



Fall 9-1-1986

Inventory Lender As A Good Faith Purchaser For Value: Priority Problems In U.C.C. 2-702

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Commercial Law Commons](#), and the [Contracts Commons](#)

Recommended Citation

Inventory Lender As A Good Faith Purchaser For Value: Priority Problems In U.C.C. 2-702, 43 Wash. & Lee L. Rev. 1351 (1986).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol43/iss4/8>

This Note is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

INVENTORY LENDER AS A GOOD FAITH PURCHASER FOR VALUE: PRIORITY PROBLEMS IN U.C.C. 2-702

Section 2-702 of the Uniform Commercial Code (Code)¹ governs a seller's right to reclaim goods sold on credit to a buyer who was insolvent when the buyer received the goods.² If a seller can establish a prima facie case for

1. U.C.C. § 2-702 (1978) (all citations are to the Uniform Commercial Code (U.C.C.) as amended in 1972). U.C.C. section 2-702 provides in pertinent part:

(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this Article (Section 2-403). Successful reclamation of goods excludes all other remedies with respect to them. As amended 1966.

U.C.C. § 2-702(2) and (3).

The National Conference of Commissioners on Uniform State Laws (Conference) originally sponsored the U.C.C. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1, 1-2 (1967). The Conference sponsored the Uniform Negotiable Instruments Law in 1896 and by 1933 had sponsored six other uniform acts involving commercial law. *Id.* The acts originally sponsored by the Conference, however, were outdated by the late 1930's. Malcolm, *The Uniform Commercial Code in the United States*, 12 INT'L & COMP. L.Q. 226, 229 (1963). In 1940, William A. Schnader, president of the Conference, persuaded the Conference to begin preparation of a comprehensive code governing commercial law. Schnader, *supra*, at 1. By 1944, the Conference had persuaded the American Law Institute to join the Conference as a co-sponsor of the Code. WHITE & SUMMERS, UNIFORM COMMERCIAL CODE 3 (2d ed. 1980). The Conference published the first official text of the U.C.C. in 1951. *Id.* In 1953, Pennsylvania became the first state to adopt the Code. *Id.* at 4. By 1957, the Conference promulgated another version of the Code, including numerous changes suggested by the New York State Law Revision Commission. Symposium, *Panel Discussion on the Uniform Commercial Code: Report of the New York Law Revision Commission*, 12 BUS. LAW. 49, 49-50 (1956). Forty-nine states and the District of Columbia had adopted the U.C.C. by 1948. 1 U.L.A. xxvi (Master ed. 1976). In most instances, states enacting the U.C.C. have followed not only the section headings and sections of the official version, but also have preserved the official version's numbering system. *Id.* See generally Dunham, *A History of the National Conference of Commissioners on Uniform State Laws*, 30 LAW & CONTEMP. PROB. 233, 233-49 (1965) (discussing history of National Conference of Commissioners on Uniform State Laws); Mentschikoff, *The Uniform Commercial Code: An Experiment in Democracy in Drafting*, 36 A.B.A.J. 419, 419-20 (1950) (general information on Uniform Commercial Code); Malcolm, *supra* at 229-46 (general information on history of Uniform Commercial Code); Schnader, *supra*, at 1-12 (general information on enactment of Uniform Commercial Code); Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367, 367-81 (1975) (discussing purposes behind Uniform Commercial Code).

2. U.C.C. § 2-702(2). Both the official comment to the Code and commentators suggest that a seller's right of reclamation stems from a buyer's implied or express representation of solvency when the buyer purchases goods from a seller. See *id.* at comment 2 (suggesting that § 2-702(2) is based on buyer's fraud against seller); Anderson, *The Reclaiming Seller Under U.C.C. Section 2-702 vs. His Four Horsemen of the Apocalypse*, 8 ST. MARY'S L.J. 271, 289-91 (1976) (same).

reclamation under section 2-702(2), the seller normally will prevail in his reclamation action when the insolvent buyer is the only other party laying claim to the goods.³ A seller's right of reclamation, however, becomes more complicated if a third party lays claim to the goods.⁴ Section 2-702(3) of the Code makes a seller's right to reclaim goods subject to, *inter alia*, the rights of a good faith purchaser for value.⁵ In the context of a credit sale transaction, a seller transfers voidable title to an insolvent buyer and the insolvent buyer can, in turn, transfer good title to any party that qualifies as a good faith purchaser under section 2-702(3).⁶ Consequently, a seller's

3. See WHITE & SUMMERS, *supra* note 1, at 1025-26. A seller's right to reclaim goods sold to an insolvent buyer is conditioned upon the buyer's insolvency when the seller delivers the goods and upon the seller's demand for reclamation within 10 days of the seller's delivery of goods to the buyer. U.C.C. § 2-702(2); WHITE & SUMMERS, *supra* note 1, at 1025-26. If an insolvent buyer makes representations of solvency in writing to a seller within three months of the seller's delivery of goods to the buyer, then the 10 day limitation period in which the seller must make his reclamation demand does not apply. U.C.C. § 2-702(2); WHITE & SUMMERS, *supra* note 1, at 1025.

4. U.C.C. § 2-702(3). Section 2-702(3) of the U.C.C. makes a seller's right to reclaim goods subject to the rights of other parties. *Id.*; see *infra* notes 5-6 and accompanying text (explaining third party rights to goods sold to insolvent buyer that are superior to seller's reclamation right).

5. U.C.C. § 2-702(3). A seller's right to reclaim goods from an insolvent buyer is subject to the rights of a buyer in the ordinary course of business, a good faith purchaser, and, in a majority of states (33), a lien creditor. *Id.* In 1966, the Code drafters amended the official version of section 2-702(3) of the Code removing lien creditors as parties whose rights are superior to reclaiming sellers. 3 HAWKLAND, UNIFORM COMMERCIAL CODE SERIES, § 2-702, at 237-39 (1984). A majority of states, however, have not adopted the 1966 amendment. *Id.* The rights of a lien creditor under § 2-702 have sparked a great deal of controversy. See Braucher, *Reclamation of Goods From A Fraudulent Buyer*, 65 MICH. L. REV. 1281, 1281 (1967) (citing numerous articles discussing issue whether lien creditor is purchaser who defeats rights of reclaiming seller under § 2-702(3)). The controversy over the definition of "lien creditor" in section 2-702(3) stemmed from confusion over whether the seller's right to reclaim was subordinate to the claim of a trustee in bankruptcy. Anderson, *supra* note 2, at 282-83. Section 70c of the Bankruptcy Act of 1898 gave a trustee in bankruptcy the status of a lien creditor upon the debtor's insolvency. BANKRUPTCY ACT § 70c, 11 U.S.C. § 110(c) (1970). If, however, the seller's right to reclaim is subject to the claim of a trustee in bankruptcy, then the section 2-702 reclamation right is of little value. The 1966 amendment to the Code removing the lien creditor from the class of parties in section 2-702(3) that defeats the rights of a reclaiming seller was an attempt by the Code drafters to reconcile the conflict between the U.C.C. and the Bankruptcy Act. HAWKLAND, *supra*, at 239; see Henson, *Reclamation Rights of Sellers Under Section 2-702*, 21 N.Y.L.F. 41, 41-54 (1975) (discussing issues surrounding rights of lien creditor under § 2-702(3)); Kennedy, *The Interest of a Reclaiming Seller Under Article 2 of the Code*, 30 BUS. LAW. 833, 833-45 (1975) (discussing rights of lien creditor in light of bankruptcy law).

While the definition of a "lien creditor" under section 2-702(3) involves complicated issues of bankruptcy law, the definition of the "buyer in ordinary course" poses few problems. Anderson, *supra* note 2, at 274-75. To defeat the reclaiming seller, a buyer must purchase from a person who deals in goods of the kind purchased. See U.C.C. § 1-201(9) (definition of "buyer in ordinary course of business"). Case law suggests that a buyer in ordinary course includes not only consumers but also retailers and agents. Colonial Fin. Co. v. De Benigno, 125 Conn. 626, 7 A.2d 841, 843 (1939).

6. U.C.C. § 2-403(1); see also U.C.C. § 2-702(3). Section 2-702(3) of the Code states

right to reclaim goods from an insolvent buyer when a third party also lays claim to the goods often turns on a court's definition of "purchaser" as used in section 2-702(3) of the Code.⁷

The Code defines the term "purchaser" in section 1-201(33) as one who takes by purchase.⁸ Section 1-201(32) defines "purchase" as taking by any voluntary transaction creating an interest in property.⁹ All courts agree that an Article 9 secured creditor fits within the Code definition of purchaser.¹⁰ If a creditor takes a security interest in a seller's goods after the seller delivers the goods to an insolvent buyer, the secured creditor has "purchased" an interest in the goods¹¹ and, under section 2-702(3), the secured creditor's claim to the goods defeats the seller's right to reclaim the goods.¹² Courts are not in agreement, however, on whether a secured creditor with a floating lien qualifies as a "purchaser" under section 2-702(3).¹³

that a seller's right of reclamation is subject to the rights of certain third parties. *Id.* Section 2-702 does not explain those third party rights explicitly. *Id.* Instead, section 2-702(3) refers to section 2-403, a section that governs the power of a party to transfer good title. *Id.* Section 2-403 explains that a buyer with voidable title can transfer good title to a good faith purchaser for value. U.C.C. § 2-403(1). Neither section 2-403(1) nor any other section of the U.C.C. defines voidable title. Anderson, *supra* note 2, at 277. The Code, however, does list four examples of voidable title in section 2-403(1)(a) through (d). *Id.* While the credit sales transaction is not included among the examples of voidable title in section 2-403(1), the examples listed therein are not exhaustive. Anderson, *supra* note 2, at 277-78; *see also* Matter of Samuels & Co., Inc., 526 F.2d 1238, 1241 (5th Cir. 1976), *cert. denied*, 429 U.S. 834. In *Matter of Samuels & Co., Inc.*, (*Samuels II*), the Fifth Circuit explained the relationship between section 2-702 and section 2-403 as part of an overall Code plan favoring the free flow of goods. *Id.* As support for its assertion that the Code favors the free flow of goods, the *Samuels II* court cited sections 2-403, 3-302, 3-305, 6-110, 7-501, 7-502, 8-301, 9-307, and 9-309 of the Code. *Id.* at 1241, n.2.

