1-1-1979

Seller's Conflicting Default Rights under Articles 2 and 9 of the Uniform Commercial Code

James L. Carpenter Jr.

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/lawreview/vol19/iss2/1
SELLER'S CONFLICTING DEFAULT RIGHTS
UNDER ARTICLES 2 AND 9 OF THE UNIFORM
COMMERCIAL CODE

James L. Carpenter, Jr.*

INTRODUCTION

The Uniform Commercial Code (U.C.C. or the Code) was intended to be a unified statute covering a broad range of commercial problems.1 Its nine substantive Articles cover the major commercial issues applicable to modern business activity,2 and any commercial transaction may involve more than one of the Articles.3 Recently, however, problems have been encountered concerning the relationships between Articles. It is becoming more apparent that the U.C.C. is not totally integrated, and that approaches must be developed for resolving its internal conflicts.

Frequent problems have arisen involving the interface between Articles 2 and 9 of the Code. The sale of goods, probably the most common commercial transaction, may be accompanied by an Article 9 interest securing payment to the seller. A third party, such as a lien creditor or secured lender, may also have an interest in the goods. The differing interests of seller,

---

1. See Hawkland, Article 9 Methodology, 9 Wayne L. Rev. 531, 532 (1963) ("[The U.C.C.] is a single, integrated statute, systematically coordinated in such a way that intended answers should emerge from it.").

2. Article 1 contains general provisions governing the construction, application, and interpretation of the Code, and also includes a number of definitions applicable to the Code generally. Article 2 deals with sales transactions, focusing on the relationship between the buyer and the seller. Article 3 covers commercial paper such as checks, notes, and other instruments. Article 4 is entitled Bank Deposits and Collections and applies to relationships between each bank and its customers. Article 5 governs letters of credit, and Article 6 covers bulk transfers. Documents of title, including warehouse receipts and bills of lading, come within the scope of Article 7, and Article 8 is mainly technical rules concerning investment securities. Article 9, the last substantive article, deals with secured transactions. References to Article 9 throughout this article will be to the 1972 Official Text.

3. A shipment of goods from buyer to seller via commercial carrier, for example, will be governed by both the Sales Article, Article 2, and the Documents of Title Article, Article 7. The simple purchase of goods with a check can include problems arising under Articles 2, 3, and 4.
buyer, lien creditor, and secured lender interrelate and in certain situations, create problems that are not resolved clearly under either Article 2 or Article 9. The issue of priority in the goods upon the buyer's insolvency has attracted both litigation and comment. A closely related issue, however, has been almost ignored: do the default rights of Article 2 or of Article 9 apply to resale of the goods when the buyer breaches obligations to the seller? Article 2, consistent with its focus on the sales transaction, gives maximum rights on resale to the seller. Article 9, however, is more concerned with the protection of third-party interests, and therefore gives more rights to both the buyer and secured party, with accompanying duties imposed on the seller to protect those rights. Under certain circumstances, application of one Article over the other will produce drastically different results.

This Article analyzes the seller's various rights and duties on resale of goods after buyer's breach and explores when these rights and duties should be governed by each Article. It first sets forth the basic fact situation to be considered and introduces the conflicts in the legal rights of the parties to the transaction. After exploring the differing default rules of Articles 2 and 9, it concludes that when such conflicts exist, the choice of Article will be significant only if the goods to be resold are worth more than the obligation owed to the seller. Finally, it considers the problem of who is entitled to those excess proceeds of resale. It concludes that, with one exception, the seller is entitled to excess proceeds before the goods have been delivered to the buyer, and that the buyer or third parties are entitled to those proceeds after delivery. That conclusion is the

4. E.g., In re Samuels & Co., 526 F.2d 1238 (5th Cir. 1976), revising en banc 510 F.2d 139 (5th Cir. 1975) (conflict between the seller of goods and the secured party with an after-acquired property interest upon buyer's insolvency), cert. denied, 429 U.S. 834 (1976); In re Mel Golde Shoes, Inc., 403 F.2d 658 (6th Cir. 1968) (conflict between the trustee in bankruptcy and the reclaiming seller under U.C.C. § 2-702(2)).


6. The literature contains very few references to this problem. The only discussions going beyond a superficial level are found in Jackson & Peters, Quest for Uncertainty: A Proposal for Flexible Resolution of Inherent Conflicts Between Article 2 and Article 9 of the Uniform Commercial Code, 87 YALE L.J. 907, 942-47 (1978); Jackson & Kronman, A Plea for the Financing Buyer, 85 YALE L.J. 1, 3 n.12 (1975); Speidel, Advance Payments in Contracts for Sale of Manufactured Goods: A Look at the Uniform Commercial Code, 52 CALIF. L. REV. 281, 302-05 (1964); none of them resolve the conflict analyzed herein. The problem is also noted in J. Honnold, supra note 5, at 533-34; Hogan, The Marriage of Sales to Chattel Security in the Uniform Commercial Code: Massachusetts Variety, 38 B.U. L. REV. 571 (1958).
same whether or not the seller has taken a consensual Article 9 security interest.

**The Basic Fact Pattern**

The conflicts in U.C.C. default rights occur primarily in circumstances similar to the following basic fact situation. M, a manufacturer, enters into a contract with W, a wholesale dealer of televisions, stereos, and similar goods, for the sale of one hundred television sets. For Article 2 purposes, M is the seller and W is the buyer. Concurrent with the sale, M takes an Article 9 security interest in the television sets to be sold to W. For Article 9 purposes, M is the secured party and W is the debtor. L, a bank, lends money to W, and as part of that loan transaction, L takes a security interest in "all personal property of W, wherever it may be found." Thus, L is also a secured party and W is once again a debtor.

At any stage of the transactions, W may default and conflicts may arise among M, W, and L. Either M or L may claim a priority interest in the goods and the right to possession. If the default occurs while the goods are still in M's possession or

---

7. By taking a consensual security interest in the goods sold to W, M took a "purchase money security interest" for purposes of Article 9. U.C.C. § 9-107. The distinction between purchase money security interests and other security interests is not critical to this article except insofar as it validates the priority of M that is assumed throughout. For perfection and priority purposes under Article 9, the purchase money secured party is basically the highest form of life. See, e.g., U.C.C. §§ 9-301(2) (10-day grace period for filing), 9-302(1)(d) (filing unnecessary in some cases), 9-312(3), (4) (general priority for purchase money security interests). See note 83 infra, for a discussion of the validity of the assumption concerning M's priority under Article 9. For default purposes, purchase money secured creditors are treated the same as other secured parties, so the distinction is not critical herein.

8. L has previously perfected this security interest by entering into a written agreement with W that adequately describes the collateral, giving value by loaning W money, and filing an adequate financing statement in the appropriate location. U.C.C. §§ 9-203 (attachment of the interest), 9-303 (perfection equals attachment plus filing). The interest becomes perfected in these goods as soon as W gains rights in the collateral. U.C.C. § 9-203(1)(c).

9. Two parties are omitted from this analysis who might normally be considered in multi-party conflicts: a buyer from W and the creditor with a lien on W's property. See, e.g., Jackson & Peters, supra note 6, at 947-49. The buyer is excluded because inclusion would seriously undermine the assumed priority of M in these circumstances. A buyer in the ordinary course will normally have priority over both sellers and secured parties, at least before delivery, id. at 949-55, and such priority vitiates the importance of the differing default rights discussed in this article. The lien creditor or its alter ego, the trustee in bankruptcy under § 70c of the Bankruptcy Act, 11 U.S.C. § 110(c) (1970), is on the same basis as the secured party. The default rights given by Article 9 to subordinate secured parties should be read broadly to include lienholders in the rights to force resale, to redeem the goods, or to receive the surplus on resale. 2 G. Gilmore, Security Interests in Personal Property § 44.8, at 1250 (1965).
during delivery to $W$, it is likely that $M$ will prevail.\textsuperscript{10} Once delivery has taken place, however, both $M$ and $L$ may have a valid claim to possession.\textsuperscript{11} Throughout this Article, $M$ will be assumed to have priority.\textsuperscript{12} The more relevant conflicts for purposes of this Article, however, concern the relative rights of the parties on resale. Several questions arise. If $M$ has either maintained or regained possession, which Article governs its rights and duties on resale? Is $M$ entitled to retain possession of the goods for its own use over the objection of $W$ or $L$?\textsuperscript{13} May $W$ or $L$ redeem the goods by paying the obligation owed to $M$?\textsuperscript{14} Is $M$ required to notify $W$ or $L$ of a proposed resale of the goods?\textsuperscript{15} Finally, which of the parties—$M$, $W$, or $L$—are entitled to the proceeds of the resale in excess of $M$'s obligation?\textsuperscript{16} The resolution of these issues turns on whether Article 2 or Article 9 applies to the default procedures. Because the seller can also be characterized as a secured party, either Article could logically apply. An exploration of the parties' rights under the two Articles will demonstrate the differing results.

