

UNIFORM COMMERCIAL CODE COMMENTARY

CONSIGNMENTS, CREDITORS' RIGHTS AND U.C.C. SECTION 2-326

Section 2-326 of the Uniform Commercial Code is intended to regulate the rights and liabilities of parties involved in consignment transactions.¹ It is the purpose of this comment to examine the issues and problems presented by section 2-326 as interpreted by the courts and to suggest changes in its provisions in order to fulfill the purposes and policies reflected in the section.

Prior to the U.C.C. it was generally held that the consignee's creditors had no claim against the consignor if the consignee's assets were inadequate to satisfy their respective claims.² This was so despite the fact that the consignor was not required to record the transaction or give notice that he retained title to the goods.³ The basic reason for ruling in the consignor's favor was that title had not passed to the consignee and the creditor could not secure an interest in or attach any goods to which the debtor did not have title. This decisional law placed a creditor of the consignee in an unfavorable position, particularly if he had relied on the consignee's possession of consigned goods and failed to ask for proof of ownership. It was difficult for a creditor to discover a consignment because the consignor was not required to give notice in order to protect his interests. For example, if a consignee presented his goods as collateral for a loan, the creditor who relied on the consignee's possession would have no protection if the goods involved were consigned.

The problem raised by reliance on a consignee's possession was aggravated with the adoption of the Code. Section 2-401, by stressing that passage of indicia of title is no longer essential to the passage of ownership rights, limited the opportunity for a creditor to rely on a certificate of title as proof of the consignee's ownership. Thus, with this new emphasis on possession, even a creditor's request of the consignee to produce his certificate of title may be futile since legal title can pass without such a certificate.

Section 2-326 is intended to alleviate this problem since its purpose is to protect creditors from the problems of the consignee's ostensible ownership

¹ In the consignment transaction, the consignee does not pay for the goods until they are sold. What ordinarily happens is that the goods are delivered by the consignor to the consignee and they remain in the latter's possession until sold or returned. If the goods do not sell, then the consignee may elect to return them and he pays nothing to the consignor. See U.C.C. § 2-326, Comment 1. All Code citations are to the 1962 Official Text, unless otherwise indicated.

² See, e.g., *Ludvigh v. American Woolen Co.*, 231 U.S. 522 (1913); *In re Praegar*, 173 F. Supp. 859 (D.N.H. 1958); *Cobb Exch. Bank v. Byrd*, 108 Ga. App. 825, 134 S.E.2d 871 (1964).

³ See Kennedy, *Trustee in Bankruptcy Under the U.C.C.: Some Problems Suggested by Articles 2 and 9, in 1 Secured Transactions Under the U.C.C.* 1051, 1103 (1963).

described above.⁴ Treating any consignment not intended as security as a "sale or return" transaction,⁵ section 2-326(2) clearly states that goods held on sale or return are subject to the consignee's creditors while the goods are in the consignee's possession. Section 2-326(3) sets out general guidelines for identifying a sale or return transaction,⁶ while subsections (a), (b), and (c) note methods by which the consignor's interest may be protected.⁷

While the language of section 2-326 clearly indicates an objective of compromise between protection of the consignee's creditors and the interest of the consignor, many problems of interpretation and applicability have arisen in the pursuit of this objective.

One such problem is determining whether a particular transaction is, in fact, a sale or return and therefore governed by section 2-326. This problem arises primarily when the transaction is arguably intended as merely the retention of a security interest in the goods consigned. Combining the two applicable sections of the Code, 1-201(37)⁸ and 9-102(2),⁹ it is stated that whenever the goods are in the possession of the consignee Article 9 will apply if the consignment is "intended as security," and Article 2 will apply if the arrangement is not "intended as security."¹⁰ Section 1-201(37) sets out that consignments are not security interests unless intended as security, while section 9-102(2) clearly states that Article 9 governs consignments intended as security.

⁴ See U.C.C. § 2-326, Comment 2; Hawkland, *Consignments under the U.C.C.: Sales or Security?* in *Uniform Commercial Code Co-ordinator* 395, 400 (1963).

⁵ See Kennedy, *supra* note 3, at 1104.

⁶ U.C.C. § 2-326(3) states:

Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum." However, this subsection is not applicable if the person making delivery

- (a) complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign, or
- (b) establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others, or
- (c) complies with the filing provisions of the Article on Secured Transactions (Article 9).

