506 (1976), that the FAA does not curtail state law remedies. See supra notes 229-41 and accompanying text. The court concluded that under state law the assignee of a lease prevailed over the trustee in bankruptcy representing creditors of the assignor of the lease and was entitled to the rent as proceeds under U.C.C. § 9-306(2). Id. at 37-39.
278 Cf. Sanders v. M.D. Aircraft Sales, 575 F.2d 1086, 1088 (3d Cir. 1978), discussed supra notes 195-213 and accompanying text (holding that state law of the place of delivery of the security interest governed the controversy).
279 See supra note 55 for text of statute.
280 No case or law review article discussed by this author that dealt with sections 503-506 of the 1958 Act, 49 U.S.C. §§ 1403-1406 (1976), involved a dispute between the parties to a security agreement.
into federal court. In another instance, a bankruptcy court resolved the dispute not according to the rationale in *Klaxon* but according to the Restatement (Second) of Conflicts § 251. There the court held that a state's laws, other than those of the locale in which the collateral was located, controlled. These cases reflect just some of the conflicts faced by courts which hold that state law is applicable.

2. Comment

The persuasive merit of the rationale for partial preemption, discussed above, varies according to the support each theory has in the language and legislative history of the 1958 Act. Courts that articulate the weakest and least followed theories for allowing state law to govern priorities base their reasoning on the continued viability of common law or the *Erie* doctrine. The argument that section 506 of the 1958 Act designates state law to govern priority conflicts among all parties to a subsequent lawsuit, even those not a party to the

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283 *Klaxon Co. v. Stentor Elec. Mfg.*, 313 U.S. 487 (1941), supra note 204. See, e.g., *Bank of Lexington v. Jack Adams Aircraft Sales, Inc.*, 570 F.2d 1220, 1225 (5th Cir. 1978) (reasoning that under *Klaxon* some state law would control, and that Mississippi’s UCC controlled because all five possible controlling states had adopted the UCC (§ 9-102) which designated the law governing the locale of the collateral as controlling the disposition of suits).

284 *RESTATEMENT (SECOND) OF CONFLICTS* § 251 (1971). The section provides:

Validity and Effect of Security Interest in Chattel

(1) The validity and effect of a security interest in a chattel as between the immediate parties are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties, the chattel and the security interest under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties, greater weight will usually be given to the location of the chattel at the time that the security interest attached than to any other contact in determining the state of the applicable law.

Id.

284 *Danning v. Pacific Propeller, Inc. (In re Holiday Airlines Corp.)*, 620 F.2d 731, 733-34 (9th Cir.) (holding that Washington's possessory, artisan lien laws governed the validity of the subsequent (Washington) repairman's lien, but that California's law governed all other aspects of the suit because it bore a more significant relationship to the parties, the chattel and the security interest), *cert. denied*, 449 U.S. 900 (1980).

285 See supra notes 164-78 and accompanying text.

286 See supra notes 179-94 and accompanying text.
document filed with the FAA,\footnote{49 U.S.C. § 1406 (1976). See supra note 55 for text of § 1406.} appears to read too much federal choice of law into the statute. The words of the statute and the legislative history indicate that Congress intended section 506 to determine only the state laws under which parties must draft their security and title documents.\footnote{See supra notes 206-13 and 226-27 and accompanying text.} The novel approach of using section 1106, which leaves state common law and state statutory remedies coexistent with the 1958 Act's remedies, to conclude that state law priorities are not preempted relies more directly on the literal language of the 1958 Act than the argument for using section 506.\footnote{See supra notes 229-41 and accompanying text.} The UCC drafters,\footnote{See supra, § 9-104 comment 1 (1977), supra note 100.} however, articulate the most well-reasoned rationale which has influenced the present trend in judicial reasoning.\footnote{See supra note 242-77 and accompanying text.} These courts hold that the 1958 Act simply is incomplete. They defer to state law to govern the determination of priorities among lien claimants.

IV. Arguments Affecting Priority Accorded a Buyer in the Ordinary Course of Business

Courts that hold state law governs the controversy among claimants to interests in an aircraft do not thereby fully resolve the issues at bar. Concluding that the 1958 Act does not contain a priority system that preempts state law does not determine the effect of a lender's consent to a sale or a buyer's notice, both of which may affect the status of the buyer in the ordinary course of business. Courts have considered these arguments and granted or denied a buyer protection from an inventory lender's lien accordingly.