\textbf{Rights On Resale Under Articles 2 And 9}

Both Article 2 and Article 9 envision resale of the goods as a remedy upon the buyer's default. The provisions governing resale are not equivalent, however. The differences are a reflection of the historically divergent treatment of secured and unsecured sales. The common law distinctions between the rights available to a conditional seller and the rights available pursuant to the seller's lien are continued in the U.C.C. For pur-

\begin{itemize}
  \item Prior to delivery, $M$ has greater power over the goods. See U.C.C. §§ 2-703 (right to withhold or cancel), 2-705 (right to stop in transit). These powers over the goods, which are inventory under Article 9, are probably security interests subject to Article 9 coverage, but are perfected without filing prior to delivery of the goods to $W$. U.C.C. § 9-113(b). Therefore, $M$ as a purchase money secured party has priority in the goods as against $L$ without taking any other action. U.C.C. § 9-312(3). See note 83 infra.
  \item After delivery of the goods to $W$, $M$'s interest in the goods would have to be perfected in accordance with Article 9 prior to delivery in order to retain its priority over $L$. U.C.C. § 9-312(3). See note 83 infra.
  \item If $L$ has priority in the goods, the issues are easily resolved. $L$ can only get such priority pursuant to Article 9, and Article 9 default rules would apply in such a case. For a discussion of the general validity of the assumption that $M$ has priority, see note 83 infra. For a possible argument that $L$ could also get priority under Article 2, see note 109 infra.
  \item See U.C.C. § 9-505.
  \item See id. § 9-506.
  \item See id. §§ 2-706(3), (4), 9-504(3).
  \item See id. §§ 2-706(6), 9-504(1), (2).
\end{itemize}
poses of simplicity, $M$ is referred to as "seller" and $W$ as "buyer," although for Article 9 purposes they would more properly be referred to as the "secured party" and the "debtor."

The Right to Excess Profits

The foundation for all the differences between Articles 2 and 9 concerning the parties' relative rights on resale is the right to any profit made on such disposition. Under both Articles, the proceeds on resale are applied first to the expenses of the resale, and then to the underlying obligation of the seller.\(^7\) The rules diverge, however, in treating the profit recovered on resale.

At common law\(^8\) and under the Uniform Sales Act,\(^9\) the seller was entitled to any profit from the resale. Section 2-706(6) of the U.C.C. continues this rule, so under Article 2, $M$ would be entitled to the excess proceeds, at least as against $W$.\(^10\) Conversely, under the Uniform Conditional Sales Act, the conditional seller had no right to excess profits,\(^11\) a rule carried over into the Code at Section 9-504.\(^12\) That section provides that after paying the underlying obligation and the expenses of resale, any excess proceeds shall be applied first to subordinate security interests. Thus, the excess proceeds would be applied first to satisfy the obligation to $L$. Any remaining surplus would be returned to $W$. This rule is buttressed by other Article 9 rights described in the following sections.

---

17. Id. §§ 2-706(1), 9-504(1)(a), (b). For our purposes, profits and excess proceeds refer to proceeds of resale that exceed the sum of expenses incurred by the seller after breach plus the obligation owed to the seller.
19. After resale of the goods, the seller "shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale." UNIFORM SALES ACT § 60.
20. "The seller is not accountable to the buyer for any profit made on any resale." U.C.C. § 2-706(6).
21. "Any sum remaining after the satisfaction of [the expenses of resale and the underlying obligation] shall be paid to the buyer." UNIFORM CONDITIONAL SALES ACT § 21. The reason this section only refers to the buyer's rights is that, under the Uniform Conditional Sales Act, the secured party's interest in the goods was not discharged by the disposition. See 2 G. GILMORE, supra note 9, § 44.8; U.C.C. § 9-504, Comment 2. The same rule concerning excess proceeds applied to other kinds of pre-Code security interests. E.g., UNIFORM TRUST RECEIPTS ACT § 6.
22. After paying the expenses of the resale and the underlying obligation, the proceeds are to be applied to "the satisfaction of indebtedness secured by any subordinate security interest in the collateral," and "the secured party must account to the debtor for any surplus." U.C.C. § 9-504(1)(c), (2).
The Right to Force Resale

Article 2 gives the seller no explicit right to retain the goods. If the goods would not produce a surplus when resold, however, the relative interests of M and W are not affected by retention. In such a case, section 2-708 would apply to determine M's damages, which would be fixed at the contract price minus the market price. If the goods are worth more than the contract price, M is entitled to retain the profits from resale but recovers no damages. Thus, M and W are in exactly the same position whether M retains the goods or whether the goods are resold.

Under Article 9, with one exception, the seller is explicitly allowed to retain the goods in satisfaction of the obligation. In order to exercise this right, however, M must notify W, and possibly L, if L had given M notice of its rights in the goods. Both W and L then have the right to object to M's retention of the goods, and M may be forced to resell. Because M's retention of the goods satisfies any obligations owed by W and extinguishes any rights held in the goods by L, resale will only be forced in the event the goods are worth more than the expenses of sale and the amount of M's obligation. Thus, the buyer's and subordinate secured party's right to force sale under section 9-505 is a means to protect their interests where the value of the goods exceeds the contract price.

The Right to Notice

The buyer is entitled to notice under Article 2 if the seller resells the goods, whether in a public or private sale. This

---

23. Such a right can be implied, however, from the language of § 2-702(3), which states that repossession by the seller pursuant to that section is its exclusive remedy, and by § 2-703(f), which gives the seller the right to cancel upon buyer's breach.

24. U.C.C. § 2-708(1). This section may also be available to determine damages even though the goods have been resold. Compare Peters, Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two, 73 YALE L.J. 199, 260-61 (1963) with J. White & R. Summers, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 223-24 (1972). For our purposes, both § 2-706 and § 2-708 provide the same measure of damages, because the resale price is assumed to be equal to the market price.

25. The only exception to the secured-party seller's right to retain under § 9-505 is in the case of consumer goods when the buyer-debtor has paid at least 60% of the cash price. This exception is to protect the installment buyer who has built up a substantial equity in the goods prior to default. See U.C.C. § 9-505, Comment 1.


27. U.C.C. § 2-706(3), (4). The only exception to the buyer's right to notice under that section is if the goods are to be sold at a public sale and "are perishable or threaten
right to notice, although limited, is to protect the buyer from improper conduct by the seller on resale. Because $M$ is entitled to recover a deficiency from $W$ after the resale, $W$ has the right to notice to ensure that the goods are sold for their full value. No other parties are entitled to notice under Article 2.

Article 9, on the other hand, provides for notice to both $W$ and $L$, provided that $L$ has given $M$ written notice of its claimed interest in the goods. Such notice protects both $W$'s and $L$'s interests in the excess proceeds over the obligation owed to $M$, and once again allows $W$ to minimize its deficiency obligation.

The Right to Redemption

The final way in which the parties' rights are different under the two Articles is in the right to redemption. Under Article 2, neither the buyer, nor anyone else, has a right to redeem the goods from the seller's possession. Therefore, if the goods are worth more than the obligation owed to $M$, $W$ is not liable for a deficiency judgment but has no right to regain possession of the goods merely by paying the contract price.

Under Article 9, because of the differing rights to the proceeds, both buyers and subordinate security interests have the right to redeem the collateral by tendering the amount of the obligation owed to the seller plus any expenses incurred by the seller due to the default. If the goods are worth more than the contract price, both $W$ and $L$ benefit by exercising such redemption rights: $W$ by retaining the benefit of its sales contract with $M$, and $L$ by application of that excess in value to its own secured interest. Thus, these redemption rights are seen once to decline in value speedily.

With a private sale under such circumstances, the buyer is not entitled to notice of the time or place of the resale. See id. § 2-706, Comment 8.

The buyer is entitled to "reasonable notice of the time and place of a public resale so that he may have an opportunity to bid or to secure the attendance of other bidders." Id. § 2-706, Comment 8.

This omission probably occurred because the drafters did not recognize the problem, but it could imply that no one else has an interest in the resale of the goods, including any profit made on resale.


Such notice is given so that "persons entitled to receive it will have sufficient time to take appropriate steps to protect their interests by taking part in the sale or other disposition if they so desire." U.C.C. § 9-504, Comment 6.

In fact, the seller has the right to cancel the contract after buyer's breach. Id. § 2-703(f).

Id. § 9-506. See Hogan, supra note 26, at 237.

When the goods are worth more than the contract price, it is clearly better
again as intimately related to the parties' relative interests in the surplus on resale of the goods.

Summary

There are other minor differences between the resale provisions of Articles 2 and 9. The method of resale, for example, is much more specifically set forth in Article 2. The rights set forth above, however, are the most important differences between the two Articles. It is clear that the differences between the seller's right to resell under Article 2 or Article 9 will only be of practical significance if the goods have risen in value above the contract price. If the goods are worth less than the contract price, the right to excess proceeds, and its accompanying rights to force sale, to notice, or to redeem, are of no importance; W is subject to a deficiency judgment under either Article, and L's interest in the goods is of no value. In a rising

...
market situation, however, the conflict between the parties over which Article would apply could be of great importance. M will argue for Article 2 and the unfettered benefits it gives to the seller, while W and L will claim the more extensive rights given them under Article 9. Therefore, it is worthwhile to focus on the resolution of that conflict.

**Resolution of Conflicting Resale Rights Under Articles 2 and 9**

In resolving the conflict, it is helpful to examine first the historical treatment of the seller’s and the conditional seller’s rights to profits on resale, in an attempt to gain insight into those situations which would require a similar treatment today. Next, those factual elements that initially appear most critical to resolution of the conflict under the Code will be analyzed. These include whether the seller has taken an Article 9 security interest and whether the goods have been delivered. Finally, three important factual constructs will be explored, and the Code’s text, Comments, and policy will be applied to resolve the issue of conflicting resale rights.

