Pimzy Whimsy in the Eleventh Circuit: Reflections on IN RE ALPHATECH SYSTEMS, INC.

Timothy R. Zinnecker
Campbell University School of Law, zinneckert@campbell.edu

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Timothy R. Zinnecker*

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I. INTRODUCTION

As a general rule, a priority dispute between holders of competing security interests under Uniform Commercial Code Article 9 ("U.C.C. Article 9") is resolved in favor of the secured party that was the first creditor to file its financing statement or perfect its security interest.¹ However, a different non-temporal rule may apply if one of the security interests is a purchase-money security interest ("PMSI").² One of

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¹ See U.C.C. § 9-322(a)(1) (2004). Statutory citations are to U.C.C. Article 9 as revised in 2000 unless otherwise indicated ("former").

² U.C.C. Article 9 refers to “purchase-money security interests.” See U.C.C. § 9-103. Former U.C.C. Article 9 refers to “purchase money security interests.” See former U.C.C. § 9-107. Unless the term appears in a quoted passage, I have elected to use the hyphenated form throughout.

* Professor, South Texas College of Law (zinneck@stcl.edu). Robert M. Lloyd, professor at the University of Tennessee College of Law, offered helpful comments on an early draft. My employer graciously provided financial support.

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these non-temporal rules affords the second-in-time creditor with first-in-line status, the so-called "super-priority" rule, if the creditor has timely perfected a PMSI "in goods other than inventory or livestock."  

The application of this super-priority rule was at the heart of the analysis in *Textron Financial Corp. v. United Financial Group, Inc. (In re Alphatech Systems, Inc.),* a decision recently rendered by a three-judge panel of the United States Court of Appeals for the Eleventh Circuit. *Textron* involved a priority dispute between two secured creditors, each claiming a perfected security interest in a piece of the bankrupt debtor’s equipment. One creditor claimed priority based on its earlier filing and its after-acquired property clause while the other creditor alleged super-priority as a holder of a timely perfected PMSI. The appellate panel affirmed earlier decisions by the bankruptcy court and the district court by awarding priority to the initial creditor, concluding that the purchase-money creditor was not entitled to super-priority because it had failed to timely file its financing statement.

In its eight-paragraph opinion, the Eleventh Circuit exposes itself to second-guessing, if not criticism, on two important legal issues. After offering a purchase-money primer in Part II and a summary of the *Alphatech Systems* opinion in Part III, Part IV asserts that the circuit panel failed to observe that the creditor asserting super-priority did not have a PMSI. Part V questions the circuit panel’s application of the super-priority statute if the creditor held a PMSI, suggesting that the panel’s analysis was incomplete, if not wrong. Finally, Part VI offers a brief conclusion.

II. A PURCHASE-MONEY PRIMER

The typical PMSI under U.C.C. Article 9 arises in two common transactions. In one transaction, Seller sells goods on credit to Buyer and retains an enforceable security interest in those goods to secure repayment of the purchase price. This Article, even when discussing cases decided under former Article 9.

1. *Id.* at 1268.
2. *Id.* at 1268-69.
4. 317 F.3d 1267, 1268-69 (11th Cir. 2003).
5. See infra pp. 381-400.
7. U.C.C. § 9-103(b)(1) (2004) ("A security interest in goods is a purchase-money security interest: (1) to the extent that the goods are purchase-money collateral with respect to that security interest[.]")
8. U.C.C. § 9-103(a)(1) (defining "purchase-money collateral" as "goods or software that secures a purchase-money obligation incurred with respect to that collateral"); U.C.C. § 9-103(a)(2) (defining "purchase-money obligation" as "an obligation of an obligor incurred as all or part of the price of the collateral"); see, e.g., Till v. SCS Credit Corp., 124 S. Ct. 1951, 1956 (2004) (holding that seller of automobile retained PMSI); Conseco Fin. Serv. Corp. v. Myers, 567 S.E.2d 641, 645 (W.Va. 2003).
may be viewed as direct financing, seller financing, or dealer financing. In the other
transaction, Buyer relies on a credit extension from Lender to purchase goods from
Seller,11 while Lender takes an enforceable security interest in those goods to secure
repayment of the loan.12 This may be viewed as an enabling loan, bank financing, or
third-party financing.

The secured party may prefer to have a PMSI, rather than a generic security
interest, for a variety of reasons. Often, the law affords special treatment for
purchase-money security interests and their holders. For example, the Federal Trade
Commission’s credit practices rules state that a secured party commits an “unfair act
or practice” by taking a non-possessory security interest in household goods unless
the security interest is a PMSI.13 Also, the Bankruptcy Code permits a debtor to
avoid a non-possessory security interest in many consumer goods, professional texts,
tools of the trade, and certain health aids if the security interest impairs an exemption
to which the debtor is otherwise entitled, unless the security interest is a PMSI.14

But perhaps the most significant favoritism is found in U.C.C. Article 9,
particularly in the areas of perfection and priority. For example, a secured party often
perfects its security interest in goods by filing a financing statement with the
appropriate state official.15 But if the collateral is a consumer good, a good “used or
bought for use primarily for personal, family, or household purposes,”16 and the
security interest is a PMSI, then the security interest is automatically perfected at the
moment when the security interest first becomes enforceable17—commonly known

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11. Buyer may use Lender’s credit rather than Seller’s credit for a variety of reasons. For
example, Buyer may find Lender’s credit terms more attractive. Also, Buyer may be forced to seek
credit from Lender or another third party if Seller refuses to extend credit.

12. U.C.C. §§ 9-103(b)(1), -103(a)(1), -103(a)(2) (defining “purchase-money obligation” as
“an obligation of an obligor . . . for value given to enable the debtor to acquire rights in or the use of
the collateral if the value is in fact so used”); see, e.g., Friendly Fin. Corp. v. Orbit Chrysler Plymouth
Dodge Truck, Inc., 835 A.2d 1197, 1199 (Md. 2003) (lender held PMSI in vehicle purchased by
buyer and financed by lender); First-Citizens Bank & Trust Co. v. Four Oaks Bank & Trust Co., 576
S.E.2d 722, 725 (N.C. Ct. App. 2003) (plaintiff held PMSI in drill rig engine purchased by debtor
with plaintiff’s check).


party holding a PMSI with a possible defense to the trustee’s voidable preference challenge. See id.
at § 547(c)(3).

15. See U.C.C. § 9-310(a) & cmt. 2. The standard forms of an initial financing statement
(referred to as a UCC-1) and a subsequent amendment (known as a UCC-3) are found in U.C.C. § 9-
521.

Filing a financing statement is not the exclusive method of perfecting a security interest in
goods. See, e.g., id. § 9-313(a). The secured party can also perfect its security interest by taking
possession of the goods; but one or both parties may find this option impractical. See id.

16. Id. § 9-102(a)(23).

17. Id. § 9-309(1). Under former Article 9, some states enacted non-uniform laws that
as “attachment.” The secured party need not file a financing statement or take any other action to perfect its PMSI in a consumer good.

as “attachment.” The secured party need not file a financing statement or take any other action to perfect its PMSI in a consumer good.


18. U.C.C. §§ 9-203(b) (stating the requirements of an “enforceable” security interest), -203(a) (indicating that a security interest “attaches” when it becomes “enforceable”).

19. See, e.g., In re Vargas, 257 B.R. 157, 162 n.6 (Bankr. D.N.J. 2001) (“Under the Uniform Commercial Code a financing statement does not need to be filed to perfect a purchase money security interest in consumer goods.”); Howell State Bank v. Jericho Boats, Inc., 533 N.Y.S.2d 363, 364 (Sup. Ct. 1988) (“Since the Galaxy boat was a consumer good it was unnecessary for the plaintiff, Howell State Bank, to file a financing statement to perfect its purchase money security interest therein.”).

This rule of law is subject to one major exception. Even if the secured party claims a PMSI in a consumer good, the security interest is not automatically perfected if the collateral is subject to a recordation scheme imposed by statute or treaty, such as an automobile title registration statute. See U.C.C. §§ 9-309(1), -311(a). Secured parties occasionally overlook this exception to the general rule, often to their detriment. See, e.g., Supnik v. Key Bank of Cent. N.Y. (In re Brown), 45 B.R. 766, 768-69 (Bankr. N.D.N.Y. 1985) (ruling PMSI in mobile home subject to state registration scheme was unperfected and therefore subject to avoidance by bankruptcy trustee). Another potential pitfall for the creditor that relies on automatic perfection is the erroneous assumption that its PMSI is in a consumer good, when in fact the collateral is something else. See, e.g., In re Rader, 144 B.R. 864, 866 (Bankr. W.D. Mo. 1992) (holding debtor’s mechanic tools were equipment, leaving unfiled seller’s PMSI unperfected and subordinate to execution lien); Hoyt v. Christoforou, 692 A.2d 217, 221 (Pa. Super. Ct. 1997) (concluding restaurant equipment was equipment, leaving unfiled seller with unperfected PMSI “vulnerable to subordination from later, third party claims”).

Given that a primary goal of perfecting a security interest is to give notice to the world of the secured party’s property interest in the collateral, one may wonder why U.C.C. Article 9 allows automatic perfection of a PMSI in a consumer good. As explained in a leading casebook,

[i]f every purchase money security interest in consumer goods were subject to a filing rule, the files would be clogged with unedifying financing statements to the point where the system might break down—and the very lives of the clerks might be at risk—under the crush of a paper avalanche.

Id. at 795.

Although the secured party’s PMSI in a consumer good may be automatically perfected on attachment, U.C.C. Article 9 provides the secured party with an incentive to file a financing statement anyway. See, e.g., U.C.C. § 9-320(b). For example, Dealer sells a piano on credit to Buyer for personal, family, or household use. Dealer retains a PMSI that is automatically perfected on
U.C.C. Article 9 also favors PMSIs in priority disputes. The general priority rule is that a security interest is effective according to its terms not only between the secured party and the debtor, but also against the debtor's creditors. But this baseline rule is subject to other U.C.C. provisions, some of which resolve inter-creditor priority disputes by examining the perfected status of the security interest. For example, assume Bank obtains an enforceable security interest in Debtor's equipment on February 1. A week later, Unsecured Creditor becomes a "lien creditor" under applicable state law following a successful lawsuit and obtains a

attachment. Before the debt is repaid, Buyer sells the piano to Neighbor, also for personal, family, or household use. If Neighbor bought the piano without knowledge of Dealer's PMSI, Neighbor acquires the piano free of the PMSI unless Dealer filed a financing statement. See id. This example illustrates why a secured party with a PMSI in a consumer good should take the extra step of filing a financing statement. The filing will not affect perfection, but it does offer the creditor additional protection against certain buyers of the collateral. Nevertheless, the priority rule of § 9-320(b), which favors a secured party that files a financing statement, seems ill-conceived when one remembers that the consumer rarely searches the public records for a financing statement filed against the consumer seller before the sale of the goods is consummated. See Robert M. Lloyd, The New Article 9: Its Impact on Tennessee Law (Part II), 67 TENN. L. REV. 329, 342-43 (2000).

The secured party should perfect its security interest not only to improve its chances of avoiding priority over other competing creditors, but also to prevent the bankruptcy trustee from avoiding the security interest under the so-called “strong-arm clause” of the Bankruptcy Code. 11 U.S.C. § 544(a)(1) (2001). The strong-arm clause gives the trustee the status of a hypothetical lien creditor as of the commencement of the bankruptcy case. See id. As a hypothetical lien creditor, the trustee may invoke U.C.C. § 9-317(a)(2) and avoid an unperfected security interest. See, e.g., Pierce v. Conseco Fin. Serv. Corp. (In re Lockridge), 303 B.R. 449, 457 (Bankr. D. Ariz. 2003); Rieser v. Randolph County Bank (In re Masters), 137 B.R. 254, 259 (Bankr. S.D. Ohio 1992) (“Under 11 U.S.C. § 544, a trustee, on the date a debtor files a bankruptcy petition, possesses the status of a hypothetical lien creditor. Therefore, to defeat the trustee’s status, a creditor must possess a perfected security interest on the date the debtor filed a bankruptcy petition.”); Lawrence R. Ahern III, "Workouts" Under Revised Article 9: A Review of Changes and Proposal for Study, 9 AMER. BANKR. INST. L. REV. 115, 126 (2001) (discussing the strong-arm clause); Richard L. Barnes, UCC Article Nine Revised: Priorities, Preferences, and Liens Effective Only in Bankruptcy, 82 NEB. L. REV. 607, 609 (2004) (observing that “the trustee is someone whose power is greatest against those who are unperfected”).

Even if the secured party has perfected its security interest before the debtor files its bankruptcy petition (preventing application of the strong-arm clause), the trustee may be able to avoid the perfected security interest under one of its other statutory powers. See, e.g., 11 U.S.C. § 547(b). For example, the trustee may be able to avoid a security interest that is perfected within the ninety-day period preceding the petition date as a "preference." See id.; Lockridge, 303 B.R. at 457 (observing that security interest perfected shortly before bankruptcy petition might survive the trustee’s strong-arm challenge but still be avoided as a preference). For a preference primer, see Timothy R. Zinnecker, Purchase-Money Security Interests in the Preference Zone: Questions Answered and Questions Raised by the 1994 Amendments to Bankruptcy Code § 547, 62 MO. L. REV. 47, 48-59 (1997).
judicial lien on Debtor’s equipment. Under the general priority rule of section 9-201(a), Bank’s property interest in Debtor’s equipment should enjoy priority over the competing lien held by Unsecured Creditor. However, section 9-317 provides an exception to the general rule and, in most instances, awards priority to Bank only if Bank’s security interest is perfected when Unsecured Creditor’s lien arises.

This result, favoring a lien creditor over an unperfected secured creditor, may change if the unperfected secured creditor holds a PMSI. For example, assume Dealer sells a photocopier to Debtor on June 1, while retaining an enforceable PMSI. Dealer then delivers and installs the photocopier at Debtor’s place of business on June 6 and files its financing statement on June 12. Unknown to Dealer, however, Tort Creditor, enjoying the status of “lien creditor” under applicable law, obtained a lien on the photocopier on June 10. Because Dealer’s security interest was unperfected when the lien arose on June 10, Tort Creditor apparently enjoys priority under section 9-317(a)(2)(A).

I say “in most instances” because even if Bank’s security interest is unperfected, Unsecured Creditor’s lien may not enjoy priority if, before the lien arises, Bank has filed a financing statement and the security agreement is in place. See id. § 9-317(a)(2)(B) (protecting secured parties who have not yet given value when the lien arises (a requirement for attachment, and therefore perfection, under § 9-203(b)(1))).

Section 9-317 also favors certain buyers and lessees over unperfected secured parties. See id. §§ 9-317(b) (permitting eligible buyers to acquire assets free of unperfected security interests), 9-317(c) (permitting eligible lessees to take goods free of unperfected security interests).

Some scholars question the propriety of this baseline rule that turns on the perfected nature of the security interest. See, e.g., 9B HAWKLAND ET AL., supra note 23, § 9-317:2, at 9-268 to -269.

