St. John's Law Review

Volume 37
Number 2 *Volume 37, May 1963, Number 2*

Article 12

May 2013

Article IX of the Uniform Commercial Code: The "Floating" Lien

St. John's Law Review

LEGISLATION

Article IX of the Uniform Commercial Code: The "Floating" Lien

Through the combined effect of several sections of Article IX of the Uniform Commercial Code, a secured party, by means of a single security agreement, will be able to create a lien that will hover over the personal property of a debtor. If the security agreement contains an after-acquired property clause, the creditor's lien will attach [1] to the property acquired by the debtor after the agreement has been made. This lien, known as a "floating" lien, may then be perfected [2] by the creditor when he files a "financing statement" in accordance with the pertinent provisions [3] of article nine. Upon perfection of the floating lien, the creditor will have secured his interest from all subsequent creditors except those who hold purchase money security interests which conform to the statutory requirements,[4] those who hold property purchased from the debtor in the ordinary course of the debtor's business,[5] and those who have purchased consumer goods for personal, family or household purposes.[6]

Although the concept of a lien that can attach to a debtor's after-acquired property is not a new one, the Code's method of creating and securing a floating lien does make changes in the existing law. In addition to examining the Code and some of these changes this note will discuss two problems which the secured party can expect to encounter.

Creation and Perfection of the Floating Lien

The article nine approach to the creation of a floating lien is an uncomplicated one. Through a "security agreement," [7] a

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1 Uniform Commercial Code § 9-204(1),(3).
2 Uniform Commercial Code § 9-302.
3 Uniform Commercial Code §§ 9-402, 9-403.
4 Uniform Commercial Code § 9-312(3),(4).
5 Uniform Commercial Code § 9-307(1).
6 Uniform Commercial Code § 9-307(2).
7 Uniform Commercial Code § 9-105(h). A security agreement is one which creates and provides for a security interest.

"secured party"[8] is able to combine such pre-Code security devices as chattel mortgages, trust receipts, and assignments of accounts receivable into a single instrument.[9] This may be contrasted with current New York law which, rather than eliminating distinctions between the various security instruments, tends to emphasize them.[10] Thus, in order to understand the effect of an after-acquired property clause in New York today, one would be required to know the appropriate provisions of the Factor's Lien Act,[11] the Uniform Trust Receipts Law[12] and the law relating to chattel mortgages,[13] depending upon the type of instrument in which the clause is to be incorporated.

Section 9-204

In accordance with its more general approach, section 9-204(3) of the Code provides that a creditor may secure his loan by creating a lien over property to be acquired by the debtor in the future. Subdivision 1 of this section provides that this interest or lien will attach to the after-acquired property when three conditions are met. First, the agreement must state that the security interest will attach; second, an advance must have been made by the creditor; and third, the debtor must have acquired an interest in the property.[14] Since the creditor's interest will attach automatically when the debtor acquires his interest in the property, it will be unnecessary for the former to prepare supplemental agreements to cover the new collateral as it is received by the debtor.[15]

In addition to permitting a security agreement to contain an after-acquired property clause, section 9-204 states that the agreement may provide for future advances to be made by the creditor.[16]

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[8] UNIFORM COMMERCIAL CODE § 9-105(i). A secured party is one "in whose favor there is a security interest. . . ."

[9] See Coogan & Bok, *The Impact of Article 9 of the Uniform Commercial Code on the Corporate Indenture,* 69 YALE L.J. 203, 206 (1959); COMMISSION ON UNIFORM STATE LAWS, NEW YORK ANNOTATIONS TO UNIFORM COMMERCIAL CODE AND REPORT TO LEGISLATURE OF NEW YORK STATE 247 (1961).

[10] See Utica Trust & Deposit Co. v. Decker, 244 N.Y. 340, 155 N.E. 665 (1927), wherein the court discusses the differences between a chattel mortgage and a factor's lien on merchandise.

[11] N.Y. PERS. PROP. LAW § 45.

[12] N.Y. PERS. PROP. LAW §§ 50-58-m.

[13] N.Y. LIEN LAW §§ 230-299-l.

[14] UNIFORM COMMERCIAL CODE § 9-204(1).

