

SOME THOUGHTS ON AGRICULTURAL LIENS UNDER THE NEW U.C.C. ARTICLE 9

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I. INTRODUCTION: WHY AGRICULTURAL FINANCING PROVISIONS ARE TROUBLESOME

Personal-property financing of farm producers and the merchants who deal with them has always been troublesome, for a variety of reasons. For one thing, agricultural products, especially crops, commence their journey to the dinner table still closely related to real estate, and at every interface between Article 9 and real property law, confusion has ensued. In addition, technical aspects of agricultural lending can differ significantly from other financing industries, necessitating "unusual" rules.

Moreover, financing of farmers has historically been marked by well-intentioned attempts to protect them from a perceived lack of sophistication and power,¹ notwithstanding the fact that farmers are merchants. A deep societal undercurrent favors extraordinary efforts to retain the farm way of life,² generating

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1. As one commentator has put it:

[C]ontemporary political and economic power is concentrated in a non-farm, urban-oriented constituency. In that sense, it is arguable that farmers receive specialized legal treatment as an attempt to protect them from the generally urban orientation of law and government. On the other hand, these legal distinctions are not entirely grounded in paternalism. There is considerable concern among urban dwellers that if farmers are not reasonably successful, food supplies in the cities may become scarce and more expensive.

J.W. LOONEY ET AL., *AGRICULTURAL LAW* 6 (1990).

2. According to one author, "Modern society continues to perceive . . . farms, and especially those identified as 'family farms,' as particularly desirable. These types of farms seem to epitomize and promote the American value of self-sufficiency." LOONEY, *supra* note 1, at 5. Another author has described the dichotomy between the folklore and the reality of farming, which has so strongly influenced the evolution of much American legislation, including Article 9, as follows:

a welter of government intervention programs and regulations that do not affect other types of financing under Article 9. Unorthodox rules and confusion have resulted.

Finally, some types of claimants to farm property are outside the organized mainstream of financiers who usually lend under Article 9. These "outsider" claimants, such as landlords and suppliers with liens on agricultural commodities, have less access to the drafting process than banks and similar financing entities. The latter, knowing that on one day they will find themselves on one side of a bank-versus-bank priority rule and on the next the other, may lobby for rules that operate among themselves in a different manner from those that pit all banks against "outsiders."

Difficulties of these sorts in the agricultural arena, resulting in conflicting judicial decisions, perceived flaws in drafting and gaps in coverage, and clashes between Article 9 and non-U.C.C. law, provided part of the impetus for the redrafting of Article 9.³

II. DRAFTING BACKGROUND

In 1990, the Permanent Editorial Board for the U.C.C., under the joint sponsorship of the American Law Institute and the National Conference of Commissioners on Uniform State Laws, appointed a Study Committee (hereinafter "Revised Article 9 Study Committee" or "Study Committee") to consider whether Article 9 of the U.C.C. needed revising. The Study Committee issued its report in 1992,⁴ recommending that numerous

The United States has had a curious romance with the farm producer. Americans are fond of the American Gothic image of the proud and proper farm couple standing with a pitchfork. . . . The myth of the sturdy yeoman farmer working the fields . . . dies hard. In fact, of course, the American farmer is a business person . . . university-trained . . . sophisticated in the sciences of agronomy. . . . [A]griculture is a big, complicated business. The people who engage in it are not hayseeds. Their investment in land and equipment matches or exceeds that of many medium-sized urban commercial enterprises. Agricultural production is a business much like any other business.

JOHN F. DOLAN, *COMMERCIAL LAW: ESSENTIAL TERMS AND TRANSACTIONS* 201 (2d ed. 1997). This is not even to mention that an ever-increasing percentage of farming is conducted by conglomerates, which have rapidly been swallowing family farms.

3. See PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PERMANENT EDITORIAL BOARD STUDY GROUP REPORT, UNIFORM COMMERCIAL CODE ARTICLE 9, 2-4 (1992) [hereinafter PEB STUDY GROUP REPORT].

4. PEB STUDY GROUP REPORT, *supra* note 3. The Permanent Editorial Board

changes be made in Article 9 and that a drafting committee be appointed to make them. Over the ensuing five years, the Drafting Committee produced a heavily rewritten version of Article 9, which was ultimately embodied in the 1999 Official Text of the Uniform Commercial Code.⁵ The latter will be referred to herein as "Revised Article 9."⁶ For convenience of differentiation, the earlier version of Article 9 will hereinafter be termed "Old Article 9," notwithstanding that, at the time of this writing, "old" Article 9 is the version currently in force in Alabama and in most other states. Revised Article 9 is presently under study by the Alabama Revised Article 9 Committee,⁷ with a view to its eventual introduction in the Alabama Legislature.

So far as agricultural provisions in particular are concerned, in compiling its 1992 report, the Revised Article 9 Study Committee recognized that revision of agricultural financing rules was "among the most important issues that it [had] addressed."⁸ Aiding the Study Committee were reports from two groups charged with examining agricultural issues—the Article 9 Task

Study Group Report was published jointly by the American Law Institute and the National Conferences of Commissioners on Uniform State Laws in two separately-paginated volumes. The first volume, entitled "Report," sets out the Study Committee's report itself, while the second volume, entitled "Appendices to Report," contains the reports that were submitted to the Study Committee by the numerous subgroups and individuals who were assigned by the Committee to examine various segments of Article 9. References in this article to the "PEB Study Group Report" are to the "Report" volume, whereas references to the "PEB Study Group Report Appendices" are to the "Appendices" volume.

5. Revised Article 9 was approved by the American Law Institute and the National Conference of Commissioners in 1998. U.C.C. section 9-101, cmt. 2 (1998); PEB STUDY GROUP REPORT, *supra* note 3, at 1. The "1999 Official Text" designation resulted from further changes that were made in the text in late 1998 and early 1999 and the issuance of the Official Comments in the spring of 1999.

6. In the interest of terminological variety, Revised Article 9 will also sometimes be called "New Article 9" or the "New Code."

7. The Committee, operating under the Auspices of the Alabama Law Institute, Robert L. McCurley, Director, and consisting of judges, lawyers and professors from across the State, includes the following members: Edward J. Ashton, Professor Donald Baker, Judy H. Barginier, Hampton Boles, Richard P. Carmody, Professor Mike Floyd, Charles Grainger, William B. Hairston, III, A. Lee Hardegree, III, Kris Lowry, Professor Gene Marsh, James Pruett, the Honorable MacDonald Russell, Jr., the Honorable James S. Sledge, Joseph C. Stewart, Julia S. Stewart, Stephen Trimmier, Laurence D. Vinson, Jr., Al Watkins and Mark P. Williams. The views expressed herein are solely those of the author.

8. PEB STUDY GROUP REPORT, *supra* note 3, at 181.

Force and the Task Force on Agricultural Liens.⁹ The two task forces (hereinafter the "Agricultural Task Forces") produced a Final Report on Agricultural Financing,¹⁰ which recommended significant changes in existing Article 9 language and the addition of numerous new provisions regarding agricultural financing. The Report on Agricultural Financing will be cited extensively herein, since many (though by no means all) of its recommendations were ultimately implemented in the New Article 9.

III. SCOPE OF THIS ARTICLE

This Article does not purport to examine in detail every provision in the New Article 9 that affects agricultural financing interests.¹¹ Rather, its discussion focuses mainly on analyzing

9. The Task Force on Agricultural Liens was sometimes known as the "Task Force on Statutory Liens." PEB STUDY GROUP REPORT, *supra* note 3, at 181-82; PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PERMANENT EDITORIAL BOARD STUDY GROUP REPORT: APPENDICES, UNIFORM COMMERCIAL CODE ARTICLE 9, at 429-31, 439 (1992) [hereinafter PEB STUDY GROUP REPORT APPENDICES]. Both task forces were groups from the ABA Section of Business Law, Committee on Commercial Financial Services, Subcommittee on Agricultural and Agri-Business Financing. PEB STUDY GROUP REPORT, *supra* note 3, at 181.

10. See FINAL REPORT ON AGRICULTURAL FINANCING UNDER ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE (STUDY COMMITTEE WORKING DOCUMENT NO. M6-48), PEB STUDY GROUP REPORT APPENDICES, *supra* note 9, at 425 [hereinafter REPORT ON AGRICULTURAL FINANCING]. The Report on Agricultural Financing, in turn, incorporated as exhibits earlier individual reports of the two task forces, along with other documents. One earlier report so incorporated—that of the Task Force on Statutory Liens—focused solely on the incorporation of agricultural liens into Article 9 and appears as Exhibit 1 to the Report on Agricultural Financing. PEB STUDY GROUP REPORT APPENDICES, *supra* note 9, at 439. The second earlier report, that of the Article 9 Task Force, examined all of the other agricultural issues and appears as Exhibit 2 to the Report on Agricultural Financing. *Id.* at 447. The other exhibits to the Report on Agricultural Financing (Exhibits 3 through 9) consist of memorandums from bankers, bank counsel and law professors concerning various aspects of the Task Forces' proposed agricultural revisions. *Id.* at 474-524.

Regarding the memorandums from bankers, the PEB Study Group Report noted that the Report on Agricultural Financing took into account "the views not only of the relevant ABA groups but also of the primary providers of agricultural credit, as reflected in written correspondence from the Agricultural Bankers Division of the American Bankers Association and the banks of the Farm Credit System." PEB STUDY GROUP REPORT, *supra* note 3, at 182.

11. For a broad-spectrum coverage of the sort mentioned in the text, see Linda J. Rusch, *Farm Financing Under Revised Article 9*, 73 AM. BANKR. L.J. 211 (1999); see also Keith G. Meyer, *Should the Unique Treatment of Agricultural Liens Continue?*, 24 IND. L. REV. 1315 (1991).

three interlocking sets of agriculturally-related rules. First, the rules that control which agricultural-commodity liens created by non-U.C.C. state statutes come within the coverage of Revised Article 9's new "agricultural lien" provisions are examined—primarily the rules defining "farm products" and "agricultural liens." Second, the foregoing rules are compared and contrasted with the criteria for possessory-lien treatment under Revised section 9-333, which will cover some liens on agricultural commodities. Third, the Article analyzes the agricultural-lien priority rules in Revised Article 9, with emphasis on the interplay between non-U.C.C. lien statutes that contain their own built-in priority rules and the "opt-out" clause in Revised section 9-322(g). The latter provision, to an uncertain extent, overrides Article 9 priority rules in favor of those in the lien statutes. Considerable emphasis is placed on the impact that Revised Article 9 will have on Alabama lien law, in the hope of informing decision-making in other states with similar lien statutes.

IV. BACKGROUND ON AGRICULTURAL LIENS

One of the major tasks that faced the drafters of Revised Article 9 was the incorporation within the Code of a class of encumbrancers whose interests had been excluded from the scope of the U.C.C. since its inception—the holders of statutory agricultural liens.¹² In general terms, such liens are definable as liens afforded by state statute to those who supply real estate (e.g., landlords), services (e.g., veterinarians), or goods (e.g., feed sellers) on credit to farmers in furtherance of crop or livestock production.

As is true of other types of statutory liens, agricultural liens were enacted by state legislatures to provide a particular type of creditor—viewed as needing special protection—with encumbrance rights rising above the level of ordinary unsecured contractual enforceability. A lien, albeit arising by operation of law rather than from the debtor's consensual agreement, serves

12. In a number of states, some agricultural liens, referred to as "common law" liens, arise from judicial precedent rather than statute. Since Revised Article 9 does not encompass common law agricultural liens, however, they will be excluded from discussion in this Article.

essentially the same purpose as a security interest by giving the creditor a special charge upon property of the debtor for recoupment of an unpaid debt.

A brief historical narrative will shed light on why agricultural liens, which have heretofore remained outside the coverage of Article 9, are now being incorporated into Revised Article 9.¹³ State legislatures enacted many agricultural liens in response to two waves of need in the agricultural community—in the 1920s-1930s and in the 1980s.¹⁴ Prior to the 1930s, farmers relied significantly on suppliers of property and services as a source of credit, in the face of country banks' reluctance to lend more than limited amounts under chattel mortgages (predecessors of the Article 9 security interest). The enactment of state statutory liens for the protection of such suppliers induced them to offer a significant alternative source of credit. Alternative financing was particularly needed when, after the war-time prosperity of 1918-1920, American agriculture descended into a deep depression, which worsened with the national depression of 1929.¹⁵

In the 1930s, the Rooseveltian New Deal hastened to revive the farm economy by enacting legislation sponsoring production credit associations and other federal instrumentalities to finance, or guarantee those who financed, farmers.¹⁶ Since these lenders financed via chattel mortgages and since farm debtors tended to use the loan proceeds to pay suppliers of agricultural

13. The basic thread of this historical narrative, with additions by the author, owes much to Steven C. Turner et al., *Agricultural Liens and the U.C.C.: A Report on Present Status and Proposals for Change*, 44 OKLA. L. REV. 9 (1991). Some of the authors of that article, namely Steven C. Turner, Richard L. Barnes, Drew L. Kershen and Brooke Schumm, served on the Task Force on Agricultural Liens (also known as the "Task Force on Statutory Liens"), whose recommendations fed into the Report on Agricultural Financing, which in turn strongly influenced the drafting of the agricultural lien provisions that ultimately appeared in Revised Article 9. PEB STUDY GROUP REPORT APPENDICES, *supra* note 9, at 431, 439.

14. The chronology in the text is accurate only from a very general, national perspective. There are many exceptions from state to state. For instance, all of Alabama's presently existing non-possessory statutory agricultural liens (discussed subsequently in this Article) were enacted in the 1800s, except for the landlord's lien on livestock, which was enacted in 1919.

15. 11 NEIL E. HARL, AGRICULTURAL LAW §100.01[2], at 100-04 (1999).