Normally a lien creditor obtains only the interest the debtor had, and thus should take subject to the prior [unperfected] security interest. A later arising interest, of course, can prevail over a prior [unperfected] security interest if it is obtained for value and in reliance on the prior interest not being ascertainable.

(footnotes omitted); RAYMOND T. NIMMER ET AL., COMMERCIAL TRANSACTIONS: SECURED FINANCING—CASES, MATERIALS, PROBLEMS 187 (3d ed. 2003) (“More cosmically, why should a secured creditor’s priority over a lien creditor depend on whether the secured creditor gave public notice of its interest? Notice of a security interest is typically not important to a lien creditor.”) (emphasis in original).


creditors and secured creditors, is subject to section 9-317(e). Subsection (e) awards priority to a purchase-money creditor that files its financing statement no later than the twentieth day following delivery of the collateral to the debtor, if the competing lien arose after attachment and before perfection. Deal er's filing was timely, therefore its security interest in the photocopier enjoys priority over Tort Creditor's lien, even though the security interest was unperfected when the lien arose, because Dealer's security interest qualified as a PMSI.

Just as the general priority rule of section 9-317(a) favors a perfected secured party over a subsequent lien creditor, so does the baseline rule for resolving priority disputes between two perfected secured parties. That general rule is codified in section 9-322: "Conflicting perfected security interests ... rank according to priority in time of filing or perfection." For example, Bank obtains an enforceable security interest in Debtor's accounts, equipment, and inventory in June 2003 and files its financing statement during that month. In August 2004, Debtor borrows money from Lender who obtains an enforceable security interest in Debtor's accounts, equipment, and inventory at the time of the loan and promptly files its financing statement. In a subsequent priority dispute between Bank and Lender concerning Debtor's accounts,

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28. See id. § 9-317(a)(2) ("except as otherwise provided in subsection (e) ... ").
29. Id. § 9-317(e). The uniform version of the predecessor statute, former § 9-301, provided a ten-day post-delivery filing period, which the overwhelming majority of states had extended to twenty days. See William D. Hawkland, Uniform Commercial Code Series: Local Code Variations § 9-301, pt. 3, at 1-7 (2003).
30. See U.C.C. § 9-317(e).
31. Compare id. § 9-317, with id. § 9-322(a).
32. Id. § 9-322(a)(1). "The justification for [this] rule ... is that it does what the parties would do for themselves in its absence, and thereby achieves a savings in transaction costs." Thomas H. Jackson & Anthony T. Kronman, Secured Financing and Priorities Among Creditors, 88 Yale L.J. 1143, 1164 (1979); see also Alan Schwartz, A Theory of Loan Priorities, 18 J. Legal Stud. 209 (1989):

The rule that secured creditors generally subordinate all subsequent creditors is said to follow from the nature of security itself; if a debtor could dilute a security interest by granting rights in the same property to later creditors, security interests would be rendered worthless and no one would take them.

Id. at 216 (footnote omitted); Robert E. Scott, The Truth About Secured Financing, 82 Cornell L. Rev. 1436 (1997):

The first-in-time priority granted to secured claims by the terms of Article 9 can be explained as a cost-effective mechanism for preventing risk alterations that would disadvantage prior creditors. The leverage over the debtor that Article 9 grants to secured creditors is an effective bonding mechanism by which debtors offer their assets as hostages against the commitment not to engage in further risky investments. Security also focuses the monitoring efforts of the creditor and further reduces the agency costs of debt.

Id. at 1454-55.
equipment, and inventory, Bank’s security interest enjoys priority because Bank filed its financing statement first.  

U.C.C. Article 9 validates the debtor’s encumbrance of yet-to-be-acquired assets through the use of an after-acquired property clause. This idea of a “floating lien” on the debtor’s existing and future assets, combined with a priority rule that is temporal, can create financial difficulty for a debtor. This difficulty is illustrated by the following hypothetical posed by Professor Steven Schwarcz and co-author Janet Malloy Link:

Suppose that Comer Market, a grocery store, borrowed money from National Savings & Loan, which secured the loan with a floating lien on Comer Market’s inventory, equipment, and other assets. Comer Market then decides it could double its profits if it buys a forklift to enable it to stock shelves more quickly. It would like to finance the purchase of the forklift from Local Bank, which is offering a lower interest rate than National. However, National’s floating lien has encumbered all of Comer Market’s assets, and Local will not lend

33. The priority rule is not “first to file” but “first to file or perfect, whichever is earlier.” U.C.C. § 9-322(a). Without knowing when Debtor acquired rights in each account, each piece of equipment, and each unit of inventory, the perfection date(s) of security interests claimed by Bank and Lender cannot be determined. Nevertheless, no perfection date would precede Bank’s filing date. Therefore, the priority result would not be affected by knowing the perfection date(s).

The result remains the same—Bank’s security interest enjoys priority—even if the Debtor-Lender transaction is consummated before the Debtor-Bank transaction. For example, assume Bank files its financing statement in June 2003, but does not obtain an enforceable security interest in Debtor’s accounts, equipment, and inventory until August 2003. Meanwhile, Debtor borrows money in July 2003 from Lender, who obtains an enforceable security interest in Debtor’s accounts, equipment, and inventory at the time of the loan and promptly files its financing statement. In a subsequent priority dispute between Bank and Lender concerning Debtor’s accounts, equipment, and inventory, Bank’s security interest enjoys priority because Bank filed its financing statement first, even though Lender’s security interest was perfected first. See id. § 9-322, cmt. 4, ex. 1. “The justification for determining priority by order of filing lies in the necessity of protecting the filing system—that is, of allowing the first secured party who has filed to make subsequent advances without each time having to check for subsequent filings as a condition of protection.” Id. Presumably, Lender will review the public records before funding its loan and discover Bank’s earlier filing. Lender then can decide to take one of the following courses of action: (1) do not make the loan, (2) obtain a security interest in unencumbered collateral, (3) seek a subordination agreement from Bank, and (4) make an unsecured loan at a higher interest rate. Jackson & Kronman, supra note 32, at 1178.

34. See U.C.C. § 9-204(a); see also Jackson & Kronman, supra note 32, at 1166-67 (explaining why “a legal regime that recognizes the validity of after-acquired property clauses is more efficient than one that does not”).

For an article that examines the development of the idea of encumbering after-acquired property, see generally David Cohen & Albert B. Gerber, The After-Acquired Property Clause, 87 U. Pa. L. Rev. 635 (1939).
unsecured. Thus, National's floating lien creates a situational monopoly because Comer Market has no collateral to offer as security to other lenders.\textsuperscript{35}

Professor Schwarz and co-author Link then explain why the law should not permit this "situational monopoly" to remain:

Unrestrained situational monopolies are economically inefficient because they eliminate competition. They allow the lender who executes a floating lien to extract monopoly profits by charging above competitive rates on subsequent loans, or to impose the lender's judgment on the debtor by withholding (and therefore depriving the debtor of) new capital.\textsuperscript{36}

U.C.C. Article 9 has created a financing mechanism that comes to the debtor's rescue and breaks the chains of this situational monopoly by creating a major exception to the basic priority rule.\textsuperscript{37} This exception creates a "second in time but first in line" rule by bestowing "super-priority" on selected PMSI holders.\textsuperscript{38} The

\begin{itemize}
\item \textsuperscript{36} Id.
\item \textsuperscript{37} See id. at 427.
\item \textsuperscript{38} Id. ("The PMSI defeats the situational monopoly by giving debtors the opportunity to acquire new collateral at competitive interest rates and creditors the opportunity to extend purchase money financing on a secured basis."); see also MBank Alamo Nat'l Ass'n v. Raytheon Co., 886 F.2d 1449 (5th Cir. 1989): PMSIs provide an avenue for heavily burdened debtors to obtain credit for specific goods when creditors who have previously loaned money to the debtor may be unwilling to advance additional funds. . . . By giving a PMSI holder a priority interest in the specific goods purchased, there is some incentive for a lender to advance funds or credit for the specific transaction.
\end{itemize}

\textit{Id.} at 1452 (internal citation omitted); \textit{id.} at 1460 (Goldberg, J., dissenting):

Creditors who have previously loaned money to the debtor and taken a security interest in the debtor's goods may be unwilling to advance additional value or funds. . . . The purchase money security provisions thus enable a leveraged debtor who is able to find a new lender to give that new lender a first claim on the new collateral purchased notwithstanding a prior filing by another creditor.

(footnotes omitted); Jackson & Kronman, supra note 32, at 1167 ("In our view, the purchase money priority is best thought of as a device for alleviating the situational monopoly created by an after-acquired property clause."); Robert E. Scott, The Politics of Article 9, 80 VA. L. REV. 1783 (1994): Relational theory offers two explanations to justify the PMSI super-priority. . . . The PMSI . . . allows the debtor to develop projects on its own that the general creditor would probably veto. Second, purchase money lenders presumably have specialized skills in monitoring and policing inventory and equipment that the general financer lacks. Thus, the skills of the PMSI creditor complement those of the general financer, and may serve to reduce monitoring costs.
exception is codified in section 9-324, with arguably the most significant rules found in subsections (a) and (b). 39

Subsection (b) awards super-priority to the holder of a PMSI in inventory 40 if (i) the secured party perfected its PMSI by the time the debtor received possession of the inventory, 41 (ii) the "secured party sent an authenticated notice to the holder of the conflicting security interest," 42 (iii) the holder of the conflicting security interest

Id. at 1798 (footnotes omitted); Scott, supra note 32, at 1455:

Fully protected by the hostage of security, creditors are motivated to be excessively cautious in refusing to permit subsequent financing that would enhance total returns to the firm. Thus, the first-in-time rule must be tempered with a scheme of superpriorities that offer the debtor an escape hatch to guard against creditor myopia. Hence, purchase money security interests and subsequent purchasers of chattel paper are granted priority over prior-in-time secured creditors as a means of balancing the effects of using assets as hostages.


39. See U.C.C. § 9-324(a)-(b). Subsections (d) and (e) address purchase-money priority in livestock (a term not defined by U.C.C. Article 9) that are "farm products" (defined at U.C.C. § 9-102(a)(34)). Id. § 9-324(d)-(e). Subsection (f) addresses purchase-money priority in "software" (defined at U.C.C. § 9-102(a)(75)). Id. at § 9-324(f). Subsection (g) provides rules that resolve priority disputes when the collateral is subject to multiple PMSIs, which might occur, for example, when Dealer sells equipment on credit to Buyer, who pays the required down payment with funds advanced by Lender. Id. § 9-324(g).

40. Super-priority in the inventory also extends to some, but not all, proceeds. See U.C.C. § 9-324(b) (extending super-priority to selected chattel paper, selected instruments, and identifiable cash proceeds received by the debtor no later than when the debtor delivers the inventory to a buyer). The super-priority does not extend to proceeds in the nature of accounts, for reasons explained in § 9-324, cmt. 8.

41. U.C.C. § 9-324(b)(1); see Cont'l Coffee Prods. Co. v. Banque Lavoro S.A., 852 F. Supp. 1235, 1241 & n.11 (S.D.N.Y. 1994) (ruling creditor that perfected its PMSI in coffee in November could not claim super-priority over earlier creditor because debtor had possession of coffee at least as early as October); Rushville Nat'l Bank v. Wells Fargo Bank (In re Dupont Feed Mill Corp.), 121 B.R. 555, 561 (Bankr. S.D. Ind. 1990) (holding creditor that filed financing statement with county clerk, rather than central filing officer, was not perfected when debtor received fertilizer; therefore, creditor could not claim super-priority over pre-existing creditor).

42. § 9-324(b)(2). Normally this situation arises when a creditor claims a security interest in the inventory through its after-acquired property clause. See Davis Bros., Inc. v. United Bank of Littleton, 701 P.2d 642, 644 (Colo. Ct. App. 1985) (concluding creditor's PMSI in debtor's drugs and sundries was ineligible for super-priority because creditor never gave notice of its PMSI to earlier creditor); Transamerica Commercial Fin. Corp. v. Blueville Bank of Grafton, 438 S.E.2d 817, 822-25 (W. Va. 1993) (holding purchase-money creditor that failed to send notice of its security interest to
received the notice sometime within the five-year period preceding the debtor's possession of the inventory, and (iv) the notice stated that the purchase-money creditor is claiming a PMSI in the inventory described in the notice.

Subsection (a), which applies when the collateral is not inventory (e.g., equipment), is much less rigorous. The statute imposes only one requirement on the purchase-money creditor seeking super-priority: the PMSI must be perfected "when the debtor receives possession of the collateral or within 20 days thereafter." Unlike the inventory creditor, the non-inventory creditor is neither required to perfect its security interest before the debtor takes possession of the collateral nor is it obligated to give notice of its PMSI to any other creditor, including existing creditors who otherwise enjoy priority from an earlier filing and an after-acquired property clause.

The creditors to whom notice must be sent are described in U.C.C. § 9-324(c).

43. U.C.C. § 9-324(b)(3). The statute's reference to a five-year period may be confusing to the casual reader. The statute merely tells the creditor that the notice is good for five years. See id. at cmt. 5. The creditor is not required to continuously send the same notice if it continues to sell or finance the debtor's inventory purchases. See id.

44. U.C.C. § 9-324(b)(4); see Fedders Fin. Corp. v. Chiarelli Bros., Inc., 289 A.2d 169, 172 (Pa. Super. Ct. 1972) (ruling that creditor's failure to describe air conditioners by serial number was not fatal to claim of super-priority).

45. See U.C.C. § 9-324(a). U.C.C. § 9-324(a) is also inapplicable to livestock, the purchase-money priority of which is addressed in subsection (d).

46. U.C.C. § 9-324(a). The uniform version of the predecessor statute, former § 9-312(4), provided a ten-day post-delivery filing period, which the overwhelming majority of states had extended to twenty days. See HAWKLAND, supra note 29, at 81-93.

The policy for providing the brief post-delivery grace period for filing is out of deference to the creditor's business practice of filing after delivery in cases of purchase money security interests in collateral other than inventory. Thus, if the debtor insists that he must have the goods today, the purchase-money financer can deliver them, without sacrificing his §9-312(4) [§9-324(a)] priority, provided he perfects within the following 10 [20] days.

2 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 29.5, at 799-800 (1965) (footnote omitted).

47. Professors White and Summers explain the justification for placing a more onerous burden on the inventory financer as follows:

In inventory finance, the general "revolving loan" or "line of credit", is common and the debtor comes to the original inventory financer periodically asking for new extensions and offering new collateral. It was feared that an unscrupulous debtor might take advantage of the ignorance of his original inventory financer by procuring a secured loan against new inventory from the original financer when he had already granted a purchase money security interest in that inventory to such other creditor. The obligation of such other creditor to notify earlier creditors of purchase money security interests on inventory makes that kind of fraud difficult. On the other hand, the practice with respect to equipment is for the secured creditor to make a single loan against a single piece of equipment and for the
The application of this super-priority rule was at the heart of the analysis in In re Alphatech Systems, Inc., a case recently decided by a three-judge panel of the United States Court of Appeals for the Eleventh Circuit. The case is summarized in Part III.