[15] UNIFORM COMMERCIAL CODE §9-204, comment 2. See Summers, *Should Oregon Adopt the Uniform Commercial Code Concept of the "Floating Lien"?* 41 ORE. L. REV. 182, 185 (1962).

[16] UNIFORM COMMERCIAL CODE § 9-204(5).

Any future advances, therefore, will also be secured by the subsequently acquired property.

At this point it is appropriate to examine the Code's conception of "attachment" of a security interest. While a creditor's interest may attach to after-acquired property, this does not necessarily mean that the creditor's interest will be superior to the claims of other creditors. This will depend upon whether or not he has taken the steps necessary to "perfect" his interest.[17] Although perfection of the floating lien will be discussed at another point, for present purposes, it should be noted that perfection is generally achieved by filing.[18]

As already indicated, the concept that a lien may attach to after acquired property is not a new one. Thus, New York has given effect to after-acquired property clauses between the parties to the agreement in chattel mortgages,[19] in factor's lien agreements,[20] in assignments of accounts receivable and contract rights,[21] and in trust receipts transactions.[22] Furthermore, the creditor's interest attached whenever the debtor's rights in the property came into existence.[23]. It must be pointed out, however, that although these agreements have been enforced between the immediate parties, they have not always survived the claims of subsequent creditors.[24] The reasons for not enforcing them against third parties will be developed at another point.

Section 9-205

Section 9-205 is also illustrative of the fact that a floating lien can be created and maintained by the secured party with little difficulty. This section permits the debtor to exercise complete control over the collateral once the agreement has been made. Thus, a security agreement will not be invalidated even when a

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[17] See Uniform Commercial Code § 9-312(5)(a),(b).

[18] Uniform Commercial Code § 9-302.

[19] Zartman v. First Nat'l Bank, 189 N.Y. 267, 82 N.E. 127 (1907); Kribbs v. Alford, 120 N.Y. 519, 24 N.E. 811 (1890); McCaffrey v. Woodin, 65 N.Y. 459 (1875).

[20] N.Y. Pers. Prop. Law § 45; see Heyman v. Kevorkian, 193 App. Div. 859, 184 N.Y. Supp. 783 (1st Dep't 1920).

[21] N.Y. Pers. Prop. Law § 45; City of New York v. Bedford Bar & Grill, Inc., 2 N.Y.2d 429, 141 N.E.2d 575, 161 N.Y.S.2d 67 (1957).

[22] See N.Y. Pers. Prop. Law § 54 which states that a contract *to give* a trust receipt is equivalent to a trust receipt.

[23] Rochester Distilling Co. v. Rasey, 142 N.Y. 570, 37 N.E. 632 (1894); McCaffrey v. Woodin, *supra* note 19.

[24] City of New York v. Bedford Bar & Grill, Inc., *supra* note 21; Matter of Gruner, 295 N.Y. 510, 68 N.E.2d 514 (1946); Zartman v. First Nat'l Bank, *supra* note 19; Rochester Distilling Co. v. Rasey, *supra* note 23.

debtor is able "to use, commingle or dispose" of collateral without having to account to the secured party for so doing.[25]

By allowing the debtor to exercise dominion over the collateral, section 9-205 effectively disposes of the *Benedict v. Ratner*[26] doctrine. In that case, the United States Supreme Court interpreted New York law in order to determine whether an assignment of accounts receivable was enforceable against a trustee in bankruptcy. The Court found that the assignment was fraudulent in law and inoperative against the trustee because the assignee-creditor enabled the assignor-debtor to treat the collateral as his own, without limitation.[27]

It has been asserted however, that the *Benedict v. Ratner* doctrine has already been weakened in at least two areas, by New York's existing law.[28] Thus, in a chattel mortgage transaction where the collateral consists of agricultural produce, the mortgagor may sell any part of the produce if the proceeds are either applied to the debt or are invested in the remaining collateral.[29] Similarly, when an agreement imposes a lien on accounts receivable or other proceeds that will result from the sale of merchandise by the debtor, and some merchandise has been returned to the debtor by a dissatisfied purchaser, the debtor may treat this returned property as his own. In such a case, there will be no adverse effects on the lien that is covering any other accounts owed to the debtor.[30]

Although section 9-205 permits the debtor to maintain unlimited control over the collateral,[31] one may question the advisability, from the creditor's standpoint, of utilizing this section to its fullest extent. The creditor may find that some degree of control over the debtor is necessary in order to avoid a possible

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[25] UNIFORM COMMERCIAL CODE § 9-205.