A. Lender's Consent or Estoppel

Regardless of whether the 1958 Act preempts state law, some courts have held that floor plan lenders actually or impliedly consent to dealers' sales to buyers. Floor plan financing contracts that permit a dealer to sell inventory without
the lender's consent unless the dealer is in default conclusively establish the lender's consent to a sale.\textsuperscript{292} Many courts hold, however, that even a financing contract that forbids the dealer from selling the aircraft without the lender's consent does not negate the argument that the lender has consented to the sale.\textsuperscript{293} Courts have found that inventory lenders impliedly consented to dealer sales because the lenders knew that the dealer intended to sell aircraft\textsuperscript{294} and satisfy the loan with the proceeds of the sale.\textsuperscript{295} Some courts call this estoppel and disallow the lender to enforce or assert its lien against the buyer.\textsuperscript{296}

The justification given by courts for preventing the lender from recovering against a buyer in the ordinary course of business was stated by the federal district court in \textit{Aufderheide}: "[o]rdinarily . . . the purchaser ought to have the right to assume that the merchant has a right to sell the commodity in question."\textsuperscript{297} Courts holding in a manner similar to the one in

\textsuperscript{292} See Bitzer-Croft Motors, Inc. v. Pioneer Bank & Trust, 82 Ill. App. 3d 1, 401 N.E.2d 1340, 1346-47 (1980) (holding that a chattel mortgage which specifically authorized the sale of the chattel and referred to the UCC and the testimony of the lender's loan officer that he contemplated the sale of the aircraft estopped the lender from enforcing its lien in the aircraft against the purchaser).

\textsuperscript{293} See, e.g., Northern Ill. Corp. v. Bishop Distrib. Co., 284 F. Supp. 121, 125 (W.D. Mich. 1968) (stating simply that the lender knew the dealer purchased the aircraft only to sell it and should, therefore, bear the loss instead of the buyer); State Sec. Co. v. Aviation Enters., Inc., 355 F.2d 225, 229 (10th Cir. 1966) (expressing its holding in terms of estoppel). \textit{But see} Dowell v. Beech Acceptance Corp., 3 Cal. 3d 594, 476 P.2d 401, 91 Cal. Rptr. 1 (1970) (holding that total preemption by the 1958 Act negated a purchaser's status as a buyer in the ordinary course of business, without considering the implied consent of the distributor that retained title under a conditional sale contract which forbade resale without the lender's consent), \textit{cert. denied}, 404 U.S. 823 (1971), \textit{discussed supra} notes 134-52 and accompanying text.

\textsuperscript{294} See Bishop, 284 F. Supp. 121, 125 (W.D. Mich. 1968). \textit{But see} O'Neil v. Barnett Bank of Jacksonville, 360 So. 2d 150, 152 (Fla. Dist. Ct. App. 1978), \textit{discussed supra} notes 122-33 and accompanying text (holding that a lender did not actually or impliedly consent to the sale of an aircraft that was not part of the dealer's inventory (this was known to the buyer) and not part of the floor plan financing).

\textsuperscript{295} State Securities, 335 F.2d 225, 227 (10th Cir. 1966).

\textsuperscript{296} \textit{Id. See} Suburban Trust & Savings Bank v. Campbell, 19 Ohio Misc. 74, 250 N.E.2d 118, 120-22 (Ohio C.P. 1969) (holding in addition to estoppel that the lender's renewal of the note with the dealer subsequent to the sale waived the prohibition against resale in the prior note and was a novation between the lender and dealer).

Aufderheide free buyers in the ordinary course of business from the duty to search the record to ascertain the status of title in the goods. For example, even if a buyer in the ordinary course of business knew the sale to him violated the dealer’s ownership rights and the lender’s security interest, a court has held that the buyer has the right to assume the seller will pay off the secured party and obtain a release of the security interest to convey clear title to the buyer. Protecting the buyer in the ordinary course of business to the extent of holding him free of a known security interest at the time of purchase indicates the favor courts bestow on buyers, since it clearly goes beyond the protection provided by the UCC.

