The Law of Fixtures: Common Law and the Uniform Commercial Code: Part II: The UCC and Fixtures

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THE LAW OF FIXTURES: COMMON LAW AND THE UNIFORM COMMERCIAL CODE*
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** For Part I of this article, see Squillante, Common Law of Fixtures, 15 Hofstra L. Rev. 191 (1987). For other materials by this author on this subject see 89 Com. L.J. 501 (1984).

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I. THE HISTORY AND PURPOSE OF § 9-313 of the Code

The Uniform Commercial Code was drafted to do exactly what

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its title suggests—to create a uniform body of commercial law. The Act itself makes this expressly understood in at least two different sections. First, the title declares that the UCC is an "Act . . . to make Uniform the Law . . . ."\(^2\) Second, section 1-102 (2)(c) reiterates that the "underlying purposes and policies of [the UCC] are to make uniform the law among the various jurisdictions."\(^3\)

Some commentators, however, have conceded that uniformity is not possible.\(^4\) James White and Robert Summers wrote that "uniformity is simply not attainable on anything like the scale that the Code drafters originally envisioned. On many issues under Article Nine there are now major conflicts of authority. Yet Article Nine is as tightly drawn as any Code article."\(^5\) Typical of the uncertainty created by various sections of the UCC is the confusion the Code creates in the area of fixtures. In particular, section 9-313, the rele-

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\(^2\) U.C.C. Title (1978) (emphasis in original).

\(^3\) U.C.C. § 1-102(2)(c) (1978).


vant code section addressing fixtures, leaves the definition of fixtures dependent upon the peculiarities of the law of each state. This would appear to be an anomaly, particularly when the states are known to be in such disagreement.7

A. The Common Law Definition of a Fixture

The Code accommodates a tripartite classification of property: realty, fixtures, and personalty, which does not always comport with its common law heritage.8 Fixtures are considered an intermediate class of property, falling between pure chattels and ordinary building materials, which lose their chattel characteristics by incorporation into a structure.10 Therefore, fixtures are considered to be real estate for some purposes, but retain their personal property character, and

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6. See infra notes 39-40 and accompanying text. The Code does not expressly define what constitutes a fixture. Rather, the drafters defer to local estate statutes and local case law in § 9-313 (1)(a), which provides that: "goods are 'fixtures' when they become so related to particular real estate that an interest in them arises under real estate law." See, e.g., Farrier v. Old Republic Ins. Co., 61 Bankr. 950, 952 (W.D. Pa. 1986)(holding that what constitutes a fixture under U.C.C. § 9-313 is a matter of state law); In re Hammond, 38 Bankr. 548, 551 (E.D. Tenn. 1984)(finding that whether goods are fixtures is determined under § 9-313, which essentially leaves the question to state law).


8. U.C.C. § 9-313 Official Comment 3 (1978). The Code "recognizes three categories of goods: (1) those which retain their chattel character entirely and are not part of the real estate; (2) ordinary building materials which have become an integral part of the real estate and cannot retain their chattel character for purposes of finance; and (3) an intermediate class which has become real estate for certain purposes, but as to which chattel financing may be preserved." Id. See infra notes 38-56 and accompanying text.


may be financed as chattels.\textsuperscript{11} Goods become fixtures within the meaning of the Code when they are “so related to particular real estate that an interest in them arises under real estate law.”\textsuperscript{12}

UCC section 9-313 specifically governs the priorities between conflicting chattel security interests and real estate interests over articles denominated as “fixtures.”\textsuperscript{13} Knowledge of its priority scheme enables businessmen to plan their activities, including borrowing for or financing the addition of fixtures as improvements to real estate.

B. The Uniform Conditional Sales Act

The predecessor to section 9-313 of the Uniform Commercial Code was section 7\textsuperscript{14} of the Uniform Conditional Sales Act (UCSA).\textsuperscript{15} This Act was promulgated in 1918, adopted by only eleven states,\textsuperscript{16} and withdrawn from the list of active uniform acts in 1943.\textsuperscript{17} The UCSA did not mention the word “fixtures” in its text. Like the UCC, it required filing for priority. The test put forth in the UCSA to determine whether a good affixed to realty had become part of that realty was whether removal of the good would cause “material damage to the freehold.”\textsuperscript{18} Primarily because of inconsistent interpretations of these provisions, however, the UCSA failed to unify the law of fixtures in the states where it was adopted.\textsuperscript{19}

The drafters of the text of the Uniform Commercial Code generally followed the scheme of the UCSA; however, section 9-313 was carefully drafted to make it clear that the “material injury test” was
abandoned and no longer in force.  

It is interesting to note that the Code’s authors, in an earlier part of the UCC, specifically authorized use of the “material injury” test. In section 2-107, which deals with “[g]oods to be severed from realty,” the Official Comment reads “[t]he word ‘fixtures’ has been avoided because of the diverse definitions of this term, the test of ‘severance without material harm’ being substituted.” This provision does not affect Article 9, however, which defines “fixtures” and specifically rejects the “material injury test.”

C. The Uniform Commercial Code

The 1962 text mentioned the word “fixtures” and specifically provided “[t]he law of this state other than this Act determines whether and when other goods become fixtures.” Under this version of the Code, the secured party could, when appropriate, remove fixtures, but was required to reimburse the non-debtor property owner or encumbrancer for any physical damage to the real estate caused by the removal.

The 1962 text created a great problem between chattel and realty financiers, especially in jurisdictions that had not adopted the UCSA. For example, with regard to fixtures, the priority scheme of the section allowed unfiled chattel secured creditors to take precedence over earlier recorded real estate mortgagees. Professor Homer Kripke, Associate Reporter of the Committee that drafted the UCC, stated that “[t]he draftsmen of the Code assumed that . . . Section 7 of the Uniform Conditional Sales Act (UCSA) had worked satisfactorily [and that,] the problem was simply to redraft and clarify the solutions of the UCSA and to integrate them into the Code. How wrong we were!” By enacting the Code, legislatures in effect created new law in those states that had not adopted the

22. Id.
27. See Kleps, supra note 19, at 394-401.
UCSA,\textsuperscript{30} because adoption of the Code introduced the word "fixtures" to these states without defining that term in the text. Thus, real estate financiers, who were unaware that the Code would apply to them, were now affected by it.\textsuperscript{31}

Thereafter, a committee was established to re-work Article 9 of the Code in order to accommodate real estate interests.\textsuperscript{32} These revisions, culminating in the 1972 amendments to Article 9 of the Code,\textsuperscript{33} still left the decision of what is a fixture to local law.\textsuperscript{34} Compounding the problem of divergent state interpretations of the meaning of "fixture" was the fact that pre-Code decisional law in some jurisdictions was conclusory. Here, courts determined that an article was a fixture based upon the conclusion that since the object had become part of the real estate it could not be removed. If the chattel could be removed, then it remained personalty.\textsuperscript{35}

In addition to the definitional problems, difficulties were generated by the priority scheme created by Article 9. Some states found it difficult to cope with the Code, which favored the fixture security interests to the real estate interests. In these states adoption of Article 9 would have turned pre-Code law on its head.\textsuperscript{36} One means of coping with this problem was suggested by the actions of Ohio and Florida. These states, in enacting the Code, reversed the priorities established by section 9-313, in order to remain consistent with their common law.\textsuperscript{37}

Addressing the lack of a fixtures definition in the 1962 text, the 1972 revised text of section 9-313 tells us that fixtures are items that are "so related to particular real estate that an interest in them arises under real estate law"\textsuperscript{38} and which presumably pass with reality in a conveyance.\textsuperscript{39} This revised definition is substantially differ-

\begin{itemize}
\item \textsuperscript{30} G. Gilmore, \textit{supra} note 13, § 30.1, at 802.
\item \textsuperscript{31} See 1978 Official Text With Comments, \textit{supra} note 1, Reasons for 1972 Change, Official Comment, app. II at 963; Hawkland, \textit{supra} note 15, at 44-45; Kripke, \textit{supra} note 4, at 304.
\item \textsuperscript{32} Coogan, \textit{supra} note 4, at 483.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} U.C.C. § 9-313(1)(a) (1978). See \textit{supra} notes 4, 39-40 and accompanying text.
\item \textsuperscript{35} For a review of the bipartite state law tests, see Squillante, \textit{supra} note 7, at 195-96.
\item \textsuperscript{36} Coogan, \textit{Fixtures—Uniformity, supra} note 4, at 1192-1219 (a thorough analysis of effect of U.C.C. on pre-Code law).
\item \textsuperscript{38} U.C.C. § 9-313(7) (1978). See \textit{infra} notes 110, 164-65 and accompanying text.
\item \textsuperscript{39} U.C.C. § 9-313(7) (1978).
\end{itemize}
ent from the old one which simply stated that "[t]he law of this state . . . determines whether and when other goods become fixtures." Thus this limits the consequences of a court finding that an item is a fixture.\footnote{U.C.C. § 9-313(1) (1962).}

1. Ordinary Building Materials Under the UCC.— The Code further narrows the significance of state law definitions in section 9-313(2): although ordinary building materials incorporated into an improvement on land are fixtures under state law, no security interest in them will be recognized for priority under the Code.\footnote{Id.} Thus, items such as bricks, lumber, and cement cannot be collateral for a security interest, once they are so incorporated.\footnote{Id.}

Where materials are incorporated into a structure that is not part of the real estate, such as mobile homes or prefabricated buildings, the rules for the materials follow the rules applicable to the building itself.\footnote{Id.} Whether the structures themselves are capable of being subject to a security interest is determined by the local law applicable to situations with conflicting chattel and real estate interests.\footnote{Id.}

The Code gives little guidance as to borderline items, such as fences or paneling. While these would pass under a deed, they are not so incorporated as to have lost their identity by incorporation.\footnote{See, e.g., Jammar, Inc. v. United States, 4 Bankr. 4 (N.D. Ga. 1979) (sink and updraft units in tavern); Farrier v. Old Republic Ins. Co., 61 Bankr. 950 (W.D. Pa. 1986) (above-ground swimming pool); Sparkman v. Etter, 249 Ark. 93, 458 S.W.2d 129 (1970) (light fixtures, carpeting and air conditioning); Aquafine Corp. v. Fendig Outdoor Advertising Co., 155 Ga. App. 661, 272 S.E.2d 526 (1980) (billboards); Dry Dock Sav. Bank v. DeGeorgia, 61 Misc. 2d 224, 305 N.Y.S.2d 73 (Sup. Ct. 1969) (aluminum siding).} Moreover, most commentators agree that the Code excludes only very basic materials from security interests.\footnote{See, e.g., Lloyd, Proposed Revisions of the Uniform Commercial Code Seek Uniformity on Fixtures, 2 REAL ESTAT. L.J. 444, 451 (1973); Shanker, An Integrated Financing System for Purchase Money Collateral: A Proposal to the Fixture Problem Under Section 9-313 of the Uniform Commercial Code, 73, YALE L.J. 788, 802-03 (1964). But see R. HENSON, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 8-3, at 305 (2d ed. 1979).} Thus, a security inter-