[26] 268 U.S. 353 (1925); see UNIFORM COMMERCIAL CODE § 9-205, comment 1.

[27] The New York rule is similar with respect to chattel mortgages, Skilton v. Codington, 185 N.Y. 80 (1906); and with respect to trust receipt financing, McCloskey v. J. Henry Schroder Banking Corp., 7 Misc. 2d 501, 168 N.Y.S.2d 522 (Sup. Ct. 1957).

[28] COMMISSION ON UNIFORM STATE LAWS, NEW YORK ANNOTATIONS TO UNIFORM COMMERCIAL CODE AND REPORT TO LEGISLATURE OF NEW YORK STATE 264 (1961).

[29] N.Y. LIEN LAW § 230-b(2).

[30] N.Y. PERS. PROP. LAW § 45 (see fourth paragraph); see Block v. Mill Factors Corp., 134 F.2d 562 (2d Cir. 1943).

[31] Section 9-205 makes it clear, however, that when perfection of a security interest depends upon possession of the collateral by the creditor rather than upon filing, the debtor must not be permitted to have access to the goods. Thus, when the security transaction takes the form of a pledge, the debtor may not exercise any control over the property.

loss of collateral and to avoid the preference problem that is created by Section 60 of the Bankruptcy Act.[32]

Section 9-302

The secured party, as stated previously, should in most instances file a financing statement in order to perfect his security interest.[33] Whether such statement *must* be filed appears to depend more upon the nature of the collateral than upon the type of instrument that is used. For example, the creditor need not file if a purchase money interest in farm equipment having a value of less than 2500 dollars,[34] or in consumer goods[35] is involved.

The financing statement that is filed need contain only the signatures and addresses of the debtor and the secured party and a statement indicating the type of property that is covered by the lien.[36] In addition, an initial filing of the financing statement will preserve the effectiveness of the lien for five years,[37] unless the agreement provides for a shorter period.

Although New York's present filing requirements depend upon the instrument that is used rather than upon the nature of the collateral, section 9-302 will not change the present law significantly. Today, in most cases, filing is necessary to protect chattel mortgages,[38] trust receipts[39] and factor's liens.[40] Moreover, the filing of a statement instead of the instrument itself is sufficient for trust receipts[41] and factor's liens.[42]

Section 9-312

This section contains the general rules for determining priorities between persons who have conflicting interests in the same property. It provides:

(1) When both of the security instruments in the collateral are perfected by filing, the *order of filing* will determine priority whether or not the interest of the party who filed first attached before or after filing.[43]

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32 30 Stat. 562 (1898), as amended, 64 Stat. 25 (1950), 11 U.S.C. § 96 (1958).
33 UNIFORM COMMERCIAL CODE § 9-302.
34 UNIFORM COMMERCIAL CODE § 9-302(c).
35 UNIFORM COMMERCIAL CODE § 9-302(d).
36 UNIFORM COMMERCIAL CODE § 9-402(1).
37 UNIFORM COMMERCIAL CODE § 9-403(2).
38 N.Y. LIEN LAW § 230.
39 N.Y. PERS. PROP. LAW § 58.
40 N.Y. PERS. PROP. LAW § 45.
41 N.Y. PERS. PROP. LAW § 58-e.
42 N.Y. PERS. PROP. LAW § 45.
43 UNIFORM COMMERCIAL CODE § 9-312(5)(a).

(2) If only one of the two conflicting interests is perfected by filing or if both are perfected by other than filing, the *order of perfection* will control.[44] Thus, where an interest is perfected by a creditor by reason of his having taken possession of the collateral,[45] he will have priority over another creditor whose agreement was executed earlier, but whose agreement was not filed earlier.