**The Historical Antecedents to Differing Rights Under Articles 2 and 9**

The U.C.C. did not arise entirely from Karl Llewellyn’s imagination. Rather, it was built on the accumulated wisdom of the common law and prior uniform acts. Article 2, in particular, is a direct descendant of the Uniform Sales Act. While the Article 2 framework differs from that Act, particularly in its diminution of the importance of title, the same result is reached in almost all cases under the two statutes. Article 9 is a more drastic change from prior law. Most of the change comes from an amalgamation into one Article of the multitude of various security interests that previously existed. The Uniform Conditional Sales Act, the antecedent statute most rele-

---

39. See J. White & R. Summers, supra note 24, at 754. "Although Article Nine is the most innovative of all the Code articles, it did not spring full grown from the forehead of Grant Gilmore or Allison Dunham, or even Karl Llewellyn." Id.
vant to the present problem, was carried over fairly completely, at least in result, to the resale provisions in Article 9.43 A look at how the differing treatment of sellers and conditional sellers came about is beneficial.44

The pre-Code ancestor of the secured party seller under Article 9 was the conditional seller, who retained title to the goods to secure payment after delivery to the buyer.46 At common law, the conditional seller was caught in a tension between two differing remedies.46 The conditional seller could sue on the debt, in which case any right against the goods was extinguished. The alternative was to repossess the goods, and although the conditional vendor was entitled to retain any surplus on resale, no deficiency judgment would be rendered if disposition on resale produced less than the amount of the underlying obligation. This forced election was thought to impose hardship on both parties to the transaction. The conditional seller was compelled to choose between the personal obligation of the buyer and the security of the goods, although both could be necessary to ensure payment of the underlying debt. The buyer was denied protection for any equity interest that might have developed in the goods.47 The Uniform Conditional Sales Act resolved this tension in the same fashion as Article 9. The conditional seller could repossess the goods, resell them, and collect a deficiency judgment, but any surplus after resale belonged to the buyer.48

In contrast to the conditional seller, a seller who did not retain a security interest was always able to retain any excess profits on resale. In the 1852 case of Warren v. Buckminster,49 a contract was formed for the sale of fifteen sheep. On default by the buyer, the seller resold the sheep to a third party for an amount exceeding the buyer’s obligation. Because the buyer had paid part of the obligation in advance, he sued to recover

43. See Uniform Conditional Sales Act §§ 18-23.
44. See Hogan, Book Review, 80 Harv. L. Rev. 282, 284 (1966) (on the importance of historical background to understanding the Code, particularly Article 9).
45. Uniform Conditional Sales Act § 1; 1 G. Gilmore, supra note 9, §§ 3.1-.8, at 62-85; 3 S. Williston, supra note 18, § 579, at 224-25.
47. See 3 S. Williston, supra note 18, § 579d, at 232.
48. Uniform Conditional Sales Act § 21. “Any sum remaining after the satisfaction of [the expenses of resale and the underlying obligation] shall be paid to the buyer.” Id. See 3 S. Williston, supra note 18, § 579d, at 234; Gilmore & Axelrod, supra note 46, at 547.
49. 24 N.H. 336 (1852).
on a count for money had and received. The court held for the seller, stating that because the goods had not been delivered, and because the sheep to be purchased had not even been selected, the buyer had no property interest in the sheep. Since a property interest in the goods was a necessary element for the buyer to recover in the action, the seller could retain any profits from the resale as his own.\footnote{Id. at 342-44. For a similar result in a contract for the sale of cattle, see Bridgford v. Crocker, 60 N.Y. 627 (1875).} The Uniform Sales Act continued this seller's right to excess profits in section 60,\footnote{After resale of the goods, the seller "shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale." \textsc{Uniform Sales Act} § 60(1).} and section 2-706 of the U.C.C. is a direct descendant of that provision.

The rationale behind these different rules has never been totally clear. Williston, in his treatise on sales, attempts to justify the difference, but his reasoning is unconvincing.\footnote{Williston suggests two arguments why the seller is able to retain any profit made on resale. First, he argues that, by reselling, the seller is acting not as the buyer's agent, but on his own behalf pursuant to authority given by law. Therefore, the seller is entitled to retain any profit made on the resale. 3 S. \textsc{Williston}, supra note 18, § 553, at 178. Williston provides his own answer to this argument, however, by stating that the mortgagor (or conditional seller) also resells by authority of law; nevertheless, that resale is on buyer's account, with the buyer entitled to any profit on resale. \textit{Id.} at 179. There is no necessary relationship between the legal power to resell and the right to retain profits.} Two distinctions between a conditional seller and an unsecured seller provide the best explanation for the uniform act results and give some insight into the resolution of the comparable U.C.C. conflict. First, the concept of title was very important in both the Uniform Sales Act and the Uniform Conditional Sales Act. The conditional seller, while retaining title to the goods in form, had passed dominion over the goods to the buyer. The seller's title was thus viewed as a mere security

\footnote{The second argument is that the conditional seller is entitled to retake the goods and keep any payments made. Therefore, since the seller with a seller's lien is functionally equivalent to a conditional seller, the seller should be able to retain any surplus from resale. \textit{Id.} at 179-80. This argument ignores the other half of the conditional seller's rights. Once the conditional seller has retaken the goods and retains payments, the conditional seller would no longer be entitled to a deficiency judgment. \textit{See} text accompanying note 46 supra. To give a seller both the right to retain the surplus and the right to a deficiency judgment is to grant such a seller with a seller's lien the benefit of equivalency to a conditional seller without any of its burdens.}

The fundamental problem is, as Williston states, that the sale with a lien is indistinguishable from a conditional sale in which the buyer has retained title to secure payment. 3 S. \textsc{Williston}, supra note 18, § 553, at 180. Despite this functional equality, the rights of sellers in either category developed along different lines, with the result that profits on resale belonged to the seller under one label, and to the buyer under the other.
title to ensure payment of the underlying debt. The amount of that debt set the value of the conditional seller's interest, any excess proceeds over that amount were traceable to the property interest of the buyer. The unsecured seller, on the other hand, had a right to resell the goods only if it still had a seller's lien on the goods, as provided by the Uniform Sales Act. Under such a lien the seller's interest was in the goods, not merely in the underlying debt, and the seller was entitled to all the proceeds of resale, even where such proceeds created a profit.

The scope of the seller's lien under the Uniform Sales Act provides a second instructive distinction. Once the goods were delivered to the buyer, the seller's lien was extinguished. Thereafter, the seller was generally entitled only to an action on the personal obligation, and any increase in the value of the goods would accrue to the buyer's benefit. After delivery, the seller's interest was equivalent to that of a conditional seller, absent the security interest. The conditional seller had the right to reclaim the goods after delivery to the buyer, but any excess profits on resale would still be the property of the conditional vendee. This importance of delivery in determining the right to excess proceeds is carried over into the provisions of the U.C.C.

**U.C.C. Treatment of the Rights to Excess Profits**

The rather metaphysical reliance on title of the earlier uniform acts was the theoretical underpinning of the differing treatment given the seller and the conditional seller concerning their right to profits on resale of the goods after the buyer's breach. In application, however, this metaphysics provided a fairly clear dividing line at the point when the goods were delivered to the buyer. The Code, in contrast, relies almost totally on factual determinants. Rights and duties are allocated based...
not on title, but rather on possession and on where the conflict falls within the framework of the commercial transaction. It is consistent with the underlying approach of the Code, therefore, to structure the resolution of this default conflict around factual signposts. Two of these signposts are most important. One concerns the existence of a consensual Article 9 security interest; the other concerns delivery.

The existence of an Article 9 interest in the seller would appear at first glance to determine the applicable rules on resale. If the seller has such an interest, then the Article 9 rules would apply, and the other secured parties and the buyer would be entitled to the excess profits on resale. However, the seller with an Article 9 security interest is an Article 2 seller as well. There is nothing in the Code that expressly denies Article 2 rights where the seller has taken an Article 9 interest; in fact, the opposite result is implied. Conversely, the Article 2 seller, without regard to an Article 9 interest, can be seen as having a "security interest" conferred by Article 2 to withhold the goods, or to stop them in transit, and to resell. Each of those rights seems to be "an interest in personal property or fixtures which secures payment or performance of an obligation"—the definition of security interest. Section 9-113 expressly recognizes this fact by making Article 9 applicable, in certain circumstances, to a "security interest arising solely under the Article on Sales (Article 2)." Moreover, Article 2 itself gives rights to secured parties as "purchasers" under section 2-403, and those rights explicitly include Article 9 rights. The secured third party lender can argue convincingly that the seller's rights on resale under Article 2 should be limited by the

---

61. See Corbin, supra note 40, at 835; Jackson & Peters, supra note 6, at 912.
62. U.C.C. § 9-113, Comment 5. In addition, it would seem odd that a seller taking a consensual Article 9 interest to increase its protection should be worse off in its rights to any increased value of the goods.
63. U.C.C. § 2-703(a).
64. Id. § 2-705.
65. Id. § 2-706.
66. Id. § 1-201(37).
67. Before the buyer gains possession of the goods, § 9-113 states that such Article 2 security interests need not comply with the Article 9 requirements of a security agreement and filing to perfect the interest, and that the Article 2 default rights apply on any default. After delivery, however, the transaction is subject to Article 9. See P. Coogan, W. Hogan & D. Vagts, Secured Transactions Under the Uniform Commercial Code § 4.07(2), at 314.3 n.51 (1963); Weingarten, Article 9 of the Uniform Commercial Code: Definitions and Rules of General Application, 9 Wayne L. Rev. 537, 553-54 (1963).
68. U.C.C. § 2-403(4). Secured parties come within the definition of purchasers as given by U.C.C. § 1-201(32), (33).
rights given to secured parties by Article 9. These conflicts, explored more fully below, make clear that the conflict between Article 2 and Article 9 default rights can never be resolved solely by a factual determination that the seller has or has not taken a consensual security interest.

A second factual determination, important in resolving this problem, is whether the goods have been delivered to the buyer. Under the earlier uniform acts, this question was almost inseparable from whether the seller had a security interest. The conditional seller, after all, only became a conditional seller once the goods were delivered to the buyer. Under the U.C.C., however, an Article 9 security interest attaches when “the debtor has rights in the collateral.” This phrase, like so many others in the Code, has a less than clear meaning. It may be that the debtor-buyer has rights in the collateral at the time the goods are identified to the contract in the seller’s warehouse. Alternatively, such rights may not arise until the time the goods are delivered to the carrier for shipment. In any case, the buyer almost certainly has rights in the collateral prior to receiving the goods, so the seller’s security interest, and those of third parties, can attach prior to delivery.69

---

69. Section 1 of the Uniform Conditional Sales Act evidences this fact. A conditional sale was defined to mean “any contract for the sale of goods under which possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of part or all of the price, or upon the performance of any other condition or the happening of any contingency.” (emphasis added). Presumably, prior to delivery the seller would have relied on the seller’s lien given by Uniform Sales Act §§ 54-56.

