

PROTECTION OF A BUYER AT AN EXECUTION SALE UNDER U.C.C. SECTION 9-307

In *National Shawmut Bank v. Vera*,¹ the Massachusetts Supreme Judicial Court was faced with a question of first impression under the Uniform Commercial Code: whether a creditor who purchases at his own execution sale is entitled to protection, as a buyer under Section 9-307(2) of the Uniform Commercial Code, against a perfected but unrecorded purchase-money security interest.² Since the decision of the Massachusetts court may well be followed in other jurisdictions due to the Code's policy of uniformity,³ it is necessary to fully analyze the rationale and result in *Vera*.

I. THE PRINCIPAL CASE AND ITS EFFECT

National Shawmut, the plaintiff in the principal case, held a purchase-money security interest in an automobile bought by one Gomes from the Howard Motor Company. The purchase-money security interest was obtained by the plaintiff through an assignment by the Howard Motor Company and was perfected⁴ without filing under section 9-302(1)(d). The defendant Vera, a judgment creditor of the debtor, caused an attachment of the automobile. At the subsequent execution sale, the defendant bought the automobile without knowledge of the purchase-money security interest held by the plaintiff. Shawmut, claiming that under section 9-503 of the Code its perfected purchase-money security interest entitled it to immediate possession of the automobile,⁵ brought an action to recover. The defendant, in response, contended that he was entitled to possession free of the plaintiff's purchase-money security interest because, under section 9-307(2),⁶ a buyer of consumer goods who buys for his own personal, family, or household purposes, for value, and without knowledge of the security interest,

¹ 1967 Mass. Adv. Sh. 237, 223 N.E.2d 515 (1967).

² U.C.C. § 9-107 (All citations to the Code are to the 1962 Official Text) states:

A security interest is a "purchase money security interest" to the extent that it is

- (a) taken or retained by the seller of the collateral to secure all or part of its price; or
- (b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

³ U.C.C. § 1-102(2)(c).

⁴ "Perfection" means that the secured party has taken all of the steps required by section 9-303, and as such is generally protected against creditors and transferees of the debtor. U.C.C. § 9-303, Comment 1.

⁵ U.C.C. § 9-503 states in part, "[u]nless otherwise agreed a secured party has on default the right to take possession of the collateral."

⁶ U.C.C. § 9-307(2) states:

In the case of consumer goods . . . a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes . . . unless prior to the purchase the secured party has filed a financing statement covering such goods.

takes free of a perfected but unrecorded purchase-money security interest. The court held that a judgment creditor who buys at his own execution sale is not a "buyer" under section 9-307(2) and, consequently, the defendant did not take free of the plaintiff's purchase-money security interest. Shawmut was, therefore, entitled to immediate possession of the automobile under section 9-503.⁷

Noting that Article 9 does not define "buyer," the court held that "buyer" was included within the section 1-201(33) definition of "purchaser" vis-à-vis "purchase" as defined in section 1-201(32), and that such "purchase" transactions referred only to "voluntary transactions." In addition, referring to writers who have contended that section 9-307(2) is restricted solely to transactions involving consumer buyers taking from consumer sellers, and, to a lesser extent upon pre-Code law, the court concluded that a judgment creditor was not a "buyer" as intended by section 9-307(2). According to the court, "buyer" in section 9-307(2) is limited in its definition to "innocent consumer purchasers of consumer goods, in wholly consensual and uncoerced transactions, from the original consumer purchaser."⁸ The court believed that a different construction presents the possibility of a purchase-money security interest's priority being defeated by a subordinate creditor. The creditor could cause an attachment of the collateral, and under section 9-307(2) buy at the subsequent execution sale free of the purchase-money security interest.

Although the court limits its decision to the judgment creditor buying at an execution sale, the requirement that the sale be "voluntary" applies just as logically to a typical consumer⁹ buying at an execution sale. The sale is no more "voluntary" when a typical consumer buys than when the judgment creditor buys. In both cases, the debtor is forced to sell by a process of attachment and execution. Thus, under the court's rationale, neither the attaching-creditor buyer nor the ordinary consumer buyer would be protected under section 9-307(2).