16. For helpful explanations of the maze of federally sponsored instrumentalities for infusing capital into the agricultural community, see BARKLEY CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶ 8.01 n.1 (1999); DOLAN, *supra* note 2, at 202-05.

property and services in lieu of buying or leasing on credit from them, agricultural liens faded in importance.

Thus it was, at the time of drafting of the original Article 9 in the 1950s, that the drafters found it "unnecessary for this Article to attempt a general codification of that lien structure which is in considerable part determined by local conditions and which is far removed from ordinary commercial financing."¹⁷ The drafters were also no doubt somewhat daunted by the prospect of trying to coordinate the bewildering array of state statutory liens with Article 9 rules. Professor Gilmore observed: "It is too much to hope that states which enact the Code will concurrently review and revise the local collection of lien statutes."¹⁸ Consequently, in a provision that has remained in the Code until the present day, the original Article 9 excluded all statutory liens, including agricultural ones, from its coverage,¹⁹ with the narrow exception of a priority rule governing possessory liens.²⁰

Agricultural liens resurged in importance in the 1980s, when American agriculture again fell into a deep depression.²¹ Since conventional sources of financing—secured creditors such as banks and production credit associations—were loathe to lend as much as farmers wished to borrow, and since suppliers of agricultural property and services found it profitable to extend credit, farmers again came to rely on lien holders as a significant alternative source of credit.²²

As the number of claimants asserting agricultural liens rose, clashes with Article 9 secured creditors escalated. Secured parties criticized several aspects of current law. For one thing, many state statutes that create agricultural liens require no public recordation of them. This is true, for instance, of all agricultural liens in Alabama. Consequently, secured parties urged, agricultural liens were "secret liens." Unlike Article 9 security interests, on which financing statements had to be publicly filed,

17. U.C.C. § 9-104, cmt. 3 (1962 Official Text).

18. II GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 887 (1965).

19. U.C.C. §§ 9-102(2), 9-104(b)-(c) (1962 Official Text).

20. *Id.* § 9-310.

21. HARL, *supra* note 15, at 100-06.

22. Turner, *supra* note 13, at 18 (listing as examples of mega-agrisuppliers willing to extend credit, W.R. Grace, Co., John Deere, Inc., and Dekalb, Inc.).

unrecorded agricultural liens afforded prospective lenders no means of ascertaining their existence. Secured parties would lend against the farmer-debtor's crops or livestock in reliance upon the absence of other encumbrances, only to be faced with a viable competing claim to their collateral when the debtor later defaulted. This complaint by secured creditors struck a responsive chord in the drafting of Revised Article 9, "secret liens" having been, in general, an anathema in credit law since the 1600s.²³

Another source of complaint—this one available to agricultural lien holders as well as secured creditors—has been that the exclusion of statutory liens from the coverage of Article 9 leaves determinations of priority to the vagaries of non-U.C.C. state statutory law. Such matters as creation, coverage, perfection, priority against other encumbrances, and enforcement of liens vary greatly from statute to statute within a state and from state to state.²⁴ State lien statutes were enacted piecemeal over more than a century's time as political winds shifted and as special interest groups gained ascendancy. They were often drafted with indifferent skill, sketchily worded, and subjected to extensive engraftings of judicial construction. They can be difficult to find and, as will be illustrated in the ensuing discussion of Alabama liens, difficult to interpret. They often either lack priority rules, or set out ambiguous ones, for conflicts between lien holders and secured parties. It was little wonder, then, that the lawyers on the Task Force on Agricultural Liens, steeped in the U.C.C. tradition of a codification largely consistent within each state and uniform among the states—would observe that

23. For an informative discussion of the historical aversion to "secret liens" and, in general, the evolution of thinking underlying the modern secured credit system embodied in Article 9, see the discussion by Julian B. McDonnell in 1 PETER F. COOGAN ET AL., SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶¶ 1.01-1.06 (1999).

24. The nonuniformity of state lien statutes was highlighted in a fifty-state survey thereof conducted by the Task Force on Agricultural Liens, with the aid of the National Center for Agricultural Law Research and Information at the University of Arkansas Law Center, Fayetteville. The survey, which catalogued for each state the types of liens available, who could assert the lien, what property was attached, whether possession was required, whether filing was required, the date the lien attached, and any priority explicitly afforded the lienholder, runs for hundreds of pages. MARTHA L. NOBLE, STATUTORY AGRICULTURE LIENS: RAPID FINDER CHARTS, NATIONAL CENTER FOR AGRICULTURAL LAW RESEARCH AND INFORMATION (1993).

agricultural financing has “survived” without a resolution of the conflicts between ag liens and security interests. . . . [but] it can be enhanced to the advantage of all parties, including farmers . . . Ag Lienholders and Banks by increasing uniformity and predictability. These goals can be accomplished by including certain Ag Liens within the scope and control of Article 9.²⁵

V. WHAT ARE “AGRICULTURAL LIENS” WITHIN THE COVERAGE OF REVISED ARTICLE 9?

The drafters of Revised Article 9 brought agricultural liens within the scope of the new Code via the following language in Revised section 9-109:

- (a) [T]his article applies to:
- (1) a transaction . . . that creates a security interest in personal property . . . by contract;
 - (2) *an agricultural lien*

....

- (d) . . . This article does not apply to:
- (1) a landlord’s lien, *other than an agricultural lien*;
 - (2) a lien, *other than an agricultural lien*, given by statute or other rule of law for services or materials. . . .
(emphasis added)²⁶

A. *Agricultural Liens Are Not Security Interests*

It is important to note at the outset that agricultural liens are referred to in subsection (a)(2) above as a separate “line item” from the reference to “security interest” in subsection (a)(1). This makes the point, which is critical to an accurate reading of the numerous agricultural provisions in Revised Article 9, that agricultural liens are not “security interests.” When the drafters of the new Code wished to apply a particular provision both to agricultural liens and to security interests, they

25. PEB STUDY GROUP REPORT APPENDICES, *supra* note 9, at 439-40.

26. U.C.C. § 9-109 (Revised 1999) (The italicized wording above reverses the former exclusion of agricultural liens from Article 9.).

explicitly referred to both. For instance, Revised section 9-322(a)(1) states, "[c]onflicting perfected security interests *and agricultural liens* rank according to priority in time of filing or perfection."²⁷ In contrast, Revised section 9-324 on priority of purchase-money security interests uses the term "security interest" alone, thereby rendering its provisions inapplicable to agricultural liens.²⁸

The upshot of the conceptual separation between "security interest" and "agricultural lien" is that agricultural liens are only partially incorporated into Revised Article 9—mainly for purposes of applying to them Article 9 filing and enforcement rules and some priority rules. Matters such as coverage and creation of the lien, and to some extent priority, still reside with the non-U.C.C. state statutes (sometimes termed "enabling statutes") that create the liens. In other words, the drafters did not undertake a wholesale conversion of state statutory liens into Article 9 security interests—an approach that would have, in effect, heavily rewritten existing state lien statutes and would have incurred the maximum amount of political resistance in state legislatures from lien-holder-oriented interests. Instead, as discussed in more detail below, the drafters followed the more modest, and therefore less risky, path of partial modification of state lien statutes.

What may catch some readers of the new Code by surprise is that, notwithstanding the differentiation between "security interest" and "agricultural lien" noted above, the definition of "secured party" encompasses both a person in whose favor a security interest exists and "a person that holds an agricultural lien."²⁹ Moreover, the new definition of "collateral" in Revised section 9-102(12) includes "property subject to a security interest or agricultural lien,"³⁰ which in turn means that the new definition of "debtor" in Revised section 9-102(28)(A) as "a person having an interest . . . in the collateral" also embraces an agricultural lien debtor.³¹ The principal significance of these three definitions as they relate to agricultural liens is that the Revised

27. *Id.* § 9-322(a)(1) (emphasis added).

28. *Id.* § 9-324.

29. *Id.* § 9-102(72)(B).

30. *Id.* § 9-102(12).

31. U.C.C. § 9-102(28)(A).

Article 9 rules governing enforcement of a security interest upon default by the debtor—rules which tend to be phrased in terms of “secured party,” “collateral” and “debtor” (rather than in terms of “security interest”)—will also apply to agricultural liens.³²

Apart from the foregoing basic scope provisions, the key determinant of whether a particular state-created lien on agricultural commodities comes within Revised Article 9’s agricultural lien rules is the definition of “agricultural lien” set out in Revised section 9-102(5), as follows:

- (5) “Agricultural lien” means an interest, other than a security interest, in farm products:
 - (A) which secures payment or performance of an obligation for:
 - (i) goods or services furnished in connection with a debtor’s farming operation; or
 - (ii) rent on real property leased by a debtor in connection with its farming operation;
 - (B) which is created by statute in favor of a person that:
 - (i) in the ordinary course of its business furnished goods or services to a debtor in connection with a debtor’s farming operation; or
 - (ii) leased real property to a debtor in connection with the debtor’s farming operation; and
 - (C) whose effectiveness does not depend on the person’s possession of the personal property.³³

The inclusions and exclusions contained in the foregoing definition require careful examination, since they control whether and when the numerous agricultural lien provisions scattered throughout the rest of Revised Article 9 apply.

B. Agricultural Liens Must Relate to “Farm Products” and “Farming Operations”

The most obvious restriction on applicability of Revised

32. See *id.* § 9-601, cmt. 7 which states: “Part 6 [i.e. the rules in the 9-600s on default] provides parallel treatment for the enforcement of agricultural liens and security interests.”

33. *Id.* § 9-102(5).

Article 9's agricultural lien provisions is the requirement in Revised section 9-102(5) that the lien relate to the debtor's "farm products."

Because, as illustrated below, the multifaceted definition of that term in Old Article 9 had generated conflicting decisional law and considerable uncertainty as to the meaning of its components, the Revised Article 9 Agricultural Task Force deliberated at length whether the term should be eliminated as a collateral classification altogether. Declining to abandon the classification,³⁴ the Task Force's recommended instead that the definition of "farm products" be clarified in several respects. The subsequent Drafting Committee followed the Task Force's recommendation to retain the "farm products" classification, but it implemented only some of the Task Force's clarification suggestions, as discussed below.

Once the "farm products" classification was installed in the new Code, it became a building block for several other important agricultural provisions,³⁵ including the definition of "agricultur-

34. PEB STUDY GROUP REPORT APPENDICES, *supra* note 9, at 432. The Task Force's reasoning was as follows:

The Task Force considered whether farm products as a collateral type should be eliminated and whether farm products should be included within the definition of inventory. One of the reasons supporting farm products as a separate collateral type is U.C.C. section 9-307(l). Section 9-307(1) provides that a buyer in the ordinary course of business other than a person buying farm products from a person engaged in a farming operation, takes free and clear of the security interests created by the seller. 7 U.S.C. § 1631 has effectively preempted the "farm products exception" of section 9-307(l). Because of this federal preemption, a question is raised as to whether there is a necessity to continue farm products as a separate collateral type.

The consensus of the Task Force is that farm products should continue as a separate collateral type. There are several reasons to retain farm products, even if for no other reason than [sic] to cover the remote possibility that 7 U.S.C. § 1631 may be repealed. In addition, if farm products were eliminated, then presumably farm products would become inventory and thereby subject to 9-312(3). The PMSI rules of 9-312(3) would not work for farm products and accordingly for this and other reasons, the Task Force believes that farm products as a collateral type should not be eliminated, notwithstanding the preemption of 9-307(l).

Id. at 454-55. Another of the "several reasons to retain farm products" was, no doubt, the recommendation in an earlier report by the Task Force on Agricultural Liens that agricultural liens be brought within Article 9 and be defined as interests "in farm products." *Id.* at 440-41.

35. In addition to the definition of "agricultural lien," discussed in the text, two new provisions tailored to subcategories of "farm products" afford preemptive priority

al lien.”

Since an awareness of the precise wording of the old and new definitions of “farm products” is crucial to an understanding of the changes that have and have not been made, both versions are set forth in full in the footnotes.³⁶

Old section 9-109(3) required that goods satisfy a two-pronged test in order to qualify as “farm products”—first, that they be “in the possession of a debtor engaged in raising, fattening, grazing or other farming operations,”³⁷ and second, that they fit within one of the enumerated types of agricultural goods (crops, livestock, etc.).³⁸ The definition of “farm products” in Revised section 9-102(34) may or may not have abolished the possessory aspect of the first prong.

Application of the “in the possession of a debtor engaged in . . . farming operations” requirement has proved troublesome from the outset—particularly in regard to distinguishing between “farm products” and “inventory.”

to purchase-money security interests in livestock, Revised U.C.C. § 9-324(d), and to production-money security interests in crops, Revised U.C.C. § 9-324A. A new rule governs priority between a security interest in crops and a real estate mortgagee's interest therein, Revised U.C.C. § 9-334(i), and the notorious “farm products exception,” carried forward into Revised U.C.C. § 9-320(a) from Old U.C.C. § 9-307(1), purports to deprive a purchaser of farm products of the usual ability of a buyer in ordinary course to cut off a prior security interest. (The “farm products exception” was brought forward into the new Code notwithstanding that it has been overridden by the federal Food Security Act, 7 U.S.C. § 1631).

36. Old section 9-109(3) defined “farm products” as follows:

Goods are . . . “farm products” if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool-clip, maple syrup, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory.

Revised section 9-102(34) defines “farm products” as follows:

“Farm Products” means goods, other than standing timber, with respect to which the debtor is engaged in a farming operation and which are:

- (A) crops grown, growing, or to be grown, including:
 - (i) crops produced on trees, vines, and bushes; and
 - (ii) aquatic goods produced in aquacultural operations;
- (B) livestock, born or unborn, including aquatic goods produced in aquacultural operations;
- (C) supplies used or produced in a farming operation; or
- (D) products of crops or livestock in their unmanufactured states.