70. Under Article 9, there are three requisites to attachment of a security interest. There must be a written security agreement adequately describing the collateral, the secured party must have given value, and the debtor must have rights in the collateral. U.C.C. § 9-203(1). To perfect the interest, there must also have been a filing of a financing statement.

71. Section 2-501(1) provides that the buyer gains a special property interest in the goods at the time they are identified to the contract. Whether this special property interest is sufficient to give the buyer rights in the collateral for purposes of attachment of the seller’s security interest is unclear. See note 73 infra.

72. For an F.O.B. shipment contract, U.C.C. § 2-319(1)(a), the risk of loss passes to the buyer on delivery of goods to a carrier. U.C.C. § 2-509(1)(a). Passing the risk of loss to the buyer almost certainly gives it rights in the collateral for Article 9 attachment purposes. See U.C.C. § 2-401(2)(a).

73. See 1 G. Gilmore, supra note 42, § 11.5, at 353 (rights in the collateral when buyer gets a special property interest under § 2-501 on identification of the goods to the contract); Hogan, supra note 6, at 577 (rights in the collateral when buyer has the power to transfer the goods; the buyer has the power to transfer the goods; the buyer certainly has such power after title has passed on delivery of goods to the carrier under an F.O.B. shipment contract). Contra, Anzivino, When Does a Debtor Have Rights in the Collateral Under Article 9 of the Uniform Commercial Code?, 61 Marq. L. Rev.
However, delivery is still important in the Code framework. Section 9-113, which makes Article 9 applicable to Article 2 security interests, states that Article 9 is not fully applicable until the buyer has or has lawfully obtained possession of the goods. This is particularly important to resolution of the proceeds problem, because one of the Article 9 provisions that does not apply under section 9-113 prior to delivery is the rights of the seller on default by the buyer. In addition, Article 2 emphasizes the critical importance of delivery in the right to excess proceeds on resale. In order to resell the goods, the seller must have possession of them. Article 2 explicitly gives the seller the right, after default by the buyer, to withhold the goods or to recover them while in transit. Once the goods have been delivered to the buyer, however, Article 2 gives the unsecured seller no general right to repossess the goods in order to resell them. The seller is left, as under the Uniform Sales Act, with only the right to sue on the personal obligation of the buyer for the underlying debt. Any rights to reclaim must be found in either the contractual agreement between the buyer and the seller, the special rights given in cases of buyer fraud by Article 2, the common law notions of replevin as incorporated by section 1-103, or an explicit Article 9 security interest taken by the seller. Delivery is thus vitally important, at least for Article 2 purposes, to secured parties or buyers who claim

---

23, 44-52 (1977) (buyer has no rights in the collateral until it gains possession of the goods).

74. "For both Article 2 and Article 9, physical location of contract goods is a significant indicator of statutory rights, particularly when third-party interests are at stake." Jackson & Peters, supra note 6, at 912. The conclusions drawn by Professors Jackson and Peters as to the relative rights of the unsecured seller, the buyer, and various third parties reflect the critical importance of delivery.

75. See note 67 supra.

76. U.C.C. § 9-113(c) states that, after the debtor obtains possession of the goods, "the rights of the secured party on default by the debtor are governed by the Article on Sales (Article 2)." On its face, this provision says nothing about the rights of third parties, however. See note 106 infra.

77. U.C.C. §§ 2-703(a), 2-705.

78. Only the buyer is given a general right to replevin under Article 2. U.C.C. § 2-716(3) gives that right when the goods are identified to the contract and the buyer is unable to cover.

79. U.C.C. §§ 2-507 (cash sale), 2-702(2) (credit sale).

80. U.C.C. § 1-103 provides that rights under state law continue under the Code, unless displaced by specific Code provisions. A seller could argue from the lack of any general right to reclaim in Article 2 that it could utilize any such rights available under non-Code state law. See note 84 infra.

81. If an Article 9 interest has been taken by the seller, § 9-503 grants the seller the right to repossess the goods.
a right to the excess value of the goods over the amount of the underlying obligation.

Having provided the necessary historical and Code introduction, it is possible to resolve the fundamental issue: in which factual circumstances do the Article 2 and Article 9 default rules apply? 82

**Three Relevant Factual Patterns**

In keeping with the U.C.C.'s emphasis on resolution of issues by factual, rather than metaphysical determinations, this section proposes factual solutions to the problem of which default rules should apply when the seller has priority in the goods. The easiest case, when the goods have been delivered to the buyer, is considered first. With one exception, Article 9 default rules should apply, giving buyers and secured parties the right to any excess proceeds after resale of the goods and satisfaction of the underlying obligation. The next two situations involve the more difficult pre-delivery problems—cases in which the seller has not taken an explicit Article 9 security interest and cases in which such an interest has been taken. Recognizing the less than clear statutory meaning and the more difficult policy issues, it is concluded that whether the seller has taken a consensual security interest should make no difference. At all times prior to delivery of goods to the buyer, the seller should be able to utilize the Article 2 rights and retain any profits on resale.

It is worthwhile to reintroduce the relevant parties in the conflict, because they will be the focus of the analysis to follow. *M*, the manufacturer of television sets and the seller involved in the transaction, may or may not have taken an Article 9 security interest in the goods. *W*, the wholesaler of such goods, has agreed to buy one hundred television sets from *M*, and will also be an Article 9 debtor if *M* has taken a consensual security interest. *W* is also a debtor in relation to *L*, the secured party.

---

82. Although the analysis is couched in terms of which resale rights apply, the rights given to *W* and *L* are worthless without some way to vindicate their interests. Section 9-507 provides the protection needed, however. Under that provision, if Article 9 applied, *W* or *L* would be entitled to recover from *M* any damages incurred due to *M*'s noncompliance with Article 9 default rules. If the goods have been resold for an amount greater than was necessary to satisfy the obligation owed to *M*, then *L* and *W* could sue under § 9-507 to recover the excess proceeds. Under certain circumstances, *L* or *W* could recover a greater amount if, for example, either could show it would have redeemed the goods, thus saving the expenses of resale and gaining the benefits of any continued increase in value. For a discussion of problems under § 9-507, see 2 G. GILMORE, supra note 9, § 44.9, at 1252.
bank that loaned money to W and took a security interest in “all personal property of W, wherever it may be found.” For purposes of simplicity, M will always be referred to as the seller and W as the buyer; the context will make clear their roles as either secured party or debtor. L is always referred to as the third party secured lender. It is also assumed throughout that M has priority over L in the right to satisfy its obligation from the goods.83

After delivery of the goods to W. Assume the television sets were delivered to W, who refused to pay, thus breaching the contract. Because of a rising market situation, M would like to

---

83. This assumption is not critical to the conflict over default rights. If L has priority, Article 9 default rules apply, because L can only get priority through the application of Article 9. However, L cannot get priority until the goods have been delivered to W, so the resulting application of Article 9 default rules is consistent with the dividing line drawn by this article. The priority question is more important with regard to whether M should take an Article 9 security interest to protect its interest. Because its priority rights as against other secured parties are uncertain, taking an Article 9 interest might be the optimal course of action.

The conflict is between L, an Article 9 secured party, and M, a seller with either a security interest solely under Article 2 or a consensual interest covered by Article 9. All such conflicts are governed by Article 9. If M has only an Article 2 security interest, then Article 9 applies because priority problems are conspicuously absent from the coverage of § 9-113. If M has an Article 9 interest, then the Article 9 provisions are applicable a fortiori. Because M is a purchase money secured party (see U.C.C. § 9-107), § 9-312 applies to determine its priority relative to L. Before delivery of the goods to W, M has priority over all other security interests in the goods. U.C.C. § 9-312(3), (4). Those provisions do not explicitly cover the case in which the goods have not been delivered to the buyer, but the necessary implication from the special protection they grant to purchase money security interests after delivery is that such interests have priority before delivery as well. See Hogan, supra note 6, at 583-85.

The post-delivery case is more complicated. Because the goods involved are inventory, M has to meet the requirements of § 9-312(3) to establish priority over L. That provision requires that the purchase money security interest be perfected at the time the buyer gains possession of the goods. Where M has taken an Article 9 interest, we have assumed that the interest has been perfected, so that M has priority. If M has an Article 2 security interest, however, it would be subordinate to L’s interest. An Article 2 security interest is perfected without filing until W gains possession of the goods. U.C.C. § 9-113(b). That perfection is lost upon delivery, and unless W has filed its Article 2 interest (a very unlikely prospect), its failure to meet the requirement of § 9-312(3)(a) gives L priority. If M meets the “perfection when the debtor receives possession” requirement, then it still must comply with the notice requirements of § 9-312(3)(b), (c), and (d) to ensure its priority position. For goods other than inventory, the same analysis would apply, except that M has 10 days after W gains possession to file and perfect its interest (still an unlikely prospect for a security interest solely under Article 2), and the notice requirements would be absent. U.C.C. § 9-312(4).

Therefore, it seems that the only time M would not have priority in the goods as against the after-acquired property interest held by L is after delivery when M is without an Article 9 interest. For more extended treatments of the priority problems facing unsecured sellers, see Hogan, supra note 6, at 575-89; Jackson & Peters, supra note 6, at 947-83. Given the uncertain resolution of such interests, M would always benefit from taking an Article 9 interest.
reclaim the sets and resell them, keeping the profits on resale for its own account. \( W \), on the other hand, has had a change of heart. It recognizes that it made a good deal in its contract with \( M \), and wants to retain those benefits by redeeming the goods if \( M \) repossesses them. \( L \) also has an interest in the rising market price. \( W \) has defaulted on its payments to \( L \), and \( L \) would like to use any profit from resale to satisfy at least part of the loan obligation. Which set of default rules will apply?