II. THE MEANING OF "BUYER" AND "PURCHASER" UNDER THE UNIFORM COMMERCIAL CODE

Section 1-201(33) defines "purchaser" as one "who takes by purchase" and "purchase" is defined in section 1-201(32) as including "*taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction* creating an interest in property." (Emphasis added). An examination of the definition of purchase as interpreted by the *Vera* court reveals two interrelated issues: (1) whether the "buying" of the goods at an execution sale is encompassed within the phrase "taking by sale" thereby including buyer within the definition of purchaser; and (2) whether the phrase "any other voluntary transaction" so qualifies "taking

⁷ 1967 Mass. Adv. Sh. at 243, 223 N.E.2d at 519.

⁸ Id. at 242, 223 N.E.2d at 519.

⁹ Goods are classified in U.C.C. § 9-109 according to the purpose for which they are held. Therefore, if a buyer at an execution sale bought goods primarily for "personal, family or household purposes," the goods in his possession would be "consumer goods" and he would be classified as a consumer.

by sale" that any provision of the Code pertaining to "taking by sale," such as section 9-307(2), refers only to "taking by sale" at a "voluntary transaction." An affirmative answer to both these questions logically results in the exclusion of buyers at an execution sale from the protection of section 9-307(2), since an execution sale is obviously not a "voluntary transaction."¹⁰

"Buyer" is explicitly defined only in Article 2, where it is defined rather broadly as one "who buys or contracts to buy goods,"¹¹ and "sale" is defined as the "passing of title from the seller to the buyer for a price"¹² These two sections clearly indicate that a "buyer" under Article 2 is one who "takes by sale." Furthermore, when the use of "buyer" or "buying" is traced throughout the Code, it will be noted that these terms are used *only* in regard to a person who takes by sale.¹³ Thus, it is evident that "buyer" is included within the broader classification of "purchaser" under section 1-201(33).

The meaning and effect of the phrase "any other voluntary transaction" in section 1-201(32) is not so clear. Since "buyer" seems restricted to a person "taking by sale," thereby placing him within the definition of "purchaser," the court's interpretation that "taking by sale" refers only to "taking by sale" in a "voluntary transaction" would necessarily mean that any Code reference to "buying," "buyer," "purchase," or "purchaser" is referring to wholly consensual and uncoerced transactions. However, many Code provisions dealing with "involuntary" transactions specifically refer to such terms as "purchase,"¹⁴ "purchaser,"¹⁵ and "buy."¹⁶ This logical inconsistency, alone, creates doubt as to the validity of the *Vera* court's interpretation.

However, an acceptance of the alternative conclusion that "taking by sale" or "buying" under the Code refers to "involuntary" as well as "voluntary" transactions forces the question of just why the phrase "or any other voluntary transaction"¹⁷ is included in the definition of "purchase" under section 1-201(32). In the New York Law Revision Commission Report on the Uniform Commercial Code, the comment on section 1-201(32) states that the definition of "purchaser" avoids the necessity of inserting an express reference in certain sections to a person acquiring an interest by a "gratu-

¹⁰ See *Motor Parts & Bearing Co. v. O.K. Rubber Welders, Inc.*, 251 Miss. 326, 331, 169 So. 2d 444, 445 (1964).

¹¹ U.C.C. § 2-103(1)(a).

¹² U.C.C. § 2-106(1).

¹³ See, e.g., U.C.C. §§ 2-401, 7-205, 8-303, 9-206.

¹⁴ E.g., U.C.C. § 3-302(3)(a) states: "A holder does not become a holder in due course . . . by purchase . . . at judicial sale. . . ."

¹⁵ E.g., U.C.C. § 9-314(3) states: "A purchaser . . . at a foreclosure sale . . . is a subsequent purchaser. . . ." U.C.C. § 9-504(4)(a) states: "The purchaser . . . in the case of a public sale. . . ."