B. Constructive Notice

The constructive notice resulting from filing interests in aircraft with the FAA may deprive a buyer in the ordinary course of business of UCC protection. The difference between the type of filing required under the 1958 Act and that required by the UCC may support an argument that the inventory lender’s lien should prevail over the interest of a buyer in the ordinary course of business. Unlike the UCC’s “notice filing,” the 1958 Act requires “transaction filing,” where the whole title or security instrument is filed in a fashion similar to that required by pre-UCC chattel mortgage acts.

100 Id. See Suburban Trust & Savings Bank v. Campbell, 19 Ohio Misc. 74, 250 N.E.2d 118, 121 (Ohio C.P. 1969) (holding that because the purchaser was in the ordinary course of business he had no duty to search the record); Northern Ill. Corp. v. Bishop Distrib. Co., 284 F. Supp. 121, 125 (W.D. Mich. 1968) (holding that the high price of aircraft does not raise a duty in purchasers to search the title in the plane).

100 See Suburban Trust & Savings Bank v. Campbell, 19 Ohio Misc. 74, 250 N.E.2d 118, 122 (Ohio C.P. 1969) (stating that “[e]ven had the [buyer in the ordinary course of business] known of the [floor plan lender’s] lien filed with the Federal Aviation Agency, he still had the right under the Uniform Commercial Code of Illinois to assume that [the dealer] would pay the obligation owing to the plaintiff, obtain a release of plaintiff’s lien so that defendant would have a clear title to the ‘plane;’ without supporting citation to the UCC).

100 See U.C.C. § 9-307(1) (1977), supra notes 81-84 and accompanying text.

100 See supra notes 85-93 and accompanying text.

103 See supra note 86 and accompanying text. The 1958 Act is a transaction filing statute by virtue of requiring that the entire security or title instrument be filed. See 49 U.S.C. § 1403 (1976), supra note 45.

103 GILMORE, supra note 85, § 15.2 at 466-67.
Logically, transaction filing provides more complete information regarding the substance of the security interest than notice filing which simply notifies that a security interest may exist.304

In *Dawson v. General Discount Corp.*,305 a seller sold a plane and assigned his rights to receive payment under a conditional sales contract to a finance company, which filed appropriate title instruments with the Civil Aeronautics Authority.306 A second buyer subsequently purchased the plane307 and maintained possession of it.308 The finance company alleged wrongful retention and conversion of the aircraft against the second buyer and sought damages.309 The Court of Appeals of Georgia held that the 1938 Act, section 503,310 applied to intrastate aircraft.311 The court reasoned that under Georgia real estate law, by recording a conditional sales contract, a person gives "constructive notice of [the interested party's] title by which the [subsequent purchaser] and all the world are bound."312 The court enforced the secured party's lien against the subsequent purchaser since he took subject to the prior, perfected interest.313 The court did not hold that the 1938 Act totally preempted the field of aircraft conveyancing, because the court did not rely on the federal statute to determine the legal effect of recording with the CAA.314

Recently the Missouri Court of Appeals held that a buyer

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304 *See supra* notes 91-93 and accompanying text.
305 82 Ga. App. 29, 60 S.E.2d 653 (1950).
306 60 S.E.2d 654-55.
307 The chain of title was: Dunlavy Flying Service or Bessemer Flying Service by Dunlavy, Jr., or Dunlavy, Jr. in his individual capacity sold the aircraft to Clevenger under a conditional sales contract, assigning his retained interest to General Discount; Clevenger sold the aircraft to Dawson. *Id.*
308 *Id.* at 654.
309 *Id.*
310 *See supra* note 30 for text of § 503, then 49 U.S.C. § 523.
311 60 S.E.2d at 657-58. *See supra* note 101.
312 60 S.E.2d at 657-58.
313 This case preceded the UCC and, consequently, does not give sufficient facts to know whether the seller, Dunlavy, Jr., was a dealer. It is possible that he was, but it is likely that his flying service was his primary business. If Dawson was not purchasing from a dealer, he was not buying in the ordinary course of business and U.C.C. § 9-307(2) would produce the same result. *See supra* note 84 and accompanying text.
314 60 S.E.2d at 657-58.
takes his aircraft subject to the perfected security interest of any lien claimant who has recorded its lien with the FAA. In *J.C. Equipment, Inc. v. Sky Aviation, Inc.*, the dealer agreed to sell to a first buyer a Cherokee aircraft in return for cash plus a trade-in of a Cessna airplane. The dealer fraudulently misrepresented the Cherokee, which induced the first buyer into the transaction. The first buyer traded its Cessna, then discovered the fraud at approximately the same time as the dealer interested a second buyer in purchasing the Cessna.