41. Id. A court's declaration, however, that an article is a fixture conclusively establishes the legal rights of the parties is sometimes immaterial to the priority rights of the parties. For example, even if a court declared that an item was a fixture, if it is a purchase money security interest the vendor had filed with the county real estate records office, the vendor has priority, even if the mortgagee filed previously. U.C.C. § 9-313(4)(a) Official Comment 4(a) (1978).
43. Id.
45. Id.
est in paneling and fences probably can be created and enforced.\textsuperscript{48}

The effect of these amended Code provisions is that any fixture, except ordinary building materials integrally incorporated into the structure, can be the subject of an enforceable security interest. This correctly rejects the common law doctrine, by denying removal which would physically or economically damage the freehold,\textsuperscript{49} and expands the availability of chattel financing for fixtures and equipment in Pennsylvania and New Jersey.\textsuperscript{50}

This conclusion, however, is still widely debated by commentators. Professor Kripke\textsuperscript{51} takes the view that anything passing under a real estate conveyance except sand, brick, lumber and such building materials, is a fixture subject to section 9-313.\textsuperscript{52} Professor Coogan\textsuperscript{53} contends that "substantially attached" items should be considered fixtures.\textsuperscript{54} Professor Hawkland, however, adheres more closely to the pre-Code common law, and would only allow removal where it is economically feasible; and where not feasible, the fixture would be part of the realty.\textsuperscript{55} The views espoused by Professors Kripke and Coogan seem more consistent with the Code, which has specifically rejected the "material injury" test.\textsuperscript{56}

The Uniform Commercial Code section on fixtures allows a chattel secured creditor to establish his priority rights in a fixture, by filing and perfecting his security interest in the fixture, as if it were a chattel, before the fixture is annexed to the realty.\textsuperscript{57} Nevertheless, nonuniformity continues in fixture law.\textsuperscript{58}

\textsuperscript{48} Interests are perfected under U.C.C. § 9-313(4)(b) (1978).
\textsuperscript{50} Pennsylvania and New Jersey had, under the common law, adopted the assembled plant doctrine and institutional doctrine respectively. For a thorough discussion of both, see Squillante, supra note 7, at 196-97.
\textsuperscript{51} Professor Kripke was the Associate Reporter for the Review Committee on Article 9 of the U.C.C. Kripke, supra note 4, at 301.
\textsuperscript{52} Kripke, supra note 29, at 64.
\textsuperscript{53} Professor Coogan was a consultant to the Review Committee on Article 9 of the U.C.C. Kripke, supra note 4, at 301.
\textsuperscript{54} Coogan, Security Interests in Fixtures Under the Uniform Commercial Code, 75 HARV. L. REV. 1319, 1348 (1962).
\textsuperscript{55} See Hawkland, supra note 15, at 45.
\textsuperscript{57} U.C.C. § 9-313(4)(a) (1978) (purchase money security interests); U.C.C. § 9-313(4)(c) (1978) (readily removable factory machines or replacement domestic fixtures).
2. Trade Fixtures Law Under the UCC.— An issue left open by the 1972 revisions is whether trade fixtures come within the meaning of “fixtures” under the Code. Under the common law, trade fixtures were usually considered personalty of the tenant, and therefore removable by the tenant. Under the UCC, if the trade object is tenant personalty, then there is no conflict of priority between the landlord-mortgagee of realty and the tenant-chattel financier, and section 9-313 would be inapplicable. The Official Comment includes tenant’s fixtures under section 9-313(5)(b). This subsection codifies the common law rule that the tenant’s secured chattel financier has the same rights of removal against the lessor as the tenant has against the lessor. Professor Kripke, however, advocates that certain trade fixtures be subject to fixture filing, particularly fixtures subject to a ninety-nine year lease, and in cases where the lessee subsequently acquires the leasehold in fee. This position is confirmed by cases under the Code which continue to hold that trade fixtures remain the personalty of the tenant.

II. Fixture Filing for Perfection

A. Conflicting Claims

If it appears that a fixture does in fact exist, creditors with conflicting claims may assert ownership of the fixture. Creditors whose claims may be in conflict include those who have the fixture as their collateral, those who have advanced money to purchase the fixture, for a discussion of tenants’ secured chattel financiers’ rights, see Squillante, supra note 7, at 263 and accompanying text. One commentator suggests an approach that would include trade fixtures under section 9-313, but exempt them from the obligations of a fixture filing under UCC section 9-313(5)(b). See R. Henson, supra note 4, at § 8-3; Special Project, The Priority Rule of Article Nine, 62 Cornell L. Rev. 834, 921 (1977).

59. See Squillante, supra note 7, at 239. See also infra note 65 and accompanying text.
60. U.C.C. § 9-313 Official Comment 6 (1978) (attempt to regulate priorities among competing secured creditors). See also Brown, supra note 1, § 16.19, at 580 (former case and statutory law, while complicated and voluminous, is now obsolete because of widespread adoption of the UCC).
61. For a discussion of tenants’ secured chattel financiers’ rights, see Squillante, supra note 7, at 263 and accompanying text.
62. See Kripke, supra note 29, at 66.
and those who own real estate to which the fixture is annexed. The Uniform Commercial Code, section 9-313 and "fixture filing" for perfection, have been created to establish priorities among conflicting claims.

Section 9-313 governs priority battles which arise between the fixture secured creditor and a claimant of real estate to which the fixture is attached. It should be well noted that conflicting claims among chattel secured parties are not resolved by this section. The policy underlying the priority rules of the Code is "to uphold the parties' reasonable expectations, and to encourage reliance on real estate recording systems." Determining priorities between the claims of the holders of conflicting real estate mortgages and those of the fixture financier is a complex area of the law.

Were one to apply a strict annexation test, the party with a claim to the real estate would generally take the fixtures as against a fixture financier. Such a priority rule would, however, tend to stifle business and commerce. To promote economic activity and commercial expansion, the Code permits a fixture secured creditor to prevail in a priority dispute against a real estate mortgagee, if the fix-

66. See J. White & R. Summers, supra note 5, § 25-7, at 1053-54; Adams, supra note 13, at 916-21. See also Headrick, The New Article Nine of the Uniform Commercial Code: An Introduction and Critique, 34 Mont. L. Rev. 28 (1973) (The UCC "establishes a comprehensive body of rules which attempt to regulate priorities among competing secured creditors.").
67. Special Project, supra note 61, at 921.
68. Priorities between conflicting security interests in the same collateral are governed by U.C.C. § 9-312(5) (1978).
69. Special Project, supra note 61, at 921-22.
70. Coogan, Fixtures—Uniformity, supra note 4, at 1186; Kripke, supra note 29, at 45.
72. U.C.C. § 9-313 Official Comment 8 (1978). Official Comment 8 provides, in pertinent part:

It is apparent that the rule which permits and encourages purchase money fixture financing, which in context is typically short-term, will result in the modernization and improvement of real estate rather than in its deterioration and will on balance benefit long-term real estate lenders. Because of the short-term character of the chattel financing, it will rarely produce any conflict in fact with the real estate lender. The contrary rule would chill the availability of short-term credit for modernization of real estate by installation of new fixtures and in the long run could not help real estate lenders.

Id.
ture financier has completed a "fixture filing."73

1. Filing Procedures.— As with the filing of any financing statement, the reason for "fixture filing" is to give notice of the secured party's interest in the fixture.74 The importance to chattel financiers of such filing cannot be overemphasized. "A fixture creditor will be subordinated to competing realty interests . . . if he does not correctly identify his collateral as a fixture and perfect his interest by filing in the local real estate records."75

"[A] 'fixture filing' is the filing in the office where a mortgage on the real estate would be filed or recorded of a financing statement covering goods which are or are to become fixtures . . . ."76 Article 9 demands that a fixture filing meet certain requirements. A financing statement used with such a "fixture filing" must give the names of the debtor and secured party, be signed by the debtor, and contain a statement concerning the type of collateral.77 It must contain the address of the secured party where information can be further obtained, and give a mailing address for the debtor. Furthermore, the fixture financing statement must state that it concerns "goods which are or are to become fixtures,"78 it must state that it will be filed in the real estate records, and it must include a description of the real estate.79 In addition to filing, a security interest must, of course, "attach." This occurs either when the collateral is in the secured parties' possession, or when the debtor has signed a security agreement, where value has been given by the creditor, and where the debtor has obtained rights in the collateral.80

In one case, the chattel secured creditor did everything necessary to perfect his security interest. The clerk, however, misfiled the

73. See infra note 78 and accompanying text for a discussion of "fixture filing."
74. U.C.C. § 9-313 Official Comment 4(a); J. White & R. Summers, supra note 5, § 25-9, at 1056; Coogan, The New U.C.C., supra note 4, at 490-92.
75. Special Project, supra note 61, at 918-19. See also Corning Bank v. Bank of Rector, 265 Ark. 68, 576 S.W.2d 949 (1979) (to establish priority a fixture filing must be filed in real estate office); Tillotson v. Stephens, 195 Neb. 104, 237 N.W.2d 108 (1975) (where security agreement was not filed in office of register of deeds, but rather, in office of county clerk, held ineffective against bank's mortgage lien on real estate).
79. Id.; see infra notes 153-56 and accompanying text.
financing statement. The error was not discovered until the debtor became bankrupt. The court held that under section 9-403(1), the presentation of the financing statement to the filing office, and not the actual filing, was sufficient for the secured creditor’s rights to attach.81

The description of the real estate to which the fixture is attached should be specific enough that one is able to “reasonably identify” what is being described.82 Because the Code has adopted “notice filing,”83 the description of real estate need not be by metes and bounds. The “proper test is that a description of real estate must be sufficient so that the fixture financing statement will fit into the real estate search system and the financing statement be found by a real estate searcher.”84 No doubt, a “fixture filing” which so describes the realty to which the fixture is attached so as to give constructive notice of a mortgage, is sufficient to meet the requirement that the real estate be described.

When the debtor does not own the real estate to which the fixture is attached, or does not have any interest in the real estate, the chattel creditor must still file the financing statement in the real estate records, but under both the name of the debtor and of the real estate owner of record.85 This allows for potential real estate mortgagees or purchasers to receive notice of the chattel secured party’s lien, thereby preserving the chattel financier’s claim.

A real estate mortgage may serve effectively both as a mortgage and as a fixture filing.86 To do so, the mortgage must be recorded in the real estate records, describe the fixtures by item or type, comply with all the requirements for a financing statement listed earlier,87 and state that the goods are, or are to become fixtures.88

82. T. Quinn, supra note 64, § 9-402(A)(I)(d), at § 9-265 (Supp. 1985); Coogan, The New U.C.C., supra note 4, at 492.
84. U.C.C. § 9-402 Official Comment 5 (1978). A description of real estate utilizing only a post office address of the owner of the real estate has been held to be insufficient. Corning Bank, 265 Ark. 68, 576 S.W.2d 949 (1979). Contra In re Mistura, 13 Bankr. 483, 32 U.C.C. Rep. Serv. 633 (D. Ariz. 1981) (accurate street address is a sufficient description of the real estate). One commentator has written that “no useful amount of additional information would be provided by giving the metes and bounds . . . .” Kripke, supra note 29, at 52; see also Coogan, The New U.C.C., supra note 4, at 491.
87. See supra note 76-79 and accompanying text.
The advantage of a real estate mortgage which also serves as a fixture filing is primarily one of duration. A filed fixture financing statement lapses five years from the date of filing, although, before the fixture filing lapses, "[a] continuation statement may be filed by the secured party within six months prior to the expiration of the five year period specified in subsection (2)," which will continue the effectiveness of the original statement. On the other hand the real estate mortgage "fixture filing" is effective "for the duration of the real estate recording." Clearly, if a secured party has the opportunity, a real estate deed fixture filing is preferable.