The Article 9 default rules should apply after delivery unless the seller is able to reclaim the goods pursuant to section 2-702(2), which gives the seller special rights on insolvency by the buyer. This should be the result whether \( M \) has taken an Article 9 security interest or not. If \( M \) has not taken such an interest, then \( M \) cannot use Article 9 repossession rights. Article 2 gives no general right to repossess the goods after buyer's default. Therefore, the goods remain in \( W \)'s possession, and the right to the value of the goods in excess of the contract price goes to \( W \) and \( L \)—an Article 9 result.

In some circumstances, \( M \) could reclaim the goods by virtue of rights conferred by the contract with \( W \), rights under state law incorporated by section 1-103,\(^4\) or rights on \( W \)'s insolvency under section 2-702(2). Leaving aside the section 2-702(2) right, the other rights, even if they allowed \( M \) to regain possession of the goods, would not allow \( M \) to retain the benefit of any increased value in the goods. If \( M \) has repossessed the goods pursuant to a state-created or contractual right, it can not claim to be reselling pursuant to section 2-706 and retain the excess profits on resale; section 9-113 forecloses that possibility. The right to resell as given by section 2-706 is apparently a security interest arising solely under Article 2,\(^5\) and \( W \) had

---

\(^{4}\) It is not totally clear that such state law rights are still available by incorporation through § 1-103. Section 2-702(2) seems to exclude at least some of the seller's state law rights in goods after delivery to the buyer. Such rights can be divided into two categories. On the one hand are state law rights that grant the seller repossession rights because of some fraudulent conduct by the buyer that allowed it to gain possession of the goods. See, e.g., Guckeen Farmers Elevator Co. v. Cargill, Inc., 269 Minn. 127, 130 N.W.2d 69 (1964). Such rights are included in the Code in a revised form in § 2-507 and § 2-702, and thus are probably barred from incorporation pursuant to § 1-103 because of § 2-702(2). On the other hand, there are also state statutes that grant sellers special interests in the goods after delivery because of the nature of the goods. See Gilmore & Axelrod, supra note 46, at 524 n.17. Although no such special rights would apply to the televisions involved in these facts, a state law right based on the nature of the goods would not be barred by § 2-702(2).

\(^{5}\) It is unclear what rights are covered by the phrase “security interest arising solely under the Article on Sales.” Comment 1 to U.C.C. § 9-113 confuses the issue by stating that “the use of the term ‘security interest’ in the Sales Article is meant to bring
lawfully obtained possession of the goods. Given these two conditions, section 9-113 expressly states that Article 9 applies to the transaction, thus giving $W$ and $L$ the benefit of any profits on resale. If $M$ does not resell, but rather retains the goods for its own use, $W$ and $L$ are still entitled to Article 9's default provisions. $M$ could argue that the repossession was not by virtue of an Article 2 security interest, and thus section 9-113 should not bring Article 9's provisions into play. Such a result would be anomalous. Delivery of goods to the buyer is the paradigm case in which the third party secured lender actually relies on those goods to ensure at least partial payment of its obligation; and Article 2’s omission of a general right to repossess coupled with section 9-113’s focus on delivery make clear the Code’s policy of fully protecting the buyer’s interest after delivery of the goods. In light of such an anomaly, a court faced with the issue should be receptive to the exercise by $W$ or $L$ of their Article 9 rights in the face of retention of the goods by $M$.

Under a contractual right to reclaim, $M$’s right to repossess the interests so designated within this Article.” Unfortunately, that term is not used in Article 2 in reference to those rights that Comment 1 implies are such “security interests under Article 2.” This is probably a result of a lack of communication between the drafters of the two articles, however, and Comment 1’s reference to the right of resale as “similar to the rights of a secured party” implies that § 2-706 creates an Article 2 security interest within the meaning of § 9-113. This conclusion is fortified by the definition of “security interest,” that is “an interest in personal property or fixtures which secures payment or performance of an obligation.” U.C.C. § 1-201(37). The right to sell the goods and apply the proceeds to the buyer’s obligation certainly appears to be an interest that “secures payment” as the words are used in this section. See Jackson & Peters, supra note 6, at 921 n.59.

The issue is not totally clear, however. Professor Gilmore limits “security interest under Article 2” to the unpaid seller’s lien on goods in its possession and the seller’s security title in goods shipped under a bill of lading or shipment term that postpones the passage of title until the goods arrive at their destination. 1 G. GILMORE, supra note 42, § 11.3, at 341-42. This clearly seems too narrow, given the broad Code definition of “security interest” and Comment 1’s explicit reference to the rights of resale and of stoppage-in-transit, which are available without regard to whether the seller has reserved title in the goods. It is possible, however, that Comment 1 is not referring to the § 2-706 right to resell as a security interest; rather, it is stating that the seller’s Article 2 rights to withhold the goods or stop them in transit, and then to resell them are a security interest when used in conjunction with one another. Such an interpretation would more closely fit the § 1-201(37) definition. That interpretation would not change the analysis here, however, because it is argued that an unsecured seller’s using any means other than § 2-702 to reclaim the goods from the buyer would be subject to Article 9 default provisions without regard to § 2-706.

86. On the importance of delivery to the buyer to show reliance on the part of the secured party, see McDonnell, supra note 5, at 455 (“If, in fact, the financier is making credit decisions on the basis of new assets, reliance would not be difficult to document.”).
is not a security interest arising solely under Article 2, but is arguably a security interest directly under Article 9. Such a right meets the section 1-201(37) definition. Therefore, although section 9-113 would not apply, the remainder of Article 9 would, giving W and L their default rights.

Under a state-created reclamation right, a court could read section 9-113 broadly to cover security interests "arising by action of law in connection with a sales transaction." This interpretation makes M's state-created repossession right subject to section 9-113 since W had lawfully obtained possession. Under the interpretation, W and L have Article 9 rights after repossession of the goods by M pursuant to a state-created or contractual right. Therefore, in a rising market situation they could force M to dispose of the goods under section 9-505 and take the profits on resale under section 9-504, or they could redeem the goods under section 9-506 to retain the increased value for themselves. Given judicial acceptance of the above interpretations, the unsecured seller would almost always lose its Article 2 right to any excess proceeds on resale once the goods have been delivered to the buyer.

The only exception to that result is in section 2-702(2), which provides that if M discovers that W has received the goods on credit while insolvent, M may reclaim the goods by making demand on W within ten days after delivery.
exercise of that right, $M$ is not allowed to collect a deficiency judgment, but is allowed to retain any profit made on resale;\textsuperscript{92} $W$ or $L$ should not be able to overturn this result. The special right to reclaim given by this section is a security interest arising solely under Article 2,\textsuperscript{93} but in such a case the buyer has not lawfully obtained possession of the goods.\textsuperscript{94} Section 9-113 therefore prescribes that default rights will be determined under Article 2, and $W$ clearly has no right to any excess proceeds under that Article. $L$'s rights are explicitly considered in section 2-702(3), which refers to section 2-403 for resolution of conflicts between the reclaiming seller and secured parties. As discussed below,\textsuperscript{95} $L$'s rights under section 2-403 are not perfectly clear, but the assumption throughout has been that $M$ has priority in the goods.\textsuperscript{96} The result is perhaps best seen as a balance of the two competing equities in a difficult situation. On the one hand, the goods have been delivered to the buyer, and secured parties could have actually relied on that fact in extending credit to the buyer. On the other hand, the insolvency case sharply presents the situation in which the seller, if not actually defrauded, has at least delivered goods to the buyer under conditions approaching fraud. Section 2-702 recognizes this conflict and resolves the issue by giving the seller the right to repossession subject to the interests of those third parties that are most entitled to protection. This conflict is resolved by the Code completely within the confines of Article 2, and the parties' relative rights on default should be similarly treated.\textsuperscript{97}

\textsuperscript{92} "Successful reclamation of goods [under § 2-702] excludes all other remedies with respect to them." U.C.C. § 2-702(3).

\textsuperscript{93} The author accepts the validity of the argument made by Professors Jackson and Peters that the § 2-702(2) right to reclaim is an Article 2 security interest, despite Judge Braucher's contentions to the contrary. Compare Jackson & Peters, supra note 6, at 926-29, with Braucher, supra note 89, at 1290.

\textsuperscript{94} On this point, Professors Jackson and Peters agree with Judge Braucher. Braucher, supra note 89, at 1290; Jackson & Peters, supra note 6, at 929-30. Each reaches the conclusion that § 9-113 does not make Article 9 totally applicable to the seller reclaiming the goods pursuant to § 2-702(2). It is hard to imagine what the "lawfully obtain possession" language in § 9-113 could apply to other than this quasi-fraudulent purchase by the buyer (see U.C.C. § 2-702, Comment 2) or a theft of the goods. In the latter case, the seller has a conversion action and need not resort to the Code's provisions.

\textsuperscript{95} For a discussion of the validity of this assumption under § 2-403, see note 109 infra. For the corresponding Article 9 discussion, see note 83 supra.