7. *See* Anderson, *supra* note 2, at 275-76. Professor Anderson suggests that since "value" and "good faith" pose few definitional problems, the definition of "purchaser" is most important in determining who qualifies as a good faith purchaser for value under section 2-702(3). *Id.*

8. U.C.C. § 1-201(33).

9. U.C.C. § 1-201(32).

10. *See, e.g.*, In re Bensar Co., Inc., 38 U.C.C. REP. SERV. 823, 828 (Bankr. S.D. Ohio 1984) (holding that secured creditor qualifies as purchaser); In re Bowman, 25 U.C.C. REP. SERV. 738, 742-44 (Bankr. N.D. Ga. 1978) (same); In re American Food Purveyors, 17 U.C.C. REP. SERV. 436, 441 (N.D. Ga. 1974) (conceding that Code definition of purchaser is broad enough to include Article 9 secured creditor); QUINN, QUINN'S UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST, at s2-337 (1985 Cum. Supp. No. 2).

11. *See Samuels II*, 526 F.2d at 1242 (holding that secured creditor qualifies as purchaser under § 1-201(33) of Code); In re Bensar Co., Inc., 38 U.C.C. REP. SERV. 823, 834-35 (Bankr. S.D. Ohio 1984) (same); In re Bowman, 25 U.C.C. REP. SERV. 738, 745 (Bankr. N.D. Ga. 1978) (same); In re Hayward Woolen Co., 3 U.C.C. REP. SERV. 1107, 1111-12 (D. Mass. 1967) (same); *Eagle Chrysler-Dodge v. Genesee Merchants*, 372 N.W.2d 546, 549 (Mich. Ct. App. 1985) (same).

12. U.C.C. § 2-702(3).

13. *Compare American Food Purveyors*, 17 U.C.C. REP. SERV. at 441 (holding that § 2-702(3) does not protect Article 9 secured creditors) *with* In re Bowman, 25 U.C.C. REP. SERV. 738, 742 (N.D. Ga. 1978) (secured floating lien creditor qualifies as purchaser for value under § 2-702(3)) *and* *Eagle Chrysler-Dodge Sales v. Genesee Merchants Bank & Trust Co.*, 143 Mich. App. 339, 372 N.W.2d 546, 548-49 (1985) (same).

A creditor establishes a floating lien by including an after-acquired property clause in a security agreement.¹⁴ An after-acquired property clause gives a creditor an interest in a buyer's future inventory.¹⁵ Most courts broadly interpret the Code definition of purchaser to include a secured creditor with a floating lien.¹⁶ In *In re Samuels*,¹⁷ the United States Court of Appeals for the Fifth Circuit adopted a literal reading of the Code definition of "purchaser."¹⁸ In *Samuels*, a seller sold cattle to an insolvent meat packer.¹⁹ After learning of the meat packer's insolvency, the seller sought to

14. U.C.C. § 9-204. Comment 1 to section 9-204 makes clear that an after-acquired property clause creates a security interest in after-acquired property without further action by the secured party. *Id.* at comment 1. Consequently, a secured creditor need not negotiate a supplemental agreement to acquire an interest in a debtor's incoming inventory. *Id.*

15. U.C.C. § 9-204(3).

16. *See, e.g., Samuels II*, 523 F.2d at 1242 (holding that secured creditor with floating lien "purchased" interest in defrauded seller's goods); *Bensar*, 38 U.C.C. REP. SERV. at 834-35 (same); *Bowman*, 25 U.C.C. REP. SERV. at 745 (same); *Hayward Woolen*, 3 U.C.C. REP. SERV. at 1111-12 (same); *Eagle Chrysler-Dodge*, 372 N.W.2d at 548-49 (same); WHITE & SUMMERS, *supra* note 1, at 1007 (maintaining that secured creditor purchases interest in inventory via floating lien).

17. 526 F.2d 1238 (5th Cir. 1976) (*Samuels II*), *cert. denied*, 429 U.S. 834. In the first decision issued in *In re Samuels & Co., Inc.*, Judge Godbold dissented from the majority's holding that allowed a seller to reclaim goods from a bankrupt buyer despite the existence of a secured creditor with a floating lien on the buyer's inventory. *In re Samuels & Co., Inc.*, 510 F.2d 139, 144 (5th Cir. 1975) (*Samuels I*). On rehearing en banc, the Fifth Circuit adopted Godbold's dissenting opinion in the earlier case as the majority opinion. *Samuels II*, 526 F.2d at 1241. Judge Godbold claimed that his position that a secured creditor with a floating lien can defeat a reclaiming seller was the result of a "meticulous and dispassionate reading" of the Code. *Id.*

18. *See supra* note 17 (Judge Godbold's opinion that found secured creditor with floating lien to be purchaser was result of strict reading of Code).

19. *Samuels I*, 510 F.2d at 144. In the final decision of *Samuels II*, the Fifth Circuit adopted Judge Godbold's dissenting opinion from an earlier hearing of the case and did not recite the facts of the case. *Samuels II*, 526 F.2d at 1238-41. Consequently, the facts of *Samuels II* are cited from 510 F.2d 139, the earlier *Samuels* opinion. *Samuels* involved a cash sale transaction. *Samuels I*, 510 F.2d at 144-46. In *Samuels I*, the Fifth Circuit found that since the sale of cattle was a cash transaction, the sellers had not yet relinquished title when the sellers discovered the buyer's insolvency. *Id.* The *Samuels I* court based its holding on the distinction between cash and credit sales. *Id.* At common law, the "cash sale doctrine" governed cash sales. *See Gilmore, The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057, 1060-62 (1954) (general discussion of cash sale doctrine). Under the cash sale doctrine, a buyer for cash did not receive title to goods until the buyer had paid the full purchase price. *See Harmon v. Goetter*, 87 Ala. 325,_____, 6 So. 93, 94 (1889) (buyer must pay price before receiving title to goods); *Masoner v. Bell*, 20 Okla. 618,_____, 95 P. 239, 240-41 (1908) (same). Consequently, if a good faith purchaser bought goods from a party who had not yet paid the full purchase price for the goods, the good faith purchaser could not acquire title to the goods. *See Gilmore, supra*, at 1060-62. A seller who sold goods on credit, however, transferred title to the goods upon delivery. BENJAMIN, BENJAMIN ON SALES §§ 796 & 799 (2d ed. 1887). Consequently, a person who bought on credit could transfer good title to a good faith purchaser for value. *Guckner Farmers Elevator Co. v. Cargill, Inc.*, 269 Minn. 127,_____, 130 N.W.2d 69, 72-74 (1964); *Ross v. Leuci*, 194 Misc. 345, 350, 85 N.Y.S.2d 497, 499-500 (Civ. Ct. N.Y. 1949). Code drafters abolished the cash sale doctrine, opting for the voidable title concept found in U.C.C. section 2-403. U.C.C. § 2-403. Section 2-403 allows a buyer with voidable title to transfer good title to a good faith purchaser for value. *Id.*

reclaim from the meat packer the proceeds obtained from the sale of the cattle.²⁰ A secured inventory lender of the meat packer, who claimed to be a good faith purchaser of an interest in the cattle, contested the seller's right to reclaim.²¹ The secured creditor claimed that under an after-acquired property clause in his security agreement a voluntary lien attached to the cattle as soon as the seller delivered the cattle to the buyer.²² The secured creditor argued that since the floating lien was the result of a voluntary transaction creating an interest in the cattle, the secured creditor qualified as a purchaser under sections 1-201(32) and 1-201(33) of the Code.²³ The Fifth Circuit agreed, finding that the Code definition of purchaser is broad enough to include an Article 9 secured creditor who negotiates a floating lien on the debtor's inventory.²⁴ Citing sections 1-201(32) and 1-201(33) of the Code, the court in *Samuels* noted that "purchase" includes taking by lien.²⁵ The Fifth Circuit also noted that including secured creditors within the definition of a section 2-702(3) purchaser is consistent with the Code policy of promoting the free flow of goods.²⁶

Even if a court finds that a secured creditor is a good faith purchaser under section 2-702(3), the secured creditor's right to take good title from a buyer with voidable title under section 2-403 attaches only if the creditor gives value for his interest in the buyer's inventory.²⁷ If a secured creditor has a lien on a buyer's present and future inventory by way of an after-acquired property clause, then the secured creditor's interest automatically attaches to the goods as soon as the seller delivers the goods to the buyer.²⁸ Some courts and commentators suggest that the secured creditor must advance "new" or "contemporaneous" value to the buyer to purchase a

20. *Samuels I*, 510 F.2d at 144. *Samuels* involved a cash seller's attempt to reclaim goods after the depository bank dishonored the buyer's checks. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* The secured creditor in *Samuels* argued that the reclaiming seller merely was an unsecured creditor and that the secured creditor's perfected security interest took precedence over the seller's unperfected interest. *Id.* The *Samuels I* court held that the seller's reclamation right was not a security interest, but rather a right to rescind the transaction with the insolvent buyer. *Id.* at 148-50. On rehearing, however, the *Samuels II* court intimated that the seller's reclamation right may qualify as an unperfected security interest. See *Samuels II*, 526 F.2d at 1248 (holding that reclaiming seller loses to secured creditor but prevails over general creditors).