An important point to keep in mind is that a fixture financing statement perfects a security interest only in fixtures. Security interests in chattels must be perfected by a chattel security filing. However, one must determine whether something actually is a fixture, which is no easy task. Moreover, the word "fixtures" in the security agreements between parties is not determinative of the classification of the chattel. Thus, a creditor faced with the choice of filing as a fixture or as a chattel secured party runs a substantial risk since improper filing by the secured party will not perfect a security interest. Therefore, dual filing may be necessary to protect the fixture creditor against both real estate creditors, if the article is a fixture, and other secured lenders, if the article is a chattel. Such precautions are further justified since, if the item remains a chattel, the fixture filing does not prejudice the secured party's rights in the item as a chattel. "The fixture filing may be merely precautionary."

94. In re Janmar, Inc., 4 Bankr. 4 (Ga. 1979)(finding that fixture filings were insufficient to perfect security interests in tables, counters and refrigeration units in a tavern, while sufficient to perfect security interest in sinks and updraft units); T. Quinn, supra note 64, ¶ 9-313(A)(5), at 9-238; Coogan, Fixtures—Uniformity, supra note 4, at 1191-92.
95. Hess v. Hess, 61 Bankr. 247 (W.D. Pa. 1986) (creditor who mistakenly filed in wrong county did not have perfected security interest); see supra note 77 and accompanying text.
III. PRIORITY FOR CHATTEL FINANCING UNDER THE UNIFORM COMMERCIAL CODE

A. The General Rule

The statutory scheme of section 9-313 establishes priorities between conflicting claims of real estate creditors and secured parties and represents a compromise between the competing interests of real estate and chattel financiers. Here, the Code attempts to enact fair statutory requirements based on the reasonable expectations of the parties.

The 1972 amendments made to Article 9 completely overhauled the original 1962 version of section 9-313, which had been highly criticized by realty financiers. The new provision protects both realty and fixture interests. It protects fixture interests by granting them priority over real estate interests through a simple filing mechanism. Thus, the chattel financier is assured under section 9-313 that he can remove his collateral upon default of the buyer.

Moreover, the interests of real estate creditors are also protected. For chattels that become annexed to realty, the fixture financier must file a “fixture filing” in the real estate recording office, so that real estate creditors, accustomed to realty priority rules, receive notice that the fixture now firmly attached to their secured realty, and which might be assumed to be part of their mortgage, is subject to a lien. Thus, those with realty interests are provided the opportunity of making informed lending decisions.

The common law rule of priority between realty mortgagees and fixture secured creditors was that the realty mortgagee prevailed. The UCC acknowledged this provision by providing that “a security
interest in fixtures is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor.”107 As one commentator wrote, “The Code resolves the conflicts between the fixture creditor and existing real estate interests just as they were settled under prior law.”108

B. Exceptions to the General Rule—An Overview

The main thrust of section 9-313, however, is to set forth exceptions to this general rule, and to specify exactly how a fixture financier can prevail over a real estate interest.109 The two most important exceptions to the “realty interests win” rule are found in subsections 9-313(4)(a) and (b).110 These two subsections “provide the basic priority rules” establishing the priority of the security interests of the fixture financier over those of the realty creditor.111

1. The First to File Rule.— Subsection (4)(b) provides that a fixture filing has priority over a conflicting realty interest in the following situations: where the “fixture filing” is perfected before the realty interest is recorded, where the security interest has priority over any other conflicting interest of a predecessor of the realty interest, and where the debtor has an interest of record in the realty or is in possession.112 One commentator has written that “the central rule of 9-313 is now found in subsection 9-313(4)(b), and the principle here adopted is that ‘the first to file or records wins.’ Thus, whoever gets there first, be he fixture filer or real estate interest, wins.”113 Of course, the technical rules for fixture filing in the real estate records must be followed, or the fixture financier will be deemed “unperfected,” and the realty interests will prevail.114 Thus, the requirements for using this rule to achieve priority, are narrow.

108. Berry, Priority Conflicts Between Fixture Secured Creditors and Real Estate Claimants, 7 MEM. ST. U.L. REV. 209, 228 (1979) (emphasis added). This statement concerns only prior realty mortgages conflicting with fixture financiers, but its overall import is that the Code has attempted to remain consistent with logical and defensible common law doctrine concerning fixtures.
110. Id. at 492.
111. U.C.C. § 9-313 (4)(b) (1978); see infra notes 151-62 and accompanying text.
113. See supra notes 78-93 and accompanying text. See e.g., Sears Roebuck & Co. v. Detroit Fed. Sav. & Loan Ass’n, 79 Mich. App., 378, 262 N.W.2d 831 (1977) (where fixture supplier failed to perfect his purchase money security interest, security interest held subordinate to real estate interest).
2. Purchase Money Security Interest.— Subsection (4)(a) modifies the subsection 4(b) first to fixture file rule. Pursuant to subsection (4)(a), the fixture financier can obtain priority over a real estate interest. A fixture filing has priority over a conflicting realty interest in the following situations: where the fixture interest is a purchase money security interest, where the realty interest arises prior to the time the goods become fixtures, where the fixture filing is perfected before the goods become fixtures or within ten days thereafter, and where the debtor is either in possession of the realty or has an interest of record. This subsection, which offers a fixture secured party the best protection in a priority battle, is frequently relied upon for priority over a real estate interest, both because of the ten day grace period and because most fixture interests are purchase money security interests. Subsection (4)(a) is a major change from the provisions of the 1962 Code. Under the earlier Code, “a security interest which attaches to goods before they become fixtures takes priority as to the goods over the claims of all persons who have an interest in the real estate,” except for some limited transactions. This provision, unlike the present Code, did not require any filing to give notice to the realty interests, as long as the security interest “attached”

115. See infra notes 152-56 and accompanying text.
116. U.C.C. § 9-313(4)(a) (1978). A key point is that the fixture security interest is perfected before the goods become fixtures or within ten days thereafter. See infra notes 174-80 and accompanying text.
117. See Coogan, The New U.C.C., supra note 4, at 494 (a “party who demands positive assurance that he has a good security interest against realty interests may . . . obtain such assurance if he can meet the requirements of paragraph (a) . . . because while paragraph (a) is limited to fixture purchase money security interests, it in fact covers nearly all fixture security interests; non-purchase money security interests in fixtures are rare indeed”).
119. “Attach” is an important term of art in the U.C.C. It refers to the time a “security interest” in particular collateral arises in favor of a secured party. Former section 9-204(1) provided that before a security interest can attach:
   (1) an agreement must have been made between the debtor and the secured party that the latter shall have a secured interest in the collateral in question; (2) value must have been given by the secured party; and (3) the debtor must have acquired rights in the collateral. The security interest will “attach” without regard to the order of occurrence, unless the parties have agreed to postpone the time of attachment. Though not technically necessary for “attachment” of the security interest, compliance with the Statute of Frauds provision of section 9-203(1) is necessary to make the security interest “enforceable” against either the debtor or third parties. The collateral must either be in the possession of the secured party, or the debtor must have signed a security agreement which describes the collateral . . . . Since it rarely would be practicable for the secured party to have possession of fixtures collateral prior to the debtor's default, a written security agreement will almost always
to the goods before it was annexed as a fixture to the realty. Naturally, those with real estate interests objected to this provision, and eventually their criticism brought about the 1972 amendments. The amended version brings the rules governing fixtures into conformity with other provisions of Article 9 and, in particular, with those provisions which emphasize the virtues and importance of notice filing.

a. Construction Mortgages.—A special situation to which 9-313(4)(a) is expressly inapplicable is the construction mortgage situation. A construction mortgage is a creditor's lien, usually recorded before construction begins, while the property is vacant, and in which the construction mortgagee finances construction work through a series of progress payments which are disbursed during the entire course of construction.

While arguments were made that such a mortgage attained priority over real estate creditors, the 1962 Code did not expressly recognize such priority. Instead, such a realty interest had to fit within an exception to the general fixture priority rule. This exception provided that fixture financiers "do not take priority . . . over a creditor with a prior encumbrance of record on the real estate to the extent that he makes subsequent advances . . . made or contracted for without knowledge" of the fixture security interest.

Because of their vulnerability in a priority dispute with secured creditors, construction mortgagees lobbied for section 9-313(6) in

be necessary to make a security interest enforceable.

U.C.C § 9-204 (1962). Note, while former subsection (1) of § 9-204 was eliminated, the term "attach" was placed in § 2-301 "and related to the concept of enforceability of the security interest between the parties to the security agreement contained in that section." 1978 Official Text With Comments, supra note 1, Reasons for 1972 Change, Official Comment, app. II, at 939.


123. U.C.C. 9-313(1)(c) (1978). Section 9-313(1)(c) provides:

(c) a mortgage is a "construction mortgage" to the extent that it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates.

Id.

the 1972 amendments to the Code.\textsuperscript{125} Arguments were raised that failure to protect the construction mortgagee would produce the same adverse effects as failure to protect the fixture financier. Indeed, without the construction mortgage there would be less of a likelihood that real property would exist to which a fixture could be affixed. Thus, section 9-313(6) provides that a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures, in the situation where goods become fixtures before the construction is completed.\textsuperscript{126} Importantly, this section gives priority to the construction mortgagee only during the construction period prior to the completion of the improvement.\textsuperscript{127} Nonetheless, in accordance with sound business policy, the section provides priority for the construction mortgagee over fixture financiers,\textsuperscript{128} and, were the situation otherwise, a construction mortgagee would have no security for his loan other than vacant land or an uncompleted structure.\textsuperscript{129} A purchase money fixture creditor can easily discover evidence of the construction lien, so there is no harm to the creditor. Moreover, the mere fact that construction activity is taking place should suggest to him that a construction mortgage may apply.\textsuperscript{130}

b. \textit{Readily Removable Machines and Replacement Domestic Appliances}.— There are other Code exceptions to the rule that the realty interest has priority over the fixture financier. Where “the fixtures are readily removable factory or office machines, or readily removable . . . consumer goods,” and the chattel security interest is perfected by any method under the Code before the goods become fixtures, the secured creditor will prevail.\textsuperscript{131} Thus, for a secured creditor to perfect his interest in these fixtures, “a ‘fixture filing’ is


\textsuperscript{127} U.C.C. § 9-313 Official Comment 4(e) (1978).

\textsuperscript{128} Coogan, \textit{The New U.C.C.}, \textit{supra} note 4, at 498-99.

\textsuperscript{129} See Special Project, \textit{supra} note 61, at 925.