¹⁶ E.g., U.C.C. § 9-504(3) states: "The secured party may buy at any public sale. . . ."

¹⁷ The phrase "or any other voluntary transaction" is new to the definition of "purchaser." None of the acts that are sources of the Code definition include the phrase. See Uniform Bills of Lading Act § 53; Uniform Sales Act § 76; Uniform Stock Transfer Act § 22; Uniform Trust Receipts Act § 1; Uniform Warehouse Receipts Act § 58.

itous voluntary transaction."¹⁸ By including "taking by gift" in the definition of purchaser, the Code has done away with the necessity of giving consideration in order to be considered a "purchaser." Therefore, the reference to "any other voluntary transaction creating an interest in property" may mean that, besides "taking by gift," any voluntary transaction considered sufficient to create an interest in property, *although gratuitous*, will make the one who receives the property interest a "purchaser." In other words, it is arguable that the phrase was inserted into the definition to cover transactions that are similar to "taking by gift,"¹⁹ but due to the exchange of some nominal consideration they "technically" are not. This proposition is supported by the fact that the phrase "voluntary conveyance" has long been used in real property cases to identify a conveyance made without "valuable consideration,"²⁰ such as a conveyance made in return for "one dollar, love and affection."²¹ It is arguable, therefore, that when the Code draftsmen added "or any other voluntary transaction" to the definition of "purchaser," their only intention was to modify "taking by gift" and not the other methods of "taking."

As shown by the foregoing analysis, however, an examination of sections 1-201(32) and 1-201(33) is far from conclusive in determining whether "buyer" under section 9-307(2) is intended to include buyers at an execution sale. Thus, it is both appropriate and necessary to examine section 9-307(2) as a reflection of the intent and policy of the Code in its protection of purchase-money security interests and consumer buyers.

III. SECTION 9-307(2) AS A REFLECTION OF CODE POLICY

A basic policy of the Uniform Commercial Code is to protect a security interest as long as it does not interfere with the normal flow of commerce.²² In addition, the purchase-money security interest is given a particularly favorable position in relation to the other security interests governed by Article 9.²³ This favoritism is evidenced by the general priority given a purchase-money security interest over other security interests,²⁴ and, of more significance to this discussion, by the exemption of certain purchase-money security interests from the requirement of filing.²⁵

¹⁸ 1 New York Law Revision Commission Report, Study of the Uniform Commercial Code 292 (1955) (hereinafter cited as NYLRCR).

¹⁹ The word "gift" is also new to the definition of purchaser since it does not appear in any of the prior acts. See Uniform Acts cited note 17 *supra*.

²⁰ See, e.g., *Hewett v. Continental Supply of Huntsville, Inc.*, 271 Ala. 660, 127 So. 2d 834 (1961); *London v. G.L. Anderson Brass Works*, 197 Ala. 16, 72 So. 359 (1916); *Vilas v. Seith*, 108 Vt. 526, 189 A. 862 (1937).

²¹ See, e.g., *Wells v. Smith*, 198 Ark. 476, 129 S.W.2d 251 (1939).

²² See Lee, *Perfection and Priorities under the Uniform Commercial Code*, 17 Wyo. L.J. 1, 34 (1962); Project, *California Chattel Security and Article 9 of the Uniform Commercial Code*, 8 U.C.L.A.L. Rev. 806, 898 (1961).

²³ See Coogan, *Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien"*, 72 Harv. L. Rev. 838, 861 (1959); Lee, *supra* note 22, at 21-22.

²⁴ See U.C.C. §§ 9-312(3), (4).