37. U.C.C. § 9-109(3) (1962 Official Text).

38. *Id.*

Since most agricultural commodities, or at least their products, are destined for sale,³⁹ they might first appear to inexperienced or incautious drafters of security documentation to be "inventory."⁴⁰ After all, the Code defines "inventory" as goods "held . . . for sale."⁴¹ The "farm products" classification, however, represents a special exception to the usual "inventory" characterization for one particular type of item—agricultural commodities. As Professor Gilmore, the principal draftsman of the original Article 9, observed, " '[f]arm products' are in effect a farmer's inventory: although there is no 'held for sale' language in the definition. . . ."⁴² At some point in passage from farmer to processor or marketer to wholesaler to retailer, however, commodities that were formerly "agricultural" no longer embody the farm-related characteristic that prompted the exception, and they become indistinguishable from ball bearings, television sets, or any other marketed commodity. Wishing to establish a cutoff rule recognizing that transition, the original Article 9 drafters seized upon the "in the possession of a person engaged in . . . farming operations" requirement as the dividing line past which agricultural items become "inventory."⁴³

Unfortunately, that dividing line has been plagued with uncertainty. Even Professor Gilmore expressed ambivalence

39. Dairy cattle kept for milk production, sheep for wool production, and chickens for egg production exemplify items that are themselves retained as relatively permanent assets, but whose products are held for sale.

40. Misclassifying what should be "inventory" as "farm products" is equally likely and equally fatal to the security interest. E.g., no matter how many marketers' hands eggs have passed through, their farm origin would, in the common vernacular, still give them the appearance of "farm products."

41. Revised U.C.C. § 9-102(48). Old section 9-109(4) similarly defined "inventory" as goods "held by a person who holds them for sale."

42. 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 373-74 (1965).

43. This sort of "cutoff" thinking is reflected in the words of Exhibit 4 to the REPORT ON AGRICULTURAL FINANCING, *supra* note 10, which, after recommending deletion of the "in the possession" requirement from the "farm products" definition, went on to say:

At the same time, however, we concluded that we did not want to render all agricultural commodities "farm products." Specifically, we believe that a line must be drawn so that when such commodities enter the stream of commerce they become transformed into "inventory." We do not want the definition of farm products to be so broad as to encompass all agricultural commodities regardless of who owns them, their intended use, etc.

PEB STUDY GROUP REPORT APPENDICES, *supra* note 9, at 479.

about the meaning of the "in the possession" component of the "farm products" definition:

In the possession of" evidently means "owned by." Not even a farmer could give an effective security interest in goods which he did not own, solely on the ground that he had possession of them. On the other hand the insistence on possession suggests that goods owned by a farmer but in the possession of a non-farmer cease to be "farm products."⁴⁴

Judicial opinions have been no less ambivalent. The cases are legion in which courts have struggled over the nebulous meaning of the "possession" standard, along with its accompanying elaboration in Comment 4 to Old section 9-109, which stated:

When crops or livestock or their products come into the possession of a person not engaged in farming operations they cease to be "farm products." If they come into the possession of a marketing agency for sale or distribution or of a manufacturer or processor as raw materials, they become inventory.⁴⁵

Numerous courts have adhered to the superficially apparent meaning of Old Comment 4 and ruled that grain, livestock or the like located in the hands of an intermediary such as a feedlot or marketing agency, rather than in the actual physical possession of the farmer, are "inventory" rather than "farm products."⁴⁶

In an attempt to resolve the confusion engendered by the possession requirement,⁴⁷ the Agricultural Task Forces recom-

44. GILMORE, *supra* note 42, at 374.

45. U.C.C. § 9-109, cmt. 4 (1962 Official Text).

46. *E.g.*, *First Bank of N. Dakota v. Pillsbury Co.*, 801 F.2d 1036 (8th Cir. 1986) (finding that grain lost its "farm products" status and became inventory upon being placed in the hands of an elevator; hence, buyer Pillsbury was not subjected to the "farm products exception" of Old section 9-307(1) and took free of security interest in farmer-debtors' crops as a buyer in the ordinary course of business); *United States v. Progressive Farmers Mktg. Agency*, 788 F.2d 1327 (8th Cir. 1986) (finding hogs placed by debtor-farmer with commission merchant for the latter to sell became "inventory"); *Garden City Prod. Credit Ass'n v. International Cattle Sys.*, 32 U.C.C. Rep. Serv. (CBC) 1207 (D. Kan. 1981) (finding cattle owned by debtor but at all times in possession of a feedlot-marketer were "inventory" rather than "farm products"; to hold that a feedlot was a debtor's agent for possession would excessively dilute the Code's "farm products" category).

47. The magnitude of uncertainty generated by conflicting decisional law on the meaning of the "possession" requirement was reflected in the following observation in

mended to the Revised Article 9 Study Committee that the requirement be removed from the definition of "farm products" or, in the alternative, that a comment be added which would "specifically indicate that possession may be by means of an agent or bailee."⁴⁸

An Agricultural Task Force subgroup assigned to study the definition of "farm products" criticized Comment 4 to Old section 9-109, quoted above, as having "the potential for confusion and mischief rather than clarification."⁴⁹

The drafters of Revised Article 9 implemented the Task Force recommendation to omit the possession requirement from the new "farm products" definition. The replacement language reads, "[f]arm products' means goods . . . *with respect to which* the debtor is engaged in a farming operation. . . ."⁵⁰

Unfortunately for "bright line" hopes, however, the drafters turned right around and resurrected the "possession" conundrum in the commentary by reincarnating the language of Old Comment 4 in the new Comment 4a to Revised section 9-102. New Comment 4a elaborates upon the "farm products" definition as follows: "If, for example [crops, livestock, and their products] come into the possession of a marketing agency for sale or distri-

a letter from a Farm Credit Bank to the Task Forces:

[W]e suggest clarification of the definitions of farm products and inventory. Crops grown and stored on the farm generally are considered farm products, but conceivably could be considered inventory. Crops held or stored at an elevator or warehouse generally are considered inventory, but could be considered farm products depending on when ownership changes. Purchased livestock held in a feedlot generally are considered to be inventory. It is unclear as to whether a producer's raised livestock also become inventory when placed in the feedlot. Courts appear to be split on decisions affecting farm product versus inventory definitions.

PEB STUDY GROUP REPORT APPENDICES, *supra* note 9, at 513.

48. *Id.* at 433. The Report stated:

A component of the definition of farm products is the requirement that the goods be in the "possession" of a debtor engaged in raising, fattening, grazing or other farming operations. . . . The term "possession" has been somewhat problematic. For example, if farm products are delivered to an agent for purposes of sale or placed with a warehouse for purposes of storage, the issue is whether those farm commodities are still farm products, or whether they are now inventory because they may no longer technically be in the "possession" of a farmer.

Id.

49. *Id.* at 479.

50. U.C.C. § 9-102(34) (Revised 1999) (emphasis added).

bution or of a manufacturer or processor as raw materials, they become inventory."⁵¹

Courts will need reminding that the Comments, notwithstanding their proximity to the statutory language in state codes, are not enacted law, but only legislative history, and that the authors of comments are fallible. Indeed, given the virtually identical wording of the old and new Comments relating to possession, one might wonder whether the reference to possession was inadvertently retained during a "cut and paste" transport of language from the old comment to the new one.

If the reference was purposely kept, then a couple of possibilities present themselves: First, "possession" was used in the Revised Comment not in its technical, rule-laden sense, but more loosely in the sense of "in the hands of." Second, the drafters perpetrated a ruse by pretending to remove the possession element (perhaps out of political expediency) when in fact they were covertly retaining it. The latter possibility strains belief.

Precedential and doctrinal support also exist for interpreting away the reference to possession in the Revised Comment 4a. As one authority on personal property law has observed:

[T]he concept of possession is . . . difficult to define. . . . [S]ome writers deny any universal and common meaning in the law to the word "possession," and contend that it has a variety of meanings depending upon the context in which, and the purposes for which, the word is employed. . . . One court has lately said that "possession" is a common term with no artful meaning, while another has called it the most vague of all vague terms!

Much of the confusion over possession may be avoided by a . . . distinction between actual possession . . . and those other situations, called "constructive possession". . . .⁵²

The notion of viewing "possession" as encompassing constructive possession was endorsed by the Iowa Supreme Court in *First National Bank in Lenox v. Lamoni Livestock Sales Co.*⁵³

In that case, a bank had taken a security interest in the farmer's livestock, a substantial portion of which the farmer sold

51. *Id.* § 9-102, cmt. 4a.

52. WALTER B. RAUSHENBUSH, *BROWN ON PERSONAL PROPERTY* 19-20 (3d ed. 1975) (footnotes omitted).

53. 417 N.W.2d 443 (Iowa 1987).

through a livestock sales company.⁵⁴ Proceeds of the sale were not paid to the bank, which, upon the farmer's default, filed an action for conversion against the defendant livestock sales company.⁵⁵ In a motion for summary judgment, the defendant maintained that it cut off the bank's security interest as a buyer in ordinary course under Old section 9-307(1), while the bank argued that defendant did not do so because it fell within the "farm products" exception to the buyer-in-ordinary-course rule.⁵⁶

The court ruled for the bank, denying the sales company's motion for summary judgment.⁵⁷ In the court's view, the livestock remained "farm products," notwithstanding passage into the hands of the sales company, because they were still in the constructive possession of the farmer.⁵⁸ The court explained that the "in the possession" requirement of Old section 9-109(3) was satisfied so long as the farmer-debtor still retained ownership of the cattle.⁵⁹ In support of its conclusion, the court offered Professor Gilmore's statement that "[g]oods cease to be 'farm products' when . . . they move from the possession *and ownership* of a farmer to that of a non-farmer. . . ."⁶⁰

Members of the Task Forces who were charged with suggesting changes in the "farm products" definition seemed to be thinking along the same lines in proposing that the following commentary replace references to "possession" in Comment 4 to Old section 9-109:

Once a debtor who is not engaged in farming operations acquires sufficient rights in crops, livestock, or supplies used or produced

54. *Lenox*, 417 N.W.2d at 444.

55. *Id.*

56. *Id.* at 444-45.

57. *Id.* at 448.

58. *Id.* at 446-47.

59. *Lenox*, 417 N.W.2d at 443. The *Lenox* court cited with approval *In re Roberts*, 38 B.R. 128 (Bankr. D. Kan. 1984), wherein crops stored by debtor-farmer in a grain elevator off the farm premises were held not to lose their "farm product" characterization, because they were still owned by the farmer. As the court saw it, "possession" in Comment 4 to Old U.C.C. section 9-109 meant ownership. *Accord, In re Nave*, 68 B.R. 139 (Bankr. S.D. Ohio 1986) (finding grain did not lose its character as a "farm product" by its storage in a commercial storage facility).

60. GILMORE, *supra* note 42, at 374 (emphasis added).

in farming or aquacultural operations so as to allow a security interest in the goods created by such a debtor to attach, the goods are no longer farm products. . . . Rather, such goods would normally be "inventory" in the hands of such a debtor.⁶¹

Unfortunately, as noted above, the Old commentary, rather than this suggested language, made its way into the Revised Comment 4a regarding "farm products."

So far as the second prong of the test for "farm products" status is concerned, namely that the item in question fit within one of the categories of goods enumerated in the definition of "farm products," Revised section 9-102(34) carries over the traditional categories that appeared in Old section 9-109(3)—crops, livestock, supplies used or produced in farming operations, and products of crops or livestock in their unmanufactured states. It also clarifies that the "farm products" classification does not include standing timber and does include "crops produced on trees, vines, and bushes"⁶² and "aquatic goods produced in aquacultural operations,"⁶³ thus bringing the latter two categories within the coverage of the agricultural-lien provisions.

61. PEB STUDY GROUP REPORT APPENDICES, *supra* note 9, at 480-81. A letter from a Farm Credit Bank to the Task Forces suggested a similar approach: "For simplicity, we suggest that crops be considered farm products, whether growing or in storage, until the producer legally transfers ownership. Also, we suggest that livestock owned by a producer be considered a farm product." *Id.* at 514.

62. U.C.C. § 9-102(34)(A)(i) (Revised 1999). The category would include fruit, nuts, berries and the like.

63. *Id.* §§ 9-102(34)(A)(ii) and 9-102(34)(B). The clarification will be welcome in states with an extensive catfish farming industry, like Alabama. Comment 11 to Revised section 9-324 explicitly refers to "catfish raised on a catfish farm" as coming within the "farm products" classification. Beyond that reference to catfish and the suggestion in Comment 4a to Revised section 9-102 that "aquatic goods" may be either animal or vegetable in nature, Revised Article 9 does not define "aquatic goods." The thrust of the following commentary recommended by the Agricultural Task Forces (but not included in the final version of Revised Article 9) should prove persuasive to courts, however:

Aquaculture generally involves the cultivation, propagation and rearing of animal or plant life in a controlled or selected water environment. It is to be distinguished from activities such as commercial fishing, for example, which does not involve the cultivation of animal life in a controlled or selected environment.

PEB STUDY GROUP REPORT APPENDICES, *supra* note 9, at 481.

VI. AGRICULTURAL LIENS RUN TO LANDLORDS, AS WELL AS SUPPLIERS

The definition of "agricultural lien" in Revised section 9-102(5) encompasses two classes of liens—suppliers' liens for goods (e.g., feed, seed, fertilizer) or services (e.g., processing of agricultural commodities) furnished in the ordinary course of business (i.e., by a merchant),⁶⁴ and landlords' liens for rent of farmland. Since Alabama law creates few agricultural suppliers' liens of any great economic significance that come within the "agricultural lien" definition,⁶⁵ the major focus in Alabama will be on landlord's liens.

Landlords' liens are, in turn, subdivisible into two categories, consensual and nonconsensual. A consensual landlord's lien arises from language in a lease wherein a tenant, such as a farmer, contractually grants the landlord an encumbrance on personal property on the leased premises for unpaid rent. By contrast, a nonconsensual landlord's lien is one that is involuntarily imposed on the tenant by operation of law—most commonly by statute. The latter type of lien arises irrespective of whether the tenant has granted the landlord a contractual lien.