\textsuperscript{130} Id. at 925-26. Nonetheless, one writer has asserted that “[t]he construction rule exception makes little sense as a policy” other than to favor the large real estate interests over small lenders and sellers. Lloyd, \textit{supra} note 47, at 455. \textit{Contra} Coogan, \textit{The New U.C.C.}, \textit{supra} note 4, at 498 (“[t]he justifications for generally favoring the construction mortgagee’s interest seem rather clear”).

never necessary,” a chattel filing will be adequate. Pursuant to this statutory scheme, if an article annexed to the reality is not a fixture under state law, then the reality interests will not prevail upon the debtor’s default, and the secured creditor will take the item as the personalty of the debtor. This was the case in Motorola Communications & Electronics, Inc. v. Dale. In Motorola, a 400 foot tall radio tower, firmly annexed to another’s reality, was leased by Misc-Corp. from Motorola, the secured creditor. Motorola filed a chattel financing statement, but not a fixture filing. Upon Misc-Corp.’s default, the owner of the reality sought to take the tower as a fixture, contrary to Motorola’s claim to the tower as a secured creditor, arguing that Motorola was unperfected for lack of fixture filing. The court did not rely on section 9-313, but determined that the tower was not a fixture, and that Motorola could repossess it as personalty, under the chattel security agreement.

3. Non-Purchase Money Security Interest Priority Over Subsequently Arising Real Estate Interests.— Further priority difficulties are created when an individual who acquires a real estate interest subsequent to the creation of a fixture enters the foray.

a. The Common Law Approach.— Under the common law a presumption arose that anything a landowner annexed to his own reality became part of the reality, or a fixture. This rule, however, became unclear when the land was encumbered by a mortgage. Then the common law distinguished between annexing a chattel before the mortgage attached, and annexing a chattel subsequent to attachment of the mortgage. In the former case, when there was a mortgage

132. See Berry, supra note 108, at 237; U.C.C. § 9-301(1)(b) (1978) (where security interest perfected).
133. See Coogan, The New U.C.C., supra note 4, at 495.
135. 665 F.2d 771 (5th Cir. 1982).
136. Id. at 772.
137. Id.
138. Id. at 774.
139. For a review of early annexation criteria, see Squillante supra note 7, at 203-08.
140. For a discussion of prior and subsequent mortgages, see Squillante, supra note 7, at 228-33.
given subsequent to affixation, the courts usually found a very strong presumption that the annexed article was a fixture. In the latter case, that of a prior mortgage attaching to the realty before annexation of the article, there was a much weaker inference that the article was a fixture. The rationale is simple. The fact trier believed that the real estate mortgagee, when giving the mortgage, relied on the realty and everything thereon to support the mortgage. It is reasonable, then, to give priority to the mortgagee who made the loan subsequent to the affixation of the chattel, because the fixture was part of the realty at the time of the creation of the mortgage.

b. The UCC Approach.— The same type of distinction and analogous reasoning has been incorporated into the priority sections of the Uniform Commercial Code. Section 9-313(4)(b) addresses transactions in which the secured party perfects his fixture filing before the real estate mortgagee files his lien. This subsection gives priority over a mortgagee whose interest arose subsequent to the perfection of the security interest in fixtures by the secured party.

The original Code provision concerning subsequent real estate interests heavily favored secured parties over the realty interests. The 1962 version of section 9-313(3) provided that a security interest attaching to goods “is valid against all persons subsequently acquiring interests in the real estate,” except in some limited instances. This provision granted priority to all chattel security interests which were perfected under any of the Code’s general provisions for perfecting over subsequently perfected real estate interests. Thus, holders of real estate interests were forced to search through all chattel security filings, to insure that any chattels an-

141. For a discussion of subsequent mortgages, see Squillante, supra note 7, at 229-31.
142. For a discussion of prior mortgages, see Squillante, supra note 7, at 231-33.
143. Adams, supra note 13, at 849-51; Squillante, supra note 7, at 228.
144. U.C.C. § 9-313 Official Comment 3(a) (1978); Coogan, The New U.C.C., supra note 4, at 493.
146. W. Hawkland, R. Lord, C. Lewis, supra note 1, § 9-313:03, at 210-13; Adams, supra note 13, at 842; Coogan, The New U.C.C., supra note 4, at 488; Kripke, supra note 29, at 73.
147. U.C.C. § 9-313(3) (1962). Subsequent reality interests were given priority in three situations: (1) § 9-313(4)(a) (subsequent purchasers for value, who purchased without knowledge of the security interest and before its perfection); (2) § 9-313(4)(b) (subsequent lien creditors); (3) § 9-313(4)(c) (prior encumbrancers to the extent that he makes subsequent advances).
nexed to the realty were not already the subject of a perfected chattel security interest. Under the 1972 Code, however, amendments were enacted to create a more equitable relationship between the two conflicting secured parties. In effect, the new amendments adopt the more common priority rule of conveyancing, that the first to file or record, with some exceptions, prevails. Thus, under subsection (4)(b), the secured creditor will have priority over subsequent real estate interests, if three requirements are met.

c. Requirements for Priority.— First, the secured creditor's fixture security interest must be perfected by a fixture filing before the real estate interest is of record. This requirement espouses the "first to file or record prevails" concept. Holders of real estate interests are familiar and comfortable with such a rule which puts the realty mortgagee on notice that its interest is subordinate to the fixture secured creditor. Moreover, the fixture filing includes many procedural requirements designed to protect the real estate mortgagee from mistakenly loaning funds on the basis of assumed collateral that is in fact already secured by a prior creditor. When the secured creditor fails to meet these requirements he will not prevail over a subsequent real estate mortgagee. For instance, all interests must be filed in the same realty office. In one instance, a fixture secured creditor filed not with the registrar of deeds, but with the county clerk.

The subsequent real estate mortgagee, a bank, which

148. See R. Brown, supra note 7, § 16.9, at 586; Adams, supra note 13, at 897; Coogan, The New U.C.C., supra note 4, at 490.
152. U.C.C. § 9-313 Official Comment 4(b) (1978). See supra note 115 and accompanying text. See also Coogan, The New U.C.C., supra note 4, at 492-93 ("general rule of priority . . . that a fixture secured party who is first in time will be first in right").
154. See supra notes 77-84 and accompanying text. Three specific elements have been incorporated which connect the fixture security interest with the real estate interest. Coogan, The New U.C.C., supra note 4, at 491-92. First, subsection 9-403(7) requires that a "fixture filing" be included in the real estate records. U.C.C. § 9-403(7) (1978). Second, where the fixture debtor does not have an interest of record in the real estate, the financing statement must indicate the name of the record owner, and be indexed under the record owner. U.C.C. §§ 9-402(5), 9-403(7) (1978). Third, § 9-402(5) requires that the financing statement "contain a description of the real estate." U.C.C. § 9-402(5) (1978).
checked the registrar files only, did not have notice of the fixture filing. In this situation, the bank prevailed over the secured creditor, because the creditor’s failure to comply with the filing procedure deprived the real estate mortgagee of notice and thus was fatal to the secured creditor’s fixture claim.  

Requiring strict compliance with filing procedures, to secure a valid claim, is not a harsh rule. Indeed, when one considers the power position which a correct filing gives to the fixture financier, strict compliance is reasonable. Moreover, without proper notice the situation might easily arise in which two or more parties simultaneously assert a priority claim on the same collateral, both of which cannot prevail. The second requirement which the fixture financier must meet to obtain a priority is that his debtor must have an interest in the real estate. Such an interest obtains through one of two procedures; the debtor may have actual physical possession of the fixture, or, as discussed above, he may file a proper fixture filing. Moreover, once obtained, the fixture security interest must now appear in the chain of title in order for the secured chattel financier to be protected.

The third requirement for obtaining a priority over a conflicting secured party is that the paramount security interest must have priority over any conflicting interest of a predecessor in interest, or encumbrancer, of the realty. At first glance, this requirement appears to be a limitation. Actually, it is a codification of an old rule of law that one must be entitled to transfer what one purports to transfer. Implementing this rule in everyday business practices means that if a fixture financier is already subordinate to a mortgagee, then the financier is also subordinate to the mortgagee’s assignee, even though the assignee could be considered a subsequent real estate interest.

One trap is inherent in the fixture filing scheme itself. The scheme creates the possibility that a time “gap” may occur in the filing scheme. This “gap” could result in a mortgagee becoming subordinated to a fixture secured creditor. The possibility of a “gap” is

156. Id. at 106-07, 237 N.W.2d at 109-10.
157. W. HAWKLAND, R. LORD, C. LEWIS, supra note 1, § 9-313:05, at 221-22; Coogan, The New U.C.C., supra note 4, at 491; see supra note 148.
160. Id. The same is true regarding an owner who grants to a grantee or subsequent mortgagee. Id.
suggested by the following scenario. The mortgagee may search the realty records and, finding no fixture filing, the mortgagee makes a loan. Between the time of the search and the making of the loan, the fixture secured creditor could file the fixture filing. When the mortgagee attempts to record his mortgage, he would then discover the fixture filing. The mortgagee in this instance would have a subordinate interest to the fixture filer because the fixture security interest was filed first in time.\textsuperscript{6}

Taken as a whole, subsection (4)(b) provides the realty creditor with adequate protection. No matter how imperfect the 1972 Code may be, it is an improvement on the 1962 version. By allowing fixture filers to achieve priority, subsection (4)(b) attempts to deal fairly with real estate interests and with fixture interests, by providing filing requirements to alert realty interests that a secured fixture priority exists, and that the fixtures are not real estate collateral. Even in light of its drawbacks, it is a fair compromise between two kinds of creditors, neither of whom would even admit of the existence of the other when trying to repossess collateral from a defaulting debtor.

4. Purchase Money Security Interest Priority Over Antecedent Real Estate Interests.— The common law majority rule presumed that a fixture was created when a chattel was attached to realty, after a prior mortgage had been recorded on that realty.\textsuperscript{162} The Uniform Commercial Code has continued this presumption in favor of realty interests over chattel financiers. Section 9-313(7) provides, with a caveat, that a fixture security interest is subordinate to a real estate interest.\textsuperscript{163} There are, however several exceptions to be found in section 9-313(4) to this presumed rule of law. One such exception is that if the fixture financier perfects by filing his security interest before the real estate interest records a mortgage, then the fixture financier has priority.\textsuperscript{164}

\textsuperscript{6} Coogan, \textit{The New U.C.C.}, supra note 4, at 493-94.

\textsuperscript{162} See Squillante, supra note 7, at 195-99.

\textsuperscript{163} U.C.C. § 9-313(7) (1978). See supra note 121 and accompanying text.


Construction mortgagees are purchase money lenders themselves, who use the entire ongoing construction project as collateral; U.C.C. § 9-313 Official Comment 4(e) (1978); W. Hawkland, R. Lord, C. Lewis, \textit{supra} note 1, § 9-313:06, at 230; J. White & R. Summers, \textit{supra} note 5, § 25-10, at 1060, they will be considered in detail in the next section; see infra notes 193-226 and accompanying text.