²⁵ U.C.C. § 9-302(1)(d) states: "(1) A financing statement must be filed to perfect all security interests except the following: . . . (d) a purchase money security interest in consumer goods; but filing is required for a fixture under Section 9-313 or

Encouraging the sale of consumer goods by allowing perfection of security interests without filing is not an innovation by the Code. Prior to the Code many jurisdictions did not subject conditional sales contracts in consumer goods to filing requirements.²⁶ What is "new," however, is the protection afforded the buyer of consumer goods who meets the qualifications of section 9-307(2), which allows him under certain circumstances to take free of a perfected but unrecorded security interest.²⁷ Section 9-307(2) was included by the drafters of the Code to partially counteract the favoritism given the purchase-money security interest under section 9-302(1)(d).²⁸ It should be noted that four states have deleted section 9-307(2) from their versions of the Code²⁹ on the ground that it excessively detracts from the protection given the secured party under section 9-302(1)(d).³⁰ The retention of section 9-307(2) by the rest of the Code jurisdictions,³¹ however, indicates a basic recognition that some degree of protection is needed for the consumer buyer against unrecorded purchase-money security interests.

In codifying this policy of protecting certain consumer buyers against unrecorded purchase-money security interests, section 9-307(2) has set out explicit criteria that must be met by the buyer in order to be protected. Specifically, he must buy without knowledge of the security interest, for value, and for his own personal, family or household purposes. Since section 9-307(2) does not explicitly require the transaction to be "voluntary," if a buyer at an execution sale is to be excluded from its protection it must be because he fails to meet the specific requirements of the section or because an underlying policy of the Code excludes such buyers from protection under section 9-307(2).

The requirements of section 9-307(2) offer no basis upon which a buyer in the normal sales transaction and a typical buyer at an execution sale can be distinguished. In the absence of any proof to the contrary, both must equally be considered to buy for value, without knowledge of the outstanding security interest, and for his own personal, family or household purposes. However, a comparison of the degree to which a buyer at a "typical" sale and the judgment creditor buying at his own execution sale fulfill the requirements of section 9-307(2) is a matter of greater complexity. Although it can generally be assumed that both buy for personal, family

for a motor vehicle required to be licensed" The Massachusetts version of the U.C.C. deletes the phrase "or for a motor vehicle required to be licensed." Mass. Gen. Laws Ann. ch. 106, § 9-302(1)(d) (1958).

²⁶ See U.C.C. § 9-302, Comment 4.

²⁷ See, e.g., 3 NYLRCR at 2059.

²⁸ See U.C.C. §§ 9-302, Comment 4, 9-307, Comment 3; 3 NYLRCR at 2059; Weingarten, Article 9 of the Uniform Commercial Code: Definitions and Rules of General Application, 9 Wayne L. Rev. 537, 611 (1963).

²⁹ Cal. Comm. Code § 9307 (West 1964); Okla. Stat. Ann. tit. 12A, § 9-307 (1963); Tenn. Code Ann. tit. 47, § 9-307 (Supp. 1966). Kansas has also omitted section 9-307(2). See Uniform Comm. Code § 9-307(2) (U.L.A. Supp. 1966).

³⁰ H. Marsh & W. Warren, Report on Proposed Amendments to the Uniform Commercial Code 9-43 (1961); 2 Permanent Editorial Board for the Uniform Commercial Code Rep. 213-14 (1965).

³¹ The Uniform Commercial Code has been adopted by all states except Louisiana, as well as by the District of Columbia and the Virgin Islands.

or household purposes, whether the judgment creditor buys for "value" and "without knowledge of the security interest" is open to question. Despite the fact that the judgment creditor can be said to have two "roles," one as a judgment creditor and the other as a buyer, he is still in fact one and the same person. On the basis of this conclusion, the value given by the judgment creditor was questioned in pre-Code cases, especially when he credited the amount he bid to the debtor's account rather than paying the money directly to the debtor.³²

Under the Code, however, it is evident that the controversy over whether a judgment creditor in such a situation actually gives "value" is resolved. Section 1-201(44)(b) states that "a person gives 'value' for rights if he acquires them . . . as security for or in total or partial satisfaction of a pre-existing claim . . ." The judgment creditor buying at his own execution sale thus acquires property rights in the item he buys by putting the money he paid toward the satisfaction of a debt, and by doing so he has given value.

