

# A TALE OF TWO CREDITORS UNDER THE DESULTORY LIEN CREDITOR AND FUTURE ADVANCES PROVISIONS OF REVISED ARTICLE 9

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Like many areas of commercial law, the 1972 version of UCC Article 9 did not keep pace with the commercial realities of the 21<sup>st</sup> Century.<sup>1</sup> To address and cure the problems presented by the aging 1972 version of Article 9, the American Law Institute (“ALI”) and the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) produced a revision.<sup>2</sup> However, as is expected from any revision, glitches, errors, and ambiguities surfaced after the revision’s 1999 promulgation.<sup>3</sup> The American Law Institute and NCCUSL set out to identify and fix the errors and, in an unusual move, produced two more revisions.<sup>4</sup>

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<sup>1</sup> See generally Introduction, PEB Study Group, UCC Art. 9 Report at 1-2 (Dec. 1, 1992). The Uniform Commercial Code (hereinafter “UCC”) is the product of the co-sponsorship of the American Law Institute (hereinafter “ALI”) and the National Conference of Commissioners on Uniform State Laws (hereinafter “NCCUSL”). In 1990, the two sponsors appointed a study committee to review Article 9 and to recommend changes. The committee last met in 1967 and extended recommendations which were later incorporated into the 1972 official text version of Article 9. Although all 50 states have adopted the 1972 version, state amendments have created differences among the states that have since impaired interstate transactions. Judicial interpretations have also resulted in conflicting applications of the article and required clarification to cure the ambiguity. The sheer number of secured transactions has increased greatly since 1972 and the need for revision, especially in the area of filing, was obvious. Technological innovations marked the greatest need for change as paper-based transactions gave way to electronic transactions. Since 1972, new types of liens and new kinds of collateral developed, requiring revision of the article to keep up with the expansion.

<sup>2</sup> See Uniform Commercial Code, Article 9, 1999 Official Text. See also *infra* Part C.2.

<sup>3</sup> See Corrine Cooper, Preface to the Second Edition of EDWIN E. SMITH & STEVEN O. WEISE, *THE NEW ARTICLE 9* at v-vi (Corinne Cooper ed., 2<sup>d</sup> ed. 2000).

<sup>4</sup> See *id.* The Standby Committee established a Task Force to identify and fix any errors or ambiguities. Upon completion of its mission, the Task Force recommended changes and corrections, and clarified modifications made to the text and comments of Revised Article 9. See also discussion *infra* Part C,2-4.

Glitches are an expected by-product of any redrafting of a statute as complex as Revised Article 9 and could be tolerated if they were in fact simply “technical in content; none of them ris[ing] to the level of a policy change.”<sup>5</sup> When the errors go to core concepts, however, the resulting conflict is impossible to ignore.<sup>6</sup> Revised sections 9-317(a)(2) and 9-323(b) exemplify the type of conflicts that result from ambiguous redrafts.<sup>7</sup> In what seems to be a drafting oversight, section 9-317(a)(2) makes the language of section 9-323(b) seemingly superfluous.<sup>8</sup> Under section 9-317(a)(2), a perfected, secured creditor should prevail over a judicial lien creditor for all debt in existence at the time of the signing of a security agreement.<sup>9</sup> By extension and under the plain language of section 9-317(a)(2), that priority should extend to any money lent after the time of signing, regardless of prior commitment or the lender’s state of knowledge of any intervening liens since it is the same security interest.<sup>10</sup> Section 9-323(b) seems to subordinate such loans, ranking as junior any advance the lender may make after 45 days of the lien creditor’s intervention, with knowledge of the intervention, and without prior commitment.<sup>11</sup> The crux of the problem is that there is no cross reference in the text of either section which limits the effects of the other.<sup>12</sup> Furthermore, the scope of the term “advance” is ambiguous, and its definition unclear.<sup>13</sup> Although these ambiguities surfaced after the first 1999 revision, the problem persists through the later two revisions.<sup>14</sup>

The circumstances that give rise to the apparent conflict and its practical consequences are best appreciated in the context of the following example. Suppose Debtor D is in financial trouble. He has defaulted under the terms of an unsecured debt agreement with creditor, C1. D and C1 agree to negotiate a workout. As a condition of these negotiations, C1 insists that D authorize C1’s filing of a financing statement on Day 1 that covers “all assets.” D agrees and

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<sup>5</sup> See Cooper, *supra* note 3.

<sup>6</sup> See NCCUSL, Introduction & Adoptions of Uniform Acts (visited Nov. 5, 2000) <[http://www.nccusl.org/uniformact\\_factsheets/uniformacts-fs-ucca9.htm](http://www.nccusl.org/uniformact_factsheets/uniformacts-fs-ucca9.htm)> (stating that 28 states have already adopted a revised version of Article 9 and that 12 states have introduced to their legislatures a revised version of Article 9).