The 1962 version of section 9-313 relating to prior mortgages was similar to the current version, in that the 1962 Code also favored the purchase money security lender over the antecedent real estate interest. W. Hawkland, R. Lord, C. Lewis, \textit{supra} note 1, § 9-313:03, at
The second exception to the rule that real estate mortgagees prevail is that a purchase money secured party, whose debtor has an interest of record in or possession of the realty to which the chattel is affixed, can take priority over a prior real estate mortgagee, if the fixture financier files before the goods become fixtures, or within ten days thereafter.166 Through section 9-313(4)(a), even a prior mortgagee is subordinated to the perfected purchase money security lender.166 Thus, in Hartford National Bank & Trust Co. v. Godin,167 a mobile home, which was installed on a mortgagee's real estate, became subject to the mortgage as a fixture, while also subject to the bank's security interest.168 The mobile home went to the bank over the mortgagee in a priority dispute, because the bank's security interest attached before the collateral was installed.

a. The Requirements for Priority.— There are four requirements that must be met before a secured party can invoke the provision of section 9-313(4)(a) and obtain priority over the mortgagee.168 The first requirement giving a secured party priority over the prior mortgagee under subsection (4)(a) is that the debtor must either have an interest of record in the real estate, or be in possession of it.170

The second requirement for obtaining priority over real estate interests is an obvious one: the conflicting real estate interest must have come into existence prior to the time that the goods become fixtures.171 Requiring the real estate interest to arise before the fixtures become attached to the land precludes the mortgagee or other encumbrancer from arguing that the fixtures were part of the realty...
when the loan was made and were relied on as security when the realty interest gave value. Therefore, the realty interest is not harmed when the fixture financier is granted priority.\textsuperscript{172}

Third, the secured party must have a purchase money security interest in the goods before they become fixtures.\textsuperscript{173} A “purchase money security interest” is an interest taken by the seller of the good to secure all or part of its price, or taken by a person who makes advances or incurs an obligation to enable the debtor to use the collateral or acquire rights in the collateral.\textsuperscript{174} Simply put, “a purchase money lender” is one who loans money to another to buy the good that becomes a fixture which the lender claims as collateral. Usually, this requirement is easily met by fixture financiers. A fixture transaction is one either for cash or for credit. If for credit, then the financier usually is a purchase money secured party. The new goods bought by the debtor then provide the financier with a ready source of valuable collateral with which to secure the loan.\textsuperscript{175} “Only infrequently does a debtor borrow against goods already owned which for some reason are later affixed, and only rarely are fixture borrowings made against goods already owned and affixed.”\textsuperscript{178}

The fourth requirement is that the security interest must be perfected by a fixture filing before the goods become fixtures, or within ten days thereafter.\textsuperscript{177} This ten day grace period is only found in conjunction with the purchase money security interest provision and can only apply against the prior mortgagees on realty interests to which the provision applies. If the ten day grace period expires, the fixture financier is subordinate to all prior real estate interests, and has lost the chance to obtain priority.\textsuperscript{178} The ten days begin to run after the chattel becomes a fixture. Additionally, if the real estate is sold or mortgaged during that ten day period, but before the secured party has filed his fixture filing, then the secured party cannot obtain priority over the new real estate interests.\textsuperscript{179} This can be considered a gap in the coverage of sections 9-313(4)(a) and (b). For example, subsection (4)(a)’s ten day grace period applies before the goods are

\begin{itemize}
\item[172.] This type of agreement was put forth by prior mortgagees under the common law. See Squillante, \emph{supra} note 7, at 257-59.
\item[174.] U.C.C. § 9-107 (1978).
\item[175.] Lloyd, \emph{supra} note 47, at 457 (“most chattel financing is of new goods”).
\item[176.] Coogan, \emph{The New U.C.C.}, \emph{supra} note 4, at 494.
\item[177.] U.C.C. § 9-313(4)(a) (1978).
\item[178.] See Coogan, \emph{The New U.C.C.}, \emph{supra} note 4, at 493.
\item[179.] See Funk, \emph{supra} note 125, at 1473-74.
\end{itemize}
annexed, while subsection (4)(b)'s priority for fixture financiers begins only after the fixture filing is perfected. If the purchase money creditor annexes the fixture to the realty, and then, six or seven days later (within ten days), perfects a fixture filing, subsection (4)(b) gives the secured party priority after the perfection. However, for the six or seven days after annexation the secured party is vulnerable to new realty interests.\footnote{180}

The importance of these four requirements can be noted, as can the differences between the original Code and its 1972 amendments, through an examination of two illustrative cases. In \textit{Coffee County Bank v. Hughes},\footnote{181} the bank held a mortgage on the Kelleys' realty.\footnote{182} Subsequently, the Kelleys bought a mobile home. Hughes financed the purchase of the mobile home, and recorded a financing statement, before the mobile home was annexed to the realty.\footnote{183} Upon the Kelleys' default, Hughes entered the Kelleys' land, upon which the bank had a mortgage, and removed the mobile home. Under application of the 1962 Code, the court held that Hughes' security interest had priority over the real estate mortgage.\footnote{184} Application of the 1972 Code to this case would produce the same result. The key is that the secured creditor, Hughes, attached his fixture financing to the mobile home when it was still a chattel, before it became a fixture through annexation to the realty. As this case illustrates, under the 1972 amendment (section 9-313(4)(a)), the purchase money security interest has priority over a prior mortgagee. Thus the 1972 provision yields results identical to those produced under the 1962 Code.

In \textit{Babson Credit Plan, Inc. v. Cordele Production Credit Association},\footnote{185} however, application of the original Code and the 1972 amendment\footnote{186} results in two different outcomes. In \textit{Babson}, Cordele held a prior mortgage on the realty. The mortgage contained an after-acquired property clause.\footnote{187} Babson's assignor was the secured creditor on the sale of milking machine equipment that was affixed

\footnotesize{\begin{itemize}
\item \footnote{180} See Coogan, \textit{The New U.C.C.}, supra note 4, at 493-94.
\item \footnote{181} 423 So.2d 831 (Ala. 1982).
\item \footnote{182} \textit{Id.} at 832.
\item \footnote{183} \textit{Id.} at 832-33.
\item \footnote{184} \textit{Id.} at 833-34.
\item \footnote{185} 146 Ga. App. 266, 246 S.E.2d 354 (1978).
\item \footnote{186} U.C.C. § 9-313(2) (1962)(security interest priority over antecedent real estate interests subject to three exceptions); U.C.C. § 9-313(4)(a) (1972)(purchase money security interest).
\item \footnote{187} \textit{Babson}, 146 Ga. App. at 267, 246 S.E.2d at 356.
\end{itemize}}
to the realty. Babson’s assignor, however, had not filed a perfected fixture filing. The debtor defaulted, and the realty mortgagee, Cordele, came into a priority conflict with Babson. Under the 1962 Code provision granting priority to a “security interest which attaches to goods before they become fixtures ... over the claims of all persons who have an interest in the real estate,” the court held that Babson’s unperfected fixture security interest took priority over the bank’s mortgage.

If the provisions of the 1972 amendment are applied, a different result is reached. Under section 9-313(4)(a), a purchase money security interest must arise before the goods become fixtures, and must be perfected by a fixture filing, either before the goods become fixtures, or within ten days thereafter. Here, the secured creditor never perfected his fixture filing, and therefore, under the 1972 amendment the real estate mortgagee, Cordele, would have priority.

5. Construction Mortgage.— The construction mortgage is perhaps one of the most controversial points of fixture law. It is one of the few practical problems solved with its own special rule in the Code. Earlier in this article, the construction mortgage was outlined in some detail.

A construction mortgage “secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land ... .” The phrase “incurred for the construction of an improvement” is recognized to include both optional advances and contractually committed advances. The 1962 version of the Code contained no special provision for construction mortgages. Construction mortgages were considered to be covered by a section providing for priority to “a creditor with a prior encumbrance of record on the real estate to the extent that he

188. Id.
189. Id.
191. Babson, 146 Ga. App. at 272, 246 S.E.2d at 359. The Court held that “an unperfected purchase money security interest prevails over a prior interest in the realty.” Id. at 274, 246 S.E.2d at 360.
193. See supra note 125 and accompanying text.
195. For a discussion of the construction mortgage provisions, see supra notes 122-30 and accompanying text.
197. U.C.C. § 9-313 Official Comment 4(e) (1978); see also Special Project, supra note 61, at 925 & n.458.
makes subsequent advances . . . made or contracted for without knowledge" of the fixture creditor. The language "made or contracted for" was thought to encompass the construction mortgage. Provisions of the 1962 Code and the results of case law flowing from it created much controversy, a number of nonuniform amendments in several states, and rejection by other states of section 9-313. Construction mortgagees objected strongly to granting the fixture secured creditors priority, as the 1962 Code did. The 1972 amendments completely reversed the 1962 priority scheme, and introduced a new scheme whereby a security interest in fixtures is ineffective against a construction mortgagee when the construction mortgagee records before affixation. In effect, the 1972 provision creates a "first to file" priority rule between construction mortgagees and chattel financiers. Specifically, section 9-313(6) provides, "[n]otwithstanding paragraph (a) of subsection (4)," a fixtures security interest is subordinate to a construction mortgage recorded before the goods become fixtures, provided that the goods become fixtures before the construction is completed. Alternatively, if the goods do not become fixtures during the period of construction then there is no need to favor the construction mortgagee. In that event, the construction mortgagee is adequately protected by the land itself and the improvement for which the loan was given.

The duration of the construction mortgage spans only "the construction period leading to the completion of the improvement;" construction mortgage priority does not apply to additions to buildings made after the completion of the improvement. Refinancing the construction mortgage, however, can lengthen the duration of the priority over a fixture financier. Moreover, construction mortgage priority applies as well to a take-out mortgage, which is "a later mortgage . . . given to refinance a construction mortgage, especially one to replace and pay off the construction mortgage . . . ." Such a mortgage will have the same priority as the construction mortgage.

199. See Special Project, supra note 61, at 924.
200. See Lloyd, supra note 47, at 444.
201. See Funk, supra note 125, at 1472.
206. Id.
207. Funk, supra note 125, at 1472.
The effectiveness of section 9-313(6) is diluted, however, because the construction mortgagee is usually the first creditor to file anyway. If the construction mortgagee is the first to file then, even without 9-312(6), he gains priority under section 9-313(4)(b). Nevertheless, one writer remarks that "[t]his statement makes little sense" as a foundation for section 9-313(6), because the real issue is new money fixture financier versus new money real estate financier.

a. Methods for Defeating the Construction Mortgagee's Priority.— Notwithstanding the priority granted to construction mortgagees in section 9-313(6), there are still at least five ways that a fixture financier may defeat the construction mortgagee priority. A fixture filing made prior to the recording of the construction mortgage defeats the priority of the mortgagee; the construction mortgagees can give written consent to permitting subordination of their interest to that of the secured creditor; or the lender can avoid making any fixture loans for the duration of the construction mortgage. Additionally, if the debtor has the right to remove the goods as against the construction mortgagee, which would mean that the goods are personalty and not fixtures, then section 9-313(5)(b) grants the fixture financier priority. Finally, if the fixtures are readily removable items, then the creditor could obtain priority under UCC section 9-313(4)(c). The last method is possible because the construction mortgagee's priority "does not extend to certain readily removable fixtures, security interests in [sic] which have been perfected before or after recordation of the construction mortgage" under section 9-313(4)(c).