III. THE ALPATECH SYSTEMS' OPINION

In September 1998, United Financial Group, Inc. ("United"), agreed to extend credit to Alphatech Systems, Inc. ("Alphatech"), secured by "a blanket security interest in 'any and all goods, accounts receivable, chattels, fixtures, furniture, equipment, assets and property of every kind wherever, now and/or hereafter belonging to Alphatech . . ." United filed its financing statement with the Florida Secretary of State on September 16, 1998.

In late December, Methods Machine Tools, Inc. ("Methods Machine"), sold a lathe to Alphatech. The December 29th invoice obligated Alphatech to pay $247,063 within thirty days; Methods Machine delivered the lathe on December 31, 1998.

Alphatech did not have financing in place at the time of the sale, but on February 17, 1999, it reached an agreement with Textron Financial Corporation ("Textron") to finance the purchase in exchange for a security interest in the lathe. Textron filed its

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4 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 33-4, at 291-92 (5th ed. [Practitioner's Edition] 2002); see also U.C.C. § 9-324, cmt. 4. But see Douglas G. Baird & Thomas H. Jackson, Possession and Ownership: An Examination of the Scope of Article 9, 35 STAN. L. REV. 175, 195-96 (1983) (advocating a notice requirement as a predicate to non-inventory super-priority in order "to cure the ostensible ownership problems" faced by the earlier secured party). Authors of a leading casebook question the merits of the Baird-Jackson position, observing: "Although they base their argument on ostensible ownership grounds, they fail to address the empirical question of whether secured creditors typically are aware of debtors' possession of after-acquired equipment." JOHN O. HONNOLD ET AL., SECURITY INTERESTS IN PERSONAL PROPERTY 245 (3d ed. 2001).


49. Id. at 1268 (quoting the agreement between Alphatech and United).

50. Id.


52. Textron Fin., 317 F.3d at 1268.

53. Id. By this date Methods Machine had issued a second invoice dated January 20, 1999. Id.
financing statement with the Florida Secretary of State a few days earlier on February 12, 1999.\(^\text{54}\)

Sometime later, Alphatech went into bankruptcy,\(^\text{55}\) and thereafter a dispute arose between United and Textron as to whose perfected security interest in the lathe enjoyed priority.\(^\text{56}\) Both the bankruptcy court and the district court held that Textron's perfected PMSI did not have super-priority under Florida's version of former U.C.C. section 9-312(4), the forerunner of revised section 9-324(a), because Textron had not filed its financing statement by the fifteenth day following Methods Machine's delivery of the lathe to Alphatech on December 31.\(^\text{57}\) Textron appealed.\(^\text{58}\)

The appellate panel identified the "sole issue on appeal" as "whether Textron had a properly perfected purchase money security interest in the Lathe, and thus had a priority to United's perfected security interest" under Florida's version of U.C.C. Article 9.\(^\text{59}\) The panel observed that it was "clear . . . that Textron perfected its purchase money security interest 43 days after delivery of the Lathe" by its filing on February 12, 1999.\(^\text{60}\) Textron argued that Alphatech did not become a "debtor" until it executed the Alphatech-Textron security agreement on February 17 and therefore, the fifteen-day filing period did not commence until February 17, the first date on which Alphatech had possession as a debtor.\(^\text{61}\) The appellate panel disagreed.\(^\text{62}\)

This Court finds Textron's argument unpersuasive, and extremely susceptible to manipulation by debtors and creditors. Under Textron's reasoning, a purchase money security interest creditor could gain priority over a prior perfected security interest at any time after delivery of the collateral so long as the financing was agreed to within the fifteen days prior to the filing of the UCC-1 financing statement.

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\(^{54}\) Id. Both the revised and former versions of U.C.C. Article 9 permit a secured creditor to file its financing statement before the parties execute the security agreement or the security interest otherwise becomes enforceable. See U.C.C. § 9-502(d) (2004); former U.C.C. § 9-402(1).

\(^{55}\) The appellate opinion does not state when Alphatech went into bankruptcy. Presumably, Alphatech (or its creditors) filed the bankruptcy petition several weeks, if not months, before February 9, 2001—the date the bankruptcy court issued its judgment on priority in favor of United and against Textron. See Textron Fin., 317 F.3d at 1268.

\(^{56}\) Id.

\(^{57}\) Id. As noted earlier, the uniform version of former U.C.C. § 9-312(4) awarded super-priority to the purchase-money creditor if the PMSI was perfected no later than ten days after delivery of the asset, a period that most states had extended to twenty days. See supra note 46; Florida's non-uniform amendment extended the filing deadline to fifteen days. See Textron Fin., 317 F.3d at 1269 (citing FLA. STAT. ANN. § 679.312(4) (West 1999) (repealed 2001) (Florida's version of former U.C.C. § 9-312(4))).

\(^{58}\) Textron Fin., 317 F.3d at 1269.

\(^{59}\) Id.

\(^{60}\) Id.

\(^{61}\) Id.

\(^{62}\) Id.

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The language of [Florida's version of former section 9-312(4)] is clear. Alphatech was a debtor no later than December 31, 1998, when the Lathe was delivered to Alphatech from Method Machines [sic] on net thirty-day terms. Therefore, Textron had fifteen days from December 31, 1998, to properly perfect its purchase money security interest. Since Textron did not perfect until 43 days later on February 12, 1999, Textron did not gain priority over United’s prior perfected security interest.63

The panel then affirmed the district court’s order, awarding priority to United.64

IV. THE (NON)PURCHASE-MONEY STATUS OF TEXTRON’S SECURITY INTEREST

The appellate panel’s decision to award priority to United, rather than Textron, rested on its conclusion that Textron was not entitled to super-priority because it failed to timely perfect its PMSI in the lathe.65 Nowhere in its opinion, however, did the panel address whether Textron even had a PMSI.66 A review of the financial arrangements surrounding Alphatech’s acquisition of the lathe should have led the panel to conclude that Textron was ineligible for super-priority, not because Textron made an untimely filing, but rather because its security interest did not qualify for purchase-money status.

Textron did not engage in seller-financing, so its security interest would only enjoy purchase-money status if it gave the value that Alphatech used to acquire rights in the lathe.67 Textron certainly gave value to Alphatech by agreeing to loan funds which Alphatech used to pay Methods Machine for the lathe.68 However, Textron made its loan on February 17, 1999, nearly one and a half months after Alphatech had purchased the lathe on December 29, 1998.69 Alphatech acquired its property rights in the lathe on the purchase date, or two days later upon delivery; Alphatech did not acquire any additional property rights in the lathe when it used Textron’s loan proceeds in February 1999 to pay the sales invoice issued by Methods Machine. As Textron’s credit extension did not permit Alphatech to acquire any additional property rights in the lathe, Textron’s security interest was not a PMSI.70 Therefore, Textron’s

63. Textron Fin., 317 F.3d at 1269.
64. Id.
65. Id.
66. Cf. id. at 1268-69.
67. U.C.C. § 9-103(a), (b)(1); former U.C.C. § 9-107.
68. Textron Fin., 317 F.3d at 1268.
69. Id.
70. Compare Textron Fin., 317 F.3d at 1268, with U.C.C. § 9-103(a), (b)(1), and former U.C.C. § 9-107.
security interest was ineligible for super-priority, so United’s security interest enjoyed priority under the general first-to-file-or-perfect rule.\footnote{See U.C.C. § 9-322(a)(1); former U.C.C. § 9-312(5)(a).}

A case that supports this analysis is North Platte State Bank v. Production Credit Association of North Platte.\footnote{200 N.W.2d 1, 6 (Neb. 1972).} Long (seller) and Tucker (buyer) made an oral contract in November 1968 for the sale of cattle, which were later identified to the contract and then delivered to Tucker on November 30, 1968.\footnote{Id. at 3.} Based on the understanding of the parties and applicable provisions of U.C.C. Article 2, the court concluded that (i) title to the seventy-nine cows passed to Tucker at delivery and (ii) Long was making the sale on open and unsecured credit.\footnote{Id. at 5.}

In November and December of 1968, Tucker visited North Platte State Bank (the “Bank”) to discuss opening a line of credit, but the parties did not discuss a specific loan for any particular purpose.\footnote{Id. at \textit{5}.} On January 13, 1969, Tucker drew a $17,775 check on the Bank and delivered it to Long as payment for the cattle.\footnote{Id. at 3.} Long then mailed the check to the Bank for payment, but the Bank returned the check because Tucker's account had insufficient funds.\footnote{Id.} After Long contacted the Bank to discuss payment of the check, the Bank acknowledged the previous loan discussions with Tucker and told the parties that a $20,000 loan would be granted, and the Bank would honor the check if Tucker would come in and complete the necessary paperwork.\footnote{Id.} Inclement weather prevented Tucker from executing the paperwork, which included a security agreement covering the seventy-nine cows, until January 30, 1969.\footnote{See \textit{N. Platte State Bank}, 200 N.W.2d at 3.} The Bank honored the $17,775 check the next day and filed a financing statement on February 5, 1969.\footnote{Id. at 4.}

In December 1969, a priority dispute erupted between the Bank and an earlier creditor.\footnote{\textit{N. Platte State Bank}, 200 N.W.2d at 3-4.} Production Credit Association of North Platte, which through an after-acquired property clause and a financing statement filed in August of 1967, claimed priority as the first creditor to file and perfect a security interest in the cattle.\footnote{Id. at 4.} The district court agreed.\footnote{Id.} On appeal, the Bank argued that its security interest was a PMSI entitled to super-priority under former section 9-312(4).\footnote{Id.} The court held that
the Bank was not entitled to any super-priority because the Bank did not have a PMSI.\textsuperscript{85}

As we have pointed out, section 9-107(b), U.C.C., provides that a security interest cannot become a purchase money security interest unless it is taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used. Clearly, the Bank could not qualify as the seller of the 79 cows. Obviously, by advancing the $20,000 and taking the mortgage it did acquire a security interest in the cows. The distinction is vital to the disposition of this case. The money advanced by the Bank enabled Tucker to pay the price to Seller for the cows. But it was not used by Tucker to acquire any rights in the cows because he already had all the possible rights in the cows he could have with both possession and title.\textsuperscript{86}

Just as the Bank in \textit{North Platte State Bank} did not have a PMSI in the cows that Tucker acquired prior to the loan, Textron did not have a PMSI in the lathe that Alphatech acquired forty-five days prior to the loan.\textsuperscript{87} In both cases, third-party financing came too late to enable the debtor to acquire any additional rights in the asset previously purchased.\textsuperscript{88}

\textsuperscript{85.} \textit{Id.} at 5-6.

\textsuperscript{86.} \textit{Id.} at 6. The court also held that the Bank would not have been entitled to any super-priority because the Bank had failed to timely file its financing statement as required by former § 9-312(4). \textit{Id.} The court acknowledged that the Bank filed its financing statement within ten days after making the loan but more than two months after Tucker had taken possession of the cattle. \textit{Id.} at 6. This part of the court's opinion is discussed \textit{infra} at Part V.

\textsuperscript{87.} \textit{Compare N. Platte State Bank}, 200 N.W.2d at 5-6, with Textron Fin. Corp. v. United Fin. Group, Inc. (\textit{In re Alphatech Sys., Inc.}), 317 F.3d 1267, 1268 (11th Cir. 2003).

\textsuperscript{88.} \textit{Textron Fin.}, 317 F.3d at 1268; \textit{N. Platte State Bank}, 200 N.W.2d at 5-6. For other cases similar to \textit{North Platte State Bank}, see \textit{In re Cliff's Ridge Skiing Corp.}, 123 B.R. 753, 763-64 (Bankr. W.D. Mich. 1991) (holding that two advances by bank to debtor in December of 1982 did not give bank a PMSI in chairlift acquired by debtor on cash-on-delivery basis and delivered in August of 1982, "[b]ecause delivery of the chairlift occurred approximately four months before First National made any loan advance, the court concludes the value given by First National did not 'enable' the Debtor to acquire the chairlift"); Manuel v. Blazer Fin. Servs., Inc. (\textit{In re Manuel}, 18 B.R. 403, 404-05 (Bankr. D.S.C. 1981) (holding that finance company that advanced checks in March 1979 made payable to both debtor and co-payees for payment of furniture purchases on open account made in September 1977, February 1978, September 1978, and on an unstated date before the finance company's loan, could not claim a PMSI in those furnishings that secured repayment of its credit extensions.

Since the plaintiffs already had possession of the household goods and furnishings on March 2, 1979, when the security agreement was executed and when Blazer advanced the funds, it is clear that Blazer made no advances nor incurred any obligation which enabled "the debtor to acquire rights in the collateral"... [and] therefore, Blazer does not have a purchase-money security interest.
The foregoing analysis does not necessarily dictate the conclusion that a security interest claimed by a non-seller creditor can never enjoy purchase-money status if the debtor’s acquisition of the asset precedes the non-seller’s credit extension. A case that illustrates this point is *General Electric Capital Commercial Automotive Finance, Inc. v. Spartan Motors, Ltd.*

General Motors Acceptance Corporation ("GMAC") agreed to finance the vehicle inventory of Spartan Motors (a car dealership) in July 1991. On May 7, 1992, Spartan Motors used its own money in the amount of $121,500 to purchase a 1992 Mercedes Benz 600 SEL from European Auto Wholesalers, Ltd.; GMAC reimbursed Spartan on May 13, 1992. On July 7, 1992, Spartan again used its own money, this time $120,000, to purchase another 1992 Mercedes Benz 600 SEL from

(footnotes omitted).


90. Id. at 629.

91. Id. at 630.
the same seller; GMAC reimbursed Spartan on July 9, 1992. Later that year Spartan Motors filed a bankruptcy petition. A priority dispute for the two Mercedes Benz vehicles arose between GMAC and General Electric Capital Commercial Automotive Finance ("GECC"), an earlier inventory financier. The trial court granted GECC's motion for summary judgment after noting that GMAC's contract obligated it to pay funds directly to sellers in advance of the sale, and only to that extent could GMAC claim a PMSI. Because GMAC had reimbursed the debtor, Spartan Motors, rather than making direct payment to the seller, European Auto Wholesalers, GMAC did not possess a PMSI in the two vehicles. Therefore, GECC's security interest enjoyed priority.