\textsuperscript{96} One other Article 2 provision granting the seller rights to reclaim the goods writing within three months before delivery the ten day limitation does not apply." U.C.C. § 2-702(2). For purposes of simplicity, it is assumed that no written representation of solvency has been given.
If $M$ has taken an Article 9 security interest, then the results argued for above remain the same. In such a case, $M$ has the right to repossess after default under section 9-503, but that right carries with it the interest of $W$ and $L$ given by the other Article 9 default provisions. $M$ should not be able to argue for rerepossession by virtue of Article 9 and then for resale or retention of the goods pursuant to Article 2. Similarly, the taking of a consensual security interest should not foreclose $M$ from its rights under section 2-702(2), even though those rights cut off the interests of $W$ and $L$ in any increased value of the goods.\textsuperscript{86}

Before delivery to $W$, and $M$ does not have an Article 9 security interest. Assume that the goods have not yet been delivered to $W$. The contract called for the risk of loss to shift to $W$ once $M$ delivered the goods to the carrier,\textsuperscript{89} and delivery to the carrier has taken place. Once the goods were in transit, $W$ telephoned $M$ and stated that it would refuse to take the goods, thus breaching the contract.\textsuperscript{100} $M$ wants to reclaim the goods and resell them pursuant to its Article 2 default rights. Once again, the parties are faced with a rising market situation, and both $W$ and $L$ would like to assert their Article 9 rights to gain the benefit of the increased value of the goods. Close analysis of the problem leads to the conclusion that such claims should not be allowed, and $M$ should be able to retain any profits on resale pursuant to section 2-706.

Contrary to the post-delivery situation, the Code's provisions and policies imply that differing rights might be available after delivery is § 2-507. This is the Code equivalent of the common law cash sale rule (see, e.g., Guckeen Farmers Elevator Co. v. Cargill, Inc., 269 Minn. 127, 130 N.W.2d 69 (1964)), just as § 2-702 is the Code descendant of the credit sale doctrine (see, e.g., California Conserving Co. v. D'Avanzo, 62 F.2d 528 (2d Cir. 1933)). The two doctrines gave essentially the same rights to reclaim to sellers under common law. See Gilmore, \textit{The Commercial Doctrine of Good Faith Purchase}, 63 \textit{Yale L.J.} 1057, 1059-62 (1954).

Under the Code, this equivalence is made uncertain. This uncertainty is primarily due to the drafting of § 2-507, which shows almost no awareness of § 2-702 or of the relationship between the two rights. The 10-day limit on reclamation, for example, is included only in Comment 3 to § 2-507. The § 2-507 right, at least as drafted, would apply to grant $M$ greater rights to reclaim than § 2-702(2). The sections have been treated as equivalent for most purposes, however (see Jackson & Peters, supra note 6, at 947 (default rights under Articles 2 and 9)), and an extended discussion of the problems in harmonizing the two sections will not be attempted here.

\textsuperscript{86} See U.C.C. § 9-113, Comment 5.

\textsuperscript{89} Under § 2-319(1)(a), it is therefore an F.O.B. shipment contract, and the buyer has rights in the collateral for purposes of attachment under § 9-203 of either $M$'s or $L$'s consensual security interest. See U.C.C. § 2-401(2)(a).

\textsuperscript{100} Once again it can be asked why a buyer would breach in that situation. For a discussion of that issue, see note 36 supra.
to buyers and secured parties. Therefore, the analysis must be separated into $M$'s rights against $W$ and $M$'s rights against $L$.

$M$ has an easier time repossessing the goods utilizing only its Article 2 rights. Section 2-705 governs stoppage-in-transit, and in a large commercial transaction, $M$ has the right to repossess the goods from the possession of the carrier upon breach by $W$. Such reclamation brings section 9-113 back into the picture, however, because the right to stoppage-in-transit by an unsecured seller is a security interest arising solely under Article 2. The goods had not yet been delivered to $W$, and in such a situation section 9-113(c) explicitly states that default rights are governed by Article 2. Section 2-706(6) gives a simple answer: "The seller is not accountable to the buyer for any profit made on any resale." Therefore, $M$ can resell the goods and the buyer has no right to any benefit from their increase in value.

$M$'s rights against $L$ are more difficult to ascertain. $L$ received a security interest in the goods when $M$ delivered them to the carrier. At that point, $W$ had rights in the collateral because the risk of loss had passed; $L$'s security interest covered the goods because they were "personal property of $W$," and $L$'s interest attached, assuming it had met the other requirements of section 9-203. That security interest is jeopardized, however, by $M$'s reclamation of the goods and intended resale.

Section 9-113 itself affords little solace to $L$, because it once again appears to push resolution of the parties' relative default rights into Article 2, and $L$ must look to that Article for any rights against $M$. An argument can be made under Article 101. For purposes of a simple breach of contract, § 2-705(1) would allow $M$ to reclaim the goods so long as 100 television sets are at least a truckload shipment. For smaller shipments, $W$ must be insolvent for $M$ to exercise stoppage-in-transit rights. This requirement could cause $M$ to lose its Article 2 resale rights on small shipments prior to delivery of goods to the buyer.

101. For purposes of a simple breach of contract, § 2-705(1) would allow $M$ to reclaim the goods so long as 100 television sets are at least a truckload shipment. For smaller shipments, $W$ must be insolvent for $M$ to exercise stoppage-in-transit rights. This requirement could cause $M$ to lose its Article 2 resale rights on small shipments prior to delivery of goods to the buyer.

102. See U.C.C. § 9-113, Comment 1; U.C.C. § 1-201(37); note 85 supra.

103. Accord, Hogan, supra note 6, at 582-83.

104. See U.C.C. § 2-509(1)(a); note 73 supra.

105. Those requirements are: there must have been a written security agreement signed by $W$ that adequately described the collateral, and $L$ must have given value, such as its loan, in consideration for the security interest. U.C.C. § 9-203(1)(a), (b). It has been assumed throughout that $L$ has filed a financing statement covering this security agreement, thus perfecting the interest as soon as it attaches. U.C.C. § 9-303(1). See note 70 supra.

106. The language of § 9-113 contains some ambiguity on this point. Under § 9-113(c), in this situation "the rights of the secured party on default by the debtor are governed by the Article on Sales (Article 2)." This gives $M$ Article 2 rights, but it does not totally exclude $L$ from arguing that it retains its Article 9 rights. Moreover, § 9-
cle 2, however, that $L$ should be able to assert its Article 9 default rights and force $M$ to sell the goods instead of retaining them and recover any profits made by $M$ on resale of the goods, or redeem the goods by paying the obligation owed to $M$. First, it should be noted that section 2-706(6) (giving $M$ the right to excess profits), refers only to the seller’s right to retain the profits as against the buyer. $L$, as a secured party, is not directly covered by that provision, and thus may be able to recover such excess proceeds under Article 2. The proper place to search for such a right is section 2-403, the major Article 2 provision dealing with the rights of parties who are not the buyer or the seller. $L$ would argue that it has rights under that section because it is a “purchaser” from $W$. Under section 1-201(32), purchase includes “any . . . voluntary transaction creating an interest in property.” $L$’s loan to $W$ in return for a promise to repay and an Article 9 security interest that covers these goods fits that definition. $L$ would not get rights as a purchaser under section 2-403(1). That subsection deals with priority rights to the goods themselves, and it has been assumed throughout that $L$ does not have such priority.

Any

---

113 omits priority problems from the scope of its coverage and seems particularly focused on the relative rights of $M$ and $W$. $L$ could thus argue that it retains its Article 9 rights without regard to § 9-113(c). The problem with that argument is that $M$’s Article 2 rights and $L$’s Article 9 rights seem to expressly conflict with respect to the right to any profit made on resale. But see U.C.C. § 2-706(6) (“The seller is not accountable to the buyer for any profit made on any resale.”) (emphasis added). The policy arguments outlined below apply equally here to forestall $L$’s reliance on its Article 9 rights. See text accompanying notes 113-122 infra.

107. “The seller is not accountable to the buyer for any profit made on any resale.” U.C.C. § 2-706(6) (emphasis added).

108. Section 2-403(1) gives rights to purchasers of goods, including good faith purchasers for value. Section 2-403(2)-(3) gives rights to buyers in the ordinary course of business from merchants who deal in goods of the kind bought. Section 2-403(4) gives rights to other purchasers of goods and to lien creditors.

109. It is possible that, in some circumstances, $L$ could have priority in the goods under § 2-403(1). There is no explicit requirement in § 2-403 that “buyers” or “purchasers” must take such an interest from one who has possession of the goods. Therefore, $L$ could be a purchaser for § 2-403(1) purposes before $W$ took delivery of the goods. As a purchaser, it would have priority over $M$ if the purchase is in good faith and for value. Assuming that there are no misdeeds to breach the good faith standard, a secured party that both gives value and takes a security interest in the goods between delivery to the carrier and stoppage-in-transit would have priority under § 2-403(1) to the extent of its security interest. $L$ has an after-acquired property interest, however, and its rights are more problematic. Although the Code definition of value is very broad (see U.C.C. § 1-201(44)), Professor McDonnell has argued that the secured party with an after-acquired property interest should not be treated as a good faith purchaser for value under § 2-403(1) unless that secured party has actually relied on the goods to protect its interest. McDonnell, supra note 5, at 454-55, 460. Such reliance is very unlikely in the case of goods that have not yet even reached the buyer. See text
rights that L has are subordinate to those of M, and exist only to the extent of excess of proceeds of resale after satisfaction of M's underlying obligation. Section 2-403(4) appears to provide an argument on which L may base a claim for that surplus. The subsection states that the rights of those purchasers of goods not given rights under 2-403(1) are governed by Article 9. L can argue that it is such a purchaser, that Article 9 gives it rights in any excess proceeds on resale, and that it can assert those rights against M. Thus, M would not have its general Article 2 right to retain the profits on resale, despite neither having taken an Article 9 security interest nor delivering the goods to the buyer. Given what seems such an illogical result, policy considerations should be weighed to determine whether the Code should be interpreted differently.