Transactions occurred in close succession, after which time the first buyer had the Cherokee and the second buyer had the Cessna. The first buyer claimed that it had title to the

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316 *Id.* at 74.
317 The dealer represented that the aircraft could pass a Federal Aviation Administration annual inspection. The dealer was to bear the cost of the inspection and any necessary work. Subsequently, the first buyer learned through an inspection that the aircraft had structural damage and had to be grounded until repaired. *Id.* at 74-75.
318 *Id.*
319 *See supra* note 317.
320 498 S.W.2d at 75. It is important to note that litigation between the first and second buyers did not fall within the ambit of the UCC doctrine of the buyer in the ordinary course of business. The appellate court only determined the good faith status of the second buyer based on the constructive notice he had when the first buyer filed a notice of rescission with the FAA. *See infra* note 321. This is relevant, however, to the definition of the buyer in the ordinary course of business, U.C.C. § 1-201(9), because the definition incorporates the good faith requirement. *See supra* note 80.
321 The court carefully noted the time sequence. On October 15, 1969, the dealer and the first buyer exchanged blank bills of sale in the two aircraft, and the dealer delivered the Cherokee to the first buyer. On October 16, 1969, the first buyer executed a notice of rescission upon learning, that same day, of the dealer's fraud, and mailed it to the FAA recording office in Oklahoma City. On October 17, 1969, the first buyer's attorney mailed a letter to the dealer requesting no sale or encumbrance of the Cessna until the repairs on the Cherokee were completed or the Cherokee was returned. On October 20, 1969, the second buyer indicated his intent to purchase the Cessna as a result of negotiations with the dealer. On October 21, 1969, the second buyer's bank ordered a title search on the Cessna and learned that as of 3:10 p.m. that day the title was in the first buyer. On October 22, 1969 at 10:09 a.m. (C.S.T), the FAA received and filed the first buyer's notice of rescission. That same day in Arizona (two hours behind Oklahoma time) the second buyer and the dealer transacted a sale of the Cessna at a bank. The first buyer still maintained possession of the Cessna. On October 24 or 25, 1969, the Cessna was removed from the first buyer's possession without its knowledge. On October 27, 1969, the second buyer received possession of the Cessna. On October 30, 1969, the FAA recorded all the instruments including the rescission of sale filed by the first buyer. 498 S.W.2d at 75.
Cessna, whereas the second buyer defended on the ground that he purchased without knowledge of the first buyer's ownership.322 The trial court held for the second buyer, reasoning that he was a good faith purchaser who had not received actual notice provided by the Federal Aviation Administration's record at the time of sale.323

The Missouri Court of Appeals in J.C. Equipment held that under Missouri law "[a] prospective purchaser has constructive notice of everything the instruments on file show with respect to the chain of title."324 The court reasoned that the UCC excludes from the definition of a buyer in good faith a purchaser who knows the sale to him violates the seller's ownership rights or the lender's security rights.325 The court concluded that the second buyer was not entitled to protected status if he purchased after the first buyer's recission was filed326 with the FAA.327 The court, therefore, reversed and remanded, instructing the lower court to determine the exact time of the sale to the second buyer.328

The court's analogy in J.C. Equipment between aircraft title recording and land title recording has merit because both land title recording acts and the 1958 Act require "transaction filing" which gives public notice of the interests held by those