(3) Finally, when neither of the conflicting interests has been perfected, the *order of attachment* is the determining factor.[46] Attachment, it will be remembered, depends on the existence of an agreement that the interest attach, value having been given by the creditor and the debtor having rights in the collateral.[47]

A significant exception to these three rules is found in the preference given by the Code to *purchase money security interests.* These interests are created when a security interest is "retained by the seller of the collateral to secure all or part of its price; or taken by a person who by making advances . . . gives value to enable the debtor to acquire rights in . . . [the] collateral. . . ."[48] When a purchase money interest is given by a debtor for the purchase of inventory, the purchase money creditor's lien will be *protected from* both *prior* as well as subsequent *floating lien creditors* if he has satisfied two conditions. He must give special notice to those prior creditors who he knows will have conflicting interests in the inventory, and must perfect his interest at the time the debtor takes possession of the inventory.[49] With respect to purchase money interests in collateral other than inventory, the purchase money creditor will have priority without giving special notice if his interest is perfected within ten days after the debtor receives the collateral.[50]

The comments of the Code indicate that the existing law has "under one or another theory, usually contrived to protect purchase

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[44] UNIFORM COMMERCIAL CODE § 9-312(5)(b).
[45] UNIFORM COMMERCIAL CODE § 9-302(i).
[46] UNIFORM COMMERCIAL CODE § 9-312(5)(c).
[47] UNIFORM COMMERCIAL CODE § 9-204(1).
[48] UNIFORM COMMERCIAL CODE § 9-107.
[49] UNIFORM COMMERCIAL CODE § 9-312(3).
[50] UNIFORM COMMERCIAL CODE § 9-312(4). The reason for this distinction between inventory and non-inventory type collateral is that in the ordinary inventory type collateral transaction, the purchase money creditor makes periodic advances as new inventory is received by the debtor. If the debtor is fraudulent and is about to receive advances from a second inventory financier, the notice provision would require the second financier to give notice to the first. Therefore, the first financier could discontinue his advances without loss. UNIFORM COMMERCIAL CODE § 9-312, comment 3.

money interests over after-acquired property interests. . . ." [51] Thus, in New York, a conditional seller who has not filed is given preference over a prior mortgagee claiming under an after-acquired property clause.[52] In these instances, the courts reason that the mortgagee's interest must fail when it conflicts with that of a conditional seller because the latter interest arises directly from the transaction.[53] This thinking is closely analogous to the reasoning used by New York courts when the claim of a chattel mortgagee is challenged by a judgment creditor [54] or by a trustee in bankruptcy.[55] In such cases, it is thought that because property secured by the mortgage is not yet in being, an equitable lien is created between the mortgagor and mortgagee. Consequently, the mortgage lien is not enforceable against either the judgment creditor or the trustee.

Article nine will not affect the result of those cases which have sustained the interests of conditional sellers because of the preference given to purchase money interests. It will, however, destroy their rationale. The Code provides:

> A security interest arising by virtue of an after-acquired property clause has equal status with a security interest in collateral in which the debtor has rights at the time value is given under the security agreement. . . . That is to say: the security interest in after-acquired property is not merely an "equitable" interest; no further action by the secured party—such as the taking of a supplemental agreement covering the new collateral—is required.[56]

On the basis of this statement it may also be assumed that the judgment creditor will no longer have priority over the previously perfected floating lien.

In spite of the relative ease with which the floating lien may be created and perfected under the Code, there are some problems which the secured party cannot overlook. For example, it is anticipated that particular difficulty will be caused by Section 60 of the Bankruptcy Act [57] and by the federal tax lien as it exists under Section 6321 of the Internal Revenue Code of 1954.

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[51] UNIFORM COMMERCIAL CODE § 9-312, comment 3.

[52] Washington Trust Co. v. Morse Iron Works & Dry Dock Co., 106 App. Div. 195, 94 N.Y. Supp. 495 (2d Dep't 1905), *modified,* 187 N.Y. 307 (1907); see New York & Suburban Fed. Sav. & Loan Ass'n v. Crescent Constr. Corp., 196 Misc. 532, 92 N.Y.S.2d 533 (Sup. Ct. 1949).

[53] *Ibid.*

[54] Rochester Distilling Co. v. Rasey, 142 N.Y. 570, 37 N.E. 632 (1894).