The issue of whether a typical judgment creditor buying at an execution sale actually buys "without knowledge of the security interest" attracted the attention of the *Vera* court. Although the court acknowledged that the judgment creditor had no actual knowledge of the security interest,³³ it frequently referred to one who "innocently" buys, with the connotation that "innocence" is another requirement one must fulfill in order to be protected by section 9-307(2).³⁴ Thus, the court implied that a judgment creditor is not "innocent" since he is in a better position to receive notice of the security interest. This implication by the court that the judgment creditor has received "constructive knowledge" may, to a certain extent, be true. A creditor, since he is probably a businessman or financier acquainted with credit transactions, would be more likely than the ordinary buyer to have considered the possibility of cutting off an unrecorded purchase-money-security-interest priority in the collateral by buying at the sale.

However, section 1-201(25) specifically states that, "[A] person 'knows' or has 'knowledge' of a fact when he has actual knowledge of it." Thus, if courts begin to look into what motivated a particular commercial transaction, and begin presuming "good motivation" and "bad motivation," a precedent may be set whereby the lack of actual knowledge and honesty in fact are not enough,³⁵ thereby going beyond the explicit Code definition of a buyer's "knowledge." In the absence of factual distinctions peculiar to a particular case, the "knowledge" of an outstanding security interest by a buyer at an

³² Some courts held that crediting payment to the debtor's account was not giving value. E.g., *Mountain Home Lumber Co. v. Swartwout*, 30 Idaho 559, 166 P. 271 (1917); *Hughes v. Hess*, 141 Tex. 511, 516, 172 S.W.2d 301, 304 (1943). Others held it depended upon the facts of each case. E.g., *Samuel D. Wasserman, Inc. v. Klahre*, 24 N.J. Super. 143, 149, 93 A.2d 628, 631-32 (App. Div. 1952).

³³ 1967 Mass. Adv. Sh. at 237, 223 N.E.2d at 516.

³⁴ *Id.* at 241-42, 223 N.E.2d at 518-19.

³⁵ It has been emphasized that a reason the drafters of the Code limited the definition of "good faith," in section 1-201(19), to *honesty in fact* was because they felt that a stricter standard might place a "freeze" on commercial practices. Braucher, *The Legislative History of the Uniform Commercial Code*, 58 Colum. L. Rev. 798, 812 (1958).

execution sale should be considered to be no greater than "knowledge" by an ordinary consumer buyer.

Another contention relied on by the *Vera* court in excluding a buyer at an execution sale from the protection of section 9-307(2) was that the section was only intended to apply to sales whereby a buyer takes from a *dishonest consumer debtor*.³⁶ Although it might be proposed that a buyer at an execution sale is taking from the consumer debtor through a "forced" sale, thereby making the transaction one between two consumers, such a contention only establishes a fiction. The buyer at an execution sale does not deal with the consumer debtor, but, in reality, he bids at an auction conducted to execute the judgment of a creditor.³⁷ Therefore, since a buyer at an execution sale is not buying from a consumer debtor, under the *Vera* court's approach he will not be protected by section 9-307(2).

The court's contention that section 9-307(2) refers only to sales between a consumer-debtor and another consumer gains strong support from various writers on the Code, who state that the intent of section 9-307(2) is to deal with sales of consumer goods between a consumer buyer and a consumer seller.³⁸ This limited interpretation finds further support in the comment of the Permanent Editorial Board concerning the rejection of section 9-307(2) by California and Oklahoma. The Board stated that section 9-307(2) was of a "limited application," representing a compromise between those who favored complete protection for the purchase-money security interest and those who favored protection for the various classes of consumer purchasers unable to ascertain the existence of security agreements.³⁹ It is submitted that this "limited application" refers to a distinction between those protected under section 9-307(2) and those not protected, based on "from whom they buy."