The New York Supreme Court reversed, awarding priority to GMAC and granting its motion for summary judgment. The supreme court first observed, as explained by U.C.C. Article 9 architect Grant Gilmore, that U.C.C. section 9-107(b), the enabling loan prong of the PMSI definition under former U.C.C. Article 9, had been enacted "to liberalize the rather rigid traditional rules" that addressed the situations under which a PMSI could be claimed by a non-seller financer who enabled the debtor to acquire inventory. Rather than exclusively focusing on "the chronology of the financing" or "the configuration of the cash flow," the court believed that proper analysis required a determination of whether the loan transaction was "closely allied" to the purchase transaction. The court observed that temporal proximity of the credit extension to the asset acquisition, as well as the intent of the parties, were two important factors in determining the "close alliance." Because (i) GMAC made payments to Spartan Motors within only two and six days following the purchases, (ii) GMAC's post-purchase reimbursement was a common industry practice, and routine with Spartan Motors, (iii) GMAC was contractually obligated to give value to enable Spartan Motors to acquire its vehicle inventory, and (iv) the value given by GMAC enabled Spartan Motors to purchase the two expensive

92. Id.
93. Id. at 630.
94. Spartan Motors, 675 N.Y.S.2d at 629-30.
95. Id. at 630.
96. Id.
97. Id.
98. Id. at 630.
99. Spartan Motors, 675 N.Y.S.2d at 631; see also Grant Gilmore, The Purchase Money Priority, 76 HARV. L. REV. 1333, 1374 (1963) ("The evident intent of [former U.C.C. § 9-107(b)] . . . is to free the purchase money concept from artificial limitations; rigid adherence to particular formalities and sequences should not be required."). Professor Gilmore echoes this statement in his acclaimed treatise on secured credit. 2 GILMORE, supra note 46, § 29.2, at 782.
100. Spartan Motors, 675 N.Y.S.2d at 631-32.
101. Id. at 632.
vehicles, the court concluded that the loans were "closely allied" to the two acquisitions, thereby giving GMAC a PMSI.\textsuperscript{102}

The supreme court did not reach a contrary result solely because Spartan Motors took title to the cars before GMAC extended credit. While the chronology of events might suggest that the loan merely satisfied a pre-existing debt, rather than enabling Spartan Motors to acquire rights in the two cars,

\begin{quote}

it seems ill-advised to create an artificial rule premised upon this circumstance, as there will be cases where a purchase money arrangement will not be established even though title has not passed, and other cases, like the one before us, where the passing of title is irrelevant to the creditor's demonstration that the value he extended was closely allied to the purchase of the collateral.\textsuperscript{103}
\end{quote}

Nor did the supreme court hold that North Platte State Bank dictated a contrary result.\textsuperscript{104} Rather, the court distinguished the earlier case by noting that the purchase and loan transactions were nearly two months apart, unlike two and six days respectively. Furthermore, the debtor and creditor had not negotiated credit terms before the debtor bought the cattle, and the creditor was not obligated to extend credit to enable the debtor to buy the them.\textsuperscript{105} "Put somewhat differently, in North Platte the availability of the loan was not a factor in the debtor's negotiation of the sale; and the plaintiff bank was not committed at the time of the sale to advance the amount required to pay for the items purchased."\textsuperscript{106}

\begin{flushright}

\textsuperscript{102} Id.
\textsuperscript{103} Id. at 633. As between the secured party and the debtor, title to the collateral generally is immaterial under U.C.C. Article 9. See U.C.C. § 9-202 (2004); former U.C.C. § 9-202.
\textsuperscript{104} See Spartan Motors, 675 N.Y.S.2d at 633.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\end{flushright}
Spartan Motors and other cases\textsuperscript{107} illustrate that a non-seller creditor may successfully claim that its security interest is eligible for purchase-money status, even if it extends credit after the debtor has acquired the asset, if the credit extension and the asset acquisition are “closely allied.”\textsuperscript{108} Strong evidence of this close alliance is

\textsuperscript{107} See, e.g., Hunter v. McHenry, 71 B.R. 60, 62-64 (Bankr. N.D. Ohio 1987) (concluding that debtor’s possession of vehicle on or about March 14 did not prevent credit union from claiming PMSI in vehicle after issuing its check for the purchase price on March 27, to seller’s courier, in return for vehicle’s certificate of title issued on March 25);

A review of the entire case suggests that the transaction involved all three parties, and that the resulting circumstances were part of their effort to consummate a sale of the vehicle. In light of these facts, it must be concluded that the value extended by [the credit union] was intended to, and did in fact, enable the Debtor to acquire the car, regardless of whether or not she already had possession.

United States v. Hooks (\textit{In re Hooks}), 40 B.R. 715, 720-21 (Bankr. M.D. Ga. 1984) (holding that lender had PMSI in cattle, title to which, pursuant to agreement, did not pass from seller to debtor until January 18, when debtor executed promissory note and security agreement, even though debtor possessed cattle for several weeks earlier and lender did not disburse funds to seller until January 29; debtor’s earlier possession was solely to permit debtor to inspect and milk cows and determine whether he wished to purchase them, and title did not pass during this time; delay between loan agreement and funding did not prevent creation of PMSI, as the loan and the disbursement were “closely allied to the sale”); Corim, Inc. v. Belvin, 414 S.E.2d 491, 491-92 (Ga. Ct. App. 1991), rev’d on other grounds sub nom. Crossroads Bank of Georgia v. Corim, Inc., 418 S.E.2d 601 (1992) (holding that bank which funded purchase price of cotton picker on February 7 held a PMSI, even though debtor acquired the cotton picker at auction on January 28; debtor and bank president had agreed several days prior to the auction that bank would finance the purchase if debtor was successful bidder; terms of the loan were finalized after the auction was held and the amount of the winning bid was known).

\[\text{The loan enabled [the debtor] to purchase the cotton picker and although there were a number of days between the purchase and the finalization of the loan, the purchase and the loan were sufficiently ‘closely allied’ to create a purchase money security interest . . . . The evidence is uncontroversial that steps taken by [the debtor] and [the bank] before and after the auction were parts of ‘a single financing arrangement’ which enabled [the debtor] to acquire rights in the cotton picker . . . .}\]

DeKalb Bank v. Purdy, 562 N.E.2d 1223, 1224-27 (Ill. App. Ct. 1990) (holding that bank which advanced loan proceeds used by debtors to pay seller of cattle, previously ordered by debtor and received on September 15 and 16, had PMSI in cattle, even though bank advanced loan proceeds on September 30; the court held so notwithstanding competing creditor’s contention that loan proceeds did not permit debtors to acquire any rights in the cattle but merely satisfied pre-existing debt).

The case at bar is distinguishable from \textit{North Platte} in that the cattle were not purchased on open account. Unlike in \textit{North Platte}, title did not pass upon transfer of possession. It is clear that the terms of the sale to the Purdys were such that title did not pass to the Purdys until Saunders received payment. . . . We disagree with DeKalb’s contention that the Purdys already possessed all possible rights in the cattle. Title is obviously a right in property, and the funds provided by Shabbona enabled the Purdys to acquire this right.

\textsuperscript{108} Official Comment 3 to U.C.C. § 9-103 states in part:

The concept of “purchase-money security interest” requires a close nexus between the acquisition of collateral and the secured obligation. Thus, a security interest does not
present if the debtor, the secured party, and the seller understand on the purchase date that the debtor will be relying on the secured party’s financing to pay the purchase price. In this situation, the financing creditor’s security interest should be deemed a PMSI because the assurance and expectation of the forthcoming financing enables the debtor to acquire rights in the asset. Absent such evidence—for example, a debtor seeks third-party financing after acquiring the asset from a seller who views the transaction as a standard unsecured sale—the financier’s security interest should not be treated as a PMSI because the financing did not enable the debtor to acquire any rights in the asset.

Unfortunately, the reported facts of Alphatech do not permit the Eleventh Circuit in Textron to rely on Spartan Motors and its “close alliance” test in its pursuit of Textron’s PMSI. Alphatech bought the lathe on December 29, 1998; Methods qualify as a purchase-money security interest if a debtor acquires property on unsecured credit and subsequently creates the security interest to secure the purchase price. U.C.C. § 9-103, cmt. 3 (2004). Authors of a leading treatise rely on the Official Comment to conclude that the validity of cases like Spartan Motors "is unclear, but doubtful." See 9A Hawkland, supra note 29, § 9-103:3, at 9-249 to -251. If the Official Comment is taken literally, then the timing of both the purchase and the credit extension becomes of paramount importance. See id. § 9-103:3, at 9-249. This elevates form over substance, emphasizing the “artificial limitations” and “particular formalities and sequences” that Grant Gilmore discouraged, while leaving no room to accommodate the structural nuances of the transaction, or the understanding and expectations of the seller, the debtor-buyer, and the creditor-financer. Gilmore, supra note 99, at 1374; see, e.g., Spartan Motors, 675 N.Y.S.2d at 633 (noting the flexibility of secured transactions). Granting PMSI status, in appropriate circumstances, to a financer that extends credit after the debtor has acquired the collateral would not render the quoted passage from the Official Comment meaningless. The passage would continue to thwart a merchant from claiming a PMSI after it converts an unsecured credit sale into a secured credit sale some time after the purchase date, in response to the buyer-debtor’s financial woes.

Given the number of cases that have addressed PMSI eligibility by reviewing the close alliance between the asset acquisition and the subsequent credit extension, it is rather puzzling why the drafters of revised U.C.C. Article 9 elected to address this significant issue with a single reference to an undefined “close nexus” in the official comments, rather than with more specific statutory language and additional elaboration and guidance in the official comments. At one time the initial drafters considered giving purchase-money status to a security interest taken by a person who for the purpose of enabling the debtor to pay for or acquire rights in or the use of collateral makes advances or incurs an obligation not more than ten days before or after the debtor receives possession of the collateral even though the value given is not in fact used to pay the price. 27 Uniform Commercial Code: Drafts 202 (Elizabeth Slusser Kelly ed., 1984). The official comment explained that the purpose of this “conclusive presumption” of purchase-money status was “[t]o eliminate difficulties of tracing.” Id. This provision did not survive the drafting process and was “deleted for the reason that it extends the purchase money security interest concept too far.” 28 id. at 285-86 (1984).

Machine delivered the lathe two days later, when "Alphatech did not [yet] have financing in place." If Alphatech did not have any financing in place, it would be difficult to conclude that Methods Machine's willingness to sell the lathe on unsecured credit hinged on its expectation or understanding that Alphatech intended to fund the purchase price with imminent third-party financing. Absent any evidence of that expectation or understanding, Textron's February loan did not enable Alphatech to acquire any rights in the lathe that it did not already hold as of the December 31 delivery date. The sales transaction and the loan extension were not "closely allied," so Textron cannot claim that its security interest in the lathe is a PMSI.

In summary, the appellate panel should have concluded that Textron did not have a PMSI in the lathe. That conclusion would have permitted the panel to avoid addressing the timeliness of Textron's filing under the super-priority statute.


111. Although Textron did not agree to make the loan until February 17, the case reveals that "Alphatech arranged for Textron to finance the purchase of the Lathe" before Methods Machine issued a second invoice on January 20. Id. The case does not (i) explain the delay in making the loan, (ii) indicate when Alphatech first approached Textron or any other lender, or (iii) suggest when Alphatech initially disclosed to Methods Machine that it might use third-party financing to pay for the lathe. Evidence on these matters may have aided Textron in carrying out its burden of proving that its security interest in the lathe was a PMSI if the appellate panel had addressed the purchase-money nature of the security interest.

112. Although the case does not expressly state that Methods Machine sold the lathe to Alphatech on unsecured credit, the terms of the purchase price, payable in-full within thirty days, combined with the omission of any suggestion of a secured credit sale, support that conclusion. See id. at 1268-69. If Methods Machine had sold the lathe to Alphatech on secured credit, while retaining a PMSI in the lathe to secure repayment of its purchase price, then Methods Machine could have assigned its security interest to Textron in exchange for the loan proceeds. The security interest claimed by Textron would retain its original PMSI status. See 9A HAWKLAND ET AL., supra note 29, § 9-103:1, at 9-235 to -236 (discussing possible assignment of PMSI); see also 2 GILMORE, supra note 46, § 29.2, at 781 ("It has always been clear that a person taking by assignment from a seller inherited the seller’s purchase-money interest . . . .").

113. Perhaps the panel never addressed whether Textron held a PMSI because counsel for Textron and United stipulated to the purchase-money status of Textron’s security interest. If the parties did indeed stipulate on that issue, the panel remains subject to criticism for failing to mention the stipulation in the opinion, not just for the benefit of the litigants, but also for all of the other interested constituencies who could be expected to rely on the opinion for its precedential value, including: financial institutions, merchants, lawyers, and state and federal judges inside and outside the Eleventh Circuit.

114. See Textron Fin., 317 F.3d at 1269 (relying solely on Florida’s statutory provision).
V. THE TIMELINESS OF TEXTRON’S FILING

The bankruptcy court, the district court, and the appellate panel awarded priority to United rather than Textron because Textron failed to timely perfect its PMSI in the lathe. Because Method Machine delivered the lathe to Alphatech on December 31, 1998, Because Florida’s super-priority statute required Textron to perfect its security interest no later than fifteen days after Alphatech received possession of the lathe, all three courts concluded that Textron’s filing on February 12, 1999, was tardy. Textron’s only argument was that the fifteen-day period did not begin until Alphatech became a “debtor” on February 17, the date that Textron agreed to make the loan and Alphatech granted a security interest in the lathe to Textron. The appellate panel was not convinced.

This Court finds Textron’s argument unpersuasive, and extremely susceptible to manipulation by debtors and creditors. Under Textron’s reasoning, a purchase money security interest creditor could gain priority over a prior perfected security interest at any time after delivery of the collateral, so long as the financing was agreed to within the fifteen days prior to the filing of the UCC-1 financing statement.

The language of Fla. Stat. § 679.312(4) [former § 9-312(4)] is clear. Alphatech was a debtor no later than December 31, 1998, when the Lathe was delivered to Alphatech from Method Machines [sic] on net thirty-day terms. Therefore, Textron had fifteen days from December 31, 1998, to properly perfect its purchase money security interest. Since Textron did not perfect until 43 days later on February 12, 1999, Textron did not gain priority over United’s prior perfected security interest.

The panel’s brief response strongly suggests that the “possession” element of the super-priority statute operates completely independent from the “debtor” element. In other words, the panel’s message is that the purchase-money creditor will enjoy super-priority only if its perfection is timely, with timeliness measured solely by the debtor’s “possession” and without relevance attaching to the possessor’s status as a “debtor,” as that term is defined by U.C.C. Article 9. Based on the language of the

115. Textron Fin., 317 F.3d at 1268-69.
116. Id. at 1268.
117. Id. at 1268-69.
118. Id. at 1269.
119. Id.
120. Textron Fin., 317 F.3d at 1269.
121. See id.
122. The panel observed that “Alphatech was a debtor no later than December 31, 1998, when the Lathe was delivered to Alphatech from Method Machines on net thirty-day terms.” Id.
statute, the appellate panel’s interpretation appears plausible; but the opinion paints an incomplete picture by failing to recognize that Textron’s argument has found favor with numerous courts and may represent the majority view.