The phrase "other than a security interest" in the definition of "agricultural lien" quoted above excludes consensual landlords' liens from the operation of Revised Article 9's agricultural lien provisions.⁶⁶ Instead, as was recognized under Old Article 9, consensual landlords' liens will not be treated as "liens" at all (as Article 9 uses the term), but rather as ordinary

64. The somewhat analogous term "buyer in ordinary course of business" is defined, in relevant part, in Revised § 1-201(9), as follows:

Buyer in ordinary course of business" means a person that buys . . . in the ordinary course from a person . . . in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices.

The identical "in the ordinary course" phrase appears in Revised section 9-333 (derived from Old section 9-310) on possessory liens, which is discussed subsequently in this Article.

65. Alabama's suppliers' liens are discussed later in this Article.

66. The "other than a security interest" language also reemphasizes the distinction that Article 9 draws between a "security interest" and an "agricultural lien."

security interests that are governed by all of the ordinary "security interest" rules of Article 9⁶⁷—most notably the filing-re-

67. Old section 9-104(b) stated and Revised section 9-109(d)(1) will continue to state: "This Article does not apply . . . to a landlord's lien." (Revised section 9-109(d)(1) does go on to say "other than an agricultural lien," however.) It has always been clear that this language excluded statutory landlords' liens because of the separate, additional statement in Old section 9-104(c) excluding "a lien given by statute." (As noted earlier, Revised section 9-104(d)(2) states the same, but with the words "other than an agricultural lien" inserted.)

In the early days of Article 9, the question arose whether consensual landlords' liens were also excluded. To make it clear that consensual liens were included within Article 9, Alabama's version of Old section 9-104(b) varied from the Official Text in stating that "[t]his article does not apply; . . . [t]o a *nonconsensual* landlord's lien." ALA. CODE § 7-9-104 (1997) (emphasis added).

Since that time, numerous cases have verified that consensual landlords' liens come within the coverage of Article 9. An illustrative example involving an agricultural lease is *Todsen v. Runge*, 318 N.W.2d 88 (Neb. 1982). In *Todsen*, the landlord had obtained from a farmer-lessee a lease stating: "The lessors will have a lien on the crops raised on the premises [for rent]." 318 N.W.2d at 89. A bank that had loaned operating capital to the farmer and that had taken in exchange a standard Article 9 security interest in the farmer's crops contested the landlord's claim to corn raised on the premises. The Nebraska Supreme Court held that Old section 9-104(b) excluded only landlords' liens arising by statute or common law, not contractual landlords' liens. *Id.* at 93. The latter, being security interests, had to be properly filed pursuant to Article 9. In the absence of such filing by the landlord, the bank's perfected security interest prevailed under the first-to-file-or-perfect rule of Old section 9-312(5) (just as it would under the same rule in Revised sections 9-322(a)(1)-(2)). In another agricultural case, *In re Waldo*, 70 B.R. 16, 17 (Bankr. N.D. Iowa 1986), a bankruptcy trustee sought proceeds of the farmer-debtor's corn crop, claiming an interest paramount to that of the landlord on whose land the crop was grown. Since the lease prohibited removal or sale of any crop grown until the rent was paid, the court concluded that, as a contractual landlord's lien, the landlord's interest would be subordinated to a trustee armed with the status of a hypothetical judicial lien creditor under § 544 of the Bankruptcy Code. *In re Waldo*, 70 B.R. at 18-19. Moreover, even if the landlord had a statutory landlord's lien, it too could be avoided by the trustee under Bankruptcy Code § 545, as a statutory lien for rent.

Numerous cases have likewise held in non-agricultural contexts that consensual landlords' liens are security interests subject to the usual rules of Article 9. *See, e.g., In re Leckie Freeburn Coal Co.*, 405 F.2d 1043 (6th Cir. 1969); *In re King Furniture City, Inc.*, 240 F. Supp. 453 (D. Ark. 1965); *United States v. Globe Corp.*, 546 P.2d 11 (Ariz. 1976); *Shurlow v. Bonthuis*, 553 N.W.2d 366 (Mich. Ct. App. 1996). The overriding moral of such cases is that a landlord wishing to assert a successful claim based on a consensual lien must be sure to file an Article 9 financing statement. As is discussed later in this Article, Revised Article 9's agricultural lien provisions will now make the same true for statutory landlords' liens on agricultural commodities.

In *Dallas v. S.A.G., Inc.*, the Eleventh Circuit Court of Appeals applied Alabama law to recognize part of the formulation discussed in the text, namely, that a lease agreement can create a consensual landlord's lien that exists independently of a lien created by statute. 836 F.2d 1307, 1309 (11th Cir. 1988). In *Dallas* a land-

quirement and priority rules. Nonconsensual landlord's liens, on the other hand, will now be brought within Revised Article 9's "agricultural lien" provisions, assuming that they fit within the other restrictions placed on the definition of that term.

A. *Agricultural Liens Must be Statutory*

Another restriction on the scope of the new Code's agricultural lien provisions is the mandate in the definition of "agricultural lien" that the lien in question be created "by statute."⁶⁸ This limitation will have its major application in states allowing liens on agricultural commodities that arise by judicial precedent rather than by statute—so-called "common law" liens. In Alabama, which has no common law agricultural liens, the "by statute" reference will serve simply to reiterate that Revised Article 9's agricultural lien provisions will be confined to nonconsensual, as distinguished from consensual, liens, as discussed above.

lord sought enforcement of a lien stemming from a clause in its lease. The trustee asserted that the landlord's lien was statutory and therefore avoidable under § 545 of the Bankruptcy Code. The court denied the trustee's claim, citing two Alabama Supreme Court cases recognizing that a lease can afford a landlord a contractual lien in addition to its statutory lien: *Alabama Butane Gas Co. v. Tarrant Land Corp.*, 15 So. 2d 105 (Ala. 1943) (finding where no statutory landlord's lien existed, because land was vacant when leased, the landlord nonetheless had an equitable lien on a later building's fixtures and improvements by virtue of lease provision), and *Montana v. Alabama Fishermen's & Hunter's Ass'n*, 146 So. 805 (Ala. 1933) (finding that while landlord lacked a statutory lien on home improvements because the tenant merely leased the land on which tenant, rather than the landlord, had built the house, the landlord had a lien enforceable in equity arising from a lease provision.). While Article 9 rules were not relevant and not applied in the *Dallas*, *Alabama Butane* and *Montana* cases, the application of Article 9 is an easy step from these holdings, per the authority from other jurisdictions cited earlier in this footnote.

Where both a consensual and a statutory lien exist, the landlord should be able to assert whichever will afford the best priority position. 8 WILLIAM D. HAWKLAND ET AL., UNIFORM COMMERCIAL CODE SERIES § 9-104:3, at 265 (1997).

68. U.C.C. § 9-102(5)(b) (Revised 1999).

*B. Agricultural Liens Must be Nonpossessory;
Interrelationship with Revised Section 9-333*

A final major limitation contained in the definition of "agricultural lien" is that the lien in question "not depend on the person's [i.e. lien holder's] possession of the personal property."⁶⁹ This restriction can be understood better when read together with the language in Revised section 9-109(d)(2) (derived without substantive change from Old section 9-104(c)): "This article does not apply to . . . a lien . . . given by statute . . . for services or materials, but section 9-333 applies with respect to priority of the lien."⁷⁰ In combination, the two provisions mean that possessory liens (sometimes termed "artisans' liens"),⁷¹ albeit statutory liens on agricultural commodities, are governed neither by Revised Article 9's agricultural lien provisions nor by any other Article 9 provision except one—the priority rule in Revised section 9-333, which applies when a possessory lien comes into conflict with an Article 9 security interest. Revised section 9-333 provides:

(a) In this section, "possessory lien" means an interest, other than a security interest or an agricultural lien:

- (1) which secures payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of the person's business;
- (2) which is created by statute or rule of law in favor of the person; and
- (3) whose effectiveness depends on the person's possession of the goods.

69. *Id.* § 9-102(5)(c).

70. *Id.* § 9-109(d)(2).

71. Liens of the sort covered by Old section 9-310 and Revised section 9-333 are also sometimes misleadingly called "mechanics' liens" because they are most often invoked by those who repair vehicles. As one commentary observes:

The term "mechanic's lien" generally refers to liens arising by operation of law in favor of persons who provide services or materials to improve land. An architect, who is an artisan, might have the benefit of a mechanic's lien, while a mechanic who repairs a car might have the benefit of an artisan's lien. Go figure!

WILLIAM H. LAWRENCE ET AL., UNDERSTANDING SECURED TRANSACTIONS 331 n.4 (2d ed. 1999).

(b) A possessory lien on goods has priority over a security interest in the goods unless the lien is created by a statute that expressly provides otherwise.

As the foregoing language indicates, Revised section 9-333 applies only when the lien's "effectiveness depends on the [lienor's] possession of the goods."⁷² Since, as is true in many other states, some Alabama statutory liens on agricultural commodities are clearly nonpossessory, while others are either clearly or arguably possessory, Revised Article 9's not-dependent-on-possession requirement for "agricultural lien" status and dependent-on-possession requirement for imposition of Revised section 9-333 merit close attention.⁷³

The following Alabama liens on agricultural commodities are clearly nonpossessory liens (and would otherwise qualify to be governed by Revised Article 9's "agricultural lien" provisions): (1) the landlord's lien on crops for unpaid rent;⁷⁴ (2) the landlord's lien on livestock for unpaid rent;⁷⁵ (3) the agricul-

72. U.C.C. § 9-333(a)(3).

73. See generally NOBLE, *supra* note 24.

74. ALA. CODE § 35-9-30 (1991), which provides:

A landlord has a lien, which is paramount to, and has preference over, all other liens, on the crop grown on rented lands for rent for the current year, and for advances made in money, or other thing of value, either by him directly, or by another at his instance or request for which he became legally bound or liable at or before the time such advances were made, for the sustenance or well-being of the tenant or his family, or for preparing the ground for cultivation, or for cultivating, gathering, saving, handling or preparing the crop for market; and also on all articles advanced, and on all property purchased with money advanced or obtained by barter in exchange for articles advanced, for the aggregate price or value of such articles and property.

Interrelated with the quoted provision is ALA. CODE § 35-9-37 (1991), which provides that under a crop-sharing agreement whereby one party furnishes the land and the other furnishes the labor to cultivate it, "the relation of landlord and tenant, with all its incidents . . . shall be held to exist between them; and the portion of the crop to which the party furnishing the land is entitled shall be . . . treated as the rent of the land. . . ." Read together, the two provisions mean that the landlord's lien on crops afforded by § 35-9-30 applies in the share-cropping situation. See, e.g., *Heaton v. Slaten*, 141 So. 267 (Ala. Ct. App. 1932).

75. ALA. CODE § 35-11-72(a) (1991), which states:

Owners of land, or their assignees, shall have a lien upon all livestock raised, grown or grazed upon rented land for the rent of said land for the current year, and which shall be paramount to all other liens. The lien shall exist only when the land is leased or rented or used for pasturing or grazing purposes.

tural laborers' lien on crops for wages due them;⁷⁶ and (4) the lien of the owner of a stallion, bull or the like on the female and her offspring for stud service.⁷⁷

The following Alabama liens on agricultural commodities are clearly possessory liens, excluded from the "agricultural lien" provisions of Revised Article 9 and governed by no other Article 9 provision except Revised section 9-333: (1) the agister's lien on livestock for payment owed for pasturing, fattening, care and the like, (which would apply to feedlots)⁷⁸ and (2) the veterinarian's lien for charges for medical care for animals.⁷⁹

76. ALA. CODE § 35-11-91 (1991), which provides:

Agricultural laborers and superintendents of plantations shall have a lien upon the crops grown during the current year in and about which they are employed, for the hire and wages due them for labor and services rendered by them in and about the cultivation of such crops under any contract for such labor and services; but such liens shall be subordinate to the landlord's lien for rent and advances, and to any other lien for supplies furnished to make the crops.

77. ALA. CODE § 35-11-330 (1991), which provides:

The owner of every stallion, jack, bull, ram, he-goat or boar, who keeps it for profit and charges a price for the service thereof, shall have a lien, for the amount of the stipulated price thereof, on any mare, jenny, cow, ewe, she-goat or sow, to which such stallion, jack, bull, ram, he-goat or boar is put, and also on the colt, calf, lambs, kids or pigs born next after such service or contract therefor, and such lien shall be paramount to, and have precedence over, all other liens on the colt, calf, lambs, kids or pigs born next after such service, and within the proper period of gestation.

78. ALA. CODE § 35-11-70(a) (1991), which provides:

Any keeper, owner, operator or proprietor of any pasture kept for grazing stock or of any cattle or livestock feed or fattening lot, or any keeper, owner or proprietor of any stable for the development or training of horses, or any person who keeps, fattens, feeds, cares for, trains or develops any horse, horses, cattle or livestock for another shall have a lien on all such horses, cattle or livestock so kept, fed, pastured, trained, cared for, fattened or developed by him, or under his control, for the payment of his charges for keeping, feeding, pasturing, training, caring for, fattening or developing the same, and he shall have the right to retain such horse, horses, cattle, livestock or stock, or so many thereof as may be necessary for the payment of such charges.

The "right to retain" language indicates that the lien is dependent upon possession by the veterinarian.

79. ALA. CODE § 35-11-390 (1991), which provides:

Every veterinarian duly licensed to practice veterinary medicine and surgery in the state of Alabama who holds a certificate of qualification as provided by chapter 29 of Title 34 shall have a lien on every animal kept, fed, treated or surgically treated or operated on by him while in his custody and under contract with the owner of such animal, for payment of his charges for keeping, feeding, treating or surgically treating or operating on such animal, and he

A third category of Alabama liens on agricultural commodities, created by what the author will term "qualified possession" statutes, includes liens that are arguably either possessory or nonpossessory and thus might be dealt with under Revised Article 9 either via the "agricultural lien" route (which, per Revised section 9-102(5)(c), requires that the lien be independent of possession) or the Revised section 9-333 route (which requires that the lien be dependent upon possession). Included within this category⁸⁰ are the livery stable keeper's lien⁸¹ and the agricul-

shall have the right to retain such animal until said charges are paid. The "right to retain" wording indicates the possessory nature of the lien.