<sup>7</sup> When necessary, all statutory references to Article 9 in the text will include the date of revision.

<sup>8</sup> See discussion *infra* Part C. The conflict persists in all three revisions.

<sup>9</sup> See *infra* Part C,2-4.

<sup>10</sup> See *id.*

<sup>11</sup> See discussion *infra* Part C,2-4.

<sup>12</sup> See § 9-317 cmt. 4 (1999). The only reference between the sections appears in the comments. While the comment includes an exception for section 9-323, the actual language of the statute does not.

<sup>13</sup> See § 9-102 (1999) (hereinafter “first revision”), § 9-105 (July, 1999) (hereinafter “second revision”), § 9-102 (Jan., 2000) (“Advance” not included in the “Definition” sections of any of the revised versions). See also § 9-323 (using the term “advance” without defining the term).

<sup>14</sup> See discussion *infra* Part C,2-4.

C1 files a financing statement. On Day 5, another creditor C2, levies upon some of D's equipment, thereby becoming a judicial lien creditor. C1 is put on notice of C2's lien. On Day 6, D and C1 agree to a moratorium of six months, during which time C1 agrees to consider requests for loans up to \$50,000, but under which C1 lends no funds at signing. C1 and D also enter into a security agreement on Day 6 securing "all debts and obligations, whether now existing or hereafter arising." The security agreement specifically covers equipment. C1 does not file a new financing statement. On Day 60, D requests money under the moratorium agreement. If lent, will C1 have priority as to the equipment?

To answer this question, understanding how sections 9-317(a)(2) and 9-323(b) work together is critical. Their interaction not only affects the priority of an Article 9 security interest against the lien of a judicial lien creditor, it also affects nearly every bankruptcy as well.<sup>15</sup>

The following discussion will focus on all three revised versions of former section 9-301(1)(b), specifically considering whether C1, the secured creditor, or C2, the judicial lien creditor, has priority as to the equipment. The latter sections of this note proved a suggested solution to the apparent conflict.

#### BACKGROUND

To better understand the problem and to put the discussion in the proper context, this note will begin with a look at the background to sections 9-317 and 9-323. Section 9-317 sets forth the rules of priority between an unperfected security interest and a lien creditor.<sup>16</sup> A lien creditor is an unsecured creditor who has acquired a lien on the debtor's property by judicial process (judicial lien creditor) or automatically by statute or common law (statutory lien creditor).<sup>17</sup> Common lien creditors include trustees in bankruptcy, taxing authorities, landlords, mechanics, artisans, lawyers, innkeepers, and others who have performed services for the debtor.<sup>18</sup>

The status of a lien creditor is particularly important since a bankruptcy trustee is given the same status as a hypothetical judicial lien creditor.<sup>19</sup> The trustee will have whatever powers a creditor, with a lien on all of the debtor's property at the moment the debtor petitions for bankruptcy, could have exercised.<sup>20</sup> Thus, if a judicial lien creditor has priority over an Article 9 security interest as of the filing of the bankruptcy petition, the trustee has such priority

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<sup>15</sup> See Bankruptcy Code and Related Provisions, 11 U.S.C. § 544(a) (1999). On the date the debtor files a petition for bankruptcy, a bankruptcy trustee is given hypothetical lien creditor status.

<sup>16</sup> See U.C.C. § 9-317(a)(2) (1999).

<sup>17</sup> See *id.* § 9-102(a)(52).

<sup>18</sup> See *id.*

<sup>19</sup> See Bankruptcy code and Related Provisions, 11 U.S.C. § 544(a) (1999).

<sup>20</sup> See *id.*

on behalf of all the creditors filing claims.<sup>21</sup> The trustee will prevail against any claims, liens, or interests that are not fully perfected at the time of bankruptcy.<sup>22</sup>

Section 9-323(b) defines the terms of a priority contest between a perfected secured creditor and a judicial lien creditor with respect to future advances.<sup>23</sup> The priority of a secured interest for future advances over a lien creditor is made absolute for 45 days regardless of knowledge of the lien.<sup>24</sup> If however, the secured party makes an advance after the specified 45 days, the advance will not have priority unless the secured party made or was committed to the advance without knowledge of the lien.<sup>25</sup>

There are several reasons which justify the extension of priority to a secured creditor's future advance over an intervening lien creditor's interest. First, the extension of such priority supports the realities of commercial transactions.<sup>26</sup> Many types of transactions require extensions of credit at different stages of the creditor/debtor relationship. For example, a creditor financing the construction of a building is not likely to extend the full amount of the loan in one lump sum.<sup>27</sup> On the contrary, the creditor is likely to extend advances only upon the completion of different stages of the construction.<sup>28</sup> The lenders in such an arrangement are not likely to extend such a credit advance if their security interest will be subordinate to an intervening lien creditor.<sup>29</sup> Such a scenario can be quite damaging to the debtor's business.<sup>30</sup> Furthermore, principles of efficiency dictate the subordination of lien creditors to the interest of secured creditors in certain future advances. Under revised section 9-204, a security agreement can create security interests in the collateral that secures not only the current loan but also future loans by the same creditor.<sup>31</sup> Accordingly, the parties need not enter into a new security agreement.<sup>32</sup> This spares the costs associated with the execution of multiple security agreements which are necessary each time the secured obligation changes.<sup>33</sup> This also allows the parties more flexibility as they need not contemplate when or for what amounts the future