Courts have struggled to interpret the statutory phrase “debtor receives possession” and to determine what triggers the running of the super-priority filing period. Results have been inconsistent, with courts falling into one of two camps: section A reviews three cases that apply the “obligation” standard, the position advocated by Textron, which examines both the debtor-creditor relationship and the debtor’s possession; section B reviews three cases that apply the “physical control” standard, the position implicitly followed by the Alphatech Systems panel, which focuses attention exclusively on the debtor’s possession, whether or not at the moment of initial possession the party is a “debtor.” Section C offers some thoughts on the two standards.

A. The “Obligation” Standard

This section summarizes Brodie Hotel Supply, Inc. v. United States, the “lead case applying the ‘obligation’ standard,” as well as two subsequent cases: National Acceptance Company of California v. Community Bank (In re Ultra Precision Industries, Inc.), and Commerce Union Bank v. John Deere Industrial Equipment Co.

Absent an enforceable security interest in the lathe, however, delivery alone would not make Alphatech a “debtor” under U.C.C. Article 9. See U.C.C. § 9-102(a)(28)(A) (2004) (defining “debtor” as “a person having an interest . . . in the collateral”), (a)(12) (defining “collateral” as “the property subject to a security interest”); see also former U.C.C. § 9-105(1)(d) (defining “debtor” as “the person who owes payment or other performance of the obligation secured”). Under the statutory definition, Alphatech did not become a “debtor” until February 17, 1999, when Textron agreed to make the loan and Alphatech granted to Textron a security interest in the lathe. See Textron Fin., 317 E3dat 1268.

123. I am not retreating from my observation in Part IV that Textron did not have a purchase-money security interest in the lathe. I am merely analyzing the merits of Textron’s argument that, for the purpose of achieving super-priority, the timeliness of the purchase-money creditor’s filing requires a preliminary determination of the possessor’s status as “debtor.”

124. See, e.g., Brodie Hotel Supply, Inc. v. United States, 431 F.2d 1316, 1319 (9th Cir. 1970).

125. 431 F.2d 1316 (9th Cir. 1970).


127. 503 F.2d 414 (9th Cir. 1974).

128. 387 So. 2d 787 (Ala. 1980). Brief summaries of other cases following the “obligation” standard appear at Appendix I to this article.
1. Brodie Hotel Supply, Inc. v. United States\textsuperscript{129}

In 1959, Brodie Hotel Supply ("Brodie") sold restaurant equipment to a buyer that went bankrupt; Brodie left the equipment at the restaurant.\textsuperscript{130} With Brodie's consent, "James Lyon took possession of the restaurant and began operating it on June 1, 1964."\textsuperscript{131} At that time, Lyon and Brodie had not finalized the terms of the equipment purchase, and negotiations continued for several months.\textsuperscript{132} In early November of 1964, Lyon borrowed $17,000 from National Bank of Alaska, with repayment secured by a property interest in the restaurant equipment.\textsuperscript{133} The bank filed its financing statement on November 4.\textsuperscript{134} A few days later, on November 12, Brodie and Lyon concluded their negotiations; Brodie then delivered a bill of sale and received a security interest in the equipment.\textsuperscript{135} Brodie filed its financing statement on November 23.\textsuperscript{136}

Sometime later, Brodie finally initiated a lawsuit against the United States to determine the priority of their competing property interests in the restaurant equipment.\textsuperscript{137} The district court granted summary judgment in favor of Brodie, which found persuasive Brodie's argument that Lyon did not receive possession, at least under the super-priority statute, until Lyon became an Article 9 "debtor" on November 12.\textsuperscript{138} Because Brodie filed its financing statement within ten days of that date, Brodie's PMSI was entitled to super-priority.\textsuperscript{139}

On appeal, the federal government argued that "debtor," as used in the super-priority statute, was "used merely to identify an individual in possession, who ultimately becomes indebted to the purchase-money mortgagee."\textsuperscript{140} The government also reminded the court that U.C.C. Article 9 permits the secured party to file a financing statement before the security interest becomes enforceable, even though the

\begin{itemize}
\item \textsuperscript{129} 431 F.2d 1316 (9th Cir. 1970).
\item \textsuperscript{130} Id. at 1317.
\item \textsuperscript{131} Id.
\item \textsuperscript{132} Id.
\item \textsuperscript{133} Id. at 1318.
\item \textsuperscript{134} Brodie Hotel Supply, 431 F.2d at 1318.
\item \textsuperscript{135} Id.
\item \textsuperscript{136} Id.
\item \textsuperscript{137} Id. at 1317.
\item \textsuperscript{138} See id. at 1317, 1319.
\item \textsuperscript{139} Brodie Hotel Supply, 431 F.2d at 1318. The careful reader will observe that Brodie actually filed its financing statement eleven days after Lyon granted the security interest on November 12. Id. The opinion is silent on this point, but presumably the court granted the one-day filing extension because November 22, 1964, fell on a Sunday. Another court granted a similar one-day extension because the final day of the super-priority filing period fell on Labor Day. See Commerce Union Bank v. John Deere Indus. Equip. Co., 387 So.2d 787, 789 (Ala. 1980) (summarized infra Part V.A.3.).
\item \textsuperscript{140} Brodie Hotel Supply, 431 F.2d at 1318.
\end{itemize}
statutory authority for pre-filing uses the terms "debtor," "secured party," and "security interest"—terms whose definitions would not be technically satisfied upon pre-filing.\textsuperscript{141} The appellate panel was unconvinced, noting that the "debtor" is "the person who owes payment or other performance of the obligation secured."\textsuperscript{142} Relying on this definition, the panel wrote:

Although Lyon might have been liable for the reasonable rental of the equipment or for its return to Brodie, he did not owe performance of an "obligation secured" by the collateral in question until November 12, 1964, and therefore was not a "debtor" [prior to that date] for purposes of [the super-priority statute]. Brodie's filing was therefore within the ten-day period and Brodie has priority over the conflicting security interest held by the SBA.\textsuperscript{143}

2. \textit{National Acceptance Company of California v. Community Bank (In re Ultra Precision Industries, Inc.)}\textsuperscript{144}

In March 1967, National Acceptance Company of California ("National Acceptance") loaned $692,000 to Ultra Precision Industries ("Ultra"), secured by a security interest in Ultra's current and after-acquired equipment.\textsuperscript{145} National Acceptance timely filed a financing statement.\textsuperscript{146} Later, in 1967 and 1968, Ultra placed orders with Wolf Machinery Company ("Wolf") for two machines.\textsuperscript{147} Wolf delivered one machine to Ultra on April 30, 1968, and the other on June 20, 1968.\textsuperscript{148} Wolf and Ultra executed a "Purchase Money Security Interest Conditional Sales Agreement" on July 31, 1968, which Wolf assigned to Community Bank, a financial institution that had agreed to finance Ultra's purchase.\textsuperscript{149} Community Bank filed its financing statement on August 5, 1968.\textsuperscript{150} A similar transaction involved a third machine that Wolf delivered to Ultra on August 7, 1968, subject to a similar sales agreement executed by Wolf and Ultra on October 23, 1968, and assigned to C.I.T.

\textsuperscript{141} See id. at 1319.
\textsuperscript{142} Id. (quoting former U.C.C. § 9-105(d)).
\textsuperscript{143} Id. (internal citations omitted) The court acknowledged that Brodie could have filed a financing statement long before November, "but it is also true that the bank, SBA's assignor, could have protected itself by inquiring into Lyon's interest in the equipment before accepting his chattel mortgage." Id.
\textsuperscript{144} 503 F.2d 414 (9th Cir. 1974).
\textsuperscript{145} Id. at 415-16.
\textsuperscript{146} Id.
\textsuperscript{147} Id. at 416.
\textsuperscript{148} Id.
\textsuperscript{149} Nat'l Acceptance Co., 503 F.2d at 416.
\textsuperscript{150} Id.
C.I.T. Corporation filed its financing statement on October 30, 1968, and reassigned the contract to Wolf when Ultra went bankrupt in 1969.\textsuperscript{152} A priority dispute arose, which the trial court settled in favor of Community Bank and Wolf, and against National Acceptance, which appealed.\textsuperscript{153} National Acceptance argued that neither Community Bank nor Wolf enjoyed PMSI super-priority because they failed to timely file their financing statements within ten days after Ultra received physical possession of the equipment.\textsuperscript{154} Community Bank and Wolf replied by contending that their filings were timely because the ten-day period did not commence until Ultra executed the sales contracts.\textsuperscript{155} The appellate panel agreed with Community Bank and Wolf.\textsuperscript{156}

The appellate panel disagreed with National Acceptance’s assertion that the reference to “debtor” in the super-priority statute could mean the debtor under the pre-existing and conflicting security interest.\textsuperscript{157} “Such an interpretation does violence to the clear language of the section, and such a thesis is inherently rejected under the rationale and holdings” of cited cases, including Brodie Hotel Supply.\textsuperscript{158} Instead, “debtor” refers to the party opposite the creditor claiming PMSI status.\textsuperscript{159} Under this reading of the statute, the purchase-money security interests held by Community Bank and Wolf enjoyed super-priority because both creditors filed their financing statements within ten days after National Acceptance had executed the sales contracts.\textsuperscript{160}

3. \textit{Commerce Union Bank v. John Deere Industrial Equipment Co.}\textsuperscript{161}

Commerce Union Bank ("CBC") and Alabama Forest Resources, Inc. ("Alabama Forest"), entered into a security agreement in December of 1976 covering Alabama Forest’s existing and future equipment and machinery.\textsuperscript{162} CBC filed its financing statement on December 15, 1976.\textsuperscript{163} On August 10, 1978, Alabama Forest obtained possession of two pieces of equipment (a crawler and a power winch) from John Deere Industrial Equipment Company ("John Deere") under a rental agreement

\begin{itemize}
\item \textsuperscript{151} Id.
\item \textsuperscript{152} Id.
\item \textsuperscript{153} Id. at 415.
\item \textsuperscript{154} \textit{Nat’l Acceptance Co.}, 503 F.2d at 417.
\item \textsuperscript{155} Id.
\item \textsuperscript{156} Id.
\item \textsuperscript{157} Id.
\item \textsuperscript{158} Id.
\item \textsuperscript{159} See \textit{Nat’l Acceptance Co.}, 503 F.2d at 417.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} 387 So.2d 787 (Ala. 1980).
\item \textsuperscript{162} Id. at 788.
\item \textsuperscript{163} Id.
\end{itemize}
that included a purchase option.\textsuperscript{164} Alabama Forest exercised its purchase option on September 11, 1978, and John Deere filed its financing statement on September 21.\textsuperscript{165} On August 25, 1978, Alabama Forest purchased a third piece of equipment from John Deere, which filed a financing statement on September 5 (September 4 was Labor Day, a legal holiday).\textsuperscript{166} In May 1979, John Deere filed a detinue suit for personal property against CBC and Alabama Forest.\textsuperscript{167} The trial court entered judgment against CBC, which appealed.\textsuperscript{168}

After determining that the lease agreement for the crawler and power winch was a true lease, rather than a secured transaction, the Alabama Supreme Court addressed whether John Deere’s PMSI was entitled to super-priority.\textsuperscript{169} Relying on \textit{Brodie Hotel Supply}, the court observed that while Alabama Forest obtained possession of the equipment on August 10, Alabama Forest did not become a “debtor” under the super-priority statute until September 11, the date of the purchase agreement.\textsuperscript{170} “[Alabama] Forest Resources was only required to pay rent on a monthly basis for the use of the equipment; therefore, it ‘did not owe performance of an obligation secured by the collateral in question’ until the purchase agreement was executed on September 11, 1978.”\textsuperscript{171} Therefore, John Deere’s filing on September 21 was timely for the purpose of obtaining super-priority.\textsuperscript{172}

\section*{B. The “Physical Control” Standard}

Not all courts have followed the \textit{Brodie Hotel Supply} line of cases and its requirement of a debtor-creditor relationship as a predicate to commencement of the grace period for filing under the super-priority statute.\textsuperscript{173} Instead, these courts, now joined by the \textit{Alphatech Systems} panel, have focused on the party’s possession of the collateral, even if the party in possession was not yet a “debtor” as defined by U.C.C. Article 9.

\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Commerce Union Bank}, 387 So. 2d at 788-89.
\textsuperscript{167} \textit{Id.} at 788. The “very gist” of a detinue lawsuit “is the wrongful detention by the defendant of the plaintiff’s personal property.” Ray v. Blackwell, 521 So.2d 44, 45 (Ala. Civ. App. 1988).
\textsuperscript{168} \textit{Commerce Union Bank}, 387 So.2d at 788.
\textsuperscript{169} \textit{Id.} at 789-91.
\textsuperscript{170} \textit{Id.} at 791.
\textsuperscript{171} \textit{Id.} (quoting \textit{Brodie Hotel Supply, Inc. v. United States}, 431 F.2d 1316, 1319 (9th Cir. 1970)).
\textsuperscript{172} \textit{Id.} at 791-92.
This section summarizes the "lead case applying the 'physical control' standard,"" North Platte State Bank v. Production Credit Association of North Platte," as well as two subsequent cases: Mark Products U.S., Inc. v. InterFirst Bank Houston, N.A., and Michaels v. Ford Motor Credit Company (In re Michaels).177

1. North Platte State Bank v. Production Credit Association of North Platte178

Long (seller) and Tucker (buyer) made an oral contract in November 1968 for the sale of cattle, which Long delivered to Tucker on November 30, 1968.179 Based on the understanding of the parties and applicable provisions of U.C.C. Article 2, the court concluded that (i) title to the seventy-nine cows passed to Tucker at delivery and (ii) Long was making the sale on open and unsecured credit.180 On January 13, 1969, Tucker drew a $17,775 check on North Platte State Bank (the "Bank") and delivered it to Long as payment for the cattle.181 The Bank did not honor the check until January 31, 1969, one day after Tucker executed the Bank’s loan papers.182 The Bank filed its financing statement on February 5, 1969.183

In a subsequent priority dispute, the district court awarded priority to a previous creditor, Production Credit Association of North Platte.184 As discussed in Part IV, the appellate court held that the Bank was not entitled to any super-priority because it did not have a PMSI.185 The court also held that the Bank would not have been entitled to any super-priority because the Bank failed to timely file its financing statement.186 The court acknowledged that the Bank’s filing on February 5, 1969, occurred within ten days after it funded the loan on January 30, 1969, but the filing date was almost two months after Tucker took possession of the cattle on November

175. 200 N.W.2d 1 (Neb. 1972).
177. 156 B.R. 584 (Bankr. E.D. Wis. 1993). Brief summaries of other cases following the "physical control" standard appear at Appendix II to this article.
179. Id. at 3.
180. Id. at 5.
181. Id. at 3.
182. Id. The loan papers included a security agreement covering the seventy-nine cows. Id. at 4.
183. N. Platte State Bank, 200 N.W.2d at 3.
184. Id. at 4.
185. See supra note 86 and accompanying text.
186. 200 N.W.2d at 8.
The Bank argued that its filing was timely because Tucker did not become a "debtor" under the super-priority statute until January 30, 1969, when the Bank made the loan and the parties executed the security agreement. The court was not persuaded, writing:

Manifestly, on January 30, 1969, when the Bank executed the loan, Tucker was a 'debtor' of both the Bank and PCA. . . . Tucker did not or could not receive possession from the Bank and it is uncontroversible that he became a 'debtor' to the Seller on November 30, 1968. While Tucker may not have been the Bank's 'debtor' until January 30, 1969, it is inescapable in the context of the Code that he was the 'debtor' in the [super-priority statute] sense when he became a 'debtor' to PCA. On November 30, 1968, the time and the only time that he 'received' possession, Tucker was a 'debtor' of PCA and Seller only. To hold otherwise renders the language of the statute meaningless, and purports a construction wholly unrelated to setting up an ascertainable time standard by which priorities may be established so that a subsequent lender can achieve priority over the first to file. . . .