[55] Zartman v. First Nat'l Bank, 189 N.Y. 267, 82 N.E. 127 (1907).

[56] UNIFORM COMMERCIAL CODE § 9-204, comment 2.

[57] 30 Stat. 562 (1898), as amended, 64 Stat. 25 (1950), 11 U.S.C. § 96 (1958).

Section 9-108 and the Preference Problem

Section 60(b) of the Bankruptcy Act provides that the trustee in bankruptcy may set aside any preference that has been received by a creditor from a debtor if the creditor knew or had reasonable cause to believe that the debtor was insolvent at the time the preference was made.[58] A preference, as defined by section 60(a),[59] is a transfer of any property by an insolvent debtor to a creditor for an antecedent debt if the transfer was made within four months before the filing, by the debtor or against the debtor, of a petition in bankruptcy.

The conflict that may arise between a secured party under a floating lien agreement and a trustee in bankruptcy is illustrated by the following example. Under the terms of a security agreement between X and Y, X receives a lien over Y's after-acquired property in consideration of several advances already made to Y. Then, within four months of the filing of a petition in bankruptcy, Y obtains new property. X, knowing that Y is insolvent, takes possession of the new "collateral" and is challenged by the trustee in bankruptcy under section 60. On these facts, the trustee will be successful in his action as the transfer was made for an antecedent debt, within four months of the filing of the petition, and with knowledge by the creditor of the debtor's insolvency.

It is in this situation, however, that section 9-108 of the Code becomes applicable. It provides that the property transferred to the creditor in the above example is deemed to have been taken by the creditor for "new value" if the debtor had acquired his rights in the property in the ordinary course of his business or under a contract of purchase made according to the security agreement. By deeming an "antecedent debt" to be "new value," section 9-108 would appear to protect the floating lien creditor from the trustee in bankruptcy.[60] It is also apparent that section 9-108 was enacted on the assumption that "the determination of when transfer is for antecedent debt is largely left by the Bankruptcy Act to state law." [61]

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[58] 30 Stat. 562 (1898), as amended, 64 Stat. 25 (1950), 11 U.S.C. § 96(b) (1958).

[59] 30 Stat. 562 (1898), as amended, 64 Stat. 25 (1950), 11 U.S.C. § 96(a)(1) (1958).

[60] UNIFORM COMMERCIAL CODE § 9-108, comment 1; Robinson, *Commercial Lending Under The Uniform Commercial Code*, 73 BANKING L.J. 77, 79 (1956).

[61] UNIFORM COMMERCIAL CODE § 9-108, comment 1. With regard to the use of state law to determine "antecedent debt" under the Bankruptcy Act, see Corn Exchange Nat'l Bank & Trust Co. v. Klauder, 318 U.S. 434, 436-37 (1943); Benedict v. Ratner, 268 U.S. 353 (1925); Matter of Ideal Mercantile Corp., 244 F.2d 828, 831 (2d Cir.), *cert. denied*, 355 U.S. 856 (1957).

In spite of the fact that state law will determine whether or not a transfer has been made for a pre-existing obligation, there is considerable doubt that section 9-108 will be accepted as a valid basis for making this determination in a bankruptcy proceeding. There is certainly a distinction between a state law which prescribes the time at which a lien has become perfected and a state law which has been enacted only to contravene the federal bankruptcy law. If it is felt by the courts that section 9-108 falls into the latter category, it will have no bearing on the bankruptcy proceedings, since "states may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations." [62]

In order to persuade the court that section 9-108 should not be applied, the trustee in bankruptcy can point to two significant factors. First, the Code comments indicate that the section in question was passed with a view towards the Bankruptcy Act;[63] and second, it is quite clear that the subsequently acquired property taken by the creditor was not, in fact, taken for "new value." [64]

Due to the possibility that section 9-108 may lull the creditor into a false sense of security,[65] several writers have set forth other grounds upon which a floating lien creditor may rely in order to circumvent the preference problem.