⁷ Hawkland, *supra* note 4, at 401.

⁸ U.C.C. § 1-201(37) states, "Unless a lease or consignment is intended as security, reservation of title thereunder is not a 'security interest' but a consignment is in any event subject to the provisions on consignment sales (Section 2-326)."

⁹ U.C.C. § 9-102(2) states, "This Article applies to security interests created by contract including . . . consignment intended as security."

¹⁰ See Hawkland, *supra* note 4, at 401-03. As Dean Hawkland points out, it is important to know whether Article 2 or Article 9 applies as they do differ. For example, § 2-201 has a \$500 minimum in its statute of frauds while § 9-203 has no minimum and the statute of frauds will apply unless the collateral is in the possession of the consignor or the consignee has signed a security agreement. A second difference is that there are no rules of creditor priority in Article 2 and thus there is no certainty that the same priority as set out in Article 9 will be followed.

This problem did not exist under the 1952 Code since section 1-201(37), at that time, included all consignments as security interests.¹¹ Under the present Code, however, the question of intention is all important and presents a difficult problem of legal and factual determination. A case exemplifying this problem is *McDonald v. Peoples Auto. Loan & Fin. Corp.*¹² in which cars were delivered to a dealer who obtained a loan on his increased inventory. The wholesaler held the title certificate with the understanding that they would be delivered to the dealer upon payment of the purchase price. However, bills of sale were turned over to the dealer and he used these to obtain the loan. On this one set of facts, the majority and the concurring opinion reached entirely different results as to the nature of the transaction. The majority opinion stated, without elaboration, that section 2-326 was inapplicable and proceeded on the assumption that Article 9 governed the case. In a similar cursory treatment, the concurring opinion concluded that the cars were delivered on consignment and therefore section 2-326 should apply. Neither opinion analysed the type of transaction involved, and the "intended as security" issue was completely overlooked.

In an effort to avoid mere conjecture as to the question of intention in each particular case, various tests have been devised by writers and the courts. One such test, devised by Dean Hawklund, envisions two purposes of consignments.¹³ The first is as a device for consignors to obtain a market when a dealer is unwilling to risk marketing the goods.¹⁴ In this type of transaction, the goods are delivered to the consignee with the agreement that they may be returned to the consignor if they fail to sell. Since the consignee does not pay for the goods until they are sold, the consignor assumes a risk because he gives up his possession without receiving the "security" of payment. In place of payment, the law "secures" the consignor's interest by allowing him to retain "title" to the goods. The role played by the reservation of title leads Dean Hawklund to call this type of transaction a "security" consignment.¹⁵ The second function of consignments is to effect retail price maintenance.¹⁶ While antitrust laws prohibit many price fixing arrangements between manufacturer and retailer, a consignment is a bailment situation in which the goods continue to belong to the consignor even though the consignee has possession of them. Thus, the consignor can set his own prices since the antitrust laws do not prevent one from fixing the price of his own goods.¹⁷ Because the object of this type of consignment is to fix prices, the consignor insists on a particular price and constantly checks the compliance with the arrangement. The courts view this type of transaction as a section 2-326 consignment according to Dean Hawklund and not as a security transaction.¹⁸ These two functions form the basis for this "intended as security" test. If the particular consignment involved is intended as a marketing con-

¹¹ U.C.C. § 1-201(37) (1952 version).

¹² 154 S.E.2d 886 (Ga. App. 1967).

¹³ See Hawklund, *supra* note 4, at 397-400, 403-05.

¹⁴ *Id.* at 404.

¹⁵ *Id.*

¹⁶ *Id.* at 399, 404.

¹⁷ *Id.* at 399.

¹⁸ *Id.* at 400, 404-05.

cession to the dealer, a security transaction is involved, and Article 9 would govern. If the consignment is intended to fix prices, on the other hand, it would be a "true consignment," not "intended as security," and Article 2 would govern. Under this functional approach all one has to do is decide which function is "intended" and the problem is solved.