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<sup>21</sup> *See id.*

<sup>22</sup> *See id.*

<sup>23</sup> *See generally* U.C.C. § 9-323(b) (1999).

<sup>24</sup> *See id.* § 9-323(b)(1).

<sup>25</sup> *See id.* § 9-323(b)(2).

<sup>26</sup> *See* LYNN M. LOPUCKI & ELIZABETH WARREN, *SECURED CREDIT: A SYSTEMS APPROACH* 578 (2d ed. 1998).

<sup>27</sup> *See id.*

<sup>28</sup> *See id.*

<sup>29</sup> *See id.*

<sup>30</sup> *See id.*

<sup>31</sup> *See* U.C.C. § 9-204(c) (1999).

<sup>32</sup> *See id.*

<sup>33</sup> *See* JULIAN B. McDONNELL, *UCC SECURED TRANSACTIONS, THE PRIORITY OF FUTURE ADVANCES AND NON-ADVANCE OBLIGATIONS*, § 7C.01, at 1, (1999).

advances will be.<sup>34</sup> The filed financing statement will then perfect the security interest both as originally made and as expanded by later advances to the debtor.<sup>35</sup>

The policy which justifies the extension of priority to a secured creditor's future advance over an intervening lien creditor when that secured creditor has knowledge of the intervening lien is more tenuous. Drafters of Article 9 explained in Comment 7 to former section 9-301 that the purpose behind giving priority to advances made within 45 days after the intervention of a when the lien creditor has knowledge of such intervention was to "effectuat[e] the intent of the Federal Tax Lien Act of 1966."<sup>36</sup> Secured parties would qualify for priority over a tax lien only if they retained their priority status over lien creditors.<sup>37</sup> This section grants the secured creditor priority over not only the IRS, but also over any lien creditor. Thus, the drafters' reasoning is only narrowly applicable.

#### DISCUSSION

Keeping the policies described above in mind, consider the following example:

Debtor D, is in financial trouble and is in default under the terms of an unsecured debt agreement with creditor, C1, for \$100. D and C1 agree to enter into talks for a workout; but as a condition of these talks, C1 insists that D authorize C1's filing of a financing statement on Day 1 that covers "all assets." D agrees and the financing statement is filed. His assets total \$125. On Day 5, another creditor C2, levies upon some of D's equipment, thereby becoming a judicial lien creditor for \$25. C1 is put on notice of C2's intervention. On Day 6, D and C1 agree to a moratorium of six months, during which time C1 agrees to consider requests for loans up to \$5,000, but under which C1 lends no funds at signing. C1 and D also enter into a security agreement on Day 6 securing "all debts and obligations, whether now existing or hereafter arising." The security agreement specifically covers equipment. No new financing statement is filed. On Day 60, D requests \$25 under the moratorium agreement. If lent, will C1 have priority as to the \$25?

Under section 9-317, C1's loan of \$25 dollars should have a priority date of Day 1, the day on which the financing statement was filed since it is the same security interest. According to the drafters in 9-317 comment 4, section (a)(2) treats the first advance the same as subsequent advances.<sup>38</sup> Thus, C1 would be entitled to all \$125 in D's assets under default. However, if C1's loan of the \$25 on Day 60 is considered a future advance, section 9-323(b) would

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<sup>34</sup> See *id.*

<sup>35</sup> See U.C.C. § 9-502 cmt. 2 (1999).

<sup>36</sup> See *id.* § 9-301 cmt. 7 (1972).

<sup>37</sup> See *id.*

<sup>38</sup> See *id.* § 9-317 cmt. 4 (1999).

seem to make it subordinate to the \$25 judicial lien since the loan was made 45 days after the lien creditor intervened, and was made with knowledge, and not pursuant to commitment.<sup>39</sup> Therefore, C1 would only be entitled to \$100 of D's assets under default, and C2 would be entitled to the remaining \$25. C1 would be under secured and out \$25.

Which section applies? Does section 9-323 limit section 9-317 without stating it? It does seem so. There seems to be no impediment in section 9-317(a)(2) which would subordinate a lien creditor's interest to the one described above. The problem is twofold. First, there is no reference in either section which would limit the other's coverage. While comment 4 to section 9-317 does make an exception for section 9-323, the actual language of the statute does not.<sup>40</sup> This is of little help, since State Legislatures adopt the code and not the comments. Secondly, "advance" is not defined anywhere in the code. Is C1's extension of the \$25 on Day 60 actually an advance covered by 9-323? Or is it a new, independent loan?