Because section 60 aims at preventing the dimunition of the debtor's assets prior to the filing of the petition,[66] a *substitution* of new collateral for old would probably not result in the creation of a preference, unless the new collateral is of greater value than the old.[67] Thus in *In re Pusey, Maynes, Breish Co.*,[68] the assignee of accounts receivable who received new accounts within four months of bankruptcy was found to have received the new accounts as a substitute for funds which he had released to the debtor. Therefore, no preference had been created. There is a

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[62] International Shoe Co. v. Pinkus, 278 U.S. 261, 265 (1929); see First Nat'l Bank v. Robinson, 107 F.2d 50, 53-54 (10th Cir. 1939); Dudley v. Eberly, 201 F. Supp. 728, 731 (D. Ore. 1962). See also Gordon, *The Security Interest in Inventory Under Article 9 of the Uniform Commercial Code and the Preference Problem*, 62 COLUM. L. REV. 49, 59-60 (1962).

[63] UNIFORM COMMERCIAL CODE § 9-108, comment 1.

[64] Friedman, *The Bankruptcy Preference Challenge to After Acquired Property Clauses Under the Code*, 108 U. PA. L. REV. 194, 220 (1959); Note, *The Commercial Code and the Bankruptcy Act: Potential Conflicts*, 53 NW. U.L. REV. 411, 415 (1958).

[65] [1954] 2 LEG. DOC. No. 65, N.Y. LAW REVISION COMM'N REP. (H) HEARINGS ON THE UNIFORM COMMERCIAL CODE 133, 136.

[66] 3 COLLIER, BANKRUPTCY §§ 60.01, 60.20 (14th ed. 1961).

[67] Coogan & Bok, *The Impact of Article 9 of the Uniform Commercial Code on the Corporate Indenture*, 69 YALE L.J. 203, 245 (1959); Note, *supra* note 64, at 415-16.

[68] 122 F.2d 606 (3d Cir. 1941).

practical difficulty involved, however, because the substitution of new accounts for old would require considerable control to be exercised by the creditor. This, of course, is a situation which the Code has attempted to eliminate by repealing *Benedict v. Ratner.*[69]

A concept closely analogous to the substitution of new collateral for old, is the conception of inventory as an *entity* rather than as specific objects comprising the whole.[70] By thinking of inventory as a "floating mass," the parts of which are constantly changing,[71] it is argued that the floating lien covered the "inventory" from the date that the lien was created. Thus, when new property is added to the "floating mass" within four months of bankruptcy, there is no preference — the lien has been covering the "inventory" at all times.[72]

One author feels, however, that the Code itself precludes the application of the entity theory to inventory in some situations.[73] Section 9-204, comment 4 indicates that a security interest in after-acquired collateral will only attach when the debtor acquires his interest in the property. Therefore, when a creditor has an agreement providing for a lien over inventory to be acquired by a debtor, but the debtor himself has no existing inventory or rights in inventory being held by a supplier, it cannot be argued that the creditor had an interest in the inventory from the time the agreement was made. Consequently, the creditor would fail in a bankruptcy proceeding if the debtor subsequently acquired an interest in the inventory within four months of the filing of the petition.[74]

Conflict with the Federal Tax Lien

In addition to the trustee in bankruptcy, the secured party may face another formidable opponent — the federal government. If the debtor owes back taxes to the government as well as an

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69 See UNIFORM COMMERCIAL CODE § 9-205.

70 Coogan & Bok, *supra* note 67, at 245-46.

71 The concept of inventory as a "floating mass" was developed in Manchester Nat'l Bank v. Roche, 186 F.2d 827, 831 (1st Cir. 1951).

72 Coogan & Bok, *supra* note 67, at 245-46.

73 Gordon, *The Security Interest in Inventory Under Article 9 of the Uniform Commercial Code and the Preference Problem*, 62 COLUM. L. REV. 49, 53-56 (1962).

74 *Ibid.* The author also argues that other sections of the Code will prevent the use of the entity theory. He refers primarily to § 9-109 which defines inventory in terms of goods actually held by a person for a particular purpose. Mr. Gordon concludes: "had the draftsmen intended the term 'collateral' to comprehend a debtor's inventory as an entity apart from its specific components, they surely would have been careful not to define 'inventory' only as a function of particular 'goods . . . held'." *Id.* at 56.

obligation to the floating lien creditor, the government will, in many instances, be found to have a prior lien by virtue of Section 6321 of the Internal Revenue Code. This section provides that when a person liable to pay a tax neglects or refuses to do so, "the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." [75] Furthermore, the federal tax lien will attach "to property and rights to property belonging to such person at any time during the period of the lien," including property acquired "after the lien arises." [76] Finally, in order to perfect its "floating lien," [77] the government need only file in accordance with the requirements of section 6323 of the Internal Revenue Code.