The test, however, is inadequate when generally applied since some transactions may include elements of both functions.¹⁹ Dean Hawkland seems to believe that the consignor and consignee will both view the consignment as fulfilling the same function. This may not always be true. The consignor may want to fix his own prices, but it may well be that the consignee views the transaction as one intended primarily for the purpose of securing a market for the consignor's goods. If both intentions are involved, the test leaves the problem completely unanswered because the court will be unable to place the consignment in one category in order to determine which Article will apply. In addition, even if the parties do intend only one function, it may still be very difficult for a court to decide which function is actually intended because the original intention may not succeed when the consignment is effectuated. For example, although price fixing was intended, the consignee may lower the price to get more business, and the consignor may not object because of a resulting rise in sales. A court would have difficulty finding a price-fixing consignment if, in fact, it is the consignee who has set the price.

A second test, rejecting the Hawkland test, suggests that, in determining the intent of the parties, the court should look beyond the practical function of the transaction and examine the financial position of the consignee, the past practices of the parties, and the agreement itself.²⁰ However, even if employed in conjunction with Dean Hawkland's functional approach, these factors may still be inconclusive. For example, if the parties had never dealt with each other the test is severely narrowed. Further, their financial position may give no clues as to the nature of the transaction. Of course, if the consignee were financially sound there would be less fear of a misappropriation of the goods, and the consignor would have little reason to look to the reservation of the title to secure his interest. This approach cannot be conclusive, however, because the consignor may want to secure his interest regardless of the consignee's financial position. Finally, any examination of the agreement may be unreliable. It could be just a facade designed to permit the "consignor" to get priority over the goods.

A better approach is suggested by a recent case which did consider the "intended as security" issue.²¹ This case held that the parties' intentions should be construed in light of the facts and circumstances existing when the contract was signed. Under this approach, *all* factors which shed light on the parties' intent would be considered. Examples of such factors include: (1) the type of goods involved; (2) the size of the consignee's clientele; and

¹⁹ Comment, Commercial Transactions: Consignors, Creditors and the U.C.C., 19 Okla. L. Rev. 407, 411 (1966).

²⁰ Id.

²¹ *In re Transcontinental Indus., Inc.*, Bankruptcy Nos. 51115, 51503, 3 U.C.C. Rep. Serv. 325 (N.D. Ga. Oct. 29, 1965).

(3) the general community practice of marketing similar goods. If the goods are easily sold, the consignor will have less cause to be concerned with securing his interest because the consignee will remain solvent and will wish to continue his relationship with the consignor. These facts may indicate a consignment governed by section 2-326. The size of the consignee's clientele may add to this effect. If the clientele is large and affluent the goods are more likely to sell, and again the consignor will have less need to secure his interest. Finally, a consideration of the current community practices in marketing similar goods may aid a court confronted with a difficult factual situation in deciding the type of consignment involved.

A second problem concerning the applicability of section 2-326 centers around the meaning of the phrase "buyer's possession" in section 2-326(2). Specifically, section 2-326(2) states that "goods held on sale or return are subject to such claims while in the buyer's possession," and section 2-326(3) provides, "Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved . . . then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return." Although the goods must be in the buyer's possession for the creditor to prevail, a problem arises if the goods are not physically located at the consignee's place of business. Suppose, for example, that the consigned goods are in various stores and warehouses not owned by the consignee and all he has are inventory sheets stating the location of the goods. Whether "possession" demands that the consignee have the goods at his place of business or whether the inventory sheets are adequate to protect the creditor under section 2-326 is an important interpretive question.

The first interpretation was followed in *In re Mincow Bag Co.*²² There the consignor delivered goods to specified chain and department stores throughout the country. The stores were to remit the sales proceeds to the consignee after the goods were sold. The court held that since the sales were not made at the consignee's place of business nor made by the consignee at the department stores, section 2-326 was not applicable to the case. While this result may follow from an interpretation of the language defining "possession" to mean "actual possession," it is arguable that such an interpretation is too restrictive in light of the purposes behind section 2-326. The court in *Mincow* stated that

the section was intended to cover a situation where the possession and offering for sale of another's merchandise presumably led to extensions of credit in the belief that the merchandise was owned by the possessor. No such extensions of credit to *Mincow* can reasonably be presumed to have resulted, however, from the possession and sale of [the consignor's] merchandise by chain stores scattered throughout the country.²³

While the first sentence is a fair statement of section 2-326's purpose, the

²² 279 N.Y.S.2d 306 (Sup. Ct. 1967).

²³ *Id.* at 308.

second sentence, if applied generally, would undercut and restrict the goal of protecting unwary creditors.