This confusion is surely not the intention of the drafters. By revising Article 9, they hoped to create a much more succinct and straightforward uniform law.<sup>41</sup> However, with regards to sections 9-317 and 9-323, it would seem that they have done just the opposite, having revised both sections three times in the last two years.<sup>42</sup> Despite all of these changes, confusion remains.

#### ANALYSIS

The following analysis addresses a priority contest between C1, the secured creditor, and C2, the judicial lien creditor, as to C1's extension of \$25 on day 60 under former sections 9-301(1)(b) and 9-301(4) as well as under all three revisions of those sections.<sup>43</sup> The discussion of each version will focus on how each respective section resolves the priority contest between C1 and C2 with regards to the day 60 loan of \$25. Initially, the analysis will determine the winner of the priority contest under a strict secured creditor versus lien creditor regimen. In contrast, the analysis will then determine the winner under a future advance regimen. To avoid confusion and uncertainty, the same creditor should have priority as to the equipment under both systems.

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<sup>39</sup> See *id.* § 9-323(b).

<sup>40</sup> See *id.* § 9-317 cmt. 4.

<sup>41</sup> See BARKLEY CLARK, *THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* ¶ 15.01 (rev. Ed. Vol.2 1999) (stating that Article 9 has been the most heavily litigated area of commercial law).

<sup>42</sup> See CORRINE COOPER, *Preface to the Second Edition of EDWIN E. SMITH & STEVEN O. WEISE, THE NEW ARTICLE 9* at v-vi (Corinne Cooper ed., 2<sup>d</sup> ed. 2000). The third revision is dated January 15, 2000 and modifies the changes made to the second revision dated August 16, 1999.

<sup>43</sup> See discussion *infra* Part C, 1-4.

1. *Pre-Revision: Section 9-301*

In its pertinent party, Former § 9-301(1)(b) states:

*Persons Who Take Priority Over Unperfected Security Interests; Rights of "Lien Creditor"*

(1) Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of a person who becomes a lien creditor before the security interest is perfected;<sup>44</sup>

Under the lien creditor versus secured creditor regime in section 9-301(1)(b), the judicial lien creditor will prevail over C1 if the lien arose before the security interest is perfected.<sup>45</sup> Thus, to determine who has priority with respect to the second \$25, it must be determined when C1 perfected his security interest.

For perfection under these conditions, there must be attachment<sup>46</sup> and a filed financing statement.<sup>47</sup> Debtor and C1 filed a financing statement covering "all assets" on Day 1. However, attachment did not occur until Day 6 when the debtor and C1 entered into a security agreement. At this time value had been given in the form of the preexisting debt,<sup>48</sup> and the debtor had rights in the collateral. Since the judicial lien arose on Day 5, one day before C1's interest in the Day 60 \$25 arose, under section 9-301(1)(b), it would have a priority date prior to that of C1 with regards to the Day 60 \$25.

This should be the same under section 9-301(4) which states:

*Persons Who Take Priority Over Unperfected Security Interests; Rights of "Lien Creditor"*

(4) A person who becomes a lien creditor while a security interest is perfected takes subject to the security interest only to the extent that it secures advances made before he becomes a lien creditor or within 45 days thereafter or made without knowledge of the lien or pursuant to commitment entered into without knowledge of the lien.<sup>49</sup>

Here, a lien creditor's interest is junior to a security interest "only to the extent that the perfected security interest secures advances made before he (lien creditor) becomes a lien creditor or within 45 days thereafter or made without knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien."<sup>50</sup> The negative implication being that if the lien creditor is first, it is senior. In this scenario, C1 advanced the \$25 fifty-five days after the

<sup>44</sup> U.C.C. § 9-301(b) (1972).

<sup>45</sup> *See id.*

<sup>46</sup> *See id.* § 9-203(1)(a)-(c) (1972). Attachment requires an authenticated security agreement, rights in the collateral, and the extension of value.

<sup>47</sup> *See id.* § 9-302 (1972).

<sup>48</sup> *See id.* § 1-201(44)(b) (1972) ("[A] person gives 'value' for rights if he acquires them (b) as security for or in total or partial satisfaction of a pre-existing claim.").

<sup>49</sup> U.C.C. § 9-301(4) (1972).

<sup>50</sup> *Id.*

judicial lien creditor became a lien creditor, with knowledge of the lien, and without prior commitment. Accordingly, the judicial lien creditor will have priority with respect to the second \$25.

The result is consistent between these two pre-revision sections as the lien creditor will prevail under both section 9-301(1)(b) and section 9-301(4) with respect to the \$25. It can therefore be concluded that the changes made to the revised sections are at the heart of the conflict now existing. The following will outline this conflict.