To be superior to the tax lien, a floating lien must pass three tests. It must be prior in time; it must be specific; and it must be perfected.[78] It is specific when it is definite as to the amount of the obligation secured, when it clearly identifies the lienor, and when it accurately describes the property that is subject to the lien.[79]

Perfection of the nonfederal lien, however, is entirely another matter. The determination as to when a lien has become sufficiently perfected to be given priority over the federal tax lien is always a federal question.[80] Consequently, a floating lien that is perfected within the meaning of the Uniform Commercial Code by the filing of a financing statement [81] may not meet the federal perfection requirements.[82]

In *United States v. White Bear Brewing Co.*,[83] a mechanic's lienholder perfected his lien under state law. In addition, he began his foreclosure action before any federal tax assessment had been made. Under these facts, the court of appeals gave

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[75] INT. REV. CODE OF 1954, § 6321.

[76] Treas. Reg. § 301.6321-1 (1962). Glass City Bank v. United States, 326 U.S. 265, 268 (1945) ("the lien applies to property owned . . . at any time during the life of the lien.").

[77] Johnson, *The Floating Lien And The Federal Tax Lien*, 15 BUS. LAW. 906, 910 (1960).

[78] United States v. City of New Britain, 347 U.S. 81, 84-86 (1954); see United States v. Davis Mining Enterprises, 187 F. Supp. 911 (W.D. Wisc. 1960).

[79] Wolverine Ins. Co. v. Phillips, 165 F. Supp. 335, 344 (N.D. Iowa 1958); see United States v. City of New Britain, *supra* note 78, at 86.

[80] United States v. County of Allegheny, 322 U.S. 174, 183 (1944); United States v. Davis Mining Enterprises, *supra* note 78.

[81] UNIFORM COMMERCIAL CODE § 9-302.

[82] United States v. City of New Britain, *supra* note 78; United States v. County of Allegheny, *supra* note 80; United States v. Davis Mining Enterprises, *supra* note 78, at 913.

[83] 227 F.2d 359 (7th Cir. 1955).

preference to the mechanic's lienholder. The Supreme Court, however, granted certiorari and reversed the judgment of the lower court in a per curiam decision.[84] The inference which may be drawn from this reversal is that the final judgment in the foreclosure action would be required before perfection could have occurred.

More recently, in *R. F. Ball Constr. Co. v. Jacobs*,[85] a subcontractor assigned payments he was to receive from a general contractor to his surety as collateral for a performance bond. Before federal tax liens were filed against the subcontractor by the government, the subcontractor defaulted in his agreement with the general contractor and the surety became liable under its bond. The only thing that was indefinite at the date of filing by the government was the actual amount of damages for which the surety would be held accountable. When a controversy arose between the government and the surety over the assigned accounts, the district court held for the surety. In another per curiam decision, however, the Supreme Court reversed, thereby giving priority to the tax lien.[86]

This decision led one district court judge to conclude that, whether competing liens are created by contract or by statute, they will be evaluated upon the basis of the "specific" and "perfected" tests.[87] In referring to contractual liens, he stated that the nonfederal lien would not be perfected unless the "event against which the assignee sought protection had . . . occurred when the federal tax lien arose. . . ."[88]

Another indication of what the federal courts may require with respect to the perfection of nonfederal liens is found in *United States v. Toys Of The World Club, Inc.*[89] There, a publisher was in possession of inventory which was owned by his debtor, possession being taken prior to the assessment of withholding taxes. When a dispute arose between the government and the publisher as to who was entitled to the inventory, the court found that because the publisher's lien was possessory as well as "specific," it had been perfected prior to the tax lien.