24. *Samuels II*, 526 F.2d at 1242.

25. *Id.* The *Samuels II* court concluded that since the definition of purchaser under the Code is broad enough to include those taking by sale, voluntary mortgage, gift, pledge or lien, the definition of purchaser is broad enough to include an Article 9 secured creditor. *Id.*

26. *Id.* at 1241; see *supra* note 6 (listing Code provisions supporting policy of promoting free flow of goods).

27. U.C.C. § 2-403(1) (describing rights of purchaser for value). The Code defines value in § 1-201(44) as "consideration sufficient to support a simple contract." U.C.C. § 1-201(44)(d).

28. See Anderson, *supra* note 2, at 280. Professor Anderson characterizes the attachment of a secured party's lien to after-acquired property of the buyer as an "unconscious" purchase that is "hardly voluntary." *Id.* Professor Anderson concludes that a secured creditor should give new value to qualify as a purchaser under section 2-703(2). *Id.* at 300.

valid interest in the buyer's incoming inventory.²⁹ In *In re Hayward Woolen Company*,³⁰ however, the United States District Court for the District of Massachusetts determined that a secured creditor's preexisting claim constitutes value sufficient for a creditor's purchase of a security interest in future inventory.³¹ But the district court did note that the secured creditor in *Hayward Woolen* had advanced \$25,000 to the buyer shortly before the seller delivered goods to the buyer.³² In sum, while the court in *Hayward Woolen* suggested in dicta that a secured creditor need not give "new" value to purchase an interest in the debtor's goods, the court also emphasized that the creditor in *Hayward Woolen* had made recent monetary advancements to the debtor in consideration for an interest in the incoming inventory.³³ Most courts, however, hold that an antecedent debt alone is value sufficient to establish a floating lien creditor as a purchaser of an interest in incoming inventory.³⁴

Code language supports the widely accepted interpretation that a section 2-702(3) purchaser includes a floating lien secured creditor.³⁵ The majority interpretation, however, undermines the section 2-702 reclamation right.³⁶ Most commercial buyers, especially buyers on the verge of insolvency, will have at least one secured creditor with a floating lien on the buyer's inventory.³⁷ Consequently, if a secured inventory lender with a floating lien

29. *Id.* at 282; McDonnell, *The Floating Lienor as a Good Faith Purchaser*, 50 S. CAL. L.R. 429, 460 (1977) (courts should require that secured creditors advance new value to debtors to acquire interest in debtor's incoming inventory); Anderson, *supra* note 2, at 300 (same); *American Food Purveyors*, 17 U.C.C. REP. SERV. 436, 441 (N.D. Ga. 1974) (same); *cf.* *In re Hayward Woolen Co.*, 3 U.C.C. REP. SERV. 1107, 1111 (D. Mass. 1967) (emphasizing that secured creditor advanced contemporaneous value in holding that secured creditor purchased interest in buyer's inventory).

30. 3 U.C.C. REP. SERV. 1107 (D. Mass. 1967).

31. *Id.* at 1111. The *In re Hayward Woolen* court based its conclusion that a preexisting debt constitutes value on the Code definition of value in section 1-201(44)(b). *Id.*; U.C.C. § 1-201(44)(b).

32. *Id.* The *Hayward Woolen* court noted that the secured creditor had advanced \$25,000 contemporaneous value after the court had concluded that a preexisting debt constitutes value. *Id.*

33. *Id.*

34. *See, e.g.*, *Holiday Rambler Corp. v. Morris*, 32 U.C.C. REP. SERV. 1222, 1225 (D. Kan. 1981) (holding that consideration sufficient to support simple contract constitutes value sufficient to purchase interest in buyer's future inventory); *Eagle Chrysler-Dodge Sales, Inc. v. Genesee Merchants Bank & Trust Co.*, 372 N.W.2d 546, 548 (Mich. App. 1985); *First Citizens Bank and Trust Co. v. Academic Archives*, 8 U.C.C. REP. SERV. 1197, 1201 (N.C. Ct. App. 1971) (same). *But see American Food Purveyors*, 17 U.C.C. REP. SERV. at 441 (suggesting that secured creditor must give new consideration to purchase interest in buyer's inventory).

35. *See* U.C.C. § 1-201(32) (Code definition of purchase includes any voluntary transaction creating interest in property); *id.* at § 9-204(1) (after-acquired property clause is permitted in security agreement); *supra* notes 14-15 and accompanying text (discussing floating lien and after-acquired property clause).

36. *See infra* notes 37-42 and accompanying text (reclamation right has little value if floating lien defeats seller's reclamation right).

37. *United States v. Westside Bank*, 38 U.C.C. REP. SERV. 705, 712 (5th Cir. 1984); Anderson, *supra* note 2, at 279.

can defeat a seller's right to reclaim, a seller's section 2-702 reclamation right has little value.³⁸ The secured creditor, on the other hand, often negotiates a floating lien on the buyer's entire inventory to secure payment for a debt of less than the value of the inventory.³⁹ Thus, the secured creditor sometimes is able to satisfy his interest without resorting to proceeds from the defrauded seller's goods.⁴⁰ A few courts and commentators have determined that the floating lien secured creditor should not necessarily qualify as a purchaser for value under section 2-702(3).⁴¹ These courts and commentators maintain that the rights of a secured creditor with a floating lien are not necessarily superior to the rights of a reclaiming seller.⁴²

While most courts find that the position favoring a reclaiming seller over a floating lien secured creditor conflicts with Code language, the minority view has support in both Code and pre-Code history.⁴³ At common law, courts did not look favorably upon the floating lien.⁴⁴ Some pre-Code courts simply invalidated floating liens.⁴⁵ Other courts concluded under common

38. *Westside Bank*, 38 U.C.C. REP. SERV. at 712. The *Westside Bank* court noted that the section 2-702 reclamation right only attaches upon a buyer's insolvency. *Id.* The *Westside Bank* court maintained that allowing the presence of a floating lien to destroy the seller's reclamation right "would in most cases emasculate the reclamation remedy" since secured creditors normally deplete an insolvent buyer's assets before general creditors can satisfy their claims. *Id.*

39. See *American Food Purveyors*, 17 U.C.C. REP. SERV. at 444 (secured creditor was able to recover all of his interest in buyer's inventory without resorting to seller's goods); Skilton, *Security Interests in After Acquired Property Under the Uniform Commercial Code*, 1974 WIS. L. REV. 925, 945 (1974) (allowing floating lien to defeat right of reclaiming seller may provide windfall to secured creditor at seller's expense).

40. See *American Food Purveyors*, 17 U.C.C. REP. SERV. at 444 (some proceeds from sales of seller's goods remain after secured creditor satisfied his interest); see also *Westside Bank*, 38 U.C.C. REP. SERV. at 712-14 (allowing reclaiming seller right to proceeds remaining after secured creditors have satisfied interests).

41. See *American Food Purveyors*, 17 U.C.C. REP. SERV. at 444 (secured creditor does not qualify as purchaser under § 2-702(3) and § 2-403); *supra* notes 66-73 and accompanying text (discussion of *American Food Purveyors*); McDonnell, *supra* note 29, at 460 (maintaining that secured creditor should have to rely on seller's goods as security for payment before secured creditor can qualify as a purchaser); Anderson, *supra* note 2, at 299-300 (suggesting that proper interpretation of "purchaser" in § 2-702(3) is one who gives "new" value for interest in seller's goods).

42. See *American Food Purveyors*, 17 U.C.C. REP. SERV. at 444 (seller reclaiming under § 2-702(2) defeats all Article 9 secured creditors); *infra* notes 66-73 and accompanying text (discussion of *American Food Purveyors*); McDonnell, *supra* note 29, at 460 (suggesting that only secured creditors who rely on defrauded sellers' goods may qualify as purchaser under § 2-702(3)); Anderson, *supra* note 2, at 299-300 (suggesting that only secured creditors who advance "new" value for interest in defrauded seller's goods may qualify as purchaser under § 2-702(3)).

43. See *infra* notes 44-62 and accompanying text (discussion of Code and pre-Code history of specific and general liens).

44. See *infra* notes 45-47 and accompanying text (common law courts invalidated or otherwise defeated purpose of floating lien).

45. See U.C.C. § 9-204 comment 2 (noting common law invalidation of floating liens); McDonnell, *supra* note 29, at 435 (noting that invalidation was common law method of defeating floating lien).

law that the rights of a secured financier were derivative in nature and since a debtor has no valid interest in goods purchased while insolvent, the debtor could not transfer a valid interest to the secured financier.⁴⁶ The purpose of the courts in invalidating the floating lien under common law was to preserve some unencumbered assets on which unsecured creditors could depend.⁴⁷ Financing specialists, however, developed various legal devices that allowed a debtor to give an interest in most everything the debtor had, including the debtor's inventory, leaving no unencumbered assets for unsecured creditors.⁴⁸ The Uniform Commercial Code drafters determined that the common law prohibition against floating liens was not accomplishing its purpose.⁴⁹ Therefore, the Code drafters included the floating lien in the 1948 draft.⁵⁰

In including the floating lien, however, the Code drafters made clear that a difference existed between specific and general inventory liens.⁵¹ Under the 1948 Code, creditors took a specific inventory lien on "segregated" units of the buyer's inventory.⁵² As the debtor sold a specific part of the inventory, the debtor would pay a portion of his debt with the proceeds.⁵³ All other inventory liens were general.⁵⁴ A floating lien with an after-required property clause was a general lien because a floating lien granted a creditor an interest in a buyer's entire inventory, both present and future, as opposed to an interest in specific items of inventory.⁵⁵ The definition of "purchaser" in the

46. See *United States v. New Orleans R.R.*, 79 U.S. (12 Wall.) 326, 364-65 (1870). In *United States v. New Orleans R.R.*, the Supreme Court held that a mortgage intended to cover after-acquired property could include only as great an interest as the transferor had at the time the transfer was made. *Id.* The Supreme Court noted that any other conclusion would be unjust. *Id.*; see also Note, *The Allocation of After Acquired Mortgage Property Among Rival Claimants*, 40 HARV. L. REV. 222, 240-47 (1926) (arguing that secured financier's interest is derivative and thus subject to same claims that parties could bring against debtor); Cohen & Gerber, *The After-Acquired Property Clause*, 87 U. PA. L. REV. 635, 654-59 (1939) (suggesting that courts are trying to use floating lien to overcome common law doctrine prohibiting transfer of future goods).