It is realistic to assume that a consignee, like the one in *Mincow*, could maintain a large business by handling goods on consignment and using department stores as his selling agents. The consigned goods would probably be recorded on documents denoting his stock in trade which he could present to a creditor to show the existence of collateral for a loan. If these notations did not indicate that the goods were on consignment, the creditor would probably assume that they were owned outright by the consignee. This is exactly the type of situation that section 2-326 purports to cover since the consignee's ostensible ownership would deceive an innocent creditor who relied on, in this case, "constructive" possession. For example, consider two consignees, one who has the goods in a department store, and the other who keeps the goods in his own stockroom. There is no logical reason to include the latter within the coverage of section 2-326 and not the former since in both cases it is a concealed consignment that creates trouble and in both cases the consignment can be effectively concealed. Even a cautious creditor who calls the department stores to check on the existence of the goods may not uncover the consignment unless he specifically inquires about the consignee's activities. It is submitted, then, that the consignee's possession of documents which indicate an ostensible ownership of goods is as deceptive to the unwary creditor as the consignee's actual possession of the goods, and that "constructive" possession should be included within the meaning of "buyer's possession." To insure that the court's interpretation will be sufficiently broad, section 2-326(2) should be amended to read, "[G]oods held on sale or return are subject to such claims while in the buyer's possession or under a certificate indicating the buyer's right to possession."

Another problem faced by the courts in determining the applicability of section 2-326 is the interpretation of the requirement that the consignee deal "in goods of the kind involved." The ambiguity of this phrase, which could mean anything from an exact kind to a general class of goods, presents a practical problem of just how broadly a court should construe it. A case exemplifying this problem in interpretation is *General Elec. Co. v. Pettingell Supply Co.*²⁴ A dealer received a consignment of large industrial lamps. The problem arose because only these industrial lamps were on consignment and they amounted to only 25% of the consignee's business. Thus, it might be argued that the consignee is not a dealer in "goods of the kind involved" and, therefore, the transaction is not governed by section 2-326. For example, if the remaining 75% of the consignee's business were in household bulbs, a narrow interpretation would hold the consignee to be a dealer in household bulbs and not in industrial lamps. The court in *Pettingell*, however, interpreted the phrase broadly and stated that "goods of the kind" does not restrict the relevant business to dealing in the precise kind of electrical goods. They saw the consignee not as a dealer in large lamps, but rather as a seller of electrical merchandise generally and, therefore, held the section applicable.

There are analytically, two distinct problems with the phrase "goods of the kind." The first problem arises from the purpose of section 2-326 to

²⁴ 347 Mass. 631, 199 N.E.2d 326 (1964).

protect creditors. If the courts narrowly interpret the phrase to mean "goods of an exact type" rather than "general class," this purpose will not be carried out. For example, if a television dealer has sold one brand for years and obtains a loan against a small amount of a second brand which has been received on consignment, the court should recognize, in applying section 2-326, that the consignee is a television dealer and not draw subtle distinctions such as the name brand. Instead, the court should primarily decide whether the consignee's possession of the goods was sufficient under the circumstances to deceive a creditor. The second problem arises from the expectations of consignors who look to the Code for guidance. If a consignor is unable to predict whether a court will construe "goods of the kind" narrowly or broadly, he will not be sure in close situations whether section 2-326 will govern the transaction. Thus, he will not know whether to comply with the section's perfecting²⁵ provisions. Take, for example, a consignee whose sales in consigned large lamps are only 1% of his business while the other 99% consists of selling industrial machinery. While an interpretation limiting the meaning of the phrase to "exact type of goods" would not find him a dealer in large lamps, extending the meaning of the phrase to "general class of goods" might find him a dealer in industrial supplies and include large lamps among them. The latter interpretation would invoke section 2-326 while the former would exclude it.

To resolve these problems, the phrase "goods of the kind" should be changed to promote only a broad interpretation. This would comport with the purpose of section 2-326 and would protect the consignor's expectations by limiting the potentiality for diverse interpretation. It is submitted, then, that section 2-326(3) be amended to read, "[G]oods of the general kind involved." Although still open to interpretation, this change should discourage courts from reading the phrase to mean "goods of the exact type" and thereby promote the adoption of interpretations including a broader class of goods.