One landmark case illustrates the differences in priority that

209. See T. Quinn, supra note 64, § 9-313(A)(3), at 9-237 (the construction mortgagee, "needless to say, will come in early under the 'first to file or record' rule of [§ ] 9-313(4)(b)").
210. Lloyd, supra note 47, at 455.
213. See Coogan, The New U.C.C., supra note 4, at 498.
215. See R. Brown, supra note 7, at 585.
216. Coogan, The New U.C.C., supra note 4, at 499. This rule is derived, undoubtedly, from the Official Comment which states that "this rule makes clear that it is not overridden by the construction mortgage priority." U.C.C. § 9-313 Official Comment 4(d) (1978).
arise under the 1962 and 1972 Codes. In *House v. Long*\(^{217}\) a construction mortgage was given for the construction of some cabins. During the construction fixtures were installed in the cabins. Throughout the construction period, a series of advances were made by the mortgagee on the loan. After the builder’s default, the construction mortgagee and the unperfected fixture financier attempted to enforce their claims against the collateral.\(^{218}\) The court held that under the 1962 Code, the fixture financier was entitled to priority on the fixtures to which his security interest attached before affixation to the realty and before any advances were made. The prior mortgagee, however, had priority over any fixtures annexed after the advances were given by the mortgagee.\(^{219}\) With a prior recorded mortgage, the construction mortgagee, under the provisions of the 1972 amendments, would defeat the claim of the purchase money fixture financier.\(^{220}\) The construction mortgagee would have priority as to all of the fixtures annexed during the span of the mortgage, regardless of when any advances were made.\(^{221}\)

b. Policies Underlying Construction Mortgagee Priority.— The construction mortgagee priority appears to be well-founded.\(^{222}\) It does eliminate some of the confusion and complexity that made fixture financing a chancy business decision, as seen in *House*.\(^{223}\) Indeed, a construction mortgagee is to a real estate transaction what the purchase money secured party is to chattel financing.\(^{224}\) Clearly, the mortgagee who finances a real estate project should not be subordinate to a chattel financier who only supplies goods that may become fixtures on the project.\(^{225}\) Preference for construction creditors is also justified by acknowledging that the attendant risks of financing construction are greater than those for the chattel financier and should therefore have greater protection.

Thus, the Code protects the mortgagee’s expectation interest and does not readily permit other creditors, even a purchase money

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\(^{217}\) 244 Ark. 718, 426 S.W.2d 814 (1968).
\(^{218}\) 244 Ark. at 719-20, 426 S.W. 2d at 815.
\(^{219}\) 244 Ark. at 723, 426 S.W. 2d at 817.
\(^{223}\) *See* Special Project, *supra* note 61, at 925 ("[t]he priority given to construction mortgagees primarily reflects the drafters’ preference of real estate interests . . .").
\(^{224}\) *See* Hawkland, *supra* note 15, at 48.
\(^{225}\) *See* Coogan, *The New U.C.C.*, *supra* note 4, at 498.
secured fixture creditor, to defeat that expectation.226 A contrary rule could leave the construction mortgagee, who typically has taken a larger risk than has any other lender, with uncertain collateral. Indeed, this collateral may not be sufficient to pay off the loan, especially if another lender may remove some of the collateral. Such a policy would seem to offend basic principles of fairness. Moreover, the element of uncertainty inherent in such a rule would be likely to increase the cost of construction financing.

Where the Code does grant other financiers the opportunity to obtain priority over the mortgagee it does so only after the mortgagee, because of filing requirements of the Code, has notice of other creditor’s priority in given fixtures. Thus, the revised provisions on construction mortgages promote commercial certainty, and also promote fairness and flexibility, by allowing the parties to change the norm through mutual agreement and proper notice.

6. Readily Removable Machines and Replacement Domestic Appliances.— The 1972 Code provides a third exception to the general rule granting priority to a fixture secured creditor over the holder of real estate interests.227 This special exception allows the fixture financier to use any method of perfection before the goods become fixtures to obtain priority, provided that the goods are readily removable factory or office machines, or replacements of domestic appliances which are consumer goods.228 Therefore, as the construction mortgagee was given priority for the construction mortgage in section 9-313(6), the fixture secured party is accommodated in section 9-313(4)(c).229

a. Chattel Filing.— The effect of section 9-313(4)(c) is that it “will relieve sellers of equipment of these types from the necessity of deciding in the first instance whether or not a particular article constitutes a fixture”230 because such a decision can be difficult.231 Instead, section 9-313(4)(c) provides that only a chattel filing is necessary for the secured party to obtain a priority over the real estate

228. U.C.C. § 9-313(4)(c) (1978). Moreover, the enforceability of priority applies even against construction mortgagees. U.C.C. § 9-313 Official Comment 4(d) (1978) (“the rule makes clear that it is not overridden by the construction mortgage priority of subsection (6)”).
229. See Lloyd, supra note 47, at 457 (“[t]he Committee seems to have switched problems from one pocket to another”).
230. Funk, supra note 125, at 1474.
231. J. WHITE & R. SUMMERS, supra note 5, § 25-10, at 1001; Coogan, The New U.C.C., supra note 4, at 496.
creditor claiming the fixture. 232 Specifically, the Code provides:

(4) A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where (c) the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any method permitted by this Article . . . . 233

Under the 1962 version of the Code, if a chattel interest was filed, but the article was a fixture, the realty mortgagee prevailed. 234 Pursuant to the 1972 amendments, however, a chattel filing is good against both realty interests and other chattel interests if the chattel meets the test of subsection (4)(c). 235 Therefore, the chattel filing called for by section 9-313(4)(c), which gives priority against both interests, is, obviously, more desirable to secured creditors.

A chattel filing is simpler in form, and less expensive to prepare than is a fixture filing, primarily because a chattel filing does not require a description of the real estate. 236 Such a requirement would add numerous problems: a description of the realty is often difficult and expensive for a fixture financier to obtain; the chattel financier is primarily concerned with selling equipment, and therefore is not familiar with the intricacies of real estate transactions and filing. 237 Moreover, one commentator suggests that the priority is to “enable parties in small transactions to avoid the second filing fee and [the cost of] title searches” necessary in filing of the realty records, and to encourage replacement of worn-out fixtures. 238 Finally, it is reasonable for real estate lenders to search the chattel files when there are loosely-annexed articles, such as a typewriter or a dictating machine, with obvious chattel characteristics attached to the realty. 239

234. U.C.C. § 9-401 (1962); Adams, supra note 13, at 858-61.
236. Funk, supra note 125, at 1474.
237. Id.
238. Lloyd, supra note 47, at 457. The real estate interest isn’t very likely to believe that barely annexed fixtures are included as realty, therefore, notice in the realty records is unnecessary. Likewise securely annexed and difficult to remove fixtures should suggest to a fixture financier to file in the realty records because the item is a fixture that will effect real estate interests. See Bernstein, Another Look at the Article 9 Revisions—Some Specific Problems, 57 CHI. BAR. REC. 289, 296 (1979).
The important notice function of the filing is served, in this instance, without the real estate filing.

The Official Comment states that the priority given in section 9-313(4)(c), "is not as broad an exception as it might seem." First, readily removable items are probably not fixtures at all. If items are readily removable then real estate interests have no claim to them at all. Second, the general rule of section 9-313(4)(b), which grants priority to the first party to file, can probably be satisfied in a (4)(c) situation, because (4)(c) requires that perfection by the secured party (usually a filing) be done by any method before the goods become fixtures. Therefore, the security interest would have taken priority over subsequent realty interests anyway, by filing first under subsection (4)(b) of section 9-313. Third, if the secured party is a purchase money secured creditor, then regardless of section 9-313(4)(c), that party has priority over prior realty mortgages, under section 9-313(4)(a). Fourth, the special priority granted therein is limited to certain readily removable equipment and machines and consumer goods.

b. Readily Removable.— The question of priority need not be who was the first to file or whether there was a complying fixture filing, but, rather, whether the item is readily removable. While the benefits of section 9-313(4)(c) are limited to certain readily removable items, "readily removable" is not defined in the Code. Rather, the Code simply provides that if the item is readily removable, then perfection by any method prior to the item becoming a fixture protects the chattel secured party.

Some commentators have likened the definition of readily removable to the distinction between "hard" and "soft" fixtures. Readily removable goods would be "soft" fixtures while all others would be "hard." "Hard" fixtures are "honest-to-God affixed," take on realty aspects, and though they may not be actually incorporated into a building, such fixtures can only be removed with great difficulty.

241. See id.
242. Id.
243. Id.
244. Id.
245. Id.
246. Id.
247. Id.
249. For a discussion of hard and soft fixtures, see Squillante, supra note 7, at 219-20.
difficulty.  

The "readily removable" designation is a return to the strict annexation test.  

To allow a fixture creditor with an interest in readily removable fixtures to prevail over a realty mortgagee, is to make the degree of annexation, i.e., "readily removable," determinative of whether an item is and remains personalty subject to the interest of a chattel secured party. This subsection's creation of a class of collateral called readily removable fixtures is so fundamental to the existence of the priority that two authors believe the issue has shifted from whether a good is a fixture or chattel to whether the article is readily removable or not.  

The Official Comment to the Code casts further doubt, as to a workable definition of readily removable, by stating that "[t]he special priority rule here stated in favor of chattel financing is limited to situations where the installation of appliances may not be intended to be permanent . . . ." Juxtaposed against the Official Comment is the common law position, now universally recognized, which states that "the intention of the party to create a permanent accession to the freehold" is the cornerstone test for determining what is a fixture. The Official Comment, then, appears to be analytically unsound. Further confusion is generated because the Comment is applicable only to readily removable fixtures. If the context of the section applies, as the Comment suggests, only to installations in which there is no intent to make an annexation, then it applies not to fixtures at all, but only to personalty. The best reading of the Comment is that the test of the statute applies only to transactions in which no intent to create a permanent fixture is clearly evident, or to those situations in which the intent, as inferred from the degree of annexation, is questionable. In fact, one author tells us that, in one

250. See 2 A. Squillante & J. Fonseca, The Law of Modern Commercial Practices § 11:72, at 770 (rev. ed. 1981). Such distinctions pale in significance when one considers the language of § 9-313(8), which permits the secured party with priority to remove his collateral from the realty no matter how it harms the realty and as long as the owner or encumbrancer is reimbursed for the harm done. U.C.C. § 9-313(8) (1978).