47. U.C.C. § 9-204 comment 2. The Code drafters maintain in Comment 2 to section 9-204 that the invalidation of the floating lien at common law was not improper, but was ineffective. *Id.*

48. *Id.* The Code drafters in Comment 2 to section 9-204 list field warehousing, trust receipts and factor's lien acts as examples of the various devices used to destroy the "cushion of free assets" that the floating lien was intended to preserve. *Id.*

49. 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 11.7 (1965).

50. *Id.*

51. U.C.C. § 7-302(4) (1948 draft) (distinguishing specific and general inventory liens); *id.* at § 7-306(2) (setting forth requirements for creating specific inventory lien); *id.* at § 7-308(2) (prohibiting specific inventory liens on after-acquired property).

52. U.C.C. § 7-302(4) (1948 draft) (distinguishing specific and general inventory liens).

53. U.C.C. § 7-306(2) (1948 draft) (setting forth requirements for creating specific inventory liens).

54. See *supra* notes 51-52 and accompanying text (distinguishing specific liens on buyer's inventory from other liens).

55. See *supra* notes 51-54 and accompanying text (specific liens must create specific interests and all liens not creating specific interest are general liens).

1948 Code draft included taking by lien, but expressly limited a purchase to taking by transactions creating a specific interest in property.⁵⁶ Since a secured creditor with a floating lien had a general interest in a buyer's inventory, the creditor could not qualify as a purchaser under the 1948 Code.⁵⁷

Further support that the drafters of the 1948 Code did not intend that a secured creditor with a floating lien qualify as a purchaser appears in the Code explanation of the voidable title doctrine.⁵⁸ Under the 1948 Code, a good faith purchaser acquired good title from a buyer with voidable title only when the purchaser took actual possession of the goods.⁵⁹ Thus, strictly construed, the only secured creditor who would qualify as a good faith purchaser was a pledgee.⁶⁰ The 1952 Code drafters eliminated both the distinction between general and specific liens and the requirement of possession before acquiring rights as a good faith purchaser.⁶¹ No evidence exists in the Code or in Code history, however, suggesting that the changes were a conscious attempt to expand the definition of purchaser to include a secured creditor with a floating lien.⁶²

While common law and Code history provide support for the position favoring the rights of a reclaiming seller over the rights of a floating lien secured creditor,⁶³ the only published decision adopting this position relies instead on tenuous interpretations of present Code language.⁶⁴ Specifically, the court favoring a reclaiming seller refused to apply the broad Code definition of purchaser in 1-201(33) to a secured creditor who negotiates a floating lien to purchase an interest in a debtor's inventory.⁶⁵ In *In re American Food Purveyors*,⁶⁶ the United States District Court for the Northern District of Georgia had to choose between granting relief to an innocent seller who was unaware of the unstable financial condition of the buyer or a less than innocent secured creditor who knew of the buyer's pending

56. U.C.C. Article II, section 56(1) (1948 draft) (Code definition of "purchase").

57. See *supra* notes 55-56 and accompanying text (general lienor did not have specific interest necessary to qualify as purchaser under 1948 Code).

58. See U.C.C. Article II, section 57 (explaining voidable title doctrine).

59. *Id.* at § 57(6).

60. McDonnell, *supra* note 29, at 445.

61. See U.C.C. § 7-302 (1949 draft) (eliminating distinction between specific and general liens); U.C.C. § 2-403(1) (1950 draft) (eliminating requirement of delivery of goods to party for party to qualify as purchaser of goods).

62. See McDonnell, *supra* note 29, at 448-49 (suggesting that reason for de-emphasis of voidable title doctrine was increased interest in entrusting doctrine).

63. See *supra* notes 43-50 and accompanying text (common law and Code history support position that floating lien creditor does not qualify as purchaser under § 2-702(3)).

64. See *infra* note 72 and accompanying text (most courts and commentators consider *American Food Purveyors*' holding as contrary to Code language).

65. See *In re American Food Purveyors*, 17 U.C.C. REP. SERV. 436, 441 (N.D. Ga. 1971) (holding that Code definition of purchase in § 1-201(32) and (33) does not apply to § 2-702(3) purchaser), *infra* notes 65-73 and accompanying text (discussion of *American Food Purveyors*).

66. 17 U.C.C. REP. SERV. 436 (N.D. Ga. 1974).

bankruptcy.⁶⁷ The court in *American Food Purveyors* conceded that an Article 9 secured creditor qualifies as a good faith purchaser for value under sections 1-201(32) and 1-201(33),⁶⁸ but held that the definition of purchaser in sections 1-201(32) and 1-201(33) of the Code did not apply to "purchaser" as used in section 2-702(3).⁶⁹ The district court concluded that section 2-702 protects only Article 2 purchasers and not Article 9 secured creditors.⁷⁰ To hold otherwise, the court in *American Food Purveyors* maintained, would violate the Code policy of liberally administering a seller's reclamation right.⁷¹ Commentators consider the *American Food Purveyors* decision a distortion of the Code that "must be read to be believed."⁷² "While attacking the court's holding as inconsistent with Code language, both courts and commentators concede that the court's construction of the Code in *American Food Purveyors* is often more equitable than the majority construction of the Code."⁷³

Only one other recorded opinion interprets the Code as allowing a defrauded seller to reclaim his goods from an insolvent buyer when a secured

67. *Id.* at 438-39. The secured creditor in *American Food Purveyors* was a factor in an ongoing relationship with the buyer. *Id.* at 438. Since the secured creditor failed to police the buyer's financial resources, the district court determined that the secured creditor was disinterested in the buyer's financial condition. *Id.* at 442. The *American Food Purveyors* court also concluded that the secured creditor failed to exercise due diligence when the creditor withheld information of the buyer's insolvency from the seller, which allowed the attachment of a floating lien on the seller's goods once the goods were in the hands of the buyer. *Id.*

68. *Id.* at 441. The *American Food Purveyors* court stated that the Code definition of purchase is "broad enough to include an Article 9 secured creditor." *Id.*

69. *Id.*

70. *Id.*

71. *Id.* The *American Food Purveyors* court apparently determined that the policy of Georgia's Commercial Code favors protecting a seller's right to reclaim over the policy suggested by Judge Godbold in *Samuels* of promoting the free flow of goods. *Id.* at 441; see *supra* note 6 (Judge Godbold in *Samuels* notes that Code policy favors free flow of goods). Bankruptcy Judge Drake in *American Food Purveyors* maintained that courts could best promote the policy of protecting the seller's reclamation right by interpreting the purchaser in section 2-702(3) as excluding Article 9 secured creditors. *American Food Purveyors*, 17 U.C.C. REP. SERV. at 441.

In addition to holding that an Article 9 secured creditor is not a purchaser under section 2-702(3), the *American Food Purveyors* court also suggested in dicta that an insolvent buyer could not transfer title to a secured creditor. *Id.* at 443. The *American Food Purveyors* court held that the secured creditor receives no more rights to the defrauded seller's goods than the buyer, rejecting the holding of *Hayward Woolen* to the contrary. *Id.*; see *Hayward Woolen*, 3 U.C.C. REP. SERV. at 1110-12 (holding that buyer with voidable title can transfer good title to good faith purchaser for value). In fact, the *American Food Purveyors* court specifically rejected the holding of *Hayward Woolen*. *American Food Purveyors*, 17 U.C.C. REP. SERV. at 442.

72. See Jackson and Peters, *Quest for Uncertainty: A Proposal for Flexible Resolution of Inherent Conflicts Between Article 2 and Article 9 of the Uniform Commercial Code*, 87 YALE L.J. 907, 956 n.216 (1978) (*American Food Purveyors* opinion has to be read to be believed); WHITE & SUMMERS, *supra* note 1, at 1027-28 (expressing "distaste" for *American Food Purveyors* decision).

73. See *In re Bowman*, 25 U.C.C. REP. SERV. 738, 743 (limiting *American Food Purveyors* holding to cases in which equities lay with seller); *B & P Lumber Co. v. First Nat. Bank of Atlanta*, 25 U.C.C. REP. SERV. 1033 (Ga. App. 1978) (same).

creditor has a floating lien on the buyer's inventory.⁷⁴ In a decision that was reversed on appeal, the United States Bankruptcy Court for the Eastern District of Pennsylvania held in *In re Emery Corporation*⁷⁵ that a secured creditor with a floating lien on a buyer's inventory did not qualify as a purchaser under section 2-702(3) unless the secured creditor advanced "new value" to the debtor after the seller delivered the goods but before the seller made his reclamation demand.⁷⁶ The *Emery* court reasoned that, because the insolvent buyer had voidable title to the seller's goods,⁷⁷ the seller could divest the buyer of title under section 2-702(2) by reclaiming the goods.⁷⁸ A good faith purchaser of the goods, according to the *Emery* court, could prevent the seller from divesting the buyer of title to the goods, but only if the purchaser acted affirmatively by issuing credit to the buyer in receipt of a security interest.⁷⁹ A floating lien creditor, however, rarely advances new

74. See *In re Emery Corp.*, 38 Bankr. 489, 493 (Bankr. E.D. Pa. 1984) (holding that secured creditor must advance new value to qualify as purchaser), *rev'd*, *Lavonia Mfg. Co. v. Emery Corp.*, 41 U.C.C. REP. SERV. 1172 (E.D. Pa. 1985).