80. The sawmill operator's lien on lumber for cutting charges, ALA. CODE § 35-11-250 (1991), is omitted from the discussion in the text, although the possessory nature of the lien is questionable in the same manner as the processor's lien, discussed subsequently. While a sawmill performs work on what generically can be viewed as an agricultural commodity, Revised Article 9 limits the meaning of the term "agricultural lien" to liens covering "farm products" (Revised section 9-102(5), discussed earlier in the text), and the definition of "farm products" in Revised section 9-102(34) excludes "standing timber." Once standing timber is cut, the resultant lumber is no longer timber, but rather "inventory" (Revised section 9-102(48)) and consequently never fits the "farm products" category and would never come within Revised Article 9's "agricultural lien" profile. If, however, the sawmill operator's lien is considered dependent upon the lienor's possession—under the analysis subsequently applied in the text to the processor's lien—it would come within the priority rule of section 9-333. If so, since the statute creating the lien does not provide otherwise, it would take priority over a prior perfected security interest.

The statute creating the sawmill operator's lien provides:

Any person, firm or corporation operating a public sawmill shall have a lien, paramount to all other liens, upon all lumber sawed by such mill under any contract with the owner of such lumber for the amount agreed upon for said sawing, or, in the event no price is agreed upon, then for the reasonable or customary price for such sawing, *so long as such lumber remains at such sawmill* or in possession of the owner of such sawmill, and *if such lumber is removed from said sawmill without the knowledge and consent of such owner*, the lien shall follow such lumber. The owner of such sawmill shall have the right to hold any lumber sawed by him until the full amount of the charges due thereon shall have been paid.

§ 35-11-250 (emphasis added, to show similarity to the possessory language in the processor's lien statute). The same analysis would exclude from Article 9's "agricultural lien" profile the lumber worker's lien on timber or lumber for wages, afforded by ALA. CODE § 35-11-270 (1991), which provides:

Every laborer or employee of any sawmill or planing mill and every laborer or employee of any person, firm or corporation engaged in the getting, cutting, rafting, shipping, hauling or manufacturing of any kind of timber, lumber or crossties, or in preparing timber, lumber or crossties for shipping, shall have a lien for his wages on any timber, lumber or crossties for all debts or wages due him in the getting, cutting, rafting, shipping, hauling or manufacturing of said timber, lumber or crossties.

tural processor's lien.⁸² Although the statutory heading for the first of these liens gives it an outdated appearance by labeling it a lien for "livery stable keepers," the lien also runs to "[any] owner or proprietor of a . . . place for feeding and caring for stock for pay,"⁸³ which should encompass modern feedlot operations. With respect to possession, the "livery stable" lien statute affords the owner of the care-and-feeding operation "the right to retain the stock" cared for and further provides, "[said] lien shall continue for six months on any stock so . . . fed and cared for in possession of persons with notice of such lien."⁸⁴ The agricultural processor's lien statute gives "[e]very owner of a cotton gin, peanut machine or picker, or hay baling machine or press, or plant for drying or processing planting seeds" a lien for processing charges on the commodity so processed and "the right to hold the processed commodity until the . . . charge has been paid,"⁸⁵ it further provides, "should the commodity be removed without knowledge and consent of the processor, the lien . . .

Apparently, section 9-333 does not apply to this lien since the lien statute gives no indication that the lien is possessory, although it is the sort of lien that one might expect to depend upon possession.

81. ALA. CODE § 35-11-190 (1991), which provides:

Any keeper, owner or proprietor of a livery stable, or other place for feeding and caring for stock for pay, shall have a lien on all stock kept and fed by him, for the payment of his charges, for keeping and feeding such stock, and he shall have the right to retain the stock, or so much thereof as may be necessary for the payment of such charges; and said lien shall continue for six months on any stock so kept, fed and cared for in possession of persons with notice of such lien.

82. ALA. CODE § 35-11-290 (1991), which provides:

Every owner of a cotton gin, peanut machine or picker, or hay baling machine or press, or plant for drying or processing planting seeds, shall have a lien on the commodity processed thereby for the toll or charge of such processing, under any contract with the owner of the commodity, whether the toll or charge for such processing be expressed or implied. Such liens shall have priority over all other liens, mortgages or encumbrances, whether existing or not at the time of the commencement of such processing or work, except the lien of a landlord as provided for in section 35-9-30. The processor shall have the right to hold the processed commodity until the full amount of the toll or charge has been paid; and should the commodity be removed without knowledge and consent of the processor, the lien herein declared shall follow the commodity.

83. ALA. CODE § 35-11-190 (1991), quoted in full, *supra* note 81.

84. *Id.* (emphasis added).

85. *Id.*

shall follow the commodity."⁸⁶

The basic question raised by the italicized language in the foregoing two statutes is whether Article 9's "dependent upon possession" or "independent of possession" criteria mean "unqualifiedly so." Looked at purely from a linguistic standpoint, what might be termed a "strict construction" would view neither of the foregoing two liens as falling within the dependent-on-possession category, since both liens remain viable in specified circumstances even after the goods have left the lienor's hands. On the other hand, what can be called a "flexible construction" would characterize both liens as sufficiently dependent on possession, since they are *largely* so: Both require that the goods initially reside in the lienor's hands and allow only narrow exemptions from possession.⁸⁷

Competing policy concerns must also be considered, however, with the choice among them hinging upon whether the court tilts more toward lienors or secured parties. Lien holders will generally fare better under the "flexible" construction—finding that qualified-possession statutes sufficiently satisfy the dependent-upon-possession requirement to place holders of their liens within Revised section 9-333. Under that section, notwithstanding the absence of public filing, lienors will enjoy priority over prior perfected security interests, unless the lien statute contains a built-in priority rule providing otherwise.⁸⁸ Filing,

86. ALA. CODE § 35-11-29, quoted in full, *supra* note 82 (emphasis added).

87. *Id.* § 35-11-190.

88. Neither of the Alabama lien statutes under discussion satisfies the "otherwise provides" clause of Revised section 9-333, i.e., neither contravenes the ordinary priority rule of Revised section 9-333 that the possessory lien takes priority over a perfected security interest. The "livery stable" lien statute contains no priority rule, and the processor's lien statute, which states that the lien "shall have priority over all other liens, mortgages or encumbrances . . . except the lien of a landlord," would coincide with, rather than contravene, Revised section 9-333's priority rule. *Id.* § 35-11-290.

The observation in the text that the lienor will "fare better" by being brought within Revised section 9-333 must be qualified with regard to the Alabama processor's lien. Even if the lien is deemed possession-independent, so that it comes within the New Code's "agricultural lien" provisions, the "all other . . . encumbrances" wording in the lien statute would likely satisfy the "opt-out" clause of Revised section 9-322(g), thereby exempting the processing lienor from Revised Article 9's "first in time" rule and consigning a conflict with a secured party to the lienor-takes-precedence priority rule set out in the processor's lien statute. Thus it would appear that under Alabama's lien-statute language, the processor would fare no

lienors may argue, has not heretofore been required under most state lien statutes, and its imposition under Revised Article 9's agricultural lien rules creates an onerous burden that will surprise uneducated lien holders. Moreover, lienors may urge that the presence of minor exemptions from possession in enabling statutes should not diminish the relevance of the basic policy behind Revised section 9-333, namely that lien holders of the sort under discussion have, by providing services or materials with respect to the commodities in question, enhanced or preserved the value of the secured party's collateral and should therefore take precedence over the secured party.⁸⁹ Finally, lienors may argue that strict adherence to the dependent-upon-possession limitation is dubious, given that the purpose for the limitation—so far as prior secured parties who are preempted are concerned—has never been clear.⁹⁰

worse under a holding that its statute was possession-independent. It must be remembered, however, as discussed in detail below, that a difference still exists between application of Revised section 9-333 and application of the New Code's "agricultural lien" provisions, even if the lien qualifies for the opt-out clause under the latter. Opt-out clause or not, agricultural lienors will be required to satisfy Article 9's *filing* rules in order to prevail, whereas possessory lienors coming within Revised section 9-333 will not. Moreover, the observation in the text that the lienor will fare better by being brought within Revised section 9-333 remains unqualifiedly relevant in states having lien statutes which, unlike the Alabama processor's lien statute, contain no priority rule affecting conflicts with secured parties.

89. The enhancement-of-value rationale, while not mentioned in the commentary to Revised section 9-333, is referred to in Comment 1 to its precursor, Old section 9-310. Comment 1 to Revised section 9-101 states, "the Comments to former Article 9 . . . remain useful in understanding the background . . . of this Article." Professor Gilmore, in describing pre-Code statutes giving priority to liens over security interests, observed that "it would be giving the holder of the security interest an unjustifiable windfall to allow him to claim the property, thus improved, while the serviceman remains unpaid." GILMORE, *supra* note 18, at 878. See also *United States v. Crittenden*, 563 F.2d 678 (5th Cir. 1977), wherein the court analogized the policies underlying section 9-310 to congressional recognition of the equities favoring the repairman in the Federal Tax Lien Act, as follows:

The statute was designed to protect the small businessman who operates informally, depending upon an oral agreement and his possession to enforce his claim for . . . services which rendered the property more valuable. . . . The person involved, because of the informality of the transaction and well established custom, is unlikely to check the . . . notices or obtain a written security agreement. . . .

Crittenden, 563 F.2d at 687.

90. Professor Gilmore claimed ignorance concerning the genesis of the possession requirement that appeared in Old section 9-310, stating, "[p]re-1956 drafts of § 9-310 did not contain this restriction, which appears in the 1956 draft without explana-

Secured parties may argue, on the other hand, for the "strict" construction, i.e., for a holding that qualified-possession statutes fail the dependent-on-possession requirement of Revised Section 9-333 and therefore qualify instead for "agricultural lien" status—so as to bring the lienors in question within Revised Article 9's agricultural lien provisions. Under those provisions, unless the lien statute provides otherwise and thereby satisfies Revised section 9-322(g)'s opt-out clause⁹¹ discussed below, lienors will be required to file an Article 9 financing statement and to do so before a competing secured party files in order to prevail over the latter.⁹² After all, secured creditors may argue, the major purpose for bringing agricultural liens within Revised Article 9 was to abolish the "secret liens" that heretofore have been promoted by state lien statutes.⁹³ Revised section 9-333 allows a form of "secret lien" by enabling an unfiled possessory lien to preempt, and therefore surprise, a prior filed security interest.⁹⁴ Hence, the more liens that can be kept out of Re-

tion." GILMORE, *supra* note 18, at 888 n.4. He went on to observe, however, that since "[a]ll the common law service liens were possessory and most of the statutory liens have continued to be so . . . in general the possessory requirement of § 9-310 merely reiterates what is already required as a condition of lien." *Id.* at 888. Merely reiterating customary practice under pre-U.C.C. law is not, however, a policy justification. See also *Crittenden*, 563 F.2d at 678, wherein the court, analogizing Old section 9-310 to the Federal Tax Lien Act, observed: "Neither the legislative history of the Tax Lien Act, nor the cases decided under the U.C.C., nor the commentators have shed much light on the policy justification for this possession requirement." *Id.* at 691 n.23. The court went on to suggest that the possession requirement attempts to draw a line between the repairman as a mechanic entitled to superpriority and his or her status as a general creditor. *Id.* At some point in time beyond the immediate period following the repair, "the mechanic's interest becomes indistinguishable from that of any other general creditor." *Id.*

From a pro-secured-party perspective, the possessory limitation does, of course, restrict the number of instances in which a perfected security interest is preempted by a later lien. But the requirement that "services or materials [be] furnished with respect to goods . . . in the ordinary course" already affords a limitation which, unlike the possessory requirement, comports with the enhancement-of-value rationale. U.C.C. § 9-333(a)(1) (Revised 1999).

91. *Id.* § 9-322(g).

92. *Id.* § 9-322(a)(1).

93. The other major purpose was to diminish uncertainty of the very sort under discussion here—the potential for conflicting judicial interpretations of murky, widely-varying lien-statute language.

94. The court in *In re Glenn*, 20 B.R. 98, 100 (E.D. Tenn. 1982), discussed further below, characterized a lien of the sort covered by Old section 9-310 and Revised section 9-333 as a "secret, potential lien" vis-a-vis prior security interests.

vised section 9-333 and brought within the new Code's agricultural lien rules, the better.

Decisional law under Old section 9-310 may shed light on the question whether qualified-possession lien statutes fit within that section's Revised Article 9 counterpart, Revised Section 9-333, depending partly on whether the Revised section works a substantive change.

Old section 9-310 required for inclusion within its priority rule only "a lien upon goods *in the possession of [the lienor]* given by statute,"⁹⁵ whereas Revised Section 9-333 requires what it defines as a "possessory lien," "which is created by statute . . . in favor of [the lienor]; and . . . *whose effectiveness depends on [the lienor's] possession of the goods.*"⁹⁶ On its face, the former merely requires possession at the relevant time, whereas the latter arguably places more emphasis on the possession-dependent nature of the enabling statute.⁹⁷

If such a substantive difference exists, secured parties might argue that the drafters of the Revised Code sought to tighten the possession-dependence standards for liens that will qualify for section 9-333 treatment,⁹⁸ and that qualified-possession statutes like the Alabama ones under discussion fit less well under Revised section 9-333 than they would have under Old section 9-310.