To interpret [the super-priority statute] in the manner the Bank urges would not only be contrary to the plain meaning of the language used in the statute but would expose an original lender to such serious practical risks that the whole structure of the Code would be impaired or endangered, because the original lender could never feel sure that he could rely on his collateral in his future dealings with the debtor. . . . We point out further that the grace period, although adequate to encompass the practicalities of the ordinary financing transaction, must necessarily be brief because of the possibility the original first to file lender may make additional advances relying upon the existence and the possession of after-acquired property by the borrower. It is clear that to hold otherwise would permit a subsequent lender 2 months later, 6 months later, or perhaps a year later, to convert an unsecured credit transaction into a first lien taking priority of the first to file lender who had advanced substantial sums on the basis of the acquisition and the possession of the same property to which priority is sought to be attached.

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187. Id. at 6.
188. Id.
189. Id. at 6-7. The court also addressed the Bank's reliance on Brodie Hotel Supply in a rather perplexing manner, stating that the earlier case was "inapposite on the facts," noting that "[t]he court reached the correct decision," and observing that the decision had been "seriously criticized." Id. at 7.

The court's concern that a creditor might convert its unsecured loan into a secured loan several months after the initial funding and then claim super-priority is unwarranted—at least under revised U.C.C. Article 9. See U.C.C. § 9-103, cmt. 3 (2004) (quoted in part and discussed supra at note 108).
2. Mark Products U.S., Inc. v. InterFirst Bank Houston, N.A. 190

In early 1982, Mark Products U.S., Inc. ("Mark Products"), sold seismic exploration equipment on an open account and unsecured basis to Vibrosearch, Inc., and affiliated entities. 191 Mark Products delivered the equipment no later than May. 192 In June of 1982, InterFirst Bank Houston, N.A. ("InterFirst Bank"), established a secured line of credit in favor of Vibrosearch, which along with its affiliated entities, executed security agreements and guaranties. 193 The collateral included the seismic equipment sold by Mark Products. 194 InterFirst filed its financing statements in July. 195 When Mark Products became concerned about the amount of debt owed by the Vibrosearch companies, it converted its unsecured debt to secured debt pursuant to a security agreement executed on September 1, 1982, and filed its financing statement two days later. 196

When the Vibrosearch companies defaulted on their obligations to both creditors, a priority dispute arose between them. 197 The trial court awarded priority to InterFirst Bank, and Mark Products appealed, arguing that it held a PMSI entitled to super-priority in the equipment. 198 The appellate court concluded that Mark Products did not hold a PMSI because the parties originally contemplated an unsecured credit sale. 199 Even if Mark Products held a PMSI, its interest would not have been entitled to super-priority because its filing occurred more than twenty days after delivery. 200 The court was not persuaded by Brodie Hotel Supply and its conclusion that the grace period for filing did not start until the obligor had become a "debtor" and the parties

190. 737 S.W.2d 389 (Tex. App. 1987).
191. Id. at 390.
192. Id.
193. Id.
194. Id.
196. Id. at 390-91. Mark Products filed its financing statement only in Texas. Id. at 391. Because former § 9-103(1) prompted the creditor to file its financing statement in the state where the collateral was located, Mark Products may not have had a perfected security interest in equipment not located in Texas. If, however, the seismic equipment was "mobile goods," then the Texas filing would be appropriate under the "debtor's location" test of former § 9-103(3) because Vibrosearch's principal place of business was in Texas. Id. at 390.

Mark Products may have been unperfected with respect to the seismic equipment owned by the affiliated entities, rather than Vibrosearch, because Mark Products filed only against Vibrosearch. Id. at 391.
197. Mark Prods. U.S., 737 S.W.2d at 391.
198. Id.
199. Id. at 394.
200. Id. at 393-94.
The holder of the first-in-time security interest can anticipate that its interest will not have priority where property subsequently acquired by the debtor is protected by a properly perfected purchase money security interest. But where property is already in the possession of the debtor for a period in excess of twenty days, the conscientious and diligent lender who gives value and properly perfects its security interest in that collateral has a right to rely upon the priorities and protection afforded under the first-to-file provisions. The Code's notice system of filing provides a warning to possible lenders that another creditor already has an interest in goods in the debtor's possession. Where there is no such notice of record and where the debtor has been in possession for more than twenty days, a creditor may rely upon mere possession of the collateral as sufficient evidence of ownership and extend credit without further inquiry. Regardless of the secured creditor's actual knowledge of the debtor's obligations to unsecured creditors, its priority cannot be defeated by the seller or financer of the goods who had a twenty-day grace period in which to perfect a purchase money security interest and neglected to do so. Without these protections there can be no certainty in commercial transactions.

The Texas UCC does not make the semantic distinction urged by Mark Products. "Collateral" is defined as "the property subject to a security interest. . . ." A "debtor" is one "who owes payment or other performance of the obligation secured. . . ." However, the Texas UCC actually uses the term "collateral" not only to identify property subject to a security interest but also to identify property which ultimately becomes the subject of a security interest. Likewise, the Texas UCC actually uses "debtor" to refer to that person or entity who is obligated, or ultimately becomes obligated, to a creditor. For example, [former section 9-402(1)] requires that a financing statement give the name of the "debtor" and a description of the "collateral." The section further states, "A financing statement may be filed before a security agreement is made or a security interest otherwise attaches." Were Mark Products' arguments to be adopted, this last quoted sentence would be without meaning because there would be no "debtor" and no "collateral" to describe before the security agreement came into being. The Texas UCC does not limit the use of the terms to persons or objects in a specific time frame; nor should we.

We hold that Vibrosearch, Inc., was a debtor in possession of the collateral twenty days after delivery, a date no later than June 20, 1982. Since Mark Products did not file its financing statement until September 3, 1982, it did not perfect its security interest within the requisite twenty-day grace period, and it

201. Id. at 392-93.
cannot qualify for the special priority afforded to a purchase money security interest under § 9.312(d). It is not disputed that InterFirst perfected its security interest in July. Therefore, we further hold that InterFirst held the first priority security interest in all the seismic exploration equipment.\(^{202}\)

3. *Michaels v. Ford Motor Credit Company (In re Michaels)\(^ {203}\)*

F & M Bank of Slinger (the “Bank”) obtained a security interest in all current and future farm equipment owned by Gordon and Kathy Michaels in July 1988.\(^ {204}\) The Bank filed its financing statement on July 21, 1988.\(^ {205}\)

The Michaels’s purchased six pieces of farm equipment from Dairyland Equipment, Inc. (“Dairyland”), during 1990 and 1991, all financed by John Deere Company (“Deere”).\(^ {206}\) In each transaction, the Michaels’s signed a purchase order and, simultaneously or soon thereafter, a Deere loan contract and security agreement.\(^ {207}\) Dairyland delivered the equipment to the Michaels’s before Deere approved financing.\(^ {208}\) Deere filed its six financing statements more than twenty days after executing the loan contracts and security agreements.\(^ {209}\) In five of the six transactions, Deere filed the financing statements more than twenty days after Dairyland had delivered the equipment to the Michaels’s.\(^ {210}\)

After the Michaels’s filed a bankruptcy petition, a priority dispute arose between the Bank and Deere.\(^ {211}\) The dispute concerned whether Deere’s PMSI was entitled to super-priority, which turned on whether Deere timely filed its financing statements.\(^ {212}\) The Bank argued that Deere’s filings were not timely because they were not made within twenty days after Dairyland delivered the equipment; Deere contended that five of its filings were timely because they occurred within twenty days after Deere accepted the loan contracts and security agreements.\(^ {213}\)

\(^{202}\) *Mark Prods. U.S.*, 737 S.W.2d at 393-94 (internal citations omitted).

\(^{203}\) 156 B.R. 584 (Bankr. E. D. Wis. 1993).

\(^{204}\) *Id.* at 587-88.

\(^{205}\) *Id.* at 588.

\(^{206}\) *Id.* at 588, 594 (Schedule “A”).

\(^{207}\) *Id.* at 588.

\(^{208}\) *Michaels*, 156 B.R. at 588.

\(^{209}\) *Id.*

\(^{210}\) *Id.* at 588-89.

\(^{211}\) *Id.* at 587-88.

\(^{212}\) *Id.* at 589. Without deciding the issue, the court found Deere’s claim of a PMSI “questionable.” *Id.* at 588 n.4.

\(^{213}\) *Michaels*, 156 B.R. at 589. Deere argued that its filing in the sixth transaction on May 16, 1991, was timely because it occurred within twenty days of delivery on April 28, 1991. *Id.* The court, however, concluded that the actual delivery date was much earlier and the filing was not timely. *Id.* at 591.
The court acknowledged that previous decisions had adopted either a "physical control" test or an "obligation" test in determining the trigger date for the timely filing requirement of the super-priority statute. The court concluded that the former test provided "the better approach":

It reduces the risk of mistaken reliance by potential or existing creditors on the debtor's apparent ownership of assets. It promotes the underlying policies of the Uniform Commercial Code in affording certainty, predictability for commercial transactions, and public disclosure.... In contrast, the "obligation" standard relied upon by John Deere provides an opportunity for mischief and transforms the 20-day grace period into an open-ended time for perfection. It gives potential PMSI creditors the ability to delay or entirely avoid the filing requirement.

Also, the court was not persuaded by Deere's logic that the twenty-day period could not start until Deere signed the loan contracts and security agreements, at which time the Michaels became a "debtor" and the farm equipment became "collateral." The court believed that those terms were "words of identification only" and "not used in the statute to fix the time within which the 20-day period for perfection is to commence." Because Deere's filings were not timely, it was not entitled to super-priority in any of the farm equipment.

C. Questions to Ponder

The preceding cases, as well as those summarized at Appendix I and Appendix II, reveal that courts are not uniformly interpreting the non-inventory super-priority statute when delivery of the collateral precedes the creation of the PMSI. Some courts are proponents of the "obligation" standard, which looks for the moment when the debtor-creditor relationship and possession first coincide. Other courts favor the "physical control" standard, which focuses on possession, even if the party in possession is not yet a "debtor" under U.C.C. Article 9. While not advocating one position over the other, Article 9 does encourage courts to recognize and address the difficult issues posed by the statute. Further, it seeks to promote articulate, well-
reasoned, and thoughtful analysis in a manner not quite as brief and one-sided as the appellate panel’s presentation in In re Alphatech Systems.

When confronting the phrase, “the debtor receives possession of the collateral,” courts must consider the intended meaning of “debtor.” Is the statute using the term merely to identify the party in possession, or is the statute referencing the technical term as defined by U.C.C. Article 9?"222 If the latter is the case, can the definition be met by examining the party’s relationship only with the creditor that is asserting purchase-money status, or can the definition be satisfied by focusing on the party’s relationship with any creditor (including a pre-existing creditor that is asserting priority through its after-acquired property clause)?"223

When the debtor receives possession of the collateral before the PMSI is created, courts must determine which event—delivery or attachment—triggers the running of the super-priority filing period and whether the answer should turn on the reason for the pre-attachment delivery. For example, the debtor may take possession pursuant to a true lease with a purchase option that the debtor exercises days, weeks, or months after taking possession."224 Maybe the debtor took possession solely for the purpose

222. See, e.g., Brodie Hotel Supply, Inc. v. United States, 431 F.2d 1316, 1319 (9th Cir. 1970) (concluding that “debtor” has the defined meaning); Michaels v. Ford Motor Credit Co. (In re Michaels), 156 B.R. 584, 591 (Bankr. E.D. Wis. 1993) (concluding that “debtor” and “collateral” are “words of identification only” and “not used in the statute to fix the time within which the 20-day period for perfection is to commence”); Mark Prods. U.S., Inc. v. InterFirst Bank Houston, N.A., 737 S.W.2d 389, 393 (Tex. App. 1987) (declining to interpret “debtor” by reference to a specific moment); Comman, supra note 214, at 266 & n.49 (relying on former § 9-402(1) and Grant Gilmore’s commentary on the phrase “debtor receives possession” to conclude that the term “is probably meant as a word of identification”); Louis W. Payne, Jr., Comment, Uniform Commercial Code—Protection for the Purchase Money Secured Party Under Section 9-312, 49 N.C. L. REV. 849, 851 (1971) (acknowledging that “[i]t is not clear whether ‘debtor’ is used merely to identify the party or whether it is also used to establish the time at which the ten-day [now twenty-day] period begins to run”) (alteration in original); id. at 853 (noting that the term “debtor” on a financing statement that is filed before the security interest attaches “merely refers to a person who expects to become a debtor” and suggesting that a court could apply the same meaning to the term in the super-priority statute when delivery of the collateral precedes attachment of the security interest).

223. See Murray Zeitlin, Note, Purchase Money Security Interest Priority Under the Uniform Commercial Code: When Does Section 9-312(4)’s Grace Period Begin to Run?, 48 TEMPLE L.Q. 1025, 1027 (1975) (“A question thus arises as to whether the term ‘debtor’ in [the super-priority statute] embraces the relationship between the borrower and a prior secured lender or whether the term is restricted to the relationship between the borrower and his purchase money mortgagee.”); see also Nat’l Acceptance Co. of California v. Cmty. Bank (In re Ultra Precision Indus., Inc.), 503 F.2d 414, 417 (9th Cir. 1974) (rejecting creditor’s argument that “debtor” can refer to the party in a relationship with the non-PMSI creditor as “an interpretation [that] does violence to the clear language of the section”); N. Platte State Bank v. Prod. Credit Ass’n of North Platte, 200 N.W.2d 1, 6 (Neb. 1972) (observing that the buyer’s pre-existing relationship with a non-PMSI creditor made the buyer a “debtor” in the context of the super-priority statute).

of inspecting the collateral in order to make a well-informed (but subsequent) choice to purchase the item on credit. Perhaps the debtor took possession pursuant to a


The drafters of revised U.C.C. Article 9 have indicated their belief that when a party agrees to buy goods on credit after initially taking possession of the goods under a transaction not governed by U.C.C. Article 9, the twenty-day filing period does not commence until the goods have become “collateral.”

For example, a person may take possession of goods as lessee under a lease contract and then exercise an option to purchase the goods from the lessor on secured credit. Under Section 2A-307(1), creditors of the lessee generally take subject to the lease contract; filing a financing statement against the lessee is unnecessary to protect the lessor’s leasehold or residual interest. Once the lease is converted to a security interest, filing a financing statement is necessary to protect the seller’s (former lessor’s) security interest. Accordingly, the 20-day period in . . . [the super-priority statute] does not commence until the goods become “collateral” (defined in Section 9-102), i.e., until they are subject to a security interest.