75. 38 Bankr. 489 (Bankr. E.D. Pa. 1984), *rev'd*, *Lavonia Mfg. Co. v. Emery Corp.*, 41 U.C.C. REP. SERV. 1172 (E.D. Pa. 1985).

76. *Id.* at 496.

77. *Id.* at 493. See U.C.C. § 2-403 (voidable title doctrine). Section 2-403 of the Code lists circumstances in which a buyer receives voidable title. *Id.* at § 2-403(1)(a)-(d). The voidable title doctrine, however, is not limited to the circumstances listed in section 2-403, but extends to all cases in which good faith purchasers receive goods pursuant to a transaction of purchase. See Anderson, *supra* note 2, at 277-78 (maintaining that enumerated situations resulting in voidable title are not exhaustive).

78. *Emery*, 38 Bankr. at 496.

79. *Id.* The court in *Emery* found that the broad definition of purchaser in 1-201(33) did not apply to section 2-702(3). *Id.* at 493. To support its reasoning that the Code definition of purchaser in sections 1-201(32) and (33) does not apply to a 2-702(3) purchaser, the *Emery* court noted that the lead sentence of section 1-201 indicates that the words defined in that section are to have the meanings given unless the context suggests otherwise. *Id.*; U.C.C. § 1-201. The *Emery* court concluded that the context of the purchaser in section 2-702(3) suggests that the section 1-201(33) definition was inapplicable. *Emery*, 38 Bankr. at 493. As support for its conclusion, the *Emery* court noted that section 2-403 of the Code provides that an insolvent buyer who accepts goods receives only voidable title, which implies that the debtor's title to the goods was not void automatically, but rather was voidable for some time after delivery of the goods. *Id.*; see U.C.C. § 2-403(1) (person with voidable title can transfer good title to good faith purchaser for value). Section 2-403 of the Code does not state specifically that a seller gives voidable title to an insolvent buyer. U.C.C. § 2-403(1)(a)-(d). The Code language in section 2-403, however, suggests that a seller transfers voidable title not only in the specific instances mentioned in the Code, but also to any transferee under a transaction of purchase. Anderson, *supra* note 2, at 278-79; see *supra* note 77 (voidable title doctrine not limited to specific circumstances listed in § 2-403(1)). The *Emery* court reasoned that the right to void the debtor's title continues until either the 10 day limitation set out in section 2-702(2) has run or the secured party purchases an interest in the debtor's goods by advancing new value to the debtor. *Emery*, 38 Bankr. at 493. Thus, a key element in the *Emery* court's analysis of the voidable title doctrine is that the voidable title doctrine does not apply unless the title is voidable for a period of time. *Id.* The *Emery* court emphasized that a secured party must take some affirmative action before the creditor acquires an interest in the goods. *Id.* The *Emery* court held that a buyer's voidable title could end either through a seller's reclamation, a buyer's purchase of the

value to a debtor but rather relies on an after-acquired property clause to attach his security interest to the debtor's property.⁸⁰ Consequently, under the *Emery* court's analysis, a secured creditor with a floating lien would seldom qualify as a purchaser that defeats a reclaiming seller under section 2-702(3).⁸¹ On appeal, the United States District Court for the Eastern District of Pennsylvania reversed *Emery* in *Lavonia Manufacturing Company v. Emery Corporation*.⁸² The district court in *Lavonia*, citing the Code definition of value, held that a secured creditor qualifies as a purchaser of an interest as long as he acquires his interest in "total or partial satisfaction of a preexisting debt."⁸³ Therefore, under the court's holding in *Lavonia*, a floating lien creditor would always qualify as a "purchaser" of his security interest and would defeat a reclaiming seller under 2-702.⁸⁴

While the *Emery* court's analysis is inconsistent with Code language,⁸⁵ the court's reasoning emphasizes the automatic nature of a secured creditor's

goods, or a secured creditor's voluntary purchase of an interest in the goods after the seller delivers the goods to the insolvent buyer. *Id.* If a secured creditor's inventory lien attaches to goods the moment a seller delivers the goods to a buyer, then the buyer's title, according to the *Emery* court, was never void. *Id.* at 493. Instead, good title transfers to the secured creditor immediately upon delivery. *Id.* The *Emery* court concluded that a secured creditor could not purchase a valid interest in an insolvent buyer's goods by way of the floating lien without violating the voidable title concept of section 2-403. *Id.* The *Emery* court, however, based its interpretation of section 2-403 of the Code on the faulty assumption that a title must be void for a period of time before the voidable title doctrine of section 2-403 allows a subsequent transfer of good title. *Id.* at 493-94. If a party contracts with an insolvent buyer to purchase goods that are identified to the contract upon delivery, then, under the *Emery* court's analysis, voidable title never passes to the buyer because the goods belong to the purchaser immediately upon their delivery. *See* U.C.C. § 2-501(1) (stating that buyer has interest in goods as soon as goods are identified to purchase contract). Consequently, under the *Emery* holding, good title cannot pass to purchasers for value or buyers in the ordinary course of business under the voidable title doctrine of section 2-403 because the insolvent buyer never had voidable title. *See id.* at 493 (voidable title can mature into good title before 10 day limit in which seller can make reclamation demand only if party gives consideration for goods after delivery of goods to insolvent buyer). The *Emery* court's construction of the Code doctrine of voidable title would frustrate the transfer of good title to good faith purchasers and buyers in the ordinary course of business who contract with buyers for goods prior to delivery of the goods. *See id.* at 493 (voidable title cannot mature into good title without passing of time). The *Emery* rationale would force purchasers to enter contracts to buy only goods that a buyer has on hand. Such an interpretation would hinder the general Code policy favoring the free flow of goods. *See* U.C.C. § 2-403 comment 1 (section 2-403 promotes basic policy of allowing easy transfer of goods); *supra* note 6 (discussing general Code policy of promoting free flow of goods).

80. *See supra* notes 14-15 and accompanying text (discussion of after-acquired property clause).

81. *See* notes 76-79 and accompanying text (*Emery* holding requires new value before secured creditor can qualify as purchaser under § 2-702(3)). The after-acquired property clause allows a secured creditor to attach his security interest to future goods coming into a buyer's inventory. U.C.C. § 9-204. Consequently, secured creditors need not advance new value to attach their security interest to incoming inventory. *Id.* at comment 2.

82. 41 U.C.C. REP. SERV. 1172, 1178 (E.D. Pa. 1985).

83. *Id.* at 1175-76.

84. *See id.* (negotiating floating lien is purchase and secured creditor with floating lien qualifies as purchaser who defeats reclaiming seller under § 2-702(3)).

85. *See Emery*, 38 Bankr. at 493. To support its holding that the Code definition of

purchase.⁸⁶ Traditionally, to give value a creditor had to rely on the interest the creditor purchased.⁸⁷ Under an after-acquired property clause in a floating lien, a secured creditor's interest attaches automatically and perhaps even without the knowledge of the creditor.⁸⁸ Courts differ on the question whether a creditor can rely on an interest without knowing the interest exists.⁸⁹ The bankruptcy judge in *Emery* envisions a good faith purchaser, including a secured creditor, as a party who consciously negotiates an interest in and thereby relies upon a buyer's goods.⁹⁰ In contrast, a majority of courts allows a secured creditor to defeat unconsciously the seller's reclamation right via a floating lien.⁹¹ To eliminate a creditor's "unconscious reliance" on a

purchaser in sections 1-201(32) and (33) does not apply to the section 2-702(3) purchaser, the *Emery* court noted that section 2-702(3) of Pennsylvania's version of the Code specifically states that the right of a reclaiming seller is subject to the rights of both a purchaser and a lien creditor. *Id.* at 493; see 13 PA. CONS. STAT. § 2702 (Pennsylvania has not adopted 1966 amendment to Code eliminating lien creditor as party to whom seller's reclamation right is subject). The court then noted that "purchaser" as defined in sections 1-201(32) and (33) also includes a lien creditor. 38 Bankr. at 493; U.C.C. §§ 1-201(32) and (33). The *Emery* court concluded that the reference to lien creditor in section 2-702(3) would be redundant if a purchaser, already mentioned in section 2-702(3), included the lien creditor. 38 Bankr. at 493. The *Emery* court's rationale would be persuasive if "taking by lien" in section 1-201(32) described how the lien creditor of section 2-702(3) acquires his interest. The language in section 1-201(32), however, indicates that a purchaser must take voluntarily. U.C.C. § 1-201(32). The Code states in section 1-201(32) that a purchase includes "taking by lien," but concludes the definition with the phrase "or any other voluntary transaction creating an interest in property." *Id.* Thus, a secured creditor with a lien on a buyer's property is a purchaser only if the creditor acquires an interest in a buyer's property by means of a voluntary lien. See U.C.C. §§ 1-201(32) and (33) (party must purchase goods via voluntary transaction to qualify as purchaser under § 1-201(32) and § 1-201(33)). The reference to lien creditor in section 2-702(3), on the other hand, refers to a lien resulting from an involuntary attachment of the buyer's goods. See U.C.C. § 2-702(3). Consequently, the use of "lien creditor" in section 2-702(3) is different from the reference to "taking by lien" in section 1-201(32).