A possible alternative interpretation is that "limited application" refers to the fact that not all buyers are protected, but only those buyers who fulfill the express requirements of section 9-307(2). Besides restricting the buyer solely to purchases of consumer goods, section 9-307(2) requires that he be a consumer, in that he must buy for his own "personal, family or household purposes." The requirements that the buyer must give "value" and be "without notice" merely iterate the historically developed requirements of the "bona fide purchaser."⁴⁰ Thus, any "compromise" limiting the various classes of consumers protected by section 9-307(2) was not accomplished by

³⁶ 1967 Mass. Adv. Sh. at 240-41, 223 N.E.2d at 517-18.

³⁷ E.g., *id.* at 237, 223 N.E.2d at 516.

³⁸ See 2 P. Coogan, W. Hogan, & D. Vagts, Secured Transactions under the U.C.C. § 19.02(3)(c) (1966); Massachusetts Bankers Association, Bankers Manual on the Uniform Commercial Code 140 (1958); Coogan, *supra* note 23, at 848; Silin, Filing Requirements under the Uniform Commercial Code, 3 Bost. B.J., 13, 14 (Oct., 1959); Vernon, Priorities, The Uniform Commercial Code and Consumer Financing, 4 B.C. Ind. & Com. L. Rev. 531, 531-32 n.5 (1963); Wiseman and King, Perfection, Filing and Forms under Article 9 of the Uniform Commercial Code, 9 Wayne L. Rev. 580, 590 (1963).

³⁹ 2 Permanent Editorial Board for the Uniform Commercial Code Rep. 213-14 (1965).

⁴⁰ See *Filtsch v. McJunkins*, 123 Okla. 181, 185, 252 P. 437, 441 (1927); *Neal v. Holt*, 69 S.W.2d 603, 609 (Tex. Civ. App. 1934).

inserting unusually strict requirements into the text of section 9-307(2). However, if section 9-307(2) is meant to apply only to buyers taking from a consumer-debtor, there is a very real "compromise." This interpretation would extend the protection of section 9-307(2) to only a limited class of consumer buyers while denying the same protection to all other consumer buyers, regardless of whether they equally bought for "value," "without knowledge," and for "personal, family or household purposes."

In accord with this proposition, it is submitted that the language of section 9-307(2) limits its effect to a consumer buyer taking from a consumer seller. Section 9-307(2) restricts its application to cases involving "consumer goods," and a buyer of those goods who does so for "personal, family or household purposes." Since section 9-109 defines "goods" according to the purpose for which they are used or bought, section 9-307(2) contains a second reference to consumer goods. However, rather than considering this as merely a repetition of the same requirement, it is arguable that section 9-307(2) is referring to the "character" of the goods at two points in time: (1) in the "hands" of the seller, and (2) in the "hands" of the buyer. Section 9-109, Comment 2 supports this interpretation by stating that "[g]oods can fall into different classes at different times" according to whose hands they are in. The seller's goods can therefore be considered "consumer goods" if, in the "hands" of the seller, they meet the definition of "consumer goods" in section 9-109(1). It is submitted that when section 9-307(2) initially refers to "consumer goods" it refers to what *use* the seller must have made of the goods, and when referring to buying for "personal, family or household purposes" it refers to the purpose for which the buyer must have *bought* the goods. Therefore, in order for a buyer of consumer goods to be protected, he must buy from a seller of consumer goods.

Although the buyer at an execution sale buys for "personal, family or household purposes," the goods he receives from his seller are more properly considered inventory than consumer goods. Since inventory is goods "held by a person who holds them for sale,"⁴¹ it is arguable that the goods held by the sheriff, to be sold by him at an auction, are in the category of inventory. Thus, regardless of the purpose for which the buyer seeks to purchase the property, the fact that the goods are inventory excludes him from the protection of section 9-307(2). Section 9-307(1), on the other hand, is concerned with a seller of inventory since the section protects a "buyer in the ordinary course of business"⁴² against the assertion of an outstanding security interest. In order for this section to apply, however, the security interest must have been created by the "buyer's" seller. It is arguable, therefore, that the buyer at an execution sale finds no protection under section 9-307. This analysis is in accord with those writers on the Code who believe that section 9-307(2) is restricted to transactions involving a consumer buyer taking from a consumer seller, and it finds further support in the prevalent Code policy toward the "execution buyer."