322 Id. at 76.
323 Id.
324 Id.
325 Id. See U.C.C. § 1-201(9) (1977), supra note 80.
326 The time of filing, not recordation, is the critical time under section 503 of the 1958 Act. See supra note 45 for text of § 503; note 48 and accompanying text (noting change from time of recordation (1938 Act) to time of filing (1958 Act)).
327 At trial there had been no proof regarding the time of the sale to the second buyer on October 22, 1969. The court took judicial notice by relevant state statutes of the two hour time difference between Oklahoma and Arizona (due to time zone and daylight savings time differences) and concluded that at 10:09 a.m. Oklahoma City, Oklahoma when the first buyer's recission was filed it was 8:09 a.m. in Phoenix, Arizona. Although the court did not conclude when the purchase occurred, it is unlikely that the second buyer's purchase occurred before 8:09 a.m. because it was held in a bank. 498 S.W.2d at 77 n.1.
328 The court held that under Missouri law the burden of proving innocent purchaser status without notice or knowledge of fraud is upon the subsequent purchaser where fraud in the original transfer is shown. Id. at 76. The remand was necessary to permit the second buyer to establish that he was a good faith purchaser. Id. at 78.
that have perfected their title by filing. The effect of UCC "notice filing" does not determine the effect of constructive notice under the 1958 Act. In providing for state law to determine the validity of a security or title document in section 506 of the 1958 Act, Congress stated the effect that it intended filing to have:

When the instrument has been filed for recordation under the law, all persons are deemed to have notice of its existence and its effect on title to the property covered thereby. Consequently, to determine whether there are any encumbrances on the aircraft, it is only necessary to consult the central file.

The Senate's statement indicates Congress intended to resolve the confusion surrounding the validity of filed instruments by increasing the legal certainty of the effects of commercial transactions. Congress intended section 506 to determine

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329 This point is overlooked by two commentators on the federal filing requirement for aircraft. They argue that the analogy is weak because aircraft are mobile and land title recording is local and fragmented. See Scott, supra note 101, at 196 (arguing only that transactions in land are not analogous to those in aircraft due to the mobility of aircraft); Note, supra note 102, at 135-36 (arguing that the ready access to local deed records distinguishes them from the FAA records located in Oklahoma City, Oklahoma). A national filing statute like 49 U.S.C. § 1403 (1976) remedies the mobility and fragmentation problems. The Note author also reasoned that the analogy failed because land title records are local, permitting ready access to the documents on file. Id. This ignores the evidence produced in many cases that an interested person can obtain a report by telephone disclosing whether any documents concerning a particular aircraft have been received by the FAA and, if so, request a written report of their contents for a nominal fee. The report is often received the next day. See Bitzer-Croft Motors v. Pioneer Bank & Trust, 82 Ill. App. 3d 1, 401 N.E.2d 1340, 1343 (1980) (loan officer stating she had obtained by telephone call to a professional title search firm in Oklahoma City, Oklahoma a report of filed documents affecting a prospective aircraft and requested a written report of this); Dowell v. Beech Acceptance Corp., 3 Cal. 3d 594, 476 P.2d 401, 402, 91 Cal. Rptr. 1 (1970) (noting that a title check with the FAA cost $3.50), cert. denied, 404 U.S. 823 (1971).

330 See supra notes 91-93 and accompanying text.

331 1964 REPORT, supra note 54, at 2320.

332 1964 REPORT, supra note 54, 2320.

333 Id. The 88th Congress enacted section 506, 49 U.S.C. § 1406, not as a comment on section 503, 49 U.S.C. § 1403, but to designate controlling state law and the effect of filing under state law. See supra notes 53-59. For an argument that some early legislative history to a version of section 506 that was not enacted is merely legislative comment on earlier legislation and without force of law, see Gary Aircraft Corp. v. General Dynamics Corp. (In re Gary Aircraft Corp.), 681 F.2d 365 (5th Cir. 1982) (stating that a different remark in some early legislative history of section 506, that section 503 was merely a filing provision and not a priority provision, was confirm-
which state's laws governed the determination of the validity of a filed document. By holding that a buyer has constructive notice of a filed document's effect on title, a court recognizes the effect Congress intended filed documents to have under state law. The Senate did not determine the legal significance of a buyer's constructive notice, leaving this to state law.

V. Conclusion

Courts have inconsistently resolved the impact of the Federal Aviation Act of 1958 on the doctrine of the buyer in the ordinary course of business because they differ in interpreting the language and congressional intent of the federal statute. By its terms, the 1958 Act requires filing and recordation of aircraft interests for those interests to be valid against third parties. The Supreme Court's recent interpretation of section 503(c) in Philco Aviation, Inc. v. Shachet confirmed this. However, section 503(e) establishes the only stated priority in the Act: liens in specific engines and propellers are prior to liens in spare parts stocked at specific locations. Interpreting the filing provisions of section 503 as creating a priority system for claimants to aircraft interests, therefore, does not produce logical results because every filed interest would be "valid" against every other filed interest. Such a result does not indicate priority of any interest unless it is assumed that a prior perfected interest has priority over subsequently perfected interests, which is a major premise not stated in the statute. The statute, therefore, does not create a priority system for determining the rights of claimants to interests in

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334 See supra notes 53-59 and accompanying text.
335 See supra notes 33-43, 47-52 and accompanying text.
336 See supra notes 45.
338 Id. at 2479-80. See supra notes 37 and 269.
339 See supra notes 63-65 and accompanying text.
340 See supra note 42 and accompanying text.
341 Id.
aircraft.