A further problem in determining the applicability of section 2-326 hinges on the requirement that the goods be delivered to the consignee "for sale." The following hypothetical will illustrate the difficulties posed. Suppose a television dealer handles five brands. Four brands are actually sold by him, but one brand is on consignment and is not sold but delivered to customers who negotiate directly with the manufacturer. In this way, the consignee becomes a mere distributor. This situation permits the same kind of deception which occurs when the unwary creditor lends money on an inventory of consigned goods. However, since the goods were not delivered "for sale" by the consignee, it is arguable that section 2-326(3) is not complied with and the creditor will not be protected. While it is also arguable that section 2-326 does apply by interpreting "for sale" to mean "for purposes of sale" by either the consignor or consignee, this is a broad interpretation and the courts have strictly interpreted other phrases in section 2-326.²⁶ In addition, the entire first sentence of section 2-326(3) concerns the consignee's

²⁵ "Perfecting" refers to the steps provided in subsections 2-326(3)(a), (b), and (c), whereby the consignor can protect his interest in the consigned goods.

²⁶ For an example of strict interpretation see discussion of the "possession" issue p. 66-67 *supra*.

business. This supports the interpretation that he is the one required to do the actual selling. The existence of conflicting interpretations at least shows the ambiguity in the phrase as it now stands.

This problem was brought up in *Pettingell*, but wasn't decided because 26% of the consignee's receipts of the disputed goods were direct sales and therefore complied with the "for sale" requirement. Suppose, however, that none were direct sales and thus the consignee became a pure distributor. One writer feels this wouldn't have mattered and the creditor would have been protected anyway.²⁷ This is a sensible view and does comport with the purpose of section 2-326 because the creditor may be deceived by the fact that the goods are in the distributor's possession regardless of whether his ultimate authority is to sell or distribute them. Thus, if the courts do address themselves to the purpose of section 2-326 rather than handle the problem on a purely technical and semantic basis, the above interpretation should prevail. However, since the courts may react restrictively,²⁸ it would be advisable to change the U.C.C. to include the words "or distribution" in section 2-326(3). Such a change would read, "Where goods are delivered to a person for sale, or distribution, and such person"

Once the question of the applicability of section 2-326 to the particular transaction has been determined, the court must consider whether the consignor has protected himself from the consignee's creditors. Under sections 2-326(a), (b), and (c) the consignor is protected if he:

- (a) complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign, or
- (b) establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others, or
- (c) complies with the filing provisions of the Article on Secured Transactions (Article 9).

Various interpretive issues have developed in applying these provisions.

The first question involves the interpretation of subsection 3(a) which provides for perfection by complying with an applicable sign law. The application of this subsection unfortunately may lead to an inequitable result as illustrated by *In re Downtown Drugstore, Inc.*²⁹ Two record racks in the store had a label stating that the records belonged to the consignor. The referee pointed out that Pennsylvania has no statutory provision for sign laws and therefore held that the consignor was not protected under section 2-326(3)(a). This indicates that a consignor, although posting clear notice of the consignment, would go unprotected under this provision unless the particular jurisdiction had an explicit statute allowing such a procedure. Exemplifying this inequitable result, suppose a consignor had the same sign

²⁷ Comment, Commercial Transactions: U.C.C. Section 2-326 and Creditor's Rights to Consigned Goods, 65 Colum. L. Rev. 547, 549-50 (1965).

²⁸ Although U.C.C. § 1-102(1) states, "This Act shall be liberally construed and applied to promote its underlying purposes and policies," this does not guarantee such an interpretation. The buyer's "possession" issue, as noted above, exemplifies an interpretation which is not in conformity with this general guideline.

²⁹ Bankruptcy No. 28442, 3 U.C.C. Rep. Serv. 27 (E.D. Pa. Nov. 3, 1965).

on identical merchandise in two states. One sign should not be adequate and the other inadequate simply because only one state has a sign law. This strict adherence to a statutory provision is also disturbing in light of the fact that the 1956 Recommendations to the Code actually increased the possibility of consignors using a sign. The Code was changed from laws "requiring" signs to laws "providing for" signs. While this did enlarge the category of such laws, the Permanent Editorial Board stopped short of making such laws unnecessary.