2. *The First 1999 Revision- Sections 9-317(a)(2) and 9-323(b)*

In its pertinent part, Section 9-317(a)(2) states:

*Interests That Take Priority Over or Take Free of Unperfected Security Interest or Agricultural Lien*

[Conflicting security interests and rights of lien creditors.] An unperfected security interest or agricultural lien is subordinate to the rights of:

(2) except as otherwise provided in subsection (e), a person that becomes a lien creditor before the earlier of the time the security interest or agricultural lien is perfected or a financing statement covering the collateral is filed.<sup>51</sup>

Notice the addition in this revised version of a new way of establishing priority. Under this version, the date of priority may be set when a financing statement covering the collateral is filed.<sup>52</sup> Thus, C1 should prevail over the judicial lien creditor for all debt in existence at the time of the signing of the security agreement.<sup>53</sup> By extension, that priority should also extend to the \$25 lent on Day 60 since it is secured by the same security interest.<sup>54</sup>

The result should be the same under section 9-323(b) which states:

*Future advances*

(b) [Lien creditor.] Except as otherwise provided in subsection (c), a security interest is subordinate to the rights of a person that becomes a lien creditor while the security interest is perfected only to the extent that it secures advances made more than 45 days after the person becomes a lien creditor unless the advance is made:

without knowledge of the lien; or

pursuant to a commitment entered into without knowledge of the lien.<sup>55</sup>

Here, C1's interest as to the \$25 is senior to the lien creditor's interest if it secures a discretionary advance made less than 45 days after the judicial lien arose, without knowledge of the judicial lien, as long as long as C1 was "per-

<sup>51</sup> U.C.C. § 9-317(a)(2) (1999). See also NEV. REV. STAT. ANN. § 104.9317 (Michie 2000). Nevada is among the states that has adopted this version.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> U.C.C. § 9-323(b)(1)-(2) (1999).

perfected” when the lien creditor’s lien arose- i.e., as long as the advance was not the first one and an earlier advance had been made.<sup>56</sup> C1 advanced the money for the second time, 55 days after the judicial lien arose, with knowledge of its existence, and this advance was not made pursuant to a commitment. The first advance was made pursuant to the pre-existing debt. Thus, under § 9-323(b), C1’s priority as to the \$25 is subordinate to that of the judicial lien creditor.

This contradicts the analysis under section 9-317(a)(2) which determined that the date of priority for all of the money lent to Debtor by C1 including the second \$25 was Day 1 when that financing statement was filed.<sup>57</sup>

### 3. *The Second 1999 Revision- Sections 9-317(a)(2) and 9-323(b)*

In the second revision to section 9-317, the drafters took out the term “unperfected,” which leaves in its pertinent part:

*Interests That Take Priority Over or Take Free of-Security Interest or Agriculture Lien:*

Conflicting security interests and rights of lien creditors. A security interest or agricultural lien is subordinate to the rights of:

(2) except as otherwise provided in subsection (e), a person that becomes a lien creditor before the earlier of the time the security interest or agricultural lien is perfected or a financing statement covering the collateral is filed.<sup>58</sup>

The analysis seems to be the same here as it was under the first revised version.<sup>59</sup> Like that version of section 9-317(a)(2), the date of priority under this revision may be set when a financing statement covering the collateral is filed.<sup>60</sup> Thus, C1 should prevail over the judicial lien creditor for all debt in existence at the time of the signing of the security agreement.<sup>61</sup> By extension, that priority should also extend to the \$25 lent on Day 60 since it is secured by the same security interest.<sup>62</sup>

If the drafters corrected the problem in this second revision, the result under section 9-323(b) should be the same. C1’s interest as to the second \$25 should be senior to that of the judicial lien creditor. The Second 1999 Revised Version of 9-323(b) is as follows:

#### *Future Advances*

(b) Lien Creditor. Except as otherwise provided in subsection (c), a security interest is subordinate to the rights of a person that becomes a lien creditor to the extent that it the security interest secures advances an advance made more than 45 days after the person becomes a lien creditor unless the advance

<sup>56</sup> See *id.*

<sup>57</sup> See discussion supra Part C.2.

<sup>58</sup> U.C.C. § 9-317(a)(2) (1999).

<sup>59</sup> See discussion supra Part C.2.

<sup>60</sup> U.C.C. § 9-317(a)(2) (1999).