In actuality, the result is not as illogical as might first appear. As a practical matter, few security interests cover as broad a range of goods as the one used herein. The more traditional security interest in goods would cover "goods in W's warehouse," or something of that nature. Such interests only arise after delivery of goods to the buyer, and the sound reasons for application of Article 9 default rights to those transactions have been discussed. More importantly, Article 9 secured party rights on default only arise if L has given notice of its interest to M. This ensures that L is not getting a mere windfall.

accompanying note 112 infra.

Moreover, an extension of one recently articulated position would bar application of § 2-403 prior to delivery of goods. See Kripke, Should Section 9-307(1) of the Uniform Commercial Code Apply Against a Secured Party in Possession?, 33 BUS. LAW. 153 (1977) (arguing that transferee cannot be "buyer" to come within protection of § 9-307(1) until the transferor has possession of the goods). Contra, Tanbro Fabrics Corp. v. Deering Milliken, Inc., 39 N.Y.2d 632, 350 N.E.2d 590, 385 N.Y.S.2d 28 (1976) (granting "buyer" status although transferor never had possession). Such arguments have thus far been limited to the buyer-in-ordinary-course provisions, but extension to cover the problem of purchasers would be consistent with the analysis.


111. A factual predicate to L's right to force sale, to receive notice of resale, and to have its interest satisfied from any surplus on such resale is that M must have received notice of L's claimed interest in the goods prior to taking the action involved. See U.C.C. §§ 9-504(1)(c), 9-504(3), 9-505(2). No notice need be given to exercise the § 9-506 right to redeem.

Under the 1962 Official Draft of the Code, M has the duty under Article 9 to notify L or any other secured party that had filed a financing statement or that was known by M to have a security interest in the goods. Because the 1962 version is still the law in the majority of the states, holding M subject to Article 9 in these circumstances would impose a terrific burden on a seller which has taken no Article 9 interest. The notice provision was changed in the 1972 Official Draft because the burdens of search.
recovery, but rather that L had relied on its interest in those goods even before they were delivered to W. Surely most secured parties are not that aware of goods not in their debtor's possession, even if their security interest is broad enough to cover such goods. Granting a right to profits on resale to those who rely on goods still in transit might not have a large impact.112

Given even those limitations, however, the policies and structure inherent in the Code seem to envision M's unfettered right to such profits in this situation. First, the "rights" given to purchasers by section 2-403(4) may not be the default rights L claims under Article 9. Section 2-403(4) is a priority section, rather than a default section, and the Code's treatment of divided ownership of goods seems to clearly delineate those two issues. Interpreting section 2-403(4) in this situation as applying to Article 9 only for priority purposes is consistent with the treatment given by section 9-113. The latter section utilizes Article 2 to resolve most conflicts that arise when the seller is using a security interest solely under Article 2 before delivery to the buyer. One set of conflicts conspicuously absent from the coverage of section 9-113 are those involving priority. Section 9-113 thus seems to envision that, even in this situation, Article 9 should resolve priority disputes, and section 2-403(4) is most easily read to buttress that intention. Granting Article 9 default rights to secured parties by virtue of section 2-403(4) in direct contravention of the result directed by section 9-113(c) would be in conflict with the "default is different than priority" structure of the Code.113

Such an argument still leaves for explanation the language of section 2-706(6), which does not mention secured parties in granting the seller the right to any profits on resale. The problem with that language, however, is perhaps best explained through historical oversight. Section 2-706 is directly patterned

imposed on all secured parties were greater than the likelihood that there would be a junior security interest actually needing protection. See Hogan, supra note 26, at 233.

112. See Jackson & Peters, supra note 6, at 947 n.136.

113. Obviously, the Code delineation between default and priority is not complete. After all, the disposition of proceeds mandated by § 9-504(1) is predicated on the relative priority of the secured parties, and § 2-702, which is a default section, expressly points to § 2-403, a priority section, to determine the rights of third parties. The distinction seems clear in § 9-113, however, which is the major Code provision dealing with the interface of Articles 2 and 9. Therefore, the priority/default distinction makes a useful argument using the Code's structure that the unsecured buyer should be able to retain the profits on resale as against a subordinate secured party with an after-acquired property interest.
on section 60 of the Uniform Sales Act, which also gave the seller the right to profits on resale as against the buyer.\textsuperscript{114} Under that Act, there would have been no need to specify the seller's right to retain profits as against secured parties in this situation, because secured parties could not have had an interest in the goods prior to delivery to the buyer.\textsuperscript{115} The authors of the Code, in carrying over the language of section 60, probably overlooked the fact that Article 9 would allow secured creditors to have an interest in the goods prior to delivery.\textsuperscript{116} This oversight should not affect the policy of section 2-706, which is to give the seller a complete ownership interest in the goods to be resold. This policy is more completely set forth in the Comments to that section. Comment 2 of section 2-706 states that, under Article 2, "the seller resells by authority of law, in his own behalf, [and] for his own benefit. . . ." This Comment at least implies that any profits from that resale belong solely to the seller. Comment 11 is even more on point, stating that "the seller retains profit, if any, without distinction based on

\textsuperscript{114} The unpaid seller after resale of the goods "shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale." \textit{Uniform Sales Act} § 60(1).

\textsuperscript{115} This result is a corollary to the animosity faced by the after-acquired property interest at common law. Utilizing the maxim that "a man cannot grant what he does not own," courts frequently invalidated sales or transfers of security interests in goods that took place before the buyer gained possession of the goods. \textit{See, e.g.}, \textit{Low v. Pew}, 108 Mass. 347, 348 (1871) (sale of "all the halibut that may be caught by . . . the schooner Florence Reed, on the voyage upon which she is about to proceed" invalid in bankruptcy); \textit{Zartman v. First Nat'l Bank}, 189 N.Y. 267, 82 N.E. 127 (1907) (chattel mortgagee's security interest in after-acquired property invalidated in bankruptcy).

Because the goods involved in \textit{Low} and \textit{Zartman} had actually come into the transferor's possession prior to bankruptcy and yet the transferee's interest in the goods was invalidated, the transferee of a security interest would have had even less chance of claiming an interest in goods of which the buyer never gained possession.

Doctrinally, it appears that a security interest could have been transferred prior to delivery of goods to the buyer. Title could pass to the buyer prior to delivery (see \textit{Uniform Sales Act} § 19), and such title presumably could have allowed the buyer to transfer a security interest in the goods at that point. One difficulty with assuming that this was in fact a possibility is the dearth of cases actually describing such a security interest, and this factual lack of such interests makes the rule granting profits on resale to the buyer as against the seller but ignoring secured parties a reasonable response by the Uniform Sales Act. The Code structure explicitly sanctions the after-acquired property interest, however, as well as making security interests attach when the buyer has rights in the collateral, so the increased number of security interests likely to be claimed prior to delivery to the buyer makes the language of § 2-706(6) unfortunately narrow.

\textsuperscript{116} Such oversight would not be unique to this U.C.C. provision. The tension between Articles 2 and 9 often makes it appear as if the drafters of each article never spoke to one another. \textit{See Jackson & Peters, supra} note 6, at 985 ("Read literally and peremptorily, the Code solutions vacillate in an almost schizophrenic manner, resulting from the apparent inattention to the relation of Article 9 to Article 2.").
whether or not he had a lien." The meaning of this Comment is not totally clear,\footnote{117} but it appears to be referring to the seller's lien under the Uniform Sales Act.\footnote{118} It can thus be interpreted as authority for the proposition that the seller's exercise of rights to withhold, cancel, or stop the goods in transit, despite the functional similarity of those rights to Article 9 security interests, will not cause the seller to lose its right to retain any excess proceeds on resale. This Comment, unlike section 2-706(6), is unlimited in scope. Its language, as well as its policy, applies equally to buyers and to secured parties. It envisions the correct result in this situation—that secured parties should not have Article 9 rights to receive any profit made on resale—and it should be adopted by courts as an amplification of the meaning of section 2-706(6).\footnote{119} The final reason for not granting $L$ any rights in the profits made on resale is more pragmatic. It is a result that can be totally obviated by $M$ and $W$. The only reason $L$ had even an arguable claim to those profits was because it had a security interest in the goods, and that security interest did not attach until $W$ had rights in the collateral.\footnote{120} It is possible for $M$ and $W$ to agree that $W$ has no rights in the goods until delivery.\footnote{121}

\footnote{117} The relevant language of Comment 11 to § 2-706 reads as follows: "Under subsection (6), the seller retains profit, if any, without distinction based on whether or not he had a lien since this Article divorces the question of passage of title to the buyer from the seller's right of resale or the consequences of its exercise." The first problem with this Comment is the relationship between the two clauses; there is no necessary connection between the two statements. More importantly for our purposes, however, the Comment uses the language of "lien," which is pre-Code jargon, rather than using the terminology adopted by the U.C.C. Because of the Comment's early appearance in the Code, however (it appears in exactly the same form in the May 1949 Draft of the U.C.C.), it presumably refers to the seller's lien under the Uniform Sales Act. This is probably the better view. If "lien" were interpreted in its more general sense, the Comment would support the proposition that an Article 2 seller retains its Article 2 rights despite taking a consensual Article 9 interest. This argument is made at text accompanying note 126 infra.

\footnote{118} See Uniform Sales Act §§ 54-56.

\footnote{119} See Danzig, A Comment On the Jurisprudence of the Uniform Commercial Code, 27 Stan. L. Rev. 621, 632 (1976), and Skilton, Some Comments on the Comments to the U.C.C., 1966 Wis. L. Rev. 597, for a discussion of the relevance of the Comments to a court deciding issues under the U.C.C.

\footnote{120} U.C.C. § 9-203(1)(c).