251. For a discussion of the strict annexation test, see Squillante, supra note 7, at 203-04.


254. See Squillante, supra note 7, at 214.

255. Teaff v. Hewitt, 1 Ohio St. 511 (1853).

256. See Squillante, supra note 7, at 214-47.
jurisdiction, "it may be doubtful whether this rule could ever be applied - intent . . . is a prerequisite element in the initial definition of a fixture."\textsuperscript{257}

The question of determining what is a readily removable fixture is further complicated because in some jurisdictions, readily removable chattels are not to be considered fixtures, because of their loosely attached nature.\textsuperscript{258} Moreover, the substantive peculiarities of law could determine that an article is not a "readily removable" fixture, but a "regular" fixture, in which case the chattel filed secured party's interest is subordinate to a reality interest.\textsuperscript{259}

In many instances it may thus behoove the filing party to undertake a dual filing. "[W]here the law is uncertain as to what a fixture is, filing in both chattel and reality records may continue to be the only safe practice."\textsuperscript{256} Requiring dual filing to protect a single interest seems antithetical to the Code purposes of promoting commercial certainty and creating simple uniform laws. Further, it causes expense and delay to business transactions. Nonetheless, when removability of a chattel is questionable, dual filing is the safest business procedure.\textsuperscript{251}

c. Readily Removable Factory or Office Machines.— While a fixture must meet the "readily removable" requirement of section 9-313(4)(c), the section's applicability is further limited because the section requires that fixtures also be either "factory or office machines." As in the case of "readily removable," the term "factory of office machines" does not serve to describe which chattels are encompassed within "readily removable" goods, since the term is undefined.\textsuperscript{262} Use of the term "equipment," which section 9-109(2) does define and which has been judicially determined, would seem to provide a much better classification device.\textsuperscript{263} Furthermore, limiting the section to these undefined terms requires the secured party to engage

\textsuperscript{257} Lloyd, supra note 47, at 457.
\textsuperscript{258} See Squillante, supra note 7, at 200.
\textsuperscript{259} See Coogan, The New U.C.C., supra note 4, at 496-497. In fact, there are several cases where this result has been reached when the "readily removable" fixture was in actuality not very "readily removable." See, e.g., In re Belmont Indus., 28 U.C.C. Rep. Serv. (Callaghan) 846 (E.D. Tenn. 1979)(dry cleaning and laundry equipment); In re Park Corrugated Box Corp., 249 F. Supp. 56 (N.J. 1966)(box manufacturing machine). Thus, to be safe, all non-readily removable fixtures should be perfected by a fixture filing.
\textsuperscript{260} Coogan, The New U.C.C., supra note 4, at 497 (emphasis in original).
\textsuperscript{261} See supra note 99 and accompanying text.
\textsuperscript{262} J. White \& R. Summers, supra note 5, § 25-10, at 1060-61.
in a game of exclusions. Businesses that are not factories or offices are evidently excluded, as are farms, garages and others. Making decisions about these exclusions then become extremely difficult. Professor Coogan, one of the drafters of this section of the Code, has written that he wonders "why he did not suggest that the term 'equipment' . . . be used instead of the undefined term 'factory or office machines.' " In fact, he asserts that the very weakness of section 9-313(4)(c) is created by the indefiniteness of the classes of collateral which it covers.

   d. Replacement Domestic Appliances.— The other category of fixtures included in subsection (4)(c), is "readily removable replacements of domestic appliances that are consumer goods." This category has three requirements: the consumer goods must be appliances, they must be replacements, and they must be removable. This is even narrower than the factory and office machines classification. "This provision of the Code is so narrow it appears to have little utility," according to Professor Funk. Therefore, although the priority granted under subsection (4)(c) to secured creditors is generous, it is narrow. Further, while generous, the subsection recommends a dual filing if the removable nature of the fixture appears to be in doubt.

7. Trustee in Bankruptcy.— The trustee-in-bankruptcy provision of UCC section 9-313(4)(d) is another exception to the rule that a creditor must file a fixture filing to obtain priority over other creditors. This provision also represents another situation where the 1962 Code and 1972 Code have reversed priorities. The 1962 version of the Code provided that "security interests . . . do not take priority over . . . (b) a creditor with a lien on the real estate subsequently obtained by judicial proceedings . . . [if] the lien by judicial proceedings is obtained . . . without knowledge of the security interest and before it is perfected." The language of this provision gave

265. Id. at 496.
267. Headrick, supra note 66, at 47.
268. See supra notes 262-65 and accompanying text.
269. Funk, supra note 125, at 1476.
270. Coogan, The New U.C.C., supra note 6, at 497.
271. The other exception is for readily removable machines and replacement domestic appliances. See supra notes 131-38 and accompanying text.
272. The construction mortgagee is the other situation. Adams, supra note 13, at 900. See supra notes 211-12 and accompanying text.
priority to the trustee-in-bankruptcy against any unperfected security interests. Furthermore, if the secured party filed incorrectly, as where the item was found to be a chattel but a fixture filing was made, or vice versa, then the lien creditor would prevail. Thus, the secured party was forced to make a choice between chattel or fixture filing (not a small risk to ask the secured party to assume), or to file in both systems, which was costly and time consuming. The effect of such a provision was to create an inequitable hardship on the secured party. The result of giving the trustee a predominant position was to add to the bankrupt's estate at the cost of a creditor who could not protect himself, because of vagueness in the law, or because of the economics of the transaction. The drafters of the Code recognized that something had to be done.\textsuperscript{274}

The 1972 Code reversed and revised the provision relating to bankruptcy. Section 9-313(4)(d) provides:

(4) A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where . . . (d) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this Article.\textsuperscript{275}

This clause is essentially a “first to file” rule. It is similar to subsection (4)(b) of section 9-313, except that under subsection (4)(d) a fixture filing is not necessary; a chattel filing will suffice. Under this result the perfected secured party is favored: the debtor’s collateral which is financed by the secured party will now not become part of the bankrupt debtor’s estate.

The drafters of the 1972 amendments to the Code permit perfection by any method, none of which need appear in the real estate records, as must a fixture filing, to prevail against a lien creditor/bankruptcy trustee.\textsuperscript{276} Such a requirement is unnecessary, the properly perfected secured party succeeds because the creditor or bankruptcy trustee is not a reliance creditor, while the financing creditor is such a person.\textsuperscript{277} That is, trustee-creditors do not advance money on the basis of the results of a real estate search, or on the appearance of the real estate as security.\textsuperscript{278} It is clear, however, that

\textsuperscript{274} 1978 Official Text With Comments, supra note 1, Reasons for 1972 Change, Official Comment, app. II, at 963; Coogan, The New U.C.C., supra note 4, at 479-83.
\textsuperscript{275} U.C.C. § 9-313(4)(d) (1972).
\textsuperscript{276} Id.
\textsuperscript{277} U.C.C. § 9-313 Official Comment 4(c) (1978).
\textsuperscript{278} See id. These creditors would not find the filing, even if a fixture filing was made.
section 9-313(4)(d) does not grant the chattel filing secured party priority against real estate interests. Section 9-313(4)(d) applies only against lien creditors or bankruptcy trustees whose status arose "by legal or equitable proceedings." To prevail against the owner or encumbrancer of realty the secured party must perform a fixture file. Nonetheless, short-term secured parties, or those whose investments are small, may prefer to take a risk by filing only a chattel statement. However, those secured parties whose economic risks are great or whose investment is of a long duration, should perform a fixture filing as well.

8. Consent to the Security Interest by the Owner or Encumbrancer.— Regardless of whether the secured party has or has not perfected, the Code permits him and the owner or encumbrancer to enter into a subordination agreement in which the parties themselves may establish the order of priority. In this respect, the 1962 Code and 1972 Code are very much alike.

The language of the 1962 Code, however, was more confusing. It provided that

[a] security interest which attaches to goods after they become fixtures . . . is invalid against any person with an interest in the real estate at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as fixtures.

Section 9-313(5)(a) of the 1972 revision provides that "[a] security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where (a) the encumbrancer or owner has consented in writing to the security interest or has disclaimed an interest in the goods as fixtures . . . ."

"An encumbrancer is one who holds a burden, charge or lien on property or an estate to the diminution of the value of the fee, but which does not prevent the passing of the fee by conveyance."

Thus, it is not considered inequitable to deny them priority because a real estate filing was not accomplished.

281. Id.
Usually, the encumbrancer is the mortgagee, not the mortgagor, but it is the mortgagee of whom subsection (5)(a) requires consent in writing.\textsuperscript{286} 

The 1972 amendments permit a unique resolution of priority disputes by allowing a secured party, who has loaned money for fixtures, to obtain priority over the real estate interest without perfecting the claim in any manner.\textsuperscript{287} The consent, however, must be in writing.\textsuperscript{288} Apparently no consideration need pass between the parties to effect the waiver, consent or disclaimer. Indeed, there is no reason why either party could not abandon the priority if that party so wishes. In effect, subsection (5)(a) allows the intent of the parties to control the dispute, and thereby may save time, money and litigation in many instances.

Consent, waiver, disclaimer, release or abandonment are particularly useful devices when the fixtures are already installed on the realty, and a bank or other financier wants to obtain a priority over a potential competitor for the collateral.\textsuperscript{289} Therefore, when the requirements of subsection (4)(a) cannot be met because the ten day period after installation has passed, or when the requirements of subsection (4)(b) cannot be met because of a prior recorded realty mortgage, or when the requirements of subsection (4)(c) cannot be met, because the fixtures are not readily removable, subsection (5)(a) provides the only possible alternative.

To make use of subsection 5(a), the financier should search the records to find all mortgages and other encumbrances on the property. Then, the financier should obtain, from each party holding such mortgage or encumbrance, written consent to the financier's priority concerning the fixture, for without such written consent from each party the financier's interest will be subordinate to the holders of the encumbrances.\textsuperscript{290} Any written consent obtained by a fixture secured creditor should be specific and concise as to the release of the realty

\begin{footnotes}
\item[286] Id.
\item[287] Coogan, The New U.C.C., supra note 4, at 486; Special Project, supra note 61, at 839.
\item[289] Moreover, there is no requirement that the disclaimer be in writing. See U.C.C. § 9-313(5)(a) (1978). A writing is admissable, however, as a practical matter to prove the fact of disclaimer and its scope. R. ANDERSON, supra note 1, § 9-313:23, at 334.
\item[290] See Funk, supra note 125, at 1474. A fixture filing and chattel filing may also be made. Id.
\end{footnotes}
creditor's claim to the fixture. The necessity for precision was demonstrated in In re Seminole Park & Fairgrounds, Inc., where the written lease provided that the tenant had the privilege to make virtually unlimited alterations and additions to the premises. After the tenant had constructed a second story on the building, and had made other large improvements, the tenant became bankrupt. The bankruptcy trustee sought permission for the secured creditor who financed the improvements to remove them from the realty, on the basis of the lease provision granting consent. The court held that “a general consent to an improvement and remodeling can hardly be construed to constitute either a landlord’s consent to security interests or a disclaimer of an interest in fixtures,” and denied priority to the security party.

A written consent under subsection (5)(a) does not require a filing, and therefore would not provide notice to any potential real estate interests of the secured party's interest in the fixture. Thus, the question arises as to whether a subsequent real estate purchaser's interest is subject to the written consent. Professor Coogan has stated that the answer to this question will be governed by local real estate law which will determine whether the writing was so publicized or recorded as to preclude the existence of a bona fide purchaser without notice. Even if there was such notice, the question remains whether it would bind the purchaser for value. If the security interest of the fixture financier is unperfected, then the bona fide purchaser must rely solely on the written consent of the realty financier. Such reliance may be understood to protect the secured party over the short term, but it is not an interest which should bind the bona fide purchaser without notice.

In one case, a waiver of rights in a grain bin was signed by the owner of the land. The court held that the waiver was ineffective

292. 502 F.2d 1015 (5th Cir. 1974).
293. Id. at 1018.
294. Id. at 1016 (elevators and escalators were also installed).
295. Id. at 1019 (upholding district court’s decision in not permitting the security party to remove).
296. Trestle Valley Recreation Area, Inc. v. Armstrong, 45 Bankr. 458, 460 (D.N.D. 1984) ("The general rule is that while parties may by agreement fix the status of property either as realty or personalty, such agreements have no effect as against third parties without notice.")(citations omitted).
as to a subsequent mortgagee, who had no notice of the unperfected security interest. Therefore, a secured party would be wise to file at least a fixture filing after obtaining the consent of the realty encumbrancer, or to record the written consent in the office where a real estate interest would be filed or recorded.