U.C.C. § 9-324, cmt. 3 (2004); cf. HONNOLD ET AL., supra note 47, at 254 (“Is Comment 3 persuasive? Is it an appropriate use of the Comments?”). Although most state legislatures do not enact the official comments into law, the majority of courts view them as “highly persuasive authority.” Pride Hyundai, Inc. v. Chrysler Fin. Co., 369 F.3d 603, 614 (1st Cir. 2004); see also Acero v. Worthy Bros. Pipeline Corp., 656 A.2d 1085, 1090 (Del. 1995) (“An official comment [to the U.C.C.] written by the drafters of a statute and available to a legislature before the statute is enacted has considerable weight as an aid to statutory construction.”); E. ALLAN FARNSWORTH, CONTRACTS § 1.9, at 47 (internal footnotes omitted) (3d ed. 2004):

In practice, courts have given considerable weight to the comments—more than that ordinarily accorded an authoritative treatise or article but less than that accorded the text itself. If the statutory provisions adopted by the legislature contradict the comments, the comments must clearly be rejected. The more difficult problem arises where the comments make assertions as to matters on which the text is silent, and here also courts have often rejected the comments.

Robert H. Skilton, Some Comments on the Comments to the Uniform Commercial Code, 1966 Wis. L. REV. 597, 631 (1966) (“As aids toward understanding and uniform application of the Code, courts may be expected to pay very serious attention to what the comments have to say. We should realize, however, that the comments are the work of human beings—gifted human beings, to be sure, but still human beings.”).

“sale on approval” but did not manifest its approval for some period of time. Possibly, the seller delivered the collateral to accommodate a preferred customer, to land a sought-after customer, to assist a customer who represented that third-party financing was, or soon would be, in place, or to aid a customer confronting an emergency, but the debtor did not execute the security agreement and other loan papers for several days for some plausible reason (e.g., the proper forms could not be located, the forms were mailed to an incorrect address, the paperwork was misplaced, an authorized signatory was on vacation or in the hospital, etc.). Should the super-priority statute be applied in a consistent manner to all of these, and possibly other, scenarios where the debtor takes possession before the PMSI is created? Or might the reason for pre-attachment delivery justify non-uniform application?

1984) (evidence revealed that debtor had taken care of cattle for several weeks prior to purchase-money loan “for the purpose of inspecting and milking the cows so that he could be sure that he wanted to purchase them”); Citizens Bank of Americus v. Fed. Fin. Servs., Inc., 509 S.E.2d 339, 340 (Ga. Ct. App. 1998) (seller delivered skidder to buyer on December 18, 1996, for demonstration purposes only; buyer executed sales contract on December 30, 1996, and promissory note and collateral documents on February 6, 1997).

226. See, e.g., Int’l Harvester Co. v. Bank of California, N.A. (In re Prior Bros., Inc.), 632 P.2d 522, 524 (Wash. Ct. App. 1981) (seller delivered tractor to debtor soon after April 8, 1976; parties understood delivery was “on approval”; debtor elected to purchase tractor sometime later by mailing a $6,000 check as down payment, which creditor received on April 22, 1976). In dissent, Chief Judge McInturff relied on several U.C.C. provisions to conclude that the seller retained a security interest in the tractor that arose upon delivery, even though the transaction was a sale on approval. Id. at 531-32. Yet the security interest would not be enforceable until the buyer executed or authenticated a security agreement. See former U.C.C. § 9-203(1)(a) (2004) (requiring, as a condition to attachment of a security interest in goods, the debtor to sign a security agreement unless the creditor possesses the collateral); U.C.C. § 9-203(b)(3)(A) (same, except requiring the debtor to authenticate a security agreement).

227. See, e.g., Nat’l Acceptance Co. of California v. Cmty. Bank (In re Ultra Precision Indus., Inc.), 503 F.2d 414, 416 (9th Cir. 1974) (seller delivered machines to debtor on April 30 and June 20, 1968, but parties did not execute conditional sales contract until July 31, 1968; seller delivered a third machine to debtor on August 7, 1968, but parties did not execute conditional sales contract until October 23, 1968); Hunter v. McHenry (In re McHenry), 71 B.R. 60, 62 (Bankr. N.D. Ohio 1987) (debtor took possession of vehicle on or about March 14, 1986, but did not execute promissory note or security agreement in favor of credit union until March 27, 1986); Bank One, N.A. v. Farmers Prod. Credit of Ashland (In re Miller), 44 B.R. 716, 717 (Bankr. N.D. Ohio 1984) (buyer received possession of tractor in February 1977 but did not execute security agreement and promissory note in favor of purchase-money lender until March 18, 1977); Ranier Nat’l Bank v. Inland Mach. Co., 631 P.2d 389, 399 n.2 (Wash. Ct. App. 1981) (McInturff, C.J., dissenting) (offering hypothetical involving farmer in dire need to purchase a replacement combine [during harvest season and dealer is] unable to locate the necessary forms to close the transaction but because time is of the essence and because of past dealings with the farmer, he allows him to take possession of the machine with the understanding the written installment sales contract and security agreement will be executed in the near future. The parties went on to execute the required documents two weeks later).
Courts must also recognize that the two standards may raise competing policy concerns. Does the "obligation" standard create the opportunity for the purchase-money creditor and its obligor to manipulate the super-priority statute to the detriment of other reliance creditors, thereby undermining U.C.C. Article 9's notice function by discouraging early filing? Would a prudent creditor extend additional credit against the item or hesitate to exercise its rights and remedies against any of the collateral based solely on its observation that the debtor has possessed the item for a brief period of time without making any inquiry into the type of property interest held by the debtor and other parties? Does the "physical control" standard fail to

228. See Michaels v. Ford Motor Credit Co. (In re Michaels), 156 B.R. 584, 590-91 (Bankr. E.D. Wis. 1993) (concluding that the "physical control" standard "reduces the risk of mistaken reliance by potential or existing creditors on the debtor's apparent ownership of assets," whereas the "obligation" standard "provides an opportunity for mischief and transforms the 20-day grace period into an open-ended time for perfection" because it "gives potential PMSI creditors the ability to delay or entirely avoid the filing requirement"); Valley Bank v. Estate of Rainsdon, 793 P.2d 1257, 1262 (Idaho Ct. App. 1990) (expressing concern with an interpretation that would permit a buyer and a seller to carefully negotiate contract terms in an attempt to delay indefinitely the filing of a financing statement and, by doing so, frustrate the "carefully defined" statutory rights of creditors); N. Platte State Bank v. Prod. Credit Ass'n of North Platte, 200 N.W.2d 1, 7 (Neb. 1972):

To interpret [the super-priority statute] ... in the manner the Bank urges... would expose an original lender to such serious practical risks that the whole structure of the Code would be impaired or endangered, because the original lender could never feel sure that he could rely on his collateral in his future dealings with the debtor.

229. See, e.g., Brodie Hotel Supply, Inc. v. United States, 431 F.2d 1316, 1319 (9th Cir. 1970) (acknowledging that while the seller could have filed a financing statement as soon as Lyon, the potential buyer, took possession of the restaurant equipment, "it is also true that the bank... could have protected itself by inquiring into Lyon's interest in the equipment before accepting his chattel mortgage"). But see Mark Prods. U.S., Inc. v. InterFirst Bank Houston, N.A., 737 S.W.2d 389, 393 (Tex. App. 1987) ("Where there is no such notice of record and where the debtor has been in possession for more than twenty days, a creditor may rely upon mere possession of the collateral as sufficient evidence of ownership and extend credit without further inquiry.") (emphasis added); Baird & Jackson, supra note 47, at 198-99 (observing that "inquiry into ownership necessitates a search for rights which a third party cannot observe because they are determined in large part by contract," arguing that "[n]one of the policies underlying Article 9 suggest that the time limit for obtaining purchase money priority should start to run upon an event, such as the signing of a conditional sales contract, that no third party can observe," and rejecting any "two-party test, based on title or any other metaphysical notion, for determining when third parties can enjoy the protection of the ostensible ownership principle"); Comman, supra note 214, at 271-72 (arguing that existing and potential creditors have a "greater difficulty" in inquiring into the debtor's interest in collateral, and contending that "policing the transaction is easier for the PMSI creditor" who "is aware of and a party to the transaction"); Payne, supra note 222, at 852 (referring to this inquiry as "ludicrously
acknowledge that the debtor may have possession of items pursuant to a transaction not covered by U.C.C. Article 9 and its filing requirements? If so, would it be unfair to place a possession-sensitive filing requirement on a non-Article 9 party that eventually must file anyway in order to obtain super-priority?

Forceful arguments favoring or criticizing the two standards have been made. Not everyone will agree on the answers to these questions. But most would agree that the questions deserve to be addressed, not with the stark brevity of the appellate panel in In re Alphatech Systems, but in a thoughtful well-reasoned manner that recognizes the various technical, substantive, and policy-oriented perspectives.

VI. CONCLUSION

U.C.C. Article 9 favors PMSIs through several provisions, including section 9-324(a), which affords the second-in-time creditor with first-in-line status if the creditor's security interest in the non-inventory collateral is timely perfected. Courts are reminded that the provision applies only if the creditor can establish that its security interest enjoys purchase-money status under section 9-103. If the creditor's security interest is a PMSI, then the security interest will enjoy super-priority over other competing security interests if the purchase-money creditor perfects its security interest no later than the twentieth day after the debtor receives possession of the collateral. The labyrinth of caselaw that began over thirty years ago illustrates that courts continue to struggle with discerning when "the debtor receives possession of the collateral" if the collateral is delivered to the debtor before the parties have created an enforceable security interest. The numerous holdings have generated the difficult.

230. Although the debtor may take possession of the goods under a transaction that is not initially a secured transaction, U.C.C. Article 9 does permit the parties to file a precautionary financing statement using such terms as "lessor" and "lessee," as well as "bailor" and "bailee," without conceding that the transaction is indeed a secured transaction. See former U.C.C. 9-408; U.C.C. § 9-505.

231. See Baird & Jackson, supra note 47, at 200 (suggesting that extending the filing rules to all divisions of ownership and possession "would reduce litigation"); Jason Butscher, To File or Not to File: The Current Confusion of When and How to Comply with Article 9-312, 25 TEX. TECH L. REV. 173, 188-89 (1993) (advocating forced filing for all leases exceeding twenty days); Comman, supra note 214, at 1033 (suggesting that it is "appropriate to delay commencement of the 20-day period [of § 9-324(a)] until the relationship of the parties falls within the scope of Article 9"); Zeitlin, supra note 223, at 1033 (arguing that "courts should not discourage flexibility in commercial relationships by requiring the filing of financing statements in transactions not governed by Article 9").

232. See U.C.C. § 9-324(a).

233. Id.
“obligation” and “physical control” standards, with the former focusing on attachment and the latter looking at possession. Each standard raises a host of significant questions. Courts are encouraged to carefully and thoroughly address these questions in their written opinions, by providing answers that promote the underlying purposes and policies of both section 9-324(a) and the U.C.C.
APPENDIX I
Cases (in chronological order) applying the “obligation” standard discussed in Part V

Rainier Nat’l Bank v. Inland Mach. Co., 631 P.2d 389 (1981): In November 1978, the debtor executed a rental agreement and a purchase option agreement with the creditor covering a Caterpillar front-loader. The debtor took possession of the loader during that month. In February 1979, the debtor exercised its purchase option by signing and mailing a conditional sales contract and security agreement (each dated February 15) on February 26. The creditor filed its financing statement on March 5. The trial court refused to award super-priority to the creditor, which appealed. The appellate court remanded the case to the trial court to determine whether the initial lease agreement was a true lease or a disguised secured transaction. The appellate court also held that if the lease agreement was a true lease, then the ten-day filing period referenced in the super-priority statute would not begin to run until the loader became “collateral” (i.e., “property subject to a security interest”); this did not occur until the debtor signed the security agreement on February 26. Therefore, if the lease agreement was a true lease, then the creditor’s filing on March 5 was timely for the purpose of super-priority.

Int’l Harvester Co. v. Bank of Cal., N.A. (In re Prior Bros., Inc.), 632 E2d 522 (1981): The debtor signed a retail installment contract with the seller on April 8, 1976, for a tractor, which the seller delivered soon thereafter. The parties understood that delivery was “on approval;” the debtor could elect to purchase the tractor by informing the seller of its decision and making a $6,000 down payment. The seller received a $6,000 check from the debtor on April 22; the seller filed a financing statement five days later. When the seller sought a declaratory judgment that its PMSI in the tractor enjoyed super-priority, the trial court concluded that the seller had failed to timely file its financing statement under the super-priority statute. The appellate court remanded the matter to the trial court to determine “whether the sale of the tractor was absolute or on approval.” Id. at 527. If the sale was absolute, then the seller failed to timely file its financing statement under the super-priority statute. But if the sale was “on approval”—with acceptance on April 22—then the seller enjoyed super-priority because it was not until April 22 that Prior Brothers became a “debtor in possession” of the tractor. The court acknowledged the two lines of cases interpreting the super-priority statute, concluding that Brodie Hotel Supply and similar cases represented “the better statement of the law.” Id. at 528. “[I]t is when the purchaser of goods becomes a debtor, i.e., owes an obligation secured by the collateral, that the time period allowed under [the super-priority statute] begins to run. When the sale is one on approval, that event takes place at the approval of the contract.” Id. at 530.

cattle purchased by the debtor in January 1980. The debtor had taken care of the
cattle for several weeks prior to the loan, so that he could inspect them and decide
whether he wanted to purchase them. Additionally, the debtor did not obtain title to
the cows before the loan was funded. As a result, the debtor did not become a
"debtor" until January 18, and it was not until that date that he had "possession"
under the super-priority statute. Because the creditor filed its financing statement
three days later, its PMSI was entitled to super-priority.

**Ford Motor Credit Co. v. First State Bank**, 674 S.W.2d 437 (Tex. App. 1984):
A bank loaned $35,000 to the debtor in September 1977 to finance the debtor's
purchase of parts inventory from another vehicle dealership. The debtor began
operating the other vehicle dealership on September 16, but the parties did not
execute the bill of sale until September 27, which was the same day that the bank
funded the loan. The bank had filed its financing statement one day earlier on
September 26. The trial court awarded super-priority to the bank over a previous
creditor, which later appealed, contending that the bank's filing was untimely. The
appellate court disagreed and relied heavily on *Brodie Hotel Supply* in its analysis,
stating:

> [I]t cannot be said that from the facts and evidence here that the conduct of [the
> other vehicle dealership] in permitting [the debtor] to 'operate the business'
amounted to surrendering possession of the inventory of its business to [the
debtor]. The evidence affirmatively shows that actual possession and control of
the inventory was not turned over to [the debtor] until September 27, 1977, at
which time the former dealership executed a bill of sale to [the debtor] upon
receipt of the bank's advance of the $35,000.00 to pay on the inventory.
Certainly, under the facts here, [the debtor] had no actual physical control over
the entire inventory of parts owned by [the other vehicle dealership] before the
closing of the sale contemplated by the agreement between those parties and the
delivery by [the other vehicle dealership] of its bill of sale on September 27,
1977.