86. See *infra* notes 87-91 and accompanying text (discussing reliance factor necessary at common law to purchase interest in collateral).

87. McDonnell, *supra* note 29, at 452. See generally McDonnell, *supra* note 29, at 451-56 (general discussion of reliance factor as requirement for purchasing interest in collateral).

88. See *Samuels II*, 526 F.2d at 1242-43 (security interest attached automatically because of after-acquired property clause); Countryman, *Buyers and Sellers of Goods in Bankruptcy*, 1 N.M. L. REV. 435, 458 n.119 (1971) (secured creditor with floating lien on inventory often unconsciously purchases interest in inventory).

89. See McDonnell, *supra* note 29, at 454-56 (discussing reliance factor necessary to qualify as purchaser for value).

90. *Emery*, 38 Bankr. at 496.

91. See, e.g., *Holiday Rambler Corp. v. Morris*, 32 U.C.C. REP. SERV. 1222, 1224-25 (D. Kan. 1981) (because antecedent debt constitutes value sufficient to purchase interest, secured creditor acquires interest in incoming inventory unconsciously through floating lien); *Eagle Chrysler-Dodge Sales, Inc. v. Genesee Merchants Bank & Trust Co.*, 143 Mich. App. 339, _____, 372 N.W.2d 546, 548-49 (Mich. App. 1985) (same); *First Citizens Bank & Trust Co. v. Academic Archives, Inc.*, 8 U.C.C. REP. SERV. 1197, 1201 (N.C. Ct. App. 1971) (same); *supra* note 88 and accompanying text (floating lien attaches to seller's goods automatically and without knowledge of secured party as soon as goods become part of the buyer's inventory); *infra* notes 96-104 and accompanying text (presence of floating lien destroys seller's reclamation right).

buyer's future inventory, the bankruptcy judge in *Emery* held that the automatic attachment of a buyer's inventory by way of an after-acquired property clause is not a "purchase" under section 2-403.⁹²

While most courts agree with the district court in *Lavonia* and have found that a secured creditor with a floating lien qualifies as a purchaser for value, courts are split on whether the floating lien merely defeats the seller's reclamation right or terminates the reclamation right entirely.⁹³ Under a strict reading of the Code, the presence of a secured creditor's floating lien on a buyer's inventory abolishes a defrauded seller's section 2-702 reclamation right regardless of whether the secured creditor must resort to proceeds from the seller's goods to satisfy the creditor's security interest.⁹⁴ Consequently, courts adopting a literal reading of the Code hold that a seller loses his reclamation right entirely if a secured creditor has a floating lien on a buyer's inventory.⁹⁵ In *In re Bensar*,⁹⁶ the United States District Court for the Southern District of Ohio characterized a seller's reclamation right as an exercise in futility when a secured creditor has a floating lien on the buyer's inventory.⁹⁷ The sellers in *Bensar* argued that the right to reclaim under section 2-702(2) is tantamount to a security interest arising under Article 2.⁹⁸ Under section 9-113 of the Code, a creditor can enforce a security

92. *Emery*, 38 Bankr. at 493; see *supra* notes 75-82 and accompanying text (discussion of *Emery*).

93. See *Westside Bank*, 38 U.C.C. REP. SERV. at 715-16 (holding that seller's reclamation right survives secured creditor's floating lien); *infra* notes 108-12 and accompanying text (discussion of *Westside Bank*). But cf. *Bensar*, 38 U.C.C. REP. SERV. at 828-30 (defrauded seller loses right to reclaim when secured creditor has floating lien on buyer's inventory); *infra* notes 96-104 and accompanying text (discussion of *Bensar*).

94. See *Bensar*, 38 U.C.C. REP. SERV. at 826, 829-30 (presence of floating lien on buyer's inventory destroys seller's reclamation right against trustee in bankruptcy); Skilton, *supra* note 39, at 945 (Code language supports holding that floating lien terminates seller's reclamation right); QUINN, *supra* note 10, at s2-339 (under strict reading of Code, seller's reclamation demand is exercise in futility if secured creditor has floating lien on buyer's inventory); see generally R. NORDSTROM, HANDBOOK OF THE LAW OF SALES 515 (discussing circumstances in which purchaser terminates seller's right to reclaim under Code).

95. See *Bensar*, 38 U.C.C. REP. SERV. at 829-30 (seller loses right to reclaim when secured creditor has floating lien on buyer's inventory); *infra* notes 96-104 and accompanying text (discussion of *Bensar*).

96. 38 U.C.C. REP. SERV. 823 (Bankr. S.D. Ohio 1984).

97. See *id.* at 826-29 (*Bensar* court found reclaiming sellers' arguments unpersuasive); *infra* notes 98-100 and accompanying text (discussing arguments posited by reclaiming sellers in *Bensar*).

98. *Bensar*, 38 U.C.C. REP. SERV. at 827-28. In addition to arguing that they had an automatic security interest in goods sold to the insolvent buyer, the reclaiming sellers in *Bensar* maintained that, by virtue of language on the bottom of a printed invoice, the sellers reserved an interest in the goods sold to the insolvent buyer. *Id.* Relying on section 2-401 of the Code, the sellers maintained that the retention of title evidenced by the language on the invoice prevented good title from passing to the buyer until both parties had satisfied all financial conditions of the transaction. *Id.* at 826-27; see U.C.C. §§ 2-401(1) and (2) (Code sections governing reservation of title to goods as security for payment). The *Bensar* court noted first that the sellers never mentioned to the buyers the language on the invoice. *Id.* at 827. Next, the

interest arising under Article 2 without filing a financing statement or obtaining possession of the goods as long as the debtor did not lawfully obtain possession of the goods.⁹⁹ The sellers in *Bensar* argued that the buyer did not lawfully obtain possession of the goods because the buyer received the goods while insolvent.¹⁰⁰ The *Bensar* court flatly rejected the seller's argument, holding that the language of section 2-702(2) does not create a security interest as defined in section 1-201(37) of the Code.¹⁰¹ The *Bensar* court concluded that the presence of a secured creditor with a floating lien on the buyer's inventory ended the seller's reclamation right against the insolvent buyer and also against any other party.¹⁰² Since a secured creditor had a lien on the buyer's inventory in *Bensar*, the district court precluded the seller from reclaiming goods in the hands of the trustee in bankruptcy.¹⁰³ While conceding that its holding was "harsh," the *Bensar* court noted that the defrauded seller could have avoided losing his goods to the secured creditor by obtaining and perfecting a purchase money security interest in the goods.¹⁰⁴

While most courts agree with the *Bensar* court's holding that a secured creditor with a floating lien has priority over a reclaiming seller, some courts

court pointed out that the sellers were aware that the buyer had presold the goods in question. *Id.* The *Bensar* court reasoned that the sellers intended that title pass to the buyers upon delivery. *Id.* Finally, and most importantly, the *Bensar* court noted that even if the buyer received only voidable title, the buyer could still transfer good title to a good faith purchaser for value under section 2-403. *Id.*

99. See U.C.C. § 9-113. Section 113 of Article 9 provides that a security interest arising under Article 2 need not be the product of a security agreement, nor filed, if the interest is in property in the hands of a buyer who did not lawfully obtain possession of the goods. *Id.*

100. *Bensar*, 38 U.C.C. REP. SERV. at 827 n.3.

101. *Bensar*, 38 U.C.C. REP. SERV. at 827. The *Bensar* court held that section 9-113 of the Code describes the impact of an Article 2 security interest and not the source of the interest. *Id.*; cf. U.C.C. § 9-113 (explaining automatic perfection of certain security interest). The district court held that the plaintiff in *Bensar* did not create a writing intended as a security interest and thus retained no interest in the goods sold to the insolvent buyer. *Bensar*, 38 U.C.C. REP. SERV. at 827; see U.C.C. § 1-201(37) (definition of security interest).

102. See *Bensar*, 38 U.C.C. REP. SERV. at 827. The reclaiming seller in *Bensar* sought to reclaim goods, not from the secured creditor with a floating lien nor an insolvent buyer, but from the buyer's trustee in bankruptcy. *Id.* at 826. The secured creditor in *Bensar* had satisfied his interest and the remaining goods were in the hands of the trustee in bankruptcy. *Id.* The *Bensar* court, however, held that the presence of a floating lien on the buyer's inventory ended the seller's right to reclaim goods. *Id.* at 826-30.

103. *Id.* at 829-30.