In another recent case, *United States v. Crest Finance Co.*,[90] the defendant had made advances to a contractor which were to be secured by the assignment of accounts receivable. Although the government assessed taxes against the contractor after the execution

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84 350 U.S. 1010 (1956).
85 140 F. Supp. 60 (W.D. Tex.), *aff'd*, 239 F.2d 384 (5th Cir. 1956).
86 355 U.S. 587 (1958).
87 Wolverine Ins. Co. v. Phillips, *supra* note 79, at 350.
88 *Ibid.*
89 288 F.2d 89 (2d Cir. 1961).
90 291 F.2d 1 (7th Cir. 1961).

of the assignment, the court of appeals, in reliance upon the *Ball* case, permitted the government to take possession of a sum of money then due the contractor. The Supreme Court again granted certiorari, reversed and remanded in a per curiam decision.[91] On this occasion, however, it reversed in favor of the nonfederal lien. On remand,[92] the Seventh Circuit indicated that, based on the Supreme Court opinion, it believed that the *Ball* decision was not controlling in this case. Apparently the two cases are distinguishable on the following basis. In *Ball,* the amount owed by the surety to the general contractor was not fixed before the government perfected its lien, while in this case, the amount owed to the bank was definitely determined before the government had filed.

These recent decisions would appear to add force to the statement made in the district court opinion of *Wolverine Ins. Co. v. Phillips,* referred to earlier.[93] It now seems that a nonfederal floating lien will only be "perfected" when the event which will determine the amount to which the creditor is entitled and against which the creditor sought protection has taken place.

Conclusion

By expressly validating the floating lien, the Code, in effect, enables a debtor to subject all of his assets to the lien. This policy has caused considerable criticism of article nine. From the debtor's standpoint, it is argued that if the floating lien covers inventory and its proceeds, the value of the collateral may at times exceed the amount of the obligation. This will lead to the freezing of his ability to obtain credit when, in actuality, this should not be the case.[94] It is also argued that the floating lien will have an anti-competitive effect upon the "lending market" because it will freeze the debtor's credit position, thereby making him a less desirable credit risk.[95]

As far as the creditor is concerned, the security of his position is certainly open to question in view of the problems created

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91 Crest Fin. Co. v. United States, 368 U.S. 347 (1961).

92 United States v. Crest Fin. Co., 302 F.2d 568 (7th Cir. 1962).

93 165 F. Supp. 335 (N.D. Iowa 1958). See the text accompanying footnotes 87 and 88 *supra*.

94 [1954] 2 N.Y. LEG. DOC. No. 65, N.Y. LAW REVISION COMM'N REP. (H), HEARINGS ON THE UNIFORM COMMERCIAL CODE 140-43. *But see,* UNIFORM COMMERCIAL CODE § 9-404(1), providing for termination of the agreement in such situations.

95 [1954] 2 N.Y. LEG. DOC. No. 65, *supra* note 94. *But see,* Summers, *Should Oregon Adopt the Uniform Commercial Code Concept of the "Floating Lien"?,* 41 ORE. L. REV. 182, 187 (1962). In answering the argument that the floating lien may stifle competition, this author states: "competition does not occur in a vacuum but on certain terms. The lender who seeks unreasonable security for his loans cannot compete for very long."

by the Bankruptcy Act and the tax lien. Consequently, it would appear that the Code's "new value" and "perfection" rules will have a tendency to unsettle rather than to strengthen his standing. In this connection it is interesting to note that, rather than relying on the "new value" rule, banks in Pittsburg operate under a system of making loans of short duration only.[96]

The first-to-file rule of priority has also been criticized. Any delays caused by searching the records and filing a financing statement can cause special hardship to the small businessman who may need credit quickly in order to remove goods from docks, airports or railroad terminals. Delay at such times will cause considerable storage expense. For this reason a first-to-advance rule has been proposed.[97]

Ironically, the answer to these objections is not found in the Code. It is found instead in existing New York law under which a debtor has been free to subject his future assets to a creditor's lien for the past fifty years. Thus, by facilitating the creation and perfection of a floating lien, the Code merely recognizes an existing situation.

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[96] Robinson, *Commercial Lending Under the Uniform Commercial Code*, 73 BANKING L.J. 77, 79 (1956).

[97] [1954] 2 N.Y. LEG. Doc. No. 65, *supra* note 94, at 123.