9. Debtor With Right to Remove Fixtures (Tenant Fixtures). Subsection (5)(b) of 9-313 is concerned with priority rather than perfection. The language of subsection (5) benefits fixture secured creditors, in that such creditors do not have to decide whether to fixture file or chattel file, or both, in order to obtain priority over realty interests. Creditors who fall within the statute save time and money, while retaining priority.

Section 9-313(5)(b) provides that

[a] security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where . . . (b) the debtor has a right to remove the goods as against the encumbrancer or owner. If the debtor’s right terminates, the priority of the security interest continues for a reasonable time.

The Official Comment makes it clear that the section encompasses tenants, licensees, holders of easements, and other persons.

This section is a reflection of the common law concepts of trade fixtures and tenant fixtures. Trade fixtures are usually described as being used by the tenant to enable the tenant efficiently to carry on a business, profession or trade, which activity is contemplated by the lease agreement, and which the tenant actually engages in during the tenancy.

299. *Id.* at 106-07, 237 N.W.2d at 110.
300. Adams, *supra* note 13, at 915. If the goods are not fixtures the secured creditor will prevail; alternatively, if the goods are fixtures the secured creditor will prevail by reason of § 9-313(4)(b). *Id.*
301. U.C.C. § 9-313(5)(b) (1978). Prior to enactment of this section, the consequences of a landlord and tenant agreement with respect to the removal of fixtures when a priority conflict develops were uncertain. See Special Project, *supra* note 61, at 927.
302. U.C.C. § 9-313 Official Comment 6 (1978) ("The status of fixtures installed by tenants (as well as such persons as licensees and holders of easements) is defined by paragraph (5)(b).")
304. Jim Walter Window Components v. Turnpike Dist. Center, 642 S.W.2d 3, 5 (Tex. Ct. App. 1982). Cases in this area must first consider whether an item is in fact a "trade fixture" used in the debtor's trade or business. Most leases contain only an undefined, general clause allowing the lessee to remove "trade fixtures." Thus, to determine whether a fixture exists the court must apply the standard three-factor test, i.e., annexation, appropriation, and
Under the common law the trade and tenant fixtures of a lessee were presumed to be removable by the lessee at the end of the lease period.\textsuperscript{308} This strong presumption was based on the policy that a lessee would not intend to make a gift of the fixture to the lessor. It was, therefore, expected that a lessee would remove his fixture at the end of the lease.\textsuperscript{308} Likewise, in subsection (5)(b), a tenant's fixtures remain removable by the secured party, as long as the tenant has an interest in the fixtures and for a reasonable time thereafter.\textsuperscript{307}

If the lease grants no removal rights to the lessee, or the lease provides that any additions by the lessee will remain with the realty, then subsection (5)(b) is unavailable to a secured party who finances the lessee's fixtures.\textsuperscript{308} Subsection (5)(b) is specific in that the secured party receives only the rights to the fixture as held by the debtor. Thus, if the debtor has no right of removal, then neither does the secured party.\textsuperscript{309}

Subsection (5)(b) gives effect to the lease terms while remaining faithful to the notice goals of the Code.\textsuperscript{310} The lessor's creditor, the encumbrancer, is not harmed by this subsection's priority preference. The lessor's mortgagee does not lend money based upon the real estate records, but rather upon the lessor's loan application and collateral. Succinctly stated:

Mortgagees are big boys; they can be expected to understand leases and to know that certain tenants commonly install fixtures and retain a right to remove them. If they wish to guard against that possibility, they can lend a little less money or can insist that landlords to whom they lend use leases which deny the tenant the right of removal.\textsuperscript{311}

Court interpretations reflect these underlying policy values and construe this subsection in favor of the tenant and secured party, and against the lessor and his mortgagee.\textsuperscript{312}
Under subsection (5)(b), at the termination of the tenant's or debtor's interest in the fixture, the secured party's priority continues for a reasonable time. Naturally, this creates the question of what constitutes a reasonable time. In any case, the secured party can, by making a fixture filing, further extend his right to priority. If the secured party fails to file, and thereby loses his priority upon the debtor's termination of interest, he is unlikely to be able to regain priority against real estate interests. Loss of the secured party's priority will occur, because, under subsection (4)(a), the secured party had not perfected a fixture filing before the goods became fixtures; under subsection (4)(b), the real estate mortgagee recorded before the secured creditor; and under (4)(c), the secured party had not perfected by one of the Code's methods. The only recourse for the secured party attempting to regain priority is to obtain the written consent of the mortgagee under subsection (5)(a). Alternatively, had he previously perfected his interest with a fixture filing, the secured party would have retained priority.

IV. REMEDIES UNDER THE CODE

The Code provides only one remedy for a secured creditor upon the default of the debtor. That remedy, subject to Part 5 of Article 9, is the removal of the collateral from the real estate. The common law provided the secured party with remedies that included recovery for damages, replevin, foreclosure, and even attorney's fees.

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315. Section 9-313(8) provides:
When the secured party has priority over all owners and encumbrancers of the real estate, he may, on default, subject to the provisions of Part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.
or punitive damages in the correct circumstances; the Code is much more limited in its remedy section. The Code, however, by abandoning the "material injury test" of the UCSA, has cleared up one element of confusion caused by the remedy of removal. Under this test, the secured party was not able to sever and remove a fixture if a "material injury to the freehold" would result. Nevertheless, removal cannot be undertaken haphazardly; section 9-313(8) requires that removal and disposition of the collateral by the secured party be undertaken in strict compliance with the provisions of part 5. The exclusive remedy of removal provided for in section 9-313(8) has been criticized by one commentator as being unduly harsh. An alternative remedy proposed by this commentator is to allow foreclosure and payment to the secured creditor.

Nevertheless, the secured party is not left without any other options. Under Section 9-503, "[w]ithout removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under § 9-504." Section 9-504 allows the secured party to sell, lease or otherwise dispose of any or all of the collateral. Furthermore, Article 9 does not prevent the secured creditor from protecting himself with a mechanic's lien or materialman's lien or any appropriate form of judicial proceeding. Should the secured party choose to remove the collateral, he must pay to the real estate interest the cost of repair for harm to the realty caused by removal. The Code, however, does not specify to whom among two or more conflicting real estate claimants the secured party should pay the repair costs. Before removal, the holder of realty interest can demand that the secured party give adequate security to insure that the damage to the realty will be repaired. The harm for which the secured party is liable is limited to physical injury to the realty; the owner of the realty is not entitled to recover from the secured party.

317. See Squillante, supra note 7, at 261.
319. See Squillante, supra note 7, at 257, 259.
321. Shanker, supra note 47, at 804.
322. Id. In one case, the secured party was allowed to render the fixture useless, pursuant to a nonuniform Code. In re Seminole Park & Fairgrounds, Inc., 502 F.2d 1015, 1019 (5th Cir. 1974).
for the loss of the value to the real estate caused by the removal.\textsuperscript{327} Were recovery extended to such damages, the secured party would, in effect, be buying the fixture from the real estate interest.

V. CONCLUSION

The common law of fixtures provides some guidance in determining whether a particular item is a fixture. Its broad definition is helpful. After years of litigation under that definition, there is now a substantial body of case law that more clearly defines the term. Unfortunately, the cases have yet to become crystal clear, and conflicting results are still reached over identical objects.\textsuperscript{328}

Primarily, the intention of the parties controls whether a chattel has become a fixture.\textsuperscript{329} It is most advantageous for parties to agree explicitly as to the status of attached chattels, for the courts will give such an agreement full force between the parties to the agreement.\textsuperscript{330}

In the absence of agreement, or if a third party creditor is inserted into the transaction, the Uniform Commercial Code's statutory scheme has achieved the goal of fairness and certainty more satisfactorily than did the traditional case-by-case method of the common law.\textsuperscript{331} The Code requires a fixture filing,\textsuperscript{332} recorded in the realty records\textsuperscript{333} prior to the establishment of a real estate interest,\textsuperscript{334} to enable a secured creditor to prevail over a conflicting realty interest.\textsuperscript{335} The Code endorses and rewards with priority the reliance of creditors on the filing and recording system.\textsuperscript{336} Relying on the notice filing system encourages business certainty and more intelligent lending decisions.\textsuperscript{337}

Exceptions to the fixture filing requirement are generally well-

\begin{itemize}
\item \textsuperscript{327} Id. See also Coffee County Bank v. Hughes, 423 So.2d 831, 834 (Ala. 1982)(holding that the owner could not recover for diminution in the value of the real estate, but reversing on the grounds that defendant caused physical damage to the premises during removal); W. Hawkland, R. Lord, C. Lewis, supra note 1, § 9-313:07, at 231 ("reimbursement is for physical injury to the nondebtor owner's . . . interest in the real estate, and not for any . . . [loss] in value caused by the absence of the fixture.").
\item \textsuperscript{328} See Squillante, supra note 7, at 193.
\item \textsuperscript{329} See id. at 194-95.
\item \textsuperscript{330} See supra notes 282-99 and accompanying text.
\item \textsuperscript{331} Special Project, supra note 61, at 837-41.
\item \textsuperscript{332} U.C.C. § 9-313(1)(b) (1978); see supra notes 64-97 and accompanying text.
\item \textsuperscript{333} U.C.C. § 9-402(5) (1978).
\item \textsuperscript{334} U.C.C. § 9-313(4)(b) (1978).
\item \textsuperscript{335} Id.
\item \textsuperscript{336} Special Project, supra note 61, at 841.
\item \textsuperscript{337} Id. at 838-39.
\end{itemize}
reasoned.\textsuperscript{338} Certain readily removable machines may be perfected by any method of filing, because they are so "loosely attached" to the realty that any real estate mortgagee should be aware of their status, and should not rely on them as security for any loan.\textsuperscript{339} A judicial lien creditor, who is not a reliance lender, does not look to the real estate record for satisfaction, or on the fixtures annexed to realty, and therefore should not obtain priority to these fixtures over one who has advanced money while relying on them as collateral.\textsuperscript{340}

The Code does correct some of the problems involved in perfecting a security interest in fixtures, by lessening the number of instances in which a fixture financier must choose whether to file a chattel or fixture filing, on pain of loss of priority if he guesses incorrectly. For example, in the case of readily removable office machines, a chattel filing gives the secured creditor priority over a conflicting real estate mortgagee regardless of whether the item is actually a chattel or a fixture.\textsuperscript{341} The Code's reliance on state law, however, to provide the definition of a fixture continues to cause uncertainty.\textsuperscript{342}

Ultimately, it is the filing process that is the best defense and greatest offense for the secured party. Correct filing causes perfection and creates the "perfect" state against competing interests. Alternatively, an improper filing is fatal to the priority hopes of the secured party. Given the fact that the Code awards an enforceable preference for conducting one's business in a certain way it is not harsh to expect the secured party to comply strictly with the filing requirements of its provisions. Even if the definition of fixtures produces a fuzzy picture, filing renders that picture clear. To steal a thought, the best advice to give a fixture financier is to "file early, file often."\textsuperscript{343}

\textsuperscript{338} See supra notes 109-11 and accompanying text.
\textsuperscript{339} See supra notes 131-38 and accompanying text.
\textsuperscript{340} U.C.C. § 9-313 Official Comment 4(c) (1978).
\textsuperscript{341} See supra notes 131-38 and accompanying text.
\textsuperscript{342} See supra notes 8-13 and accompanying text.
\textsuperscript{343} Coogan, The New U.C.C., supra note 4, at 497.