104. *Id.* at 830. Section 9-312(3) of the Code governs the requirements necessary for a seller to perfect a purchase money security interest in inventory. U.C.C. § 9-312(3). Under section 9-312(3)(b), a secured party must give notification in writing to holders of conflicting security interests if the holders of those conflicting interests have filed a financing statement before the seller files his purchase money security interest. *Id.* at § 9-312(3)(b). The holder of a conflicting perfected security interest also must receive notice of the purchase money security interest within five years before the debtor receives the goods perfected. *Id.* at § 9-312(3)(c). If a party seeking a purchase money security interest complies with all of the requirements of section 9-312(3), "a feat of some consequence," that party will take priority over any conflicting security interest. *Id.*; WHITE & SUMMERS, *supra* note 1, at 1048.

have found that the presence of a floating lien on a buyer's inventory does not terminate the seller's reclamation right.¹⁰⁵ Courts holding that a seller's reclamation right survives a secured creditor's floating lien have concluded that a seller has a right to reclaim goods or proceeds from the sale of goods from an insolvent buyer, but only after the secured creditor has satisfied his interest out of the buyer's inventory.¹⁰⁶ Courts that allow a seller a right to reclaim after a secured creditor has satisfied his interest classify the seller's 2-702(2) reclamation right as a security interest.¹⁰⁷ In *United States v. Westside Bank*,¹⁰⁸ the United States Court of Appeals for the Fifth Circuit held that a secured creditor with a floating lien had a duty to protect the interest of a reclaiming seller after the secured creditor had satisfied his interest out of the buyer's inventory.¹⁰⁹ The Fifth Circuit in *Westside Bank* characterized the seller's section 2-702(2) reclamation right as an unperfected "junior security interest."¹¹⁰ The *Westside Bank* court also found that, after the secured creditor had satisfied his interest out of the proceeds from the sale of the buyer's inventory, the secured creditor had a duty to apply the remaining proceeds to satisfy any junior security interest.¹¹¹ Under the

105. See *Westside Bank*, 38 U.C.C. REP. SERV. at 712-13 (reclaiming seller takes second priority to buyer's assets behind secured creditors); *infra* notes 108-12 and accompanying text (discussion of *Westside Bank*); *Holiday Rambler Corp. v. Morris*, 32 U.C.C. REP. SERV. 1222, 1226 (D. Kan. 1981) (seller's right to reclaim is security interest arising under Article 9 of Uniform Commercial Code); *In re Metal Tech. Mfg., Inc.*, 27 U.C.C. REP. SERV. 701 (Bankr. D. Utah 1979) (same).

106. See *Westside Bank*, 38 U.C.C. REP. SERV. at 711-13 (reclaiming seller has second priority to goods behind secured creditor); *Holiday Rambler*, 32 U.C.C. REP. SERV. at 1225-26 (same); *infra* notes 108-12 and accompanying text (discussion of *Westside Bank*).

107. *Westside Bank*, 38 U.C.C. REP. SERV. at 713; see *infra* notes 108-12 and accompanying text (discussion of *Westside Bank*); *Anderson*, *supra* note 2, at 295-97 (seller's reclamation right survives floating lien if court finds reclamation right to be security interest).

108. 38 U.C.C. REP. SERV. 705 (5th Cir. 1984).

109. *Id.* at 711. The *Westside Bank* court held not only that the seller could reclaim after the secured creditor had satisfied his interest, but also that the seller has a right to proceeds from the sale of his goods. *Id.* at 712. *But cf. Bensar*, 38 U.C.C. REP. SERV. at 826 (holding that reclaiming seller cannot reclaim proceeds from sale of goods).

A controversy underlying a seller's right to reclaim goods from an insolvent buyer is whether the seller can reclaim proceeds from the sale of his goods. *Quinn*, *supra* note 10, at §2-339. The controversy usually turns on whether a court classifies a seller's reclamation right as a security interest, in which case the seller would be entitled to proceeds, *Westside Bank*, 38 U.C.C. REP. SERV. at 715-16, or as a right to rescind the transaction, in which case the seller can recover only the goods sold to an insolvent buyer. See *Bensar*, 38 U.C.C. REP. SERV. at 826 (reclaiming seller is not entitled to proceeds from sale of his goods).

110. *Westside Bank*, 38 U.C.C. REP. SERV. at 713.

111. *Id.* The *Westside Bank* court reasoned that a secured creditor's right to dispose of an insolvent buyer's inventory is subject to Article 2. *Id.*; see U.C.C. § 9-504(1) (governing secured party's right to dispose of collateral upon debtor's default). The *Westside Bank* court held that the seller's reclamation right is a limitation on the secured creditor's ability to dispose of the debtor's assets. *Westside Bank*, 38 U.C.C. REP. SERV. at 713. The *Westside Bank* court further concluded that, under section 9-504(1) of the Code, secured creditors must apply the proceeds from the sale of the debtor's inventory to all junior security interests after the secured creditors have satisfied their senior security interests. *Id.*; see U.C.C. § 9-504(1) (governing secured party's right to dispose of collateral upon debtor's default).

Westside Bank analysis, a seller's reclamation right is subordinate to the rights of a secured creditor with a floating lien, but survives the presence of a floating lien and the seller may satisfy his interest in the buyer's inventory prior to general creditors of the buyer.¹¹²

The holdings of the United States District Court for the Southern District of Ohio in *Bensar* and the Fifth Circuit in *Westside Bank* represent the dichotomy existing in the courts over the fate of the section 2-702 reclamation right in the presence of a floating lien.¹¹³ While the *Westside Bank* analysis affords relief to a defrauded seller, the *Westside Bank* court's classification of the section 2-702 reclamation right as a security interest is inconsistent with Code language.¹¹⁴ Section 9-102(2) defines a security interest as a transaction "intended to create a security interest."¹¹⁵ A seller's reclamation right does not satisfy the definition of security interest unless the seller enters a transaction intending to create a security interest.¹¹⁶ If a seller enters a transaction with the buyer to retain a security interest in goods, the seller has taken a purchase money security interest in the goods and, under 9-312(3) defeats the floating lien secured creditor.¹¹⁷ Thus, if the seller has a security interest, he need not resort to the 2-702 reclamation right to recover his goods.¹¹⁸

Defining the seller's reclamation right as a security interest undermines not only Code language, but also the Code drafters' goal that a reclaiming seller shall defeat lien creditors of a buyer.¹¹⁹ Many states have eliminated the lien creditor as a party that defeats the seller's reclamation right under

112. See *Westside Bank*, 38 U.C.C. REP. SERV. at 713-14 (Code entitles reclaiming seller to second priority in proceeds from sale of insolvent buyer's goods if seller properly makes demand); *Samuels II*, 526 F.2d at 1246 (same). But see *In re Mel Golde Shoes, Inc.*, 403 F.2d 658, 660 (6th Cir. 1968) (holding that seller's reclamation right is not security interest); *Ranchers and Farmers Livestock Auction Co. v. First State Bank*, 531 S.W.2d 167 (Tex. Civ. App. 1975) (same).

113. See *supra* notes 96-104 and accompanying text (discussion of *Bensar* holding that reclamation right is not security interest); *supra* notes 108-12 and accompanying text (discussion of *Westside Bank* holding that reclamation right is security interest).

114. See U.C.C. § 9-102(1)(a) (security interest is transaction intended to create interest); *infra* note 115 and accompanying text (seller's right to reclaim does not satisfy Code requirements for security interest).

115. U.C.C. § 9-102. Section 9-102 of the Code sets forth the policy and subject matter of Article 9. *Id.* Section 9-102(2) states in pertinent part that Article 9 "applies to security interests created by contract . . . intended as security." *Id.*

116. U.C.C. § 9-102(2); see *infra* note 115 and accompanying text (security interest arises only when parties intend for transaction to create security interest).

117. See U.C.C. § 9-107 (definition of purchase money security interest); U.C.C. § 9-312(3) (perfected purchase money security interest takes priority over conflicting security interests in same inventory).

118. See *Bensar*, 36 Bankr. at 830 (reclaiming seller need not rely on § 2-702 reclamation right if seller perfects purchase money security interest in goods); *King Foods v. Erie Farms*, 34 U.C.C. REP. SERV. 109, 113, 21 Pa. D. & C.2d 434 (1981) (same).

119. See HAWKLAND, *supra* note 5, at 239 (Code drafters eliminated lien creditor as party to whose rights Code subjects seller's reclamation right).

section 2-702(3).¹²⁰ If courts classify a seller's right to reclaim as an unperfected security interest, however, then a lien creditor will defeat a reclaiming seller because, under section 9-301(1)(b) of the Code, a lien creditor takes his interest in a debtor's assets prior to creditors with unperfected security interests.¹²¹ Courts can prevent lien creditors from defeating the reclamation right of a seller by reasoning that, if a seller's reclamation right is a security interest, then the interest is automatically perfected under section 9-113 of the Code.¹²² Consequently, a seller would prevail over a lien creditor because the seller would have a perfected security interest in a buyer's goods.¹²³ On the other hand, a reclaiming seller would lose to an Article 9 secured creditor because the secured creditor filed or perfected his security interest before the seller's security interest attached.¹²⁴

If a secured creditor has a perfected interest in a buyer's inventory, classifying the seller's right to reclaim as a security interest gives the seller second priority after the secured creditor has satisfied his interest.¹²⁵ If, however, a secured creditor has an unperfected lien on a buyer's inventory, classifying the seller's right to reclaim as a security interest may allow the seller to defeat the claim of the unperfected inventory lender.¹²⁶ In *Guy Martin Buick, Inc. v. Colorado springs National Bank*,¹²⁷ the Supreme Court of Colorado agreed that a seller with a security interest in goods sold to an insolvent buyer defeats an unperfected secured creditor with a floating lien on the buyer's inventory.¹²⁸ The court in *Guy Martin Buick*, however, held that section 2-702(2) does not create a security interest in favor of a defrauded seller.¹²⁹ The plaintiff in *Guy Martin Buick* delivered goods to an insolvent

120. See *id.* (thirty-three states have adopted 1966 Code amendment eliminating lien creditor as party whose rights section 2-702(3) subjects seller's reclamation right).

121. See U.C.C. § 9-301(1)(b) (rights of creditor with unperfected security interest are subordinate to rights of lien creditor whose lien attached before creditor had perfected security interest).

122. See U.C.C. § 9-113 (creditor need not file to perfect security interest if buyer unlawfully obtained goods from creditor).

123. *Id.*

124. See U.C.C. § 9-312(5)(a) (conflicting perfected security interests in same collateral take priority according to time of filing or perfection).