If Revised section 9-333 works no substantive change, then two divergent lines of decisions under Old section 9-310 on whether temporary interruption of the lienor's possession dis-

95. U.C.C. § 9-310 (1962 Official Text) (emphasis added), which provided in full as follows:

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

96. *Id.* § 9-333(a)(2)-(3) (Revised 1999) (emphasis added).

97. The court in one of the pro-lienor decisions on interruption of possession discussed below, *M & I Western State Bank v. Wilson*, 493 N.W.2d 387, 391 (Wisc. Ct. App. 1992), remarked, without further explanation, "the possession requirement of [section 9-310] is separate from any possession requirement of the underlying mechanic's lien."

98. No evidence of intent to alter the substantive meaning appears in the commentary. Comment 2 to Revised Section 9-333 simply prefaces its description of the section with the statement, "[a]s under former Section 9-310. . . ."

qualifies the lien from coverage of the section⁹⁹ may afford arguments on whether qualified-possession liens come within the Revised section. If nothing else, these cases reflect the conflicting policy considerations that will affect the applicability of Revised section 9-333.

One line of cases,¹⁰⁰ sympathetic toward secured creditors, refused to apply Old section 9-310 to subordinate a prior secured party to a lienor who had surrendered possession of a repaired vehicle to the owner but then later regained possession. The court in *In re Glenn*,¹⁰¹ a leading case in this line, observed:

A secured party should be able to determine at any moment the place of its claim among all claims against the collateral. This requires notice. In this respect, possession [by the artisan] . . . gives notice of the lien [to the secured party]. Once possession is relinquished, the person who did the repairs cannot expect to have it reinstated with priority. That would create an ever-present dangerous uncertainty for parties, including prior secured parties, who deal with the debtor with respect to goods in his possession.¹⁰²

A principal case exemplifying the opposing line of authority,¹⁰³

99. If the lienor relinquishes possession without regaining it, it is universally held that the priority of Old section 9-310 is lost. *E.g.*, *Forrest Cate Ford Inc. v. Fryar*, 465 S.W.2d 882 (Tenn. App. 1970). The same will be true of Revised § 9-333.

100. *E.g.*, *United States v. Crittenden*, 563 F.2d 678 (5th Cir. 1977) (holding that a mechanic retained priority over a prior security interest only to the extent that the mechanic continuously possessed the collateral; federal common law rule was fashioned by analogizing section 9-310 to the "continuous possession" requirement of the Federal Tax Lien Act); *In re Lott*, 196 B.R. 768 (Bankr. W.D. Mich. 1996) (holding that upon relinquishing possession the artisan lost the lien; later resumption of possession to make a second repair created a new lien only for charges for the second repair); *In re Glenn*, 20 B.R. 98 (E.D. Tenn. 1982) (refusing to apply Old section 9-310 where, after the repair, the mechanic released the vehicle into the possession of the owner, whose check was later dishonored; common law lien not resurrected by the mechanic's regaining possession); see also the dissenting opinion in *Thorp Comm'l Credit Corp. v. Mississippi Road Supply Co.*, 348 So. 2d 1016 (Miss. 1977) (opining that section 9-310 should be construed to continue the pre-U.C.C. state of the law described by Professor Gilmore as follows: "The lien [for services and materials] was everywhere regarded as dependent on possession: if the lienor gave up possession of the goods, the lien was lost and could not be revived by a subsequent retaking.") (citing GILMORE, *supra* note 18, at 873)).

101. 20 B.R. 98 (Bankr. E.D. Tenn. 1982).

102. *Glenn*, 20 B.R. at 100.

103. *ITT Indust. Credit Co. v. Robinson Co.*, 350 So. 2d 48 (Miss. 1977) (holding that a mechanic must be given priority under Old section 9-310 where, after repair,

M & I Western State Bank v. Wilson,¹⁰⁴ rejected the *Glenn* decision and awarded priority to the lienor in similar circumstances, stating:

[M]echanic's lien laws provide new and additional remedies to those of the common law and are to be liberally construed to accomplish their equitable purpose of aiding materialmen and laborers to obtain compensation for material used and services bestowed upon property of another and thereby enhancing its value.¹⁰⁵

At the least, cases in the latter line of decisions should provide lienors wishing access to Revised section 9-333 with support for the view that some courts have not heretofore been overly stringent in applying the possessory requirement.¹⁰⁶

the mechanic relinquished possession to the vehicle operator, who later returned it to the mechanic's possession); *Thorp Comm'l Credit Corp.*, 348 So. 2d at 1016 (finding that a repairman's turning a vehicle over to the debtor, who later returned it, did not prevent application of Old section 9-310; state lien statute allowed retention of the lien after release of possession to the owner); *M & I Western State Bank v. Wilson*, 493 N.W.2d 387 (Wisc. Ct. App. 1992) (finding that Old section 9-310 gave priority to a repairman who released and then regained possession of a repaired vehicle; temporary release was held not to prejudice the prior secured party, presumed to know of the risk that a later repair could subordinate its interest under the lien statute). *Cf.* *Beverly Bank of Chicago v. Little*, 527 So. 2d 706 (Ala. 1988) (holding that in subcontracting repair work to others, a repairman was deemed by the Alabama Supreme Court to have retained constructive possession sufficient to satisfy section 9-310). The cited cases noted, but were not persuaded in their interpretation of section 9-310 by, the pre-U.C.C. state of the law described by Professor Gilmore, *supra* note 100.

104. 493 N.W.2d 387 (Wisc. Ct. App. 1992).

105. *M & I Western*, 493 N.W.2d at 389 (quoting *Wiedenbeck-Dobelin Co. v. Mahoney*, 152 N.W. 479, 481 (Wisc. 1915)) (emphasis omitted).

106. In *Thorp Comm'l Credit Corp.*, 348 So. 2d at 1016, the court applied Old section 9-310 to give priority to a repairman's lien over a perfected security interest, notwithstanding that the repairman turned over possession of the vehicle to the debtor, who subsequently returned it to the repairman. The court noted that the Mississippi lien statute in question explicitly permitted the lienholder to retain its lien even after relinquishing possession to the owner of the vehicle or one deriving title or possession therefrom. If Revised section 9-333 is viewed as having made no substantive change in the possessory requirement of Old section 9-310, the case supports application of the new section to liens arising from qualified-possession statutes.

VII. PRIORITY OF AGRICULTURAL LIENS—STATE LIEN LAW VS. REVISED ARTICLE 9—THE “OPT-OUT” CLAUSE OF REVISED SECTION 9-322(g)

The major question raised by Revised Article 9's new agricultural lien provisions will be what priority the agricultural lienor will enjoy or suffer in a conflict with an Article 9 secured party. Most of the other provisions of Revised Article 9 affecting agricultural liens, such as the applicability provisions discussed above, as well as the attachment, filing and perfection rules, are designed to “plug into” the Revised Article 9 priority rules.

In states like Alabama, which have priority rules incorporated into their existing non-U.C.C. agricultural lien statutes, one must first ask whether, or to what extent, the Revised Article 9 priority rules even apply. The provision that makes answering this question crucial in regard to conflicts with secured parties in such states is what the author will term the state “opt-out clause” in Revised section 9-322(g), which provides:

A perfected agricultural lien on collateral has priority over a conflicting security interest in or agricultural lien on the same collateral if the statute creating the agricultural lien so provides.¹⁰⁷

The ordinary, “catchall” priority rule imposed by Revised Article 9 on an agricultural lienor battling an Article 9 secured party is the same as that imposed on one secured party contending with another, namely, the “first in time, first in right” mandate of Revised section 9-322(a), which, with the addition of references to agricultural liens, was derived from Old section 9-312(5)(a). Revised section 9-322(a) provides:

[P]riority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules:

(1) Conflicting perfected security interests and agricultural liens rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first

107. U.C.C. § 9-322(g) (Revised 1998).

perfected, if there is no period thereafter when there is neither filing nor perfection.

(2) A perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien.¹⁰⁸

When Revised section 9-322(a) is read together with Revised section 9-322(g), quoted earlier, it will be seen that the latter creates a special, "second in time, first in right," preemptive-priority exception to the "first to file or perfect" rule for an agricultural lien whose non-U.C.C. state enabling statute so provides.

The opt-out clause in Revised section 9-322(g) raises two major questions: First, assuming the language of the state lien statute satisfies the requirements of the opt-out clause, is the lienor then released from all Article 9 rules and consigned entirely to the lien statute for its rights and duties? Second, what requirements must the lien statute satisfy in order to satisfy the opt-out clause?

A. Even if the Opt-Out Clause Applies, Article 9 Perfection Is Still Required

The answer to the first question—whether the opt-out clause, if satisfied by the state lien statute, excludes a lien from all Revised Article 9 rules—is clearly, "No." Revised section 9-322(g) makes it clear that only a "*perfected* agricultural lien" will prevail over a conflicting security interest, even if the lien statute purports to grant the lienor absolute priority over security interests. The quoted wording means that, at all events, the lienholder must comply with the perfection requirements of Article 9 to prime a secured party—albeit that the lien holder may perfect after the secured party does and still win.¹⁰⁹ This

108. *Id.* § 9-322(a) goes on to state that if neither the security interest nor the agricultural lien is perfected, the first to attach prevails. This provision, derived from Old section 9-312(5)(b), would generally govern only in the rare instance in which both parties had either failed to file or filed defectively.

109. In requiring that agricultural liens satisfy the perfection requirements of Revised Article 9, the drafters did make special accommodations for the nonconsensual nature of such liens, i.e., for the fact that they are created by statute rather than

effect comports with the general recommendation of the Task Force on Agricultural Liens, as follows:¹¹⁰ "[T]he creation and enforceability of the Ag Lien would be determined by the underlying Ag Lien statute. Article 9 would then govern perfection and the Ag Lienholder would be required to file a U.C.C. financing statement in order to perfect."¹¹¹ The Revised Code's "perfection at all events" requirement is hardly surprising, considering that the drafters' principal purpose for drawing agricultural liens into Article 9 in the first place was to protect secured parties from being surprised by what heretofore have been "secret

by contractual assent of the debtor: Pursuant to Revised section 9-203(b), the usual requirements for perfection are filing, together with satisfaction of the three requisites of "attachment," namely the making of a security agreement by the debtor, acquisition of rights in the collateral by the debtor, and the secured party's giving value. For agricultural liens, however, Revised section 9-308(b) replaces the attachment requisites with the requirement that the lien simply have become "effective" pursuant to the enabling state lien statute. The main significance of the difference is that agricultural lien holders need not have obtained a security agreement from the debtor.

Determining just when agricultural liens become "effective" pursuant to their enabling statutes may present courts with a challenging question. For Alabama landlords' liens, on which this Article most heavily focuses, it seems most likely that such liens become "effective" at the inception of the lease, notwithstanding that the lien does not become enforceable until the tenant has defaulted on rental payments.

Another accommodation to the nonconsensual nature of agricultural liens appears in Revised section 9-509(a)(2), which provides that the holder of an agricultural lien may file a financing statement without the need for the debtor's authorization, as long as the lien has become effective by the time of filing and the financing statement covers only collateral in which the lienor holds an agricultural lien (and not also collateral covered by a security interest taken by the lienor). The reasoning behind this accommodation is that a debtor upon whom a lien has been involuntarily imposed would hardly be willing to voluntarily approve a security agreement or financing statement.

110. For a description of the interaction between the Agricultural Liens Task Force and the Revised Article 9 Study Committee, see the text accompanying *supra* notes 3-10.

111. PEB STUDY GROUP REPORT APPENDICES, *supra* note 9, at 441. That the term "perfected agricultural lien" in Revised section 9-322(g) refers to perfection under Article 9 rules, rather than under non-U.C.C. principles, is made clear by other provisions in Revised Article 9. For instance, Revised section 9-308(b) specifies the Article 9 steps by which "[a]n agricultural lien is perfected" (emphasis added); to wit, perfection occurs when the agricultural lien "has become effective and all of the applicable requirements for perfection in section 9-310 have been satisfied." Revised section 9-310(a) goes on to state, "[e]xcept as otherwise provided . . . a financing statement must be filed to perfect all security interests and agricultural liens." (emphasis added). Since none of the "otherwise provided" rules apply to agricultural liens, filing is the only permissible alternative.

liens.”

As is true in Alabama, lien statutes in most states require no public recordation of agricultural liens. Consequently, Revised Article 9, in requiring the filing of a U.C.C. financing statement as a prerequisite to priority, imposes a new burden on agricultural lien holders. Thus, the reason the drafters included the opt-out clause in Revised section 9-322(g) becomes apparent, namely, to allay political opposition in state legislatures to the inclusion of agricultural liens within Revised Article 9¹¹² by offering a compromise: Although lienors will be subjected to Revised Article 9’s filing mandate, they will be insulated from Revised Article 9’s “first in time” rule if the lien statute meets the requirements of the opt-out clause in Revised section 9-322(g).¹¹³ The drafters might have “sweetened the pot” more for agricultural lienors by affording them a preemptive, “second in time” super priority within Revised Article 9 itself, as the Task Force on Agricultural Liens recommended,¹¹⁴ but unfortunately

112. The Task Force on Agricultural Liens observed:

It will be a “hard sell” to convince Ag Liens to come into Article 9 given the basic first to file rule [in what became Revised section 9-322(a)]. In most cases a bank will have a preexisting U.C.C-1 and a security agreement with an after acquired property clause. Accordingly, in most cases the first to file rule will place the Ag Lien in a junior position.

PEB STUDY GROUP REPORT APPENDICES, *supra* note 9, at 444.; *see also* Turner, *supra* note 13, which recognized that during the drafting process, the “first in time” rule would undermine the position of agricultural lien holders and would likely face “severe political opposition in a state legislature.” It also suggested that a provision like the opt-out clause that eventually appeared in Revised section 9-322(g) might make the agricultural lien provisions in Revised Article 9 “more politically palatable.” *Id.* at 26-27.