<sup>61</sup> See *id.*

<sup>62</sup> See *id.*

is made:

- (1) without knowledge of the lien; or
- (2) pursuant to commitment entered into without knowledge of the lien.<sup>63</sup>

Here again, the changes made to this section do not alter the result obtained earlier under the first revision.<sup>64</sup> With the deletion of the phrase “while the security interest is perfected,” the drafters removed one more step in the analysis. Now, instead of having to determine if the secured party had made an earlier advance on top of everything else, one must now only consider when the loan was made, with what knowledge, and whether or not it was pursuant to commitment.<sup>65</sup> C1's interest as to the \$25 is subordinate to the lien creditor's interest if it secures an advance made more than 45 days after the judicial lien arose, the advance was made with knowledge of the judicial lien, and the advance was not made pursuant to commitment.<sup>66</sup> C1's second advance was 55 days after the judicial lien arose, with knowledge of its existence, and this advance was not made pursuant to a commitment. Thus, under section 9-323(b), C1's priority as to the \$25 is subordinate to that of the judicial lien creditor.

As was true under the first 1999 revisions, the priority dates contradict each other.<sup>67</sup> The priority date as to the second \$25 should be the same under both sections. When it is not, there is no guidance as to which section should prevail.

#### 4. *The Third 2000 Revision- Section 9-317(a)(2) and 9-323(b)*

The latest changes to section 9-317(a)(2) are as follows:

(a) Conflicting security interests and rights of lien creditors. A security interest or agricultural lien is subordinate to the rights of:

(2) except as otherwise provided in subsection (e), a person that becomes a lien creditor before the earlier of the time:

(A) the security interest or agricultural lien is perfected; or

(B) one of the conditions specified in Section 9-203(b)(3) is met and a financing statement covering the collateral is filed.<sup>68</sup>

This revision does add another requirement. The priority date is no longer when a financing statement was filed, but when at least one condition under section 9-203(b)(3) is met.<sup>69</sup> This changes result that we came up with under the first two revisions.<sup>70</sup> While a financing statement was filed on Day 1,

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<sup>63</sup> U.C.C. § 9-323(b)(1)-(2) (1999).

<sup>64</sup> See discussion *supra* Part C.2.

<sup>65</sup> See U.C.C. § 9-317(a)(2) (1999).

<sup>66</sup> See *id.*

<sup>67</sup> See discussion *supra* Part C.2.

<sup>68</sup> U.C.C. § 9-317(a)(2)(A)-(B) (2000).

<sup>69</sup> See *id.* § 9-317(a)(2)(B).

<sup>70</sup> See discussion *supra* Part C.2-3.

a security agreement was not signed until Day 6. This is one day after the intervention of the lien creditor, giving the lien creditor a superior interest as to the \$25. The drafters did not change the text of section 9-323(b) so the result would be the same here as it was under the last two revisions.<sup>71</sup> The lien creditor would also have a superior interest as to the \$25.

This seems to solve the confusion as to who has a superior interest as to the \$25. However, the failure to define "advance" or to cross reference the sections still presents a problem. This is best demonstrated in the following example. Suppose as a condition of entering into restructuring or workout arrangements, a creditor requires the filing of a financing statement and the signing of a security agreement. The security agreement, however, delays attachment until the completion (if any) of the workout process.<sup>72</sup> Thus, the parties have incentive to enter into such an agreement if they do not yet have a deal. This would allow them to beat out a lien creditor by circumventing section 9-317(a)(2). As a result, the question of priority still remains as to a second advance if all the workout does is secure an antecedent debt, and the advance is made at least 46 days after knowledge of a judicial lien.

### 5. The Drafters' Concerns

Examination of the drafters' concerns in revising sections 9-301(1)(b) and 9-301(4) is necessary to enable resolution of the above described conflict. First, consider the drafter's reasons for revising section 9-301(4).<sup>73</sup> The changes made to this section reflect the drafter's concerns about the application of the opinion in *Dick Warner Cargo Handling Corporation vs. Aetna Business Credit, Inc.*<sup>74</sup> In that case, Judge Friendly concluded that section 9-301(4) did not apply to "non-advances."<sup>75</sup> This meant that interest, attorney's fees, and expenses that occurred after the emergence of the lien would not have the same

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<sup>71</sup> See *id.*

<sup>72</sup> See U.C.C. § 9-203(a) (2000) (Stating that a security agreement can expressly postpone the time of attachment).

<sup>73</sup> See *id.* § 9-323 cmt. 4 (1999) ("Subsection (b) replaces former Section 9-301(4). It addresses the problem considered by PEB Commentary No. 2 and removes the ambiguity that necessitated the Commentary. Former Section 9-301(4) appeared to state a general rule that a lien creditor has priority over a perfected security interest and is 'subject to' the security interest 'only' in specified circumstances. Because the section spoke to the making of an 'advance,' it arguably implied that to the extent a security interest secured non-advances (expenses, interest, etc.), it was junior to the lien creditor's interest."). See also Julian B. McDonnell, UCC Secured Transactions, the Priority of Future Advances and Non-Advance Obligations, § 7C.03, at 1-2, (1999).