By examining the status of a buyer at an execution sale, both under pre-Code law and related Code sections, it is possible to discover the Code's

⁴¹ U.C.C. § 9-109(4).

⁴² See U.C.C. § 1-201(9).

policy toward such parties. This approach was not utilized by the *Vera* court, but it lends strong support to the court's conclusion. Under pre-Code law, the overwhelming majority of jurisdictions held that one who bought at an execution sale, whether judgment creditor⁴³ or typical consumer,⁴⁴ bought subject to the doctrine of caveat emptor. It was also generally held that an execution sale discharged all liens and encumbrances subordinate to the one being satisfied at the sale.⁴⁵ Therefore, the buyer at an execution sale did not take subject to all liens and encumbrances, but only to those superior to the one being discharged at the sale. This concept of discharge, under which the holder of a subordinate lien or encumbrance no longer had a claim against the collateral, has been retained in section 9-504(4) of the Code, in regard to sales "forced" by a secured party.

According to section 9-504(4):

When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, *discharges the security interest under which it is made and any security interest or lien subordinate thereto*. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this Part or of any judicial proceedings. . . .

When this section is read in light of section 9-312(4), the position of a buyer at a "forced" or "involuntary" sale becomes quite clear. Under section 9-312(4), a purchase-money security interest in consumer goods has *priority over a conflicting security interest* in the same collateral if the interest is *perfected at the time* the debtor receives possession of the collateral. Therefore, if such a perfected interest exists in the collateral, a forced sale to satisfy a non-purchase-money security interest in the collateral will not discharge the purchase-money security interest, if it were perfected at the time the debtor received possession of the collateral. Although directly concerned with a sale of collateral forced by a secured party, section 9-504(4) is a strong indication of the Code's policy concerning the rights and status of a purchaser at an "involuntary" or "forced," as opposed to a "wholly uncoerced," sale. It is arguable by analogy, therefore, that an unfiled but perfected purchase-money security interest under section 9-302(1)(d) will not be discharged by an execution sale forced by a judgment creditor, and the buyer at the sale will not be protected against the assertion of the superior interest.

IV. SECTION 9-307(2): A PROPOSED AMENDMENT

Reviewing the foregoing analysis, it is submitted that a "buyer" under the Code is included within the definition of purchaser in section 1-201(32). However, as evidenced by the conflicting theories concerning the effect of the phrase "any other voluntary transaction" in the definition of purchaser, it

⁴³ E.g., *Riley v. Martinelli*, 97 Cal. 575, 583, 32 P. 579, 580 (1893); *Simmons v. Clark*, 151 Kan. 431, 99 P.2d 739 (1940); *Vandin v. Henry McCleary Timber Co.*, 157 Wash. 635, 289 P. 1016 (1930).

⁴⁴ See Annot., 68 A.L.R. 659 (1930).

⁴⁵ *Call v. Thunderbird Mortgage Co.*, 58 Cal. 2d 542, 548, 375 P.2d 169, 172 (1962).

is far from clear whether "purchasing" under the Code is restricted to voluntary transactions or includes "buying" at an execution sale.

An examination of the language and intent of section 9-307(2) and of Code policy concerning the status of the parties to an "involuntary" transaction is more revealing. Although the section is obviously intended to ameliorate the favored position of purchase-money security interests, the protection of section 9-307(2) may well be of "limited application." Statements by the *Vera* court, commentators on the Code, and the Permanent Editorial Board, as well as the language of section 9-307(2), all support the contention that section 9-307(2) is intended to include only parties buying directly from a consumer-debtor. Under this approach a buyer at an execution sale is excluded from the protection of section 9-307(2) since he cannot, in actuality, be considered to be buying from a consumer-debtor.