125. See *Westside Bank*, 38 U.C.C. REP. SERV. at 713. The *Westside Bank* court held that a secured creditor with a floating lien has a duty to protect the interests of other creditors. *Id.* The court noted that section 9-504(a) makes a secured creditor's right to dispose of collateral subject to Article 2. *Id.* The *Westside Bank* court concluded that the secured creditor could not dispose of the buyer's inventory until the reclaiming seller satisfied his interest from the remainder of the goods. *Id.*

126. See *infra* notes 127-37 and accompanying text (seller would have defeated inventory lender with unsecured floating lien if court in *Guy Martin Buick, Inc. v. Colorado Springs Nat. Bank* had classified seller's section 2-702 right to reclaim as security interest); see *Guy Martin Buick, Inc. v. Colo. Springs Nat. Bank*, 519 F.2d 354, 359 (*Guy Martin Buick* court refused to classify seller's reclamation right as security interest).

127. 519 P.2d 354 (Colo. 1974).

128. *Id.* at 359.

129. *Id.*

buyer in exchange for payment by check.¹³⁰ The drawee bank dishonored the check and the plaintiff filed a timely reclamation demand and recovered the goods.¹³¹ A secured creditor with an unperfected lien on the buyer's inventory brought a successful action against the seller for the goods as a good faith purchaser under section 2-403.¹³² The seller appealed, arguing that his reclamation right was a security interest perfected upon repossession of the goods.¹³³ The seller maintained that his perfected security interest defeated the inventory lender's unperfected interest in the goods.¹³⁴ The *Guy Martin Buick* court, adopting a literal reading of the Code, concluded that a seller's right to reclaim was a right to rescind a transaction with an insolvent buyer and not a security interest.¹³⁵ The court stated in dicta, however, that had the seller's right to reclaim fit within the Code definition of a security interest, the seller would have prevailed in the action.¹³⁶ Consequently, whether a seller can protect his interest in goods sold to an insolvent buyer often depends on how a court classifies the seller's reclamation right.¹³⁷

While a seller's right to reclaim often depends on a court's classification of the section 2-702 reclamation right, sellers may not know how a particular court defines the right to reclaim. Therefore, to protect his interest a seller should obtain and perfect a purchase money security interest and not rely on the section 2-702 right to reclaim.¹³⁸ While perfecting a purchase money security interest in inventory is tedious and time consuming,¹³⁹ a seller who fails to perfect an Article 9 security interest risks losing his goods to a secured creditor with a floating lien on the buyer's inventory.¹⁴⁰ If a seller fails to file a purchase money security interest on goods sold to an insolvent buyer and a secured creditor with a floating lien claims the seller's goods as part of the buyer's inventory, the seller may argue that his reclamation right

130. *Id.* at 355-56.

131. *Id.*

132. *Id.* at 356.

133. *Id.* at 359.

134. *Id.* The seller in *Guy Martin Buick* claimed that he perfected his security interest in the goods by repossessing the goods before the secured creditor perfected his interest in the buyer's inventory. *Id.*; see U.C.C. § 9-312(5)(a) (first security interest filed or perfected takes priority over other security interests in same collateral).

135. *Guy Martin Buick*, 519 P.2d at 359.

136. *Id.*

137. Compare *Westside Bank*, 38 U.C.C. REP. SERV. at 713 (seller's reclamation right is security interest and thus survives floating lien) and *supra* notes 108-12 and accompanying text (discussion of *Westside Bank*) with *Bensar*, 38 U.C.C. REP. SERV. at 826-30 (seller's reclamation right is right to rescind contract with insolvent buyer and thus reclamation right does not survive floating lien) and *supra* notes 96-104 and accompanying text (discussion of *Bensar*).

138. See *Bensar*, 38 U.C.C. REP. SERV. at 829-30 (holding that seller must take out purchase money security interest for absolute protection).

139. See U.C.C. § 9-312(3). To perfect a purchase money security interest in inventory, a seller must file a financing statement and give notice of the purchase money security interest to all secured creditors with conflicting security interests. *Id.*

140. See *supra* notes 15-34 and accompanying text (majority of courts hold that seller loses right to reclaim if secured creditor has floating lien on buyer's inventory).

is an unperfected security interest.¹⁴¹ If the court accepts the seller's argument, then the seller will lose to creditors with perfected security interests and perhaps to lien creditors, but will prevail over general creditors.¹⁴² As one commentator noted, "half a loaf . . . is better than no loaf at all."¹⁴³ Alternatively, a seller may argue that a secured inventory lender is not a purchaser of an interest in the goods in the hands of an insolvent buyer and thereby attempt to defeat the claim of all secured creditors whether perfected or not.¹⁴⁴ Most courts, however, have rejected this argument.¹⁴⁵ A seller's argument that a floating lien secured creditor is not a purchaser probably will not prevail since most courts interpret the Code in accordance with prior decisions in their jurisdiction and, if the issue has not yet come to trial in the jurisdiction, courts usually adopt the prevailing view in an effort to promote a consistent interpretation of the Code.¹⁴⁶

The interpretation that allows a reclaiming seller to defeat the rights of a secured creditor or at least a secured creditor with a floating lien on the buyer's inventory represents an extreme solution to the priority problems of section 2-702.¹⁴⁷ On the other hand, a literal interpretation of the Code often unnecessarily deprives a defrauded seller of his reclamation right against an insolvent buyer.¹⁴⁸ Code language suggests that the mere presence of a floating lien on a buyer's inventory destroys a seller's right to reclaim regardless of whether a secured creditor needs the goods to satisfy the creditor's interest.¹⁴⁹ The equitable middle ground classifies a seller's right to reclaim as an unperfected security interest that gives a reclaiming seller second priority behind secured creditors.¹⁵⁰ Interpreting a seller's reclamation right as a

141. See *supra* notes 108-12 and accompanying text (discussing court holdings that classify reclamation right as security interest).

142. See *Westside Bank*, 38 U.C.C. REP. SERV. at 715-16 (holding that secured inventory lender must preserve remaining goods or proceeds for reclaiming seller after secured lender has satisfied his interest); *supra* notes 114-24 and accompanying text (discussing implications of classifying seller's right to reclaim as security interest).

143. QUINN, *supra* note 10, at s2-339.

144. See *Emery*, 38 Bankr. at 496 (reclaiming seller takes priority over rights of secured creditor with floating lien), *rev'd*, 41 U.C.C. REP. SERV. 1172; *supra* notes 75-81 and accompanying text (discussion of *Emery*).

145. See *Lavonia Mfg. Co. v. Emery Corp.*, 41 U.C.C. REP. SERV. 1172, 1178 (E.D. Pa. 1985) (reversing *Emery* ruling allowing defrauded seller to reclaim goods from insolvent buyer despite presence of secured creditor's floating lien on buyer's inventory); Jackson and Peters, *supra* note 72, at 957 n.216 (noting that few cases follow minority view that grants reclaiming seller priority over secured creditor with floating lien).

146. See *Samuels II*, 526 F.2d at 1241-42 (all courts should interpret Code language alike).

147. See *supra* notes 65-92 and accompanying text (minority view protects seller at expense of secured creditor).

148. See *Bensar*, 38 U.C.C. REP. SERV. at 826, 829-30 (presence of floating lien on buyer's inventory terminates seller's reclamation right). *But cf. Westside Bank*, 38 U.C.C. REP. SERV. at 713 (seller's reclamation right should survive floating lien).

149. See *supra* notes 95-104 and accompanying text (secured creditor with floating lien defeats rights of seller to reclaim against any party).

150. See *supra* notes 108-12 and accompanying text (some courts allow reclaiming seller to take second priority behind secured creditor).

security interest, however, strains the section 1-201(37) definition of security interest.¹⁵¹ Furthermore, if courts interpret a reclamation right as an unperfected security interest, then lien creditors may defeat a reclaiming seller regardless of whether section 2-702(3) made the reclamation right subject to the rights of a lien creditor.¹⁵²

Despite the drawbacks of classifying a seller's reclamation right as a security interest, courts are more willing to adopt this equitable middle ground than to follow the *Emery* court's approach of requiring a secured inventory lender to advance new value for incoming goods before the lender's interest in those goods will prevail over a defrauded seller's interest.¹⁵³ Nothing in the Code specifically requires new value for an interest to attach, and most courts refuse to read this requirement into the Code.¹⁵⁴ In addition, the majority of courts refuse to strain Code language by classifying the seller's reclamation right as a security interest.¹⁵⁵ Until drafters change the Code language, the majority courts, having adopted a strict interpretation of Code definitions, will continue to allow a floating lien to destroy the seller's section 2-702 reclamation right.¹⁵⁶ While this latter position "emasculate[s]"¹⁵⁷ the seller's right to reclaim, "it's hard to quarrel with the decision[s] as an application of statutory provisions."¹⁵⁸

GARY BRYANT

151. See *supra* notes 114-24 and accompanying text (seller's reclamation right is not security interest under Code).

152. See U.C.C. § 9-301(1)(b) (unperfected security interest is subordinate to rights of person who becomes lien creditor before secured creditor perfects security interest).

153. See QUINN, *supra* note 10, at §2-338 (*Emery* is only recent opinion holding that secured creditor must advance new value to debtor after debtor receives goods for creditor to take security interest in such goods); *Lavonia*, 41 U.C.C. REP. SERV. 1172, 1178 (reversing *Emery*).

154. See *Samuels II*, 526 F.2d at 1243-44. The *Samuels* court noted that the Code requires only honesty in fact, reasonable commercial behavior, and fair dealing to qualify as a purchaser for value. *Id.*

155. See *Mel Golde Shoes*, 403 F.2d at 660 (holding that seller's reclamation right is not security interest); *Bensar*, 38 U.C.C. REP. SERV. at 827 (same).

156. Anderson, *supra* note 2, at 299.

157. *Westside Bank*, 38 U.C.C. REP. SERV. at 712.

158. Skilton, *supra* note 39, at 945.