<sup>74</sup> See *Dick Warner Cargo Handling Corp. v. Aetna Business Credit, Inc.*, 746 F.2d 126, 127 (2<sup>nd</sup> Cir. 1984). See also PEB Commentary No. 2 to 1972 U.C.C. version § 9-301(4)(addressing the problem of whether non-advances, e.g., interest on advances accruing either before or after the lien arises, or expenses of foreclosure of the security interest arising after the lien arises, are excluded from the priority of pre-lien advances under the security interest by the language of former §9-301(4)).

<sup>75</sup> See *id.* at 134.

priority as their future advance counterparts.<sup>76</sup> While this was a valid concern and one that required clarification, the solution did little to clarify the now existing confusion.

The root of the problem lies in the changes made to former section 9-301(1)(b). Under both former section 9-301(4) and the first revised version of section 9-323(b),<sup>77</sup> the result of the priority contest is the same. The lien creditor's interest was senior to that of C1 with regards to the \$25. This implies that the changes made to section 9-323(b) did not create the confusion. Thus, the source of the conflict must lie in the changes made to former section 9-301(1)(b).

The drafters made the greatest changes to former section 9-301(1)(b).<sup>78</sup> When revising that section, the drafters focused on a hypothetical situation whereby a secured party had filed a financing statement but had not yet given value.<sup>79</sup> Under the hypothetical, the drafters ask us to assume the following scenario: A secured party files a financing statement on April 1, but does not give value until April 15.<sup>80</sup> Lien creditor levies on April 7.<sup>81</sup> Secured Party (with knowledge of the lien and no commitment to make advances) makes an additional advance on June 15.<sup>82</sup> The intended result, they say, is that the additional advance is subordinate to the rights of the lien creditor.<sup>83</sup> However, they point out that section 9-323(b) does not apply by its terms.<sup>84</sup> The Lien Creditor is not a "person that becomes a lien creditor while the security interest is perfected."<sup>85</sup> The security interest was not perfected until April 15, when the Secured Party gave value and its security interest attached.<sup>86</sup> The Lien Creditor became a lien creditor on April 7, after the financing statement was filed but before the security interest was perfected.<sup>87</sup>

The drafters then look to section 9-317(a)(2) and find that it does not

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<sup>76</sup> *See id.*

<sup>77</sup> *See* discussion supra Part C.1-2.

<sup>78</sup> *See* U.C.C. § 9-317 cmt. 4 (1999). The drafters revised former section 9-301(1)(b) so that a first advance was treated no differently than all other advances. They did this in revised § 9-317(a)(2) by allowing the date of perfection to be set by the filing of a financing statement which covers the collateral. Thus, a first advance is treated the same as subsequent advances. A judicial lien that arises after a financing statement is filed and before the security interest attaches and becomes perfected is subordinate to all advances secured by the security interest, even the first advance. *Id.*

<sup>79</sup> *See* EDWIN E. SMITH & STEVEN O. WEISE, *THE NEW ARTICLE 9* app. at 433-434 (Corinne Cooper ed., 1999).

<sup>80</sup> *See id.*

<sup>81</sup> *See id.*

<sup>82</sup> *See id.*

<sup>83</sup> *See id.*

<sup>84</sup> *See id.*

<sup>85</sup> *See* EDWIN E. SMITH & STEVEN O. WEISE, *THE NEW ARTICLE 9* app. at 433-434 (Corinne Cooper ed., 1999).

<sup>86</sup> *See id.*

<sup>87</sup> *See id.*

apply either.<sup>88</sup> It refers to the rights of a person holding an unperfected security interest.<sup>89</sup> In the example, the Secured Party never held an unperfected security interest.<sup>90</sup> The security interest became perfected simultaneously with attachment.<sup>91</sup>

While this resembles the very issue raised by this note, it is not. There is one very important difference. In our example, value had already been given on Day 1 in the form of Debtor's preexisting debt.<sup>92</sup> So, while the changes made to section 9-301 in the three revisions seem to fix the problem the drafters addressed, it is ineffective in eliminating the confusion that is addressed between sections 9-317(a)(2) and 9-323(b).<sup>93</sup>

#### SOLUTION

The solution to this problem is twofold. First, the problem could be corrected legislatively by reading an exception into section 9-317(a)(2) which would cover the circumstances anticipated in section 9-323. Second, the problem could also be corrected by defining advance, either legislatively or judicially.

The first solution requires the legislature to adopt a version of section 9-317(a)(2) which makes an exception for the conditions of section 9-323(b). The exception could read: "A judicial lien that arises after a financing statement is filed and before the security interest attaches and becomes perfected is subordinate to all advances secured by that security interest, even the first advance, except as otherwise provided in section 9-323(b)."<sup>94</sup> This was stated in the comments of the first revised version of section 9-317(a)(2) but does not appear in the statute itself.<sup>95</sup> Thus, under the facts of our hypothetical, priority as to the loan on Day 60 of \$25 would be determined under the rules of section 9-323(b) since it would apply by its terms.