\footnote{121} Section 2-401 is not totally clear as to when a buyer has rights in the goods. At least if the seller retains title on an F.O.B. destination contract, § 2-401(2)(b) provides that title will not pass until the goods are delivered to the buyer. Section 2-401(2)(a) mandates that, unless otherwise agreed, title passes on delivery of goods to the carrier under an F.O.B. shipment contract. $M$ and $W$ presumably could agree that title would not pass until delivery to the buyer even though it was an F.O.B. shipment contract with risk of loss falling on the buyer during shipment. Section 2-401(1) makes this analysis problematic, however, by stating that "any retention or reservation by
In such a case, \( L \) would have no rights in these goods, because they were reclaimed by \( M \) prior to \( W \) gaining any rights in the collateral. It would be anomalous for \( L \)'s rights to turn on the language of the sales agreement between \( M \) and \( W \). Foreclosing \( L \) from using its Article 9 default rights without regard to what that agreement says as to the buyer's and seller's rights in the goods seems to be the correct result.\(^{122} \)

Before delivery to \( W \), and \( M \) has an Article 9 security interest. It is clear that \( M \), when unsecured, has the right to any profits made on resale of the goods as against both \( W \) and \( L \). The only remaining issue is whether that result is changed if \( M \) has taken and perfected an Article 9 security interest.

\( W \), once again, seems to be foreclosed from exercising any rights under Article 9. \( M \) can reclaim and resell the goods relying only on its rights under Article 2,\(^{123} \) and \( W \) has no claim under that Article to any profits made on the resale.\(^{124} \) \( M \)'s rights are not absolutely clear, however, and some question concerning those rights is raised by one possible interpretation of section 9-113. An argument can be made on the language of that section that Article 2 default rules are to apply only if the goods have not been delivered to the buyer and the seller has a security interest solely under Article 2.\(^{125} \) Since \( M \) does not have a security interest solely under Article 2, section 9-113

---

122. See Jackson & Peters, supra note 6, at 946 (anomalous to allow buyer's rights to turn on the presence or absence of secured parties with rights in the goods); Jackson & Kronman, supra note 6, at 24.

123. U.C.C. §§ 2-705, 2-706.

124. Id. § 2-706(6).

125. See Weingarten, supra note 67, at 554 ("So long as these interests arise solely under the Article on Sales and so long as the [buyer] . . . does not have possession of the goods . . . the rights of the secured party on default are governed by the Article on Sales.").
could be read to prohibit M from exercising its right to retain profits under Article 2. Comment 5 to section 9-113 seems to foreclose the possibility of that interpretation, however. The "security interest solely under the Article on Sales" language is not a condition to the seller's exercise of default rights pursuant to Article 2; it is rather a condition to the application of section 9-113 in the first place. Since section 9-113 does not apply, according to Comment 5, M retains all of its rights under Article 2 even though it has taken an Article 9 security interest. Only if M exercises rights given only by Article 9 is it subject to W's rights to excess proceeds of resale. Thus, M utilizes only its Article 2 default rights and is entitled to retain those proceeds.

A similar argument applies to M's rights as against L. M as a seller retains all its Article 2 rights even though it has also taken an Article 9 security interest, and the argument that Article 2 should not grant default rights to L remains the same.

There remains the intuitive feeling, however, that M's Article 9 interest should make a difference. M has gained something by taking an explicit security interest, and it seems equitable that it should have to give something in return, such as its right as against secured parties to retain the profits from resale of the goods. Such an argument, however, founders on analysis. The primary benefit gained by M from taking an Article 9 security interest is more certainty concerning its priority position in the goods. But for default purposes, the only real benefit is the section 9-503 right to repossess the goods after W has gained possession. In exchange for that right, M does give up its right to excess profits. Before the goods have been delivered, however, M derives almost no default benefits from Article 9, and it should not bear any of the burdens of that Article either. Therefore, even in the situation in which the seller has taken an Article 9 security interest, it retains its right to profits made on resale as against both the buyer and other secured parties.

126. "[A] seller who reserves a security interest by agreement does not lose his rights under the Sales Article, but rights other than those conferred by the Sales Article depend on full compliance with this Article." U.C.C. § 9-113, Comment 5.

127. By taking and perfecting a consensual Article 9 interest prior to the delivery of goods to the buyer, the seller has ensured its priority position as a purchase money secured party as against all other secured parties, so long as it complies with the notice provisions of § 9-312(3) for goods classified as inventory. For a discussion of the panoply of conflicts with secured parties faced by a seller that does not take such an interest, see Jackson & Peters, supra note 6, at 955-83.

128. It has been suggested that Comment 3 to § 9-504 lends force to the argument.
CONCLUSION

This analysis of the default rules under Articles 2 and 9 of the U.C.C. has shown how the major differences relate to the relative rights of the buyer, seller, and secured parties to any increase in value of the goods over the sales price. After careful analysis, it has concluded that Article 2 rules give such price benefit to the seller at all times before delivery, and that the Article 9 rules give the benefit to the buyer and third parties after the goods have been delivered to the buyer. Whether the seller has taken an Article 9 security interest makes no difference in either result.

The one exception to the above rules involves the seller’s right under section 2-702(2) to repossess goods delivered to the buyer while insolvent. Such a factual situation is a kind of bridge between the pre- and post-delivery cases, and the policy issues are more closely balanced. Although the conclusion is that the Article 2 default rights should apply in such a case, Article 2 recognizes the equities in favor of some secured parties by granting them priority over a section 2-702(2) reclaiming seller.

The general pre-delivery/post-delivery result is in keeping with the overlap of the broad policies distinguishing Articles 2 and 9.129 Article 2 applies to sales transactions, in which the seller’s major focus is on performance of the contract. Article 9 deals with secured transactions, in which the secured party takes an interest in the goods mainly to secure the payment of a debt. In secured party-seller transactions, this distinction blurs, because the payment secured by the Article 9 interest is the same as the buyer’s obligation to be performed in the Arti-

---

that Article 2 default rights should apply to transactions for the purchase and sale of goods without regard to whether one of the parties also has a security interest in the goods. See Jackson & Kronman, supra note 6, at 3 n.12. That Comment, and the language of § 9-504(2) mandate that any surplus after resale of chattel paper taken as collateral by sale belongs solely to the buyer, even though all transactions involving the sale of chattel paper are otherwise governed by the usual Article 9 rules. U.C.C. § 9-102(1)(b). The language of the Comment indicates that this rule could be extended to all sales that come within Article 9’s coverage, arguably implying that Article 2 rights should apply to such other secured sales, but that language is too broad. The problem is that the rule concerning surplus on resale of chattel paper is accompanied by a rule barring deficiency judgments. Because the Article 2 seller has rights both to any surplus on resale and to a deficiency judgment, the policies inherent in § 9-504(2) and Comment 3 to that section have minimal application to this problem.

129. “Article 2 is primarily devoted to insuring performance of the contract of sale . . . . Article 9 is seemingly exclusively devoted to securing the performance of obligations or payment of debts.” Speidel, supra note 6, at 303. See 2 G. Gilmore, supra note 9, § 432, at 1185-89.
article 2 transaction. In response to this blurring, the Code has given the Article 2 seller certain rights in the goods to ensure payment of that obligation. Such rights are, theoretically and functionally, Article 2 rights, and carry along with them the sales rule for rights to the increased value of the goods. However, such rights are extinguished on delivery of goods to the buyer; thereafter Article 9, with its focus on security for the debt, and its corresponding rule that any increased value of the goods goes to the buyer and secured parties, provides the seller's only tool for maintaining an interest in the goods. The conclusion reached in this article reflects this underlying Code principle.

This conclusion also reflects the specifics of the Code treatment. Some defects are evident, particularly in the treatment of secured parties' rights to the profits on resale when the goods have not been delivered to the buyer. Section 2-706(6) should probably be amended to read: "the seller is not accountable to any other party for any profit made on resale." Section 2-403(4) might also be amended to make clear its focus on priority rights of the parties. Such amendments would be unnecessary if a simple change were made in Article 9. The fundamental uncertainty in this entire area revolves around the meaning of the phrase, "the debtor has rights in the collateral." An amendment stating that the debtor has no rights in goods purchased prior to gaining possession of those goods would neatly resolve the entire conflict. Such a change might remove some interests from secured parties, but security agreements as generally drafted do not call for rights in the goods prior to the buyer's possession in any case. The benefits of such an amendment in increased certainty of the seller's rights would easily outweigh the diminution in secured parties' collateral.

In lieu of such a change, businesses and courts will have to ensure the correct result. In order to protect their Article 2 rights, sellers will have to provide in their sales contracts that the buyer gains no rights in the goods prior to possession or, in the alternative, discover whether its buyers have any secured creditors with extremely broad security interests. Either of

---

130. U.C.C. § 9-203(1)(c).

131. Anzivino, supra note 73, at 44-52, argues that the buyer cannot have rights in the collateral even under the Code's present version until it gains possession of the goods. The Anzivino article suffers from a mistaken concept that "rights in the collateral" means "priority rights in the collateral," and is contrary to the weight of authority. See 1 G. Gilmore, supra note 42, § 11.5, at 353; Hogan, supra note 6, at 577. Therefore, an amendment to Article 9 would be necessary to ensure the desired result.
these courses of action may be too great for the admittedly minor risk involved, but it is a risk that ought to be consciously weighed by sellers. Courts, for their part, should continue the task of shaping Code interpretations to meet the needs of commercial transactions. The correct result in this conflict is fairly clear; the U.C.C. should be shaped to reach it.

---

132. As argued previously, one way for a seller to ensure its right to excess proceeds upon resale after default is to provide in the agreement with the buyer that neither risk of loss nor title will pass to the buyer until delivery. See note 121 supra. This approach obviously imposes cost on the seller, which may or may not be fully compensated by a change in the sales price.

133. "[R]easonably construed, with a sense of history as well as of the present, a code can . . . aid the growth of the commercial world by a combination of guidance and flexibility." Jackson & Peters, supra note 6, at 985.