113. It should be noted that Revised section 9-322(g) immunizes lienors from the first-in-time rule only as against competing secured parties. When contending with judicial lien creditors or buyers or lessees from the debtor, the agricultural lienor is subject to Revised section 9-317(a)(2), (b) and (c), respectively, which apply a “first in time” priority rule without the benefit of an opt-out clause.

114. In the course of explaining the language they proposed for Revised Article 9’s agricultural lien provisions, the Task Force on Agricultural Liens observed:

[T]he suggested changes establish a first-to-file rule with respect to priority disputes between Ag Liens and Article 9 security interest [sic] and as between Ag Liens. The Task Force recommends, however, that some provision be made for the concept of a “purchase money” or “priority” Ag Lien. . . . The policy for such a priority is that although certain supplies may be consumed and not “incorporated” in the farm product the ag supplier does provide a value enhancement to the farm product.

PEB STUDY GROUP REPORT APPENDICES, *supra* note 9, at 443. The report went on to

for lienors, they chose not to do so.

The question may be asked: How does it benefit the secured party to subject the lien holder to the Article 9 filing requirements if the secured party will lose under a lien statute's absolute lienor-takes-priority rule anyway? Presumably, the reasoning is that even if a particular secured party loses to a lienor's preemptive priority via the opt-out clause's deference to the lien statute, secured parties in general will benefit from requiring agricultural lienors to file and thereby publicize their formerly "secret" liens.

The upshot of the foregoing analysis is that even if a state lien statute purports to grant an agricultural lien absolute priority over security interests, thereby satisfying the opt-out clause profile—Revised Article 9 will still, in effect, rewrite the lien statute by adding to it, "but only if the agricultural lien is perfected pursuant to U.C.C. Article 9."¹¹⁵ State legislatures are, of course, free to change this result by amending Revised Article 9,¹¹⁶ but doing so will elicit political pressure from banks and other secured parties not to reverse at the state level their hard-won reform of the "secret lien" scenario in the national drafting process. Moreover, states understandably will be reluctant to "tinker" by way of inserting a nonuniform amendment in Revised Article 9. Given the much greater length and complexity of the Revised Code, as compared with the Old Code, a slip of the pen can produce a ripple effect of difficult-to-ascertain dimensions throughout numerous other Revised Article 9 provisions.

recommend language affording superpriority to agricultural lienors based on prenotification to security interests, patterned after the provision giving preemptive priority to purchase-money financiers of inventory in Revised section 9-324(b). *Id.* at 443-44. Revised section 9-324(d), which sets out a new superpriority for purchase-money financiers of livestock, must be carefully distinguished from the foregoing proposal to award preemptive priority to agricultural lienors. Revised section 9-324(d) would require the creditor to pursue the standard route for acquiring a consensual security interest—a matter separate from the new Code's scheme for incorporating statutory agricultural liens.

115. Revised Article 9 will also rewrite lien statutes to the extent that their priority rules are inconsistent with the "first in time" rules in Revised section 9-317 governing conflicts in which agricultural lien creditors contend against judicial lien creditors, buyers from the debtor, or lessees from the debtor, as discussed *supra* note 113.

116. The legislature might, for instance, delete the word "perfected" from Revised section 9-322(g).

Nonuniform amendments can also have a chilling effect on today's ubiquitous interstate financial dealings.

*B. What Lien-Statute Language Will Satisfy
the Opt-Out Clause?*

The other major question raised by Revised section 9-322(g), and one that seems destined for litigation, is just what language in a state lien statute will satisfy the requirements for triggering the section's opt-out clause? The question can be raised with regard to two Alabama liens of major financial import that will be affected by Revised Article 9's agricultural-lien provisions—the landlord's lien on crops and the landlord's lien on livestock. Both contain priority language similar to that appearing in the agricultural lien statutes of numerous other states.¹¹⁷ The statute creating the landlord's lien on crops states: "A landlord has a lien, which is paramount to, and has preference over, all other liens, on the crop grown on rented lands for rent for the current year. . . ." ¹¹⁸ The statute creating the landlord's lien on livestock provides, "Owners of land . . . shall have a lien upon all livestock raised, grown or grazed upon rented land for the rent of said land . . . which shall be paramount to all other liens."¹¹⁹

Does lien-statute language of the sort just quoted—"paramount to all other liens"—meet the criteria laid down by Revised section 9-322(g), which states, "A perfected agricultural lien . . . has priority over a conflicting security interest . . . or agricultural lien . . . if the statute creating the agricultural lien so provides"?¹²⁰ Analysis of the latter language can be simplified by eliminating a couple of the most unlikely possibilities as to the meaning of the phrase "so provides." First, must the non-U.C.C. lien statute specify that a "perfected" agricultural lien takes priority over a security interest? No. "Perfection" is a defined concept internal to Article 9.¹²¹ Moreover, the commen-

117. See NOBLE, *supra* note 24, wherein examples appear throughout the book.

118. ALA. CODE § 35-9-30 (1991). The section is quoted in full, *supra* note 74.

119. *Id.* § 35-11-72. The section is quoted in full, *supra* note 75.

120. U.C.C. § 9-322(g) (Revised 1998) (emphasis added).

121. As noted earlier, *supra* note 109, Revised section 9-308(b) specifies the Arti-

tary to Revised section 9-322(g) makes clear the separation between the concept of perfection on the one hand and the requisite language of the lien statute on the other:

Statutes other than this Article may purport to grant priority to an agricultural lien as against a conflicting security interest or agricultural lien. Under subsection (g), if another statute grants priority to an agricultural lien, the agricultural lien has priority only if the same statute creates the agricultural lien *and* the agricultural lien is perfected. Otherwise subsection (a) applies the same priority rules to an agricultural lien as to a security interest, regardless of whether the agricultural lien conflicts with another agricultural lien or with a security interest.¹²²

A second unlikely possibility is that a mere reference in the lien statute to priority over other agricultural liens, without any mention of security interests, will trigger the Revised section 9-322(g) opt-out clause when the agricultural lien comes into conflict with an Article 9 security interest. If that were so, then the two Alabama landlords' lien statutes quoted above ("paramount to . . . other liens") would clearly satisfy the opt-out clause in a lienor-versus-secured-party conflict, as well as in a lienor-versus-lienor conflict.¹²³ By emphasizing that Revised section 9-322(a) lays down a priority rule (first in time) for lienor-versus-lienor conflicts, however, the commentary to Revised section 9-322(g) quoted above makes it clear that the words "or agricultural lien" were inserted in the latter provision solely to cover opt-outs for lienor-versus-lienor conflicts and not for lienor-versus-secured-party conflicts. The fact that (subject to the opt-out clause) Revised Article 9 imposes a priority rule for a conflict, say, between a landlord's lien on crops and an agricultural processor's lien, will surprise many since it reverses Old Article 9's relegation of all lienor-versus-lienor conflicts to non-U.C.C. law.¹²⁴

cle 9 requirements—namely, "effectiveness" and filing a financing statement—for ascertaining when "[a]n agricultural lien is perfected."

122. U.C.C. § 9-322, cmt. 12 (emphasis added).

123. Implicit in this discussion is the author's view that the two Alabama landlords' lien statutes under discussion do satisfy the Revised section 9-322(g) opt-out clause whenever the landlord's lien comes into conflict with another agricultural lien.

124. In this regard, the drafters of Revised Article 9 can be viewed as having truly "pushed the envelope." A number of priority rules in Old Article 9 governed a conflict in which one of the parties was a non-U.C.C. claimant while the other was

The interpretational issue concerning Revised section 9-322(g) thus narrows to the question whether the word "liens" in lien statute language like "paramount to all other liens" constitutes a reference to security interests. Commercial lawyers will intuitively respond, "Yes, of course." In credit law in general, the definition of "lien" is broad enough to include security interests.¹²⁵ In common decisional and financing-industry parlance, the term "lien" is often (albeit, from a technical standpoint, erroneously) used in reference to an Article 9 security interest. The Bankruptcy Code includes Article 9 security interests within its definition of "lien."¹²⁶ In addition, at least two commentaries have assumed, without discussion, that an "all other liens" reference would satisfy an opt-out clause of the sort appearing in Revised section 9-322(g).¹²⁷

Nonetheless, the author believes that at least a modicum of doubt exists whether a lien statute designating priority only with respect to "other liens" sufficiently references Article 9 security interests to trigger the Revised section 9-322(g) opt-out clause. For one thing, Article 9 itself differentiates between

an Article 9 secured party, for instance Old section 9-310 (now Revised section 9-333) governing disputes between an artisan's lien and an Article 9 security interest, as discussed earlier in this Article. But imposing priority upon two combatants neither of whom holds an Article 9 security interest represents a ground-breaking step. It should be noted that the Alabama processor's lien statute, ALA. CODE § 35-11-290 (1991), quoted *supra* note 82 and discussed further below, does satisfy the opt-out clause, both with regard to conflicts with secured parties and conflicts with other lienors, except landlords' liens.

125. For example, "lien" has been defined as "a generic term [which] standing alone, includes liens acquired by contract or by operation of law," *Egyptian Supply Co. v. Boyd*, 117 F.2d 608, 612 (6th Cir 1941), as "[a] charge or security or encumbrance upon property," HENRY CAMELL BLACK, BLACK'S LAW DICTIONARY 832 (5th ed. 1979), and as "an encumbrance on . . . property . . . most frequently used as a means of securing the right of a party to collect funds," RICHARD R. POWELL, 5 POWELL ON REAL PROPERTY § P3A.01 (1999).

126. "Lien" means a "charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101(37) (1994).

127. Turner, *supra* note 13, at 27 & n.38 (noting Alabama statutes creating landlords' liens on crops and livestock as examples of statutes that would trigger an opt-out clause proposed by the authors with wording similar to that in Revised section 9-322(g)); John Mark Stevens, Comment, *Boon or Boondogle? Proposed Article 9 Revisions Incorporate Statutory Agricultural Liens for Better, Not Worse*, 30 TEX. TECH. L. REV. 1199, 1223-24 (1999) (opining that several Texas lien statutes affording priority over "other liens" qualify for application of the Revised section 9-322(g) opt-out clause).

"liens" and "security interests." As Grant Gilmore said, "throughout the Code the term 'lien' is consistently used in contradistinction to the term 'security interest.' 'Security interest' means an Article 9 security interest . . . 'lien' means something else."¹²⁸ Of course this usage is internal to Article 9, whereas the opt-out clause is activated "if *the statute creating the agricultural lien* so provides,"¹²⁹ which refers the matter to a statutory system separate from Article 9, with its own nomenclature. But the nomenclature of statutes like Alabama's landlord-lien statutes, drafted fifty years and more before the advent of the Uniform Commercial Code, is murky at best.

A stair-step analysis of statutory lien language in descending order of strength of reference to security interests may prove useful. At the top would reside statutes like Alabama's agricultural-processor's lien statute, which provides that an agricultural-processor's lien "shall have priority over all other liens, mortgages or encumbrances . . . except the lien of a landlord. . . ."¹³⁰ Such language, particularly the "all other . . . encumbrances" wording, would seem most likely to satisfy the Revised section 9-322(g) opt-out clause, thereby exempting the lien holder from Revised Article 9's "first in time" rule—unless the opt-out clause were read to require an explicit reference to "security

128. GILMORE, *supra* note 42, at 306. Professor Gilmore was describing Old Article 9, but the same is true under the New Code. Under Revised Article 9, "lien" means a judicial lien (i.e., one held by a "lien creditor," per Revised sections 9-102(52) and 9-317(a)(2)), an artisan's lien (of the sort governed by Revised section 9-333, discussed above), or an "agricultural lien." None of these liens are Article 9 security interests.

129. U.C.C. § 9-322(g) (Revised 1998) (emphasis added).

130. ALA. CODE § 35-11-290, quoted *supra* note 82. The statute goes on to specify that the "except the lien of a landlord" clause refers to the lien "provided for in section 35-9-30," meaning the landlord's lien on crops. No reference is made to the landlord's lien on livestock, since the types of processing referred to in the statute—cotton, peanuts, hay and seeds—are limited to crops.

As discussed earlier, text following note 86, *supra*, it is unclear whether the processor's lien is possession-dependent and therefore whether it even comes within Revised Article 9's "agricultural lien" provisions, as distinguished from the possessory-lien priority rule of Revised section 9-333. Assuming for purposes of discussion that the agricultural-lien provisions would apply to the processor's lien, the "except the lien of a landlord" clause would take a priority conflict between the processor's lien and a landlord's lien on crops outside of the opt-out clause of Revised section 9-322(g) and bring it within Revised section 9-322(a)'s "first in time" rule. Assuming both liens were "effective" (per Revised section 9-308(b)), as discussed *supra* note 109, before being filed upon, the first to file would prevail.

interests" in the lien statute's priority rule—a reading the author would consider unduly strict.

Second in strength of reference to security interests would come lien statutes predating the U.C.C. that specify priority over conditional sales and chattel mortgages—precursors to Article 9 security interests.¹³¹ While no Alabama agricultural lien statute is so worded, the concept merits analysis. Courts have given thought to such wording in the analogous realm of artisans' liens. From the inception of the Code, section 9-310¹³² (now Revised section 9-333, discussed above), has contained an opt-out clause for artisan's liens quite similar to that afforded agricultural liens in Revised section 9-322(g).¹³³ In the early days of the U.C.C., courts were faced with a choice similar to that posed by Revised section 9-322(g), namely whether references to pre-U.C.C. security devices in lien statutes were translatable into references to Code "security interests."¹³⁴ Some courts found such references nontranslatable. In *Corbin Deposit Bank v. King*,¹³⁵ a repairman asserted that his artisan's lien had priority over a prior perfected security interest in a repaired vehicle

131. There can be no doubt that the drafters of Article 9 intended to encompass within the label "security interest" transactions given archaic names by the transacting parties like "chattel mortgage" or "conditional sale." Old section 9-102(2) stated explicitly: "This Article applies to security interests created by contract including . . . chattel mortgage . . . conditional sale. . . ." The question raised by the author is whether a state legislature's use of such terms in a separate statutory scheme enacted before the inception of the U.C.C. should be viewed necessarily as prospectively embracing what only later would become "security interests."