The second solution would be to define "advance." Although the drafters have corrected various errors in three revisions, it is unlikely that the definition will come from another revision. In two important cases under the 1972 version, the 2<sup>nd</sup> and 7<sup>th</sup> circuits defined advances very narrowly as "sums put at the disposal of the borrower."<sup>96</sup> While this is a necessary definition and an im-

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<sup>88</sup> See *id.*

<sup>89</sup> See *id.*

<sup>90</sup> See *id.*

<sup>91</sup> See EDWIN E. SMITH & STEVEN O. WEISE, *THE NEW ARTICLE 9* app. at 433-434 (Corinne Cooper ed., 1999).

<sup>92</sup> See discussion *supra* Part C.

<sup>93</sup> See discussion *supra* Part C.2-4.

<sup>94</sup> See U.C.C. § 9-317(a)(2) cmt. 4 (1999).

<sup>95</sup> See *id.* § 9-317(a)(2).

<sup>96</sup> See *Dick Warner Cargo Handling Corporation vs. Aetna Business Credit, Inc.*, 746 F.2d 126 (2<sup>nd</sup> Cir. 1984) (citing BLACK'S LAW DICTIONARY 48 (5th ed. 1979)). See also *Uni Imports, Inc. v. Aparacor, Inc.*, 978 F.2d 984 (7<sup>th</sup> Cir. 1992) (following the *Dick Warner Cargo*

portant guide with respect to whether such things as interest, attorney's fees and costs constitute future advances, it does not address the situations outlined earlier. There is no case law on the subject under the new revised version, and the comments speak only about interest and expenses.<sup>97</sup>

If "advance" were defined as an extension of value within 45 days of an initial loan, then anything after that would have to be considered a new loan. If it is a new loan, then it is covered by section 9-317.<sup>98</sup> Thus, under the facts of our hypothetical, the extension of the \$25 occurred more than 45 days after the first advance (pre-existing debt) and therefore would not fall under section 9-323(b) but would instead be entirely governed by section 9-317(a)(2).<sup>99</sup>

### CONCLUSION

The confusion between sections 9-317(a)(2) and 9-323(b) which was created by the first revision has only increased with the passage of two additional revisions. Understanding how these two sections work together is critical. They not only affect the priority of an Article 9 security interest as against the lien of a judicial lien creditor, they also affect nearly every bankruptcy as well.<sup>100</sup> The problem is intensified when these differing revisions find themselves under the scrutiny of state legislatures where the States have either adopted or are considering adoption of one of the several versions.<sup>101</sup>

Although the ambiguity creates a cloud of uncertainty and could open the door to possibly unending litigation, a workable solution is quite ascertainable. The changes are unlikely to come from yet another ALI/NCCUSL revision, given the already unworkable number of current revisions to Article 9. A present opportunity exists, however, for state legislative correction. As the different revisions find their way to state legislatures, correction can be made in the form of an exception to section 9-317(a)(2) which would cover the circumstances anticipated in section 9-323 or by defining "advance". For those states which have already adopted one version or another, the solution may best lie in a judicial definition of "advance." Ideally this would be the most practical manner by which to harmonize the present disuniformity. Nevertheless, its'

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Handling Corporation vs. Aetna Business Credit, Inc. definition of new advances).

<sup>97</sup> See U.C.C. § 9-323(a)(2), cmt. 2 (1999) and PEB Commentary No. 2 to 1972 U.C.C. version § 9-301(4) (concluding § 9-301(4) should not be read as excluding or limiting interest on advances or expenses made in their collection and enforcement, or other non-advances ancillary to advances having priority against the lien creditor).

<sup>98</sup> See U.C.C. § 9-317(a)(2) (2000).

<sup>99</sup> See *id.*

<sup>100</sup> See Bankruptcy Code and Related Provisions, 11 U.S.C. § 544(a) (1999). On the date the debtor files a petition for bankruptcy, a bankruptcy trustee is given hypothetical lien creditor status.

<sup>101</sup> See NCCUSL, Introduction & Adoptions of Uniform Acts (visited Nov. 5, 2000) <[http://www.nccusl.org/uniformact\\_factsheets/uniformacts-fs-ucca9.htm](http://www.nccusl.org/uniformact_factsheets/uniformacts-fs-ucca9.htm)> (stating that 28 states have already adopted a revised version of Article 9 and that 12 states have introduced a version of the revisions to their legislatures).

most likely result is a hodge-podge of disuniform case law dependent upon the whims of separate judges.

Whichever solution chosen, the timing for action is critical. Even though confusion between the revised sections may seem abstract and unlikely to occur, as this note has demonstrated, the problem is real. States need to consider the scenario between C1 and D described above and take action to forestall inevitable conflict.