This interpretation of the status of a buyer at an execution sale is also supportable as an expression of Code policy by section 9-504(4), which provides that, when upon default, a sale is held to satisfy an outstanding security interest, the sale discharges only that security interest and any security interests subordinate thereto. The same policy would support the contention that a buyer at an "involuntary" sale, including a buyer at an execution sale, does not take free of a prior purchase-money security interest.

Thus, it is submitted that a buyer at an execution sale is not included within the protection of section 9-307(2). This conclusion raises the question whether the position of the buyer at an execution sale is such that section 9-307(2) should be changed to include him within its protection. Since the judgment creditor buying at an execution sale and the ordinary consumer buying at an execution sale can generally be assumed to fulfill the requirements stipulated in section 9-307(2), the only reasonable purpose for limiting section 9-307(2)'s protection to consumer buyers taking from consumer sellers is that any extension of protection under section 9-307(2) would increase the risk of perfection without filing under section 9-302(1)(d), and consequently, increase the volume of initial filings of purchase-money security interests. If there is a "significant" increase in the "risk," it is arguable that the importance of maintaining the obviously favored status of the purchase-money security interest would outweigh any inequity to the buyer at an execution sale.

Since the only "risk" to the holder of a purchase-money security interest envisioned by section 9-307(2) is the risk of sale of the collateral by a dishonest debtor, the extension of protection to a buyer at an execution sale would in fact be an additional risk the creditor must consider in making his decision as to whether he should file. It is submitted, however, that the risk of the collateral being sold at an execution sale is of minimal practical importance to the secured party's decision to file, and any increase in the "risk" to the secured party is outweighed by the inequity to the buyer.

Since the holder of a purchase-money security interest is generally a financier or businessman,⁴⁶ his interest in the method of disposition of the collateral only extends to whether it affects his ability to recover the amount

⁴⁶ See Kripke, *The "Secured Transactions" Provisions of the Uniform Commercial Code*, 35 Va. L. Rev. 577, 578-80 (1949).

of his investment or sale price of the item. Regardless of the method of sale, in order to receive any proceeds the secured party must perfect his security interest in the proceeds by filing a financing statement within ten days of the sale.⁴⁷ Therefore, if the collateral is sold at an execution sale, the secured party has a better chance of being able to perfect his security interest than if the collateral is privately sold by a dishonest debtor, because in all probability a sale by the debtor would be carried out with the least publicity possible, whereas an execution sale, by its very nature, requires the giving of public notice.⁴⁸ Thus, there is little increase in the overall risk of the secured party losing the entire amount of his investment due to a failure to perfect his security interest in the proceeds. Also, if the secured party has filed within ten days of the sale, there is little chance that he will get back less proceeds from the execution sale than he would from a sale by a dishonest debtor. In fact, since a sale by a dishonest debtor is not subject to the external controls of an execution sale, the secured party will probably recover a greater percentage of the proceeds from an execution sale than from a sale by a dishonest debtor.

Thus, including a buyer at an execution sale under the protection of section 9-307(2) only slightly increases the overall risk of perfecting by section 9-302(1)(d). On the other hand, if a buyer at an execution sale is not protected by section 9-307(2), he is left in a particularly unfortunate position. As demonstrated earlier, he cannot be assumed to have any greater "knowledge" of the existing purchase-money security interest than the typical buyer protected by section 9-307(2).

Because of the similar circumstances of the "9-307(2) buyer" and the buyer at an execution sale, it is suggested that the protection of section 9-307(2) be extended to the buyer at an execution sale by inserting into section 9-307(2), after the word "buyer," the phrase "including a buyer at an execution sale."

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⁴⁷ U.C.C. § 9-306(3).

⁴⁸ E.g., Cal. Civ. Proc. Code § 692 (West 1955); Mich. Stat. Ann. § 27A.6031 (1962); N.Y. Lien Law § 202 (McKinney 1966); Pa. Stat. Ann. tit. 12, § 2312 (1951).