In addition, problems may well arise under subsection 3(a) with respect to the expectations of future consignors. If they look to the U.C.C. for guidance in perfecting their interests, they may think that since their state has adopted the subsection, it is a valid way to perfect. In this way a consignor could think he was protecting himself, yet fail to do so. This problem of misleading the consignor is especially important since few states have sign laws,³⁰ yet only California has omitted subsection 3(a) from the Code.³¹ Therefore, it would be wise to change the Code and make the requirement one of adequate notice to the creditor rather than the existence of an explicit statutory sign-law provision. The reason for this lies in the purpose of section 2-326; if the creditor is actually warned, the section should not protect him since he is no longer deceived by the consignee's possession. Thus, the amended section might read, "provides by a conspicuous sign notice of the consignor's interest." This change should resolve the problem with subsection 3(a) as it now stands.

A similar problem of interpretation and application arises in connection with the operative effect of section 2-326(3)(b) on the expectations of the parties. Under the subsection a consignor is protected if the consignee is "*generally known* by his creditors to be *substantially engaged* in selling the goods of others." (Emphasis added.) The italicized phrases are so general that few potential consignors could be confident that their interests would be protected.³² As an example of the problem, *In re Griffin*³³ should be reviewed. In this case, the consignee, in addition to his furniture cleaning business, sold new and used furniture which was advertised by a sign in his store window. The used furniture was consigned to him and trouble developed when the consignee's landlord levied on all the goods for delinquent rent. This led to litigation between the consignors of the used furniture and the landlord. The court, by grouping several factors together, found subsection 3(b) to be complied with and therefore protected the consignors. These decisive factors were: (1) furniture cleaning could only apply to others' property; (2) there was no new furniture on the premises; (3) new *and used* furniture was on the sign, thereby giving notice that what was being disposed of were the articles of others. Since a potential consignor may not

³⁰ See 2 W. Hawkland, A Transactional Guide to the Uniform Commercial Code 753 (1964).

³¹ This confusion was the precise reason California omitted subsection 3(a). See Committee on the Commercial Code of the Cal. State Bar, The Uniform Commercial Code, 37 Cal. S.B.J. 117, 136-37 (1962).

³² See Kennedy, *supra* note 3, at 1107; Hawkland, *supra* note 28, at 748.

³³ 1 U.C.C. Rep. Serv. 492 (W.D. Pa. April 28, 1960).

even think of such an outcome, let alone depend on it, his ability to rely on the section for protection may be extremely limited. Indeed, it may be inferred from the ambiguity of the subsection that it was intended to protect the unwitting consignor if a court found, in retrospect, that he complied with section 2-326. Although such an intention would protect the consignor in some situations, it restricts the subsection's usefulness as it offers little help to the potential consignor who looks to the Code for protection.

The outcome of these problems is that, in most states, the consignor who follows the Code is virtually forced to file under subsection 3(c). This is not a bad result, however, because filing certainly affords adequate protection for the consignor. In fact, if a valuable amount of goods are involved, filing is perhaps the only satisfactory way for a consignor to protect himself. The other subsections, even if amended, would not always offer the same degree of reliability. In some situations, however, filing may be too expensive, or otherwise impractical. The draftsmen of the Code seem to have recognized this when they expressly provided alternatives.

The reasoning in *Griffin* suggests a possible solution and a more viable alternative to filing. The court stressed notice and the importance of the sign, seemingly combining subsections 3(a) and 3(b). Such a step would result in one section with the sole requirement being adequate notice to creditors without specifying precisely how such notice is to be given. The amended section might state that the consignor is protected if he, "provides adequate notice to creditors of the consignor's interest." While filing would still be preferable in many cases because it avoids the doubts one may have about what constitutes adequate notice, the combination of 3(a) and 3(b) still offers a better alternative than the present Code. This conclusion is based on the fact that adequate notice includes not only actual notice but knowledge of facts that give a "reason to know" that some fact exists.³⁴ This is an objective test with the issue being "would a person in the position of this person have had reason to know the crucial fact?"³⁵ This alternative could be especially useful if a small amount of consigned goods are involved in a state with no sign law.

This comment has sought to analyze the various issues that have arisen under section 2-326. The major problems involve the interpretation of various phrases in the section to determine its applicability to particular factual situations; and the interpretation and application of the provisions protecting the consignor's interest in the consigned goods. The resolution of these problems, which the suggested interpretations and amendments are designed to promote, should make section 2-326 a more meaningful guide to consignors, consignees and their creditors.

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³⁴ See U.C.C. § 1-201(25), for the Code definition of "notice."

³⁵ Mentschikoff, Highlights of the Uniform Commercial Code, 27 Modern L. Rev. 167, 169 (1964).