132. Old section 9-310 is quoted *supra*, note 95.

133. In fact, the opt-out clause in Revised section 9-322(g) was probably modeled on that of Old section 9-310. In an article by members of the Task Force on Agricultural Liens, an opt-out clause proposed by the authors with language similar to that in Revised section 9-322(g) was described as "patterned after the 'unless' clause of . . . U.C.C. § 9-310." Turner, *supra* note 13, at 27 n.38.

134. Professor Gilmore raised the question without answering it, as follows:

No doubt some difficulty will be encountered in determining which [lien] statutes meet the "expressly provide otherwise" test [of section 9-310]. . . . Take, for example, the case of a nineteenth century lien statute which provides that the lien is subordinate to (or ineffective against) "chattel mortgages and conditional sale contracts." Does that language (if it is not amended when the Code is enacted) now subordinate the lien to all Article 9 "security interests," whether they would, before the Code, have been chattel mortgages, conditional sales or something else. . . . ?

GILMORE, *supra* note 18, at 887.

135. 384 S.W.2d 302 (Ky. Ct. App. 1964).

pursuant to section Old section 9-310. The court held that a pre-U.C.C. Kentucky statute awarding priority to a "mortgage" over liens did not satisfy the opt-out clause of Old section 9-310 because "the Uniform Commercial Code . . . is treating the matter of security interests—not mortgages. Although there are many similarities between a mortgage and security interest, there are many dissimilarities also."¹³⁶ While other courts have found references to pre-Code security devices translatable into post-Code terminology,¹³⁷ cases like *Corbin* at least raise doubts

136. *Corbin Deposit Bank*, 384 S.W.2d at 304. The court found that pre-U.C.C. cases within the state which had given priority to a recorded chattel mortgage were overturned by the enactment of the rule in U.C.C. section 9-310 awarding preemptive priority to an artisan's lien in the absence of a statutory provision otherwise. In accord with *Corbin* was *In re Yost*, 40 B.R. 962 (Bankr. W.D. Ky. 1984), wherein the bankruptcy court adopted the *Corbin* holding to recognize the priority of a repairman's lien over an earlier perfected security interest under section 9-310, notwithstanding the secured party's objection that the term "mortgage" in the pre-U.C.C. Kentucky statute preferring mortgages to liens was merely an archaic term for "security interest." *In re Yost*, 40 B.R. at 962.

In *Nickell v. Lambrecht*, 185 N.W.2d 155 (Mich. Ct. App. 1970), the court addressed pre-U.C.C. cases requiring as a condition to priority of a common law artisan's lien over a conditional sale that the conditional seller, as title holder, have consented to the repairs. Finding that enactment of U.C.C. section 9-310 overruled such cases, the court observed that to hold otherwise would be to emphasize, to the exclusion of all other considerations, the retention by the [creditor] of title and might revitalize formalisms eliminated by the code. This would be contrary to main threads of the code: the de-emphasization of title in favor of a functional approach and the elimination of distinctions in the law's treatment of security interests based on their form. *Nickell*, 185 N.W.2d at 160. The decision is not directly germane to the discussion in the text, since no statutory language referring to conditional sales was involved, but the case makes the point that an important difference exists between pre-Code conditional sales and their "security interest" successors in the U.C.C., namely the priority awarded conditional sellers in pre-Code law was based to some extent on the conditional seller's having retained title, leaving no interest in the purchaser to which a subsequent lien could attach. The U.C.C. abolished the relevance of location of the title, per Old section 9-202 (Revised section 9-202). Consequently, one commentator has observed, any attempt by a secured party to circumvent the lienor's preemptive priority under Old section 9-310 on a retention-of-title argument would be fruitless: "This argument is clearly a loser. The location of title is irrelevant under Article 9." CLARK, *supra* note 16, ¶ 3.07[3][c].

137. See, e.g., *Thorp Comm'l Credit Corp. v. Mississippi Road Supply*, 348 So. 2d 1016 (Miss. 1977) (finding that U.C.C. section 9-310 simply reiterated policy of a pre-U.C.C. Mississippi statute giving artisans' liens priority over prior conditional sales contracts); *Checkered Flag Motor Car Co. v. Grulke*, 164 S.E.2d 66 (Va. 1968) (holding that a Virginia artisan's lien statute denying a mechanic priority beyond \$75.00 in repair charges as against "a reservation of title contract, chattel mortgage . . . or other instrument securing money" with respect to the repaired vehicle

about the matter.

Third in strength of reference to security interests would come lien statutes like those creating landlords' liens in Alabama, which provide only that such liens shall be paramount to "all other liens."

Alabama statutory evolution and decisional law predating the U.C.C. call into question whether such references can be read to prefer lienors over modern "security interests" within the meaning of the opt-out clause in Revised section 9-322(g). The "paramount to all other liens" language never did, as it might appear to do on its face, award priority in all circumstances over consensual security devices. Indeed, Alabama courts have held that the "paramount to all other liens" priority rule in the lien statutes yielded to contrary provisions in the conditional sales recording act—a predecessor of U.C.C. Article 9.

The most striking example of this came with holdings establishing that the reserved title of a seller under an unrecorded conditional sales contract took priority over a landlord's lien, notwithstanding the "paramount to all other liens" language in the statute creating the latter. In *Alford v. Singer Sewing Machine Co.*,¹³⁸ a landlord seized the tenant's sewing machine under an Alabama statute affording lessors of buildings a lien for unpaid rent against personal property of the tenant on the premises¹³⁹—a statute directly analogous to those creating landlords' liens on crops and livestock because it contains a "superior to all other liens" clause. The Singer Sewing Machine Company asserted a competing claim to the machine under the terms of its unrecorded conditional sale contract with the tenant.¹⁴⁰ Since the Alabama conditional sales act, which listed only "purchasers . . . mortgagees and judgment creditors without notice" as interests protected against unrecorded conditional

fit within the provision of U.C.C. section 9-310 precluding priority over a prior security interest if the lien statute "provides otherwise," so the conditional seller had priority over a subsequent repair lien except for \$75.00 in repair charges). Cf. *Westlake Fin. Co v. Spearman*, 213 N.E.2d 80, 2 U.C.C. Rep. Serv. 1174 (Ill. App. Ct. 1965) (holding that a pre-U.C.C. lien statute containing no priority rule, but which state courts had construed to give preference to prior conditional sales over repairman's lien, was overturned by the enactment of U.C.C. section 9-310).

138. 85 So. 584 (1920).

139. ALA. CODE § 4747 (1907), which later became ALA. CODE § 35-9-60 (1991).

140. *Alford*, 85 So. at 584.

sales¹⁴¹ failed to mention landlords' liens, the Alabama Court of Appeals found the lien subordinate to the conditional sale.¹⁴² Subsequently, in *Brooks v. Dial*,¹⁴³ the Alabama Supreme Court applied the reasoning of the *Alford* decision in subordinating a landlord with a lien on livestock for pasturage¹⁴⁴ to an unrecorded conditional sale contract, notwithstanding that the lien-enabling statute contained, as it does today, a "paramount to all other liens" provision.¹⁴⁵ In reaction to *Alford* and *Brooks*, the Alabama Legislature amended the conditional sales act in 1923 to add landlord's liens to the list of interests protected against unrecorded conditional sales.¹⁴⁶ Even after the 1923 amendment, however, landlords' liens remained inferior to recorded conditional sales, notwithstanding the "paramount to all other liens" provision in the lien statute.¹⁴⁷

Hence, both before and after the 1923 amendment of the conditional sales act, Alabama courts viewed the "paramount to all other liens" priority rule of the lien act as subordinate to the priority rule of the conditional sales act. To the extent that a pre-U.C.C. conditional sale would be translatable into a post-U.C.C. Article 9 security interest, the analogous situation today might be for a court to view the landlords' liens statute as deferring to the secured-party-versus-agricultural-lien priority rules within Revised Article 9 that depend upon time of filing, irrespective of the "paramount to all other liens" language in the lien statute. Under that reasoning, the "paramount to all other liens" language would not qualify for the opt-out clause of Re-

141. ALA. CODE § 3394 (1907).

142. *Alford*, 85 So. at 586.

143. 107 So. 744 (1926).

144. ALA. CODE §§ 8894-8896 (1923), which later became ALA. CODE § 35-11-72 (1991), quoted in full *supra* note 75.

145. ALA. CODE §§ 8894-8896 (1923).

146. *Id.* § 6898, which later became ALA. CODE tit. 47, § 131 (1958). The latter was supplanted by the Uniform Commercial Code. ALA. CODE § 7-10-102(1) (1975). For decisions by the Alabama Supreme Court recognizing the legislative change adding landlords' liens to the interests protected in the conditional sales act, see *Isbell-Hallmark Furniture Co. v. Sitz*, 114 So. 677 (1927); *Brooks v. Dial*, 107 So. 744 (1926); *Brunswick-Balke Collender Co. v. Starnes*, 107 So. 743 (1926).

147. See *Isbell-Hallmark Furniture Co.*, 114 So. at 677 (recognizing that the 1923 amendment of the conditional sales act protected landlords' liens only "until the conditional sale contract [was] put to record carrying constructive notice of the vendor's title").

vised section 9-322(g), and the lien statute would therefore give way to the Revised Article 9 priority rules.

Possibly detracting from the foregoing chain of reasoning is the unique, reservation-of-title nature of pre-U.C.C. conditional sales and the fact that they are currently most analogous to a special type of Article 9 security interest—a purchase-money security interest.¹⁴⁸ But even the pre-Code judicial treatment of chattel mortgages, comparable to more basic, non-purchase-money Article 9 security interests today, lends some weight to the argument that the “paramount to all other liens” language in the lien statutes, as applied by the courts, falls short of what is required for satisfaction of the opt-out clause of Revised section 9-322(g).

When deciding conflicts between chattel mortgages on personalty located on leased property and landlords’ liens, Alabama courts did frequently cite the “paramount to all other liens” language in the lien statute in support of subordinating a chattel mortgage recorded after inception of the lease, but the same courts also predicated their decisions on the principle that the chattel mortgagee’s knowledge of location of the goods on the leased premises gave rise to constructive notice of the landlord’s lien—a principle enunciated in the chattel mortgage act priority rule (which declared chattel mortgages “inoperative against creditors and purchasers without notice, until recorded”)¹⁴⁹ and not stated in the lien statutes.¹⁵⁰

148. See, e.g., *Arbuthnot v. Thatcher*, 188 So. 245, 246 (1939), wherein the court observed: “It is perhaps appropriate to call attention to the difference between this case [involving a chattel mortgage] and cases of conditional sale contracts, or purchase money mortgages, wherein title never passed to the tenant except in so far as such titles were void under recording statutes.”

149. ALA. CODE § 3386 (1907), which, without change in the relevant language, became ALA. CODE § 6890 (1923), which, without change in the relevant language, became ALA. CODE tit. 47, § 123 (1958), which was supplanted by the Uniform Commercial Code. ALA. CODE § 7-10-102(1) (1975).

150. See, e.g., *Anniston Prod. Credit Ass’n v. Leak*, 48 So. 2d 67 (1950); *First Nat’l Bank of Gadsden v. Burnett*, 104 So. 17 (1925); *Darden v. Ogle*, 310 So. 2d 182 (Ala. 1975) (stating the principle reflected in the text in dictum, while deciding the rights of a purchaser from the tenant); *Gay & Bruce v. W.B. Smith & Sons*, 100 So. 633 (1924) (stating the principle reflected in the text in dictum, while deciding the rights of a purchaser from the tenant). Oddly, however, notwithstanding that the “notice” principle did not appear in the landlords’ lien statutes and did appear in the chattel mortgage act, none of the cited decisions explicitly referred to the chattel mortgage act.

Moreover, Alabama courts subordinated landlords' liens to chattel mortgages recorded before renewal or inception of the landlord's lease on the ground that the landlord would have knowledge, or constructive notice of the mortgage at the time of entering into the new lease¹⁵¹—again applying a principle stated in the chattel mortgage act priority rule and not stated in the landlords' liens statutes.

Since recordation of a chattel mortgage is analogous to filing an Article 9 security interest today and filing supplants the pre-U.C.C. notion of "notice," the foregoing chattel-mortgage decisions would seem comparable to modern courts' basing their resolution of a dispute between a security interest and an Alabama landlord's lien on the "first in time" rule embodied in Revised section 9-322(a) rather than reading the lien statutes as awarding preemptive, second-in-time priority, as would be required of the lien statutes in order for them to qualify for the opt-out clause of Revised section 9-322(g).

VIII. CONCLUSION

The fit between existing state statutes creating liens on agricultural commodities and the new Code's agricultural lien provisions is an awkward one at best. State legislatures will be well advised to consider revising the wording of their lien statutes to improve that fit—particularly by stating explicitly that the priority rules therein do, or do not, address conflicts with Article 9 security interests. In the absence of such rewording, Revised Article 9 will, by default, at least partially rewrite lien statutes, and courts will find themselves engaging in the sorts of tortuous analyses that this Article has demonstrated.

Revised Article 9's new agricultural-lien scheme will no doubt benefit secured creditors by eliminating what heretofore have been "secret liens." From the lienor's perspective, however, the new Code's imposition of Article 9 filing rules will cause inconvenience, surprise to the uneducated, and frequent subordination to more savvy secured parties. Whether the vaunted

151. *Payne v. Boutwell*, 164 So. 755 (1935); *Matheson v. Farmers' Bank & Trust Co.*, 116 So. 906 (1928), *aff'd*, 116 So. 906 (1928).

increase in certainty and predictability lienors will enjoy from incorporation of their interests into Article 9 will outweigh those detriments is an open question.