*Id.* at 443. As the debtor did not acquire "possession" of the other vehicle
dealership's inventory until September 27, the bank's filing was timely and its PMSI
was entitled to super-priority.

**Bank One, N.A. v. Farmers Prod. Credit (In re Miller)**, 44 B.R. 716 (Bankr.
N.D. Ohio 1984): The debtors signed a purchase agreement with the seller in
December 1976 to acquire a tractor. The financing bank argued for super-priority
because it filed its financing statement on March 25, within ten days after the debtors
signed the bank's security agreement and promissory note on March 18. A pre-
existing creditor argued that the filing was not timely, however, because the debtors
had taken possession of the tractor at least one week before obtaining financing.
After acknowledging the divergent applications of the super-priority statute, the
bankruptcy court elected to phrase the issue as follows: "When was Miller possessed
of this tractor as a 'debtor'?" *Id.* at 720. The court held that the debtors did not
become “debtors” until they executed the bank’s financing documents on March 18, making the bank’s filing on March 25 timely for purposes of obtaining super-priority.

Hunter v. McHenry (In re McHenry), 71 B.R. 60 (Bankr. N.D. Ohio 1987): The debtor arranged for her credit union to finance an automobile purchase. She took possession of the vehicle on or about March 14, 1986, but she did not execute a promissory note or security agreement in favor of the credit union until March 27. The credit union perfected its security interest in the vehicle on April 2. The bankruptcy court held that the ten-day super-priority perfection period did not commence until the debtor and her credit union had created an enforceable security interest in the vehicle, even if the debtor had possession of the vehicle before that date. As the parties did not create the security interest until March 27, the credit union’s filing on April 2 was deemed timely.

De Kalb Bank v. Purdy, 562 N.E.2d 1223 (Ill. App. Ct. 1990): In September 1983, the debtor purchased 324 head of cattle from a seller. The parties agreed that the seller retained title to the cattle until the debtor’s check was honored. The cattle arrived in four trucks, three arriving on September 15, and the fourth arriving the next day. On September 16, the debtor drew a check on its financial institution (the debtor’s primary financing source for his cattle operations) as payment for the cattle. The financial institution informed the debtor on September 27 that it would not honor the check. On September 30, the debtor obtained a $45,000 loan from another bank and used the proceeds to pay for the cattle, which served as collateral for the loan. The bank filed its financing statement on October 14. The trial court held that even if the bank had a PMSI in the cattle it was not entitled to super-priority because the bank filed its financing statement more than twenty days after the debtor obtained possession of the cattle. After reviewing several cases, the appellate court concluded that the bank enjoyed super-priority. The court concluded that the twenty-day filing period did not begin to run until the debtor and the bank entered into a debtor-creditor relationship on September 30, so the bank’s filing on October 14 was timely.

Color Leasing 3, L.P. v. Fed. Deposit Ins. Corp., 975 F. Supp. 177 (D.R.I. 1997): The debtor leased a printing press from a creditor sometime in 1980. The lease expired in June 1988. The debtor elected to purchase the printing press for $360,000 to be paid over three years. The debtor executed a promissory note and a security agreement (covering the printing press and other assets) on December 31, 1988. The creditor filed its financing statement on January 5, 1989. After the debtor defaulted on loans from a bank, the bank seized and sold some of the debtor’s assets, including the printing press. The creditor sued the bank for conversion, alleging that it had held a superior PMSI in the printing press. Without much analysis, other than observing “critical similarity” with the Brodie Hotel Supply line of cases, the court chose to focus attention on the debtor-creditor relationship between the debtor and the creditor, concluding that the relationship began not when the debtor executed the bill of sale on December 31, 1987, but rather when the debtor executed the promissory note on December 31, 1988. Since the creditor filed its financing statement six days later, its PMSI enjoyed super-priority.
Orix Credit Alliance, Inc. v. CIT Group/Equip. Fin., Inc. (In re Hughes), 230 B.R. 213 (Bankr. M.D. Ga. 1998): Beginning in January 1994 and ending in March 1997, the debtor entered into six purchase-money transactions with equipment dealers. In each transaction the security agreement—conditional sales contract was assigned to a creditor that filed its financing statements within fifteen days of the relevant contract date. The debtor testified in a bankruptcy court that he took possession of the equipment “a few weeks” before he signed the relevant security agreement, but the creditor testified that the debtor executed the contracts “within a day of delivery.” Id. at 221. The court felt no need to resolve the conflicting testimony because, citing In re Hooks (also decided by the bankruptcy court for the Middle District of Georgia), the debtor did not become obligated to purchase the equipment until he signed the contracts and became a “debtor.” Since the creditor filed its financing statements within the fifteen-day statutory period following the execution date of each contract, its filings were timely for purposes of the super-priority statute.

Citizens Bank of Americus v. Fed. Fin. Servs., Inc., 509 S.E.2d 339 (Ga. Ct. App. 1998): The bank loaned $22,520 to the debtor on December 5, 1996. The loan was secured by a security interest in a logging skidder that the debtor was negotiating to acquire (but the debtor used the loan proceeds to satisfy other debts, not to purchase the skidder). The bank promptly filed its financing statement. The seller delivered the skidder to the debtor on December 18 for demonstration purposes only. The debtor executed a sales contract on December 30. After the debtor obtained the necessary insurance, it executed a promissory note and collateral documents on February 6, 1977, in favor of a financer, which remitted the loan proceeds to the seller. The financer perfected its PMSI by filing its financing statement on February 10. In a subsequent priority dispute, the trial court entered judgment in favor of the financer. The bank appealed, contending that the financer was not entitled to super-priority because its filing on February 10 was not within fifteen days of the seller’s delivery of the skidder to the debtor on December 18. The court observed that the debtor was a mere bailee until it acquired ownership of the skidder on February 6, when the debtor’s possession and indebtedness “first coincided.” The court then reviewed Brodie Hotel Supply and North Platte State Bank and made the following observation:

The Brodie line of cases, similar to the present one, involved sales on approval. This resulted in holdings that the [super-priority statute's] grace period did not begin to run until the purchase money obligation was assumed. North Platte and cases following it involved situations in which the buyer or lessee owed performance of an obligation secured by the property at the time physical possession was acquired. This resulted in holdings that the time period allowed by the statute began to run at that time. In none of the cases was it held that the running of the grace period was triggered before the debtor owed performance of the secured obligation.
Id. at 342. The court finally concluded that the financer enjoyed super-priority because it filed its financing statement within fifteen days after the debtor acquired ownership of the skidder and executed the promissory note evidencing its purchase obligation.

Coastal Bank v. Douglas Asphalt Co. (In re Galbreath Clearing and Grading, Inc.), 258 B.R. 859 (Bankr. S.D. Ga. 2000): “On October 16, 1998, [the debtor] executed a retail installment contract and security agreement” covering “five pieces of equipment” being purchased from the seller. Id. at 860. The seller filed its financing statement on October 26, reflecting an assignee. The debtor had taken possession of the equipment in February 1998 under the terms of a short-term lease. Nevertheless, the bankruptcy court (after concluding that the lease was a true lease) awarded super-priority to the assignee, relying on Citizens Bank of Americus and Brodie Hotel Supply to conclude that the purchase-money filing was timely. “Even though [the debtor] had possession and use of the equipment by virtue of the earlier five month short-term lease agreement, [the debtor] did not receive possession, as a debtor in the transaction at issue, until the documents were executed on October 16, 1998.” Id. at 866.
APPENDIX II
Cases (in chronological order) applying the "physical control" standard discussed in Part V

James Talcott, Inc. v. Assocs. Capital Co., 491 F.2d 879 (6th Cir. 1974): The lessor delivered a Caterpillar tractor to the lessee on February 17, 1969. The parties executed a lease agreement on February 25; the lessor filed financing statements on March 3. The lessor delivered a second Caterpillar tractor to the lessee on March 14. The parties executed a lease agreement on April 22; the lessor filed financing statements on April 28. The lessee exercised the purchase option under both leases in October 1969, at which time the parties executed a security agreement encumbering both tractors. Because both leases stated that the rental obligation began running from possession (February 17 and March 14), not the date of the leases themselves (February 25 and April 22), the trial court held that the lessor-seller was not entitled to super-priority because its filings were not timely. The trial court wrote:

It would be a frustration of this purpose (certainty in commercial transactions under the U.C.C.) to hold that a purchase money secured party can deliver goods to his debtor, delay indefinitely before entering into a security agreement which binds the debtor retroactively as of the delivery date, and still obtain a perfected security interest by filing within ten days of the agreement.

Id. at 882-83. The appellate panel affirmed and also distinguished Brodie Hotel Supply, noting that in that case a secured obligation did not arise until the buyer executed the purchase agreement, whereas the lessee-buyer in this case incurred a secured obligation when the rents began to accrue on the possession dates.

In re Henning, 69 B.R. 348 (Bankr. N.D. Ill. 1987): The creditor sold and delivered cattle to the debtor between April 1982 and August 1984. Loan documents were not executed until August 1984; the creditor did not file its financing statement until August 22, 1984. The court observed that title to the cattle passed to the debtor upon delivery, which triggered the running of the twenty-day period of the super-priority statute. As the debtor had taken possession of the cattle more than twenty days before the creditor filed its financing statement, the creditor’s PMSI was not entitled to super-priority. The court distinguished Brodie Hotel Supply by noting that in that case the creditor-seller and the debtor-buyer did not reach agreement on the terms of sale until the date of the sales contract, which was the date which started the grace period for post-possession filing. In this case, however, the creditor and the debtor had reached agreement on the terms of sale as of the various possession dates, long before they executed the promissory note and security agreement. Therefore, the twenty-day period began running from the possession date, not the date of the promissory note and security agreement.

agreement on the delivery dates. The seller filed financing statements against the first scraper on June 27, the second scraper on June 27, and the third scraper on August 5. The parties executed three lease agreements for the scrapers on July 31, effective as of the respective delivery dates. Each lease agreement included a purchase option, which the debtor exercised pursuant to a purchase contract executed September 26. Because the parties backdated the lease agreements and the rental obligations to the earlier dates of delivery, the court held that the debtor acquired possession of the three scrapers under the super-priority statute upon delivery, rather than when the parties executed the lease agreements. The Georgia super-priority statute provided for a fifteen-day post-possession filing period, so the court found that only the seller’s filing against the second scraper was timely.

Valley Bank v. Estate of Rainsdon, 793 P.2d 1257 (Idaho Ct. App. 1990): A cattle rancher became ill in 1981 and thereafter asked his son to care for his cattle. The son did so, placing them with cattle that he and his wife owned. When the father realized that he would be unable to resume his cattle-raising operation, he and his wife agreed to sell one hundred of his best cows and calves to his son and daughter-in-law. The parties signed a “memorandum agreement” sometime between March 31, 1982, and April 6, 1982, which recited that the sellers would retain a PMSI in the cattle to be sold. The son and daughter-in-law also signed a promissory note. The sellers did not file a financing statement until April 30. When the son and daughter-in-law defaulted on their obligations to the parents and Valley Bank, all of the cattle were sold, which triggered a priority dispute in the proceeds between the parents and Valley Bank. The trial court granted summary judgment in favor of the parents because their PMSI enjoyed super-priority since the son and daughter-in-law did not take possession of the one hundred cattle until they actually selected the cattle in early June. Valley Bank appealed, contending that the parents were not entitled to super-priority because they did not file their financing statement within ten days after the parties signed the memorandum agreement on March 23, the date that—in Valley Bank’s opinion—the son and daughter-in-law became debtors in possession of the cattle. The appellate court agreed with Valley Bank:

We cannot accept the [parents’] argument that this selection process [from March through early June] delayed the filing requirement. Such a rule would inject too much uncertainty into commercial transactions. ‘The Code’s generally purpose is to create a precise guide for commercial transactions under which businessmen may predict with confidence the results of their dealings.’

Id. at 1262 (quoting NBD-Sandusky Bank v. Ritter, 446 N.W.2d 340, 341-42 (Mich. Ct. App. 1989)). Because the parents did not timely file their financing statement, they did not have super-priority. The court then reversed the trial court’s holding and remanded the case for further proceedings.

Citizens Nat’l Bank v. Cockrell, 850 S.W.2d 462 (Tex. 1993): The seller sold his mini-blind business on credit to the buyers on August 1, 1985, retaining a security
interest in the business assets. The buyers began operating the business on August 1, although the seller continued to participate in day-to-day operations until October 3, when he surrendered his keys. On or about that date, the buyers executed the security agreement and signed the financing statement that the seller filed on October 7. When the buyers defaulted on their obligations, the bank foreclosed on the mini-blind equipment and sold it to a third party. The seller then sued the bank for conversion, contending that its PMSI enjoyed super-priority. Resolution of the lawsuit turned on whether the seller had filed its financing statement within twenty days after the buyers obtained possession of the equipment. A jury returned a verdict in favor of the seller, but the trial court granted the bank's motion for judgment notwithstanding the verdict ("j.n.o.v."). The court of appeals reversed the trial court's judgment after defining "possession" in terms of "exclusive possession" (evidence of which supported the jury verdict in favor of the seller). The FDIC, as receiver for the bank, appealed. After citing numerous cases and acknowledging divergent views, the Texas Supreme Court held that "possession" as used in the super-priority statute should be "interpreted in light of the impression conveyed to an observer not involved in the transaction, not according to private limitations contained in the contract between the buyer and seller." *Id.* at 465. The court continued by saying:

As commentators have noted, the UCC drafters' choice to have the purchase money priority rule turn on "possession," rather than on when the debtor obtains "rights" in the collateral, indicates a desire that the commencement of the grace period be easily ascertainable....

The definition of "possession" adopted by the court of appeals implicates these same concerns. During August and September, the equipment was located in the warehouse that had become the [buyers'] place of business, used for the business that the [buyers] were then managing, and operated by employees of the [buyers]. If, despite this ostensible possession, the [buyers] were not in "possession" within the meaning of [the super-priority statute] because [the seller] and two of his employees retained access to the warehouse, then [the statute's reference to] "possession" acquires a meaning different from the simple physical control that to outside parties suggests ownership rights. Since the duration of [the seller's] supervision of the business was a matter of agreement between him and the [buyers], the court of appeals' interpretation would also allow some manipulation of the grace period by the parties to the transaction, frustrating Article 9's scheme.

*Id.* (internal citations omitted). The Texas Supreme Court then held that the appellate court erred in defining "possession" in terms of exclusivity, and it concluded that no evidence supported the jury verdict favoring the seller. The court then reinstated the trial court's j.n.o.v. in favor of the bank.