The legislative history of the 1958 Act indicates that Congress did not intend to preempt state law which governs disputed claims to chattels. The incomplete priority scheme in the federal statute implies Congress intended existing state priority laws to govern controversies over interests in aircraft. The few courts that have found Congressional intent to preempt state priority systems do not cite any legislative history for authority but infer such intent from vague notions of federal policy. The best view of the 1958 Act is that it does not establish a priority system and does not preempt state priority law. The 1958 Act establishes a national recording system which preempts only state filing requirements.

Under state law, constructive notice of a filed document’s effect on title, i.e. its contents, affects a buyer in the ordinary course of business if the security document prohibits sales by the dealer without the inventory lender’s prior approval. A buyer with constructive notice that the sale to him violated an inventory lender’s right to approve or disapprove the sale is outside the UCC definition of a buyer in the ordinary course of business. Since Congress intended that all buyers be deemed to know the effect on title of filed documents specifying interests in aircraft, even purchasers of new aircraft would have to check the FAA registry to ascertain the dealer’s title and insist on the inventory lender’s approval of the sale before completing the transaction.

Constructive notice of a filed document’s effect on title to an aircraft would not affect a buyer in the ordinary course of business if the inventory lender specifically permitted sales by the dealer. A buyer with constructive notice that the sale to

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342 See supra notes 53-91 and accompanying text.
343 See supra notes 241-91 and accompanying text.
345 See supra notes 286-91.
346 See supra notes 302-34.
347 U.C.C. § 1-201(9) (1977), supra note 80.
348 1964 REPORT, supra note 54, at 2320.
him may violate an inventory lender's rights under a filed se-
curity instrument does not know that the sale actually vi-
olates the lender's rights, because the buyer has not the duty,
ability, or right to ascertain whether the dealer has met all
the terms of the financing agreement. Therefore, lending
agreements filed with the FAA which permit sales unless the
dealer was in default would not give the buyer sufficient con-
structive knowledge that the sale to him violated the lender's
rights. A buyer with constructive notice that the dealer condi-
tionally had the right to sell the aircraft to him would still be
a buyer in the ordinary course of business under the UCC
definition.

Courts may find the lender's conduct indicates consent to
dealer sales, even absent express consent in the financing
agreement. A finding of implied consent would nullify any
constructive notice that the inventory lender had an express
right to withhold consent. A constructive notice theory based
on a security instrument filed with the FAA would not prevail
in courts that find the inventory lender consented to dealer
sales merely by financing inventory.

There does not appear to be a need for legislation to unify
the judicial determinations regarding the applicability of the
1958 Act because of the present trend in judicial interpreta-
tion. In states other than California and Florida, courts
determining the rights between a buyer in the ordinary course
and his seller's inventory lender rely on the UCC, not the 1958
Act to determine priorities. This majority position results
from federal and state courts determining that the 1958 Act
only preempts state filing requirements, not state priority sys-
tems. Courts which apply UCC article 9 to determine conflict-
ing claims in aircraft interests favor buyers in the ordinary
course of business over their sellers' inventory lenders. Fur-
ther decisions will probably continue to follow the UCC as
demonstrated by the latest and most well reasoned opinion,

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449 Dowell v. Beech Acceptance Corp., 3 Cal. 3d 544, 476 P.2d 401, 91 Cal. Rptr. 1
Gary Aircraft Corp. v. General Dynamics Corp. (In re Gary Aircraft Corp.), 351 which the Supreme Court recently and tacitly approved in Philco Aviation Inc. v. Shacht. 352

351 See supra notes 242-79 and accompanying text.

352 103 S. Ct. 2476, 2480 (1983), discussed supra notes 37 and 269.